

Contract and Equality

Thomas Wilhelmsson

This article takes up a discussion concerning the possibility of developing a principle of contractual equality, according to which commercial undertakings would be obliged to treat their clients and other contractual parties equally. The need for such a principle, which is implicit in various substantive provisions - including section 36 of the Swedish Contracts Act - is justified as a result of the transfer of public functions to the market and the increasingly indistinct dividing line between the private and public sectors. The significance of the principle will ultimately depend upon which of the justifications for special treatment the law will accept.

1 Discriminatory Practice?

In 1991, the US researcher *Ian Ayres* published a long article entitled "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations".¹ In that article Ayres examined the prevalence of discrimination on the retail car market. The particular empirical question posed concerned the price paid for a motor vehicle of the same brand by a white man, a white woman, a black man and a black woman respectively. Did the seller behave differently towards different buyers depending upon gender and race?

The research was carried out in such a manner that a number of individuals representing different races and genders visited car retailers in Chicago and asked to be given a quote on a vehicle of a predetermined brand. They thereafter negotiated the sale and reduction of the price in accordance with a predetermined negotiation strategy. In conducting the research, efforts had been made to eliminate any discrepancies in the surrounding circumstances which could affect the negotiations: all of the individuals conducting the tests wore the same clothing, were of approximately the same age, explained - if asked - that they were engaged in a yuppie profession and - which is important - stated that they could finance the purchase themselves.²

The results of the research were quite clear. The prices achieved through the negotiations were significantly lower for the men than for the women and the white buyers would have paid significantly less than the black. The differences are most apparent where the seller's costs are deducted from the final offer and

¹ 104 Harvard Law Review 1991 p. 817-872.

² Ayres p. 825.

one looks at net profit made by the seller pursuant to the sale. Thus it can be seen that the seller would have earned more than three times the profit on vehicles sold to black females as compared to those sold to white males:³

Average Dealer Profit for Final Offers

White Male	\$ 362
White Female	\$ 504
Black Male	\$ 783
Black Female	\$ 1237

It should be observed that the differences did not depend to any significant extent on the fact that the dealers were more prepared to drop the price in the negotiations conducted with men and white persons as compared to women and black persons. The differences depended significantly upon the fact that the dealers' original offers differed according to the customer. The dealers reduced the price by approximately the same amount from the black women's higher starting price as from the white men's lower starting price.⁴

It is not necessarily to be assumed that an equivalent investigation in the Nordic countries would produce a similar result concerning, for example, equality between the sexes. It is conceivable that prices for new cars are less flexible and that the various factors which affect the treatment on the market of different genders vary in some respects. This is of minor significance in this context. I refer to the investigation merely to illustrate that it is possible to encounter inequalities on consumer markets which are based, for example, on gender and race.

This may be a novelty for some. It is a more obvious and accepted fact that the market treats consumers differently depending upon their financial, educational and social status. *David Caplovitz'* classic "The Poor Pay More"⁵ already made us aware that a lot of goods and services, and especially credit, are more expensive for poor consumers than those who are well off. Of course, this cannot be explained solely as a consequence of discrimination on the part of a particular lender. The poor in many countries pay more, for example, because they choose other forms of credit or shop at different places than the well off.⁶ Consequently, it was initially thought that education and information would curb the problem.⁷ It could also be assumed that this problem, for that very reason, is

³ Ayres p. 828.

⁴ Ayres p. 830-832, where it is also stated that the difference between white men and women depended primarily upon the men succeeding in driving a better bargain.

⁵ *The Poor Pay More. Consumer Practices of Low Income Families*, The Free Press, New York, Third printing 1969.

⁶ See, for example, Ross Cranston, *Consumers and the Law*, 2. ed., Frome and London 1984 p. 3 *et seq.*, where the author refers, inter alia, to an investigation according to which the interest rate on credit advanced to customers in various shops which primarily serviced customers from the working class was around 34%, whereas the interest rate in shops servicing mainly educated customers was only 18%.

⁷ See Caplovitz p. 182 *et seq.*

less prevalent in the purportedly “informed” Nordic societies.⁸ However, it can hardly be denied that underprivileged customers in the Nordic countries are also forced to accept more expensive forms of credit because they are denied access to the more usual types of lender. That well-to-do consumers who can offer good security are able to arrange cheaper credit than other consumers is also fairly obvious in the Nordic countries.

Enough empiricism. The examples set forth above are merely intended to illuminate the fact that contract law can produce discrepancies between different market groups. Of course, this has been recognised and discussed for a long time in the context of labour law, where issues concerning equality have an important status in legal debate. However, the question has largely been otherwise ignored in contract law. This is particularly so in the general contract law debate, but to some degree also in the consumer law debate where one occasionally comes across terms such as “risk consumers” and “underprivileged consumers”. The purpose of this article is to focus on the problems associated with equality and examine what this might involve for the development of the contract law paradigm.

The particular instance of inequality which is scrutinised here is *the inequality between individuals performing the same role* (in other words “on the same side”) in a specific contractual relationship. Thus, the issue concerns the different treatment of, for example, different consumers and groups of consumers - inequality between consumers - rather than inequality between the consumer and the undertaking contracted with. I limit myself primarily to the situation where the same person (undertaking) treats two presumptive counter-parties to a contract differently. The further, and perhaps more important problem - which Caplovitz identifies - where, for example, different undertakings apply different terms and conditions, must in this context be disregarded.⁹

When I speak here of a contract law principle of equality, I am thus referring to a principle according to which a person (as will later become apparent usually an undertaking) is obliged to treat his counter-parties equally.

2 The Prevailing Contractual Model and Equality

The question may be posed as to why the issue of equality, in the terms defined above, has been attributed such little attention in the contract law debate. The answer is simple: the prevailing contract law philosophy, the contractual paradigm, is formulated in such a way as to exclude issues of this nature from the scope of contract law. That certainly is the case with respect to traditional approaches to contract law, but also applies with respect to many forms of more critical, “alternative”, “social” contract models. What most variations of

⁸ That the problem exists also here appears from the information concerning the relative proportionate relationship between instalment and credit account sales in my book *Konsumentskyddet i Finland*, Juristförbundets Förlag, Helsingfors 1989, p. 321.

⁹ It should be observed that “the poor pay more” problem referred to in the text is often a result of a combination of both problems: cheaper lenders do not advance credit to the underprivileged who are therefore required to turn to lenders offering less advantageous terms.

contract law have in common is that, in assessing contractual fairness, they focus on the relationship between the parties to the contract, which excludes issues of fairness in other relationships. The legal approach to the notion of a contract as “a case for two” has cloaked issues of equality of the kind exemplified in the introduction.

In the traditional liberal paradigm, it was self evident that interest was focused on the individual contractual relationship between the parties. Fairness was present already in the respect for freedom of choice and contractual freedom. To the extent that fairness was perceived as an issue of economic balance, interest was similarly focused on the relationship between the parties. It was accepted that freedom of contract was inclined to result in a balanced contractual relationship since the parties to the contract were best able to protect their own interests and, led by their free and rational wills, could achieve the optimal compromise between their opposing interests.

