The Politics of Constitutional Identity and its Legal Frame—the *Ultra Vires* Decision of the German Federal Constitutional Court

By Matthias Mahlmann[*]

A. The Old Story and its New Turn

Since the ECJ handed down the *Mangold v. Rüdiger Helm (Mangold)* decision in 2005,[1] scholars have provided sometimes quite far reaching and sharp critiques of the decision and of what they took to be its consequences for European Union law. The decision concerned several questions, but the core issue was the applicability of (then) Community (now European Union) age-based anti-discrimination law in the case of a fixed-term employment contract. The contract at issue was based on a law that allowed fixed-term contracts without demanding objective reasons justifying the limitation of the period of employment beyond the age of 52.[2] The law is enmeshed in the political problem of including people older than 52 in the workforce without depriving them of secure working conditions. The legal issue was complicated by the fact that the transposition time of the relevant directive 2000/78/EC including the prohibition of discrimination on the ground of age had not yet expired because of a permissible extension of that time by Germany.[3] The ECJ declared the relevant norm to be contrary to Community law and thus not applicable in the case at hand.[4] It applied the directive in question despite the still pending time limit for transposition, arguing with the requirement under Community law that Member States refrain from taking any measures liable to seriously compromise the attainment of the result prescribed by the directive.[5] It buttressed its argument with the duty to report about the progress made during the extended transposition time. This provision was held

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[1] Case C-144/04, Werner Mangold v Rüdiger Helm, 2005 E.C.R. I-9981 [hereinafter *Mangold* case].

[2] Paragraph 14 (3) Law On Part-Time Working and Fixed-Term Contracts (*Gesetz über Teilzeit und befristete Arbeitsverträge*) (BGBl. 2000, p. 1966) as amended by the First Law for the Provision of Modern Services on the Labour Market of 23 December 2002 (BGBl. 2002 I, p. 14607).

[3] Art. 18 EC Directive 78 of 27 November 2000, O.J. 16 L 303 establishing a general framework for equal treatment in employment and occupation.

[4] *Mangold*, para. 78.

[5] *Id*. at para. 67. This principle was established in Case C-129/96, Inter-Environnement Wallonie ASBL v. Region Wallone, 1997 E.C.R. I-7411, para 45.

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to imply that the Member State was not allowed to adopt measures incompatible with progressive implementation.[6] Furthermore, the ECJ interpreted the prohibition of age discrimination as an expression of a fundamental principle of Community law: the principle of equal treatment in the field of employment and occupation.[7] Applying a proportionality test, the court found this foundational principle to have been violated. The ECJ also underlined the broad discretion the Member States retained in the field of social and employment policies. Because the provision's only criterion for allowing fixed-term contracts without an objective reason was age, without any other consideration linked to the structure of the labor market in question or of the personal situation of the person concerned, the Court found that even in light of this broad discretion, the respective norm was not appropriate and necessary to vocationally integrating unemployed older workers, which formed the purpose of the norm.[8]

Critiques of the decision found these arguments unconvincing. For some, the idea of a general principle prohibiting age discrimination appeared especially surprising. Sometimes, the decision was taken as an indicator of a spreading divide between the rationale of Community law and the legal principles of the national German legal order.

The issue was then taken to the German Federal Constitutional Court.[9] The case originated from a constitutional complaint against a decision of the Federal Labor Court applying the findings set out in *Mangold* to a fixed-term contract of an employee with a supplier of automobile manufacturers.[10] The complainant (a legal person) argued that the *Mangold* decision was contrary to the system of competences of Community law as the ECJ handed down legal principles that were not part of community law. As a consequence, it was *ultra vires*, violating the complainant's contractual freedom according to Art. 2.1 and Art. 12.1 in conjunction with Art. 20.3 of the Basic Law. In addition, these norms were violated by a lack of protection of legitimate expectations by the decision of the Federal Labor Court, as the contract was concluded before the ECJ handed down *Mangold*. Finally, the complainant argued that its right to its lawful judge, via Art. 101.1 sentence 2 of the Basic Law, had been violated as the Federal Labor court did not submit a preliminary reference to the ECJ to clarify whether the standards developed in *Mangold* also apply to contracts concluded before this decision was handed down.

