THE SOCIAL RIGHTS APPROACH OF THE EUROPEAN COURT OF JUSTICE TO ENFORCE EUROPEAN EMPLOYMENT LAW

Sebastian Krebber†

Mangold v. Helm, the first age discrimination case decided by the European Court of Justice in November 2005, is the most startling employment law decision of that Court for the past thirty years. Disregarding longstanding principles of European law developed by the Court itself, the European Court of Justice applies a directive directly between private parties and this even a year before the implementation of the directive was due. This article seeks to explain the decision and analyzes its sources, its legal technique, its purpose, and its practical impact.

I. CASE C-144/04, *MANGOLD V. HELM*

A. European Law Background: Directive 2000/78/EC, Prohibition of Age Discrimination

On November 27, 2000, on the basis of Article 13 EC-Treaty, the Council of the European Union adopted Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[1] It prohibits discrimination on the grounds of religion or belief, disability, age, or sexual orientation as regards employment and occupation, Article 1. With regard to discrimination because of religion or belief and sexual orientation, Directive 2000/78/EC had to be implemented by December 2, 2003,

† Professor for Civil Law and Labor Law and Director of the Institute for Labor Law, Albert-Ludwigs-Universität Freiburg/Breisgau, Germany. Dr. iur. habil, University of Trier 2003, Dr. iur., University of Trier, 1997; LL.M. Georgetown University Law Center 1990.

1. 2000 O.J. (L 303) 16. Directive 2000/78/EC and Art. 141 EC-Treaty as well as Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22, and Directive 2002/73/EC of the European Parliament and of the Council of September 23, 2002, 2002 O.J. (L 269) 15, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 1976 O.J. (L 39) 40 , are the existing legal sources for European anti-discrimination law in the field of employment law.

with Article 18(1), but Article 18 (2) gives the Member States an additional period of three years (i.e., up to December 2, 2006) to implement the provisions concerning age and disability discrimination.

B. National Law Background: Fixed-Term Employment Contract, Protection Against Unfair Dismissals and Unemployment

A fixed-term employment contract expires automatically at the end of the period contracted for. There is no obligation for the employer to justify the grounds for the termination. Any fixed-term employment contract, and in particular a series of fixed-term employment contracts, each stipulating a short fixed-term, would give the employer the possibility to end the employment relationship at will at the end of the/every term. Hence, a legal system with a general legal protection against unfair dismissals is traditionally unsympathetic to fixed-term employment contracts, as they allow employers to circumvent that protection. This traditional view compares the *legal status* of the fixed-term employee with the *legal status* of the employee hired for an indefinite duration.

With rising unemployment, however, the perception has somewhat shifted, because the alternative *in practice* is often fixed-term employment as opposed to no employment at all. As a consequence, the fixed-term employment relationship is also seen as a tool to fight unemployment, and European legislators are struggling to find a compromise between the two positions. Because unemployment is often particularly severe among persons of a certain age—for example, in France among young persons[2] or, as in Germany, among older employees[3]—the legislature may enact rules differentiating with regard to age.

The German solution, found in section 14 of the Teilzeit- und Befristungsgesetz (TzBfG),[4] is an example[5] of such an approach:

2. In 2005, France had an unemployment rate in the population aged less than 25 years of 22.3%. Eurostat, http://epp.eurostat.ec.europa.eu.

3. In 2004, in Germany, 11.0% of the unemployed were older than 55 years. STATISTISCHES JAHRBUCH 2005 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 92 (2005).

4. Law on part-time working and fixed-term contracts, Dec. 21, 2000, Bundesgesetzblatt 2000 Part I at 1966 (F.R.G.); *see* Case C-144/04, Mangold v. Helm, 2005 E.C.R. 18, *available at* http://www.curia.europa.eu/en/content/juris/index_form.htm.

5. France, with the Contrat Première Embauche (CPE), introduced special rules for people under 26 years of age. Loi No. 2006-396 du 31 Mars 2006 pour l'égalité des chances, *repealed by* Loi n° 2006-457 du 21.04.2006.

(1) A fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where:

1. the operational manpower requirements are only temporary,
2. the fixed term follows a period of training or study in order to facilitate the employee's entry into subsequent employment,
3. one employee replaces another,
4. the particular nature of the work justifies the fixed term,
5. the fixed term is a probationary period,
6. reasons relating to the employee personally justify the fixed term,
7. the employee is paid out of budgetary funds provided for fixed-term employment and he is employed on that basis, or
8. the term is fixed by common agreement before a court.

(2) The term of an employment contract may be limited in the absence of objective reasons for a maximum period of two years. Within that maximum period a fixed-term contract may be renewed three times at most. The conclusion of a fixed-term employment contract within the meaning of the first sentence shall not be authorised if that contract is immediately preceded by an employment relationship of fixed or indefinite duration with the same employer. A collective agreement may fix the number or renewals or the maximum duration of the fixed term in derogation from the first sentence.

(3) A fixed-term employment contract shall not require objective justification if when starting the fixed-term employment relationship the employee has reached the age of 58. It shall not be permissible to set a fixed term where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months. Until 31 December 2006 the first sentence shall be read as referring to the age of 52 instead of 58.[6]

6. Paragraph 14(3) of the TzBfG was amended in 2002 by the First Law for the provision of modern services on the labor market, Dec. 23, 2002, Bundesgesetzblatt 2002 Part I at 14607. The original wording of section 14(3) was:

> The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months.

(4) The limitation of the term of an employment contract must be fixed in writing in order to be enforceable.

