Gender Equality in Contract Law

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Contents

I. Introduction ............................................................................................................................... 155

II. Unequal Bargains ..................................................................................................................... 156
   A. Compensation discrimination ............................................................................................... 156
      A-1. Inequality Findings ..................................................................................................... 156
      A-2. Legislative (Re-)action ............................................................................................... 157
   B. Gender Tax .......................................................................................................................... 157
      B-1. Inequality Findings ..................................................................................................... 158
      B-2. Legislative (Re-)action ............................................................................................... 159
   C. Discussion ......................................................................................................................... 160

III. Unequal Power...................................................................................................................... 163
   A. Example: Sexual Harassment .............................................................................................. 164
      A-1. Inequality Findings ..................................................................................................... 164
      A-2. Legislative (re-)action ................................................................................................. 165
   B. Discussion ......................................................................................................................... 165

IV. Unequal Burdens ................................................................................................................... 166
   A. Example: Surety Contracts ................................................................................................ 166
      A-1. Inequality Findings ..................................................................................................... 167
      A-2. Judicial Reaction ......................................................................................................... 167
      A-3. Discussion .................................................................................................................. 168
   B. Example: Contractual Responsibility ................................................................................ 171
      B-1. Inequality Findings ..................................................................................................... 172
      B-2. Discussion .................................................................................................................. 172

V. Conclusions ............................................................................................................................ 173
I. Introduction

When we think about contracts, we see ourselves in front of the cash register in a supermarket. The daily purchase of consumer goods determines to a considerable extent our view of contracts in general. If a customer buys something in a bakery, at newspaper stand or in coffee house, the price of the goods will be the same, regardless of the gender of the customer. Contract law thus appears to be gender neutral: the value of the performance is predetermined by fixed prices and rates. In rarer cases it may depend on the negotiating skills and the bargaining position of the individual party. Yet a closer look reveals that contract law is no different from other areas of law: its nature is deeply gendered. The focus of my contribution will be on European contract law. In the European Union, the gender dimension of contract law has received increased attention in recent years. Most of the attention has taken the form of EU Directives, i.e., rules which generally have to be transposed into national law by the Member States. Other issues have appeared on the dockets of the courts of several Member States. And some issues are, at this point, not yet part of a broad discussion. In contract law, inequalities exist in various forms and at various levels: Women get unequal bargains (I.), they hold unequal power (II.) and they bear unequal burdens (III.).

I. Unequal Bargains

If we shift our view from the "gender-neutral" waiting line in the supermarket to the person who sits at the cash register, the gendered nature of contract law becomes visible at once. Usually, this person will be a woman, whereas the supervisor of the store will be a man. Often, she will receive less pay than her male colleagues even if she does comparable work. In short, the gender-neutrality of contract law disappears when one turns to the area of employment law.

A. Compensation discrimination

A-1. Inequality Findings

Even today, the principle of equal pay for work of equal value remains a near universal battlefield. By way of example, a recent report by the Commission of the European Communities estimates the (unadjusted) gender pay gap to stagnate at 15%. Moreover, this gap is decreasing at a slower pace than the gender employment gap. In other words, the fact that significantly more women participate in the European labor market has not lead to a corresponding elimination of compensation discrimination.

A-2. Legislative (Re-)action

These findings are even more appalling if one takes into account that the equal pay principle has been on the European agenda since the Treaty of Rome in 1957. At that time, France had insisted on an equal pay provision because such a rule existed in French law and France feared a competitive disad-

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150 Note on EU materials: All legislative documents (Directives, preparatory materials [SEC-Documents]) as well as the Bulletin on legal issues in equality can be downloaded at <http://ec.europa.eu/employment_social/gender_equality/legislation/index_en.html>. Certain Commission Reports "COM-Documents" can also be downloaded at: <http://eur-lex.europa.eu/en/prep/index.htm>. You may also be successful by simply entering the document name into an Internet search engine (google, yahoo).