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[6] *Mangold,* paras. 71–72.

[7] *Mangold*, paras. 74–76.

[8] *Mangold*, para. 65.

[9] BVERFG, 2 BvR 2661/06, 6 July 2010. English version available at http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html.

[10] Bundesarbeitsgericht [Federal Labor Court], Case 7 AZR 500/04, April 26, 2006.

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This complaint offered the first (and for some, the best) opportunity to apply the recently developed standards for establishing a violation of Germany's constitutional identity by Community law, as set out in the decision of the Federal Constitutional Court on the reconcilability of the Treaty of Lisbon with the German Basic Law.[11] The complaint thus presented the Federal Constitutional Court with an intricate mix of a very distinct legal flavour: the case raised a core issue of the relationship between national and EU Law and thereby forced the Court to write another chapter in the story of its relationship with the ECJ that has for decades engaged not only the German legal audience. In addition, the issue had to be decided on an emotionally loaded subject matter, as (surprisingly, from other perspectives) modern European anti-discrimination law is in general of great concern for some in Germany, though decreasingly so.[12]

[11] BVerfG, Case No. 2 BvE 2/08, headnote 5 (June 30, 2009), http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html:

> The Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (see BVerfGE 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>: see the latter two concerning legal instruments transgressing the limits), whilst adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 second sentence and 5.3 of the Treaty on European Union in the version of the Treaty of Lisbon (Lisbon TEU). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.

[12] For some comments on that matter, see MATTHIAS MAHLMANN, GLEICHBEHANDLUNGSRECHT, 33 et seq., 87 et seq. (2007).

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B. Circumscribing *Ultra Vires*—The Decision of the Federal German Constitutional Law

The Federal Constitutional Court rejected the constitutional complaint as unfounded.[13] Decisive for this outcome is an effort to circumscribe narrowly the possibility of an *ultra vires* control, the necessity of which it reiterated. Given the principle of conferral as set out in Art. 5.1 sentence 1 and Art. 5.2 sentence 1 of the Treaty on the European Union (TEU), it took itself to be "empowered and obliged to review acts on the part of the European bodies and institutions with regard to whether they take place on the basis of manifest transgressions of competence or on the basis of the exercise of competence in the area of constitutional identity which is not assignable (Article 79.3 in conjunction with Article 1 and Article 20 of the Basic Law), and where appropriate to declare the inapplicability of acts for the German legal system which exceed competences".[14] This task, however, had to be balanced against the ECJ's duty to interpret and apply the Treaties as to maintain the supremacy, unity and coherence of Union law. If every national court were to judge by itself the validity of legal acts, it argued, "the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk".[15] Consequently, the Court held the *ultra vires* review, "can only be considered if a breach of competence on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competence, and the impugned act leading to a structurally significant shift to the detriment of the Member State in the structure of the competences."[16]

The court thus significantly raised the bar for establishing an *ultra vires* act by requiring a manifest breach leading to a shift in the structure of the competences between Member States and the Community. However, such a breach does not have to reach the level of touching upon the constitutional identity of a state.[17] Consequently, any such act has to have more than punctual importance and has to show relevance for the system of competences as such.

The *Mangold* case raised the question of the extent to which the ECJ could adjudicate on fundamental rights. Though the Federal German Constitutional Court did not doubt the

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[13] BVerfG, Case No. 2 BvR 2661/06, para. 48 et seq. (July 6, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html.

[14] *Id.* at para. 55 (internal quotations omitted).

[15] *Id.* at para. 57.

[16] *Id*. at para. 61 (referencing the concurring German legal literature).