C. The Facts

In 2003, Mr. Mangold, then 56 years old, concluded a contract with Mr. Helm. In Article 5 of the contract, the parties agreed:

1. The employment relationship shall start on 1 July 2003 and last until 28 February 2004.
2. The duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers (the provisions of the fourth sentence, in conjunction with those of the fourth sentence, of Paragraph 14(3) of the TzBfG . . .), since the employee is more than 52 years old.
3. The parties have agreed that there is no reason for the fixed term of this contract other than that set out in paragraph 2 above. All other grounds for limiting the term of employment accepted in principle by the legislature are expressly excluded from this agreement.[7]

Mr. Mangold brought an action against Mr. Helm before the Arbeitsgericht München arguing that the limitation of the term of the contract was invalid. The Arbeitsgericht München stayed the proceedings and referred the case to the European Court of Justice for a preliminary ruling on, inter alia, the issue of age discrimination.[8]

D. Decision of the European Court of Justice

Differentiating with regard to age is indeed a direct discrimination prohibited by Article 2(1) of Directive 2000/78/EG, unless justified (Articles 4 and 6 of the Directive). Nonetheless, applying generally recognized principles upon the effect of directives, the answer of the European Court of Justice should have been that since the directive did not have to be implemented with regard to age at the time when Mr. Mangold and Mr. Helm entered into their contract, German employment law did not yet have to comply with the Directive's regime.[9] Further, even if implementation had been

7. Case C-144/04, Mangold v. Helm, 2005 E. Comm. Ct. J. Rep. number 21 (not yet reported). For clause 3 of the contract between Mr. Mangold and Mr. Helm see also *infra* note 13.

8. The other arguments (Case C-144/04, Mangold v. Helm, 2005 E.C.R. 22-31 (not yet reported)) are not of interest for the issue analyzed in this article.

9. *See*, *e.g.*, Editorial Comments, *Horizontal direct effect - A law of diminishing coherence?*, 43 COMMON MARKET L. REV. 1, 6 (2006). The European Court of Justice has, however,

overdue at the relevant time, Mr. Mangold could not, in an action against Mr. Helm, have relied on the directive,[10] because under the rule developed in *Marshall v. Southampton and South-West Hampshire Area Health Authority* "a directive may not of itself impose obligations on an individual."[11]

The European Court of Justice instead took a different standpoint, which makes it the most surprising and puzzling, but at the same time most interesting decision dealing with employment law for the past thirty years.

> 74 . . . [A]bove all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.
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> 75 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. . . .
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> 76 Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.
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> . . .
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> 78 . . . It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired."[12]

recognized a certain effect of directives before their date of transposition. *See* Case C-129/96, Inter-Environnement Wallonie v. ASBL Région wallonne, 1997 E.C.R. I-7411.

10. Editorial Comments, *supra* note 9, at 7.

11. Case C-144/04, Marshall v. Southampton and South-West Hampshire Area Health Auth., 1986 E.C.R. 723, 749.

12. Case C-144/04, Mangold v. Helm, 2005 E.C.R. number 74 (not yet reported).

E. Understanding the European Court of Justice in Mangold

Mangold raises numerous questions of European (Employment) Law.[13] This article will concentrate on the most important element of the decision: It will seek to demonstrate that the best way to understand the decision in *Mangold* is that the European Court of Justice has taken a social rights approach to disregard generally recognized rules governing the application of primary or secondary EU-law, and it will analyze the sources, the purpose, and the practical impact of this legal method.

II. THE LEGAL TECHNIQUE OF *MANGOLD*

The legal technique is crucial to understanding the legal nature of the approach of the European Court of Justice in *Mangold*. As quoted above, the Court takes the stand that "[t]he principle of non-discrimination on grounds of age must . . . be regarded as a general principle of Community law," because:

- Directive 2000/78/EC does not itself lay down the principle of equal treatment in the field of employment and occupation, and
- The source of the principle underlying the prohibition of discrimination is found in "various international instruments and in the constitutional traditions common to the Member States."

A. The Outer Shell of the Argumentation

If one sets aside the merits of the argument for a moment and first only looks at its appearance, it is striking how short and incoherent the relevant lines of the judgement are. The Court does not bother to mention which "international instruments" it specifically refers to. Neither does it make it clear when exactly it is speaking about discrimination at large as a general concept, discrimination on other grounds prohibited by Community Law, and discrimination because of age. As the Court nonetheless links its thoughts grammatically and thus logically, it gives the reader the (false) impression that in all of the quoted sentences, it is talking about the same aspect of anti-discrimination law.

13. *See*, *supra* note 8; see also Case C-144/04, Mangold v. Helm, 2005 E.C.R. numbers 32 et seq. (not yet reported) (discussing the issue of admissibility of the reference for a preliminary ruling in this more or less overtly artificially created judicial dispute).

In fact, the decisive part of the judgment does not reflect a legal argument at all. The Court does not even try to create the illusion that it will disclose the reasons for its decision. In *Mangold*, the European Court of Justice does not make an effort to convince. It imposes its view through its power as the competent court.

B. The Merits

A possible explanation of this—even by its own standards—blatant lack of argument is that both of the grounds referred to by the European Court of Justice do not convince on the merits.

1. Argument 1: Directive 2000/78/EC Does Not Itself Lay Down the Principle of Equal Treatment in the Fields of Employment and Occupation

a. Potential of Argument 1

The European Court of Justice argues that the directive is not the source of the principle of equal treatment. If this were true, it would limit the function of Directive 2000/78/EC: If there were *no* general principle of non-discrimination in Community law, the legal regime of anti-discrimination law would merely be found in the Directive. Therefore, the European Court of Justice would have had to follow the rules, mostly developed by itself, that apply to Directives. Relying on the *effet-utile-tools*,[14] as the Court often did to strengthen the effect of EU-law, would not have been sufficient: these tools are not powerful enough to allow the Court to overcome the principle that "a directive may not of itself impose obligations on an individual,"[15] as indeed this limitation on the direct effect of directives was developed by the Court in the light of the *effet-utile-doctrine*.[16]

If however, the principle prohibiting age discrimination were to be found in an instrument *of higher legal rank and importance* than Directive 2000/78/EC as well as the common Treaty rules, the Court

14. Above all interpretation in conformity with community law and direct effect, see CONSTITUTIONAL LAW OF THE EUROPEAN UNION 667 et seq. (interpretation), 769 et seq. (direct effect) (Koen Lenaerts, Piet van Nuffell & Robert Bray eds., 2nd ed. 2004) (interpretation in conformity with community law); EU-LAW 178–89, 202–28 (direct effect), 211–20 (interpretation) (P. Craig & G. de Búrca eds., 3rd ed., 2003). For the context of employment law, see also Brian Bercusson, *Social and Labour Rights under the EU Constitution*, *in* SOCIAL RIGHTS IN EUROPE 169, 174 et seq. (Grainne de Búrca & B. de Witte eds., 2005). *See generally* Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337; Case 148/78, Criminal proceedings against Tulli Ratti, 1979 E.C.R. 1629.