151 For an overview, see RUTH NIELSEN, Gender Equality in European Contract Law, 2004.


153 Id.
vantage for French enterprises.\textsuperscript{154} France had to wait nearly twenty years until the equal pay principle was effectively enacted in the form of a Directive in 1975.\textsuperscript{155} Since then, legislative action with regard to employment equality has been an ongoing process. In 2006, a new directive was adopted which incorporated the development in this area of the law, including the case law of the European Court of Justice.\textsuperscript{156} The 2006 Directive repeats the equal pay principle in Article 4. It also contains a number of provisions designed to enhance its effectiveness. For instance, Member States are required to install equality bodies to promote equality and assist the victims of discrimination (Art. 20). Also, NGOs have a right to bring complaints in favor of employees (Art. 17). Furthermore, the burden of proof has substantially shifted to the employer (Art. 19) and the Member States are obliged to incorporate dissuasive sanctions into their legal systems (Art. 18).

B. Gender Tax

The labour market may be the most visible area of contract law\textsuperscript{[158]} where gender discrimination occurs. But it is far from being the only one. Going back to the waiting line at the supermarket, it is enough to imagine the same line at a dry cleaning service to find gender specific contractual inequalities.

B-1. Inequality Findings

Dry cleaners, tailors and hairdressers regularly charge women more for their services than men.\textsuperscript{157} Furthermore, in many European countries it is a standing practice that women and men are treated differently with regard to insurance contracts.\textsuperscript{158} Another area where unequal treatment is widespread is the area of financial services. The European Commission concludes from reports by Member States that women have much less access to credit facilities than men. For instance, pregnant women were refused mortgages. In other cases, women were required a grantor for their loan, where a man with similar credit rating would not face such a requirement. Also, part-time workers were refused loans, resulting in an indirect discrimination of women. In yet other cases, banks refused to allow the woman's name to be put first on the joint bank account, which results in discrimination in entitlements such as share options, which are frequently restricted to the first named member.\textsuperscript{159} Other research


\textsuperscript{157} This seems to be a universal phenomenon. Studies included in the legislative history of California's Gender Tax Repeal Act of 1995 estimated that, overall (and not limited to the services mentioned above), the additional cost for women due to price-discrimination amounts to about 1'351 USD annually. See California Senate Judiciary Committee, Committee Report for 1995, Cal A.B. 1100, 1995-1996 Reg. See 2, available in Westlaw, CCA database, also cited in Recent Legislation, 1840 n 6.

\textsuperscript{158} For an account of the different treatment in the EU Member States, see Commission Staff Working Paper, Proposal for a Council Directive implementing the principle of equal treatment for men and women in the access to and the provision of goods and services, 5.11.2003, SEC(2003) 1213, pp. 5-12. See also supra note 1.

concludes that women have much less access to bank loans for starting their businesses than men. A main factor seems to be that women's business proposals run on a smaller scale than men's. Also, women have far less access to venture capital than men. Lastly, gender-biased pricing has been found in such unsuspicious contractual dealings as in bargaining for a new car. This is an area where the price can vary, but where one would expect that the outcome depends solely on the negotiating skills of the buyer. This is not the case: A US study found significant differences in the prices quoted to women compared to the prices quoted to white men, even though the testers were trained to bargain uniformly and followed a pre-specified bargaining script. According to the authors of the study, the disparate treatment has multiple causes. One cause seems to be that the car dealers use observable variables such as gender to make inferences about the buyer's knowledge, search and bargaining possibilities.

In sum, gender-biased pricing is widespread and it includes such existential areas as insurance and credit contracts.

B-2. Legislative (Re-)action

In European contract law, the issue of price discrimination is addressed by the Council Directive of 2004 on the equal treatment between men and women in the access to and supply of goods and services. The Directive applies – with certain exceptions – to goods and services available to the public. It prohibits differences in treatment between men and women as a matter of principle. It also contains three notable exceptions: One exception concerns positive measures to compensate for past discrimination (Art. 6). The other exception allows differential treatment if it is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Art. 4). And the third exception concerns insurance contracts (Art. 5).

