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THE ROLE OF THE JUDGE IN INTERPRETING LAW

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INTRODUCTION

Topicality and scientific novelty of the subject. Article 109 of the Constitution of the Republic of Lithuania, which was adopted by Lithuanian Nation in the referendum on 25 October 1992, claims that when considering cases, judges shall obey only the law. Even a wide interpretation of the concept of law would make it difficult to claim that court is an institution establishing and not applying law, though the assertion that the judge is bound by law is accepted as an axiom. The problem arises because of the fact that in every particular case it is the judge himself who defines what law is and what it means. When considering a particular litigation, judges act as official interpreters of rules of law whose interpretation decides the outcome of the litigation. Furthermore, the interpretation of law carried out by judges is special because of the fact that it can be binding not only for litigants but also for society through the formative court practice. Therefore, creating a normative text, legislature delegates the right to judges to present a binding interpretation of that text.

According to this, it is undisputed that the interpretation of law presented by judges gains another meaning as well as it opens space to an interpretative game and brings up a lot of questions related to the judges‘ interpretation of law: what should judges be like in their everyday work considering cases and interpreting rules of law that have an undefined content – should they be active or passive, looking for rationality in a statute or should they apply the rules of law without considering them? This problem can be formulated as a question: how should statutory law be applied by judges – in a mechanical or creative way? The interpretation of law is unavoidable when judges consider cases, however, the borderline between interpretation and creation is sometimes very slim, so it is necessary to investigate when interpretation of law becomes creation, how to reduce the number of such cases and to set limits.

It has also been mentioned that court must administer justice what also brings up some questions about the content of the function carried out by judges: does the administration of justice only mean the application of rules of law created by legislature for the particular case, or should it mean something more like the search and protection of law principles and values, realisation of goals of legal regulation and etc. Thus judges when interpreting the content of the applied rules of law are confronted with

the necessity to clarify not only the meaning of the rule of law itself but also answer other related questions, for example, Is the meaning of the rule of law fixed at the moment of its creation or does it change throughout the time; how much of the conception of the rule of law does the interpretation of the judge make; how much do the intentions of legislature make and what are their proportions; what is the relationship between the particular problem being solved and a broader goal of legislature.

The role of judges in the trial and partly in society depends on the answers to those questions. Considering that, this work will present the analysis of one of the issues related to the role of judges – the relationship between judges and law, looking from a perspective of discovery/creation of law. It is topical as it relates to the position of judges to make influence on the content of rules of law when interpreting it, what reveals one of the aspects defining the relationship between judges and legislature: is the court only the „discoverer" and applier of the will of legislature, or its partner contributing to the formation of law content, or a guardian and warrantor of law-protected values?

The issue of the research on the role of judges as interpreters of statutory law, looking from the perspective of discovery/creation of law, is not new in the jurisprudence of Lithuania. Quite a lot of aspects of this issue have been researched by analysing questions related to the interpretation of law in general (scientific publications and studies by T. Berkmanas, K. Jankauskas, G. Lastauskienė, V. Mikelėnas, R. Šimašius, A. Vaišvila, V. Vasiliauskas and others), the extent of judges' discretion (scientific publications by J. Gumbis), sources of law (scientific publications by G. Lastauskienė, E. Kūris, V. Nekrošius, V. Vasiliauskas, R. Jokubauskas) as well as by discussing different concepts of law (studies by R. Bakševičienė, E. Kūris, G. Lastauskienė, K. Jankauskas, V. Mikelėnas, A. Vaišvila). The most researched issues have been main features of the approach that does not accept judges' power of interpreting and creating law at the same time as well as related problems; citicism against this approach has also been presented, and alternative models that accept judges' power of creating law and providing judges with the right to appeal not only to the rules of law established by legislature, but also principles of law and law-protected values have been presented as the methods of solving insufficiency problems of a positivistic model that does not accept judges' power to interpret rules of law in a creative way.

On the other hand, there is a tendency in Lithuania that more and more often a judge is being attributed not only with the function of the applier of law but also with the role of a creative interpreter, moreover, the necessity of increased activeness of courts and development of interpretation freedom are beeing emphasized. There are also authors who do not assent to the approach that judges can be not only interpreters of rules of law but also to contribute to its creation.

Conditionally, all researches related to the topic that have been carried out in Lithuania can be devided in two groups - one group of researches is related to general issues of interpreting law, the other group is related to the issues of judges practice, their relationship with legislature in the process of revealing the content of law, with the juridical power of a judge-made law and etc. This work aims to generalize fragmentary researches focusing on specific issues of interpreting law and to link them with general approaches to judges as interpreters of law as well as to focus on the relationship between judges and law, looking from the perspective of discovery/creation of law and herewith revealing a broader conception of judges‘ role in this aspect, in the relation with legislature.

One of the studies that is closest to the above topic can be the doctoral thesis by V. Vasiliauskas, 2004 „The importance of a precedent in the Romanic – Germanic juridical system“ and related publications as they aimed to reason judges‘ right not only to interpret but also to create law in particular cases. This right of the judge to create law is basically built on the research of the importance and power of a court precedent as law source; the issue that has been analysed is whether a court precedent might be considered a law source and a new legal rule or is it only an eligible behaviour model formulated by the judge. In addition, the author has accepted judges‘ right to create law only in that case when a gap in statutory law occurs, claiming that at least episodically, in particular cases (let us call them exceptional), judges create law, i.e. create new rules of law through their own decisions (that is precedent) that fill the gaps in the law system. Thus the power of judges to interpret or create law is revealed through the power of a precedent as a particular law source.

Meanwhile, this work does not make a research of a precedent and its power but presents the analysis of different approaches to the role of judges, looking from a perspective of discovery/creation of law (see „the object of the research“). In this case,

the power of a court precedent is not topical as the behaviour of a particular judge is being analysed when considering cases and facing an ambiguous legal rule. In that case, when that particular legal rule has already been clarified by the superior court, the court can simply make use (or not) of the authoritative opinion of the superior court on the interpretation and content of the legal rule considering the factual circumstances of the case. In this regard, when decision that explains a particular legal rule has already been passed, a judicial precedent is considered as one of the law sources available to the judge; however, this does not reveal the role of judges in interpreting law, looking from the perspective of the actual discovery/creation of law, what is eseential to this work.

The objective of the research is to analyse and compare different models of the role of judges in interpreting law, looking from the perspective of discovery/creation of law and to prove following hypotheses such as 1) the role of judges in interpreting law cannot be precisely defined as it depends on the specific concept of law in every case; 2) the role of judges in interpreting law depends on methods and ways for interpreting law, that are used by the in a particular case; 3) the creation of law in interpreting it is inavoidable for the judge.

To implement this objective, the following **tasks** are to be undertaken:

1. To analyse and evaluate the positivistic model of the role of the judge in interpreting law according to which judges are considered to be solely interpreters of the law established by legislature, to highlight the insufficiency of this model and reasons for that.
2. To analyse and evaluate approaches that are alternative to the positivistic model of the role of the judge in interpreting law by focusing on the means that have been offered to eliminate the insufficiency of the positivistic model of the role of the judge in interpreting law.

The objective of the research is reflected in the topic of the doctoral thesis so it is essential to define the concepts of the title at first.

Judge is perceived as a representative of judicial authority, an official considering particular cases. At this thesis the terms „judge“ and „court“ are used as synonyms.

Role in this thesis is taken in its general meaning, i.e. as the importance and impact of participation.

Law is likely to be the most problematic term. The issue of the definition of law is very topical in the theory of law as the concept of the definition of law is like a quintessence of the whole law system, like the issue of the inner integrity, consciousness, rationality, modernity and eventually, the social efficiency of that system. In this thesis it is very important as it deals with the activity and the role of courts in interpreting law.

Thus there is a natural question what the object of judges‘ interpretation is: is it law as a whole or only some aspects of a legal practice? Are they statutes? Court decisions? Legal texts? Or is it a social practice of law as a whole including the history of the creation of law, its goals etc.

It is obvious that the answer to this question essentially depends on how law is interpreted. Therefore, when analysing the position of the judge in the process of interpreting and creating the law, the same problems occur as when trying to answer the eternal question of Philosopy of Law what law is. There isn‘t a single answer to this question. Nevertheless, distinguishing and structuring different concepts of law in order to understand the functions of judges in interpreting and applying the law remains topical as it can help to have a better perception of possible alternative models of the role of the judge and to highlight the merits and demerits of each position.

Dissasociating from this complicated issue caused by the absence of one concept of law, the starting point for this thesis is considered to be the conception of law as a system of legal rules established by legislature. Such perception of law is considered to be a starting point, taking into account that this concept of law is traditionally accepted when speaking about the system of rules applied by judges. However, this thesis does not attach to this concept of law and when analysing the role of the judge in interpreting law and considering other possible aspects of this activity, it also aims to reveal how judges‘ powers and means of interpretation depend on the concept of law itself which they can use to determine the content of an ambiguous legal rule and to perform other court functions, e.g. to guarantee the protection of human rights.

Therefore, later in the thesis, there is a transition to the analysis of the insufficiency of the above mentioned concept of law as a system of legal rules established by legislature in judges‘ work. In regard to the fact that jurisprudence has not yet come to the unambiguous concept of law (what is not necessary as it will debase the Philosophy of Law itself), and, as far as it is essential for the subject of research, the

research deals separately with different concepts of law and the particularity of the role of judge in interpreting law. Therefore, analysing the positivistic model of the role of the judge in interpreting law, law is perceived as a system of rules of law established and consolidated by legislature. In part 2 of the thesis, different concepts of law and the concept of the role of the judge are revealed by analysing approaches that are alternative to the positivistic model of the role of the judge in interpreting law.

