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COMMENTS ON THE LEGAL MAXIM “SUMMUM IUS SUMMA INIURIA”

Interpretation based on maxims of legal logic occupies an honourable place among the possible methods of legal interpretation; this is done most frequently by using basic concepts originating from the classical period of Roman law, which facilitate orientation among contradictory decrees and help to clarify the meaning of legal rules. Here belong the following principles, widely known in Modestinus's formulation but dating from the period of the *leges XII tabularum*: „*lex posterior derogat legi priori*”,¹ the Papinian „*lex specialis derogat legi generali*”,² and the „*lex primaria derogat legi subsidiariae*”. It is a basic interpretive principle, that the legal rule should be interpreted in its integrity, not by extracting certain parts of it;³ following the letter of the law often leads to its evasion;⁴ during interpretation the legislator's intention should be taken into account,⁵ if this is doubtful, the more lenient solution should be preferred.⁶ All these can be traced back into a highly philosophical, Celsian principle – also widely accepted in contemporary legal thinking – which declares that the vocation of the Law is to implement Justice, asserting that „*ius est ars boni et aequi*”,⁷ the Law is an art of the Good and the Just. Out of these, the procedure called *in fraudem legis* is related to the statement that enforcing the letter of the

¹ XII tab. 12, 5; Mod. D. 1, 4, 4.

² Pap. D. 48, 19, 41; 50, 17, 80.

³ Cels. D. 1, 3, 24.

⁴ Paul. D. 1, 3, 29.

⁵ Cels. D. 1, 3, 19.

⁶ Marc. D. 28, 4, 3 pr.

⁷ Ulp. D. 1, 1, 1.

law often leads to inequity contradictory with the spirit of the law; i.e., to injustice. Cicero also quotes this *proverbium*, widely spread as early as in the age of the Republic, which remained in use in his formulation until today: „*summum ius summa iniuria*”;⁸ i.e., the utmost enforcement of the law leads to the greatest injustice.

The present paper has a modest aim, it does not offer a general survey, much rather an introspection into the problem. First, it enumerates the occurrences of this proverb in the sources of Roman literature (I.); then, it outlines the development and semantic changes of the concept of *interpretatio* (II.); finally, it will consider the further-reaching consequences of this *proverbium* in *Adagia* by Erasmus of Rotterdam, one of the most important humanists (III.).

I. This idea first occurs in Terence’s comedy, *Heautontimoroumenos*: „*Neque tu scilicet / illuc confugies: ‘Quid mea? Num mihi datumst? Num iussi? Num illa oppignerare filiam meam me invito potuit?’ Verum illuc, Chermes, / dicunt: Ius summum saepe summast malitia.*”⁹ The situation is the following: Syrus asks Chermes for money, so that he could help his young master, but in order to get the sum he claims that he needs it for Chermes’s daughter. The law is indubitably on Chermes’s side, but unconditioned clinging to the law cannot be reconciliated with the *pietas* and *clementia* expected from a Roman *pater familias*. In order to analyse the *summa malitia* turning point it is useful to peruse some meanings and the most typical occurrences of the *summus–summa–summum* adjective and the different connotations of the word *malitia*. In its original meaning *summus* is the Latin equivalent of the Greek *hypathos*.¹⁰ Varro¹¹ and Isidorus Hispalensis¹² use it as a grammatical technical term for the explanation of the *superlativus*, Quintilian applies it for the description of rhetorical amplification.¹³ Used figuratively, it can be encountered in many places, both with temporal meaning¹⁴ and in relation to social status;¹⁵ e.g., applied to the *optimates* and the *nobiles*¹⁶ as the contradiction of the *humiles*, the *infima plebs*¹⁷ and the *infimus ordo*.¹⁸ Isidorus describes the word *malitia*, deriving

⁸ Cic. *off.* 1, 33.

⁹ Ter. *Heaut.* 792sq.

¹⁰ WALDE, A.–HOFMANN, J. B. *Lateinisches Etymologisches Wörterbuch I–II*. Heidelberg, 1954. II 630.

¹¹ Varro *ling.* 8, 75.

¹² Isid. *etym.* 1, 7, 27.

¹³ Quint. *inst.* 7, 10.

¹⁴ Plaut. *Asin.* 534; *Persa* 33; *Pseud.* 374; Cic. *Cato* 78; Suet. *Tib.* 64, 4.

¹⁵ Plaut. *Cist.* 516; *Amph.* 77; *Capt.* 279; *Merc.* 694; *Stich.* 409; *Persa* 418; Cic. *Tusc.* 2, 144.

¹⁶ Plaut. *Stich.* 492sq.; *Cist.* 23sq.; *Pseud.* 70; *Merc.* 604; Ter. *Heaut.* 227. 609; *Ad.* 502.

