the community have been historically so disadvantaged as to be unable to compete in the race in the first place. Although most people would probably agree at a relatively rarefied plane of abstraction that equality is a proper goal, there is scope for a great deal of debate over the lengths to which it is proper to go in order to provide such a level playing-field.[10] In addition, there is the even more difficult problem of deciding to what extent equality embraces respect for minority practices and requires the recognition of diversity, as distinct from identity of treatment.[11]

There are many different ways in which the concept of equality can be expressed and in which it can be attempted to be realized in practical terms.[12] It has been described by one commentator as 'one of that genre of words . . . which have both a vague conceptual meaning and a rich emotive meaning—with the conceptual meaning being subject to constant redefinition'.[13] The same author draws attention to three main (though not exclusive) expressions of the principle of equality, namely 'formal' equality (consistency of treatment), equality of opportunity, and equality of results.

In addition, although many different models of equality can be articulated and described, legal systems often adopt their own individualized views of these various models. Current EU law, as will be seen throughout this book,[14] espouses differing approaches to the concept,[15] and is indeed subject to competing influences in this regard.[16] There are, in short, no absolutes in this area in practice, although absolute positions can be defined in theory.

The picture can perhaps best be viewed in terms of a continuum. At one end lies what is often called 'formal' equality; this is the minimal, Aristotelian postulate that like cases should be treated alike and that different cases should be treated differently, unless there is an objective reason not to do so. Thus, for example, two people with identical qualifications and experience should be paid the same wage,

[10] For a seminal, though now in part historical, analysis of the causes of inequality and the panoply of responses to it which are open to society, see McCrudden, 'Institutional Discrimination' (1982) 2 OJLS 303.

[11] See Barmes with Ashtiany, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32 ILJ 274. The proposed Constitution, discussed below, rather engagingly adopts a 'motto' for the EU, which is to be 'United in diversity': see its Art I-8.

[12] See McCrudden, 'Equality and Non-Discrimination', in Feldman (ed), *English Public Law* (Oxford University Press, Oxford, 2004), ch 11; Barnard, 'The Principle of Equality in The Community Context: *P, Grant, Kalanke and Marschall*: Four Uneasy Bedfellows?' (1998) 57 CLJ 352; Fredman, 'A Critical Review of the Concept of Equality in UK Anti-Discrimination Legislation', Working Paper No 3 (Cambridge Centre for Public Law and the Judge Institute of Management Studies, 1999); and Fredman, 'The Future of Equality in Britain', Working Paper Series No 5 (EOC, 2002).

[13] Barrett, 'Re-examing the Concept and Principle of Equality in EC Law' (2003) 22 YEL 117, at 120.

[14] But see ch 3 in particular.

[15] See Fenwick, 'From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law' (1998) 4 EPL 507; Barnard and Hepple, 'Substantive Equality' (2000) 59 CLJ 562; Bell and Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 ELRev 349.

[16] See Flynn, 'Equality Between Men and Women in the Court of Justice' (1998) 18 YEL 259, and McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in Fredman (ed), *Discrimination and Human Rights* (Oxford University Press, Oxford, 2001).

irrespective of any dissimilarities which they may possess. This is also frequently referred to as the 'merit' principle: individuals ought to be rewarded according to their merit and not according to stereotypical assumptions made about them on account of the group to which they belong. However, such a principle is of course deceptively simple, for how is it to be judged, for example, that the qualifications and experience of two individuals are identical?[17] And to precisely which situations and decisions is the principle to be applied?[18] In addition, this analysis does nothing to improve the condition of an under-class, since it is satisfied where two individuals are treated equally badly, as well as where they are treated equally beneficially. If one of the prime rationales of equality law is the improvement of the lot of human beings, this simply will not do.

These sorts of difficulties lead some legal systems to focus on factual scenarios which can be shown empirically to produce specially severe or marked injustice and hardship ('suspect classifications' in American terminology), and then to enact quite specific laws which attempt to remedy the situation. For example, it is often perceived that, as a result of stereotyping, women and people from ethnic minorities are treated unequally in the workplace by comparison with men and the prevailing ethnic majority. A frequent legislative response is therefore to enact legislation making it unlawful to discriminate on the grounds of sex and ethnic origin in the context of employment.

A more fluid version of this principle is also encountered. This acknowledges specific instances of discrimination in practice but then tries to generalize and to cater for similar, but not yet classified, examples of discrimination. Such a model typically covers a broad range of situations in which discrimination is rendered unlawful and contains an *eiusdem generis* provision allowing the prohibition to develop organically to deal with fresh situations as they manifest themselves. McCrudden characterizes this model as prevalent in relation to the 'protection of particularly prized "public goods", including human rights'. He goes on to explain that the focus here is on the distribution of the public goods, rather than on the characteristics of the recipient, except for the purpose of justifying different treatment.[19]

These models, however, share a common shortcoming which is often analysed in terms of symmetry. In the example taken here, the rules apply identically to men

[17] See further McCrudden, 'Merit Principles' (1998) 18 OJLS 543.

[18] This sort of problem manifested itself in Joined Cases C-122 & 125/99P *D and Sweden v Council* [2001] ECR I-4319, which concerned the alleged entitlement of a Community employee, who had a registered same-sex partnership under Swedish law, to identical treatment to that accorded to a married employee. The ECJ found that the then existing laws of the Member States showed great diversity in approach to same-sex partnerships and that they did not generally assimilate them to marriage; it held that the employee's situation was therefore not comparable with that of a married employee. On same-sex partnerships, see further Wintemute and Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, Oxford, 2001). In the UK, a Civil Partnership Bill was introduced in the House of Lords and brought to the House of Commons on 5 July 2004; this proposed legislation would grant legal recognition to same-sex partnerships and place civil partners in the same position as married people as regards discrimination on the ground of their status. At the time of writing, it had not been enacted.

[19] McCrudden, op cit, n 12, at para 11.05.