When defining the concept of *interpretation* in general and *interpretation of law* in set terms, it should be noted, that the word „interpretation“ can be perceived as 1) explanation of the meaning of something like a text, language or fact; 2) as the whole of the meanings, that is given to the elements of any formalized theory in one or another way. Likewise, in scientific juristic sources the interpretation of law is mostly perceived in some aspects:

Firstly, in the broad sense, interpretation of law is perceived as a cognitive, creating activity, the results of which are expressed in statutes or in legal studies, in the formative doctrine of law. That is the research of law as a particular social phenomenon, its nature and origin.

Secondly, the interpretation of law in the narrower sense is perceived as a process of thinking when subjects implementing law instructions explain the meaning of legal provisions, the contents of terms, permissions or orders in legal acts, their legal power and operating margins for themselves, and following the outcomes of such an explanation rationally, they direct their behaviour in a particular way. In this case, the interpretation of law is defined as the determination of the meaning of written legal text that is necessary for legislation, systematization and application of legal rules. Determination of what particular rule of what particular statute regulates the relations of a certain case, as the court, in order to find a particular rule, has to clarify its origin and place in the system of the law.

Thirdly, in the most narrow sense, the interpretation of law is perceived as the determination of the meaning of ambiguous, contradictory rules of law. When defining the interpretation of law in this sense, it is often claimed that it is the actual determination of the meaning or aim of the legal rules when applying law, i.e. when the purpose is to apply a particular statute or legal rule to the specific situation. It is claimed that the interpretation of law, in fact, is the search for the one correct answer from some

alternatives, and the interpretation of law and its outcomes are established in a certain public document, e.g. court decision.

In this thesis, interpretation of law is perceived in its second and third meaning taking into account the powers of particular model attributed to judges when interpreting law. Therefore, the interpretation of legal rules perceived as a rational activity when giving the meaning to legal text is the primary task of the judge as well as an important tool for considering a certain case. When interpreting a legal rule, a legal meaning of the text is „withdrawn“ from the semantic meaning of the text, and the interpreter replaces „static“ law with „dynamic“ law by transforming a linguistic text into a legal rule.

After defining the terms, it is getting clear that this work deals with the impact of judges as public officer who consider specific cases and the importance of their activity when defining the content of an ambigue legal rule, looking at this process of determination of the content of the legal rule from the perspective of discovery / creaton of law. So we can formulate the definition of the object of the research as well.

The object of the research involves authorisation (discretion) of the judge to affect its content when interpreting law. The impact of the judge on the content of law has been researched by highlighting the relation of the judge and the law, looking from the perspective of the discovering of law. Conditionally, three different approaches to the role of the judge in interpreting and applying law might be distinguished, looking from the perspective of the discovery/creation of law. I.e. for convenience, all scientific theories related to the tasks of judges and their role from the above mentioned point of view may be conditionally devided into three groups: 1) the Classical approach; 2) the Realistic approach; 3) the Socio-Economic approach. These groups may be called the model of limited decision making of judges, the model of free decision making of judges and the model of rational decision making of courts. The main criterion for the distinguishing of the above mentioned theory groups is the approach to the fact whether judges create law when considering cases, are they only appliers of legal rules established by legislature or do they occupy a middle position between theses extremes. So, in fact, all approaches to the relations of judges and law may be arranged in a row between the two extremes: the Classical approach on one side that does not accept judges‘ power to create law, and the Realistic approach, that absolutes the role of the

judge and identifies the law with the court activities. Of course, there are quite a lot of theories between these two extreme poles seeking for the middle position. Given the fact that it is impossible to discuss or even mention them all, the main features of certain positions will be discussed, and their advantages and disadvantages will be highlighted leaving the further question of distinguishing theories and approaches open.

When defining the object of the research it is essential to point up what has not been researched in this thesis.

Firstly, it does not aim to deflect all the possible approaches to the judges‘ work in the process of interpreting law as such approaches as well as the concepts of law are not complete.

Secondly, taking into account the object of the thesis and present researches that fragmentary reveal certain practical problems of interpreting law in courts as well as the fact that the decision of every particular case is related to the actual legal facts, it purposely aims to present only theoretical and general analysis of the role of the judge in interpreting law. Therefore, neither the case-law nor legal regulations of particular countries or interpretations of particular legal rules presented by courts have been analysed.

Thirdly, as it has already been mentioned, this work does not aim to analyse the topic of sources of law as well as the questions of power and importance of judicial precedents.

Fourthly, it should also be stated that the issue of court institutions where law is interpreted is not essential to the topic of this work. Each judge considering a specific case has the right to interpret, and cases that go to high courts begin their „way“ from the court of first instance. Of course, there is a difference between the power of interpretations presented by various courts and their impact on the legal system as only the interpretations of the Supreme Courts are considered to be judicial precedents and authoritative opinions, moreover, decisions of the Supreme Courts are more accessible as they are published. However, the object of the research involves judges‘ authority to influence the law when interpreting it as well as judges‘ power to make use of certain methods of interpreting law, i.e. problems arising in every judge‘s work in such situations when the content of a certain legal rule that has to be applied is ambiguous and there aren‘t any specific and unquestionable sources to define it.

Fifthly, the issue when the judge has to interpret the law, i.e. whether the law should be interpreted every time it is applied, in every case, is not actual to the topic. For more clarity is should be mentioned that there are some positions for this issue. Firstly, a legal rule should be interpreted when it is not clear, so the judge, each time facing an ambiguous legal rule, has to use the interpretation of law as it is perceived in the narrowest sense. Therefore, it is accepted that in some cases the interpretation of law may be unnecessary if the applicable legal rule is clear and there are no doubts about its meaning both in linguistic and other terms. In this case, it is admitted that only ambiguous legal rules should be interpreted. Secondly, it may be stated that the legal rule as a logical construction beeing operated by the subject, should be expressed in the source of law, and later on, it should become a logical construction again, perceived by the receiver of the legal rule, so the process of interpreting and perception is always on when the requirements of law are implemented. It is claimed that the thought about certain rules being discovered and perceived without any interpretation is only an illusion, as the interpretation of law is an inavoidable and essential stage in the process of implementation of law requirements, and the explicitness of the text of the legal rule does not negate the necessity of interpretation. In complicated situations, the subject who is applying law, searches for the right decision and looks for the answer about the content of specific legal rules and principles, he also appeals not only to the rules of formal logic but also analyses the content of social relationships, the whole legal regulation and follows value criterion as well as looks for the rational balance between different values. In fact, it can be claimed that the interpretation of law in its narrowest sense is considered to be necessary not in every case, while the interpretation in the second sense – the narrower one - is considered to be essential every time, but the judge is not lways empowered to use it, and it depends on the role provided to the judge in the process of the interpretation of law. However, when analysing the role of judges in this work, this discussion is not topical as its analysis might give the answer to the question on how often judges should interpret the law, thus it does not influence the role of judges in this process in any way.

The issues related to judges power and its limits in the society, being discussed in this thesis, are often the subject of political discussions. However, this „political status“ should not stop looking for scientific methods to analyse the

phenomenon discussed. Therefore, this work does not make a research of the issues of judges powers looking from the position of the doctrine of separation of powers, or the issues of court activeness, thus these issues are being analysed in how much they are actual when analysing the interpretation of law in court, looking from the perspective of discovery/creation of law, i.e. when analysisng judges‘ powers to create legal rules in the process of interpretation of law.

Overview of the analysis. The analysis and the main scientific studies may be devided into two groups:

The *first* group of scientific researches includes those ones with the opinion of a particular author on how judges should interpret the law, it is a complex and integral theory of „judging“. There are not any scientific studies of this kind in the Lithuanian language as the role of judges in interpreting law, looking from the perspective of discovery/creation of law, has not been theoretically researched in Lithuania. In Lithuania, there have been only fragmentary researches on the interpretation of law carried out by courts. Integral theories of the interpretation of law carried out by courts and the role of the judge in interpreting law have been formulated by A. Barak, R. Dworkin, R. Posner and A. Scalia, so the studies of these authors are significant for revealing specific integral approaches to the object of the research and they have been presented as examples of the solutions of the above mentioned problems. Herewith, theories of the role of the judge in interpreting law formulated by the above mentioned authors have been systematised providing them with a specific position in the spectrum of possible approaches to the activities of judges.

The *second* group consists of researches carried out by various authors where particular fragments are revealed that are relevant to the topic of the role of the judge in interpreting law. In this research group there is a plenty of researches and publications by Lithuanian law scientists as well, although, as it has already been mentioned, the object of the research – the role of judges in interpreting law, looking from the perspective of discovery/creation of law, has not been explored in complex and theoretically integral aspect in Lithuania, however, some issues of this theses have already been explored and catch quite a lot of attention. Particularly significant and widely used are researches related to the interpretation of law, its concept, methodology and application etc.

Taking into account the outcomes of the researches carried out by those authors, the issues that have been concretized and systematized were the methods used for the interpretation of law in general, the means that might be used in this process (e.g. reference to principles of law, values protected by law or goals of legal regulation), what are merits and demerits of the methods for interpreting law, what criticism is made against them, and what means are proposed to solve the problems arising when interpreting law. The researches on the extent of the role of the judge in interpreting law or judges‘ discretion are also of great importance. Secondly, when working on this thesis, there was made use of scientific studies where various concepts of law were analysed, i.e. studies by H. L. A.. Hart, K. Kelsen, R. Dworkin, R. Posner and as well as researches of their studies. As well as researches where integral concepts of law are not revealed, but there is analysis of the proportion and importance of specific elements constituting the law. The most important studies are scientific publications on the analysis of principles of law. They are highly important for this thesis as they helped to perceive and reveal judges‘ reliance on the concept of law, principles of law and the meaning of various constituting elements when interpreting law as well as to highlight the role of courts when defining the content of the legal rule, looking from the perspective of discovery/creation of law.

