In this paper I will address the background to the development of equality as a fundamental principle of European law and how that principle is applied, with a particular emphasis on the area of harassment and sexual harassment.

1. Equality as a Fundamental Principle of European Law

The EC Treaty as originally drafted contained only one express reference to equal treatment; Article 119 required Member States to ensure that men and women should receive equal pay for equal work. This had been inserted almost exclusively for economic reasons, driven by France’s desire to ensure an ability to compete with other member states which did not, at the time, recognise equal pay for men and women.
At first it was thought that Art 119 did not give rise to any legal effects at all. This understanding was changed by the landmark decision of Defrenne v Sabena\(^1\) which established that the right to equal pay was legally binding. Ms Defrenne, a Belgian air hostess, felt that she was entitled to a similar salary as male air stewards. Although there was no equal pay legislation in Belgian law, she argued that her entitlement was derived \textit{directly} from Art 119. The Court of Justice, in a radical decision, agreed with this interpretation of the Article and recognised for the first time the binding nature and direct effects of Article 119.

Thus, equality (though limited to equality between the sexes) was eventually, albeit belatedly, recognised by the Court as as a fundamental constitutional principle of European law:

\begin{quote}
"...respect for fundamental personal human rights is one of the general principles of the Community law... There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights".
\end{quote}

Since then the principle of equality between men and women has been elevated to one of the cornerstones of European law and is commended as one of the most significant and successful achievements of the European legal order.

More recently the Court of Justice has recognised equality within the constitutional principles of Community law as going beyond equality between the sexes to equality on the “new” grounds and in particular on grounds of age. In Mangold\(^2\) the Court gave its first substantive decision on the Framework Directive outlawing discrimination on grounds of, inter alia, age and

\begin{footnote}
\(1\) Case 149/77 [1978] ECR 1365.
\(2\) 2005] ECR I-9981
\end{footnote}
in doing so emphasised once again the fundamental importance of the principle of equal treatment as a constitutional principle under Community law. In classifying the prohibition to discriminate on grounds of age as a constitutional principle of Community law, the Court continued a long line of caselaw in the areas of free movement and gender equality. Interestingly the Court found that the prohibition to discriminate on grounds of age existed as a general principle of Community law independently from the Framework Directive. The Court recognised the principle as part of the general principle of equal treatment as a fundamental right under Community law.

**The Equality Directives**

The recognition of the impact of Article 119 led to the implementation of the Equal Pay Directive and the Equal Treatment Directive which outlawed direct and indirect discrimination on grounds of gender in pay and in working conditions.

More extensive measures on equality were incorporated into the (then) EC Treaty by the Treaty of Amsterdam in 1997. One of the most important changes was that Article 141 (formerly 119) obliged the Community to adopt measures to provide for equal treatment and equal opportunity for women not just with regard to equal pay, but also

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4 At paragraph 74 of its judgement.

5 At paragraph 75.


7 Council Directive 76/207/EC
more widely in occupation and employment. The insertion of a new Article 13 (formerly 6a) allows the adoption of measures aimed at combating a wide range of forms of discrimination and extended the principle of equality to race and ethnic origin, sexual orientation, religion and belief, age and disability.

The changes brought about by the Treaty of Amsterdam ultimately led to the implementation of the the Race Directive,¹⁸ the Framework Directive⁹ and the Recast Equal Treatment Directive¹⁰.

Later in 2004, for the first time the scope of the principle of equal treatment between men and women was extended to access to and the supply of goods and services¹¹. Whilst a welcome development, it is quite a restrictive Directive. It does not apply to the content of media and advertising or to education and allows wide exceptions to the requirements of equal treatment even where there is evidence of direct discrimination on grounds of sex.

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¹¹ Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and the supply of goods and services
1. DEFINING DISCRIMINATION IN EUROPEAN LAW

i. Direct Discrimination

Direct discrimination is the classic exponent of formal equality and is based on treating one person less favourably on the relevant ground than another person in a comparable situation, i.e. treating like with like. Similar definitions of direct discrimination apply in all the of the Directives introduced since 2000 following on the introduction of Article 13 of the Treaty of Amsterdam. Using the Recast Directive\textsuperscript{12} as the point of reference, direct discrimination is defined Article A2(1)(a) as occurring:-

\textit{“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”}.