In the sociologically inclined critique of this approach, interest is also focused primarily on the contractual balance between the two parties. When *Max Weber* stated that the function of the freedom of contract was to provide an opportunity for those who held property to utilise that property on the market as a means of acquiring power over others,¹⁰ he was clearly adverting to the exercise of power associated with the imbalance within a contractual relationship. *Vilhelm Aubert* undoubtedly had a similar phenomenon in mind when he proposed that freedom of contract involved the legal order supporting the accumulation of value and contributing to the maintenance or increase of discrepancies within society.¹¹

This attitude to the relationship between contracting parties also prevails in the contract law of the welfare state. In discussing rules intended to protect the weaker party in a contractual relationship it is of course vis-à-vis the purportedly stronger counter-party that such protection is regarded as necessary. Even the more socially oriented analyses of the distributive effects that the modern welfare state’s contract law has, or could have, regard the relationship between the parties as the central element.¹² It is typical, for example, that provisions regulating the minimum wage, which could be seen as a means of influencing the income relationship between different employee-groups, are regarded in that type of contract theory as an instrument for redistributing wealth from specific employers to specific employees,¹³ i.e. inter partes, within the contractual relationship. The distributive effects of consumer credit law have also been analysed from that perspective. Legislative provisions relating to protection of debtors have been regarded as a means of influencing the apportionment of benefits between the lender and borrower classes. The

¹⁰ Max Weber, *Wirtschaft und Gesellschaft*, 4 Aufl., 1-2 Halbband, Tübingen 1956 p. 455.

¹¹ Vilhelm Aubert, *Retten sosiale funksjon*, Oslo-Bergen-Tromsø 1976 p. 78 *et seq.* According to Aubert freedom of contract means that legal norms do not positively fix the content of contracts.

¹² See, for example, Hugh Collins, *Social Market and the Law of Contract*, ARSP-Beiheft 49 (1992) pp. 85-97.

¹³ So, for example, the perhaps best known defender of the notion that contract law plays - and should play - a role with respect to distributive justice in society, Anthony Kronman, *Contract Law and Distributive Justice*, 89 Yale Law Journal 1980 p. 499.

reallocation of power and resources between the creditors and consumers has been perceived as an important objective for credit legislation.¹⁴ The question of fairness between different groups of debtors, identified as "the poor pay more" problem, has attracted little interest in legal discussion.¹⁵ The contract paradigm's focus on the two-party relationship has a strong influence over our legal analysis.

When I speak here of the two-party relationship, I do not limit myself to the basic atomic structure which characterises traditional contract law and which involves looking merely at the individual contract between two specific contracting parties. I also subsume within this notion the collective measures, which have won territory in modern contract law, e.g. in regulating standard form agreements. Such measures are also markedly characterised by the same two-party approach, but in a collective form. When the Consumer Ombudsman, as representative for consumers generally, takes action against an inequitable standard form agreement, he does so because the balance in the relationship between the undertaking and the consumer has, in his view, been lost. Equity is still primarily viewed in the context of a two-party relationship, now between the abstract consumer and the actual or abstract undertaking.¹⁶ In other words, collectivism in contract law does not necessarily¹⁷ reflect a view of equality of the kind sought after here. A form of collectivism, which involves stepping away from the atomic contractual model is necessary, however, in order to pose the questions which are relevant in the context of this article.¹⁸

My question is whether, and if so in what way, we can break out of this two-party mindset? Is it possible within the scope of applicable law to design a contractual model which facilitates focusing attention on problems of equality of the type referred to in the introduction? Is it possible to develop some general principles which would be relevant with reference to the problems identified?

It is self-evident that the evaluation of these issues must relate to contracts

¹⁴ See, e.g., Iain Ramsay, *Consumer Credit Law, Distributive Justice and the Welfare State*, 15 *Oxford Journal of Legal Studies* 1995, p. 181.

¹⁵ In my work *Critical Studies in Private Law*, Dordrecht 1992, the notion of a comparison between different contracting parties is central in that here, it is sought the possibilities to protect the weaker groups (poor, unemployed, sick) by contractual methods. In this work, which examines the question of "positive discrimination" in favour of certain exposed groups, the comparison is, however, more implicit than explicit.

¹⁶ The EC directive 93/13/EEC on unfair terms in consumer contracts (OJ 1993 L95/29, 21 April 1993) art. 7.3 requires the possibility to take measures also against business organisations, that is "abstract undertakings".

¹⁷ In practice, the Consumer Ombudsman does, of course, focus – as will appear later – on practice in the line of business within which he conducts his evaluation, as a result of which an undertaking which, to the disadvantage of the consumer, departs from the practice observed by other undertakings or from its own practice, runs a risk of being caught. In that sense the evaluation can involve an examination of equality between different counter-parties.

¹⁸ The atomic contractual model is exploded from several directions. The fact that contractual networks are these days afforded attention and accorded the status of legal significance also constitutes a step in that direction. An interesting theoretical analysis of this problem has been presented by Gunther Teubner, *Piercing the Contractual Veil? The Social Responsibility of Contractual Networks*, in Wilhelmsson (ed.), *Perspectives of Critical Contract Law*, Aldershot 1993, p. 211 – 238.

which exist in greater numbers on the market. It is not possible to conduct such comparisons between agreements in the context of unique agreements, e.g. individual agreements between large companies; contractual reality is in this regard in accord with the preconditions for contractual liberalism. The current examples have been taken from the consumer market, but the scope of the article is not limited to the field of consumer law.

In accordance with the method I have found useful in contexts such as these, I first look for breaking points in the prevailing paradigm. Is there any support in existing contract law, and related areas, for the development of such principles?

3 What Causes Inequality?

Prior to reviewing concrete legal materials, it is worth briefly identifying the causes of the problem being dealt with. What is it that causes inequality of the kind under discussion here? An answer to this question is inclined to provide us with a view of whether and to what extent it is socially possible to create legal counter-measures to the problem.

Discrimination against parties to a contract can exist for different reasons. When one speaks of discrimination on the basis of race, gender and such factors, it is reasonable to assume that the cause to some extent is subjective and depends upon prejudices and attitudes. This is probably more so in relationships where there is a greater degree of personal interaction and where performance under the contract can affect the personal relationship between the parties, such as on the employment market or the housing market. However, such factors are also relevant on the more anonymous consumer market. The investigation undertaken by Ayres referred to in the introduction contains certain indications to this effect. Sexist attitudes exist which are expressed, for example, in salespeople's language: forms of address such as "honey", "girls", "cutie" or statements such as "You're a pretty girl, so I'll give you a great deal" or "We can't drop our pants until its paid for"¹⁹ are good examples. However, Ayres' result can hardly be explained merely on the basis of subjective factors. In many cases the buyers had been directed to sellers representing the same gender and race as the buyer, and these often treated the buyers worst of all.²⁰

Unfortunately it is therefore not so simple to conclude that discrimination in the contractual relationship is solely a consequence of the unworthy attitudes of unkind individuals. If this were the case one could expect that the market mechanism would solve many of the problems. An undertaking which on subjective grounds discriminates against, e.g., coloured people, or women, would quickly lose a customer group. And in those cases where this would be an insufficient incentive, legislative measures which were intended to deal with the problem would conform to the system, i.e. they would produce the result which the market should have produced.