Methodology of the research. The object of the research – judges‘ power to make influence on the content of law when interpreting it – and the theoretical research of this object determines a specific choice and application of the methodology of the research. Taking into account theoretical nature of this work, analytic research, based on the adjustment and combination of logical, systematic and teleological methods, is prevailing. In some cases, descriptive, historical, comparative and linguistic methods have been used as well.

A descriptive method is inavoidable when defining concepts of law provided by various authors, elements of law and their proportions as well as the emerging perception of the role of the judge when interpreting law, as only after having described different opinions on those issues it is possible to make comparisons between different positions, analyse them, make some criticism against them and highlight their advantages by showing the role of the judge in the process of interpreting law in the aspect of each position.

A comparative method has been used for comparing possible approaches to the relationship of judges and law, looking from the perspective of discovery/creation of law. This method is irreplaceable for analysing advantages and disadvantages of different models of the role of the judge in interpreting law.

When analysing separate compound issues of the research, systematic, historical and teleological methods have also been used aiming to reveal features, particularities and drawbacks of certain approaches to the role of the judge in interpreting law. Moreover, to highlight what means judges are empowered to make use of in the case of specific models of interpreting law in courts, as well as when searching for the answer to the question whether those means are sufficient to define the content of the particular legal rule applicable in a specific case without switching to the creation of law, and herewith to ensure objectivity and predictability of the interpretation of law made by judges.

A systematic method of the research is of great importance as, looking from the perspective of discovery/creation of law, the relationship between judges and law is to be analysed with the perception of the integer of approaches to this issue and by determining the position of the models for solving this problem in this system. With the help of the systematic and comparative methods, the analysis of the opinions presented in the literary sources has been made as well as summarizing conclusions have been made and essential aspects of the topic have been shown. The systematic method has helped to perceive law as a dynamic phenomenon related to the whole social reality, and to see those features in the activity of court when interpreting law. It is broad in this work because there is a sequential „transition“ from the positivistic perception of the role of judges when interpreting law, which means not empowering judges to create law, to the other extreme – a realistic approach considering law as the result of judges‘ creation. With the help of this sequential transition, other approaches have also been presented that aim to combine inevitability of judges‘ creative work and attempts of its limitation.

One of the main methods is a logical analysis of judicial phenomena that helps to distinguish specific classification criteria, make conclusions and generalizations.

The content of various essential concepts has been made using a linguistic (semantic analysis) method.

A teleological method has aimed to define the goals of the followers of the model presenting a concrete role of judges in interpreting law to support a particular model as well the circumstances for the formation of this approach.

A historical method has not been widely used, as this work does not aim to present the historical analysis of the topic. However, in some cases, a certain application of this method has helped to determine philosophical beginnings and origin of approaches to the role of judges in interpreting law as, in order to gain a versatile knowledge of judicial phenomena, law and its interpretation should be considered as a historical phenomenon that appears, changes and is historically formed. A fragmentary application of the historical method may be considered as the mean of the preciser perception of the role of judges in this process as phenomena researched have been historically determined by the past and may be properly interpreted through the mediation of history.

CONTENT OF THE DOCTORAL DISSERTATION IN BRIEF

The structure of the doctoral thesis is determined by the analysis of the role of judges in interpreting law by moving from one extreme to the other: as it has already been mentioned, all models of judges‘ role when interpreting law should be positioned in a line between two extremes – with theories that do not accept any creative work of the judge on one side, and theories that absolute judges‘ role claiming that it is the law what courts do. According to this, the positions have been presented starting with those ones that do not empower judges to create law when interpreting it and finishing with the conception of judicial realism claiming that judges are actual creators of law. It should be noted that there are not many radical theories, so usually judges‘ role is perceived as being somewhere in the middle position between these extreme poles of discovery and creation of law. Moreover, taking into account that to achieve the goals of the research, the tasks were to be undertaken as to explore and evaluate a positivistic model of the role of the judge in interpreting law and any alternative approaches that are usually presented as a certain way to eliminate insufficiency of the model of the role of the judge in interpreting law, this thesis is devided into two parts, each of them deals with the implementation of one of the above mentioned tasks.

The first part „Positivistic model of the role of the judge in interpreting law and its insufficiency“ is designed to discuss a traditionally accepted model of the role of the judge in interpreting law, according to which judges are considered to be only interpreter of positive law established by legislature and are not empowered to create it. The main features, main ideas of the model have been analysed and the main criticism against it as well as the reasons for its insufficiency have been presented.

The first chapter of part 1 “Concept of the positivistic model the role of the judge in interpreting law” is designed to reveal the nature and main features of this model. When structuring this analysis, three main key stones of the positivistic model of the role of the judge in interpreting law have been distinguished. The *first* one is the perception of the conception of law and the role of judges proposed by the followers of legal positivism. Although a lot of conceptions of law, different in their nature, are attributed to the theories of legal positivism, and it is complicated to talk about a generalized approach of the proponents of positivism to the law and judges‘ relation to it when interpreting law, however, some kinds of judicial positivism, relevant to the topic, have been distinguished: theory of commandments, positivism and neopositivism, normativism. Despite the differences between the theories of law conceptions, they are united by the fact that none of them considers judges as being actual creators of law, so they do not accept judges‘ right to create law. According to the simplyfied version of judicial positivism, judges‘ activity when interpreting law and making decisions is considered to be almost a mechanical process during which a court decision should not be based on non-judicial arguments, moral and social values or judge‘s opinion. The main task of the judge, in the case of the model of the positivistic decision making, is to take a rational, but not a value-based, logically reasoned decision, when, with the help of interpretation of the legal rule, the judge discovers and applies an existing law established by legislature.

The *second* key stone of the positivistic model of the role of the judge in interpreting law is the doctrine of separation of powers. According to this doctrine, power to create law is given only to legislature, so judges are supposed to “discover” law, if it is necessary, by using various methods of interpreting law.

The *third* key stone of the positivistic model of the role of the judge in interpreting law is judicial formalism as the foundation of a positivistic approach to the

role of the judge in interpreting law. According to the formalistic approach, judges‘ activity when considering cases is of highly syllogistic nature, i.e. the task of the judge is to determine the content of the major and minor premise and make a logical decision. In this activity judges are not supposed to outrun the limits of the law established by legislature. i.e. the content of the major premise should be defined by exploring and interpreting the system of legal rules established by legislature. Although a positivistic approach to the role of the judge in interpreting law is broader than the formalistic one, thus the latter is included and based upon. These two approaches have different „degrees of formality“, i.e. formalisms is supposed to be an extreme approach not accepting judges‘ possibility to make use of a creative element when applying law, and positivism is considered to be a more reasonable position, approving of formalism, that judges should not create law, but herewith accepting that strict formalism is not sufficient, and judges play a more important role than to simply apply the rule of law to the facts. A strict definition of sources of law determines the gaps of the system, so the followers of the positivistic approach accept judge‘s power to create law in a very limited context.

The second chapter of part 1 “Insufficiency of the positivistic model the role of the judge in interpreting law and its reasons” is designed to reveal main reasons determining the insufficiency of the positivistic model of the role of the judge in interpreting law as it does not give any answers to all interpretative questions in judges‘ work when interpreting law, especially in difficult cases. When analysing the reasons for insufficiency of the positivistic model, problems related to the determination of the content of the major premise or the legal rule: indeterminacy of language and interpretation rules, limitation of the establisher of the legal text and imperfection of legislation process as well as changes in public relationships. Is has also been discussed in what ways the indeterminacy of legal text is usually solved by searching for means that can help judges to get through the insufficiency of the role of the judge in interpreting law, however, judge are not supposed to be given the power to outrun the limits of the text of the rule of the interpreting law or the limits of the system of the legal rules established by legislature. There is a discussion about the main means from the following ones – methods of interpreting law: linguistic, historical, interpreting the intentions of the legislator as well as a systematic method of interpreting law. Moreover, reasons of the insufficiency of those methods to ensure the objective interpretation of the

text of legal rules or the interpretation of legal rules within the limits of the will of legislature have been also discussed.

In the third chapter of part 1 there is a discussion on the ways to solve the insufficiency problems of the positivistic model of the role of the judge in interpreting law within the limits of this model. A doctrine of the new textualization has been presented as an approach, proponents of which, realising the insufficiency of the positivistic role of judges discussed, propose a possible way out that allows to consider judges neither partners of legislature nor creators of law. There is also a criticism against this doctrine. The first part of the thesis reveals the fact that acceptance of the presence of difficult cases as well as a specific discretion considering these cases, herewith, when interpreting law in those cases, judicial formality become obviously insufficient to characterize the role of he judge in interpreting law. The interpretation and perception of the legal rule as well as its application in a specific case, especially in a difficult one, is determined not only by the legal rule itself, but also by something existing beside or instead of the legal rule. A positivistic model of the role of the judge in interpreting law does not propose any systems of interpreting law that could help to avoid judges discretion in the interpretation of law, herewith some subjectivity and indeterminacy. The legal text itself and the nature of legal regulation require interpretation and application of the legal rule to be not of the syllogistic nature, not to minimize used premises to the meaning of the legal text, not related to the context of the application of the legal rule or intentions of the authentic legislator, as well as to evaluate possible changes in the meaning of the legal text due to the current of time. It has to be admitted that judges when interpreting the meaning of the legal rule and considering its possible applications are supposed to clear not only the content of the legal rule itself, but also any other important factors that have influence on the application of the rule and constituting the legal rule itself. Circumstances that are to be clarified by a judge when considering a difficult case as well as trying to find the law – corresponding decision are considered to be the main reasons underlying the judicial power and the need for determining not only the obligation to interpret the law, but also to create it.