15. *See supra* note 11.

16. *See also* Bercusson, *supra* note 14, at 169, 176.

could—and did—disregard those rules.[17] Stipulating that the directive is not the source of the principle of equal treatment therefore is the first necessary step to give the Court the basis to expand its power and—as the functioning of such a general principle is not laid down in the words of the EC-Treaty—the liberty to invent new means to overcome otherwise generally accepted limitations imposed on Community law.

b. The Formal Aspect of Argument 1: Mixing up Hierarchies

The second significant aspect of *Mangold* is that the Court, in order to support the argument that the directive is not the source of the principle of equal treatment, does *not* refer to any provision of the EC-Treaty. Instead, it refers to Article 1, as well as to the third and fourth recitals *of directive 2000/78*, to find the general principle.

The fact that the Court does not analyze EC-Treaty provisions to find such a principle, but rather finds the decisive clue of the argument that will empower the Court to disregard the rules governing the functioning of Directives, *in Directive 2000/78/EC itself*, mixes up the hierarchy of the different levels of Community law: The Directive, lower in rank, gives the Court the hint that it may disregard the general rules applying to directives, which are founded in the EC-Treaty, which is higher in rank than the Directive. The least would have been to explain *why* such logic in its legal thinking is not contrary to the formal hierarchy of the different categories of Community Law.

c. The Merits of Argument 1

Does Article 1 or either of the recitals in any way discuss that Directive 2000/78 does not lay down a principle, but merely gives it its actual shape? Article 1 reads: "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment." Contrast that with the words of the European Court of Justice:

> Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in

17. *See* Koen Lenaerts, *Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law*, 31 EUR. L. REV. 287, 293 (2006); *see also* Editorial Comments, *supra* note 9, at 1, 7; Gregor Thüsing, *Europarechtlicher Gleichbehandlungsgrundsatz als Bindung des Arbeitgebers?*, ZIP, Dec. 2, 2005, at 2149, 2150–51. *But see* U. Everling, *Zur Europäischen Grundrechte-Charta und ihren Sozialen Rechten*, *in* GEDÄCHTNISSCHRIFT FÜR MEINHARD HEINZE 157, 173 (2005).

> accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation'. . .[18]

The difference is between "general framework" and "principle": In the Court's logic, if the Directive merely sets out a *framework*, the *principle* has to be found somewhere else. This line of thought plays too much with words in a legal environment characterized often by no more than, at most, approximate accuracy in its legal terminology.

The two recitals read:

> (3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.
>
> (4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.[19]

Not a single word in those recitals backs the interpretation of the Court. They do not address the issue of the balance of powers between Member States and the Community at all, but rather—taken together with recital 1[20]—they set the EU anti-discrimination legislation in the context of human rights protection in the EC-Treaty, the traditions of the Member States, and a choice of international legal instruments. It is highly unlikely that these recitals were intended to mean anything more than that.

18. Case C-144/04, Mangold v. Helm, 2005 E.C.R. 74 (not yet reported).
19. 2000 O.J. (L 303) 16.
20. Which reads

> In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects 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, as general principles of Community law.

2. Argument 2: The Source of the Principle Underlying the Prohibition of Discrimination is Found in "Various International Instruments and in the Constitutional Traditions Common to the Member States"

a. Why "Various International Instruments and . . . the Constitutional Traditions Common to the Member States" and Not the EC-Treaty as Source of the General Principle?

Before the Treaty of Amsterdam of 1996, the only provision in the EC-Treaty addressing anti-discrimination issues was Article 119, which read:

> Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.
>
> For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.
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> Equal pay without discrimination based on sex means:
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> (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
>
> (b) that pay for work at time rates shall be the same for the same job.

The Community therefore did not have *any* explicit competences to pass anti-discrimination legislation.[21] This changed in 1996 only. The Treaty of Amsterdam introduced Article 13,[22] Article 137,[23] and

21. Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 1976 O.J. (L 39) 40, was in fact adopted on the basis of Art. 235 (now Art. 308), which reads:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

22. Art. 13 (1) reads:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

23. The relevant passage reads:

> 1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:
>
> . . .
>
> (i)equality between men and women with regard to labour market opportunities and treatment at work;

Article 141(3).[24] Apart from those *bases of competences*, the EC-Treaty also makes some general references to equality between women and men in Articles 2 and 3.[25]

. . .

2. To this end, the Council:

(b)may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions, except in the fields referred to in paragraph 1(c), (d), (f) and (g) of this article, where the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the said Committees. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the procedure referred to in Article 251 applicable to paragraph 1(d), (f) and (g) of this article.

24. Which reads:

The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

The legal sources of European anti-discrimination law in the field of employment law are set out in *supra* note 1.

25. Art. 2:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Art. 3:

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(a)the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

(b)a common commercial policy;

(c)an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

(d)measures concerning the entry and movement of persons as provided for in Title IV;

(e)a common policy in the sphere of agriculture and fisheries;

(f)a common policy in the sphere of transport;

(g)a system ensuring that competition in the internal market is not distorted;

(h)the approximation of the laws of Member States to the extent required for the functioning of the common market;

(i)the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;

A basis for competence, however, is limited to giving the Community a power to act. A basis of competence, thus, is part of the regime of separation of powers between the Community and the Member States. All that it says is that, under the circumstances set out, the Community may legislate, whereas without such a power, the competence to legislate would remain with the Member States.[26] A basis for competence does not and cannot, *by itself*, lay down a general principle of Community Law.

