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***Summum Ius Summa Iniuria*—Comments on the Historical Background of a Legal Maxim of Interpretation**

Abstract. Interpretation based on maxims of legal logic occupies an honourable place among the possible methods of legal interpretation; this being done most frequently 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. The following principles belong hereby, widely known in Modestinus's formulation but dating from the period of the *leges XII tabularum*: „*lex posterior derogat legi priori*”, the Papinian „*lex specialis derogat legi generali*”, 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. The following the letter of the law often leads to its evasion. During the interpretation one should take into account the legislator's intention. If this is doubtful, the more lenient solution should be preferred. All these ideas can be traced back into a highly philosophical, Celsian principle, which is—also widely accepted in contemporary legal thinking. It—declares the vocation of the Law to implement Justice, according to which „*ius est ars boni et aequi*”, the Law is an art of the Good and the Just. Out of these, the procedure called *in fraudem legis* is connected to the statement that enforcing the letter of the law often leads to inequity contradictory with the spirit of the law, i. e. injustice. Cicero also quotes this *proverbium*, already widely spread in the age of the Republic, which remained in use in his formulation until today: „*summum ius summa iniuria*”, 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, but rather an introspection into the problem. First it enumerates the occurrences of this proverb in the sources of Roman literature (I.), then it sketches the development and semantic changes of the concept of *interpretatio* (II.), next it investigates the meaning of *summum ius* in the relation of the *ars boni et aequi* principle and the concept of Justice in legal sources and Cicero's works (III.), in the end it will consider the further reaching consequences of this *proverbium* in *Adagia* by Erasmus of Rotterdam, one of the most important humanists (IV.).

Keywords: Cicero, *summum ius*, *summa iniuria*, interpretation, *aequitas*

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I. This idea occurs for the first time 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, Cherme, / dicunt: Ius summum saepe summast malitia.*”¹ The situation is the as follows: 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 indoubtedly on Chermes's side, but the 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*.² Varro³ and Isidorus Hispalensis⁴ use it as a grammatical technical term for the explanation of the *superlativus*, while Quintilian applies it for the description of rhetorical amplification.⁵ Used figuratively, it can be encountered in many places, both with temporal meaning⁶ and in relation with social status,⁷ e.g. applied to the *optimates* and the *nobiles*⁸ as the contradiction of the *humiles*, the *infima plebs*⁹ and the *infimus ordo*.¹⁰ Isidorus describes the word *malitia*, deriving from the word *malus*, as the evil thought of mind,¹¹ it occurs in the works of many auctors as the synonym of *astutia* and *calliditas*.¹² In the prologue of *Heautontimoroumenos* Terence mentions *expressis verbis* the Greek type of

¹ Terentius: *Heautontimoroumenos* 792. sqq.

² Walde, A.—Hofmann, J. B.: *Lateinisches Etymologisches Wörterbuch I–II*. Heidelberg, 1954. II 630.

³ Varro: *De lingua Latina* 8, 75.

⁴ Isidorus: *Origines sive etymologiae* 1, 7, 27.

⁵ Quintilianus: *Institutio oratoria* 7, 10.

⁶ Plautus: *Asinaria* 534; *Persa* 33; *Pseudolus* 374; Cicero: *Cato maior de senectute* 78; Suetonius: *Tiberius* 64, 4.

⁷ Plautus: *Cistellaria* 516; *Amphitruo* 77; *Captivi* 279; *Mercator* 694; *Stichus* 409; *Persa* 418; Cicero: *Tusculanae disputationes* 2, 144.

⁸ Plautus: *Stichus* 492. sq.; *Cistellaria* 23. sq.; *Pseudolus* 70; *Mercator* 604; Terentius: *Heautontimoroumenos* 227. 609; *Adelphoe* 502.

⁹ Plautus: *Cistellaria* 24. sq.; Terentius: *Eunuchus* 489; *Hecyra* 380; Cicero: *Epistulae ad Atticum* 4, 1, 5; *Philippica in M. Antonium* 2, 3.

¹⁰ Carcaterra, A.: ‘Ius summum saepe summast malitia’, In: *Studi in onore di E. Volterra*, Milano 1971. IV. 631. sqq.

¹¹ Isidorus: *Differentiae* 1, 358. *Cogitatio prova mentis malitia appellatur*.

¹² Isidorus: *Origines sive etymologiae* 10, 6. *Astutus ab astu vocatus, quid est callidi et cauti nominis, qui possit sine periculo fortiter aliquid facere*;. Cf. Carcaterra: *op. cit.* 638.

his comedy,¹³ which, with regard to the above cited *proverbium*, can most probably be identified with two lines by Menander,¹⁴ though the two ideas do not correspond word for word.¹⁵ Terence speaks about *ius*, whereas Menander mentions *nomoi*, i. e. the laws and not *dikaion*; the *synchophantés* has a slightly wider semantic meaning 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*.¹⁶ The *lian akribós* can be equally translated by the phrase *summo iure* or *nimis exacto quodam studio*.¹⁷ 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.¹⁸

Hieronymus takes his version from this Terentian *locus*: „*O vere ius summum summa malitia.*”¹⁹ A statement with similar content (*summum ius summa crux*) is formulated by Columella, when he deals with 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.*”²⁰ So it is forbidden to deal too harshly with the *colonii*, the master should exercise the virtues of meekness and consideration.²¹

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' factum est iam tritum sermone proverbium.*”²² Consequently, it is not

¹³ Terentius: *Heautontimoroumenos* 4–5.