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160 See DANISH AGENCY FOR TRADE AND INDUSTRY, Women Entrepreneurs Now and in the Future, September 2000, passim, download at: <www.efs.dk/publikationer/rapporter/bankers.uk/index-eng.html>.


163 By taking the initial price quoted to the white male buyer as a reference, the price deviation was as follows: Offers to black male buyers averaged about 935 USD higher. Black female testers got offers about 320 USD higher. White females received initial offers which were 110 USD higher. As to the final offer, black males were asked to pay 1,100 USD more than white males, black females 410 USD more and white females 92 USD more. See AYRES/SIEGELMAN, American Economic Review 85 (1995), supra note 161, p. 308.

164 Apart from this so called statistical discrimination theory, the data also supports – although to a lesser extent – the animus-based discrimination theory. Animus-based discrimination is said to occur when the disparate treatment is caused by the bigotry of the dealership’s owners, employees or fellow customers. According to this theory, the higher prices paid by minorities and women serve to compensate the bigoted seller for the psychological distaste for having to associate with the victims of discrimination such as minorities and women. AYRES/SIEGELMAN, American Economic Review 85 (1995), supra note 161, pp. 313-319.


166 The Directive does not apply to the content of media and advertisement and to education, see Art. 3 para. 3 Directive 2004/113/EC, supra note 165.
C. Discussion

In view of the above, the conclusion is relatively simple: Men get better deals than women. This is not only true for the labour market, but also for the service industry and even for the sale of goods. The European Union has reacted to this inequality by enacting legislation aimed at amending the situation. However, if one looks at the exceptions in the Directive regarding the goods and services, it becomes clear that inequalities will remain.

It is not so much the first exception which is problematic. This exception states the well-established principle that affirmative action is allowed to remedy past discrimination. For example: As pointed out above, women have traditionally had more difficulties in obtaining loans to start their business. In response, some Member States have established specific loans for women entrepreneurs, at special rates or conditions and with additional business support and advice. The Directive allows a derogation from the principle of equal treatment for this kind of affirmative action.

The second exception is more general in scope, allowing a derogation from the principle of equal treatment in the presence of "legitimate aims". These aims have yet to be defined. However, it is obvious that there is an opening which could lead to the erosion of the principle of equal treatment. A look at the preparatory materials confirms this: They include examples such as single-sex sessions in a swimming pool or private membership clubs. With regard to private clubs, the exception is problematic because certain clubs can exclude women from essential networks in their business environment. One example is the Rotary Club. In the US, the Supreme Court held that Rotary was in violation of the California Civil Code which prohibits gender discrimination by business establishments. One conclusion to be drawn from this is that some private clubs have a public component which is important enough to justify their regulation by equal treatment legislation.

Furthermore, the preparatory materials also state that differential treatment is allowed when the goods or services are based on skills which are practised differently for one sex or the other. This opens a broad line of defense for industries which practice gender-biased pricing, as they will argue that women pay more because their service requires additional skills and additional time. For example, dry cleaning services have been arguing that because women's clothes are smaller in size they do not fit the automated machinery for pressing, and that therefore they have to be hand pressed. On an individual level, this kind of discrimination is, economically speaking, not important enough to ask for a review by the courts. The issue may be taken up by consumer organisations, women's groups or other NGOs which, according to the Directive, have a right to bring complaints.

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169 One should also note that in some Member States national private law already provides a basis for women to force their entry into those kinds of clubs, for instance Art. 28 of the Swiss Civil Code (ZGB) and § 138 I of the German Civil Code (BGB). In a comparative perspective, the same line of argument might be persuasively under Japanese law because on a formal level the legal provisions are very similar: § 90 of the Japanese Civil Code contains an immorality clause which finds a parallel in § 138 I of the German Civil Code. Under German law, this provision arguably provides a basis for the right to enter a contract – be it a membership contract or any other contract – if this contract was refused on immoral grounds. Gender is such an immoral ground. This line of argument might be persuasively argued in Japanese law also, especially when considering § 2 of the Japanese Civil Code which states that the law shall be construed on the basis of the individual dignity and the substantial equality of both sexes. However, according to discussions with Japanese colleagues, Japanese law does, at this point, not allow a general right to contract.

