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Rights adjudication and constitutional pluralism in Germany and Europe

Alec Stone Sweet and Kathleen Stranz

ABSTRACT The development of a corpus of fundamental rights at the EU level has accentuated the constitutional pluralism that existed within many national legal systems. Illustrating the dynamic, the adjudication of the age discrimination provisions of the 2000 Framework Directive on Employment Equality in Germany produced two major outcomes. First, interactions between the ECJ and the German labour courts served to upgrade rights protections afforded to workers, relative to national constitutional standards. Second, the structural position of the German Federal Constitutional Court, as a privileged locus of rights protection, was weakened, while the authority of the labour courts was enhanced. Looking ahead, we are entering a new era of rights-based legal integration that will further serve to Europeanize national law, while undermining the (supposed) unity and coherence of national legal orders.

KEY WORDS Constitutional pluralism; European Court of Justice; Europeanization; labour law; legal integration; non-discrimination.

INTRODUCTION

This article builds on two strains of research on the European Court of Justice (ECJ) and legal integration.¹ The first tracks and evaluates the impact of the ECJ's case law on market and political integration. The scholarship has conclusively shown that the legal system of the European Union (EU) has pushed integration further than member states were prepared to go on their own, under extant decision-rules, provoking a process of adaptation on the part of EU legislators and national officials (Cichowski 2007; Mattli and Slaughter 1998; Stone Sweet 2004). A second strain has documented the interactions of the ECJ and the national courts (Alter 2001; Nyikos 2003; Panke 2007), processes resulting in the gradual 'Europeanization' of national legal orders. Our focus here is on the judicial politics of rights protection, specifically on how German courts and the ECJ have interacted to create and enforce a right to be free from discrimination in the workplace.

The case study is important in its own right. Adjudicating the 2000 Framework EU Directive on Employment Equality produced two linked outcomes. First, it

consolidated the rights-based, ‘constitutional pluralism’ that characterizes the German legal system. By ‘constitutional pluralism’, we refer to a situation, within the domestic legal system, in which two or more sources of judicially enforceable rights, occupying a rank above statute, co-exist.² Second, private litigants, German labour judges, and the ECJ leveraged EU fundamental rights to upgrade German standards of rights protection to a higher, European level, marginalizing the German Federal Constitutional Court (GFCC) in the process.

The wider significance of the case also deserves emphasis. Kelemen (2011) has demonstrated that the importance of the ECJ and the national courts broadly expanded as the EU’s legislative bodies (post-Single European Act) embraced a rights-based, court-centric system for monitoring and enforcing member state compliance with EU secondary law. This contribution provides further empirical support for Kelemen’s arguments. With respect to the themes developed by the editors of this collection (Kelemen and Schmidt 2012), we do not see the importance of the ECJ and the national courts declining in the near future. On the contrary, the expansion of broad judicial review powers in the service of rights protection will reinforce the legal system’s capacity to control outcomes.

The case study we present is embedded in crucial legal developments that have taken place over the past four decades (Bell 2011). In the 1970s and 1980s, the ECJ developed a general principle of equality – in the guise of a fundamental right to be free of discrimination – through its rulings on equal pay and equal treatment of the sexes. By the end of the 1990s, the Court’s jurisprudence on non-discrimination had thoroughly ‘judicialized’ EU law-making in the area, all but requiring the EU’s legislative organs to codify the Court’s major rulings as entrenched secondary law (Cichowski 2001). These rulings also opened up new domains of national policy to the reach of EU law through national judges. Most important, they obliged national courts to supervise workplace rules and practices, that is, private contractual relations. A new wave of activity began in 2000, when the EU legislator initiated a series of rights-based secondary legislation that, in effect, codified the (in part, unwritten) general principle of equality that the Court had elaborated. The most important of these statutes is Directive 2000/78 – ‘establishing a general framework for equal treatment in employment and occupation’. In *Mangold* (C-144/04), a momentous 2005 ruling, the ECJ ‘constitutionalized’ the provisions of the Directive related to age discrimination, by holding that the Directive’s main features expressed norms that already existed as (unwritten) EU fundamental rights. The *Mangold* saga heralds a new generation of inter-court, judicial politics that will heavily condition how the European system of rights protection will evolve.

The contribution is organized as follows. Section 2 provides an overview of how EU equality law had developed prior to the *Mangold* ruling. We then (3) discuss long-standing tensions within German law, as embodied in the differing approaches of the German Federal Labour Court (GFLC) and the GFCC to the application of rights in disputes between private parties. Section 4 focuses

on the *Mangold* litigation and its consequences. As Sections 2–4 show, the development of EU equality law undermined the autonomy of the national legal order, while enhancing constitutional pluralism within Germany. In the conclusion (5), we argue that the distinctive architecture of rights-based constitutionalism in Europe, coupled with the EU's turn toward combating discrimination will further undermine the (supposed) unity and coherence of national legal orders, while bolstering the importance of the relationship between the ECJ and the national courts.