[17] *Id.* at para. 65.

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legitimacy the ECJ on this matter, it did, however, indicate some limits to such jurisprudence:

> Further development of the law transgresses these boundaries if it changes clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties), or creates new provisions without sufficient connection to legislative statements. This is above all not permissible where case-law makes fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power and influence.[18]

With these standards, the Court explicitly established the space for judicial leeway, including the acceptance of, as it put it, "the right to tolerance of error" of the ECJ.[19]

The Federal Constitutional Court did not decide whether *Mangold* was *ultra vires*. Even assuming that it was, it argued that it was in any case not of such a nature that the demanded quality of an act manifestly beyond the competence of the ECJ and of an impact for the balance of the structure of competences was reached. The opening of the field of community law through directives was based on standards, it argued, developed by the case law of the ECJ in the past.[20] The advance effect of the directive 2000/78/EC formed just another case group of the "negative effect" of directives, ruling out certain measures by Member States putting into question the efficient transposition of directives.[21] Finally, the recourse to the general principle of the prohibition of discrimination based on age was in any case not regarded as a sufficiently qualified *ultra vires* act, since the issuance of a secondary act through the Council (the Directive 2000/78/EC) tied it back to acts of the Member States (including Germany).[22]

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[18] *Id.* at para. 64.

[19] *Id.* at para. 66.

[20] *Id.* at paras. 72–74.

[21] *Id.* at paras. 76–77.

[22] *Id.* at para. 78–79.

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In addition, it reiterated a procedural provision, contained in the Lisbon-decision:

> Prior to the acceptance of an *ultra vires* act, the Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen.[23]

In order to account for possible hardship in individual cases it mobilized the constitutional principle of legitimate expectations. It argued that this principle was not violated by the decision of the Federal Labor Court. Because of the primacy of application of Union law, the Federal Labor court was allowed to consider itself not in a position to grant protection of legitimate expectation contrary to the jurisprudence of the ECJ.[24] It advised, however, that "it should be considered, in constellations of retroactive inapplicability of a law as a result of a ruling by the Court of Justice of the European Union, to grant compensation domestically for a party concerned having trusted in the statutory provision, and having made plans based on this trust."[25] Such a situation was at stake in the case at hand: the automobile supplier had trusted the statutory provision concluding a contract before the *Mangold* decision was handed down. After *Mangold*, it faced a legal situation with potentially substantial financial consequences, due to a fixed-term contract being turned into an unlimited employment contract.[26]

Finally, the Federal Constitutional Court confirmed its consistent case law on the right of one's lawful judge according to Art. 101.1 sentence 2 Basic Law. It can constitute a denial of the lawful judge if a German court does not comply with its obligation to make a submission to the Court of Justice of the European Union in a preliminary ruling according to Art. 267.3 TFEU. The decision not to submit the case has to, however, be the kind that no longer appears to be comprehensible and manifestly untenable. The impugned judgment of the Federal Labor Court, which had not engaged the ECJ at another time, did not meet this standard and was thus not regarded as violating the right to the lawful judge

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[23] *Id.* at headnote 1, para. 60.

[24] *Id.* at para. 86.

[25] *Id.* at headnote 2, para. 85.

[26] The Federal Labor Court (*Bundesarbeitsgericht*) had denied a protection of legitimate expectations in favour of the complainant irrespective of EU law. It argued with the lack of prior rulings by the Federal Labor Court regarding the permissibility of a fixed-term contract based solely on age without objective reasons and the lack of consensus on the matter in legal literature. *See* Bundesarbeitsgericht [Federal Labor Court], Case 7 AZR 500/04, April 26, 2006.

as it reasonably applied the content of the *Mangold* ruling.[27] With this decision, the senate of the Federal Constitutional Court contradicted a recent decision of one of its chambers formulating a stricter control of the duty to submit cases to the ECJ.[28]