(Art. 8). In this context it should also be noted that the European Court of Justice has been an important catalyst for the effective implementation of equality rights.\footnote{For the role of the Court of Justice see, for instance, Commission Staff Working Paper, SEC(2004) 482, supra note 153, p. 5.}

Most problematic, however, is the third exception. It concerns insurance contracts. In the crucial sector of health insurance, some Member States apply unisex tariffs, notably France and the United Kingdom.\footnote{Commission Staff Working Paper, SEC(2003) 1213, supra note 157, p. 6.} Other states do not, notably Germany. Where gender is taken into account, it is generally women who pay higher premiums.\footnote{As it is the case in Switzerland, see SUSAN EMMENEGGER, Feministische Kritik des Vertragsrechts (1999), pp. 68-69.} Sometimes the balance-tipped the other way in the old age bracket.\footnote{This is the case in Germany, see Commission Staff Working Paper, SEC(2003) 1213, supra note 157, p. 7-8.} Insurance companies argue with higher costs attributed to women’s health care, including pregnancy and childbirth.\footnote{This is the case in Germany, see Commission Staff Working Paper, SEC(2003) 1213, supra note 157, p. 7.} Women can do many things, but they can hardly achieve a pregnancy without the contribution of a man. Yet the insurance companies turn a blind eye on this simple issue of causality when calculating their "risk-based" premiums. Even with regard to the other additional costs attributed to women, gender-related pricing is not convincing — for instance, it doesn’t take into account that women often work double shifts outside and inside the home and that this double contribution to society may result in greater health problems.

The draft of the 2004 Directive specifically prohibited the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and other related services.\footnote{See Art. 4, Commission Proposal COM(2003)657, supra note 166, p. 22-23.} However, the fierce resistance of some Member States, notably Germany, has lead to a much tuned-down version of the unisex insurance rates. Article 5 of the Directive allows Member States to permit deviations from the unisex rates where the risk assessment is based on "relevant and accurate actuarial and statistical data."\footnote{Art. 5 par. 2 Directive 2004/113/EC, supra note 164.} In practice, this means that in those Member States where difference in insurance premium exists, this difference will remain. Moreover, and this is especially alarming, there is a risk of an increase in gender-biased insurance tariffs, as the move toward privatization in the insurance sector is undermining the previously gender-neutral schemes of the social insurance provided by the state.\footnote{This argument is found in the Commission Proposal for the 2004 Directive, see Commission Proposal COM(2003) 657, supra note 166, p. 8.}

On a positive note, the use of pregnancy and maternity is explicitly prohibited as a "statistical" basis for differential treatment (Art. 5 paragraph 3).

II. Unequal Power

It has already been pointed out that, when shifting the view from the waiting line in the supermarket to the person who sits at the cash register, the gendered nature of contract becomes visible because the person will usually be a woman. This woman will not only be paid less for her work while paying more to get her hair cut. She also runs a high risk that, in the course of her employment, she will be sexually harassed.\footnote{EU Directive 2006/54/EC defines sexual harassment as follows: "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. See EU Directive 2006/54/EC, supra note 155, Art. 2 (d).}
A. Example: Sexual Harassment

A-1. Inequality Findings

The EU Commission reports that the percentage of female employees who experienced some form of sexual harassment can be estimated at between 40% and 50%. In other words, sexual harassment is part of the contractual reality of women. A German national study describes the typical harasser as a man aged between 30 and 50, married, who has worked in his job for a long time. Men can also be victims of sexual harassment. When men are harassed, it is generally by other men; the reason for their harassment is usually their "unmanliness": they are or are thought to be homosexual or they do not conform in other ways to the established image of what it means to be "a man". In this sense, sexual harassment does not only concern women, it also concerns men who are thought to have female attributes.