THE ECJ AND THE CONSTITUTIONALIZATION OF NON-DISCRIMINATION

Beginning in the late 1970s, the ECJ began to 'constitutionalize' the notion of sex equality. In *Defrenne II* (43/75), the Court recognized the direct effect of ex-Art. 119 EC (now Art. 157 TFEU), which obliges the member states to ensure that men and women receive 'equal pay for equal work', thus converting that provision into a right that individuals could ask national courts to enforce. Over two decades, the scope of this right steadily expanded to include much more than salary and wages. During this same period, the Court also developed the 'general principle of equality' from two sources: ex-Art. 119 EC and the 1976 Equal Treatment Directive. Gradually, a justification for this jurisprudence emerged. The EU, the Court stressed, was not just an economic association to be legitimated through efficiency-based rationales. It was also a social community, whose duty it was to mitigate at least some of the injustices generated in market and workplace relations.

As scholars have extensively documented (Bell 2011; Ellis 1998, 2005; Stone Sweet 2004: ch. 4), the constitutionalization of sex equality made the courts the site of normative innovation, largely eclipsing legislative authority at both the EU and national levels. The Commission leveraged the ECJ's rulings, using them as templates for new EU statutes, including directives on indirect discrimination (1997), occupational social security (1986) and pregnancy and maternity (1996). The general outcome – recurrent codification of the Court's progressive case law – flows in part from the fact that the ECJ treated the norm of non-discrimination as a fundamental right, conferring upon it a higher-law position within the structure of EU law.

For present purposes, the '*constitutionalization* of the principle of non-discrimination' refers to several overlapping features of equality law.³ A first concerns legal sources. In 1980, it could be assumed that a discrete piece of secondary legislation, the 1978 Equal Treatment Directive, comprised the source of the principle of equal treatment of the sexes, and that ex-Art. 119 EC originated the rule that men and women must receive equal pay for equal work. By the end of the 1990s, the Court had made it clear that these texts expressed norms of equality and non-discrimination which could also be found in the (judge-made) general principles of EU law. A second feature relates to the procedure through which the member states, or governments, may override

the Court's jurisprudence in this area. Normally, an unwanted interpretation of a treaty provision or a statute may be overridden, respectively, through treaty revision (by a unanimous vote of the member states) or statutory amendment (in this domain, the override rule would be a unanimous vote on the part of governments acting in the Council of Ministers). It is not at all clear, however, how the member states could override the Court's case law on fundamental rights (the general principles), even if they could muster consensus. A third characteristic of the principle of equality must also be stressed. As a fundamental right, it is imbued with both vertical and horizontal direct effect, a point that warrants further discussion.

In the 1960s, the Court famously initiated its 'constitutional' jurisprudence of direct effect and supremacy (Mancini 1989) which, as national courts adapted to it, would gradually but inexorably 'transform' the EU (Weiler 1991), federalizing the regime in all but name (Lenaerts 1990). Treaty provisions and directives that meet certain criteria are directly effective; that is, private parties may plead them at national bar. The central purpose of such litigation is to provoke judicial scrutiny of member state compliance with EU law. Individuals, firms and groups generate the case load; the preliminary reference procedure (governed by Art. 267 TFEU) organizes a dialogue between the ECJ and the national courts on issues concerning the conformity of national law to EU Law; and, under the doctrine of supremacy, the national judge must set aside (disapply) any national legal rule or practice that conflicts with EU law. In areas governed by direct effect and supremacy, national judges are expected to act as agents of the EU legal order, not the national order.

The ECJ took an aggressive stance with respect to the *vertical direct effect of EU law*, which refers to the immediate judicial applicability of EU law to disputes between (a) private parties and (b) national organs of government. As the Court has consistently stressed, direct effect constitutes a mechanism for enhancing 'the effectiveness' of EU law within national legal orders. The doctrine has been central to market-building through 'negative integration', the judicially led process through which barriers to intra-EU trade in goods and services, labour flows and investment are removed (see Schmidt 2012). When adjudicating cases involving one of the 'four freedoms', vertical direct effect was enough. The Court's position on the *horizontal direct effect of EU law*, which refers to the applicability of EU law to relations between two private persons or entities, was more nuanced. In *Defrenne II*, the Court opened the door to horizontal direct effect, holding that, under the Treaty, employers could not operate systems of remuneration that discriminated on the basis of sex. By virtue of the direct effect of ex-Art. 119 EC, employees may bring suit against employers before national judges, thereby triggering judicial review of the firm's workplace policies, as well as the national law that would permit such policies. Adjudicating disputes under EU law that is applicable between private parties inevitably implicates judges in 'positive integration', the process through which EU law, designed to replace disparate national regulation, is made and applied. Somewhat controversially (Prechal 1995), the ECJ has balked at conferring horizontal direct effect

on directives that member states had either failed to transpose into national law, or had transposed incorrectly.⁴