C. The Dissent

The decision was handed down by a majority of six votes to two with regards to the grounds, and seven votes to one with regards to the outcome. Dissenting judge Landau argued that the majority placed "excessive requirements on the finding of an *ultra vires* act on the part of the Community or Union bodies by the Federal Constitutional Court."[29] He agrees that a qualified, "manifest" breach is necessary to trigger the *ultra vires* control. To demand in addition a significant shift in the structure of competencies between the Member States and the supranational organization, however, in his view, does not sufficiently protect the democratically legitimized competencies of the Member States.[30] The danger of an incremental shift of competencies was underestimated by the majority, according to his view.[31] Handing down *Mangold*, the ECJ manifestly transgressed the competences granted to it and thus acted *ultra vires*. The main points of contention are the advance effect of the directive and the assumption of a general principle of community law prohibiting age discrimination.[32] Finally, he argues that the Federal Labor Court should have engaged the ECJ another time and solved the case—in the event of a complete confirmation of the *Mangold* case by the ECJ—on the basis of the principles of cessation of the operational foundation of the contract.[33]

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[27] BVerfG, Case No. 2 BvR 2661/06, para. 92 (July 6, 2010),http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html

[28] BVerfG, 1 BvR 230/09, para. 20–21 (Feb. 25, 2010),

http://www.bverfg.de/entscheidungen/rk20100225_1bvr023009.html.

[29] BVerfG, Case No. 2 BvR 2661/06, para. 95 et seq. (July 6, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html

[30] *Id.* at paras. 101–102.

[31] *Id.* at para. 103.

[32] *Id.* at paras. 105–113.

[33] *Id.* at para. 116.

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D. Did the Court Do the Right Thing?

The decision of the Federal Constitutional Court was met with immediate criticism.[34] The decision merits, however, assenting support. Though there are other interesting dimensions to this case, there are two central questions to be considered here. First, does the developed standard make any sense? Second, if so, was it applied convincingly? Let's consider these questions in turn.

I. The Standard of Ultra Vires *Control*

One may ask many questions about the constitutional merits of the identity control developed by the Federal German Constitutional Court. There is a rich debate about it that cannot be pursued here. Given the case at issue, the question is rather, given this jurisprudence, whether its concretization and application is convincing. Here it seems that any other less qualified standard is hard to reconcile with the general normative structure of the process of European integration and the provisions concerning integration of the Basic Law. Evidently, not just any misapplication of the law can possibly suffice because the consequence would be that the Federal Constitutional Court would become a *Cour de cassation* for all acts of EU organs that are (as any act of a public authority) open to the claim of misapplying the law. On this point, the dissent agrees. But is there perhaps another standard covering some middle ground between this standard and that which the Federal Constitutional Court developed that can be applied in practice? It seems not. Such a fine-grained standard would demand that misapplications of the law be clearer and more evident than they are. Especially the second element of the test developed by the Federal German Constitutional Court demanding the structural significance of the possible breach of competencies is a workable tool to identify acts that can be regarded with good reasons as *ultra vires*. The Federal Constitutional Court stated that the ECJ has a "right to tolerance of error." The Federal Constitutional Court, however, also protects itself against the consequences of its own possible errors by demanding a specifically qualified degree of breach of the order of competencies. Sufficient certainty of such violations is only possible if the breach must be qualified and manifest and needs a systemic impact. The Court thus shields itself against the danger to confuse perhaps justified criticism of a decision with the sufficiently secure establishment of an *ultra vires* act. There are many decisions of the ECJ that are (sometimes rightly) contested. To open Pandora's box of *ultra vires* control for many of these cases would endanger the working of the intertwined legal order of the European Union to a degree not desirable if European integration is to succeed.

The criterion of structural importance of the *ultra vires* act serves another decisive function: to give legitimacy to the effects of the *ultra vires* control by the Federal

[34] *See, e.g.*, Dieter Grimm, *Die große Karlsruher Verschiebung*, FRANKFURTER ALLGEMEINE ZEITUNG, *available at* http://www.faz.net/-01hz2b.