From the point of view of the harasser, sexual harassment serves not so much to satisfy a physical desire but rather to secure power and status: It is used to demonstrate the inferiority of women in the work environment. The hierarchies are strongest when the harasser is superior. However, sexual harassment is most frequent between colleagues. The message is simple and humiliating: it reminds women that they are not perceived as colleagues, employees, or, more generally speaking, as contracting party dealing at arm's length, but that they are "just women". The simple fact that women can be harassed has consequences. The constant threat to be reduced to a sexual object makes it difficult for women to perceive themselves as equal partners in the work place. [165]

A-2. Legislative (re-)action

When the EU Council enacted its first Directive on equality in the workplace in 1976, sexual harassment was not on the agenda, even though some Member States such as the United Kingdom already had discrimination laws which included sexual harassment. Mayor activities on a Union-wide basis only started in the 1990s, with a Council Resolution in 1990 and a Commission Recommendation in 1991. Finally, in 2002, the European Parliament amended the Directive of 1976 to include sexual harassment as a form of sex discrimination prohibited by EU law. The 2002 Directive establishes
guidelines for sanctions, legal action, and potentially unlimited compensation for sexual harassment victims.

B. Discussion

The pervasiveness of sexual harassment indicates its normality: it is part of the contractual reality of women. The EU Directive has not yet changed this. In fact, the Directive had to be implemented by 2005. However, several Member States have not yet fully transposed it into national law.\textsuperscript{188} For instance, in certain Member States a definition of sexual harassment is lacking\textsuperscript{189} or an element of repetitiveness is \textsuperscript{166} required in order to prove sexual harassment.\textsuperscript{190} Also, with the exception of France and Italy, much less importance is attached to the issue of sexual harassment in the southern countries than in the northern countries.\textsuperscript{191}

III. Unequal Burdens

So far, the gender-neutral appearance of contract law, as exemplified by the waiting line in the supermarket, has proven to be deceptive. It was enough to shift the view from the supermarket to other businesses such as hairdressers and insurances to discover gender-biased rates and conditions. It was also enough to look at the supermarket cashier to see that the employment market is segregated. There are other areas of contract law which are also segregated but where the segregation is much less obvious. One type of contract where this is the case is the surety contract. Here, the contractual reality is such that, in the family context, it is mostly women who bear the burden of the surety. Apart from this practical issue, contract law in general puts an unequal burden on women because in order to profit from the protection that contract law offers, women have to behave like men.

A. Example: Surety Contracts

According to § 446 of the Japanese Civil Code, a surety has an obligation to perform if the principal debtor fails to fulfill his or her obligation. The Japanese Civil Code makes no reference to the gender of the surety or the principal debtor. In fact, no modern Civil Code does. Yet surety contracts have a long history of gender relevance. Under Roman law, women had the right to refuse performance of the surety contract under a special act which dates from 50 A.D.\textsuperscript{192} As to more recent history, in Switzerland, married women had to have the \textsuperscript{167} permission of the authorities to stand surety for their husbands until 1988.\textsuperscript{193} Today, the gender relevance of surety contracts becomes visible by looking at the case law.

A-1. Inequality Findings

In a number of European Countries as well as in some Common Law Countries, it has been the practice of banks to offer credit to married persons on the condition that the spouse stands surety for the

\textsuperscript{188} For an overview, see Legal Issues in Gender Equality 1/2007, 6. See also supra note 1.

\textsuperscript{189} This is the case in Romania, see Legal Issues in Gender Equality 1/2007, and supra note 187, p. 47.

\textsuperscript{190} This is the case in Belgium, see Legal Issues in Gender Equality 1/2007, supra note 187, p. 14.

\textsuperscript{191} See EUROPEAN COMMISSION, Sexual harassment, supra note 178, p. iv.

\textsuperscript{192} It is the Senatus Consultum Veilleianum. See, for instance, NIKOLAUS BENKE, Why Should the Law Protect Roman Women? Some Remarks on the Senatus Consultum Velleianum (ca. 50 A.D.), in: K. Berresen et al. (ed.), Gender and Religion in Europe, European Studies 2001, pp. 41-56.