It is significant that all of the definitions in the equality directives permit hypothetical comparisons which had not been expressly provided for in the earlier directives, thereby causing some historic difficulties in considering, for example, the scope of protection for pregnant women for whom there was no male comparator.

Given that most situations in which discrimination is alleged to arise occur because of different treatment rather than identical treatment, direct discrimination as a concept does have obvious limitations. Nevertheless the strength of direct discrimination within equality law is that it

\textsuperscript{12} Directive 2006/54
cannot be justified\textsuperscript{13}. This can be vividly seen in the Court’s decision in Dekker\textsuperscript{14} where less favourable treatment of a woman on grounds of her pregnancy was found to constitute direct discrimination and could not therefore be justified even where equal treatment would involve a very real financial penalty for the employer as national law required that both the pregnant claimant and her replacement during her maternity leave were entitled to be paid by the employer.

\textbf{ii. Indirect Discrimination}

Indirect discrimination is far more sophisticated and sensitive to differences that apply in practice between different categories of people, than direct discrimination can ever be. However the significant limitation of indirect discrimination is that it can be justified subject to certain tests that have been clearly set down by the Court of Justice.

The Recast Directive defines indirect discrimination at Article A 2(1)(b) as follows:

\footnote{\textsuperscript{13} This is subject to very limited exceptions on the facts of particular cases such as occurred in Birdseye Walls Limited v Roberts Case C-132/92 [1993] ECR I-5579. Whilst both the European Commission and the Advocate General argued that exceptionally direct discrimination might be justified, the Court to some extent side stepped the issue by finding there was no discrimination at all on the facts where bridging pensions were provided to female ex-employees aged between 60 and 65 who had retired early.}

\footnote{\textsuperscript{14} (1990) ELR 1–3941}
“where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage, and the means of achieving that aim are appropriate and necessary.”

Similar definitions are provided for in the Race Directive and the Framework Directive on the relevant grounds. The definitions provided for in the post 2000 Directives are helpful, given the absence of any clear definition in the earlier Directives. The focus of indirect discrimination is clearly on the effect of the rule or practice which represents a greater move towards substantive equality than could ever be accommodated by the far more formalistic concept of direct discrimination.

Even in the absence of statutory definitions, indirect discrimination was usefully analysed by the Court of Justice as far back as the decision in Defrenne (No. 2)\(^\text{15}\) where the Court recognised the direct effects of what was then Article 119 of the Treaty as giving rise to directly enforceable rights for women in European Communities to equal pay which they could individually enforce in their national courts. The Court sought to explain the difference between direct and indirect discrimination as follows:

“[A] distinction must be drawn within the whole area of application of Article A119 between first, direct and overt discrimination which may be identified solely with the aid of 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. It is impossible not to recognise that the complete implementation of the aim pursued by Article A119 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

\(^\text{15}\) Case C 43/75 [1976] ECR 455
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.”

Ellis\textsuperscript{16} describes this early attempt to explain the difference between direct and indirect discrimination as confusing as either sort of discrimination can be either overt or disguised and in practice it is more often direct discrimination which is disguised by its perpetrator whilst indirect discrimination is frequently quite overt. She suggests that in reality the distinction which the Court of Justice seems to have been trying to make in Defrenne was simply between discrimination which can be identified without the need for further explanatory legislation and that which cannot.

Issues also arose in the earlier case law as to whether adverse impact envisaged by indirect discrimination must have actually occurred or whether the anticipation of such impact was sufficient. This was caused in part by the absence of a definition of indirect discrimination in the earlier equality directives.

Justification of Indirect Discrimination

Each of the definitions of indirect discrimination in the directives expressly allow for the objective justification of such discrimination. The classic analysis of indirect discrimination and the circumstances in which it can be justified was provided by the Court of Justice in its seminal

\textsuperscript{16} E EU anti-discrimination law, Oxford University Press 2005, at 89
analysis of justification of indirect discrimination in Bilka Kaufhaus which merits extensive quotation.