Significant problems lie in the fact that the system itself, primarily the market, often tends to produce discrimination in contractual relations. As is

¹⁹ Ayres, p. 846.

²⁰ See Ayres, p. 847.

generally known from, e.g., the labour market, it can occasionally be rational and profitable to discriminate on grounds, e.g., of gender or race. Leaving the labour market for the moment, it is in fact the credit market which is the traditional example of a market where discrimination exists on rational, market-based grounds. The price of credit always includes a risk premium which will cover the risk of the loan not being repaid when it matures, and of course the risks vary depending upon the customer's financial status. This fundamental notion on the market is one of the primary reasons for the "the poor pay more" syndrome on the credit market.

The concept of risk is also important in other respects in the context of a discussion concerning discrimination in contractual relations. In a risk and insurance society,²¹ the issue of risks and their classification is increasingly important. For example, in classifying insurance risks and in calculating insurance premiums, notice may be taken of the insured's age, gender, occupation and place of residence. Insurance mathematics presupposes discrimination: as *Nick Huls* observed, we have moved "From class struggle to classification".²² That often, but not always, is taken to mean a higher premium for under-privileged groups.

Variations in risks are an important cause of discrimination on the market. However, there are other reasons which are related to profit opportunities within different market segments. One example, again from the American empirical investigation to which I have referred, will suffice in this context. The differences between white and black and men and women could not be explained in that case by risk analysis, as the buyers had declared their willingness to pay cash. Ayres' explanation for the phenomenon is based upon the fact that American motor vehicle retailers' profits were not evenly earned from the entire sales volume, but rather, a large proportion of that profit came from a few good deals. Therefore the retailers' business is characterised by a search for good deals – "search for suckers" – i.e. for consumers who, for one reason or another, are willing to pay a relatively high price for the car.²³ In this game, race and gender provide the seller with the information he requires in order to find consumers who are willing to pay higher prices.²⁴ It is in fact a case of exploiting the generally lower level of knowledge possessed by such consumer groups concerning the matters relevant to the purchase, as well as their generally greater aversion to bargaining.

The market thus produces inequality. The question now becomes what this means in terms of the possibilities of assailing the phenomenon of inequality – and in posing this question I presume that it is regarded as desirable to strive against inequality and discrimination. To what extent is one forced to attempt to overcome the fundamental structures of the market, which demands a far greater intensity in regulation than when one merely attempts to find certain rules of

²¹ See concerning the insurance society François Ewald, *Der Versorgungstaat*, Frankfurt am Main 1993. A good introduction can be found in Ewald, *Die Versicherungsgesellschaft*, 22 *Kritische Justiz* 1989, p. 385-393.

²² Nick Huls, *Critical Insurance Law*, in Wilhelmsson (ed.), *Perspectives of Critical Contract Law*, Aldershot 1993, p. 155.

²³ Ayres, p. 854.

²⁴ Ayres, p. 844.

conduct within the scope of those structures?

One indication of the strength of the market in this regard is the fact that interventions in the market designed to protect the weaker party are often inclined to increase inequality rather than reduce it. A good example is the many provisions which emphasise the furnishing of information and transparency as a means, *inter alia*, of protecting consumers. Such a strategy, centred around the availability of information which is typical of EC consumer law and of growing importance for us as well, can be problematic (ineffective)²⁵ in many respects: the information may not reach the consumer or he may have difficulty understanding it. These problems are, as a rule, most acute in the under-privileged consumer groups, i.e. those groups having the greatest need for protection. Empirical studies of, e.g. unit pricing, show that poor consumers use such information less than others.²⁶ American rules concerning mandatory interest information – truth-in-lending – similarly suggest that the increased levels of awareness of interest rates, which has been achieved through such regulations, is concentrated in higher income groups.²⁷ Regulations concerning the provision of information benefit the rich more than the poor.

There is reason to return to the special requirements which the market demands in conjunction with the analysis of what is achievable in legal terms in this field. Below, I will look more closely at what is accepted as legally possible in the Nordic countries. What concrete legal materials can be relied upon in this context?

4 Concrete Legal Materials: Domestic Swedish and Finnish law

When one speaks of equality and the law, the first thing one thinks about - for obvious reasons - is the public law notion of equality, according to which citizens are equal before the law. In Finland, this rule was reaffirmed in conjunction with a constitutional reform effected in 1995 through the introduction of a rule according to which no person, without due cause, shall be accorded different treatment on the basis of gender, age, origin, language, persuasion, belief, health or handicap, or for any other reason referable to his/her person.²⁸ That principle, like all international rules on human rights which prohibit discrimination in various circumstances,²⁹ is an expression of a social value which is asserted to be important. In itself, this affords compelling

²⁵ In itself it is not problematic, of course, from the point of view of the party protected, that he gains access to more information. The danger lies in that the obligation to provide information is used as an alternative to more substantive consumer protection provisions which would provide better protection for weaker consumer groups who have problems in using the information.

²⁶ Kent B. Monroe & Peter L. LaPlaca, *What Are the Benefits of Unit Pricing?* *Journal of Marketing* 36, July 1972, p. 16-22.

²⁷ William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, *Wisconsin Law Review* 1973, p. 414.

²⁸ The Finnish Constitution (amended by Act 969/1995) section 5. The new Finnish constitution entering into force in the year 2000 has the same provision in section 6.

²⁹ See Martin Scheinin, *Ihmisoikeudet Suomen oikeudessa* [Summary: Human Rights in Finnish Law], *Jyväskylä* 1991, p. 230.

support for the notion of a principle of equality in contract law, especially as doctrine today generally advocates greater emphasis on fundamental human rights in the legal decision making process.³⁰ Since the problem in the present case is related to the question in what relationship equality should be assessed,³¹ and since equality before the law can be interpreted in different ways in a private law context - as formal or substantive equality - the public law starting point is barely sufficient in itself as a basis for a principle of contractual equality. This is probably more so in relation to Swedish law, where the constitutional principle of equality is expressly addressed to the public and the legislature.³² In the post-welfare state society, where the dividing line between the public and private sectors is increasingly unclear, it is obvious, however, that reasoning which is backed by the constitution must carry growing weight: if one starts from the obligation to treat people as equal before the law in the public sector, it is difficult to ignore the idea of such an obligation in comparable private activities.