\textsuperscript{193} See Art. 177 para. 3 of the Swiss Civil Code (ZGB), revised in 1984 and in force in 1988.
credit. Effectively, this has meant that the wife stood surety for her husband. In view of the prevalence of the traditional role model, it also meant that the surety was often given by a woman who was neither involved in the decision to borrow the money in the first place, nor was she involved in the decision on how the borrowed money was spent. When – as it sometimes happened – the husband defaulted on the payment, the banks required payment by the wife. Sometimes, the wife had already separated from her husband. Nevertheless, the contractual obligation to stand surety remained. As a consequence, these women found themselves in a situation of life-long debt.

A-2. Judicial Reaction

In an initial phase, some courts – notably in Germany, referred to the concepts of freedom of contract and equality between spouses. And they held that the wives were bound by their promise. It was argued that marriage is a partnership among equals. Therefore, the creditor could rightly assume that a husband would not exercise any kind of undue influence on his wife in order for her to sign the surety contract. Today, there are rulings in the UK, in Germany, in Austria and in Switzerland which limit the possibilities of the credit institutions [168] to require surety by family members. [197]

A-3. Discussion

Women who stand surety for their husbands receive some protection by the courts in a number of European countries. In practical terms, this is a success. From a gender perspective, however, the case law on surety contracts shows that the contractual reality of women is not fully understood, or, if it is understood, it is conveniently ignored.

One – purely anecdotic – gender aspect of the case law is that the highest German Civil Court (BGH) made a quantum leap toward better protection of the surety person when the judges were confronted, for the first time, with the very exceptional case where it was not the wife who had stood surety for her husband, but the husband who had signed a surety contract in favor of his wife. One might also add that the panel who rendered that particular judgement consisted of men only. [198]

On a more serious note, the German case law shows that the courts have not continued to use the initial argument about marriage as a partnership between equals where undue pressure could not possibly exist. On the contrary: The courts implicitly admit in the surety cases that marriage – which is an emotional and sexual relationship between a man and a woman – gives rise to a heightened risk of undue influence. However, the power question is not openly addressed. Neither is the fact that the power division runs along gender lines. Instead, the courts simply held that it would be unreasonable for a person to enter a contract that did not bear the prospect of an economic advantage. Therefore, one could assume that this person acted under duress. By [169] simply assuming that the wife was in a situation of constraint, the courts did not have to address its source. Accordingly, they were able to avoid the issue male dominance and female subordination in the context of marriage. In this sense,
the case law on surety contracts shows that, even when faced with male dominance, this reality is only taken into account implicitly and does not become part of the public legal reasoning of the courts.

A similar phenomenon can be observed in the English case law on surety contracts. Here, the landmark case of Royal Bank of Scotland v. Etridge\textsuperscript{200} involved eight married couples where the husbands had exercised undue influence on their wives. In their deliberations, the Law Lords openly used the term "husband" for the undue influencer and the term "wife" for the victim of the undue influence. However, when it came to the core of the ruling, the terms "husband" and "wife" were rejected in favor of more general terms.\textsuperscript{201}

Furthermore, the case law also highlights the view of the judiciary of what is considered reasonable behaviour. For the courts, a reasonable person will not enter a contract if there is no economic advantage. This standard of reasonableness is gendered: Its point of reference is the REMM – the rational, economic, maximising man. The "man" in this formula is not just a linguistic relict of a time where the term was said to include both sexes. On the contrary: Rational, economic and maximising behaviour is usually associated with and socially expected of men. In our society, men are typically seen as self-interested, autonomous, competitive individuals. Such an individual would indeed refrain from entering a contract when he could not expect to gain from it. It is different if the point of reference is caring, selfless individual. Such an individual might well enter a contract which is not advantageous if, in turn, it is to the advantage of a person to whom [170] that individual is emotionally connected. Cooperation, connection, community and care are values traditionally associated with and socially expected of women.\textsuperscript{202} The courts in the surety contracts did, however, not employ the caring individual as a point of reference. Instead, they used a legal standard which corresponds to the prevalent behaviour of men and thereby equated reasonableness with typical male behaviour. In other words, for men, social and legal expectations correspond. For women, they do not.\textsuperscript{203}

In the event of surety contracts between spouses, the courts could have chosen a different reasoning. European marriage law is based on the principle of mutual cooperation between the spouses – the same is true for Japanese marriage law.\textsuperscript{204} To address the problem of surety contracts entered by one spouse for another, it would have been enough to recognize that the cooperation principle of marriage law has an impact on contract law. Third parties such as credit institutions are bound by the cooperation principle insofar as they are not allowed to take advantage of the solidarity between the spouses by demanding that one spouse stand surety for the other without any substantive or procedural safeguards. In other words, one could without much difficulty have used marriage law as a way to open contract law to values traditionally associated with women.