On the other hand, the EC-Treaty could go beyond merely conferring a competence. By not referring to the EC-Treaty as the source of the general principle, the European Court of Justice implicitly takes the stand that the EC-Treaty, in the field of anti-discrimination law, is limited to granting the Member States the power enact legislation.[27]

(j)a policy in the social sphere comprising a European Social Fund;
(k)the strengthening of economic and social cohesion;
(l)a policy in the sphere of the environment;
(m)the strengthening of the competitiveness of Community industry;
(n) the promotion of research and technological development;
(o) encouragement for the establishment and development of trans-European networks;
(p)a contribution to the attainment of a high level of health protection;
(q)a contribution to education and training of quality and to the flowering of the cultures of the Member States;
(r)a policy in the sphere of development cooperation;
(s)the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
(t)a contribution to the strengthening of consumer protection;
(u)measures in the spheres of energy, civil protection and tourism.
2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

26. Art. 5 EC-Treaty, which reads:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

27. *But see* Editorial Comments, *supra* note 9, at 8 (where *Mangold* is seen as a *contra legem* interpretation of art. 13); Ulrich Preis, *Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht - Der Fall "Mangold" und die Folgen*, NZA, at 401, 406 (2006).

b. "[V]arious International Instruments and . . . Constitutional Traditions Common to the Member States" as a Legitimate Source for a General Principle

The second issue with regard to Argument 2 is whether international instruments and constitutional traditions common to the Member States can, in principle, be the source for a general principle. The Treaties do not refer in a general way to "international instruments," which, given the ambiguity of the term, is not surprising. Article 6 of the EU-Treaty and Article 136 of the EC-Treaty do, however, mention particular international conventions, and Article 6 of the EU-Treaty also makes a reference to the constitutional traditions of the Member States. Article 6 of the EU-Treaty states:

> 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. . . .

Article 136 of the EC-Treaty:

> The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. . . .

Due to the vague wording in Article 6 of the EU-Treaty and Article 136 of the EC-Treaty, the scope of the reference to the European Convention on Human Rights, the European Social Charter, and the constitutional traditions common to the Member States is uncertain.[28] Notwithstanding the fact that the Treaties expressly refer to particular international conventions, the European Court of Justice has, in some past decisions, pointed unspecifically to at "international treaties" of which Member States are signatories in

28. S. Krebber, *in* KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG art. 136, at 33 (Christian Calliess & Matthias Ruffert eds., 2nd ed., 2002).

general,[29] and at least on one occasion at "various international treaties."[30] The Court has both referred to the European Convention on Human Rights, the European Social Charter, and the constitutional traditions common to the Member States as a second line of thought merely to back a result already reached on other grounds[31] and as the key (although not necessarily prevailing) argument.[32] In light of the second series of cases, the technique of Argument 2 as such is not new. International instruments and constitutional traditions common to the Member States can, in principle, be the source for a general principle.

c. The Prohibition of Age Discrimination in "Various International Instruments and in the Constitutional Traditions Common to the Member States"

The end of the journey when assessing Argument 2 on the merits hence is to look at the "various international instruments and . . . the constitutional traditions common to the Member States." As mentioned earlier, the first difficulty is that it is unclear to what principle the Court is exactly referring: To a general principle of the prohibition of discrimination (i.e., on all grounds), to sex discrimination, or to discrimination because of age? As *Mangold* deals with age, only a general principle of non-discrimination on all grounds or a specific prohibition of age discrimination would help.

When analyzing the Human Rights Conventions referred to in recital 4 of Directive 2000/78/EC and the Constitutions of the Member States, the result is astounding: A principle of the prohibition of age discrimination does not exist in the words of the international instruments it quotes. There is no general principle of non-

29. *See*, *e.g.*, Case 4/73, Nold, Kohlen- und Baustoffgroßhandlung v. Comm'n of the Eur. Communities, 1974 E.C.R. 491, 507; Case 5/88, Wachauf v. Bundesamt für Ernährung und Fortwirtschaft, 1989 E.C.R. 2609, 2639 et seq..

30. Cases C-74/95 and C-129/95, Criminal Proceedings against X, 1996 E.C.R. I-6609, I-6637. In that decision, however, the Court unlike in *Mangold v. Helm* goes on to give an example for such a treaty.

31. *See*, *e.g.*, Case 149/77 Defrenne v. Sabena, 1978 E.C.R. 1365, 1379; Case 24/89, Balizot v. University of Liège, 1988 E.C.R. 379, 403.

32. *See*, *e.g.*, *Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, *supra* note 29; Case 44/79, Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 3727, 3744 et seq.; Case 5/88, Wachauf v. Bundesamt für Ernährung und Fortwirtschaft, 1989 E.C.R. 2609, 2639 et seq.; Cases 46/87 and 227/88, Hoechst AG v. Comm'n of the Eur. Communities, 1989 E.C.R. 2859, 2923; Case C-260/89, Elliniki Radiophonia Tiléorassi v. Dorassi v. Dimotiki Etairia Pliroforisses, 1991 E.C.R. I-2925, I-2963; Case C-219/91, Criminal Proceedings against Johannes Stephanus Wilhelmus Ter Voort, 1992 E.C.R. I-5485, I-5512 et seq.; *Criminal Proceedings against X*, *supra* note 30, at I-6609, I-6637; Case C-299/95, Kremzow v. Republic of Austria, 1997 E.C.R. I-2629, I-2645.

discrimination[33] encompassing age discrimination either. Only three constitutions of Member States out of twenty-five forbid age discrimination.[34]

In other words: the principle underlying the prohibition of age-discrimination is *not* found in "various international instruments and in the constitutional traditions common to the Member States."[35] This explains the blatant absence of argument, the imprecise wording and syntax of the relevant passages of the judgement, as well as the lack of clarity in what the Court actually is referring to.