¹⁴ Menandr. Nr. 545.

¹⁵ About the question of *contaminatio* in Terence's comedies see Rieth: *Die Kunst des Menanders in den Adelphen des Terenz*. Hildesheim, 1964.

¹⁶ Donatus: *Commentarius a. h. l. Summum ius saepe summa est malitia id enim, quod datum est, utique reddendum est, sed iure cautum est, ut filia quidquid acceperit vel filiae nomine datum fuerit, quae in familia est, non recte datum videatur. Itaque aequitatis est ut debitum solvi debeat, ius est ut sic datum reddatur: ita summum ius summa malitia.*

¹⁷ Carcaterra: *op. cit.* 641.

¹⁸ Carcaterra: *op. cit.* 644.

¹⁹ Hieronymus: *Epistulae* 1, 44.

²⁰ Columella: *De re rustica* 1, 7, 1. *sq.*

²¹ Fuhrmann, M.: *Philologische Bemerkungen zur Sentenz 'Summum ius, summa iniuria'*, In: *Studi in onore di E. Volterra*, Milano, 1971. II. 74.

²² Cicero: *De officiis* 1, 33.

the *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.²³ Taking into consideration the bequeathing of the *proverbium*, one can safely assert that the Terentian and Columellian versions are more closely connected to each other than to the Ciceronian *antithesis*, and that they represent an earlier stage in the formulation of this thought.²⁴ In these two authors' work the clash of the legal and moral norms becomes foregrounded, i. e. the action permitted and approved by the *ius* becomes a subject of contest from the side of the *mos*.²⁵ 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.²⁶ The claim is made not only for a morally correct decision but also for the right and justified application of the law. The proverb objects to the abuse of the law, to its literal and not sensible interpretation.²⁷ (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 of the *forum*. It can be also assumed that he is referring to his own rhetorical practice when he emphasises the great familiarity of the proverb, as he frequently used the *summo iure agere* and the *summo iure contendere* phrases, too.²⁸)

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.²⁹ In this work Cicero appears as legislator—as his model Plato³⁰ does in *Nomoi*³¹—, a thing which must have seemed extremely

²³ Bürge, A.: *Die Juristenkomik in Ciceros Rede Pro Murena*, Zürich, 1974. 53; Földi A.—Hamza G.: *A római jog története és intézményei (History and Institutes of Roman Law)*, Budapest, 2004. (9th edition) 73.

²⁴ Stroux, J.: '*Summum ius, summa iniuria*' Ein Kapitel der Geschichte der *interpretatio iuris*, Berlin—Leipzig 1926. 21; Fuhrmann: *op. cit.* 1971. 74.

²⁵ Stroux: *op. cit.* 49.

²⁶ Fuhrmann: *op. cit.* 1971. 75.

²⁷ 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*. Berlin, 1968. I. 230.

²⁸ Cicero: *In Verrem* 6, 4. *Non agam summo iure tecum, non dicam id quod debeam forsitan obtinere, cum iudicium certa lege sit.*; *Epistulae ad Atticum* 16, 15, 1. *Ego ... dubitassem fortasse utrum remissior essem an summo iure contenderem.*

²⁹ Tomulescu: *op. cit.* 230.

³⁰ Cicero: *De legibus* 1, 15.

³¹ Cf. Görgemanns, H.: *Beiträge zur Interpretation von Platons Nomoi*, München, 1960; Morrow, G. R.: *Plato's Cretan City*, Princeton, 1960.

new, almost provoking indignation, because doing this he intended to reform and replace the venerated *leges XII tabularum*,³² thus occupying the place of the nation who made these laws.³³ The first book contains considerations of legal theory, which was practically unknown in Rome in the 1st century BC. It aims at harmonizing statutory law with natural law because this was the only way Roman law could lay claim to universality.³⁴ 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 according to this,³⁵ and the task of the law is to separate the lawful from the unlawful.³⁶ The law and the *ratio* are inseparably connected, moreover, they are each other's synonyms in a certain respect; so the law must originate directly from philosophy and not from the pretorial edict or the *leges XII tabularum*, thus it can never lose its validity.³⁷ He formulates in a strictly imperative mood the demand never before written down in Rome: „*Lex iusta esto!*”³⁸ Law must be based on Justice, which might seem trivial in itself, but Cicero had felt the lack of this condition himself; thus the law solely depends on Justice, and social cohabitation depends only on the law, this conclusion must have seemed considerably bold in ancient Rome.³⁹ Cicero, appearing in philosophy as a great system originator, 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.⁴⁰

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. Just as example, I enumerate hereby a couple of *proverbia* becoming *regulae iuris*.⁴¹ Aquila

³² Cicero: *De legibus* 2, 23. 59.

³³ Knoche, U.: Ciceros Verbindung der Lehre vom Naturrecht mit dem römischen Recht und Gesetz, In: *Cicero ein Mensch seiner Zeit*, hg. Radke, G. Berlin, 1968. 41.

³⁴ Hamza, G.: A *ius naturale* a *Corpus Ciceronianum*ban (The *ius naturale* in the *Corpus Ciceronianum*). In: *Hereditas Ciceroniana*. Debrecen, 1995. 75. sqq.

³⁵ Cicero: *De re publica* 3, 22.

³⁶ Cicero: *De legibus* 2, 13.

³⁷ Cicero: *De legibus* 1, 18; 2, 14.

³⁸ Cicero: *De legibus* 1, 18.

³⁹ Knoche: *op. cit.* 46. sqq.