The courts did not chose that line of argument is not wholly surprising. The fact that law privileges male behaviour by making it the legally expected behaviour has long been voiced a criticism by feminist legal scholars.\textsuperscript{205} The example of the surety contracts shows how deeply rooted this male bias

\textsuperscript{200} See, supra note 196.

\textsuperscript{201} See Royal Bank of Scotland v. Etridge (No. 2), supra note 196, p. 456: "It is important that a wife (or anyone in a like position) should not charge her interest in the matrimonial home to secure the borrowing of her husband (or anyone in a like position) without fully understanding the nature and effect of the proposed transaction and that the decision is hers, to agree or not to agree." For a feminist analysis of the English case law, see ROSEMARY AUCHMUTY, The Rhetoric of Equality and the Problem of Heterosexuality, in: Linda Mulcahy/Sally Wheeler (eds.), Feminist Perspectives on Contract Law (2005), pp. 52-74.

\textsuperscript{202} For a fundamental work on the gender difference approach, see CAROL GILLIGAN, In a Different Voice. Psychological Theory and Women's Development (2. ed. 1993).


\textsuperscript{204} Switzerland: 159 Swiss Civil Code (ZGB); Germany: § 1355 German Civil Code (BGB). Japan: Art. 24 of the Constitution and Art. 752 of the Japanese Civil Code.

is; even when a more gender sensitive reasoning is possible, the courts will revert to typically "masculine" ways of defining contractual relationships.

B. Example: Contractual Responsibility

The unequal value that the legal order accords to typically male and typically female is not limited to single contracts such as the surety law. One can look at the general part of the law of obligations, more precisely, at the law governing contractual responsibility, to see the male bias.

Contractual responsibility becomes relevant in the event of damage. By the term "damage", one understands an involuntary economic loss that a person suffers as a result of a certain event – in our case: a breach of contract. The law distinguishes between pecuniary and non-pecuniary loss. In European private law, it is a firm principle pecuniary loss usually has to be fully compensated. But how about the disappointment that the other party knowingly breached the contract? This would fall under the category of non-pecuniary loss. Here, the compensation systems in Europe differ. In most cases, however, non-pecuniary loss is not compensated as fully as pecuniary loss. Swiss and German law, for instance, require a severe infringement of one's personal rights. Furthermore, damages are only due if the injury has not been compensated in any other way. English law is more generous; yet even under English law, damages are not awarded for disappointment unless the contract specifically meant to provide enjoyment or to give peace of mind. Japanese law seems to be on the generous side for non-pecuniary loss also.

As an example, let us assume that an art dealer sells a painting to a customer. Before that customer retrieves the painting, another customer sees the painting and offers a substantially higher price. The art dealer hands over the painting to the second customer. He will be liable to the first customer for non-performance. But one has to ask what that liability entails: Often, the first customer suffers no economic damage. And the mere disappointment about the fact that the art dealer knowingly breached the contract will not automatically be compensated.

B-1. Inequality Findings

If one looks at the law of contractual responsibility and asks which behaviour is expected from its participants and, as a consequence, which behaviour is protected, one can conclude the following: Parties to a contract are not expected to fully respect the feelings and the emotional hopes of the other party. Contract is a matter-of-fact exchange and not a social relationship. It assumes adversarial positions. Contractual responsibility means primarily that one may not cause pecuniary damage to each other. As long as there is no such damage, the disappointment felt by the breach of contract does not, as a matter of principle, give a right to compensation. In other words, contract law reinforces an economic system which is designed to maximise profits. It is designed for the rational, economic, maximising man.