The second part "Searches beyond the limits of the text" deals with models of the role of the judge in interpreting law that are alternative to the positivistic one, according to which judges are not supposed to confine himself to the positive law

established by legislature and, when interpreting law, are supposed to base on what is beyond the limits of the language of legal text. In that case, when the legal rule is insufficient to resolve the case or to determine the content of the applicable legal rule, the judge is provided with two possible ways – the first one is to look for such alternatives that could completely or partly guarantee the domination of law, and the other one is to admit that there is not such a model that could guarantee the domination of law, i.e. to give up searching for completeness of the interpretation itself. That is the role of the judge when interpreting law depends on: in the case of the first alternative the power of judges to create law during its interpretation is more or less limited, while in the case of the second alternative it has to be admitted that the role of the judge is a lot more active than only as interpreters of law (or is completely different). According to this, the second part of the thesis analyses and evaluates models of the role of the judge in interpreting law, proposing the position that when interpreting law, judges cannot confine themselves only to the legal rules or the frame of the positivistic law established by the legislator. These models are devided into three groups and each of these groups have been discussed in a separate chapter in part 2. The first group consists of approaches accepting that judges‘ freedom when interpreting law to create it and make their own decisions is limited, as particular factors, providing this activity with objectivity and limiting judges‘ interpretation. After summarising models of this group, they can be called a thoughtful disquisition of legal text, where judges are considered to be partners of legislature, contributing to its creation. A thoughtful disquisition of legal text is presented by analysing means provided to judges that underly the interpretation of undefined legal rules. Such means discussed –principles of law, law-protected values and the aim of legal regulation – provide judges with power to outrun the limits of the positivistic law established by legislature and herewith guarantees that judges‘ interpretation of law will be predictable, objective and limited, as court power to create law when interpreting is limited by formal (legal rules of the process, legal texts, precedents ect.) and value-based (universally accepted values, principles ect.) levers. Therefore, although judges are inevitably supposed to outrun limits of legal rules established by legislators when interpreting law, it does not close the door to the objective interpretation of law. The thesis analyses not only advantages of means provided to judges that help to define the content of the legal rule applicable to the

certain case, but it also highlights their disadvantages and weaknesses. In addition, this part analyses how the means provided to judges in the process of law interpretation depend on the particular concept of law, and herewith the power of judges to make influence on law content. The analysis of factors encouraging judges‘ creativity when interpreting law as well as the extent and limits of judges‘ discretion in the case of thoughtful disquisition of legal text have been presented. In part 2 of the thesis, the second group of the discussed approaches that are alternatives to the positivistic model of the role of the judge in interpreting law, are the following ones the proponents of which do not accept judges‘ power to create law, but law applied by judges is not identified with the system of legal rules established by legislators. In this case, it is admitted that judges‘ interpretation of law, even though it is limited, but neither by rules or standards, nor by the system of law established by legislators, but by certain natural, objectively existing values or conditions of social or psychical nature. Therefore, the second chapter of part 2 of the theses discusses some theories that consider judges to be as „gospellers“ and protectors but, by no means, creators: „in minds of the people“, in culture, judges are considered to be appliers of continually forming and changing law or tools of social environment, product of which law is. Both sociological concepts of law and the historical school (as well as the school of natural law) realise judges‘ interpretation of law as the definition of actually objective, independent of human will and formed off the control of the legislature rules and their application in the particular case. In other words, judges in their work are limited by the existing perfect law, formed order or factors of social environment. Therefore, the role of the judge in interpreting law can be predictable and limited, but not by means of the language, as it is claimed by the proponents of the positivistic model of law interpretation, i.e. not by the text of legal rules and by the text of the rules of legislature, but by something what is beyond the limits of that text. This something means social and psychical facts beyond the text. Therefore, even though each judge implements discretion under the influence of subjective factors, law is not predictable, as all judges of a certain society live in the same environment which has an almost identical influence on them. Judges‘ decisions can be predictable in regard to general social regularities. Moreover, the reasons, why the impression of „discovery“, „purification“ or pursuance of law is superficial, goes

well with proposed law concepts, however, it does not reflect the real role of judges and does not ensure explicitness in their interpretation of law.

The third group of the approaches discussed is the position, the proponents of which consider judges to be actual creators of law. In this case, it is the approach, appealing to the theories of legal realism and having a sceptical evaluation of rules of positive law. Two currents of legal realism have been analysed – American and Scandinavian realisms in the aspects of the role of the judge in interpreting law. In this case, any possibility of the scientific explanation of the validity of law have been refused, and the only one acceptable approach is materialism, so, according to the followers of legal realism, there is only reality. Therefore, law is what judges decide, making judges the main people in the process of law creation. This thesis reveals that such a sceptical approach to the legal rules established by legislature encourages the attention to the totally different role of judges as particular arbitrators of litigations.

The final stage of the research – **conclusions** that generalize the implementation of the objective of the thesis and tasks raised:

1. A positivistic model of the role of the judge in interpreting law is that one, according to which judges are accepted as interpreters of law exclusively established by legislature. One of the key attitudes of this model is an assertion that in all cases, there is possibility of objective interpretation of law carried out by courts based on the use of different methods of interpretations of legal rules, so judges, when interpreting law, doe not appeal to anything what is beyond the limits of legal text of the legal rules established by legislature and the intentions of the legislature. In this case, the main goal of judges is to make a rational, not a value-based, logically reasonable decision, by making which judges explain and apply already existing law established by legislature. The positivistic approach to the role of judges in interpreting law is based on the theories of law concepts proposed by the proponents of positivistic law as well as judicial formalism as the basic argumentation theory. Judicial formalism is the most radical form of the model of the positivistic role of judges in interpreting law, denying any creative work of judges when interpreting the content of legal rules, while the positivistic model of the role of the judge is broader as it accepts insufficiency of formal interpretation of law, existence of difficult cases as well as the importance of methods for interpreting law in judges‘ work. The most essential difference of the role of the judge in interpreting law

from the judicial formalism is that the positivistic approach to the role of judges when interpreting law accepts judges‘ power to outrun the limits of the rules of interpretative law established by the legislature in a very limited extent, i.e. judges, when interpreting rules of positive law, are provided with the possibility to apply not only to the legal text but also to the method of clarification of legislatory intentions as well as to fill the gaps of law.

2. A positivistic approach to the role of the judge in interpreting law is not sufficient in the interpretative activity of law carried out by courts and cannot ensure that judges remain interpreters of law exclusively established by legislature, as interpretation of law is inavoidably determined by specific factors that are beyond the text of legal rules established by legislature. This positivistic insufficiency of the role of the judge in interpreting law is determined by some groups of reasons. *Firstly*, one of the main reason for the insufficiency of positivistic role of the judge in interpreting law is indeterminacy of legal text, and problems related to this are being tried to solve by looking for the content of legal rules deeper in the language, however, proposed methods for interpreting law – linguistic, historical, the method of explanation of legislative intentions, as well as a systematic one - do not eliminate the possibility of subjective evaluations of judges, do not prevent judges‘ choices and discretion to create law during its interpretation. Methods of interpreting law that are available for judges do not ensure objective and predictable interpretation of law that is acceptable to the positivistic approach to judges‘ activity when interpreting law, so they are insufficient to prevent creation of law during its interpretation. *Secondly*, there aren‘t any reliable means that could help to eliminate insufficiency of the model of the positivistic role of judges in interpreting law, caused by other reasons – indeterminacy of interpretation rules, limitation of the established of legal text, incompletion of the process of the legislature, obligation of judges to take into account changes in social life, herewith they could ensure that the limits of the text of the rules of positivistic law will not be outrun, i.e. the insufficiency of the positivistic model of the role of the judge in interpreting law will be eliminated within the limits of this model and the role of the judge means more than the interpreter of law. *Thirdly*, in the case of the positivistic role of judges in interpreting law, judges are supposed to make not a value-based decision but a decision that corresponds the legal rules established by legislature. In this way, according to this

model, law is dissociated from the protected values, moral attitudes, aims of human right protection, so it cannot be expected that acting within the limits of this model, judges are going to make a decision corresponding to the standards of justice, rationality, honesty and proportionality in the particular case. Judges who cannot outrun the limits of the positivistic model of the role of the judge in interpreting law cannot focus on these standards and values that are beyond the limits of the system of the rules of the positivistic law.

3. According to the concept of sociological law, the school of natural law and the historical school of law define the role of the judge as the task of discovery, purification and conservation of law, however, they do not propose an acceptable way how to overcome the insufficiency of the model of the positivistic role of judges when interpreting law, herewith ensuring explicitness and predictability of law interpretation in courts. These approaches do not accept judges as creators of law like the positivistic model of the role of the judge in interpreting law, and judges‘ interpretation of law is perceived as the determination of legal rules that are objective, independent of human will and formed without the control of legislature, and their application in the specific case. In this case, judges are limited in their interpretation of law by already existing perfect law, existing order and facts of social environment, however, it does not ensure explicitness in judges‘ interpretation of law, as judges‘ action of discovery, purification and observance of law, when not having clear standards, methods and content of judges‘ activity, does not reflect the actual role of judges when forming the content of legal regulation applicable for the specific case.

4. Judges are accepted as creators of law for the specific case only in that case when judges‘ relationship with law, looking from the perspective of discovery/creation of law, is realized in the way proposed by the legal realism. In this case, the insufficiency of the positivistic model of the judge when interpreting law is not actual as, having accepted judges as creators of law for the specific case, the issue of the determination of the content of legal rule established by the legislature is not important. This approach to the relationship of the judge and law, based on legal realism and looking from the perspective of discovery / creation of law, might be acceptable if there were substantial changes in the approach to judges‘ functions in interpreting law and considering cases in general: the main functions of judges should include the elimination

of the specific litigation, adjudication of the litigation in an way acceptable to the sides without giving prominence to the means used for implementing this function.