Here, again, we encounter features of legal doctrine that are crucial to our analysis. Most important, the general principles, including fundamental rights, enjoy at least the rank of Treaty law in the hierarchy of legal norms of the EU. The Court, therefore, can recognize the *horizontal direct effect* of a fundamental right. In the domain of sex equality, the ECJ has on several occasions held that norms found in EU statutes simply reflect a higher-law norm embedded in the general principles. When it does so, statutory law is effectively ‘constitutionalized’, and *horizontal direct effect* kicks in. Thus, while the ECJ constrained the reach of judicial authority in denying the horizontal direct effect of directives, it may overcome this constraint through determining that a fundamental right is in play. If, from the perspective of the ECJ’s ‘constitutional’ jurisprudence, national courts are agents of the EU legal order every time they adjudicate disputes in domains governed by EU law, then a crucial point follows. Once the Court decides that an EU legal norm is possessed of horizontal direct effect, by virtue of its relationship to a fundamental right, national constitutional rights and the jurisprudence of national constitutional courts are no longer dispositive.

The question of whether national judges actually conform to the role that the ECJ has imagined for them – as faithful ‘agents’ of EU law – is not merely a doctrinal question but a deeply political one. After all, national judges may consider themselves to be, first and foremost, agents of the national legal order; national rights jurisprudence may dictate outcomes that the ECJ, under the supremacy doctrine, would require them to abandon; and the ECJ has no direct means to compel national courts to comply with its rulings. As an empirical matter, the question will be settled on the basis of choices made by specific national judges in specific cases. The ECJ’s equality jurisprudence broke new ground;⁵ indeed, it has been transformative. Outside of EU law, for example, the concept of indirect sex discrimination *per se* was unknown in the law of the member states.⁶ Some national judges were initially reticent about adjudicating such cases, and some initially rejected the (alien) doctrinal framework that the Court developed to deal with claims of indirect discrimination, a version of an intrusive form of scrutiny called *proportionality analysis*. Gradually, however, judges did adapt to the Court’s case law with wide-ranging consequences for national conceptions of equality and discrimination that are still being worked out.

Member states governments too adapted: they ratified the Court’s moves, codifying the Court’s case law in directives (Stone Sweet 2004: 159–70). The doctrinal framework governing the adjudication of indirect discrimination, for example, is found (copied virtually word-for-word) in a provision of the 1997 directive on the matter, further facilitating its diffusion within national orders. In 1999 (Treaty of Amsterdam), the member states provided legal basis for legislation serving to combat discrimination (now Art. 19.1 TFEU), upon the unanimous vote of the Council with the consent of the Parliament.

In 2000, legislators adopted the Framework Directive on Employment Equality (2000/78/EC), part of a ‘suite’ of ‘secondary rights legislation’ that would soon appear (Bell 2011). The Directive prohibits discrimination in employment, benefits and work conditions based on age, disability, religion, belief and sexual orientation. The legislation explicitly references the Court’s established case law; it covers both direct and indirect discrimination, as well as harassment; and it is directly applicable, upon transposition, both vertically and horizontally. With the Framework Directive, the EU’s legislative branch had harnessed judicial authority to make the principle of non-discrimination effective at the level of the workplace. Indeed, it made obligatory the ECJ’s preferred methodology: proportionality analysis of any public interest or economic justification that would infringe upon the principle of non-discrimination. Proportionality analysis involves least-restrictive means testing and balancing (discussed further below); adopting it constitutes, in effect, a rejection of judicial deference to political or economic decision-makers in favour of a strict form of review (Stone Sweet and Mathews 2008).

In sum, the Directive provided the basis for a significant incursion of EU law into national law and workplace practices. Unavoidably, national judges would be faced with deep, structural choices about the nature of and scope of the authority of the EU and of the ECJ. In the next two sections, we focus on how German courts have made these choices, with what systemic consequences.

RIGHTS PLURALISM IN GERMANY

When it comes to rights protection under the Basic Law, the German legal order is characterized by a structural condition: constitutional pluralism (defined above).⁷ Perhaps contentiously, we do not view the German legal order as a unified normative system, or German rights doctrine as coherent. In many EU member states (Stone Sweet 2009), rights-based pluralism means that two or more high courts, with respect to the same litigants (or class of litigants), can claim authority to resolve legal disputes about the scope, content and applicability of a right, and no single high court can directly impose its authority on the other(s). In Germany, apart from the GFCC, there are five, autonomous supreme courts; some of these routinely enforce functionally equivalent rights provisions under the jurisprudence of the GFCC, the ECJ, and the European Court of Human Rights; and the mechanism developed to ensure the GFCC’s control over how the other domestic supreme courts adjudicate rights claims – the individual constitutional complaint – has proved to be inadequate when it comes to European law. Moreover, some German courts self-consciously use the ECJ to enhance their own authority, and to subvert that of the GFCC (Alter 2001).