In this sense, the law of contractual responsibility embodies male values: By taking as a point of reference a self-interested, autonomous contracting party, it privileges typically male behaviour. By focusing on economic issues as the central point in contractual responsibility, it is geared to the typically male responsibility to provide the economic support of the family. It is the male social reality

206 As an example, § 416 I of the Japanese Civil Code states that in the event of a breach of contract, the debtor has to compensate all damages which were due to occur in the regular course of events.

207 See Art. 49 of the Swiss Civil Code (ZGB). In Germany, the courts have elaborated these principles with regard to § 826 of the German Civil Code (BGB), see HELMUT HEINRICHS, in: Palandt, Bürgerliches Gesetzbuch, 65. ed. 2006, note 8 Einführung vor § 145 BGB.


209 I thank my colleague, Prof. Yuko Nishitani, for helpful comments on this issue.

210 For this criticism, see also LINDA MULCAHY, The Limitations of Love and Altruism – Feminist Perspectives on Contract Law, in Linda Mulcahy/Sally Wheeler (eds.), supra note 200, pp. 1-19, at 4.
which provides the basis for the legal framework. The typically female responsibility of caring for others does not receive an equal recognition in law.

B-2. Discussion

For men, the compensation system of contract law corresponds to the social expectations. For women, there is a contradiction between the social expectation of relational behaviour and the legal exclusion of [173] those same values. The legal exclusion has consequences for the appreciation of one's feelings and one's behaviour. If it is clear that the legal order does not sanction unrelated behaviour, then the disappointment caused by such behaviour will be perceived as weakness. The goal will then be to overcome the sensation of injury caused by unrelated behaviour. In this sense, contract law tells women that their socially expected reaction is not within the norm – is not "normal".

IV. Conclusions

In Japan, women's rights took a quantum leap with the Constitution of 1946 which prescribed gender equality in all vital areas such as voting, contracts, and family law. In continental Europe, women's rights were a step-by-step affair. Contract law was one of the first areas where formal gender equality was established. Women were granted the right to contract long before they were allowed to vote and even longer before they achieved formal equality in family law. In spite of women's longstanding participation in contractual dealings, contract law remains gendered and discriminates women. Obvious examples are the employment contract and certain contracts relating to goods and services. In these areas of the law, the European Union has enacted a legal framework to remedy the discrimination which women suffer. Whether the European Union will continue its effort to fight discrimination remains to be seen. One problem is that this type of legal action requires the unanimous vote of the Member States. The recent enlargement of the EU from 15 to 27 countries from Central and Eastern Europe and the Mediterranean will make it much more difficult to achieve a consensus on equality issues. In fact, whereas the accession process served to increase the awareness of gender equality issues, one can now observe a loss of momentum and even a backlash. In almost all new Member States the gender equality laws are poorly implemented. There is a lack of awareness of the laws and there are negative attitudes toward equality issues. Much will depend on the political pressure by the "old" Member States, the European Court of Justice and the women who use European law to fight for their right to equal treatment.

Apart from these traditional areas of gender inequality in contract law, another inequality is also apparent: By assuming that contracting parties are self-interested, autonomous and competitive individuals, it uses standards which correspond to behaviour which is socially expected of men. For men, social and legal expectations correspond. For women, they do not. Society expects women to be caring and relational. Contract law expects them to be self-interested and autonomous. As long as this contradiction remains, gender equality in contract law remains an illusion.


212 In Switzerland, for instance, women were granted the authority to contract in 1881. They had to wait until 1973 for the right to vote in federal matters – and in some cantons until 1991 to vote in cantonal matters. The family code, which held that the husband is the head of the family, was replaced by a more egalitarian version in 1984. Similar development took place in the neighboring countries. By way of example: In Austria, women achieved legal capacity in 1811, the right to vote in 1918, and equality in family law in 1976. In Japan, it seems that the Constitution of 1947 established gender equality in all these areas at the same time.

213 New Member States in 2004 were: Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia. Bulgaria und Romania joined in 2007.