One should assume that the European Court of Justice knew what it was doing and that it was therefore perfectly aware of the fact that its arguments do not stand on the merits. There is some sign that the Court *did not even care* whether its arguments would stand: It does not bother to mention the European Social Charter, although the supervisory body of this convention, the European Committee of Social Rights, has taken the stance that Article 1(2) of the Convention, although not mentioning it expressly,[36] does "prohibit discrimination in employment at least on grounds of sex, race, ethnic

33. Some international conventions stipulate a prohibition of discrimination with regard to the rights and freedoms granted by the Convention, see for example, Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights of 19 December 1966, 999 UNTS 171, at art. 2(1); International Covenant on Economic, Social and Cultural Rights of 19 December 1966, 993 UNTS 3, at art. 2(1). Such a prohibition still falls short of a general principle of non-discrimination, but comes close to it. However, it only helps if age discrimination were mentioned at all, which is not the case.

34. Sweden: Chapter 1, Art 2 IV, which reads, "The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the private person."; Finland: Chapter 2, Section 6, which reads, "(2) No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person."; Portugal: Article 59, which reads,

> 1. Regardless of age, sex, race, citizenship, place of origin, religion and political and ideological convictions, every worker shall possess the right:
>
> a) To the remuneration of his work in accordance with its volume, nature and quality, with respect for the principle of equal pay for equal work and in such a way as to guarantee a proper living;
>
> b) That work be organised in keeping with social dignity and in such a way as to provide personal fulfilment and to make it possible to reconcile professional and family life;
>
> c) To work in conditions that are hygienic, safe and healthy;
>
> d) To rest and leisure time, a maximum limit on the working day, a weekly rest period and periodic paid holidays;
>
> e) To material assistance when he involuntarily finds himself unemployed;
>
> f) To assistance and fair reparation when he is the victim of a work-related accident or occupational illness.

35. *See also* Preis, *supra* note 27, at 401, 406.

36. Article 1(2) of the European Social Charter reads, "With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake . . . 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon . . ."

origin, religion, disability, age, sexual orientation, and political opinion."[37] Neither does it quote Article 21(1) of the Charter of Fundamental Rights of the European Union, which reads: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."[38] Although the interpretation of Article 1(2) of the European Charter may not be convincing, and the Charter of Fundamental Rights of the European Union may not be legally binding as yet, but they still would have been a better authority than what the European Court of Justice chose to quote.

Merely criticizing a Court that deliberately presents an obviously wrong and unconvincing[39] argument falls short. It would seem to be more useful to try to understand the Court in order to assess the significance of the decision and its potential for future cases.

C. Mangold *as a Social Rights Approach*

1. General Principle = Social Right

The Court, in its own words, qualified the prohibition of age discrimination and possibly of prohibition of discrimination on all grounds as a *general principle*. The chosen term, however, is too general and too indistinct to accurately describe the legal tool that the Court applied.

The European Court of Justice created a legal instrument capable of overriding the rules of EU-law governing the effect of directives, which it had developed from the Treaty.[40] From the point of view of legal theory, a better way to phrase the core of the *Mangold* decision

37. *See* European Social Charter (revised), European Committee of Social Rights, Conclusions 2006 (Italy), at 6, *available at* http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/2_recent_conclusions/1_by_state/Italy_2006.pdf. For earlier conclusions taking the same position, see O. de Schutter, *Anchoring the European Union to the European Social Charter: The Case for Accession*, *in* SOCIAL RIGHTS IN EUROPE, *supra* note 14, at 111, 142, n117. *See also* DAVID HARRIS & JOHN DARCY, THE EUROPEAN SOCIAL CHARTER 47 (2d ed. 2001); Diamond Ashiagbor, *The Right to Work*, *in* SOCIAL RIGHTS IN EUROPE, *supra* note 14, at 241, 252–53; Mark Bell, *The Contribution of the European Social Charter and the European Union to Combating Discrimination*, *in* SOCIAL RIGHTS IN EUROPE, *supra* note 14, at 261, 262 et seq.

38. 2000 O.J. (C 364) 1.

39. *See*, *e.g.*, Anthony Arnull, *Out with the Old*, 31 EUR .L. REV. 1, 2 (2006) ("thoroughly unconvincing").

40. *See supra* note 14; Cases C-6/90 and C-9/90, Francovich and Bonifaci v. Italy, 1991 E.C.R. I-5357.

would be that, for the purposes of Community law, the European Court of Justice created a *social right*.[41]

Calling it a social right rather than a general principle puts the right that the Court created in a broader theoretical and practical context and explains more accurately the special legal status that the Court invokes. "Social right" is the term commonly used in the context of national constitutions[42] as well as regional[43] and universal[44] human rights instruments when referring to rights concerning social and economical issues.[45] Social rights are distinguished from political and civil rights for the purposes of human rights theories.[46] At the same time, however, they share at least some aspects of the special nimbus of civil rights, simply because the social right, just like civil rights, is guaranteed in a national constitution or in a supranational agreement rather than merely in a statute or in a directive, and hence at a higher level in the hierarchy of legal rules. This higher rank is a necessary condition to override norms lower in hierarchy.

2. The Substance of the Newly Created Social Right

Inventing a new social right, however, cannot be the end of the road. In order to apply it, one has to know its substance. In this respect too, *Mangold* is a remarkable decision. The Court could have gone on inventing scope, contents, and limitations of the newly

41. *See also* Preis, *supra* note 27, at 401, 405 et seq.

42. For an overview, see Cecile Fabre, *Social Rights in European Constitutions*, *in* SOCIAL RIGHTS IN EUROPE, *supra* note 14, at 15, 17 et seq.

43. In the European context mainly the European Social Charter of 1961, the revised European Social Charter of 1996, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union of 2000.

44. *See supra* note 33.

45. *See* Grainne de Búrca, *The Future of Social Rights Protection in Europa*, *in* SOCIAL RIGHTS IN EUROPE, *supra* note 14, at 3, 4.; Fabre, *supra* note 42, at 15.