⁴⁰ Lübtow, U. v.: Cicero und die Methode der römischen Jurisprudenz. In: *Festschrift für L. Wenger*. München, 1944. I. 232.

⁴¹ Carcaterra: *op. cit.* 663.

Romanus quotes the sentence „*cui quod libet, hoc licet*”,⁴² which can be found in Ulpianus as „*non omne quod licet honestum est*”.⁴³ Publius Syrus’s thought, „*lucrum absque damno alieno fieri non potest*”⁴⁴ resonates with Pomponius’s rule: „*iure naturae aequum est neminem cum alterius detrimento fieri locupletiores*”.⁴⁵ Seneca maior’s sentence „*tacite loquitur; silentium videtur confessio*”⁴⁶ corresponds with Paulus’s „*qui tacet, non utique fatetur: sed tamen verum est eum non negare*”.⁴⁷

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 concept *interpretas* and *interpretari* in Plautus, and other, mainly fragmentary bequethed authors of archaic Roman literature. In *Poennulus* the slave says that the speech of his master could only be made intellegible by Oedipus, who solved the enigma of the Sphinx too.⁴⁸ In *Pseudolus* the content of an undecipherable letter could be solved only by the Sybilla.⁴⁹ Both cases are concerned with the 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 scope of religious mysteries and endows it with the meaning of decoding, of solving an enigma.⁵⁰ In *Bacchides*, the importunate messenger is made to leave in a comic fashion but with quite resolutely, by the use of very palpable means,⁵¹ to which the messenger, who interpreted the highly paraphrased threat for himself thought it better to proceed more cautiously.⁵² In *Cistellaria* a father makes out from the words of

⁴² Aquila Romanus: *De figuris sententiarum* 27.

⁴³ Ulp. D. 50, 17, 144.

⁴⁴ Publilius Syrus: *Sententiae* L, 6.

⁴⁵ Pomp. D. 50, 17, 206.

⁴⁶ Seneca: *Controversiae* 10, 2, 6.

⁴⁷ Paul. D. 50, 17, 142

⁴⁸ Plautus: *Poennulus* 443. sq. *Isti ... orationi Oedipo opust coniectore, qui Sphingi interpretas fuit.*

⁴⁹ Plautus: *Pseudolus* 25. sq. *Has ... credo, nisi Sibilla legerit, interpretari alium posse neminem.*

⁵⁰ Fuhrmann, M.: *Interpretatio*—Notizen zur Wortgeschichte, in: *Symptica F. Wieacker*. Göttingen, 1970. 82.

⁵¹ Plautus: *Bacchides* 595. sq. *Ne tibi hercle haud longe est os ab infortunio, ita dentifragibula haec meis manibus gestiunt.*

⁵² Plautus: *Bacchides* 597. *Cum ego huius verba interpretor, mihi cautios.*

the *hetaira* speaking with him that she seduced her son;⁵³ in this case it is not the enigmatic words and composition of the interlocutor where one should draw conclusions from, but it is rather the conclusion drawn from the situation, the subjective opinion that is denominated by the word *interpretor*.⁵⁴ Refreshing the interlocutor's memory, recalling a certain event can also be signified by the verb *interpretari*,⁵⁵ elsewhere the revealer, the solver of a doubtful situation, or the implementor of a plan is called the *interpre*s. In the last case it is the synonym of *internuntius*.⁵⁶ Thus Plautus uses the expressions *interpre*s and *interpretari* 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 including a kind of irrational activity, pertaining to the realm of the *religio*.⁵⁷ This seems to be corroborated by the fragments after Plautus and before Cicero. A Pacuvian fragment connects the task of the *interpre*s with the interpretive activity of the *augures* and *haruspices* and it mentions a sinister *prodigium*,⁵⁸ placing the interpretive activity within the context of Roman religious institutions.⁵⁹ 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 *interpre*s here stands for the Greek *mantis*.⁶⁰ It is also a fragment by Pacuvius, according to which the activity of the *interpretari* in the course of interpreting obscure texts is at certain times doomed to highly uncertain guesses.⁶¹ Based on this, we can assume that in the beginning the *interpre*s mediated not only between humans but also between the human and the divine sphere, so in the course of fulfilling his task, besides

⁵³ Plautus: *Cistellaria* 316. *sqq.* *Sed cum dicta huius interpretor, haec herclest, ut ego opinor, meum quae corrumpit filium. Suspiciost eam esse, utpote quam numquam videro; de opinione credo.*

⁵⁴ Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 84.

⁵⁵ Plautus: *Epidicus* 552.

⁵⁶ Plautus: *Miles gloriosus* 798. 951. *sq.* 962.

⁵⁷ Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 84.

⁵⁸ Pacuvius v. 80. *sqq.* (*Tragicorum Romanorum Fragmenta*, ed. Ribbeck, O., Leipzig, 1871.) *Cives, antiqui amici maiorum meum, consilium socii, augurium atque extum interpretes, postquam prodigium horrifera, portentum pavos.*

⁵⁹ About the *aurures* and *haruspices* cf. Latte, K.: *Römische Religionsgeschichte*, München, 1967. 141. 158.

