attempts to examine the scope and coverage of EU law on all the grounds (bar one) upon which it currently forbids discrimination and seeks to promote equality between people; the law forbidding discrimination on the ground of nationality is not covered in depth (though occasional reference is made to it where the context requires) for reasons of space and also because its rationale is very different from that of the other grounds, rooted as it is in the importance of the free movement of persons to the achievement of a single economic market; in addition, its scope is somewhat different from that of the other categories of discrimination and, furthermore, the whole area of nationality discrimination is being subsumed today into the wider notion of citizenship of the Union.[4]

Non-discrimination and equality

Despite the length of time which it took the EU to outlaw discrimination on this portfolio of grounds, it is not actually difficult for most people today to embrace the broad notion that at least some types of discrimination are unacceptable and should be forbidden by law. Of course, the word 'discriminate' is capable of two distinct connotations, the first of which expresses the usually laudable activity of making those kinds of choices which everyday life presents to human beings; thus, we speak, for example, of being 'discriminating' consumers of food or art, meaning that we make informed and critical judgements about these matters. This is not, however, the sense which legal systems attach to the word 'discriminate'; the law is concerned with discrimination only when it is in some generally recognized way unacceptable. As Feldman has explained, discrimination becomes 'morally unacceptable' when it takes the form of treating a person less favourably than others on account of a consideration which is 'morally irrelevant'.[5] The critical question which then has to be decided by the legal system is when a consideration is to be considered morally irrelevant. If taken to extremes, this principle could effectively stultify decision-making by requiring the positive justification of every matter taken into consideration by the decision-maker. Legal systems frequently, therefore, attempt to classify or to enumerate those matters which are morally irrelevant in specified contexts. Thus, there is some consensus today that many matters which fall outside the control of an individual, such as sex, race, and disability, are generally speaking morally irrelevant bases on which to disfavour people in fields such as the workplace and education. Control is not, however, the invariable key to deciding this matter. Age, for example, although outside control, may often be considered to be morally relevant to the doing of a job: a five-year-old may not be the best person to pilot a jumbo jet! Even more doubt surrounds those issues over

[4] See in particular Case C-85/96 *Martínez Sala* [1998] ECR I-2691 and Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale* [2001] ECR I-6193. See also Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non-) Economic European Constitution' (2004) 41 CMLRev 743.

[5] Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford University Press, Oxford, 2002), 135–9.

which, arguably, people have some control, such as their choice of religion or (more controversially) sexual orientation.

A legal system which outlaws discrimination has also to be acutely aware of the many different ways in which discrimination manifests itself. The law cannot restrict its prohibition to conscious or deliberate acts founded on prejudice, since these are certainly not the only ways in which disadvantage grounded upon discrimination arises. Much discrimination results from the traditional, unquestioning ways in which society is ordered and the ways in which it functions in practice. For example, the ineffectual and haphazard pursuit by the London Metropolitan Police Service of the murderers of the black teenager Stephen Lawrence constituted institutional discrimination, irrespective of the wrongdoing of individual officers. In very important words, which should serve as a reminder to all legislators in this area, Sir William Macpherson's Inquiry into the matter defined the concept of 'institutional racism' as:

> The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.
>
> It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease.[6]

In addition to difficulties surrounding the identification and definition of discrimination, it has become clear from the practical operation of systems of anti-discrimination law that it is not enough to focus simply on the negative concept of non-discrimination. If the moral basis on which the law forbids discrimination is that there is a fundamental human right to be treated in the same way as other human beings,[7] the aim must logically be to produce substantive equality. This is a much more positive and value-laden concept than non-discrimination, although courts not infrequently conflate the two ideas.[8] In particular, it involves taking an active attitude to dismantling the obstacles which stand in the way of equality (however 'equality' is to be defined).[9] Thus, for example, it is not sufficient for the achievement of equality simply to require the same conditions for all people, whether male or female, black or white; this is because in practice some sections of

[6] *The Stephen Lawrence Inquiry*, Cm 4262-I (HMSO, London, 1999), para 6.34.

[7] In addition to this goal of neutrality as between different groups of people, Fredman has argued that the non-discrimination principle also furthers individualism and personal autonomy: see Fredman, 'Equality: A New Generation?' (2001) 30 ILJ 145.

[8] For example, in Case T-45/00 *Speybrouck v Parliament* [1992] ECR II-33, the Court of First Instance stated that 'the principle of equal treatment for men and women in matters of employment and, at the same time, the principle of the prohibition of any direct or indirect discrimination on grounds of sex form part of the fundamental rights the observance of which the Court of Justice and the Court of First Instance must ensure' (at 46).

[9] For a compelling critique of Europe's existing race discrimination laws from this perspective, see Hepple, 'Race and Law in Fortress Europe' (2004) 67 MLR 1.