¹⁷ Plaut. *Cist.* 24sq.; Ter. *Eun.* 489; *Hec.* 380; Cic. *Att.* 4, 1, 5; *Phil.* 2, 3.

from the word *malus*, as the evil thought of mind;¹⁹ it is used by many authors as the synonym of *astutia* and *calliditas*.²⁰ In the prologue of *Heautontimorumenos* Terence mentions *expressis verbis* the Greek type of his comedy,²¹ which, with regard to the above cited *proverbium*, can most probably be identified with two lines by Menander,²² though the two ideas do not correspond word for word.²³ Terence speaks about *ius*, whereas Menander mentions *nomoi*; i.e., the laws and not *dikaion*. The *synkhophantēs* carries a slightly wider semantic load than *malitia*, which could be translated into Latin as *damnum*, *calumnia* or *malum*, in any way designating a content in contradiction with the spirit and destination of *ius*;²⁴ *lian akribōs* can be equally translated by the phrase *summo iure* or *nimis exacto quodam studio*.²⁵ Hence it becomes obvious that Terence heavily altered the Menandrian thought and adapted it to the circumstances of Roman legal life but preserved its basic message.²⁶

Hieronimus takes his version from this Terentian *locus*: „*O vere ius summum summa malitia*.”²⁷ A statement with similar content (*summum ius summa crux*) is formulated by Columella, when he speaks about the responsibilities of the *pater familias* and the *dominus*: „*comiter agat cum colonis facilemque se prebeat, ...sed nec dominus in unaquaque re, cui colonum obligaverit, tenax esse sui iuris debet, sicut in diebus pecuniarum vel lignis et ceteris paucibus accessionibus exigendis, quarum cura maiorem molestiam quam impensam rusticis adfert. Nec sane vindicandum nobis quidquid licet, nam summum ius antiqui summam putabant crucem*.”²⁸ So it is forbidden to deal too harshly with the *colonii*, the master should exercise the virtues of meekness and consideration.²⁹

The *proverbium* passed into legal common knowledge in Cicero's formulation in *De officiis*: „*Existunt saepe iniuriae calumnia quadam et nimis callida, sed malitiosa iuris interpretatione. Ex quo illud 'summum ius summa iniuria'*”

¹⁸ CARCATERRA, A. 'Ius summum saepe summast malitia'. in *Studi in onore di E. Volterra*. Milano, 1971. IV. 631sqq.

¹⁹ Isid. *diff.* 1, 358.

²⁰ Isid. *etym.* 10, 6. Cf. CARCARETTA 638.

²¹ Ter. *Heaut.* 4–5.

²² Menandr. Nr. 545.

²³ About the question of *contaminatio* in Terence's comedies see RIETH *Die Kunst des Menanders in den Adelphen des Terenz*. Hildesheim, 1964.

²⁴ Don. *Comm. in Ter. Heaut.* 792sqq.

²⁵ CARCATERRA 1971. 641.

²⁶ CARCATERRA 1971. 644.

²⁷ Hier. *epist.* 1, 44.

²⁸ Colum. *rust.* 1, 7, 1sq.

²⁹ FUHRMANN, M. Philologische Bemerkungen zur Sentenz 'Summum ius, summa iniuria'. in *Studi in onore di E. Volterra*. Milano, 1971. II. 74.

factum est iam tritum sermone proverbium.”³⁰ Consequently, it is not *ius* itself that results in *iniuria*, but the malevolent enforcement of a seemingly lawful claim is the case when injustice is committed under the mask of law enforcement.³¹ Examining the bequeathing of the *proverbium*, one can safely assert that the versions of Terentius and Columella are more closely connected with each other than with the Ciceronian *antithesis*, and that they represent an earlier stage in the formulation of this thought.³² In these two authors’ work the clash of the legal and moral norms becomes foregrounded; i.e., the action permitted and approved by *ius* becomes contestable from the side of *mos*.³³ The Ciceronian formulation goes even further: it is not only the legal and ethical norm that conflict here, the collision takes place within the legal system.³⁴ The claim is made not only for a morally correct decision but also for the right and just application of the law. The proverb objects to the abuse of the law, to its literal and not sensible interpretation.³⁵ (The phrase *factum etiam tritum sermone proverbium* could refer to the fact that Cicero himself took over the idea of *summum ius summa iniuria* from an earlier *auctor* or the practice on the *forum*, or it can be assumed that he is referring to his own rhetorical practice when he emphasises the great familiarity of the proverb, as he frequently used the phrases *summo iure agere* and *summo iure contendere* too.³⁶)

However, he greatly exceeds the requirement of equitable legal interpretation in *De legibus*, where, among other things, he analyses the connection between natural law and positive law.³⁷ In this work Cicero appears as legislator – as his model Plato³⁸ does in *Nomoi*³⁹ – a thing which must have seemed extremely new, almost provoking indignation, because doing this he intended to reform and replace the venerated *leges XII tabularum*,⁴⁰ thus occupying the pla-

³⁰ Cic. *off.* 1, 33.