⁶⁰ Matius frg. 2. (*Fragmenta Poetarum Latinorum*, ed. W. Morel, Leipzig 1927.) *Obsceni interpretes funestique ominis auctor.; Cf. Il. 1, 106. sq.*

⁶¹ Pacuv. v. 151. *sq.* (*Tragicorum Romanorum Fragmenta*, ed. Ribbeck, O. Leipzig, 1871.) *Nil coniectura quivi interpretarier, quorsum flexiloqua dictio contenderet.*

everyday logic he had to employ certain means belonging to the realm of the irrational as well.⁶²

For the religious usage of these expressions one can find ample evidence in the *Corpus Ciceronianum* and other authors from the contemporary Roman literature; *augures*, *haruspices*, *decemviri* and Persian *magi* are mentioned as *interpretes*,⁶³ 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*.⁶⁴ In many cases the expressions *interpretes* and *coniectores* serve as each other's explanation, highlighting each other.⁶⁵ According to Cicero, this interpretive activity is necessary because of the obscure and doubtful nature of certain religious phenomena. It is not surprising however that the concept of *interpretatio* was eagerly connected to obscure and polisemic contents outside the circle of *religio* too, e. g. in philosophical polemic.⁶⁶

In accordance with sacral connotations the most practical, everyday use of *interpretes* can also be founded, it occurs in diplomatic, administrative, military and commercial fields too. In these cases the *interpretes* is no one 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 as the contrary of the rhetor, who possibly takes over a thought from somebody else, but enriches and embellishes it with elements of style when delivering it to the audience.⁶⁷ Cicero himself used these possibilities of individualisation when he translated the speeches of Greek rhetors into Latin, and in his philosophical works with respect to the employment of Greek models.⁶⁸ Horace, giving advice to poets, in his *Ars Poetica* is against word for word translation performed in the

⁶² Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte*. op. cit. 85.

⁶³ Cicero: *De legibus* 2, 20; *Philippica* in *M. Antonium* 13, 12; *De natura deorum* 2, 12; 3, 5; *De divinatione* 1, 3. 4. 46; 2, 110; Livius: *Ab urbe condita* 10, 8, 2; Gellius: *Noctes Atticae* 4, 1, 1.

⁶⁴ Cicero: *De legibus* 2, 20. 30; *De divinatione* 1, 3. 45. 92. 93. 116; *Pro M. Aemilio Scauro* 30; *De domo sua* 107; Quintilianus: *Institutio oratoria* 3, 6, 30; Plinius: *Naturalis historia* 2, 141; 7, 203; Gellius: *Noctes Atticae* 4, 1, 1; Valerius Maximus: *Facta et dicta memorabilia* 1, 5. 6.

⁶⁵ Cicero: *De natura deorum* 2, 12; *De divinatione* 1, 118; 2, 62. 66. 144; Quintilianus: *Institutio oratoria* 3, 6, 30.

⁶⁶ Cicero: *De divinatione* 1, 1166; *De natura deorum* 1, 39; Quintilianus: *Institutio oratoria* 3, 4, 3.

⁶⁷ Cicero: *De finibus bonorum et malorum* 3, 15; Hieronymus: *Epistulae* 57, 5.

⁶⁸ Cicero: *De optimo genere oratorum* 14; *De legibus* 2, 17; *De officiis* 1, 6; 2, 60; *De oratore* 1, 23; *Academica priora* 2. 1, 6; *De finibus bonorum et malorum* 1, 6.

manner of the *interpretes*.⁶⁹ Quintilian challenges a poet's originality precisely because of his being an *interpretes*.⁷⁰ *Interpretatio* as a technical term first occurs in rhetorics namely in *Auctor ad Herennium*'s discourse concerning rhetoric figures, according to which a kind of *geminatio*; the *conduplicatio* only differs from *interpretatio* in 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.⁷¹ Quintilian does not consider the *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.⁷² In certain cases *interpretatio* means the etymological analysis of words and the most precise rendering in Latin of the Greek technical terms, in course of which, as Cicero warns, one should avoid excessive hair splitting.⁷³

It can be concluded that in the Ciceronian age the expression *interpretes* was used in two clearly separable meanings. On the one hand it was used as *interpretes deorum*, for the definition of the person enlightening phenomena from the sphere of *religio*, transmitting the divine will towards the human realm, on the other hand (as the religious semantic content did not entirely occupy this concept) it was used for denoting the interpreter and translator mediating in human communication by bridging linguistic impediments.⁷⁴

As a scientific technical term, the word *interpretes* first became widely used in the fields of philology and legal science. Cicero does not call the philologists *interpretes*,⁷⁵ according to Suetonius's relations however Cornelius Nepos already mentions them as *poetarum interpretes*.⁷⁶ In the field of legal science Livius remembers Tullus Hostilius as „*clemens legis interpretes*“,⁷⁷ though this wording is slightly anachronistic as the king did not interpret or translate the

⁶⁹ Horatius: *Ars poetica* 133. sq. *Nec verbum pro verbo curabis reddere fidus interpretes*.

⁷⁰ Quintilianus: *Institutio oratoria* 10, 1, 87.

⁷¹ *Auctor ad Herennium* 4, 38; Cf. Fuhrmann: *op. cit.* 1970. 88.

⁷² Quintilianus: *Institutio oratoria* 9, 3, 98; 10, 5, 5.

⁷³ Cicero: *De divinatione* 1, 1; *Topica* 35; *De officiis* 2, 5; *De finibus bonorum et malorum* 3, 15; Livius: *Ab urbe condita* 1, 44, 4; Seneca: *De beneficiis* 1, 3, 6; Gellius: *Noctes Atticae* 4, 9, 9; Quintilianus: *Institutio oratoria* 5, 10, 8; Cf. Fuhrmann: *op. cit.* 1970. 89; Flashar, H.: *Formen der Aneignung griechischer Literatur durch die Übersetzung*, *Arcadia* 3. 1968.