Given that the Court expressly referred to a “real need” on the part of the undertaking, it would appear that a subjective view by an employer will not be sufficient. They will have to show a genuine need for the discriminatory factor, which sets up a formidable hurdle for any employer seeking to justify indirectly discriminatory conduct17. However the analysis of the Court in Bilka Kaufhaus does permit objectively justified economic grounds where the national court finds that the measures chosen by the employer correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end. Having said that, mere generalisations will not satisfy the test of justification. This can be seen in the Court’s decision in Rinner-Kuhn18 where it rejected the “mere generalisations” put up by German government in its unsuccessful attempts to defend and justify its sick pay legislation which was not granted to part-time workers.

The strength of the Courts objective justification test has been described by O’Leary19 as enabling a measure to be challenged while leaving what are at the very least unavoidable choices regarding employment policies or social welfare entitlements to the Member States (CHECK). However O’Leary also criticises the whole area of justification of indirect discrimination as having weaknesses in ensuring effective substantive equality. The limits placed by the Court on proportionality which can be problematic particularly where Member State legalisation is concerned... (CHECK ALL OF THIS). She questions the value of judicial statements concerning the fundamental constitutional nature of the principle of equal treatment when set against the increasingly conservative interpretation of equality law by the

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17 Ellis Ob Site at 109
18 Case 171/88 [1989] ECR 2743
19 O’Leary “Employment law at the European Court of Justice: Judicial Structures, Policies and Processes” 2002 at 149-150
Court, employers and member States of financial burdens or a threat to the deregulated approach to employment rights which some member States have come to regard as an essential feature of the quest for high levels of employment and sustained economic growth.\(^\text{20}\).

However the Court of Justice in its decision of Hill & Stapleton v Department of Finance\(^\text{21}\) is more heartening in its strong rejection of economic justification of what would otherwise be unlawful direct discrimination on grounds of gender. The Court held:

**HARASSMENT**

Harassment, including sexual harassment, was not expressly outlawed in European law until relatively recently even though a very small number of the Member States including Ireland\(^\text{22}\) had used the national legislation implementing the Equal Treatment Directive of 1976 to confirm that sexual harassment in the workplace was unlawful and actionable.

The more recent European equality directives, including the Recast Equal Treatment Directive\(^\text{23}\), the Race Directive\(^\text{24}\) and the Framework Equality Directive\(^\text{25}\) all now specifically include harassment in defining what constitutes unlawful discrimination.

\(^{20}\) See O’Leary at 151

\(^{21}\) [1998] E.L.R. 225

\(^{22}\) For a discussion of the development of sexual harassment in Irish law see Bolger and Kimber, *Sex Discrimination Law* (Round Hall, 2000), chapter 8.


Defining Harassment

The Recast Equal Treatment Directive 26 defines harassment in relation to gender at Article 2(1)(c) as follows:

‘where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.’

Article 2 (1)(d) defines sexual harassment as occurring:

‘where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.’

The Race Directive 27 provides at Article 2(3) that harassment

‘shall be deemed to be discrimination within the meaning of paragraph 1, when any unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and/or creating an intimidating, hostile, degrading, humiliating or offensive environment.’


The Framework Directive makes similar provision in relation to harassment on grounds of religion or belief, disability, age or sexual orientation. 28

**Elements of the Definitions of Harassment and Sexual Harassment**

**i. Unwanted Conduct**

Harassment and sexual harassment are clearly defined as ‘unwanted’ conduct which inevitably and necessarily involves an analysis of the conduct entirely from the point of view of the recipient rather than the perpetrator.

**ii. Purpose or Effect**

The definitions all refer to conduct which has the ‘purpose’ of violating a person’s dignity etc, it also refers to conduct which has the ‘effect’ of doing so. By referring to ‘effect’ the purpose or intention of the perpetrator is largely irrelevant particularly when the conduct in question is defined as unwanted conduct. The net result is that conduct which is viewed by the recipient as unwanted and as having the effect of violating their dignity etc., could be deemed to be harassment regardless of the intention of the perpetrator and of the reasonableness of the recipient’s inevitably subjective views of the conduct or the effect which the conduct has on them. There is no requirement in these definitions that the conduct in itself be reasonably capable of being viewed as harassment.