When one steps down from the constitutional level, it is necessary first to examine any rules which are expressly intended to prohibit or discourage discrimination. Such rules - based on international conventions - can easily be found in penal legislation. For example, the Finnish Crimes Act, Chapter 11, section 9, contains a provision according to which it is punishable, *inter alia*, not to treat a particular person on generally accepted terms, or to treat someone on manifestly unequal or worse terms than others on the basis of the former's race, national or ethnic origin, skin colour, language, gender, age, family circumstances, sexual preference, health or religion, social views, political or trade union activities or any other comparable circumstance. The corresponding rule in Swedish law is contained in Chapter 16, section 9 of the Swedish Penal Code. However, the list of the characteristics, treatment on the basis of which will be regarded as discriminatory, is shorter in the Swedish text and covers only race, skin colour, national or ethnic origin, faith and homosexual preferences.

As we know, equality between the sexes in the workplace has been the subject of particular attention from the legislature both internationally and nationally. Equality legislation is today heavily influenced by EC law, for which reason it will be necessary to return to this subject in the next section of this article. It may be noted here, however, that Finnish law - unlike Swedish law - alongside legislation on gender equality, in employment law includes a rule

³⁰ Scheinin, p. 273 *et seq.*

³¹ That one has had in mind a perspective on equality of the kind relevant to this discussion is confirmed by § 5.4 of the new rule in the Finnish Constitution: "Equality between the sexes in society and at the workplace shall be encouraged in accordance with the provisions of law, in particular in the fixing of wages and other terms of employment."

³² Chapter 1, section 9 of the Swedish Constitution provides that courts and administrative organs and others who perform functions within the public administration shall, in carrying out their function, observe the equality of all persons before the law. The anti-discrimination provisions in Chapter 2, section 15 and Chapter 2, section 16 stipulate further that neither primary nor secondary legislation may have the effect of disadvantaging any citizen on the grounds specified in those provisions.

prohibiting discrimination on other grounds.³³

The question arises, to what extent can these provisions in employment and penal law influence general contract law? At least in one respect this possibility has been explicitly acknowledged, at any rate in theory, in Swedish and Finnish law. This is in the application of section 36 of the Contracts Act.³⁴ The notion that general clauses of this kind can constitute gateways to new lines of thought in contract law³⁵ is confirmed in this regard.

The preparatory work with respect to the Swedish general clause states expressly that discrimination should constitute a ground for adjusting contractual terms on the basis of the general clause. In this context, reference is made in particular to cases of discrimination on the basis of race, skin colour, origin or faith, since these have been criminalised in the Penal Code.³⁶ The same view is repeated in the preparatory works to the Finnish general clause: a contractual term which "...is used for systematic discrimination on the basis of gender, age, race, nationality, religion, membership of organisations etc." should be subject to judicial review and be able to be adjusted.³⁷ As with the presently applicable penal rules, a broad inclusion is here advocated of factors which cannot be regarded as acceptable grounds for discrimination.³⁸ The Swedish preparatory work did not, however, explicitly express a view as to whether discrimination on other grounds than those referred to in the Penal Code could constitute cause for adjustment of a term. Nor, however, is this excluded.³⁹ With the substantive approach of section 36 of the Contracts Act, it is difficult to see why, where necessary, contractual terms should not be adjusted over a broader field. Discrimination on the basis of other factors which are mentioned only in the Finnish Crimes Act, or which are not explicitly referred to, as e.g. handicaps of various kinds, should be subject to intervention on the basis of the general clause.

³³ See the Employment Contracts Act, section 17.3: "The employer shall treat employees without prejudice so that no person, without due cause, is treated differently to another on the basis of birth, religion, age, political or trade union activities or any other comparable circumstance."

³⁴ In Finland in consumer relations, the corresponding provisions of the Consumer Protection Act, Chapter 4, section 1 are applied instead. This does not, however, affect what is said in the text.

³⁵ Josef Esser & Eike Schmidt, *Schuldrecht*. Band I. Allgemeiner Teil. 6 Aufl. Heidelberg 1984, p. 17 refers to general clauses as "Einbruchstellen".

³⁶ SOU 1974:83, p. 148. One case can be cited from the Swedish Labour Court, AD 107-1983, where a collective agreement concerning the proper order for termination of employment contracts as a result of redundancy, which provided that Finnish-speaking employees were placed after other employees, was declared contrary to accepted practice on the labour market and illegal. The court, in discussing remedies, referred expressly to contractual principles and section 36 of the Contracts Act. In the literature, the case has been interpreted as being an application of that provision, see Ruth Nielsen, *The Impact of Internationalisation on the Nordic Doctrine of the Sources of Law*, in Børge Dahl & Ruth Nielsen (ed.), *New Directions in Business Law Research*, Copenhagen 1996, p. 19.

³⁷ Finnish Government Bill, 247/1981, p. 16.

³⁸ The reason for the broad formulation is, however, probably that the author of the Finnish bill has only managed to read the introduction to the chapter on discrimination in SOU 1974:83. The broader formulation appears here on p. 147.

³⁹ SOU 1974:83, p. 148.

Discrimination on the basis of race, gender and similar factors of the kind referred to above, often carry a subjective element and the provisions designed to regulate and discourage such discrimination are market rational. In those few cases again where such discrimination is rational in economic terms, which – as stated above – it sometimes is, efforts to eradicate the discrimination hardly affect the fundamental structures of the market economy. It is not, therefore, surprising that in the context of discrimination of the kind referred to here, it has been regarded as possible to intervene on the basis of, e.g., the general clause in section 36 of the Contracts Act.

To undermine the "poor pay more" problem at a more fundamental level appears to be substantially more difficult, especially since different treatment is based on variations in risks or costs. The preparatory work to the Swedish general clause specifically emphasises that "differences which emanate from economic circumstances, e.g. differences in costs between different customers" cannot usually be regarded as discrimination.⁴⁰ In the Finnish preparatory work, which is more diffuse on this subject, a perhaps more open attitude is adopted. It is stated: "Adjustment of a term should consequently be possible on the basis that one party in a particular contractual relationship includes a term which he does not usually adopt in similar contracts and there is no satisfactory reason for the departure."⁴¹ The clue is of course present in the expression "satisfactory reason". It is possible that the draftsman of the preparatory work has thought that discrimination on economic grounds as a rule would be satisfactory – assuming such careful thought has been given to the matter at all.