⁷⁴ Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte*. *op. cit.* 91.

⁷⁵ Cicero: *De divinatione* 1, 34.

⁷⁶ Suetonius: *De grammaticis* 4.

⁷⁷ Livius: *Ab urbe condita* 1, 26, 8.

law concerning *provocatio*, he only facilitated its implementation.⁷⁸ In Pliny's *Naturalis Historia* the Ephesian Hermodoros appears as the *interpretes* of the *leges XII tabularum* but it means only translator,⁷⁹ just as in Pomponius's text the mentioning of Hermodoros as *auctor* means the same.⁸⁰ However in connection with the *lex Valeria*, dating from 449 BC., conferring the status of *sacrosanctus* on the *trinuni plebis*, *aediles* and the *iudices decemviri*, 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.⁸¹ 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 1. century BC. sources.⁸² 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*⁸³—but rather he defines the task of *interpretari* as a basic component of the *iuris consultus*'s activity, at times narrowing its scope using synonyms.⁸⁴ 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*.⁸⁵ Cicero, in his work entitled *Brutus*—dealing with the history of Roman rhetorics—in the *loci* dedicated to his friend, one of the most outstanding lawyers of the age, Servius Sulpicius,⁸⁶ makes some remarks 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

⁷⁸ Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte*. *op. cit.* 92.

⁷⁹ Plinius: *Naturalis historia* 43, 21.

⁸⁰ Pomp. D. 1, 2, 2, 4.

⁸¹ Livius: *Ab urbe condita* 3, 55, 8.

⁸² Cicero: *De oratore* 1, 193; *De legibus* 2, 59; *Brutus* 144; *Philippica in M. Antonium* 9, 10; Cf. Fuhrmann: *op. cit.* 1970. 92. sq.

⁸³ Quintilianus: *Institutio oratoria* 3, 6, 59; Cf. C. 1, 14, 12, 5; 7, 4, 17. pr.; 6, 29, 4. pr.; 6, 23, 30.

⁸⁴ Cicero: *Pro Balbo* 20; *Pro Caecina* 70; *De oratore* 1, 199; *De legibus* 1, 14; *De officiis* 2, 65.

⁸⁵ Cicero: *De oratore* 1, 185–192; Cf. K. Barwick: *Das rednerische Bildungsideal Ciceros*, Berlin 1963. 7. sqq.

⁸⁶ 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 Wieacker F.*, Göttingen, 1978. 176. sqq.

instances of *interpretatio iuris* when the *iuris consultus* is dealing with the applicability and modes of application of perfectly clearly formulated legal texts containing decrees of general validity.⁸⁷

In legal texts, the expression *interpres* can seldom be encountered, and not as a technical term, it usually means translator or interpreter here⁸⁸ and only in specific cases does it signify the person doing the interpretation, the one searching for the meaning of texts.⁸⁹ The derivations *interpretari* and *interpretatio* beyond any doubts mean the interpretive activity performed by lawyers and forums administering justice. Following Fuhrmann's thematization, 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*.⁹⁰ In certain cases the meaning of *interpretari* ranges from interpretation to assumption and establishing.⁹¹ 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 only between

⁸⁷ Cicero: *Brutus* 152. Cf. Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte*. op. cit. 96. sq.

⁸⁸ Ulp. D. 45, 1, 1, 6; Pomp. D. 49, 15, 5, 3; Gai. *inst.* 3, 93.

⁸⁹ Paul. D. 1, 3, 37. *Optima est legum interpres consuetudo*.

⁹⁰ *Testamenta*: Iav. D. 32, 29. pr.; Nerva D. 40, 7, 17; Pomp. 50, 16, 123; Afr. D. 28, 5, 48, 2; Gai. D. 35, 1, 16; Scaev. 40, 5, 41, 10; Pap. D. 35, 1, 72. pr.; 50, 17, 12; Ulp. D. 7, 8, 12, 2; Mod. 31, 34, 1. *Stipulationes*: Proc. D. 50, 16, 125; Cels. 45, 1, 99. pr.; Nerva D. 2, 11, 14; Pomp. D. 23, 4, 9; Maecen. D. 35, 2, 32, 2; Pap. D. 2, 15, 2; Ulp. D. 45, 1, 38, 18. *Contractus*: Iav. D. 18, 1, 77, 80. pr.; Nerva D. 2, 14, 58; Marc. D. 13, 5, 24; Pap. D. 17, 2, 81; Paul. D. 50, 17, 172. pr.; Ulp. D. 23, 4, 11. *Laws in general*: Cels. D. 1, 3, 18; Iul. D. 1, 3, 11; Paul. D. 1, 3, 23. 37; Ulp. 1, 3, 13; Mod. D. 1, 3, 25. *Criminal laws and criminal cases*: Paul. 50, 17, 155, 2; Herm. D. 48, 19, 42. *Privileges*: Iav. D. 1, 4, 3; Paul. D. 28, 6, 43. pr. *Leges XII tabularum*: Pomp. D. 40, 7, 21. pr.; 50, 16, 120. *Leges*: Gai. D. 23, 5, 4; Scaev. D. 28, 2, 29, 6. 13; Pap. D. 48, 3, 2, 1; Paul. D. 49, 14, 40. *Edicta*: Paul. D. 13, 5, 17; Ulp. D. 12, 1, 1. pr.; 13, 5, 18, 1; 13, 6, 1, 1; 25, 4, 1, 11; 37, 12, 1, 2; 43, 3, 1, 11. *Senatus consulta*: Ulp. D. 5, 3, 20, 6; 36, 1, 1. pr.; 38, 17, 1, 6. *Constitutiones*: Marc. D. 29, 1, 25; Paul. D. 50, 15, 8, 7.