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Constitutional Court. These effects may be very significant: declaring a judgment of the ECJ *ultra vires* and thus not applicable in Germany means a major disruption of the legal order of the EU with evident, far reaching and certainly long lasting consequences for the whole of the project of European legal integration. If a Court of a Member State wants to find acceptance of its *ultra vires* control mechanism and avoid the suspicion of trying to foster particularistic intentions contrary to the principles of Union law behind the façade of *ultra vires* discourse by not applying judgments of the ECJ, certainly nothing but a violation of the structure of competencies of the EU and the Member States will suffice. Only such a violation carries enough weight to justify the consequences of the *ultra vires* control that can be nothing else but a measure of last resort.

It is not quite clear, however, why the decision is supposed to not rule out a shift of competencies in a piecemeal process of erosion as the dissent and critics argued: If such a process is detectable, the developed standard can certainly apply. The same reasoning, it seems, is *mutatis mutandis*, valid for acts of organs of the EU other than the ECJ.

II. The Application to Mangold

The problems raised by a different standard can be well illustrated with the *Mangold* case itself. One may ask namely with some legal ground under one's feet whether *Mangold* was really a decision of a Court led astray by judicial activism unbound by law. *Mangold* is in many technical aspects a complex case. Nevertheless, three main points were the main object of critique. First, the application of the directive before the transposition date. Second, and connected with the first, the application of the principle of equal treatment to this case. Third, the concrete application of the principle of proportionality in the framework of a possible justification of the unequal treatment of employees with respect to the admissibility of fixed-term contracts depending on their age.

The argument of the ECJ that Member States are obliged, during the time of transposition, not to create facts that are detrimental to the final transposition of a directive seems reasonable enough and is not contested as such. That this rule should lead to an application of the prohibition of discrimination before the transposition date is buttressed with another argument, namely the connection of the prohibition of discrimination with the principle of equal treatment in the field of employment and occupation. That this principle was central was clear from the argument of *Mangold* and has recently been underlined by the ECJ confirming its *Mangold* ruling.[35] A right to equal treatment formed

[35] Case C-555/07, Seda Kücükdeveci v. Swedex GmbH & Co. KG (Jan. 19, 2010). The Court stated that the "Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment." *Id.* at paras. 20, 50. On the matter see Skouris, *Methoden der Grundrechtsgewinnung in der EU, in* HANDBUCH DER GRUNDRECHTE, VOL. VI/1, § 157, 21-24 (Merten & Papier eds., 2010).

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part of the catalogue of fundamental rights of the Community Law even before the Charter of Fundamental Rights became mandatory containing equality and non-discrimination provisions.[36]

But how to interpret such a praetorian right to equal treatment? Many proposed to look at the Charter for guidance after it was "solemnly" declared in 2000 for the interpretation of the fundamental rights of then Community law.[37] However, the Charter non-discrimination clause, Art. 21.1, contains a prohibition of age discrimination. The ECJ thus acted squarely within the framework of the consensus on fundamental rights established by the Charter. Another avenue usually applied by the ECJ (and invoked in *Mangold*) to interpret fundamental rights is to find inspiration apart from international instruments, especially the ECHR in the constitutional traditions of the Member States, and engage on that basis in evaluative comparative law. One example of such a constitutional tradition could be the German Basic Law. More precisely, one can point to the general equality provision, as the special prohibitions of discrimination in Art. 3.2. and 3.3 of the Basic law do not include age.