Of course it is conceivable that the collective regulation of contractual terms in consumer relations can be used against undertakings which apply discriminatory terms in similar cases in which the private law general clause is applied. A 1992 decision of the Finnish Market Court is relevant in this context, in which discrimination, which was economically motivated, was held to be contrary to law. The facts of the case were somewhat peculiar, however, since one could also rely, at least in part, upon specific legislation:

Finnish Market Court 1982:21. According to section 12 of the then Electricity Act, the Electricity Authority was obliged to observe terms and conditions for the supply of electricity approved by the Ministry of Trade and Industry. According to the terms and conditions fixed by the Ministry, one was entitled to require security for payment of electricity supplied to private households only where compelling reasons existed, which were required to be examined in advance. The mere fact that the consumer lives in rental accommodation could not, according to the Market Court, constitute such compelling reason. A contractual term and condition pursuant to which a consumer who lived in rental accommodation was required to provide security for payment of debts based upon the supply of electricity was unfair.

There are examples in other fields where discrimination on the basis of grounds other than gender, race and such like, can be assailed. These include, primarily, circumstances where the mechanism of the market is rendered ineffective. I am

⁴⁰ SOU 1974:83, p. 147.

⁴¹ Finnish Government Bill 247/1981, p. 16.

thinking here in particular of competition rules concerning the abuse of dominant position.⁴² The Swedish Competition Act (1993:20) provides that a prohibited abuse of a dominant position – which can result in the imposition of civil law damages (section 33) – can consist of applying different conditions to similar transactions, whereby some trading partners are afforded a competitive disadvantage (section 19, sub-section 2, paragraph 3). In the Finnish Competition Act (480/1992), an abuse of a dominant position is deemed to exist, inter alia, where the dominant undertaking, without due cause, refrains from a contractual relationship or uses commercial terms and conditions which are not founded upon generally accepted commercial practice and which restrict the customer's commercial freedom (section 7, paragraph 1, 2). Both the refusal to supply and the restriction of the customer's commercial freedom are usually described as a form of discrimination.⁴³

The example is limited in scope in the sense that it refers to the situation where an undertaking, as a result of its dominant position, can acquire unfair advantages or restrict competition on the market. The present case law, e.g. concerning the Swedish Act, relates primarily to a discriminatory measure's effect on competition.⁴⁴ It is also expressly stated in the preparatory works to the Act that discrimination may be acceptable if it is related to cost differences or variations in commercial risks.⁴⁵ The Finnish doctrine also emphasises that discrimination will not be regarded as damaging if it is commercially justified on economic grounds, e.g. when selling to retailers their inability to pay, lack of trade knowledge or unreliability.⁴⁶ In this sense, the prohibition against discrimination in competition legislation is clearly market rational.

More general anti-discriminatory legislative prohibitions, apart from those found in penal legislation, rarely exist in countries with market economies. "The poor pay more" syndrome is regarded as a natural consequence of that economic structure. Nevertheless, it cannot be asserted that no attention has been given to the problem in the private law regulation of discrimination. One means of eliminating discrimination in relation, for example, to prices and interest rates, is to endeavour to achieve the greatest possible uniformity in price setting. Rules setting maximum rates of interest, which exist in several countries, are said to be used specifically for the purpose of eliminating the emergence of particularly high interest markets aimed at low income earners.⁴⁷ Uniform legislation can also reduce discrimination in other ways. Provisions which, to some extent or in a particular area, render prevailing standards mandatory, can prevent the

⁴² Discrimination can, of course, also constitute an example of a prohibited concerted practice restricting competition, see the Swedish Competition Act section 6, sub-section 2, paragraph 4. I will not examine this in any more detail here, since the rules on abuse of a dominant position are more directly connected with the individual undertaking's commercial freedom vis-à-vis potential contractual partners.

⁴³ Kirsti Rissanen & Valentine Korah, *EY:n ja Suomen kilpailuoikeus*, Helsinki 1991, p. 330.

⁴⁴ See, e.g. Kenny Carlsson, Lars Schuer & Eric Söderlind, *Konkurrenslagen*, 2 ed., Gothenburg 1995, p. 375 *et seq.*

⁴⁵ Swedish Government Bill 1992/93:56, p. 87 *et seq.*

⁴⁶ Rissanen & Korah, p. 331.

⁴⁷ Ramsay, p. 191 *et seq.*

emergence of especially low quality markets for poor consumers.⁴⁸ Consumer protection legislation can acquire an anti-discriminatory function where the mandatory minimum standard is set sufficiently high and especially if the minimum is tied to the norm otherwise prevailing on the market. The kind of discrimination in issue here, however, is often discrimination which flows from different undertakings addressing themselves to different segments of the market. In principle, however, such legislation also has the effect of preventing an undertaking from applying too divergent terms and conditions in relation to different customers.

The significance of normal standards is not only reflected in mandatory legislation of the kind referred to above. Many general contractual principles link the assessment, *inter alia*, to prevailing market standards. By way of example, reference can be made to the doctrine on the invalidity of unexpected and onerous contractual terms in the law relating to standard form contracts; according to this doctrine, the abnormal is often more inclined to be regarded as unexpected.⁴⁹ The market exhibits a paradoxical characteristic in the sense that not only does it contribute to the creation of inequality, but it also contributes to the establishment of criteria which determine what is inequitable as being contrary to the market norm. The interpretation and supplementing of contracts also takes place, at least partially, in light of normal standard in the relevant line of business. Doctrines of this kind can thus influence the development of legal thinking in a way that can include assessments of equality.

Rules concerning price, quality and other terms and conditions can reduce discrimination only with regard to the content of the contract. It is thus acknowledged that such rules can produce the dysfunctional effect that, where the minimum level is set too high, weaker consumers are left without any contractual alternative. A maximum interest rate, the effect of which is to eliminate high-interest markets, can result in poorer consumers not being able to obtain credit at all. Rules dealing with the content of contracts are not adequate to counteract such discrimination. Regulations are required establishing a positive obligation to contract and guaranteeing market access to the less fortunate.

The generally accepted view among private lawyers is that rules concerning compulsory contracting constitute the exception, since they are contrary to the fundamental principle of freedom to contract. In a recent and most interesting Nordic study concerning obligations to contract which inure to the benefit of private persons, *Frey Nybergh* is critical of this view. He shows, on the basis of a review of legislation in the Nordic countries concerning the provision of essential services such as electricity, gas, heating, water, telephone services, health care, housing, transport, postal services, insurance and banking, that "the

⁴⁸ This consequence of consumer protection legislation is emphasised by Udo Reifner & Michael Volkmer, *Neue Formen der Verbraucherrechtsberatung*, Frankfurt am Main 1988, p. 21 *et seq.*

⁴⁹ This is not to say that clauses which represent industry standards within a line of business cannot also be unexpected, e.g. for a consumer. With respect to terms and conditions in contracts between undertakings, see, e.g. Ulf Bernitz, *Standardavtalsrätt*, 6th ed., Stockholm 1993, p. 38: "the courts will probably ... be careful in allocating [to the doctrine on unexpected and onerous clauses] such terms and conditions in standard form contracts which are generally accepted in commerce."