³¹ BÜRGE, A. *Die Juristenkomik in Ciceros Rede Pro Murena*. Zürich, 1974. 53; FÖLDI, A.–HAMZA, G. *A római jog története és institúciói*. (History and Institutes of Roman Law) Budapest, 2006¹¹. 73.

³² STROUX, J. ‘*Summum ius, summa iniuria*’ *Ein Kapitel der Geschichte der interpretatio iuris*. Berlin–Leipzig, 1926. 21; FUHRMANN 1971. 74.

³³ STROUX 1926. 49.

³⁴ FUHRMANN 1971. 75.

³⁵ BÜCHNER, K. *Summum ius summa iniuria*. in *Humanitas Romana*. Heidelberg, 1957. 102; TOMULESCU, C. S. Der juristische Wert des Werkes Ciceros. in *Gesellschaft und Recht im griechisch-römischen Altertum I–II*. Berlin, 1968. I. 230.

³⁶ Cic. *Verr.* 6, 4; *Att.* 16, 15, 1.

³⁷ TOMULESCU 1968. 230.

³⁸ Cic. *leg.* 1, 15.

³⁹ Cf. GÖRGEMANN, H. *Beiträge zur Interpretation von Platons Nomoi*. München, 1960; MORROW, G. R. *Plato’s Cretan City*. Princeton, 1960.

⁴⁰ Cic. *leg.* 2, 23. 59.

ce of the nation who made these laws.⁴¹ The first book contains considerations of legal theory, which was practically unknown in Rome in the 1st century BC. It aims at harmonizing *ius civile* with *ius naturale* because this was the only way Roman law could lay claim to universality.⁴² From the demand of *ius naturale* neither the *comitia*, nor the *senatus* can give exemption, this being eternal and unchanging. The fundamental task of the legislator and the judge is to proceed in accordance with it,⁴³ and the task of the law is to separate the lawful from the unlawful.⁴⁴ *Ius* and *ratio* are inseparably connected; moreover, they are each other's synonyms in a certain respect; so law must originate directly from philosophy and not from the pretorial edict or the *leges XII tabularum*, therefore, it can never lose its validity.⁴⁵ He formulates in a strictly imperative mood the demand never written down before in Rome: „*Lex iusta esto!*”⁴⁶ Law must be based on Justice, which might seem trivial in itself, but Cicero himself had felt the lack of this condition; so law depends solely on Justice, and social cohabitation depends only on the law – this conclusion must have seemed considerably bold in ancient Rome.⁴⁷ Appearing as a great system originator in philosophy, Cicero wanted to encompass law in a system as well as in his work – unfortunately lost since then – entitled *De iure civili in artem redigendo*, which does not seem to have exerted much influence on legal scholars in Rome.⁴⁸

Returning to *summum ius summa iniuria*: it was quite common that certain maxims formulated in everyday life and transmitted through literary sources were appropriated by Law as rules of universal validity. For example, here are a couple of *proverbia* that became *regulae iuris*.⁴⁹ Aquila Romanus quotes the sentence „*cui quod libet, hoc licet*”,⁵⁰ which can be found in the fragment of Ulpianus as „*non omne quod licet honestum est*”.⁵¹ Publius Syrus's thought, „*lucrum absque damno alieno fieri non potest*”⁵² resonates with

⁴¹ KNOCHE, U. Ciceros Verbindung der Lehre vom Naturrecht mit dem römischen Recht und Gesetz. in *Cicero ein Mensch seiner Zeit*. Hrsg. v. RADKE, G. Berlin, 1968. 41.

⁴² HAMZA, G. A *ius naturale* a Corpus Ciceronianum. (The *ius naturale* in the Corpus Ciceronianum) in *Hereditas Ciceroniana*. Debrecen, 1995. 75sq.

⁴³ Cic. *rep.* 3, 22.

⁴⁴ Cic. *leg.* 2, 13.

⁴⁵ Cic. *leg.* 1, 18; 2, 14.

⁴⁶ Cic. *leg.* 1, 18.

⁴⁷ KNOCHE 1968. 46sq.

⁴⁸ LÜBTOW, U. v. Cicero und die Methode der römischen Jurisprudenz. in *Festschrift für L. Wenger*. München, 1944. I. 232.

⁴⁹ CARCATERRA 1971. 663.

⁵⁰ Aquila Rom. *fig.* 27.

⁵¹ Ulp. D. 50, 17, 144.