In fact, constitutional pluralism emerged in the early years of the Federal Republic, when the GFLC moved to give horizontal direct effect to the rights provisions of the Basic Law. To our knowledge, the GFLC was the first court to do so anywhere in the world. In a series of seminal rulings, the GFLC

held that rights, including of speech and conscience, marriage, sex equality, and human dignity and personality, were directly applicable between employees and employers.⁸ By 1957, the GFLC could treat the horizontal direct effect of rights as settled case law.⁹ The move was controversial. It imported, into the ‘private law’, norms that were considered to be part of the ‘public law’, obliterating distinctions many considered to be foundational. In developing this jurisprudence on its own, without a reference to the GFCC, the GFLC also implicitly denied the GFCC’s centrality as the fount of rights protection. The outcome, the construction of rights as binding on relations between employers and employees, was unanticipated by the founders of the Federal Republic (Quint 1989: 252–58).

In 1958, the GFCC reacted, in its celebrated *Lüth* ruling.¹⁰ The GFCC held that, since the ‘constitutional values’ (now usually called ‘principles’) permeate ‘all spheres of law’, it was the duty of the entire judiciary to ensure the compatibility of ‘every provision of the private law’ with rights. The Court rejected two ‘extreme’ positions: the view that rights are exclusively norms of the public law, and do not touch the private law; and the position taken by the GFLC on the horizontal direct effect of rights in employment law. *Lüth* took a middle road, standing for the proposition that the rights enumerated in the first chapter of the Basic Law (Arts. 1–19) are *indirectly effective* between individuals: in consequence, judges are obliged to interpret the various codes that make up the private law as if these codes had been written in conformity with rights provisions (as interpreted by the GFCC on an ongoing basis). The *Lüth* ruling provoked a long series of battles between the GFCC and the Supreme Civil Court (*Bundesgerichtshof*), as the GFCC worked to ‘constitutionalize’ the Civil Code, while civil judges sought to defend their autonomy. The GFLC continued down its own path, usually managing to stay one step ahead of the GFCC. To circumvent the GFCC’s control, for example, the GFLC strengthened what is now known as the General Clause on Equality, an expansive, unwritten, judge-made right to be free of discrimination in workplace relations, which the GFLC had originated prior to *Lüth*.¹¹ Thus, significant constitutional pluralism existed in Germany prior to the advent of the ECJ’s equality jurisprudence.

Unlike the GFLC, the Constitutional Court had chosen not to give equality a privileged status (Fuchsloch 1995; Kokott 1995). Art. 3.1 of the Basic Law comprises a general equal treatment clause; Art. 3.2 provides equal rights between women and men; and Art. 3.3 prohibits discrimination on the grounds of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions, and disability. Until the 1980s, the GFCC gave these provisions a narrow scope when compared to protections conferred on other freedoms. Generally, the GFCC deploys a robust, three-step proportionality test when it adjudicates rights claims. When it came to Art. 3, however, the GFCC developed a more deferential level of scrutiny akin to what Americans would call ‘rational basis’ review. Under a full proportionality analysis, a court reviews an act or measure to ensure that (1) the means selected to achieve a purpose are ‘suitable’ to achieving that purpose (a suitability test); (2) the means chosen do not

infringe upon the right more than is 'necessary' (a 'necessity' or least-restrictive means test); and (3) the cost of the measure – infringement on the right – is outweighed by the benefits of the measure under review (a residual 'balancing' test). The GFCC afforded the legislator wide discretion for making distinctions within categories falling under Arts. 3.2 and 3.3, in effect, stopping the analysis after step 1. Furthermore, the GFCC did not recognize indirect discrimination. With regard to sex equality, for example, the German constitution covered only discrimination that resulted from measures that overtly or intentionally treated men and women differently.

Abetted by German judges, the ECJ's equality case law fatally undermined the GFCC's position. German labour courts supplied the references to the ECJ in two foundational cases: *Bilka* (170/84) and *Rinner-Kühn* (C-171/88). These cases concerned the lawfulness of policies that denied part-time employees benefits afforded to full-time workers (pensions and sick-leave respectively), in situations in which women comprised the vast majority of the part-time labour force. In their references, German judges made it clear that they considered these practices, and the national statutes that permitted them, to be a form of indirect sex discrimination, and therefore unlawful under ex-Art. 119 EC. The ECJ responded by giving the referring courts what they wanted: a mandate to root out indirect discrimination in the workplace and in Germany's social policies. Further, because the right inheres in ex-Art. 119, the Court recognized its horizontal direct effect; employees could henceforth plead it directly against employers before national judges. As important, the ECJ insisted that judges use a full-blooded proportionality test to adjudicate such claims, whereas German judges would not be able to do so under the doctrines of the GFCC. In its final judgment in the *Bilka* saga (1986), the GFLC applied the ECJ's ruling to resolve the case.¹² The GFLC then began to invoke Art. 157 TFEU (ex-Art. 119 EC) as the source of the right, not the Basic Law, thereby marginalizing the GFCC.