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That subjective definition of sexual harassment gives rise to the very real possibility that a person could be found guilty of harassment simply because the recipient of their innocent conduct perceives that conduct as harassment, in spite of there being no reasonable basis for that perception.

In practice, a less rigid approach has been adopted by the Irish Equality Tribunal and the Labour Court, although they have on a number of occasions pointed out that it is the effect the conduct has on the recipient rather than the intention of the perpetrator which matters. The Equality Tribunal have repeatedly stated that the person alleging harassment must establish, on the balance of probabilities, that the harassment did in fact take place. If this is established, the Tribunal will consider whether the employer was vicariously responsible for the harassment and whether the employer took reasonable steps to prevent it from taking place. Therefore even where a claimant alleges harassment from what is clearly a subjective standpoint, it does not absolve them of the burden of proving a prima facia case that the conduct did in fact occur.

However it is questionable whether such an approach, whilst it may appear sensible, does does in fact fit in with the subjective definition of harassment as apparently required by the Directives.

iii. Related to

Each of the three Directives uses the phrase “related to” the outlawed grounds in defining harassment. That phrase was found to have significance in the UK
Employment Appeals Tribunal decision of English v Thomas Sanderson Blinds Limited\textsuperscript{29} where the Tribunal found that there was a material difference between the wording contained in the relevant Regulations and the wording in Article 2(3) of the Framework Directive in that the phrase used in the Regulations of ‘on grounds of’ sexual orientation imported the concept of causation asking why the alleged discriminator acted as he did which the Tribunal found was not the same question as that raised by Article 2(3) of the Directive. The Tribunal held that the phrase ‘on the grounds of’ in the UK Regulations did not properly implement the Directive.\textsuperscript{30}

Harassment arising from discrimination by association: Coleman.

In one of the few decision of the European Court of Justice to address the area of harassment, the concept of harassment on grounds of association has been recognised. In Coleman v Attridge Law,\textsuperscript{31} the plaintiff claimed she had been treated less favourably than other employees because she was the primary carer of a disabled child. Ms Coleman worked in a firm of solicitors in London as a legal secretary from January 2001. In 2002, she gave birth to a disabled child whose health condition required specialized care. On 5 March 2005, Ms Coleman accepted voluntary redundancy from her employment. She claimed that she had been constructively dismissed from her employment and treated less favourably than her fellow employees as she was the primary carer for her disabled son. Specifically on the harassment point, she alleged abusive and insulting comments were made both about her and her child whereas no such comments were made when other employees had to ask for time off or a degree of flexibility in order to look after non disabled children.

\textsuperscript{29} [2008] ICR 607.
\textsuperscript{30} For a discussion of this case see Banton, ‘Sexual Anomalies’ [2008] NLJ 47.
\textsuperscript{31} Case C-303/06[2008] ICR 1128 and see also Pilgerstorfer, ‘Transferred Discrimination in European Law’ [2008] ILJ 384.
The UK Employment Appeal Tribunal\textsuperscript{32} referred the matter to the ECJ for a direction as to whether the Framework Directive 2000/78/EC included discrimination and harassment on the grounds of disability by association. The UK Disability Discrimination Act 1995 even as amended in light of the requirements prescribed by the Framework Directive did not provide any such express protection from discrimination. As the Framework Directive prohibits direct discrimination and harassment “on the grounds of ... disability” with no reference to actually possessing the characteristics of the ground, Ms Coleman argued that this also covered discrimination by a person’s association with an individual with a disability.