⁵² Publ. Syr. *Sent.* L, 6.

Pomponius's rule: „*iure naturae aequum est neminem cum alterius detrimento fieri locupletiore*”.⁵³ Seneca maior's sentence „*tacite loquitur; silentium videtur confessio*”⁵⁴ corresponds with Paulus's „*qui tacet, non utique fatetur: sed tamen verum est eum non negare*”.⁵⁵

II. In order to highlight the origin and the meaning of the word *interpretatio*, let us examine the loci to see in what context the concepts *interpretis* and *interpretari* are used by Plautus, and other authors of archaic Roman literature bequeathed to us mainly in fragments. In *Poenulus* the slave says that the speech of his master could only be made intelligible by Oedipus, who solved the enigma of the Sphinx too.⁵⁶ In *Pseudolus* the content of an undecipherable letter could be solved only by the Sybilla.⁵⁷ Both cases are concerned with deciphering the meaning of extremely intricate texts, which can be done exclusively by *oracula*, the solvers of great predictions, of mythical secrets, so the author draws the activity of *interpretari* into the circle of religious mysteries and endows it with the meaning of decoding, of solving an enigma.⁵⁸ In *Bacchides*, the importunate messenger is made to leave in a comic fashion but quite resolutely, with palpable means,⁵⁹ so the messenger, who interpreted the highly paraphrased threat for himself, thought it better to proceed more cautiously.⁶⁰ In *Cistellaria* a father gathers from the words of the *hetaira* speaking with him that she seduced her son.⁶¹ In this case it is not the enigmatic words and composition of the interlocutor where one should draw conclusions from, it is much rather the conclusion drawn from the situation, the subjective opinion that is denominated by the word *interpretor*.⁶² Refreshing the interlocutor's memory, recalling a certain event can also be signified by the verb *interpretari*;⁶³ elsewhere the revealer, the solver of a doubtful situation, or the implementor of a plan is called the *interpretis*; in the last case it is the synonym of *internuntius*.⁶⁴ So Plautus uses the expressions *interpretis* and *inter-*

⁵³ Pomp. D. 50, 17, 206.

⁵⁴ Sen. *contr.* 10, 2, 6.

⁵⁵ Paul. D. 50, 17, 142.

⁵⁶ Plaut. *Poen.* 443sq.

⁵⁷ Plaut. *Pseud.* 25sq.

⁵⁸ FUHRMANN, M. *Interpretatio – Notizen zur Wortgeschichte.* in *Symptica F. Wieacker.* Göttingen, 1970. 82.

⁵⁹ Plaut. *Bacch.* 595sq.

⁶⁰ Plaut. *Bacch.* 597.

⁶¹ Plaut. *Cist.* 316sq.

⁶² FUHRMANN 1970. 84.

⁶³ Plaut. *Epid.* 552.

⁶⁴ Plaut. *Mil.* 798. 951sq. 962.

pretari with two connotations: on the one hand, in their original sense, meaning mediation, on the other hand, in the sense of understanding, making to understand, a more abstract and indirect meaning; this latter meaning implies a kind of irrational activity related to the realm of *religio*.⁶⁵ This seems to be corroborated by the fragments after Plautus and before Cicero.

A Pacuvian fragment connects the task of the *interpretres* with the interpretive activity of the *augures* and *haruspices* and it mentions a sinister *prodigium*,⁶⁶ placing the interpretive activity within the context of Roman religious institutions.⁶⁷ A fragment from a Latin translation of the *Ilias* contains a line from Agamemnon's reply to Calchas's premonition; comparing it to the Homeric text it becomes evident that *interpretres* here stands for the Greek *mantis*.⁶⁸ It is also a fragment by Pacuvius according to which the activity of the *interpretari* in the course of interpreting obscure texts is at times doomed to highly uncertain guesses.⁶⁹ Based on this, we can assume that in the beginning the *interpretres* mediated not only between humans but also between the human and the divine sphere, so in the course of fulfilling his task, besides everyday logic he had to employ certain means that belonged to the realm of the irrational as well.⁷⁰

For the religious usage of these expressions one can find ample evidence in the *Corpus Ciceronianum* and other authors from contemporary Roman literature. *Augures*, *haruspices*, *decemviri* and Persian *magi* are mentioned as *interpretres*;⁷¹ premonitions, miraculous and sinister signs, thunderstrucks, dreams, religious phenomena, and generally the will of the gods, all pertaining to the sphere of *religio*, constitute the object of *interpretari*.⁷² In many cases the expressions *interpretres* and *coniectores* serve as each other's explanation, highlighting each other.⁷³ According to Cicero, this interpretive activity is needed because of the obscure and doubtful nature of certain religious phenomena, so it is not surprising that the concept of *interpretatio* was eagerly associated with obscure

⁶⁵ FUHRMANN 1970. 84.