46. A widely accepted distinction: For the purposes of public international law and with regard to the two covenants quoted *supra* in note 33, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 572–73 (4th ed. 1990). For the Charter of Fundamental Rights of the European Union, see Lord Goldsmith, *A Charter of Rights, Freedoms and Principles*, 38 COMMON MARKET L. REV. 1201, 1212 (2001). For Italy and France, see L. Imariso, *Norme costituzionali programmatiche e tutela dei diritti sociali: Alcune reflessioni sulle esperienze italiana e francese*, *in* I DIRITTI FONDAMENTALI IN EUROPA 558 et seq. (Assozianzione Italiana di Diritto Comparato ed., 2002). For Germany, see Ernst-Wolfgang Böckenförde, *Die sozialen Grundrechte im Verfassungsgefüge*, *in* SOZIALE GRUNDRECHTE 7 (Ernst-Wolfgang Böckenförde et al. eds., 1981). For Austria, see THEODOR TOMANDL, DER EINBAU SOZIALER GRUNDRECHTE IN DAS POSITIVE RECHT 8 et seq. (1967). In general, see for example, M. LUCIANI, SUI DIRITTI SOCIALI, DEMOCRAZIA E DIRITTO: TRIMESTRIALE DELL'CRS 545, 563 et seq. (1994); L. PRINCIPATO, I DIRITTI SOCIALI NEL QUADRO DEI DIRITTI FONDAMENTALI, GIURISPRUDENZA COSTITUZIONALE 873, 887 (2001).

created social right. Instead, the European Court of Justice refers to Directive 2000/78/EC. In fact, it *directly applies* Directive 2000/78/EC:

> 78 Having regard to all the foregoing, the reply to be given to the second and third questions must be that Community law and, more particularly, Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. . . .[47]

This last step of the legal technique is as peculiar as the first ones: The European Court of Justice invents a new social right. On the one hand, this social right prevails over the Treaties. On the other hand, the substance of the social right is defined by a Directive, which in itself, of course, is of lower rank than the Treaties.

III. WHAT IS NEW ABOUT THE *MANGOLD* APPROACH?

Has the European Court of Justice gone mad? No, the *Mangold* approach may be surprising, but it is not new. Its crucial elements can be identified both in previous case law and in the EC-Treaty. This very peculiar and unique legal thinking of European law is one of the products of an unmethodical almost fifty-year-old political and legal struggle about the separation of powers between the Member States and the Community.

A. Case Law: Mangold *and* Defrenne II

Article 119, quoted earlier, was included in the original version of the EEC-Treaty because France, believing that it paid female and male employees equally, feared that Member States in which female employees were paid less would have competitive advantages.[48] Equal pay consequently meant nothing more than a tool to guarantee competitive equality. However, in 1976, in *Defrenne v. SABENA (Defrenne II)*, the European Court of Justice held that Article 119 had a direct effect between employees and their employers:

> 7 The question of the direct effect of article 119 must be considered in the light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the treaty.

47. Case C-144/04, Mangold v. Helm, 2005 E.C.R. number 78 (not yet reported).

48. Opinion of Advocate General Dutheillet de Lamothe, Case 80/70, 1971 E.C.R. 445, 455 et seq. (*Defrenne v. Belgium, Defrenne I*).

8 Article 119 pursues a double aim.

9 First, in the light of the different stages of the development of social legislation in the various member states, the aim of article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.

10 Secondly, this provision forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action , to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the preamble to the Treaty.

11 This aim is accentuated by the insertion of article 119 into the body of a chapter devoted to social policy whose preliminary provision, article 117, marks "the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.".

12 This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the community.

. . .

14 Therefore, in interpreting this provision, it is impossible to base any argument on the dilatoriness and resistance which have delayed the actual implementation of this basic principle in certain member states.

. . .

16 Under the terms of the first paragraph of article 119, the member states are bound to ensure and maintain "the application of the principle that men and women should receive equal pay for equal work".

. . .

18 For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a community or national character.

19 It is impossible not to recognize that the complete implementation of the aim pursued by article 119, by means of the

elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at community and national level.

. . .

21 Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by article 119 must be included in particular those which have their origin in legislative provision or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.

22 This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.

. . .

24 In such situation, at least, article 119 is directly applicable and may thus give rise to individual rights which the courts must protect.

. . .

27 The terms of article 119 cannot be relied on to invalidate this conclusion.

28 First of all, it is impossible to put forward an argument against its direct effect based on the use in this article of the word "principle", since, in the language of the treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions, as is shown, for example, by the heading of the first part of the Treaty which is devoted to "principles" and by article 113, according to which the commercial policy of the Community is to be based on "uniform principles".

29 If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the community and the coherence of its external relations would be indirectly affected. 30 It is also impossible to put forward arguments based on the fact that article 119 only refers expressly to "member states".

31 Indeed, as the Court has already found in other contexts, the fact that certain provisions of the treaty are formally addressed to the member states does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.

32 The very wording of article 119 shows that it imposes on states a duty to bring about a specific result to be mandatorily achieved within a fixed period.

> 33 The effectiveness of this provision cannot be affected by the fact that the duty imposed by the treaty has not been discharged by certain member states and that the joint institutions have not reacted sufficiently energetically against this failure to act.
>
> 34 To accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by article 164 of the Treaty.
>
> 35 Finally, in its reference to "member states", article 119 is alluding to those states in the exercise of all those of their functions which may usefully contribute to the implementation of the principle of equal pay.
>
> 36 Thus, contrary to the statements made in the course of the proceedings this provision is far from merely referring the matter to the powers of the national legislative authorities.
>
> 37 Therefore, the reference to "member states" in article 119 cannot be interpreted as excluding the intervention of the courts in direct application of the Treaty.
>
> 38 Furthermore it is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying independent agreements concluded privately or in the sphere of industrial relations such as individual contracts and collective labour agreements.
>
> 39 In fact, since article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.
>
> 40 The reply to the first question must therefore be that the principle of equal pay contained in article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.[49]

There are notable differences between *Defrenne II* and *Mangold*. In *Defrenne II*, for example, the Court tries to convince by actually arguing. Unlike with Directive 2000/78/EC, the time limit stipulated in Article 119 had elapsed when the European Court of Justice ruled in *Defrenne II*. Because of these and other differences, one could easily "distinguish" *Defrenne II*. But the point is not whether or not

49. Case 43/75; Defrenne v. SABENA (Defrenne II), 1976 E.C.R. 455, 472 et seq.

Defrenne II is technically a precedent for *Mangold* because European law is not a case law system that applies the principle of stare decisis.

