

Free law-finding (causes and consequences)

Abstract

This dissertation deals with the phenomenon of free law-finding and analyses its causes and consequences. The introduction outlines the aim of the dissertation, reasons for choosing this topic, the current state of research, especially in the Czech-Slovak legal environment, methodology and also briefly the issue of causality in general. The main part of the dissertation is divided in two parts. The first part contains description and analysis of the German Free Law Movement (*Freirechtsschule*) from the turn of the 19th and 20th centuries led by the German legal scholar Hermann Kantorowicz and his manifesto *The Battle for Legal Science (Der Kampf um die Rechtswissenschaft)*, which formed the theoretical basis of the Free Law Movement and, thus, also of this dissertation. In this part, the lives and works of the main representatives of the Free Law Movement are discussed (Hermann Kantorowicz, Ernst Fuchs, Eugen Ehrlich), but also some others are mentioned including Gustav Radbruch. At the end of the first part, the analysis of the free law in the theory of the Free Law Movement is provided, as well as of the causes and consequences which have led to the emergence and existence of the Free Law Movement; finally, the analysis of the consequences of the Free Law Movement is provided and they are divided into negative one (failure) and positive ones (contributions). The second part is devoted to the free law-finding at present, both in terms of legal theory and of legal practice, especially of the Constitutional Court of the Czech Republic in comparison with some other courts from the Czech Republic, Slovak Republic, Federal Republic of Germany European Court of Human Rights. Step by step, various probable manifestations of the free law-finding are examined such as gaps in positive law, *contra-legem* judiciary in connection with the problem of legal formalism, decision-making based on legal principles and values, filling of the content of the indefinite legal terms, or the problem of the application of the constitutional conventions as a manifestation of the free law-finding and at the same time of the normative force of the factual. At the end of the examination of each of these individual manifestation of the free law-finding, attention is paid to their relation to the free law-finding on the theoretical basis brought by the Free Law Movement. The end of the second part consists of the analysis of the causes and consequences of the free law-finding at present, the conclusion, which follows, provides with a summary of the results of the dissertation.

Key words: free law movement; gaps in law; legal principles