⁶⁶ Pacuv. v. 80sq. (Ed. RIBBECK, O. TRF Leipzig 1871.)

⁶⁷ About the *augures* and *haruspices* see LATTE, K. *Römische Religionsgeschichte*. München, 1967. 141. 158.

⁶⁸ Mat. *frg.* 2. (Ed. MOREL, W. FPL Leipzig, 1927.) *Obsceni interpretres funestique ominis auctor*. Cf. *Il.* 1, 106sq.

⁶⁹ Pacuv. v. 151sq. (Ed. RIBBECK, O. TRF Leipzig 1871.)

⁷⁰ FUHRMANN 1970. 85.

⁷¹ Cic. *leg.* 2, 20; *Phil.* 13, 12; *nat.* 2, 12; 3, 5; *div.* 1, 3. 4. 46; 2, 110; *Liv.* 10, 8, 2; *Gell.* 4, 1, 1.

⁷² Cic. *leg.* 2, 20. 30; *div.* 1, 3. 45. 92. 93. 116; *Scaur.* 30; *dom.* 107; *Quint.* 3, 6, 30; *Plin. nat.* 2, 141; 7, 203; *Gell.* 4, 1, 1; *Val. Max.* 1, 5. 6.

⁷³ Cic. *nat.* 2, 12; *div.* 1, 118; 2, 62. 66. 144; *Quint.* 3, 6, 30.

and polisemic contents outside the circle of *religio* too; e.g., in philosophical polemic.⁷⁴

In addition to its sacred connotations, the most common, practical usage of *interpres* can also be found; it occurs in diplomatic, administrative, military and commercial fields too. In these cases *interpres* is none other than interpreter or translator. In the sources the interpreter translates word for word, *verbum pro verbo*, and in this respect he can be regarded the contrary of the *orator*, who possibly takes over a thought from somebody else, but enriches and embellishes it with elements of style when delivering it to the audience.⁷⁵ Cicero himself used these possibilities of individualisation when he translated the speeches of Greek rhetors into Latin, and in his philosophical works on the employment of Greek models.⁷⁶ Giving advice to poets in his *Ars poetica*, Horace is against translation word for word performed in the manner of the *interpres*.⁷⁷ Quintilian challenges a poet's originality precisely because of his being an *interpres*.⁷⁸ *Interpretatio* as a technical term first occurs in rhetorics, namely in *Auctor ad Herennium*'s discourse concerning rhetoric figures, which claims that a kind of *geminatio*, the *conduplicatio* differs from *interpretatio* only to the extent that the *verbum pro verbo* translation is a form-and-content true transfer of a train of thought from a different language whereas *conduplicatio* is the same activity within a single language.⁷⁹ Quintilian does not consider *interpretatio* to be a rhetoric figure as it was previously by Cornificius, but sees in it only an exercise to be used in the course of rhetoric training.⁸⁰ In certain cases *interpretatio* means the etymological analysis of words and the most precise rendering of Greek technical terms in Latin, in course of which, as Cicero warns, one should avoid excessive hair splitting.⁸¹

It can be concluded that in the Ciceronian age the expression *interpres* was used in two clearly separable meanings. On the one hand, it was used as *interpres deorum*, as the definition of the person who enlightens phenomena from the sphere of *religio*, transmits the divine will towards the human realm. On the other hand (as the religious semantic content did not entirely occupy this

⁷⁴ Cic. *div.* 1, 1166; *nat.* 1, 39; Quint. 3, 4, 3.

⁷⁵ Cic. *fin.* 3, 15; Hier. *epist.* 57, 5.

⁷⁶ Cic. *opt. gen.* 14; *leg.* 2, 17; *off.* 1, 6; 2, 60; *De orat.* 1, 23; *Ac* 2, 1, 6; *fin.* 1, 6.

⁷⁷ Hor. *Ars* 133sq. *Nec verbum pro verbo curabis reddere fidus interpres.*

⁷⁸ Quint. 10, 1, 87.

⁷⁹ *Auct. ad Her.* 4, 38. Cf. FUHRMANN 1970. 88.

⁸⁰ Quint. 9, 3, 98; 10, 5, 5.