The GFCC ruled on the case six years later, in 1992, pursuant to a constitutional complaint brought by the *Bilka* Department store, the loser in the case, attacking the GFLC's ruling as unconstitutional. The company claimed that the GFLC and the ECJ had struck the wrong balance, in that they undervalued the economic burdens to employers, while ignoring settled German constitutional case law. The GFCC rejected these arguments, in effect deferring to the ECJ.¹³ In 1997, more than a decade after *Bilka* had been decided, the GFCC adopted the ECJ's framework as its own approach to indirect discrimination under Art. 3.2 of the Basic Law, citing the GFLC's and the ECJ's case law in the process.¹⁴ In this episode, the ECJ and the German labour courts enhanced their status as rights-protecting courts, and they enhanced rights protection for German women. The GFCC, left behind and on the sidelines, changed its own rights jurisprudence in an effort to re-establish relevance.

With this background in mind, we turn to how age discrimination was addressed by German courts prior to the adjudication of the 2000 Framework Directive. German constitutional law does not expressly prohibit age

discrimination. In the employment context, when the GFCC was asked to review the constitutionality of statutes that treated persons differently with reference to their age, it would review these provisions under Art. 12 Basic Law (freedom of occupation), treating Art. 3.1 as a supplementary, residual criterion. Only in cases not covered by Art. 12 or some other enumerated freedom, would the Court analyse a claim under the equality or non-discrimination heading (Art. 3 Basic Law) in a first stage. As noted above, this jurisprudence has consequences for the deference given by the GFCC to legislative authority. The GFCC applies proportionality analysis to most of the enumerated freedoms, but deploys a deferential, 'reasonableness' test to equality claims under Art. 3 Basic Law. In practical terms, this meant that the GFCC would almost never find a violation of the equality clause unless an enumerated freedom had also been violated. This case law has remained remarkably consistent since the late 1950s. The GFLC, on the other hand, had recognized an autonomous action for age discrimination in private contractual agreements since at least the 1980s.

In summary, when it came to protecting employees from discrimination, the GFLC's posture toward equality was open to EU law and flexible. Recall that it had embraced the horizontal direct effect of rights, before the GFCC sought to stifle that development in *Lüth*. Under its own jurisprudence, the GFLC continued to blend analysis under the General Clause and the Basic Law, balancing both against, say, the right to contract claimed by the employer. After *Bilka* and *Rinner-Kühn*, the GFLC could simply reference the ECJ's jurisprudence, while implicitly rejecting the GFCC's case law. Put differently, the ECJ's key rulings in the area strengthened what labour judges were already pre-disposed to do.¹⁵ The GFCC, on the other hand, had painted itself into a doctrinal corner, making it appear insular and defensive. The 2000 Framework Directive would lay bare these tensions. Since the Directive prohibits, among other things, age discrimination in both its direct and indirect forms, and it applies to both the public and private sectors, the German legal order would be forced to adapt in deep, structural ways. The question was not if, but how, it would adapt.

4. THE *MANGOLD* CASE AND ITS IMPACT

In 2005, the ECJ issued its first ruling on the Framework Directive's provisions on age discrimination, pursuant to a reference sent by Judge Hauf, sitting on the Munich Labour Court of first instance. The case involved the employment of a lawyer, Mr Mangold, by another lawyer, Mr Held, to a fixed-term contract under conditions provided by federal statute governing part-time and fixed contract employment. The statute had been amended in 2003, to relax certain protections for employees, aged 52 and over, from dismissal. The alleged purpose of the statute was to facilitate the hiring of older workers. Mr Held had been an opponent of the 2003 amendment, on discrimination grounds, and had urged legislators to reject the amendment before the Bundestag. The proceedings established that Held had hired Mr Mangold for the

express purpose of challenging the law in the courts,¹⁶ but Judge Hauf set these objections aside, asserting authority to review the legality of the statute. Although the case raises a wide range of technical matters, we focus here on the major ‘constitutional’ issues.

Judge Hauf, whose antipathy for the statute was undisguised, faced several hurdles. Most important, the German statute under review had been amended prior to the deadline for transposing the Framework Directive into German law, and the government and the legislature were dragging their feet. EU directives, recall, are not possessed of horizontal direct effect. Further, the ECJ’s doctrine of ‘indirect effect’, which requires judges to interpret national law with reference to EU law in order to make it effective, would only kick in once the transposition period had expired; and, in any event, age 52 was a rule that afforded no interpretive wiggle room. To make matters more complex, the German statute appeared to be compatible with the only pertinent EU legislation on the books, EU Directive 1999/70 on fixed-contract work, which does not address age discrimination.