5. Judges should be inevitably accepted as partners of legislators, protectors and guarantees of law-protected values, creatively attributing to the formulation of the law content to a certain extent, so the most acceptable model of the role of the judge in interpreting law is the acceptance of judges‘ power to make use of thoughtful disquisition of legal text. Thoughtful disquisition of legal text, integrating different kinds of this „interpretation“ (interpretation of law, based on principles of law, law-protected values and aims of legal regulation) provide a possibility of solving the insufficiency of the positivistic model of the role of the judge in interpreting law, herewith ensuring a definite and predictable result of judges‘ interpretation of law. Thoughtful disquisition of legal text empowers judges to outrun the limits of the text of legal rules and base on something what is beyond the limits of the text of legal rules, however, these means for interpreting law, attributed to judges, restrict judges‘ creative interpretation of law and provide objectivity to this interpretation. These means, that help to overcome the insufficiency of the positivistic model of the role of the judge in interpreting law and herewith restricting judges‘ creation of law, include principles of law, law-protected values and the necessity to take into account aims and effects of legal regulation (functional and teleological interpretation of law, social engineering, pragmatic jurisprudence). The main shortage of thoughtful disquisition of legal text is that the means attributed to judges, used one-by-one, open new opportunities to judges for creating law without ensuring its restriction, domination, and the possibility to predict court decisions. Therefore, thoughtful disquisition of legal text becomes the way of negotiation of the insufficiency of the positivistic model of the role of the judge in interpreting law only in that case when judges‘ obligation to combine the above mentioned means of thoughtful disquisition of legal text and search for their balance when interpreting law is defined as well. When balancing the results that were obtained using the proposed means of thoughtful disquisition of legal text with the help of the systematic approach, and applying the above mentioned means in a complex, courts are able to implement their functions that cannot be performed confining only to the interpretation of the content of legal rules established by legislature.

THE LIST OF SCIENTIFIC PUBLICATIONS RELATED TO THE SUBJECT OF THE DOCTORAL DISSERTATION

1. KAZANAVIČIŪTĖ, Rūta. Classical Approach to the Role of Judges in Interpreting and Applying Law. Teisė. v. 70, p. 86-101.
2. KAZANAVIČIŪTĖ, Rūta. Alternative Approaches to the Role of Judges in Interpreting and Applying Law. Teisė. v. 71, 147-162.

OTHER PUBLICATIONS OF THE AUTHOR ON THE TOPIC OF THE DISSERTATION THESIS

1. KAZANAVIČIŪTĖ, Rūta. The Role of the Judiciary in the Transition Societies (Lithuania) // The 23rd IVR Congress. Law and Legal Cultures in the 21st Century: Diversity and Unity. Special workshops. Students and Young Researchers. Pieniazek M. (ed.). Andrzej Frycz Modrzewski Krakow University, 2009, p. 59-77.

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TEISĖJO VAIDMUO AIŠKINANT TEISĘ

Reziumė

Darbo aktualumas ir mokslinis naujumas. Lietuvos Respublikos Konstitucijos 109 straipsnio trečioji dalis įtvirtina, kad teisėjai, nagrinėdami bylas, klauso tik įstatymo. Net ir labai plačiai aiškinant sąvoką ,,įstatymas“, būtų gana sudėtinga teigti, jog teismas yra teisę kurianti, o ne ją taikanti institucija, todėl teiginys, kad teisėją saisto teisė, priimamas kaip aksioma. Problema kyla dėl to, kad tai, kas yra tas ,,įstatymas“ ir ką jis reiškia, kiekvienu konkrečiu atveju turi pasakyti bylą nagrinėjantis teisėjas. Spręsdamas konkretų teisinį ginčą teisėjas veikia kaip oficialus teisės normų aiškintojas, kurio aiškinimas lemia ginčo baigtį. Teisėjų atliekamas teisės interpretavimas yra ypatingas ir dėl to, kad gali būti įpareigojantis ne tik šalims, bet – per formuojamą teismų praktiką – ir visuomenei. Taigi sukurdamas normatyvinį tekstą įstatymų leidėjas deleguoja teisėjui galią pateikti privalomą tokio teksto aiškinimą.

Atsižvelgiant į tai reikia pripažinti, kad teisėjo pateikiamas teisės aiškinimas įgyja kitokią prasmę, kartu atveria erdvę interpretaciniam žaismui ir iškelia daugybę su teisėjo atliekamu teisės aiškinimu susijusių klausimų: koks turi būti teisėjas savo kasdieniame darbe nagrinėdamas bylas ir aiškindamas neapibrėžto turinio teisės normas – aktyvus ar pasyvus, ieškantis įstatymo racionalumo, ar įstatymo normas taikantis beatodairiškai, nesusimąstydamas? Šią problemą būtų galima suformuluoti vienu klausimu: kaip teisėjas turi taikyti teisę – mechaniškai ar kūrybiškai? Teisės aiškinimas teisėjui nagrinėjant bylas yra neišvengiamas, tačiau riba tarp teisės aiškinimo ir kūrybos kartais yra labai nežymi, todėl būtina tirti, kada teisės aiškinimas tampa kūryba ir kaip sumažinti tokių atvejų, kaip tai riboti.

Be to, minėta, iš teismo reikalaujama vykdyti teisingumą, o tai taip pat kelia teisėjo atliekamos funkcijos turinio klausimų: ar teisingumo vykdymas yra tik įstatymų leidėjo sukurtos teisės normos taikymas konkrečiam atvejui, ar tai privalo būti kas nors daugiau, pavyzdžiui, teisės principų, vertybių paieška ir gynimas, teisinio reguliavimo tikslų įgyvendinimas ir pan. Taigi teisėjas, aiškindamasis taikomų teisės normų turinį, susiduria su būtinybe išsiaiškinti ne tik pačios teisės normos teksto prasmę, bet ir atsakyti į kitus su tuo susijusius klausimus, iš kurių svarbiausi trys: ar teisės normos

reikšmė yra užfiksuojama jos sukūrimo metu ar ji ilgainiui kinta; kiek teisės normos reikšmės supratimo sudaro interpretatoriaus suvokimas, kiek įstatymų leidėjo ketinimai ir koks jų santykis; koks konkrečios sprendžiamos problemos ir platesnio įstatymų leidėjo tikslo santykis.

Nuo atsakymo į šiuos klausimus priklausys ir teisėjo vaidmuo teismo procese bei iš dalies visuomenėje. Atsižvelgiant į tai šiame darbe pateikiama vieno iš su teisėjo vaidmeniu susijusių klausimų – teisėjo ir teisės santykio, žvelgiant iš teisės atradimo / kūrimo perspektyvos – analizė. Tai aktualu, nes susiję su teisėjo galimybe aiškinant teisę daryti įtaką jos turiniui, o tai kartu atskleidžia vieną iš teisėjo ir įstatymų leidėjo santykį apibūdinančių aspektų: ar teismas yra tik įstatymų leidėjo valios „atradėjas“ ir taikytojas, ar įstatymų leidėjo partneris, prisidedantis prie teisės turinio formavimo, ar teisės ginamų vertybių sergėtojas ir garantas.

Tiriama problema – teisėjo, kaip teisės aiškintojo, vaidmuo žvelgiant iš teisės atradimo / kūrimo perspektyvos – nėra nauja Lietuvos teisės moksle. Nemažai šios problemos aspektų tirta analizuojant klausimus, susijusius su teisės aiškinimu apskritai, teisėjų diskrecijos apimtimi, teisės šaltiniais, taip pat aptariant įvairias teisės sampratas. Dažniausiai tirti požiūrio, nepripažįstančio teisėjo galios aiškinant teisę kartu ją kurti, pagrindiniai bruožai, su juo susijusios problemos, pateikiama tokio požiūrio kritika, o alternatyvūs modeliai, pripažįstantys teisėjui galią kurti teisę arba suteikiantys jam laisvę aiškinant teisę remtis ne vien įstatymų leidėjo sukurtomis teisės normomis, tačiau ir teisės principais, teisės ginamomis vertybėmis, ar atsižvelgti į teisiniu reguliavimu siekiamus tikslus, pateikiami kaip būdai spręsti pozityvistinio modelio, nepripažįstančio teisėjo galios teisės normas aiškinti kūrybiškai, nepakankamumo problemas, plačiau jų neanalizuojant. Kita vertus, pastebima tendencija, kad ir Lietuvoje vis dažniau teisėjui pripažįstama ne tik formalaus teisės taikytojo funkcija, bet ir kūrybiško interpretatoriaus vaidmuo, bei pažymimas teismų aktyvumo didinimo poreikis, interpretacijos laisvės plėtojimas. Taip pat yra autorių, nesutinkančių su požiūriu, kad teisėjas gali būti ne tik teisės normų aiškintojas, bet ir prisidėti prie jos kūrimo.

Sąlygiškai visus su nagrinėjama tema susijusius Lietuvoje atliktus mokslinius tyrimus būtų galima skirstyti į dvi grupes – viena grupė tyrimų susijusi su bendromis teisės aiškinimo problemomis, kita – su teisėjo veikloje kylančiais klausimais, jo santykiu su įstatymų leidėju atskleidžiant teisės turinį, su teisminio precedento teisine

galia ir pan. Šiuo darbu siekiama apibendrinti fragmentinius, konkrečioms teisės aiškinimo problemoms skirtus tyrimus, juos susieti su bendru požiūriu į teisėją kaip teisės aiškintoją, bei susitelkti būtent į teisėjo ir teisės turinio santykį, žvelgiant iš teisės atradimo / kūrimo perspektyvos, kartu atskleidžiant nuo to priklausantį platesnį teisėjo vaidmens suvokimą šiuo aspektu, santykio su įstatymų leidėju požiūriu.