expressly regulated obligation to contract, as a restriction of the traditional concept of freedom of contract, assumes a more central position than what one might expect upon a superficial review.”⁵⁰ On the basis of that conclusion the author proceeds to argue in favour of adopting a more precise principle of an obligation to contract in Nordic law, which would extend at the very least to essential services and according to which undertakings may not, without due cause, refuse to enter into contractual relations with a consumer.⁵¹ He manages at the same time to present a new perspective on the concept of freedom of contract: the positive freedom of contract, which meets expectations found in a consumer society, takes account of the consumer’s freedom to consume – his freedom to enter into a contract for essential services – and therefore introduces into the very notion of contractual freedom a certain measure of compulsion to enter into contractual relations.⁵² Nybergh’s positive contractual freedom/obligation to contract also contains explicit elements of an endeavour to discourage discrimination: he seeks to establish that where a consumer suffers from a social force majeure situation (difficulties arising as a result of illness, unemployment etc.), such disability can conceivably constitute a separate justification for not denying the consumer the right to enter into contractual relations referred to above.⁵³

It is also worth noting that there may be intermediate solutions between a fully developed positive obligation to contract and an unlimited freedom for an undertaking to select the parties with which it is prepared to contract. An example of such a solution is found in rules that oblige an undertaking to justify its decision to refuse to contract. The Finnish Consumer Credit Commission some years ago proposed a provision pursuant to which a lender which refused to advance credit to a consumer, or which advanced credit on substantially less advantageous terms than it usually did, would be liable – upon demand from the consumer – to disclose the reasons on the basis of which the decision was grounded.⁵⁴ The proposal has not, however, been implemented.

The review in this section of the paper shows that the current two-party contract model has not entirely excluded the equality issue from the scope of contract law. There is concrete evidence in the field of contract law in which clear or implicit attention is given to the issue of whether potential contracting parties are dealt with equally by their counter-parties. Given that equality issues of the sort identified earlier usually only arise where a party enters into, or is prepared to enter into, multiple contracts of the same kind, it is natural that the evidence as a rule relates to conduct in the commercial sector. If one is entitled to speak at all of an obligation of equality in contract law, then it is an obligation for undertakings to treat their customers/employees/counter-parties equally.

The concrete legal material I have reviewed here justifies certain preliminary, more general reflections. One such is the introduction of the concepts of market-rational and market-corrective limitations of the freedom of contract. With the

⁵⁰ Frey Nybergh, *Avtalsfrihet - rätt till avtal*, Copenhagen 1997, p. 295.

⁵¹ Nybergh, p. 227 *et seq.*, p. 296 *et seq.*

⁵² Nybergh, p. 77 *et seq.*

⁵³ Nybergh, p. 260 *et seq.*

⁵⁴ Kom.bet. 1993:7, p. 63.

expression market-rational rules against discrimination, I refer to rules through which one attempts to eliminate discrimination which is founded upon prejudice and similar subjective factors. This is often such discrimination which the market mechanism should have dealt with. It is obviously easier to implement market-rational rules than to correct discriminatory measures which are economically motivated. Notwithstanding that the two concepts "market-rational/market-corrective" are not expressly applied, the concrete material to which I have referred is for the most part market-rational. Even in those circumstances where one endeavours to change economically motivated conduct, as in the case of regulation of dominant position, it is rather an issue of seeking to achieve the result which the market mechanism would have achieved if it had not been sidelined.

The above comments are reflected, *inter alia*, in the fact that discrimination on the basis of gender, race, religion, sexual preference and other similar factors has been easier to deal with than discrimination related to the customer's financial status ("the poor pay more"). The first type of discrimination often includes a subjective element, even though discrimination can sometimes be economically motivated, whilst the possibility of focusing specifically on economically interesting customer groups and discriminating against groups with less financial capacity is consistent with the basic idea of a market economy. Financially weak customers have primarily been assisted with general mandatory rules fixing a minimum level of performance by the undertaking and of its contractual terms and with rules establishing a positive obligation to contract. These have not, however, been implemented on a widespread basis. In this context, the normality attitude referred to above - the notion that everyone (including the weak) should be entitled to the normal standard - encounters another view of what is normal, *viz.* that it is normal on the market to discriminate on the basis of risk and costs.

5 The Relevance of EC Law

The comments so far have related to national Swedish and Finnish law. Following Sweden's and Finland's membership of the European Union, EC law offers a little extra spice so far as concerns the evolution of new principles of law in the Member States. In particular with regard to the equality issue it seems that EC law might contribute strength to arguments that advance the development of the law in a more social direction.⁵⁵ There are several examples of concrete legal rules in EC law which can be said to support the development of a principle of equality in contract law.

As is well known, EC law has special importance in the context of equality between the sexes on the labour market. The equal pay for equal work principle is expressed in Article 119 of the Treaty of Rome and has been entrenched in the Equal Pay Directive⁵⁶ and the Equal Treatment Directive.⁵⁷ What is

⁵⁵ I referred to the equality issue as one of the points with respect to which Nordic contract law can draw inspiration from EC law in my work *Social Contract Law and European Integration*, Aldershot 1995, p. 203 *et seq.*

⁵⁶ Directive 75/117/EEC, OJ no. L 45/19, 19 February 1975.

interesting in this context is that these directives are not regarded only as specific measures designed to deal with specific problems. They are regarded as expressing a general principle of EC law as well. The Court of Justice has held that the right not to be discriminated against is one of the general principles of EC law.⁵⁸

EC law, for obvious reasons, also emphasises another matter as a particularly unacceptable grounds for discrimination. Article 6 of the Treaty of Rome prohibits all discrimination on the basis of nationality. That Article is supplemented, within the context of the labour market, by Article 48 according to which all discrimination by employees in member states concerning occupation, salary and other terms and conditions of employment shall be abolished. As the *Bosman* case illustrates, that Article is not applicable only to actions of public authorities, but is also relevant with regard to private arrangements such as the rules of sporting associations.⁵⁹ It is obvious that the principle of prohibition against discrimination on the basis of nationality – which, as a part of primary Community law, is directly applicable to relationships between private parties – can also have relevance in contract law.⁶⁰ It supports, to a certain extent, the notion of anti-discrimination as a central principle in EC law. This is, however, subject to one important reservation: discrimination on the grounds of nationality is only prohibited vis-à-vis citizens of member states, whereas discrimination is tolerated to a much greater extent in relation to those not included in the community.

Competition law is possibly the area in which EC law is most developed. The comments set forth above concerning the prohibition against discrimination in competition law also apply, of course, in EC law. Articles 85 and 86 in the Treaty of Rome name the use of discriminatory terms and conditions as an example both of prohibited restrictions of competition and abuse of a dominant position. The scope of these prohibitions will not, however, be explored here. I only refer to them in order to highlight the number of contexts in which a prohibition against discrimination in contractual relations arises in EC law.

The concrete legal material offered by EC law in the context of discrimination is of such importance that one is tempted to speak of a general EC principle, also applicable in contract law. The influence of EC law in Nordic law to some extent supports the notion set forth above to the effect that undertakings have an obligation to treat their customers/employees/counter-

⁵⁷ Directive 76/207/EEC, OJ no. L 39/40, 14 February 1976.