In a wide-ranging reference, Judge Hauf sought to persuade the ECJ that the German statute was unlawful under EU law.¹⁷ She began by pointing out that, in Germany, fixed-term-contract provisions had long been subject to constraints grounded in judicial precedent, including the rule that objective reasons must be given for limiting employment protection under such contracts, whereas the 2003 amendment did not require such justification when hiring workers aged 52 and over. Next, referencing the scholarly literature, which is far more contested than her portrayal would suggest,¹⁸ Judge Hauf indicated that the German provisions probably violated the Framework Directive with respect to age discrimination. More important, she argued that the case was covered by EU fundamental rights, including provisions of the EU’s Charter of Rights (then not in force): Art. 30 of the Charter announces a right to protection against unjustified dismissals; and Art. 21 prohibits age discrimination. Judge Hauf did not base her arguments on the Framework Directive, in part because the Directive had yet to be transposed into German law, and in part because she was seeking to constitutionalize the prohibition of age discrimination.

The ECJ, rejecting a more cautious approach urged by its Advocate-General, ruled that the question was governed by the general principle of equality, which included a right to non-discrimination on the basis of age. In framing the ruling in this way, the Court could circumvent the problem of horizontal direct effect, by basing its decision on fundamental rights,¹⁹ not the Directive. Taking its cues from Judge Hauf, the Court held that the German provision under review discriminated against older employees, and that this harm could not be justified under the proportionality test required by Art. 6 of the Directive (which is itself based on the ECJ’s equality jurisprudence). Because the national legislation fell within the scope of EU Law (through Directive 1999/70), the national judge is an agent of the EU legal order, authorized to ‘provide all the criteria of interpretation needed . . . to determine whether [national] rules

are compatible with such a principle'. The ECJ then gave Judge Hauf what she wanted, authorization to enforce EU fundamental rights against the national rule under review.

The *Mangold* decision provoked a storm of protest.²⁰ Most notably, the former president of both the GFCC and the Federal Republic, Roman Herzog, attacked the Court in a public, frontal assault. In 2008, Herzog and his colleague, Lüder Gerken, published an article in the *Frankfurter Allgemeine Zeitung* entitled: 'Stoppt den Europäischen Gerichtshof' (Stop the ECJ). The Court's move to general principles was characterized as an *ultra vires* act under the criteria laid down by the GFCC in its famous ruling on the Maastricht Treaty.²¹ In addition, the authors claimed that *Mangold* violated the constitutional rights of German employers (freedom of contract, freedom of occupation and the constitutional principle of legal certainty).

In the meantime, the GFLC quickly embraced the new jurisprudence in *Honeywell*, a case decided six months after the ECJ's *Mangold* ruling.²² The facts were similar to those in *Mangold*, leading the GFLC to refuse to apply the relevant German provisions. The GFLC also took it upon itself to address the question of whether *Mangold* was *ultra vires* under the German Basic Law, rejecting the claim on multiple grounds. In doing so, the GFLC had conferred upon itself what arguably are inherently constitutional functions only to be exercised by the GFCC.

The GFCC ruled on the case four years later, pursuant to an individual complaint brought by the Honeywell Corporation. Observers considered the case to be a test of the GFCC's asserted authority to review the *ultra vires* nature of EU acts under its *Maastricht* ruling. A coalition of law professors from diverse backgrounds published an expert opinion attacking *Mangold*, and urging the GFCC to declare the ECJ's ruling *ultra vires* (Gerken *et al.* 2009). The GFCC dismissed these arguments,²³ over the dissent of one justice, thereby avoiding open conflict with the GFLC and the ECJ.

In our view, the GFCC had little to gain and much to lose in declaring the ECJ's *Mangold* decision invalid under German law. By the time of the GFCC's ruling (2010), the EU Charter of Rights had entered into force, changing at least the symbolic politics of the matter. In addition, the *Mangold* ruling had generated a wave of references from the German courts to the ECJ, interactions which the GFCC could not directly control. Last, to declare the ECJ's *Mangold* ruling *ultra vires* would be to admit an uncomfortable truth, namely that German standards for protecting fundamental rights were lower than European standards. The GFCC would then be faced with the difficult task of forcing the labour courts, which would be strongly supported by the ECJ, to comply with its ruling.

The ECJ, for its part, appeared to wobble. In its first post-*Mangold* case on the issue, *Palacios de la Villa* (C-411/05), Advocate-General Mazák forcefully criticized the *Mangold* ruling, characterizing it as a flight of fancy. The ECJ found the Spanish law under scrutiny to be justified under the Framework Directive, eschewing fundamental rights analysis under the general principles.

In the very next case, *Bartsch* (C-427/06), brought by the German GFLC, the Court held that the scope of the equality principle, with respect to age discrimination, did not extend to cases that have no connection to EU Law. *Bartsch* is also of interest in that it produced an opinion by Advocate-General Sharpston, elaborating ideas that could have significant influence on future developments. Sharpston advanced an expansive version of the *Mangold* doctrine, suggesting that the content of the general principle of non-discrimination would necessarily change over time, as society changes. The Court should be prepared to recognize new forms of discrimination, and seek to combat them on fundamental rights grounds, *Mangold* being just one instance in this unfolding process.