Darbo tikslas yra išnagrinėti ir palyginti skirtingus teisėjo vaidmens aiškinant teisę modelius, žvelgiant iš teisės atradimo / kūrimo perspektyvos, ir patikrinti hipotezes, kad: 1) teisėjo vaidmuo aiškinant teisę negali būti tiksliai apibrėžiamas, nes priklauso nuo to, kaip kiekvienu atveju suprantama pati teisė; 2) teisėjo vaidmuo aiškinant teisę priklauso nuo to, kokiais teisės aiškinimo metodais ir būdais jam pripažįstama galia naudotis šiame procese; 3) teisėjo atliekama teisės kūryba jos aiškinimo metu yra neišvengiama.

Siekiant šio tikslo, iškelti tokie **uždaviniai**:

1. Ištirti ir įvertinti pozityvistinį teisėjo vaidmens aiškinant teisę modelį, kuriame teisėjas laikomas išimtinai įstatymų leidėjo įtvirtintos teisės normos aiškintoju, išryškinti šio modelio nepakankamumą ir to priežastis.
2. Ištirti ir įvertinti pozityvistiniam teisėjo vaidmens aiškinant teisę modeliui alternatyvius požiūrius, pabrėžiant priemones, kuriomis siūloma šalinti pozityvistinio teisėjo vaidmens aiškinant teisę modelio nepakankamumą.

Tyrimo objektas – tai teisėjo įgaliojimai (diskrecija) aiškinant teisę daryti įtaką jos turiniui. Darbe nagrinėjamas teisėjo, kaip konkrečias bylas nagrinėjančio valstybės pareigūno, poveikis ir jo veiklos reikšmė nustatant neaiškios teisės normos turinį, žvelgiant į šį teisės normos turinio nustatymo procesą iš teisės kūrimo / atradimo perspektyvos.

Sąlygiškai gali būti išskiriami trys skirtingi požiūriai į tai, koks teisėjų vaidmuo aiškinant ir taikant teisę, žvelgiant iš teisės atradimo / kūrimo perspektyvos. Tai yra, siekiant patogumo, visas mokslines teorijas, susijusias su teisėjui keliamais uždaviniais bei jo atliekamu vaidmeniu minėtu požiūriu, galima sąlyginai suskirstyti į tris dideles grupes: 1) klasikinis požiūris; 2) realistinis požiūris; 3) socio-ekonominis arba socialinio teisingumo požiūris. Taip pat šios grupės gali būti pavadintos atitinkamai riboto teisėjų sprendimų priėmimo modeliu, laisvo teisėjų sprendimų priėmimo modeliu bei racionalaus teisėjų sprendimų priėmimo modeliu. Pagrindinis kriterijus, kuriuo remiantis

skiriamos šios teorijų grupės, yra požiūris į tai, ar teisėjas spręsdamas teisinius ginčus kuria teisę, ar yra tik įstatymų leidėjo išleistų teisės normų taikytojas, ar užima kokią nors tarpinę vietą tarp šių kraštutinumų. Taigi iš esmės visus požiūrius į teisėjo ir teisės santykį galima išdėstyti vienoje eilėje tarp dviejų kraštutinumų: vienoje pusėje būtų klasikinis požiūris, nepripažįstantis teisėjui galios kurti teisę, o priešingoje spektro pusėje požiūris, suabsoliutinantis teisėjo vaidmenį, o pačią teisę tapatinantis su tuo, ką daro teismai. Žinoma, tarp šių dviejų kraštutinių polių yra daugybė teorijų, ieškančių viduriniojo kelio. Atsižvelgiant į tai, kad neįmanoma jų visų aptarti ar bent paminėti, bus pateikiami ryškiausi tam tikrų pozicijų pavyzdžiai, aptariami pagrindiniai jų bruožai, išryškinami pranašumai ir trūkumai, tolesnį teorijų ir požiūrių skirstymo klausimą paliekant atvirą.

Apibrėžiant tyrimo objektą, būtina pažymėti tai, kas šiame darbe nėra tiriama.

Pirma, nesiekiama atspindėti visų galimų požiūrių į teisėjo veiklą aiškinant teisę, nes tokie požiūriai, kaip ir teisės sampratos, nėra baigtiniai.

Antra, atsižvelgiant į darbo objektą ir į esamus tyrimus, fragmentiškai atskleidžiančius tam tikras praktines teisės aiškinimo teismuose problemas, be to, įvertinus tai, kad kiekvienos konkrečios bylos sprendimas taip pat yra susijęs su joje nustatytais konkrečiais teisiniais faktais, sąmoningai siekiama pateikti išimtinai teorinę, bendrąją teisėjo vaidmens aiškinant teisę analizę. Dėl to nėra analizuojami nei teismų praktikos, nei konkrečių valstybių teisinio reguliavimo, teismų pateikiamų konkrečių teisės normų aiškinimo ar pan. pavyzdžiai.

Trečia, minėta, kad šiame darbe nebus tiriama teisės šaltinių problematika, taigi ir teismų precedentų galios bei reikšmės klausimai.

Ketvirta, pažymėtina ir tai, kad nagrinėjamai darbo temai nėra aktualus ir teismų, kuriuose atliekamas teisės aiškinimas, instancijų klausimas. Teisę aiškinti turi kiekvienas konkrečią bylą nagrinėjantis teisėjas, o aukštesnius teismus pasiekiančios bylos pradeda „kelią“ nuo pirmosios instancijos. Žinoma, iš esmės skiriasi įvairių instancijų teismų pateikiamų išaiškinimų galia ir įtaka teisinei sistemai, nes teisminiais precedentais ar autoritetingomis nuomonėmis laikomi aukščiausių teismų išaiškinimai, be to, aukščiausių teismų sprendimai yra daug lengviau prieinami, nes viešai skelbiami, iš karto įsiteisėja. Tačiau šio darbo tyrimo objektas – teisėjo įgaliojimai aiškinant teisę veikti jos turinį, teisėjo galia naudotis tam tikrais teisės aiškinimo būdais, tai yra

kiekvienam teisėjui iškylančios problemos, susidūrus su situacija, kai tam tikros taikytinos teisės normos turinys yra neaiškus ir nėra konkrečių ir neabejotiną galią turinčių šaltinių jį nustatyti.

Penkta, darbe nėra aktuali problema, susijusi su tuo, kada teisėjas turi aiškinti teisę: ar teisė turi būti aiškinama kiekvieną kartą ją taikant, kiekvienoje byloje. Dėl aiškumo tik verta paminėti, kad šiuo klausimu galimos kelios pozicijos. Pirma, kad teisės normą aiškinti reikia tada, kai ji nėra aiški, todėl teisėjas kiekvieną kartą, susidūręs su neaiškia teisės norma, turi naudoti teisės aiškinimą, kaip jis suvokiamas anksčiau aptarta siauriausia prasme. Dėl to pripažįstama, kad ,,kai kuriais atvejais teisės aiškinimas gali būti ir nereikalingas, jei taikytina teisės norma yra aiški ir jos prasmė nekelia abejonių tiek lingvistiniu, tiek kitais požiūriais. Taigi tokiu atveju pripažįstama, kad reikia aiškinti tik neaiškias teisės normas. Antra, gali būti teigiama, jog teisės norma, kaip loginė konstrukcija, kuria operuoja subjektas, turi būti išreikšta teisės šaltinyje, o vėliau vėl tapti logine konstrukcija, suvokta teisės normos adresato, todėl aiškinimosi arba suvokimo procesas vyksta visada, kai siekiama vykdyti teisės reikalavimus. Tvirtinama, kad įsivaizdavimas, jog tam tikros teisės normos gali būti atrandamos ir suvokiamos be aiškinimo procedūros, tėra iliuzija, nes teisės aiškinimas yra neišvengiamas ir būtinas teisės reikalavimų vykdymo etapas, o teisės normos teksto aiškumas nepaneigia interpretavimo būtinybės. Sudėtingomis situacijomis teisę taikantis subjektas, ieškodamas teisingo sprendimo, kartu ieško atsakymo dėl konkrečių teisės normų ir principų turinio, remiasi ne tik formaliosios logikos taisyklėmis, bet kartu analizuoja ir socialinių santykių turinį, teisinio reguliavimo visumą, vadovaujasi vienais ar kitais vertybiniais kriterijais, ieško racionalios skirtingų teisinių vertybių pusiausvyros. Iš esmės galima teigti, kad teisės aiškinimas, suvokiant jį anksčiau aptarta siauriausia prasme, laikomas teisėjo veikloje reikalingu ne visais atvejais, o teisės aiškinimas antra prasme – siauresne – reikalingas visada, tik ne visada teisėjas turi galią jį plačiai naudoti, tai priklauso nuo teisėjui suteikiamo vaidmens teisės aiškinimo veikloje. Vis dėlto šiame darbe nagrinėjant teisėjo vaidmenį aiškinant teisę ši diskusija nėra aktuali, nes jos nagrinėjimas galėtų pateikti atsakymą į klausimą, kaip dažnai teisėjas turi aiškinti teisę, tačiau niekaip nedaro įtakos paties teisėjo vaidmeniui šiame procese.

Darbe aptariami klausimai, susiję su teisėjo galiomis ir jų ribomis, visuomenėje dažnai yra politinės diskusijos objektas. Tačiau šis ,,politiškumas“ neturėtų būti

priežastis neieškoti mokslinių metodų analizuoti aptariamą reiškinį. Dėl to darbe nėra plačiai tiriamos teisėjo galių, žvelgiant iš valdžių padalijimo doktrinos pozicijos, ar teismų aktyvizmo problemos, o šie klausimai nagrinėjami tik tiek, kiek tai aktualu atliekant teisės aiškinimo teisme analizę, žvelgiant iš teisės atradimo / kūrimo perspektyvos, tai yra nagrinėjant teisėjo galias kurti teisės normas jų aiškinimo procese.