⁸¹ Cic. *div.* 1, 1; *top.* 35; *off.* 2, 5; *fin.* 3, 15; Liv. 1, 44, 4; Sen. *ben.* 1, 3, 6; Gell. 4, 9, 9; Quint. 5, 10, 8. Cf. FUHRMANN 1970. 89; FLASHAR, H. Formen der Aneignung griechischer Literatur durch die Übersetzung. *Arcadia* 3, 1968.

concept), it was used for denoting the interpreter and translator who mediate in human communication by bridging linguistic impediments.⁸²

As a scientific technical term, the word *interpres* became widely used first in the fields of philology and legal science. Cicero does not call the philologists *interpretes*.⁸³ According to Suetonius's account, however, Cornelius Nepos already refers to them as *poetarum interpretes*.⁸⁴ In the field of legal science Livius remembers Tullus Hostilius as „*clemens legis interpres*”,⁸⁵ though this wording is slightly anachronistic as the king did not interpret or translate the law, concerning *provocatio*, he only facilitated its implementation.⁸⁶ In Pliny's *Naturalis Historia* the Ephesian Hermodoros appears as the *interpres* of the *leges XII tabularum* but it means only translator,⁸⁷ just as in Pomponius's text the reference to Hermodoros as *auctor* means the same.⁸⁸ However, in connection with *lex Valeria*, dating from 449 BC., Livius already speaks about the *interpretes* as a genuine legal technical term, as they tried to establish the correct interpretation of this law in long legal debates.⁸⁹ Both the explanators of the *leges XII tabularum*, driven by an archeological interest, usually searching for the meaning of a forgotten word, and the *iuris prudentes* of the near past are mentioned as *interpretes* in the sources from the 1st century BC.⁹⁰ Cicero does not simply call the lawyers of his time *interpretes iuris* – as it was later used by Quintilian as the equivalent of *iuris consultus*⁹¹ – instead, he defines the task of *interpretari* as a basic component of the *iuris consultus*'s activity, sometimes narrowing its scope by using synonyms.⁹² In *De oratore*, in the parts concerned with establishing the place and importance of the auxiliary sciences of rhetorics from the point of view of the theory of science and dialectics, Cicero does not mention *interpretatio*.⁹³ In his work entitled *Brutus*, which deals with the history of Roman rhetorics, in the loci dedicated to his friend, one of the most outstanding lawyers of the age, Servius Sulpicius,⁹⁴ Cicero makes some remarks

⁸² FUHRMANN 1970. 91.

⁸³ Cic. *div.* 1, 34.

⁸⁴ Suet. *Gramm.* 4.

⁸⁵ Liv. 1, 26, 8.

⁸⁶ FUHRMANN 1970. 92.

⁸⁷ Plin. *nat.* 43, 21.

⁸⁸ Pomp. D. 1, 2, 2, 4.

⁸⁹ Liv. 3, 55, 8.

⁹⁰ Cic. *De orat.* 1, 193; *leg.* 2, 59; *Brut.* 144; *Phil.* 9, 10. Cf. FUHRMANN 1970. 92sq.

⁹¹ Quint. 3, 6, 59; Cf. C. 1, 14, 12, 5; 7, 4, 17 pr.; 6, 29, 4 pr.; 6, 23, 30.

⁹² Cic. *Balb.* 20; *Caec.* 70; *De orat.* 1, 199; *leg.* 1, 14; *off.* 2, 65.

⁹³ Cic. *De orat.* 1, 185–192; cf. BARWICK, K. *Das rednerische Bildungsideal Ciceros*. Berlin. 1963. 7sqq.

⁹⁴ About Servius Sulpicius Rufus see SCHULZ, F. *Geschichte der römischen Rechtswissenschaft*. Weimar, 1961. 65; STEIN, P. The place of Servius Sulpicius Rufus in the development of Roman legal science. in *Festschrift für F. Wieacker*. Göttingen, 1978. 176sqq.

concerning certain cases of *interpretatio* (primary highlighting its task to clarify and order obscure and doubtful states of affairs), but neglects to make its methodology and inner construction an object of scrutiny. In the course of this he fails to mention the instances of *interpretatio iuris* when the *iuris consultus* is dealing with the applicability and modes of application of perfectly clearly formulated legal texts that contain decrees of general validity.⁹⁵

In legal texts, the expression *interpres* can seldom be encountered, and not as a technical term. It usually means translator or interpreter here⁹⁶ and only in specific cases does it signify the person doing the interpretation, the one searching for the meaning of texts.⁹⁷ The derivations *interpretari* and *interpretatio* beyond doubt mean the interpretive activity performed by lawyers and forums administering justice. Following Fuhrmann’s thematisation, this interpretive activity could refer to different legal transactions (e.g., *testamenta, stipulationes, contractus*), to the laws in general, to criminal laws, to verdicts in criminal cases, imperial privileges, and certain concrete decrees resulting from the *leges XII tabularum*, other laws, the pretorial edict, *senatus consulta* and *constitutiones*. In certain cases the meaning of *interpretari* ranges from interpretation to assumption and establishing.⁹⁸ Based on this, the formational and developmental process of the meaning of *interpretari* become visible. In the preclassical age, *interpretatio* often occurs in the spheres of religion and mantics; i.e., indicating the mediation between the divine and human spheres. However, from Cicero’s time the latest, it became to mean the translator’s and interpreter’s activity; i.e., a secularised activity, mediating between humans only; from this time both grammar and rhetorics, and on their analogy jurisprudence, began to use it as their own technical term.⁹⁹