⁹¹ 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, 72 a; Pap. D. 50, 17, 79; Ulp. D. 13, 5, 5, 6.

humans. From this time both grammar and rhetorics, and on their analogy jurisprudence, began to use it as their own technical term.⁹²

III. Celsus's famous statement „*ius est ars boni et aequi*”—transmitted by Ulpianus—occurs as the opening idea of Iustinian *Digesta*, according to this, whoever intends to deal with law should first know where its name comes from. *Ius* got its name from *iustitia*—as Celsus astutely defines—law is the art of the good and the equitable.⁹³ Following this train of thought, Ulpianus states that lawyers should exercise their profession as a priestly vocation, because they must respect justice, propagate the knowledge of the good and the equitable, separating the legal from the illegal, the permissible from the forbidden.⁹⁴ Later Ulpianus defines justice as an unceasing and eternal effort to give everybody their due right. Therefore the commandments of the law are the following: to live decently, not to hurt anyone, to give everybody their due.⁹⁵ This definition being considerably well known, there is not need of further explanation. In concordance with this Ulpianus *expressis verbis* calls the magistrates' attention to the fact that unlawful procedures are forbidden. As far as judges are concerned—for whom it is also forbidden to proceed with partiality, prejudice, or generally incorrectly—they must keep in mind the principle of *aequitas*, especially in the cases in which their personal consideration is of greater importance.⁹⁶ The mere memorization of the legal material is not equivalent with the genuine knowledge of law, as Celsus emphasises, and he strongly blames the lawyers who do not want to consider the entire law when solving a case, and who only present an arbitrarily selected portion even while justifying their *responsa*.⁹⁷ The „*suum cuique tribuere*” principle is in remarkable resonance with that locus of Cicero's *Topica* which defines the *ius civile* as the *aequitas* established for the people living in the same state with

⁹² Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 99. sq.

⁹³ Ulp. D. 1, 1, 1. *Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi.*

⁹⁴ Ulp. D. 1, 1, 1. *Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus, et boni et aequi notitiam profiteamur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.*

⁹⁵ Ulp. D. 1, 1, 10. *Iustitia est constans et perpetua voluntas suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

⁹⁶ Ulp. D. 47, 10, 32; 5, 1, 15, 1; Gai. D. 50, 13, 6; C. 3, 1, 13, 6; Tryph. D. 16, 3, 31. pr.

⁹⁷ Cels. D. 1, 3, 17. 24. Cf. Polaček, A.: *Ius est ars aequi et boni*. In: *Studi in onore di A. Biscardi*. Milano, 1982. II. 27. sq.

the scope of preserving their goods.⁹⁸ Regarding the *Corpus Ciceronianum*, in the speech delivered in defence of L. Licinius Murena, this contradiction is thoroughly highlighted: in connection with certain legal institutions of marital law (*coemptio tutelae evitandae causa*, *coemptio sacrorum interimendorum causa*),⁹⁹ which became empty and troublesome by the time of Cicero, the rhetor formulates:¹⁰⁰ „*In omni denique iure civili aequitatem relinquerunt, verba ipsa tenuerunt.*”¹⁰¹ So, criticism is not directed against the keystone of the state, the laws,¹⁰² only against legal practitioners and their methods of interpretation.

The loci from the *Corpus Ciceronianum* referring to *aequitas*—with special regard to Cicero’s theoretical works—can be classified in the following categories.¹⁰³ In certain cases *aequitas* appears as the opposite of *ius*,¹⁰⁴ in other cases one can find the trinity of *aequitas–ius–lex*, which divides the concept of law in a very special way.¹⁰⁵ On the one hand it divides justice into a *ius* based on *lex*, on the other hand into a *ius* based on *aequitas*.¹⁰⁶ Elsewhere—e. g. in *Pro Caecina*—*aequitas* is none other than the means of *interpretatio iuris*.¹⁰⁷ A third different group is constituted by the loci where *aequitas* is mentioned as a synonym of *ius*.¹⁰⁸ In his philosophical works *aequitas* appears in many thoughts as a projection, a form of *iustitia*, being the foundation of human relationships.¹⁰⁹ It brings us closer to our present topic of discussion if we try to trace the occurrences of *aequitas* in Cicero’s speeches and his correspondence. In certain characterisations it appears as a personal

⁹⁸ Cicero: *Topica* 2, 9. *Ius civile est aequitas constituta eis, qui eiusdem civitatis sunt ad res suas obtinendas.*

⁹⁹ Cf. Benedek, F: *Die conventio in manum und die Förmlichkeiten der Eheschließung im römischen Recht*, PTE Dolg. Pécs, 1978. 19. sqq.

¹⁰⁰ Cic. *Mur.* 27. *Mulieres omnes propter infirmitatem consilii maiores in tutorum potestate esse voluerunt, hi invenerunt genera tutorum, quae potestate mulierum continetur. Sacra interire noluerunt, horum ingenio senes ad coempionales faciendas interimendorum sacrorum causa reperti sunt.*

¹⁰¹ Cicero: *Pro Murena* 27.

¹⁰² Cicero: *De legibus* 1, 14.

¹⁰³ Ciulei, G.: Les rapports de l’équité avec le droit et la justice dans l’oeuvre de Cicéron, RHD 1968. 640. sqq..