Darbo struktūra. Darbo struktūrą lemia tai, kad teisėjo vaidmens aiškinant teisę analizė pateikiama pereinant nuo vieno kraštutinio požiūrio prie kito: kaip jau buvo minėta, visus teisėjo vaidmens aiškinant bei taikant teisę modelius būtų tiksliau išdėstyti vienoje eilėje tarp dviejų kraštutinumų – vienoje pusėje yra teorijos, nepripažįstančios jokios teisėjo kūrybinės veiklos, kitoje – suabsoliutinančios teisėjo vaidmenį ir teigiančios, jog teisė ir yra tai, ką daro teismai. Atsižvelgiant į tai darbe dėstomos pozicijos, pradedant nuo nepripažįstančių teisėjui galios kurti teisę ją aiškinant ir baigiant teisinio realizmo atstovų koncepcija, kad teisėjas yra tikrasis teisės kūrėjas. Pažymėtina, kad radikalių teorijų nėra daug, todėl paprastai teisėjo veikla suvokiama kaip esanti kur nors viduryje tarp šių kraštutinių – teisės atradimo ir kūrimo – polių.

Pirma darbo dalis „Pozityvistinis teisėjo vaidmens aiškinant teisę modelis ir jo nepakankamumas“ skirta aptarti tradiciškai pripažįstamą teisėjo vaidmens aiškinant teisę suvokimo modelį, pagal kurį teisėjas laikomas išimtinai įstatymų leidėjo sukurtos pozityviosios teisės aiškintoju, neturinčiu galios jos kurti. Analizė, atskleidžianti pagrindinius pozityvistinio požiūrio į teisėjo vaidmenį aiškinant teisę bruožus, atliekama aptariant kelis svarbiausius tokio požiūrio ramsčius: teisinio pozityvizmo atstovų pateikiamas teisės sampratas ir teisėjo vaidmens suvokimą jose, valdžios padalijimo doktrinos įtaką ir teisinį formalizmą kaip pozityvistinio požiūrio į teisėjo vaidmenį aiškinant teisę pagrindą. Taip pat šioje dalyje nagrinėjamos pagrindinės priežastys, lemiančios, kad pozityvistinis teisėjo vaidmens aiškinant teisę modelis nėra pakankamas, nes nepateikia atsakymų į visus teisėjo veikloje aiškinant teisę kylančius interpretacinius klausimus, ypač sunkiosiose bylose. Nagrinėjant pozityvistinio modelio nepakankamumo priežastis aptariamas logikos nepakankamumas aiškinant pozityviosios teisės normas ir siekiant pritaikyti konkrečią teisės normą byloje; analizuojamos didžiosios prielaidos – teisės normos – turinio nustatymo problemos: kalbos ir interpretavimo taisyklių neapibrėžtumas, teisinio teksto kūrėjo ribotumas ir įstatymų leidybos netobulumai, visuomeninių santykių kaita. Taip pat nagrinėjama, kokiais būdais

paprastai bandoma spręsti šią pozityvistinio požiūrio nepakankamumo problemą, kartu nesuteikiant teisėjui galios kurti teisę, tai yra teisėjui išliekant išimtinai teisės aiškintoju, negalinčiu peržengti aiškinamos teisės normos ar normų sistemos teksto (turinio) ribų. Šios dalies pabaigoje pristatomas naujasis tekstualizmas – kaip požiūris, siūlantis galimą išeitį sprendžiant pozityvistinio teisėjo vaidmens aiškinant teisę modelio nepakankamumą, kartu nepripažįstant teisėjo nei įstatymų leidėjo partneriu, nei teisės kūrėju.

Antroje darbo dalyje „Paieškos už kalbos ribų“ nagrinėjami pozityvistiniam teisėjo vaidmens aiškinant teisę modeliui alternatyvūs požiūriai, pagal kuriuos teisėjas negali apsiriboti pozityviąja įstatymų leidėjo sukurta teise ir aiškindamas teisę privalo remtis kuo nors, kas yra už teisinio teksto kalbos ribų. Modeliai, kuriuose dėstoma pozicija, kad teisėjas aiškindamas teisę negali apsiriboti vien teisės norma ar pozityviosios įstatymų leidėjo sukurtos teisės sistemos rėmais, skirstomi į tris grupes ir atskirai aptariama kiekviena grupė.

Pirma grupė – tai požiūriai, pripažįstantys, kad teisėjui aiškinant teisę, jo laisvė ją kurti ir spręsti ginčus savo nuožiūra yra ribota, nes yra tam tikri veiksniai, suteikiantys šiai veiklai objektyvumo bei ribojantys teisėjo vykdomą interpretaciją. Šiai grupei priskirtini modeliai bendrai gali būti vadinami turininguoju teisės aiškinimu, kai teisėjas laikomas įstatymų leidėjo partneriu, iš dalies prisidedančiu prie jos kūrybos. Turiningasis teisės aiškinimas pristatomas atskirai nagrinėjant teisėjui suteikiamas priemones, kuriomis remdamasis jis gali aiškinti neapibrėžtą teisės normą. Tokios aptariamos priemonės – teisės principai, teisės ginamos vertybės ir teisinio reguliavimo tikslas – suteikia teisėjui galią peržengti pozityviosios įstatymų leidėjo sukurtos teisės ribas ir kartu užtikrina, kad teisėjo atliekamas teisės aiškinimas bus prognozuojamas, objektyvus ir ribotas. Taip pat pateikiama analizė veiksnių, skatinančių teisėjų kūrybiškumą aiškinant teisę, bei nagrinėjama teisėjo diskrecijos apimtis ir ribos turiningojo teisės aiškinimo atveju.

Antra grupė aptariamų pozityviajam teisėjo vaidmens aiškinant teisę alternatyvių požiūrių yra tokie, kurių šalininkai nepripažįsta teisėjo galios kurti teisę, tačiau teisėjo taikomos teisės netapatina su įstatymų leidėjo sukurta teisės normų sistema. Šiuo atveju pripažįstama, kad teisėjo atliekamas teisės aiškinimas, jei ir yra ribojamas, tai ne taisyklių ar standartų, ne įstatymų leidėjo sukurtos teisės sistemos, o tam tikrų

prigimtinių, objektyviai egzistuojančių vertybių ar socialinės bei psichinės prigimties sąlygų.

Trečia nagrinėjamų požiūrių grupė tai pozicija, kurios šalininkai teisėją mano esant tikruoju teisės kūrėju. Šiuo atveju tai yra požiūris, besiremiantis teisinio realizmo šalininkų teorijomis apie teisės prigimtį ir skeptiškai vertinantis pozityviosios teisės taisykles. Dėl to teise yra laikoma tai, ką nusprendžia teisėjas, taip teisėjas tampa svarbiausiu veikėju teisės kūrybos procese. Taip pat atskleidžiama, kad toks skeptiškas požiūris į įstatymų leidėjo sukurtas teisės normas kartu skatina atkreipti dėmesį į visiškai kitokį teisėjo, kaip konkretaus ginčo arbitro, šalių taikintojo ar mediatoriaus, vaidmenį.

Darbo pabaigoje atlikti moksliniai tyrimai bei gauti rezultatai apibendrinami ir pateikiamos pagrindinės **išvados**:

1. Pozityvistinis teisėjo vaidmens aiškinant teisę modelis yra toks, kurio laikantis teisėjas pripažįstamas išimtinai įstatymų leidėjo sukurtos teisės aiškintoju. Viena iš pamatinių šio modelio nuostatų yra tvirtinimas, kad visais atvejais yra įmanomas objektyvus teismo atliekamas teisės aiškinimas, grindžiamas įvairių teisės normos teksto aiškinimo metodų naudojimu, todėl teisėjas, aiškindamas teisę, nesiremia niekuo, kas būtų už įstatymų leidėjo sukurtos teisės normos kalbos ir įstatymų leidėjo ketinimų ribų. Svarbiausias teisėjo tikslas tokiu atveju yra priimti racionalų, nevertybinį, logiškai argumentuotą sprendimą, kurį priimdamas teisėjas aiškina ir taiko jau esamą įstatymų leidėjo sukurtą teisę. Pozityvistinis požiūris į teisėjo vaidmenį aiškinant teisę grindžiamas teisinio pozityvizmo atstovų pateikiamomis teisės sampratos teorijomis, valdžių padalijimo doktrinos sureikšminimu ir teisiniu formalizmu kaip bazine argumentavimo teorija. Teisinis formalizmas yra radikaliausia pozityvistinio teisėjo vaidmens aiškinant teisę modelio forma, neigianti bet kokią teisėjo kūrybinę veiklą aiškinant teisės normų turinį, o pozityvistinis teisėjo vaidmens modelis yra platesnis, nes pripažįsta formaliojo teisės aiškinimo nepakankamumą, sunkiųjų bylų egzistavimą ir teisės aiškinimo metodų svarbą teisėjo veikloje aiškinant teisę. Esminis pozityvistinio teisėjo vaidmens aiškinant teisę modelio skirtumas nuo teisinio formalizmo yra tas, kad pozityvistinis požiūris į teisėjo vaidmenį aiškinant teisę pripažįsta teisėjo galią labai ribota apimtimi peržengti aiškinamos įstatymų leidėjo sukurtos teisės normos ribas, tai yra teisėjui suteikiama galimybė aiškinant pozityviosios teisės normas remtis ne tik jų tekstu, bet ir įstatymų leidėjo ketinimų aiškinimosi metodu, ir pildyti teisės spragas.