Whilst the decision of the ECJ is rather brief, the Opinion of Advocate General Maduro is insightful, well reasoned and potentially far reaching. He took the opportunity to reflect generally on the ethos and principles underlying non-discrimination and equality legislation. He pointed out that the Framework Directive was adopted under Article 13 EC and must be interpreted in light of the goals set out in that Article. He referred to the importance of equality and stressed the values underlying this principle “being human dignity and personal autonomy”.\textsuperscript{33} Directly targeting someone who is disabled is one way of discriminating against him but it is not the only way, as it is also possible to target people closely associated with them who do not belong to the protected group and these “subtler” forms of discrimination should also be caught by anti-discrimination legislation as affecting the disabled person. He stated that a “robust conception of equality entails that these subtler forms of discrimination should also be caught by anti discrimination legislation” and argued that “the person who is the immediate victim of discrimination not only suffers a wrong himself, but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined”.

\textsuperscript{32} As the respondent appealed the decision of the Employment Tribunal to refer to the questions to the ECJ.

\textsuperscript{33} [2008] IRLR 722 at 724, paragraph 9.
Having set out this analysis, the Advocate General looked to the Framework Directive which, he found, was adopted to ensure the dignity and autonomy of persons covered by the protected classes and to ensure that this is not compromised by more subtle forms of discrimination. In order to ensure this aim is achieved the Framework Directive sets out that discrimination is to be outlawed “on the grounds of ... disability”. He found that “on the grounds of” allowed for an examination of the reason for the discriminatory treatment. Therefore if Ms Coleman could demonstrate that she was adversely treated due to her son’s disability then she would be come within the ambit of protection of the Directive. The fact that she did not possess the ground of disability was not the focus of the Directive and that “the Directive does not allow the hostility an employer may have against people belonging to” any of the grounds of discrimination “to function as the basis for any kind of less favourable treatment in the context of employment and occupation”. He concluded that the “Directive does not come into play only where the claimant is disabled herself but every time there is an instance of less favourable treatment because of disability.”

The Advocate General strongly rejected the argument advanced by the United Kingdom Government that the Directive only set minimum standards and it was for each Member State to decide whether or not to prohibit discrimination on the grounds of association. Because of the use of the phrase “on grounds of” in the ambit of protection from harassment, he considered that harassment, like direct discrimination, fell within the ambit of the Directive by reason of association with an individual with a disability.

In a lamentably brief judgment, the ECJ agreed with the conclusions of the Advocate General but took a rather different approach in doing so. The Court recalled the purpose of the Directive as being to “combat all forms of discrimination on grounds of disability”. It noted that while the Framework Directive includes certain provisions designed
specifically for the needs of disabled people, such as reasonable accommodation and positive action, this does not mean that the principle of equal treatment enshrined in the Directive is to be interpreted strictly so as only to prohibit direct discrimination on the grounds of disability for those exclusively with a disability.

The significance of the decision is the clear conclusion reached both by the Advocate General and the European Court of Justice that the principle of non-discrimination in the Framework Directive applies equally to employees who are treated less favourably or subjected to harassment by their employer on the grounds of their association with disabled individuals, even though the Framework Directive does not expressly provide for such protection from discrimination and or harassment. The decision will apply to those employees who care for disabled children or elderly parents. However, it is worth noting that the decision has not created a new separately protected group of carers as was reported in the media.\textsuperscript{34} Carers will only succeed in their claims if they can show that the disability of the person they care for was a factor in the harassment or less favourable treatment they received. Any claim on their part to additional reasonable accommodation will not succeed.

The fact that the ECJ emphasized the use of the phrase “on grounds of” in its decision on the scope of the discrimination and harassment provisions means it is likely that the decision will apply to all of the other grounds in the Framework Directive, the Race Directive\textsuperscript{35} and the Recast Gender Directive.\textsuperscript{36} Interestingly in the UK, the Employment Appeals Tribunal expressly referred to the ECJ decision in Coleman in a recent decision in favour of a claimant who alleged he had been harassed because of his employer

\textsuperscript{34} Barnard, ‘Reporting the AG’, [2008] 158 NLJ 1095.

\textsuperscript{35} Directive 2000/43/EC

\textsuperscript{36} Directive 2006/54/EC.
pursuing a discriminatory policy against another employee on the grounds of that employee's religious beliefs.\textsuperscript{37}

\textsuperscript{37} Saini v All Saints Haque Centre [2009] IRLR 74.