The similarities between the two decisions are more helpful in trying to understand *Mangold*. Both cases deal with the prohibition of a discrimination on personal grounds, sex in *Defrenne II*, age in *Mangold*. Both decisions come at a time when the Member States only half-heartedly take note of the prohibition of discrimination in question.[50] Technically, *Mangold* makes the prohibition to discriminate on the grounds of age a "general principle of Community law,"[51] though *Defrenne II* makes the prohibition to discriminate on the grounds of sex "a foundation of the community."[52] In both cases, the European Court of Justice gave the prohibition to discriminate a special rank, which enabled it to override otherwise applicable limitations, and which is best qualified as a social right.

Though not technically, *Defrenne II* is a precedent for *Mangold*: *Defrenne II* marks the beginning of the legal struggle against discriminations in the European Union. In fact, the ground for qualifying the prohibition of age discrimination in Directive 2000/78/EC as a social right although it is not found in "various international instruments and in the constitutional traditions common to the Member States," is the special attention given to anti-discrimination legislation in European law in and since *Defrenne II*.

B. EC-Treaty-law: Mangold *and Article 141(3) and (4) EC-Treaty, Articles 27, 28 and 30 of the Charter of Fundamental Rights of the European Union*

Not even *Mangold*'s legal technique as a social right whose substance is stipulated by directives is a novelty. Through the Treaty of Amsterdam, former Article 119, quoted earlier, became Article 141(1) and (2), and subsections (3) and (4) were added. Subsection (3) refers to a "principle of equal opportunities and equal treatment of men and women in matters of employment and occupation" and subsection (4) mentions a "principle of equal treatment":

50. *Id.* at 455, 477; *see*, *e.g.*, Herbert Wiedemann & Gregor Thüsing, *Der Schutz älterer Arbeitnehmer und die Umsetzung der Richtlinie 2000/78/EG*, NZA 2002, at 1234 et seq.; MARTIN LÜDERITZ, ALTERSDISKRIMINIERUNG DURCH ALTERSGRENZEN – AUSWIRKUNGEN DER ANTIDISKRIMINIERUNGSRICHTLINIE 2000/78/EG AUF DAS DEUTSCHE ARBEITSRECHT 41 et seq. (2005); Spiros Simitis, *Altersdiskriminierung - die verdrängte Benachteiligung*, Neue Juristische Wochenzeitschrift 1453 et seq. (1994).

51. Case C-144/04, Mangold v. Helm, 2005 E.C.R number. 75 (not yet reported).

52. Case 43/75, Defrenne v. SABENA (Defrenne II), 1976 E.C.R. 455, 473.

> (3) The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
>
> (4) With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

If the Council is to adopt measures to ensure the application of the principle of equal opportunities, subsection (3), and if the Member States can take measures of affirmative action notwithstanding the existence of the principle of equal treatment, subsection (4), such a principle must exist at the Community Law level. However, the EC-Treaty does not stipulate the principle of equal treatment explicitly, and hence the scope of application and the substance of the principle of equal treatment are not set out in primary Community Law. This situation is similar to the one in *Mangold*: A principle exists, but it is unknown what the principle says.

In the context of Article 141(3) and (4) of the EC-Treaty, academic writers have proposed that the principle of equal treatment exists at the level of primary Community Law and that the scope of the principle is laid down in the directives dealing with sex discrimination[53]—exactly the position of the European Court of Justice in *Mangold*.

This peculiar technique can also be found in Articles 27, 28, and 30 of the Charter of Fundamental Rights of the European Union, which guarantee the workers' right to information and consultation, the right of collective bargaining and collective action as well as protection against unfair dismissal as social rights "in the cases and under the conditions provided for by Community law and national laws and practices," Article 27, and "in accordance with Community law and national laws and practices," Articles 28 and 30.[54]

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53. *See*, *e.g.*, Rolf Birk, *Arbeitsrechtliche Regelungen der Europäischen Union*, *in* 1 MÜNCHENER HANDBUCH ZUM ARBEITSRECHT § 19, at 329 (Reinhard Richardi & Otfried Wlotzke eds., 2d ed. 2000); Sebastian Krebber, *supra* note 28, at art. 141, 76.

54. Article 27 reads: "Workers' within the undertaking . . . Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices." Article 28 reads:

IV. PURPOSE, IMMEDIATE, AND INDIRECT PRACTICAL SIGNIFICANCE OF THE *MANGOLD* APPROACH

In order to assess the potential of the *Mangold* approach, one has to identify the purpose and the immediate as well as indirect practical significance of the decision. As mentioned earlier, *Defrenne II* and *Mangold* come at a time when the Member States react unenthusiastically, if not unwillingly to the community prohibiting discrimination.[55] Arguably, both decisions have to be seen as a "*coup de tonnerre*" to wake Member States out of their lethargy and to show them that the European Court of Justice takes the prohibition seriously.

The immediate practical significance, on the other hand, is limited: A social right at the level of primary Community Law whose scope is defined by a Directive comes down to applying the directive. The direct practical impact is therefore limited to situations in which the application of the directive and the traditional "*effet utile*"-tools developed by the European Court of Justice[56] for such cases do not help. *Mangold* in fact shows us what these situations are: (1) Application of the legal regime of the directive before its transposition is due, and (2) Direct effect between individual parties.[57] The message of *Mangold* is that, whenever a rule of European Employment law, embodied in a directive, has the status of a social right, the European Court of Justice is not inclined to limit the remedies of the parties to asking damages from the Member State in the tradition of *Francovich and Bonifaci v. Italy*.[58]

Defrenne II had a substantial indirect effect: the European Court of Justice has construed the principle of equal pay extensively and the exceptions to the principle narrowly.[59] It is yet not certain whether *Mangold* will have a similar indirect effect on the interpretation of the

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> Right of collective bargaining and action
> Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 30 reads: "Protection in the event of unjustified dismissal . . . Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices." *See* Sebastian Krebber, *in* KOMMENTAR DES VERTRAGES ÜBER EINE VERFASSUNG FÜR EUROPA TEIL I (C. Calliess & M. Ruffert eds., 3d ed. forthcoming November 2006).

