

Strategic Action in Law Making and the Moral-Ethical Dimensions of Labour Agreements

The present research will begin by describing shortly the basic elements of the Finnish collective agreement system. A special feature characterizes the Finnish system: the incomes policy agreement model. Settlements are negotiated on a tripartite basis (employers' confederations, employees' confederations and the Government). Finnish Governments have supported incomes policy agreements by promising, e.g. reforms in labour law, tax law and/or social policy. There has also been a tendency to favour low-income employees, as the model has sought to promote social solidarity. At any rate, collective agreements are always negotiated and settled at branch level, even where an incomes policy agreement or centralised labour market solution were available. The definition of corporatism will be examined in light of these issues.

The pragmatic discourses and the procedurally regulated bargaining of Habermas' ideal model of the democratic law-making process are presented as examples of the strategic dimension of action of the Government's and the labour market organisations' joint norm-setting activity.

The practises of Ewald's concept of social law provide a second example of the strategic action as regards the incomes policy agreement model.

The ethical-political discourses and moral discourses provide examples of the ethical and moral dimensions of Habermas' ideal model of democratic law-making process. Some ideas of Rawls are also discussed in the context of the incomes policy agreement model. As far as Rawls is concerned, the research focuses especially on the concept of equilibrium.

The key issue in the present research is: to what extent can the results of strategic action in law-making in corporatism and in corporatist labour agreements procedure satisfy the moral and ethical dimensions? What kind of goals does this procedure have?

The Government negotiates with the parties to the labour market and normally tries, if possible, to reach an incomes policy agreement. Of course, sometimes one or more of the parties to the tripartite system has been reluctant to take part due to, for example, the state's political situation, the country's weak economy or ideological reasons.

An incomes policy agreement has the legal status of a "gentleman's agreement" or "an informal agreement". The Government (State) does not sign the settlement as the labour market parties do. Actually, it

means that the incomes policy agreement as a whole is not an institutional fact as a collective agreement is. At any rate, the incomes policy agreement strikes some kind of social equilibrium at least in the labour market, even if the contract is not legally binding. The concept of social equilibrium in the labour market is described in this connection.

The present study will make, as an excursus, some attempts to illustrate the issues through logic and semiotics.

The general agreements concluded at national intersectoral level between employees' and employers' confederations will not be discussed in this research. General agreements have been concluded for example in questions "concerning the protection of the employees against dismissal". However, if the general agreements are agreed to be a part of the collective agreement at branch level, then this implementation has legal effects: the terms of the general agreement belonging to the collective agreement are legally binding according to the Collective Agreements Act and, consequently, the general agreements are conceptually included in this study.

The research focuses as well on the concept of legislator: how to define the legislator in corporatism, where there are several "lawgivers"? In this respect, some ideas of Aarnio, Van Hoecke and Wintgens are introduced.

The possibility of labour market organisations to conclude legally binding collective agreements is a form of delegation. The research concentrates on the notion of contractual balance drawn by the collective agreements that are legally binding under law. It is necessary to define the concept of contractual balance and then to analyse what kind of factors could have a negative influence on the settled contractual balance. The collective agreement is also analysed briefly from the point of view of the concept of institutional fact. To gain more concreteness, the study will focus on a certain industrial branch (paper industry) in relation to the issue of contractual balance. For more clarity, the study examines real cases dealing with the borderline between collective agreements and competition law. This is why the research provides some details about the procedural side of the legal cases. The research utilizes the ideas of Aristotle, Ewald, Nagla, Pöyhönen and Siltala with respect to the theme.

The Labour Court (LC), which is an essential part of the Finnish labour market system is, according to law, composed of a president and two neutral members (they are supposed not to represent the employees' and employers' interests), four employers' members and four employees' members. There are four members that are public officials. The employers' and employees' representatives are appointed,

according to law, "from among candidates recommended by the most representative confederations of employers and employees, respectively."

In corporatism (the tripartite model) an organisation that has representatives at the negotiation table discussing an incomes policy agreement or other labour market agreements is also represented in the Labour Court. It is therefore possible that there is some contradiction among the representatives of labour market organisations: normally one has to follow goal rationality at the negotiation table and rule rationality when sitting in Court.

In this context, the present study will analyse cases that had an influence on the contractual balance in the paper industry during the contract periods from 1993 till 2000. In this task, the research resorts to several methods of legal theory. However, before such an analysis, the research concentrates on (1) the doctrine of sources of law and (2) the standards by which the contradictions between legal norms are to be solved.

As regards the doctrine of sources of law, the research describes the concept of travaux préparatoires in general. As far as standards are concerned, the study concentrates on *lex specialis derogat legi generali* (a particular norm prevails over a general norm of the same hierarchical order). These general remarks are needed before the detailed analyses. In these analyses the doctrine of sources of law is described as it was before Finland became a member of EU. Siltala has described this kind of doctrine of sources of law as static.

Firstly, the *ex post* point of view is presented in connection with the decisions. Some syllogisms are used in trying to clarify the structure of the decisions. Secondly, the research will analyse the *ex ante* and *ex post* point of view through a procedural risk analysis of the cases. This analysis is based on methods for analysing (legal) and contractual risks. In this connection, the research reflects on Dworkin's and Van Hoëcke's theories, as well.

Finland has been a member of the European Union since 1995 and of the European Council since 1990. The research describes the change from the linear model to the non-linear model both between and within legal systems. In this connection, the concepts of "strange loops" and "tangled hierarchy" are analysed, and some remarks are made as regards circularity, and the harmonisation of EC legislation and its meaning, as examples of the interplay between legal orders.

With respect to the EU membership, "Jack-in-the-Box- effects" or "systemic surprises" may arise between national legal orders on the one

hand, and the legal order of the European Communities, on the other hand. The ECJ has given plenty of new case law dealing with the borderline between labour law and competition law: the ECJ has held that collective agreements are immune to competition law. The ECJ has taken an entirely opposite attitude compared to the decision of the Finnish Supreme Administrative Court. However, the decision of the Finnish Court was based on laws and settlements before Finland joined the European Union. The new ECJ cases are introduced and the reasons and argumentations for the decisions are analysed. At any rate, it may well be that there exists a contradiction between the decision of the Finnish Court and the prevailing doctrine of the case law of the ECJ.

The doctrine of sources of law is used in the form that it has taken, in the present author's opinion, after Finland joined the EU. Siltala has argued that the new doctrine of sources of law (institutional doctrine of law named by Siltala) is dynamic by nature.