III. Investigating the use and explanation of the *proverbium „summum ius summa iniuria”* in the works of Erasmus of Rotterdam seems to be substantiated not so much by the historical and dogmatic depth of the Erasmian interpretation – as this idea was made the object of much more intensive and exhaustive legal theory scrutiny by numerous humanists; e.g., Claudius Canticula, Bonifacius Amerbach or Symon Grynaeus (if only due to Erasmus’s slighter interest in historical studies) – but because of the immense influence

⁹⁵ Cic. *Brut.* 152. Cf. FUHRMANN 1970. 96sq.

⁹⁶ Ulp. D. 45, 1, 1, 6; Pomp. D. 49, 15, 5, 3; Gai. *inst.* 3, 93.

⁹⁷ Paul. D. 1, 3, 37.

⁹⁸ Cels. D. 48, 19, 21; Nerva D. 25, 1, 15; Iul. D. 50, 16, 201; Afr. D. 47, 2, 62, 6; Pomp. D. 50, 16, 246, 1; Pap. D. 22, 1, 1, 3; Herm. D. 5, 3, 52; Gai. *inst.* 4, 72a; Pap. D. 50, 17, 79; Ulp. D. 13, 5, 5, 6.

⁹⁹ FUHRMANN 1970. 99sq.

produced by this excellent humanist over the centuries enhanced by his enormous authority, which is hard to underestimate.¹⁰⁰ Without any need to enter a more meticulous study of the genesis and influence of Erasmus's *Adagia*, it can be stated that from its first edition in the 16th century until the end of the 18th century, it was used as a widely appreciated scholarly text book, so it can be safely assumed that the „*summum ius summa iniuria*” *paroemia* gained considerable popularity among humanists, theologians, philosophers, as it is proved by it being frequently quoted in the most various contexts.¹⁰¹

As Erasmus had been making an effort to perfect the *Adagia* until the end of his life, several versions and explanations of this idea can be encountered in the Erasmian corpus. The first edition dating from 1500 refers to the proverb in two places;¹⁰² first in connection with the Terentian quotation „*summum ius summa malitia*”; later with regard to Plato and Cicero under the title of „*ad vivum summo iure*”. The text appearing in Basel in 1540¹⁰³ but dating from 1536 synthesises all the known occurrences of this idea in Latin authors. Before enumerating and analysing the loci, trying to avoid the charge that he includes *sententiae* instead of *adagia*; i.e., proverbs, Erasmus gives a long explanation, and eventually finds his acquittal in quoting the Terentian *nominatim*.¹⁰⁴

Not being a jurist, Erasmus dedicated less attention to the legal *paroemia*, except for a few explanations referring to *Iustitia*. Only four years before his death, in 1532 did Erasmus become interested in juridic regulations, and asked his friend, Bonifacius Amerbach in a letter to send him some material, suitable for the completion of the *Adagia*. Then, after receiving the two-page-long collection, he urged his friend to send him some more. It is highly probable that this was how the quotations from the Roman sources found their way into the 1540 edition of the *Adagia*.¹⁰⁵

In Erasmus's interpretation *aequitas* often mentioned to highlight the *paroemia* „*summum ius summa iniuria*” probably did not actually mean equity

¹⁰⁰ Cf. APPELT, T. C. *Studies in the Contents and Sources of Erasmus' Adagia, with Particular Reference to the First Edition, 1500, and the Edition of 1526*. Chicago 1942.

¹⁰¹ KISCH, G. *Summum ius summa iniuria*. in *Aequitas und bona fides*. Festgabe Simonius. Basel, 1955. 211.

¹⁰² *Desyderii Herasmi Roterdami veterum maximeque insignium paroemiarum id est adagiorum collectanea*. Parrhisiis M. Iohanne Philippo Alamanno diligentissimo impressore Anno M.Vc.

¹⁰³ Des. Erasmi Rot. *Operum Secundus Tomus Adagiorum Chiliades Quatuor cum Sequicenturia Complectens, ex postrema ipsius auctoris recognitione accuratissima, quibus non est quod quicquam imposterum vereare accessurum*. Basileae ex Officina Frobeniana AN. M.D.XL.

¹⁰⁴ KISCH 1955. 207.