2. Pozityvistinis teisėjo vaidmens aiškinant teisę modelis nėra pakankamas teismo atliekamoje teisės aiškinimo veikloje ir negali užtikrinti, kad teisėjas liktų išimtinai įstatymų leidėjo sukurtos teisės aiškintoju, nes teisės aiškinimą neišvengiamai lemia ir tam tikri veiksniai, esantys už pozityviosios įstatymų leidėjo sukurtos teisės normos teksto ribų. Šį pozityvistinį teisėjo vaidmens aiškinant teisę nepakankamumą lemia kelios priežasčių grupės. *Pirma*, viena iš pagrindinių pozityvistinio teisėjo vaidmens aiškinant teisę nepakankamumo priežasčių yra kalbos neapibrėžtumas, su kuriuo susijusias problemas bandoma spręsti teisės normos turinio ieškant „giliau kalboje“, tačiau siūlomi teisės aiškinimo metodai – lingvistinis, istorinis, įstatymų leidėjo ketinimų aiškinimo, sisteminis – nepašalina teisėjo subjektyvių vertinimų galimybės, neužkerta kelio teisėjo pasirinkimams ir diskrecijai kurti teisę ją aiškinant, neužtikrina pozityvistiniam požiūriui į teisėjo veiklą aiškinant teisę priimtino objektyvaus ir nuspėjamo teisės aiškinimo. *Antra*, nėra patikimų priemonių, kurios padėtų pašalinti pozityvistinio teisėjo vaidmens aiškinant teisę modelio nepakankamumą, atsirandantį dėl kitų priežasčių – interpretavimo taisyklių neapibrėžtumo, teisinio teksto kūrėjo ribotumo, įstatymų leidybos netobulumų, teisėjo pareigos atsižvelgti į visuomeninių santykių kaitą, ir kartu užtikrintų, kad aiškinant teisę nebus peržengtos pozityviosios teisės normų kalbos ribos, tai yra kad pozityvistinio teisėjo vaidmens aiškinant teisę nepakankamumas būtų pašalintas neišeinant už šio modelio ribų ir netektų pripažinti reikšmingesnio teisėjo vaidmens nei vien teisės aiškintojo. *Trečia*, pozityvistinio teisėjo vaidmens aiškinant teisę modelio atveju iš teisėjo reikalaujama priimti įstatymų leidėjo nustatytas teisės normas atitinkantį, nevertybinį sprendimą. Taip laikantis šio modelio, teisė atskiriama nuo jos ginamų vertybių, moralės nuostatų, žmogaus teisių apsaugos siekio, todėl negali būti tikimasi, kad pagal šį modelį veikiantis teisėjas priims teisingumo, protingumo, sąžiningumo ar proporcingumo standartus atitinkantį sprendimą konkrečioje byloje. Teisėjas, negalintis peržengti pozityvistinio teisėjo vaidmens aiškinant teisę modelio ribų, negali orientuotis į šiuos už pozityviosios teisės normų sistemos ribų esančius standartus ir vertybes.

3. Prigimtinės teisės doktrina, istorinė teisės mokykla, sociologinė teisės samprata teisėjo vaidmenį aiškinant teisę apibrėžia kaip teisės atradimo, išgryninimo ir saugojimo užduotį, tačiau nepasiūlo priimtino sprendimo būdo, kaip būtų galima įveikti pozityvistinio teisėjo vaidmens aiškinant teisę modelio nepakankamumą, kartu

užtikrinant teisės aiškinimo teisme apibrėžtumą ir nuspėjamumą. Šie požiūriai nepripažįsta teisėjo teisės būti kūrėju, kaip ir pozityvistinis teisėjo vaidmens aiškinant teisės modelis, o teisėjo atliekamą teisės aiškinimą suvokia kaip iš esmės objektyvių, nuo žmogaus valios nepriklausančių, įstatymų leidėjo nekontroliuojamai susiformavusių teisės taisyklių nustatymą ir taikymą konkrečiam gyvenimo atvejui. Šiuo atveju teisėjas aiškindamas teisę yra ribojamas jau tartum egzistuojančios tobulos teisės, susiklosčiusios tvarkos ar socialinės aplinkos faktų, tačiau tai neužtikrina teisėjo atliekamo teisės aiškinimo apibrėžtumo, nes toks teisėjo atliekamas teisės ,,atradimo“, ,,išgryninimo“ ar laikymosi veiksmas, kai nėra aiškių tokios teisėjo veiklos standartų, būdų ir turinio, neparodo teisėjo realiai vykdomo vaidmens formuojant konkrečiu atveju taikytino teisinio reguliavimo turinį.

4. Teisėjas pripažįstamas teisės konkrečiam atvejui kūrėju tuo atveju, kai teisėjo ir teisės santykis, žvelgiant iš teisės atradimo / kūrimo perspektyvos, suvokiamas teisinio realizmo siūlomu būdu. Šiuo atveju pozityvistinio teisėjo vaidmens aiškinant teisę modelio nepakankamumo problema nėra aktuali, nes, pripažinus teisėją teisės konkrečiam atvejui kūrėju, įstatymų leidėjo sukurtų teisės normų turinio nustatymo klausimas nėra toks reikšmingas. Šis teisiniu realizmu grįstas požiūris į teisėjo ir teisės santykį, žvelgiant iš teisės atradimo / kūrimo perspektyvos, priimtinas tokiu atveju, jei iš esmės būtų keičiamas požiūris į teisėjo atliekamas funkcijas aiškinant teisę ir apskritai nagrinėjant bylas: pagrindiniu teisėjo uždaviniu turėtų tapti pašalinti konkretų konfliktą, išspręsti ginčą šalims priimtinu būdu, nesureikšminant to, kokias priemones teisėjas naudoja šiai užduočiai atlikti.

5. Teisėjas neišvengiamai turi būti pripažįstamas įstatymų leidėjo partneriu, teisės ginamų vertybių saugotoju ir garantu, tam tikra apimtimi kūrybiškai prisidedančiu prie teisės turinio formulavimo, todėl priimtiniausias teisėjo vaidmens aiškinant teisę modelis yra teisėjo galios naudotis turininguoju teisės aiškinimu pripažinimas. Turiningasis teisės aiškinimo būdas, integruojantis įvairias šio aiškinimo ,,atmainas“ (teisės aiškinimą, remiantis teisės principais, teisės ginamomis vertybėmis, teisinio reguliavimo tikslais), suteikia galimybę įveikti pozityvistinio teisėjo vaidmens aiškinant teisę modelio nepakankamumą, kartu užtikrinant apibrėžtą ir prognozuojamą teisėjo atliekamo teisės aiškinimo rezultatą. Turiningasis teisės aiškinimas suteikia teisėjui galią aiškinant teisę peržengti teisės normos teksto ribas ir remtis kažkuo, kas yra už normos kalbos ribų,

tačiau tokios teisėjui suteikiamos teisės aiškinimo priemonės taip pat riboja teisėjo atliekamą kūrybiškąjį teisės aiškinimą ir suteikia šiam aiškinimui objektyvumo. Tokios pozityvistinio teisėjo vaidmens aiškinant teisę modelio nepakankamumą padedančios įveikti ir kartu teisėjo kūrybą ribojančios priemonės yra teisės principai, teisės ginamos vertybės ir būtinybė atsižvelgti į teisinio reguliavimo tikslus ar padarinius (funkcinis, teleologinis teisės aiškinimas, socialinė inžinerija, pragmatinė jurisprudencija). Pagrindinis turiningojo teisės aiškinimo būdo trūkumas yra tas, kad šios teisėjui suteikiamos priemonės, naudojamos po vieną, dėl įvairių priežasčių atveria teisėjui teisės kūrybos galimybes, neužtikrindamos jos ribojimo, teisės viešpatavimo ir galimybės prognozuoti teismų sprendimus. Dėl to turiningasis teisės aiškinimas pozityvistinio teisėjo vaidmens aiškinant teisę modelio nepakankamumo įveikimo būdu tampa tik tada, kai taip pat nustatoma teisėjo pareiga aiškinant teisę minėtas turiningojo teisės aiškinimo priemones derinti ir ieškoti jų pusiausvyros. Pasitelkę sisteminį požiūrį derindami turiningojo teisės aiškinimo siūlomomis priemonėmis gautus teisės aiškinimo rezultatus ir minėtas priemones kiekvienu atveju taikydami kompleksiškai, teisėjai gali atlikti jiems keliamas užduotis, kurių atlikti neįmanoma apsiribojus vien įstatymų leidėjo sukurtų teisės normų teksto turinio aiškinimu.

AUTORĖS MOKSLINIŲ PUBLIKACIJŲ DISERTACIJOS TEMA SĄRAŠAS

1. KAZANAVIČIŪTĖ, Rūta. Klasikinio požiūrio į teisėją kaip teisės aiškintoją ir taikytoją alternatyvos // Teisė. 2009, t. 71, p. 147-162.
2. KAZANAVIČIŪTĖ, Rūta. Klasikinis požiūris į teisėją kaip teisės aiškintoją ir taikytoją // Teisė. 2009, t. 70, p. 86-101.

KITOS AUTORĖS PUBLIKACIJOS DISERTACIJOS TEMA

1. KAZANAVIČIŪTĖ, Rūta. The Role of the Judiciary in the Transition Societies (Lithuania) (Teisėjų vaidmuo pereinamosiose visuomenėse (Lietuva) // The 23rd IVR Congress. Law and Legal Cultures in the 21st Century: Diversity and Unity. Special workshops. Students and Young Researchers. Pieniazek M. (ed.). Andrzej Frycz Modrzewski Krakow University, 2009. P. 59-77.

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