In 2010, the ECJ appeared to follow Sharpston's lead. In *Küçükdeveci* (C-555/07), the Higher Labour Court of Düsseldorf asked the ECJ to review the compatibility of a German Civil Code provision with EU law on age discrimination. Ms Küçükdeveci was employed from the age of 18 by Swedex, a company that dismissed her after 10 years of service. In calculating the period of notice owed to Ms Küçükdeveci, Swedex relied on a provision of the German Civil Code that allowed employers to exclude from consideration periods of work prior to an employee's 25th birthday. The plaintiff challenged the terms of her dismissal before a German labour court, which dismissed the claim. She appealed on the grounds that the provisions in question constituted age discrimination, in that she was not credited with work-time corresponding to her length of service. Labour courts operating in different Länder had produced contrary rulings on these same Civil Code provisions.²⁴

The Düsseldorf court's reference to the ECJ expressed discomfort with the situation. The referral pointed out that, under the German Basic Law, it was bound by German statutes, and that only the GFCC possessed the authority to invalidate a German law. It then baldly stated that, given the GFCC's jurisprudence, a reference to the GFCC would be unlikely to help Ms Küçükdeveci; indeed, the referral cited two GFCC decisions upholding the provision in question in related cases. Nonetheless, the judges made it clear that they believed that the part of the Civil Code under review violated the EU's age discrimination principle, and could not be justified under the EU's Framework Directive. The referring judge then raised a major constitutional question: could any national court set aside a national norm if it considers that norm to be contrary to the principle of non-discrimination, or must the national judge be pre-authorized by the ECJ to do so?²⁵

Six member state governments (the Czech Republic, Denmark, Germany, Ireland, the Netherlands and the United Kingdom) filed briefs or weighed in at oral argument, an unusually high number. On the major issues, the governments spoke in one voice: they opposed the *Mangold* doctrine; they objected to the horizontal direct effect of the principle of non-discrimination; and they rejected the notion that national courts could, on their own, set aside national norms, under *Mangold*. The Commission urged the Court to stay the course and confirm *Mangold*.

Ms Küçükdeveci won the case. The Court, while mentioning Art. 21 of the Charter (prohibiting age discrimination) strongly confirmed *Mangold*, which it relied on for the proposition that the ‘general principles of EU law prohibits all discrimination on grounds of age, as given expression in Directive 2000/78.’ The Court found the relevant provision of the Civil Code, dating from 1926, to be discriminatory and disproportionate, and ordered the referring judge to set it aside. It answered the key constitutional question as follows:

It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement . . . to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle.

In an unusual move, the Higher Labour Court then issued a final judgement, setting aside the offending norms, and giving reasons for its decisions,²⁶ a mode meant to signal the advent of new precedent. The episode reveals constitutional pluralism in action.

Legislation transposing the Framework Act into German law entered into force in 2006. German courts have subsequently sent a wave of references to the ECJ, and these interactions will shape how the German statute will be implemented. Thus, the developments we have described comprise only the opening stages – in but one member state – of a long process of institutionalizing EU non-discrimination law through adjudication.

5. CONCLUSION

As this contribution has shown, the German labour courts willingly perform their roles as agents of the EU legal order, thereby enhancing the authority of the ECJ. They have also shown themselves to be more anxious to secure their own status as rights-protecting courts than to defend the autonomy of the German constitutional order. As it had done previously in the area of sex equality, the GFLC succeeded in marginalizing the GFCC, leaving the GFCC to play catch-up. The age of rights-based, constitutional pluralism in Europe is clearly upon us.²⁷

Looking ahead, the ECJ’s approach to non-discrimination raises a number of important questions. A first concerns the relationship between the Court’s fundamental rights jurisprudence and the Charter of Rights. Under the Charter, which entered into force on 1 December 2009 (pursuant to the Lisbon Treaty), lawyers and judges will generate more rights-oriented litigation and preliminary references, and they will plead and decide cases differently. The ECJ, for its part, will be able to find rights issues implied in most cases it looks for them. Thus, there is every reason to expect that rights preoccupations will gradually come to dominate the Court’s activities. Nonetheless, under Article 51(1) Charter, Charter rights apply to the member states ‘only when they are

implementing Union law', whereas the fundamental rights (as general principles) apply to the member states whenever they act 'within the scope of EU law'. Arguably, the latter comprises a broader mandate for judicial review. It is possible that the Court chose its formulation in *Mangold* in anticipation of the Charter's eventual promulgation, which would provide it with more reach and flexibility when dealing with references from the national courts. Today, there is hardly any area of national labour law, for example, that does not have a significant connection to EU law, and thus it is EU (not national-constitutional) rights that control. The German labour courts, we expect, will now aggressively work to construct the Charter for their own purposes.