¹⁰⁵ KISCH 1955. 208.

as a legal interpretive principle, much rather justice that should be enforced even against the letter of the law.¹⁰⁶ For the explanations Erasmus usually refers to antique authors generally with the exact documentation of the sources but at times without summarizing their content. Most often the concept *aequitas* is simply used in the sense of *aequum et bonum*, as the opposite of *iniquitas*, placing the spirit of the law above its letter. One can find the type of the Ciceronian pair of concepts in the Aristotelian *Ethica Nicomachea*, which asserts that a man can be regarded equitable, if he is satisfied with less, even if the law is on his side, and does not stick to his own justice in the detriment of others, so equity is none other than a kind of justice.¹⁰⁷ It is interesting though, that Erasmus does not make any reference to Aristotle in the early editions of the *Adagia*, only the 1536 and 1540 editions allow us to assume that probably he had the specific locus from *Ethica Nicomachea* in mind. In these latter editions reference is made to Cicero's *Pro Murena*, instead of *Pro Caecina*; naturally, together with the classic formulation of the *proverbium*, which can be read in *De officiis*. We can suspect Aristotelian influence – on an ideological level rather than in the concrete wording – in the reference to the intention of the legislator opposed to the letter of the law.¹⁰⁸ The image „*voces ...quasi legum cutis est*”; i.e., the words constitute the skin, the outward layer, is presumably Erasmus's own. Erasmus's attention to the two legal fragments by Celsus and Paulus respectively from the *Digesta* by Iustinian was probably called by Bonifacius Amerbach, but he used them merely as a kind of illustration without examining either their historical or dogmatic background.¹⁰⁹

Reaching the end of our introspection, we can draw the following conclusions. From the maxims of legal logic as means of legal interpretation, in the present work we made the proverb „*summum ius summa iniuria*” the object of our scrutiny, enumerating its occurrences in antique literary sources, namely in Terence, Columella and then in Cicero. In this last formulation the meaning of the proverb became the most clearly crystallized. It signifies the excessive, malevolent legal practice in the course of *interpretatio iuris*, which plays off the letter of the law against its spirit. Following this we tried to trace the different meanings, formation and the stages of development of the expression *interpretatio* itself, in the course of which *interpretatio* combined *mutatis mutandis* the nuances of the religious sphere, on the one hand, and those of the grammatical

¹⁰⁶ BÜCHNER 1957. 13sq.

¹⁰⁷ Aristot. *NE* 1138a

¹⁰⁸ Aristot. *rhet.* 1374b

¹⁰⁹ KISCH 1955. 210.

field, on the other, until it reached the semantic content of interpretive activity, and became a determining factor by the classical age. The Celsian *sententia* „*ius est ars boni et aequi*” formulates one of the most general, all-encompassing basic principles of *interpretatio* meant to offer protection against the too strictly interpreted and applied *summum ius*. By presenting the relevant loci from Erasmus of Rotterdam’s *Adagia* as a typical example of the persistence of the *paroemia* „*summum ius summa iniuria*”, we wanted to show the way a proverb turning into *regula iuris* – apart from its direct legal application – became an integral part of today’s legal common knowledge.

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Напомене уз правну максиму “Summum ius summa iniuria”

*Резиме*¹¹⁰

Аутор у овом чланку од правних максима које се јављају као средства тумачења, своје истраживање усмерио је на proverbium «summum ius summa iniuria».

Прати његово коришћење у античким литералним изворима посебно код Теренција, Колумеле и најзад у списима Цицерона.

Сматра, да је значење ове изреке јавља на најјаснији начин у текстовима Цицерона. Према Цицерону, означава злонамерну примену и остваривање права у процесу interpretatio iuris путем претераног придржавања слову закона изигравајући на тај начин његов смисао.

Аутор после утврђивања значења ове изреке прати различита значења израза interpretatio, њихов настанак и развојне етапе. Сматра, да је термин interpretatio спајајући mutatis mutandis с једне стране, нијансе термина које се јављају у области религије и с друге стране, значења у граматици, стигло до обележавња значења интерпретативне делатности правника класичног периода.

Целзова sententia «ius est ars boni et aequi» формулише један од најуопштених, најобухватнијих основних начела тумачења у функцији заштите од претераног дословног тумачења и примене summum ius. На основу анализе ове Целзове дефиниције аутор констатује да, – мада римски учени правници никад нису дефинисали појам aequitas-a – aequitas је постао, захваљујући сарадњи јуриспруденције и реторике, веома значајно средство развоја права путем правне праксе.

¹¹⁰ Резиме написала др Магдолна Сич, ванредни професор, Правног факултета у Новом Саду.

Као еклатантан пример даље примене изреке *summum ius summa iniuria* указује на одговарајуће текстове дела Еразмуса Ротердамског под називом «*Adagia*». Цитирајући текстове овог извора жели да укаже на то – како је једна изрека постала правно правило (*regula iuris*) – без непосредне примене у праву – на који начин је посредним путем ушла у савремену правну мисао.