55. *See supra* note 50.

56. *See supra* note 14; Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy*, 1991 E.C.R. I-5357.

57. *See supra* note 9.

58. Cases C-6/90 and C-9/90, Francovich and Bonifaci v. Italy, 1991 E.C.R. I- 5357.

59. *See* Krebber, *supra* note 28, at art. 141, at 23, 29, 82.

prohibition of age discrimination, but it is very likely. If the European Court of Justice qualifies a rule of European employment law as a social right, it thereby conveys that it considers the rule in question as one of fundamental importance. Throughout its history, the Court has not interpreted such rules narrowly. *Mangold's* "*coup de tonnerre*," just as *Defrenne II's*, will probably be followed by many more, until the Member States have accepted the broad understanding of the prohibition of age discrimination laid down in Directive 2000/78/EC.

V. CONCLUSION

A. Mangold *in a Nutshell*

A closer look at *Mangold*, therefore, reveals that the decision stands in the tradition of the European Court of Justice's case law as well as European Treaty law.

(1) The European Court of Justice gives the prohibition of age discrimination the rank of a social right as it did thirty years earlier with equal treatment between women and men in *Defrenne II.*
(2) The legal authority for qualifying the prohibition of age discrimination in Directive 2000/78/EC as a social right is the special attention given to anti-discrimination legislation in European law since *Defrenne II*.
(3) The substance of the social right is laid down in Directive 2000/78/EC, a technique also found in Article 141(3)–(4) of the EC-Treaty and in Articles 27, 28, and 30 of the Charter of Fundamental Rights of the European Union.
(4) Applying the social right comes down to applying Directive 2000/78/EC.
(5) The direct effects of this approach are consequently limited to situations in which the application of the directive and the traditional "*effet utile*"-tools do not help: Application of the legal regime of the directive before its transposition is due, and direct effect between individual parties.
(6) The indirect effect will most likely be an extensive construction of the principle of non-discrimination because of age and a narrow interpretation of the exceptions to the principle.
(7) The legal thinking behind *Defrenne II*, *Mangold* as well as Article 141 (3)–(4) EC-Treaty and Articles 27, 28, and 30

of the Charter of Fundamental Rights of the European Union is unique to European law and one of the products of an unmethodical, almost fifty-year-old political and legal struggle about the separation of powers between the Member States and the Community.

B. Further Potential? The Two Prongs of Defrenne II *and* Mangold

Does *Mangold* have a further potential for other issues of European employment law? To give an estimation, one has to bear in mind the legal technique of *Mangold* and *Defrenne II*. This technique has two prongs and requires: (1) existing European legislation on the one side, *and* (2) some basis for qualifying the legislation in question as a social right.

Finding a basis for qualifying an issue of employment law as a social right is the easier part. Age discrimination, at stake in *Mangold*, is a particular case, because this pattern of discrimination has only recently been discovered and addressed in Europe.[60] With regard to other issues of labor and employment law, however, there is a broad choice of sources for social rights in the European context: the European Social Charter, the revised European Social Charter, the European Convention of Human Rights, the Charter of Fundamental Rights of the European Union, and the Constitutions of the Member States. They all protect numerous issues of employment and labor law.

But—and this is a crucial point too easily overlooked—the existence of a social right *alone* does not work in the *Defrenne II* and *Mangold* logic. The legal mechanism of the two decisions, in addition to a social right, also requires existing European legislation. And there is little European legislation in employment and labor law.[61]

60. *See* SPIROS SIMITIS, ALTERSDISKRIMINIERUNG - DIE VERDRÄNGTE BENACHTEILIGUNG, NEUE JURISTISCHE WOCHENSCHRIFT 1453 (1994).

61. The most important directives are: Anti-discrimination law, *supra* note 1. Individual employment law: Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP, 1999 O.J. (L 175) 43; Council Directive 1997/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP, and the ETUC, 1998 O.J. (L 014) 9; Council Directive 1991/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, 1991 O.J. (L 288) 32; Council Directive 1993/104/EC and Council Directive 2003/88/EC concerning certain aspects of the organization of working time, 1993 O.J. (L 307) 18 and 2003 O.J. (L 299) 9; Council Directive 1980/987/EEC and Council Directive 2002/74/EC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, 1980 O.J. (L 283) 23 and 2002 O.J. (L 270) 10; Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, 2001 O.J. (L 82) 16; Council Directive 1998/59/EC on the

Therefore, the potential of the *Defrenne II* and *Mangold* approach is limited. In particular, both cases are not an argument to override the limits imposed by the separation of competences between the European Union and the Member States such as, for example, Article 137(5) of the EC-Treaty[62] or Article 51(2) of the Charter of Fundamental Rights of the European Union.[63] If the European Union does not have the power to enact legislation, there can be as many bases for the qualification as a social right as are imaginable, but the second prong of the *Defrenne II* and *Mangold* mechanism, actual EU legislation, will not exist. The clearest case to be made in the light of *Defrenne II* and *Mangold* therefore is that all of the grounds on which discrimination is prohibited in the relevant directives[64] also are social rights and that therefore *Defrenne II* and *Mangold* method applies to all of them.

approximation of the laws of the Member States relating to collective redundancies, 1998 O.J. (L 225) 16. Collective labor law: Council Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, 2002 O.J. (L 80) 29; Council Directive 1994/45/EC on the establishment of a European Works Council or a procedure in Community-scale groups of undertakings for the purposes of informing and consulting employees, 1994 O.J. (L 254) 64; Council Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees, 2001 O.J. (L 294) 22. Occupational Health and Safety: Council Directive 1989/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work; 1989 O.J. (L 183) 1; Council Directive 1992/85/EEC on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 1989/391/EEC), 1992 O.J. (L 348); Council Directive 1994/33/EC on the protection of young people at work, 1994 O.J. (L 216) 12; Council Directive 1991/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, 1991 O.J. (L 206) 19.

62. Which reads: "The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."

63. Which reads: "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

64. *See supra* note 1.