⁵⁸ *Defrenne v. Sabena*, Case 149/77 [1978] ECR 1365, p. 1378.

⁵⁹ *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, Case C-415/93 [1995] ECR I-4921. See especially p. 82, according to which "Article 48 not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner", with reference to the earlier case of *Walrave v. Union Cycliste Internationale*, Case 36/74 [1974] ECR 1405 at 17.

⁶⁰ See also, e.g. *Maria Chiara Spotti v. Freistaat Bayern*, Case C-272/92 [1993] ECR I-5185, where a provision in a legislation concerning high-schools, according to which teachers in foreign languages, which were of course often foreigners, were to be employed for a certain time, whilst this did not apply to other teachers, was held to contravene Article 48.

parties equally.⁶¹ EC materials constitute an additional element in the construction of such a contractual principle of equality.

6 Towards a Contractual Principle of Equality

The above sections show that the question of equality between different groups of contracting parties in the sense discussed here has indeed been the object of attention in Nordic law. Those rules that do exist, however, do not fit comfortably within the prevailing contract paradigm, which focuses on the relationship between two parties. It may be that we are standing on the threshold of a new contract paradigm which is able to adapt to the changes taking place in reality and which, to a greater extent than is presently possible, is able to overcome the boundaries of the two party relationship and view individual contracts as a part of more complex networks, contractual portfolios, customer groups, etc. The contract could be viewed as a more open system,⁶² in which, inter alia, issues of equality such as those discussed here take their natural place. A more involved examination of the implications of a principle of equality in terms of the contract paradigm, will, however, have to wait. As is shown below, there may even be grounds at present to question prevailing private law systematisations at a more fundamental level.

Before I go on to discuss whether and in what sense a contract law principle of equality might be developed, there is reason to make some comments concerning the issue of why such a principle is apparently of importance just now.

We live in a time during which significant changes are being made to our social order. The welfare state, in the form to which we have become accustomed, is being deconstructed, or at least is changing its form. The catch-phrases of the day are market orientation and privatisation. This means, inter alia, that state ownership is being reduced through privatisation, that public functions are being awarded to private institutions on a contractual basis, that public functions are being cut-back and are left to be regulated by the market and that result oriented management and other market oriented mechanisms are being introduced into the public sector. This development, which involves a shifting of the burden from public law to private law, must also have consequences for our approach to private law and contract law.⁶³ This means, inter alia, that objectives which were formerly dealt with by the public sector can be the subject of increasing attention in the private sector. The obligation to treat clients equally, to which public authorities were subjected, should also be

⁶¹ See also, e.g. Ruth Nielsen, *Arbejdsgivarens ledelsesret i EF-retlig belysning*, Copenhagen 1992, which on the basis of EC law creates a general principle in Danish law according to which an employer must treat its employees equally. See also Ruth Nielsen 1996 p. 19.

⁶² Matti Rudanko, *Kauppa-oikeuden kehityssuuntauksia*, Lakimies 1996 p. 24 *et seq.*, briefly poses the proposition that the post welfare state's contract law should start from the idea of contract as an open system within which one can observe, e.g. environmental points of view or macro-economic objectives.

⁶³ This is one of the issues which the current research project "Welfare State-expectations, Privatisation and Private Law" is concerned with. See in this regard, e.g. Retfaerd 74, 1996, p. 107 *et seq.*

accorded relevance in the private sector, at least (and especially) in the context of the offering of such essential services as previously were or could have been operated by the public authorities.

The deconstruction of the welfare state has also led to an increase in social inequality. A public discussion is presently underway concerning the risk of society being split into an A and a B team, the winners and the losers. At the same time, it seems clear that the welfare state has reached the limits of its capacity. It is neither economically nor bureaucratically feasible to allow all allocation of welfare to be effected under the auspices of the public sector. If one strives against inequality and the emergence of groups who are not aided by welfare, it becomes necessary to find new solutions in parallel and in addition to proven public law models. It is necessary to initiate a serious examination of what opportunities are presented by private law solutions towards maintaining a measure of solidarity in our society. A small step in such a strategy is the notion of a principle of equality in contract law.

The privatisation of public functions and the transfer of public duties to the market in conjunction with the conversion to market-management and result-oriented accountability in public administration, is cause enough - to some extent - to question the traditional legal systematisation. The elementary traditional division into public law and private law is, as is recognised, being diluted⁶⁴ and other systematic approaches can produce new insight and inspiration. From the point of view of the individual citizen, the distinction between public law and private law is not always especially clear: his view of the large private bank and the social security office may be much the same. Seen from a grass roots perspective, the following types of categories could better represent this view of the objects of legal regulation:

(i) *The law of power*: rules concerning the public exercise of power (police, courts, etc.). The core of public law rules are found here, unaffected by the dilution of the border between private and public law.

(ii) *The law of organisations*: rules concerning the functioning of the

⁶⁴ The assertion that this is in the process of taking place is too general and unanalytical. The distinction between private law and public law may refer to a multitude of factors: (i) it may be conventional, some objects being regulated by private law (e.g. the contract) and others by public law (e.g. public service), (ii) it may be related to the nature of the parties: relationships between private parties belong to private law and relationships between public parties belong to public law, (iii) it may relate to the remedies in question: private law claims, such as for damages and specific performance, are enforced in individual proceedings before courts of general jurisdiction, whereas public law regulates the penal system, licensing requirements, supervision and control and different forms of collective remedies, (iv) it may relate to different basic values: private law is said to build upon private autonomy, whereas public law is intended to take care of public policy issues (whereby, e.g., large parts of consumer law would be a part of public law) and (v) it may relate to the different traditions underlying the fields of law and the fact that private law and public law use different concepts and principles. The assertion that the differences between private law and public law are being erased apply to all these elements, but can do so in different ways. The introduction of a principle of equality into contract law would mean that elements which according to (iv) and (v) are regarded as belonging to public law, would be assimilated into the private law sphere, defined according to (iii).

organisational structures with which citizens deal and to which they belong.⁶⁵

(iii) *The law of services*: rules concerning the services, in a broad sense, which citizens can obtain. This includes both consumer law and other parts of private law which regulate private service, as well as rules concerning public service.

(iv) *Market law*: rules concerning the relationships between professional actors on the market. Large parts of commercial contract law and competition law belong here, but also, e.g. the public law rules on public procurement.

(v) *The law of conduct*: rules concerning the type of behaviour by citizens which society regards as unacceptable. Criminal law, tort law and other forms of behavioural norms are examples of such rules (which may partially belong to other categories as well).

This list, which is hardly exhaustive, does not - at this stage - constitute an attempt to establish a new system for the legal order. I merely intend hereby to highlight the fact that, especially in the post-welfarist, privatised society, with the need for more welfare in what is known as private law, can one identify new systematical groupings and comparisons which can be more inspiring and creative in a legal discussion than the traditional division between private law and public law.

