The limits between interpretation and judicial development of the law

The thesis deals with the issue of the limits between interpretation and the judicial development of the law, especially in relation to the limits that the interpreter must respect when considering whether to proceed to the (judicial) development of the law in a specific case, and further in relation to the identification of risks that in connection with this procedure may arise. The thesis focuses mainly on questions related to the limits of the development of law. The reason is the following: while questions related to the interpretation of law constantly attract the attention of legal theorists, much fewer works are devoted to the questions related to (judicial) development of law. The aim of this thesis is thus (i) to show where the limits of the interpretation of the legal text end, (ii) to identify for which specific cases these limits will also represent the final boundary for their solution, and (iii) if this is not the case, to finally define further limitations and conditions of procedure for those cases where the (judicial) development of the law may be considered. The subject-matter of the research in this thesis is thus to find the limits between the cases when the interpreter *interprets*, to distinguish them from the cases when the interpreter *develops* the law and *is entitled to do so*, and from the cases when the interpreter *develops* the law without *being entitled to do so*, i.e., in fact does not develop the law, but unlawfully creates the law.

The topic of the thesis is not only legally theoretical, but is also highly practical, as adherence to or deviation from the methodological procedure can have a direct link to specific results of the processes of application of the law (i.e., the pronouncement of a specific judicial or administrative decision). The thesis respects the importance of this fact, and therefore, using examples from a wide range of court decisions (from the Czech Republic as well as abroad), it analyses the specific practices of the courts and compares them with the theoretical standards of legal doctrine.

As mentioned above, the specific aspect of this thesis consists in the fact that its main area of interest is analysis of certain issues related to the (judicial) development of law (its means, method of use, and limitations), which in the Czech legal doctrine receive less attention than issues related to the interpretation of legal texts. Another specific aspect of this thesis consists in the use of legal professional literature written in French, as most of the works of Czech authors were inspired by the literature written in German or Polish.

As for the structure of the text, the thesis consists of an introduction, seven chapters dedicated to specific questions, and a conclusion.

The first chapter of the thesis defines the necessary limitations that result from the very nature of the processes of interpretation and (judicial) development of the law. Both legal theoreticians as well as the authorities which apply the law should be approaching these processes being aware of these limitations. This part of the thesis deals with the findings of communication theory and applies them to the process of creating legal norms and their interpretation.

The second part of this thesis is then specifically devoted to the identification of the beginning and the end of the interpretation process and, in particular, the determination of criteria for identifying the boundary between interpretation of the legal text and the (judicial) development of the law, including reflections on the importance of successful identification of this boundary. The importance of this boundary and its examination is not only theoretical, but is also highly relevant for legal practice. While the interpretation of legal regulations is in practice always allowed, the judicial development of the law is prohibited in certain cases and would represent an impermissible (sometimes even unconstitutional) interference with the principle of legal certainty of the subjects of legal norms.

In the third part of this thesis, the reader can find inspiring insights from French and Belgian jurisprudence on the issues of interpretation and judicial development of law. These theoretical findings are supplemented by description of historical legal developments from the Great French Revolution to the present day. In this historical development, the struggle between the written text and the purpose of the law, and the necessarily existing tension between the need for legal certainty and the need to judicially develop the law can be illustrated very well.

The fourth part of the thesis is devoted to two related topics. Firstly, it deals with the identification and description of the individual phases of the decision-making process, including the phases where the judges consider the use (and possibly also use) the means for judicial development the law. The text also describes the potential decision variants at specific moments. This very moment is also related to the second topic discussed in this part of the thesis, namely the justification of the development of law in the conditions of a continental type of legal culture, i.e., what arguments can be used to justify the judicial development of law.

The fifth part of the thesis is entirely focused on analogy. Specifically, it includes the definition of analogy as a methodological procedure and consideration of the manner of its use (whether it is an obligation or a right of the interpreter). This part also contains an extensive theoretical and practical analysis related to the determination of areas of the law in which the

use of analogy is inadmissible. This is followed by an analysis of other restrictions related to the use of analogy in specific cases, i.e., specifically the issue of the existence of gaps in the law, their categorization and determination, for which of them one of the ways of completing the law can be applied, and for which not.

The sixth part of the thesis deals with teleological reduction, which represents the second main method through which law can be judicially developed in the conditions of a continental type of legal culture.

The last (seventh) part of the thesis contains a brief reflection on whether other methodological means (i.e., other legal analogy and teleological reduction), which are sometimes discussed in connection with the judicial development of law, may really represent independent means of judicial development of law or not.

Finally, the conclusion presents a synthesis of the most significant findings and tries to answer the question of whether the limits between interpretation and judicial development of the law are drawn clearly or not, and in which typified situations its identification may cause problems.

Key words

Interpretation of law, judicial development of law, analogy