The guarantee of equality before the law, via Art 3.1 of the Basic Law, has been interpreted in the older case law of the Court as an interdiction of arbitrary treatment within the limits of material justice.[38] More recent decisions have increased the demands for unequal treatment to be justified beyond this position. The Federal German Constitutional Court has ruled that as the principle of equality before the law intends to prevent the unjustified

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[36] Case C-147/79, Hochstrass v. European Court of Justice, 1980 E.C.R. I-3005. The argument of the ECJ in *Mangold* has not made the doctrinal construction very transparent, which is a general problem of the ECJ jurisprudence in comparison with more discursive traditions of other courts. From the context, however, it seems rather clear that the central principle that is the base of argumentation is the principle of equal treatment in the field of employment and occupation, not only the prohibition of discrimination of age. The derivation of the principle of non-discrimination on the ground of age is a consequence of this principle of equal treatment, as others on the ground of religion or belief, disability, age or sexual orientation. *See id.* at para 75. The court could have made clearer how the principle of equal treatment in the field of employment and occupation is derived from international instruments and constitutional traditions. One way would be to explicitly include the general principle of equal treatment (not only in the field of employment and occupation) into the doctrinal construction. This principle, it seems, is the content of recital 3 (principle of equal treatment) and 4 (right of all persons to equality before the law) of the Directive the ECJ refers to in *Mangold* at paragraph 74 and found in the legal orders of the Member States. This principle is the object of the international treaties and constitutional traditions the court refers to as well. The argument that there are no international instruments on age discrimination or many constitutional traditions of that kind (this argument is, for example, discussed by the Federal Constitutional Court, see BVerfG, 2 BvR 2661/06, 6 July 2010, para. 78) then loses its doctrinal force. For an example for the complexities of reconstructing what national constitutional traditions actually mean, see *infra* the remarks on Art. 3.1 of the Basic Law.

[37] Matthias Mahlmann, *1789 Renewed? Prospects of the Protection of Human Rights in Europe*, 11 CARDOZO J. OF INT'L & COMP. LAW 903 (2003-2004).

[38] BVerfGE 1, 14 (52); 25, 101 (105).

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unequal treatment of persons, the legislature is regularly subject to strict constraints in cases of unequal treatment based on characteristics of a person as such. These legal constraints become stricter depending on the extent to which the personal characteristics that constitute the ground for unequal treatment resemble the characteristics listed in Article 3.3 of the Basic Law and there is therefore greater danger that unequal treatment based on them will lead to discrimination against a minority. The strict constraint is, however, not limited to discrimination against persons. It also exists where unequal treatment of subject matters leads to the unequal treatment of groups of people.

The strictness of the constraint depends on the degree to which the persons affected are able to change the characteristics that are the ground of unequal treatment through their behavior. In addition, the limits on the legislature are more narrowly circumscribed depending on the extent to which the unequal treatment of persons or subject matters can affect disadvantageously the enjoyment of basic liberties.[39] As a result, direct discrimination under the guarantee of equality is possible, but only within the limit of differentiated standards of justification. These standards range from a test of arbitrariness to strict scrutiny of proportionality, in the case of unequal treatment based on personal characteristics.

Age is certainly a personal characteristic not open to change by the individual. Consequently, a test of proportionality applies. How strictly it is formed may be open for debate given the intricacies of the necessary differentiations based on age.

What could the ECJ thus learn from the constitutional law of Germany? It seems not very far-fetched that the conclusion would be that unequal treatment on the ground of the personal characteristic of age by a legal provision has to match a test of proportionality. This, however, is, in a nutshell, the guiding principle applied in *Mangold*. How can this decision then be *ultra vires* in the qualified sense if it arguably mirrors the standing case law of the Federal Constitutional Court in central respects? There is certainly a deeper irony here: the Federal Constitutional Court was a key player demanding the creation of an order of fundamental rights in the Community Law by the case law of the ECJ. This is a standard story in the making of EU law. It would have been an interesting turn of events if the ECJ had been reprimanded to draw conclusions from one of these fundamental rights—the principle of equal treatment—and to do so in a manner that is (at least arguably) even similar to the one drawn by that Court itself on the matter at stake which demanded the creation of these rights in the first place. Finally, one may of course disagree with the application of the proportionality test in *Mangold*, perhaps valuing the integration in the labor market of older employees higher than maintaining the prospect of

[39] BVerfGE 88, 87 (96); BVerfG, 1 BvR 611/07, para. 84 (July 21, 2010), http://www.bverfg.de/entscheidungen/rs20100721_1bvr061107.html.

constant employment. But to make such fine distinctions the basis of an *ultra vires* decision seems hard to justify.