For example, within the scope of what is referred to above as the law of services (which I will focus on hereafter⁶⁶) one encounters public law principles concerning equality and equal treatment. It is natural to allow these principles to influence attitudes to traditional private law elements within these fields. One could, at any rate, start from the assumption that, in the absence of good reasons to the contrary,⁶⁷ equality offered in the context of public service would also be offered in the context of private service. A person receiving such a service often regards the situations as so similar that parallel solutions would, from his point of view, be quite natural.

As *Juha Hähyä* has shown, the fact that the contract has become a standardised mass-phenomenon has led normality to acquire greater significance. As a result of the standardised procedures, people already have expectations when they enter into the agreement: “They expect to find a typical situation and are disappointed if their expectations are not met.”⁶⁸ One expects, quite simply, that the law will guarantee that which is common on the market. That applies both to comparisons between different actors on the market as well as to the coherence of the actions of a specific actor. To the extent that this is correct, one can assert that a principle of equality is established in the deep

⁶⁵ This includes private law rules on companies and cooperations, contractual networks and labour regulations, as well as parts of the rules on public organisation.

⁶⁶ Equality perspectives are also relevant within “the law of organisations”, inter alia, within labour law. I do not have the opportunity to explore that field, however, in this article.

⁶⁷ In accordance with the definition of equality in the introductory section, I refer here to an obligation to offer services to all customers within the scope of a company's existing service outlets. The next question, the extent to which a company should have an obligation to establish a network also, e.g. in unprofitable areas - which has been discussed in conjunction with transport and postal services - must be disregarded.

⁶⁸ Juha Hähyä, *Sopimus, laki ja vakuutustoiminta*, Helsinki 1996 with an English summary [Contract, legislation and insurance] on p. 358 *et seq* (quoted from p. 360).

structure⁶⁹ of modern contract law.

Thus, when one speaks of a principle of equality in contract law, it is a question of stating expressly that which already exists implicitly in the new deep structures of the contractual philosophy being developed and which is reflected in parts of the concrete legal materials. In reality, it is a question of establishing on these foundations another attitude to the main rules and exceptions than that which has previously been expressed - the principle of equality involves a step away from the traditional principle that everyone is entitled to choose the other party with whom he will contract - in the same breath as where Frey Nybergh, as discussed above, wants to include an obligation to contract in the notion of freedom of contract.

A principle of equality of this kind could be expressed as follows. Undertakings, public authorities and other similar institutions are obliged to treat their customers equally. This means that everyone should be entitled to contract with that undertaking on the same terms and conditions as other customers, unless there are sound reasons for special treatment.

The right to contract cannot, of course, be unconditional. There are reasons for special treatment that are so deeply rooted in the basic structure of the market economy that they must be accepted. The significance of the principle of equality as formulated above is therefore to a high degree affected by the grounds for special treatment which are regarded as acceptable. A new perspective of the kind sketched out here is nevertheless important since it places the whole issue on the agenda. One cannot always simply assume that an undertaking is entitled to choose whatever customers it wants and treat them differently if it so desires, at least so long as catch words like gender, race, nationality, religion, sexual preference etc. do not give rise to a debate. Instead, one must in all cases of special treatment consider whether or not and to what extent special treatment is something that should be accepted.

An undertaking which refuses to contract with a consumer, or which offers terms significantly less attractive than are offered to others, is obliged to justify why it does so. One could shift the burden of proof onto the undertaking to establish acceptable grounds for different treatment. Even the Finnish Consumer Credit Commission could accept the not so radical minimum requirement that an undertaking should give reasons for different treatment. The remedy for a breach of the principle of equality can clearly vary: in certain cases, especially in the context of essential services, an obligation to contract is appropriate, whereas damages may be suitable in other cases. In applying a contract which has already been entered into, the natural remedy is to adjust a clause to its normal level where it discriminates to a degree that cannot be justified. If discrimination is apparent from the terms and conditions applied by an undertaking, action on the basis of legislation concerning collective regulation of contract terms is justified.

I am not so naive as to think that one can implement a far reaching principle

⁶⁹ I refer here to Kaarlo Tuori's division of the law into three levels: the surface (what I have called concrete legal materials), legal culture and the deep structure, see Tuori, *Valtionhallinnon sivuelinorganisaatiosta 1*, Vammala 1983, p. 76. In English, see e.g. the paper of Kaarlo Tuori, in Lars D Eriksson & Samuli Hurri (eds.), *Dialectic of Law and Reality. Readings in Finnish Legal Theory*, Helsinki 1999 p. 403 *et seq.*

of equality or even that it is desirable to do so in all situations. The acceptable grounds for departing from a principle of equal treatment may be extensive, which is apparent from the review undertaken above of the concrete legal materials. However, one need not be satisfied with eradicating only more subjective forms of discrimination, often related to gender, race, etc.; one can also aim to eradicate economically motivated measures at least in some situations. “A search for suckers” of the kind Ayres observed in his research is hardly something to be accepted, whereas differences attributable to variations in cost structures are, as a rule, more difficult to condemn generally.

Perhaps the most central problem in this regard, however, is how one should allow taking into account of variations in the risk structure between different contracting groups. As stated above, the concept of risk and classification of risk is of central importance in modern society. This is an insurance society, where events are understood in terms of the concept of risk, where the world is mathematised and typologised through probability calculations on a collective basis and where most things can be valued in money.⁷⁰ In such a society, solidarity is said to be a concept which belongs primarily to the field of insurance economics.⁷¹ This thinking does not necessarily need to be applied exclusively to insurance and social insurance in narrow terms; many types of, e.g. contractual rules, exhibit traces of the same calculable solidarity. Should the parties who bear the lesser risk in a fair setting of price be forced on grounds of solidarity to share the greater risk which accompanies contracts entered into with weaker parties? Or should we have more refined nuances of risk classification where each party bears its own risk and where the weak as a result pay more, or are excluded entirely from opportunities to contract? The issue here involves the classification struggle, discussed by Nick Huls in the context of insurance, but which in fact has a broader application.

The question of how one should deal with risk classification is hardly susceptible to a meaningful answer by the application of a general rule. The situations vary and the arguments with them. On the financial markets, for example, a refusal to contract because of a high credit risk is in certain circumstances not only acceptable but desirable. Generally expressed, however, one can say that in a social civil law, in which the emphasis is on solidarity, it is necessary to attempt to discourage discriminatory risk classifications and endeavour to establish more inclusive classifications. To the greatest extent possible, one should endeavour to work against solutions which force the poor to pay more. “The poor should pay the same” (or in certain cases “the poor should pay less”) could be the catch cry of the endeavour towards such solidarity solutions.

⁷⁰ Ewald 1989, p. 389-391.

⁷¹ Ewald 1989, p. 388.