In the meantime, litigation under the suite of directives on equality and non-discrimination, adopted since 2000 (Bell 2011), is exploding. In *Coleman* (C-303/06), a case involving equality for the disabled, the UK argued (as other states have) that the Framework Directive on Employment Equality lays down only 'minimum standards'. In his opinion, Advocate-General Maduro rejected this argument, but only after developing an expansive notion of equality and non-discrimination linked to the 'underlying values' of 'dignity and personal autonomy'. Under this conception, 'subtle' forms of indirect discrimination must also be covered. Maduro's formulation in *Coleman* fits well with the view of Advocate-General Sharpston (in *Bartsch*, discussed above) to the effect that the principle of non-discrimination is inherently expansive and adaptable to changing circumstances. The ECJ sided with Ms Coleman against the United Kingdom. If adjudicating non-discrimination claims in the EU means judicial recognition and enforcement of the underlying values of equality, then *Mangold* is only a modest but crucial step down the long path of judicialization through the protection of individual rights.

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NOTES

- 1 For a recent review of the social science literature on these topics, see Stone Sweet (2010).
- 2 In many European legal orders, three such sources – national constitutional rights, EU fundamental rights, the EU Charter of Rights, and the European Convention on Human Rights – co-exist and, in some areas, substantively overlap. Individuals have a choice of which source to plead; and judges have a choice of which right to enforce.

- 3 We take no normative view in this article on whether the constitutional rhetoric is appropriate, or whether developments in this domain of law are normatively defensible.
- 4 *Marshall I* (152/84); *Dori* (C-91/92). This gap in protection was partly closed by the emergence of the doctrine of *state liability*, holding that national judges can order state officials to compensate private parties for compliance failures; see *Franovich* (C-6 & 9/90); *Brasserie du Pecheur* (C-46/93 and C-48/93).
- 5 *Jenkins* (96/80); *Bilka* (170/84); *Rinner- Kühn* (171/88); as consolidated in *Enderby* (C-127/92).
- 6 The lone exception being the United Kingdom.
- 7 On constitutional pluralism more generally, see Stone Sweet (2009).
- 8 Bundesarbeitsgericht [1954], BAGE 1, 185.
- 9 Bundesarbeitsgericht [1957], BAGE 4, 274.
- 10 Bundesverfassungsgericht [1958], BVerfGE 7, 198.
- 11 Bundesarbeitsgericht [1956], BAGE 3, 180.
- 12 Bundesarbeitsgericht [1986], BAGE 53, 161. Körner (2001: 1046) notes that the GFLC went further than the ECJ, making justification of discriminatory effects more difficult for employers.
- 13 Bundesverfassungsgericht [1992], *Neue Zeitschrift für Arbeitsrecht* 10(5): 213–15.
- 14 Bundesverfassungsgericht [1997], BVerfGE 97, 35.
- 15 More generally, German labour law has always been regulated through a style of relatively autonomous judicial law-making that resembles practices found in the common law, as well as in ECJ decision-making, which has facilitated these dialogues. We thank an anonymous reviewer for emphasizing this important point.
- 16 This fact scandalized specialists, including Bauer (2005).
- 17 Arbeitsgericht München 2004, *Neue Zeitschrift für Arbeitsrecht-Rechtsprechungsreport* 10(1): 43–47.
- 18 Däubler (2001) argued that the provision violated the Directive, while Koberski (2005) disagreed.
- 19 The Court derived the right from ‘various international instruments and ... the constitutional traditions common to the Member States’.
- 20 Including Bauer and Arnold (2006), Hailbronner (2008) and Preis (2006).
- 21 Bundesverfassungsgericht [1993], BVerfGE 89, 155. In that ruling, the GFCC warned that it would invalidate any EU act having the effect of depriving German legislative organs of their control over legal norms created at the EU level. Private parties thereby possessed the right to plead the *ultra vires* nature of Community acts before all German judges, and to bring constitutional complaints alleging the same to the GFCC.
- 22 Bundesarbeitsgericht [2006], BAGE 118, 76.
- 23 Bundesverfassungsgericht [2010], BVerfGE 126, 286. English translation available online at: www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106en.html (accessed 7 September 2011).
- 24 Landesarbeitsgericht Berlin-Brandenburg [2007] found a violation of EU law, *Neue Zeitschrift für Arbeitsrecht-Rechtsprechungsreport* 13(1): 17–19, whereas Arbeitsgericht Lörrach [2007] did not, *Arbeit und Recht* 3: 184.
- 25 From the perspective of the ECJ’s case law on supremacy, the question is a version of one that has already been decided; see *Simmethal II* (106/77). The member states only formally accepted the ECJ’s doctrine of supremacy in 2007, in Declaration 17 ‘Concerning Primacy’. *Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon*, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0335:0359:EN:PDF> (accessed 7 September 2011).
- 26 Landesarbeitsgericht Düsseldorf [2010], *Zeitschrift für Wirtschaftsrecht* 31(12): 596.

27 The evolution of the European Convention on Human Rights, as a body of directly effective, supra-legislative (if infra-constitutional) rights, has also generated dynamics that are rapidly consolidating constitutional pluralism as a general, structural feature of European law (Keller and Stone Sweet 2008: 682–89).

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