This leaves us with the question of a piecemeal erosion of competencies through jurisdiction. If one looks at the concrete matter, age discrimination, most of the discrimination decisions handed down by the ECJ, apart from gender and nationality issues, deal with the characteristic of age. This jurisdiction, as it has evolved, shows a mixed balance sheet of an all in all hardly activist jurisprudence.[40] A general shift of competencies away from the Member States, e.g. as far as social policies are concerned, is not detectable.

These remarks are not about *Mangold*. However the aforementioned arguments for the path taken in *Mangold* which is—after its mentioned confirmation—to be regarded as

[40] *See* Case C-17/05, Cadman v. Health and Safety Executive, 2006 E.C.R. 1-9583, paras. 26–40: length of service legitimate criterion for unequal treatment; no obligation to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard; no need to show that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better (on Art. 141 EC); Case C-411/05, Felix Palacios de la Villa v. Cortefiel Servicios SA, 2007 E.C.R. 1-8531, para. 77): compulsory retirement clauses contained in collective agreements acceptable where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime; Case C-388/07, Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform, 2009 E.C.R. 1-1569, para. 68: no preclusion of a national measure which does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. Derogation from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labor market or vocational training; burden of proof of legitimacy of the aim relied on for justification; Case C-88/08, Hütter v. Technische Universität Graz, 2009 E.C.R. 1-5325, para. 52: preclusion of a national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labor market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded; Case C-229/08, Colin Wolf v. Stadt Frankfurt am Main (Jan. 12, 2010), para. 48: maximum age for recruitment to intermediate career posts in the fire service at 30 acceptable; Case C-341/08, Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk (Jan. 12, 2010), para. 82: preclusion of setting a maximum age for practising as a panel dentist where the sole aim of that measure is to protect the health of patients against the decline in performance of those dentists after that age, since that age limit does not apply to non-panel dentists; regulation admissible, however, the aim of which is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labor market concerned, the measure is appropriate and necessary for achieving that aim; Case C-555/07, Seda Kücükdeveci v. Swedex GmbH & Co. KG, para. 57 (Jan. 19, 2010): preclusion of not taking into account periods of employment completed by an employee before reaching the age of 25 in calculating the notice period for dismissal; Case C-499/08, Ingeniorforeningen i Danmark acting on behalf of Ole Andersen & Region Syddanmark, para 50 (Oct. 12, 2010): preclusion of national legislation pursuant to which workers who are eligible for an old-age pension from their employer under a pension scheme which they have joined before attaining the age of 50 years cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment; Case C-45/09, Gisela Rosenbladt v Oellerking Gebäudereinigungsges, para 81 (Oct. 12, 2010): clauses on automatic termination of employment contracts on the ground that the employee has reached the age of retirement valid.

standing case law, illustrate that what seems from one legal perspective as inventing new legal positions may reasonably appear from another as the consequence of well-established principles of law. A court asked to decide, not on the merits of such cases, but rather on whether another court in this maze of supranational legal uncertainty has sufficiently erred, such as to deem its decision legitimately *ultra vires,* cannot but show restraint and put the bar high enough to leave room for such necessary judicial disagreement. This protects the right to error of others while shielding itself against the perhaps quite detrimental consequence of the errors it may commit itself assessing the *ultra vires* quality of an act of a different court. This is what the German Federal Constitutional Court did, and it was well advised to do so.

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