¹⁰⁴ Cicero: *De inventione* 32; *Partitiones oratoriae* 28; *Pro Caecina* 36; *De oratore* 1, 56.

¹⁰⁵ Cicero: *Topica* 5. 7.

¹⁰⁶ Ciulei: *op cit.* 642.

¹⁰⁷ Cicero: *Partitiones oratoriae* 39; *De re publica* 5, 2.

¹⁰⁸ Cicero: *Topica* 2. 24; *Partitiones oratoriae* 37.

¹⁰⁹ Cicero: *De re publica* 1, 2; *Laelius de amicitia* 22; *De officiis* 1, 19; *Topica* 23.

characteristic feature,¹¹⁰ this is the way he characterises Scipio¹¹¹ and Servius Sulpicius,¹¹² and he expects every Roman in office to possess this quality, he finds it particularly desirable in the case of judges.¹¹³ At the same time *iustitia* appears only as an exception as somebody's personal feature in Ciceronian characterisations.¹¹⁴ *Aequitas*, often mentioned together with *ius*, not only as its complementary, is considered an ethical norm playing an important role in the administration of law.¹¹⁵ So it does not appear as the kind of equity that would give the judge the possibility to reach a decision in contradiction with written law because this way the verdict could easily become unjust, coming to a result contradictory with its aim.¹¹⁶

Let us take a quick view—following Pringsheim's statements—to the changes that the concept of *aequitas* underwent after Cicero, as the complementary and opposite of *ius*, and see how the concepts of *ius aequum* and *ius strictum* are formed.¹¹⁷ The *ius aequum* adjectival construction does not mean the legal interpretation, used in an abstract sense, based on equity, but the adjective *aequus* means, both in literary and legal sources, according to its original sense, the equal right, identically available for everybody.¹¹⁸ Basically, it is not the *ius* that is divided into *ius aequum* and *ius strictum*, but *aequitas* appears as a principle regulating, at times correcting *ius*, at times harmonising with it, at times constituting a contradictory principle, which however, has never been defined at the level of an abstract definition, probably due to a lack of effort.¹¹⁹ In the time of the dominate *aequitas* kept gaining terrain from *ius*, a turning point in this being was Constantinus's legislation who on the one hand declared that the emperor alone is entitled to interpret the difference between *ius* and *aequitas*, on the other hand, he made *aequitas* the synonym of *iustitia*

¹¹⁰ Cicero: *Ad Quintum fratrem* 1, 1, 45.

¹¹¹ Cicero: *In Verrem* 5, 81.

¹¹² Cicero: *Ad familiares* 4, 4, 3; *Philippica in M. Antonium* 9, 10.

¹¹³ Cicero: *De lege agraria* 2, 102; *Pro M. Tullio* 8; *Pro L. Valerio Flacco* 49; *Pro Cluentio* 5, 159.

¹¹⁴ Cicero: *Ad familiares* 13, 28 A, 2; 13, 66, 2; Cf. Bürge: *op. cit.* 49. *sqq.*

¹¹⁵ Cicero: *De oratore* 1, 86, 173; Cf. Schulz *op. cit.* 90; F. Pringsheim: *Ius aequum und ius strictum*, ZSS 42. 1921. 643. *sqq.*

¹¹⁶ Cicero: *Philippica in M. Antonium* 5, 20; *De imperio Cn. Pompei* 58; Cf. Bürge: *op. cit.* 52.

¹¹⁷ Pringsheim: 643. *sqq.*

¹¹⁸ Cicero: *In Verrem* 3, 118; Livius: *Ab urbe condita* 38, 50, 9; Tacitus: *Annales* 3, 27; Seneca: *Epistulae ad Lucilium* 86, 2; Tryph. D. 29, 1, 18, 1; Paul. D. 46, 1, 55; C. 3, 36, 11; 6, 58, 15, 1.

¹¹⁹ Paul. D. 50, 17, 90; 44, 4, 1, 1; Ulp. D. 2, 14, 52, 3. Cf. Pringsheim: *op. cit.* 644.

and *ius iustitiaque*, ranking these above *ius (strictum)*.¹²⁰ This idea was later taken over by Iustinian legal science, so the sources reflect the clear dominance of *aequitas*, to which the concepts of *humanitas*, *iustitia*, *benignitas*, *utilitas* and *bona fides*¹²¹ are associated,¹²² leaving to *ius* the meaning of strict, limited and—*sit venia verbo*—narrow-minded law, clinging to a rigid, word for word interpretation.¹²³ The expression *ius strictum* cannot be found in the literary sources of the classical period, *iudicium strictum* is used as a technical term of rhetorical works.¹²⁴ In Statius's *Silvae strictae leges* are opposed with *aequum*;¹²⁵ *ius strictum* only becomes an unquestionable technical term in Iustinian's legal work.¹²⁶

Returning to Cicero, the expressions „*summo iure agere*” and „*summo iure contendere*” indicate the use of the whole range of possibilities offered by the law,¹²⁷ which in itself does not mean legal practice contradictory with *aequitas*, its being proper or improper becomes clear only in the concrete situation. At times Cicero has the possibility to be lenient, but the hostile behaviour of the opponent can make him legitimately act against this with the strictest means of the law, keeping in mind not only his personal interests but the interests of the state as well.¹²⁸ (In connection with the *summum ius* being dependent on the specific situation, both Stroux¹²⁹ and Bürge¹³⁰ quote as a literary example, the scene from Shakespeare's *Merchant of Venice* in which, Portia as judge uses the literal, instead of the sensible interpretation of the law against Shylock, reluctant to accept the doge's more equitable proposal, finally making him withdraw.¹³¹) Although *aequitas* as the principle of interpretatio is not

¹²⁰ C. 1, 14, 1; C. Th. 1, 5, 3; 3, 1, 8.

¹²¹ Cf. Földi A.: *A jóhiszeműség és tisztesség elve – Intézménytörténeti vázlat a római jogtól napjainkig*, PIIR IX. Budapest, 2001. (With German Summary: *Das Prinzip von Treu und Glauben – Abriss der Geschichte eines Rechtsgrundsatzes vom römischen Recht bis zur Gegenwart*) 9. 19. sqq.

¹²² Ulp. D. 15, 1, 32. pr; Pap. D. 26, 7, 36; Paul. D. 39, 3, 25; Pap. D. 46, 6, 12.

¹²³ Pringsheim: *op. cit.* 648.

¹²⁴ Seneca: *Controversiae* 1. praef. 23; 4. praef. 3; Quintilianus: *Institutio oratoria* 12, 10, 52.

¹²⁵ Statius: *Silvae* 3, 5, 87. sq. *Nulla foro rabies aut strictae in iurgia leges; morum iura viris solum et sine fascibus aequum.*

¹²⁶ C. 4, 31, 14, 1; 5, 13, 1, 2; Pap. D. 5, 3, 50, 1; Paul. 13, 5, 30; Tryph. D. 23, 2, 67, 1; Pap. D. 29, 2, 86. pr.; Iav. D. 40, 7, 28. pr.; C. 3, 42, 8, 1; Gai. *inst.* 3, 18.

¹²⁷ Cicero: *In Verrem* 6, 4

¹²⁸ Cicero: *Epistulae ad Atticum* 16, 15, 1.

¹²⁹ Stroux: *op. cit.* 57.

¹³⁰ Bürge: *op. cit.* 54.

¹³¹ Shakespeare: *The Merchant of Venice* 4, 1, 300. sqq.

formulated *expressis verbis* in connection with *causa Curiana*, treated by Cicero, the contradiction between *interpretatio restrictiva* and *interpretatio extensiva* being discussed here, regarding its content, it seems to belong to its essence. The basic question concerning the facts of the case is whether the *substitutio pupillaris*¹³² can also be regarded as *substitutio vulgaris*,¹³³ and connected to this, the question whether the so-designed heir is also the heir of the bequeather, should also be answered.¹³⁴ Q. Mucius Scaevola argued for the restrictive, L. Licinius Crassus argued for the extending interpretation. Consequently, both of them referred to *auctores* substantiating their opinion. Moreover, Crassus, employing the weapon of humor, made fun of the obsolete formulation of the legal text, thus ridiculing its restrictive interpretation.¹³⁵ (The decision made in *causa Curiana* did not prove to be of long-lasting value from the point of view of legal science, as we know about several later *sententiae* contradictory with this.¹³⁶) As we have seen neither Cicero, nor other Roman legal scientists, basically reluctant to abstract definitions,¹³⁷ determined the uncontradictory concept of *aequitas*. Therefore the decisiveness of the attempt to solve the *scriptum–voluntas* contradiction, emphasised by Stroux in connection with the *causa Curiana*,¹³⁸ loses its validity because the *aequitas* did not act as a basic principle of judgement, but rather as a rhetorical ornament.¹³⁹ Crassus, who in the *causa Curiana* acted as *patrocinium aequitatis*, in another case proved to be the advocate of *ius strictum*. M. Marius Gratidianus sold a plot to C. Sergius Orta, from whom he had bought the same plot a few years earlier. The plot was loaded with *servitutes*,¹⁴⁰ about which Sergius Orta, as the former owner must have had knowledge, however, at the signing of the contract, Gratidianus did not mention the *servitutes*, though this would have been his duty.¹⁴¹ In the case of *actio empti* the seller is responsible for the *dolus*, the judge had to decide whether Gratidianus proceeded *dolose* or not; the *advocati* of the parts had a great opportunity to influence the *iudex*, using rhetoric devices based on legal science.¹⁴² As Cicero remarks too, in this case

¹³² Gai. *inst.* 2, 179. Cf. Finazzi, G.: *La sostituzione pupillare*, Napoli, 1997.

¹³³ Gai. *inst.* 2, 174. *sqq.* Cf. Földi–Hamza: *op. cit.* 626.

¹³⁴ Cf. d'Orta, M.: *Saggio sulla 'heredis institutio'*, *Problemi di origine*, Torino, 1996.

¹³⁵ Cicero: *De oratore* 1, 180; Cf. Bürge *op. cit.* 58; Schulz: *op. cit.* 95.

¹³⁶ Treb. D. 26, 2, 33; Mod. D. 28, 6, 4. pr.

¹³⁷ Iav. D. 50, 17, 202.

¹³⁸ Stroux: *op. cit.* 57.

¹³⁹ Bürge: *op. cit.* 54.

¹⁴⁰ Cf. Grosso, G.: *Le servitù prediali nel diritto romano*. Torino, 1969.

¹⁴¹ Cicero: *De officiis* 3, 67.

¹⁴² Bürge: *op. cit.* 61.

Antonius based his reasoning on *aequitas*, opposed to him, Crassus clung to the more restrictive interpretation. The appearance of these poles in the same case strongly resonates with the training practice of rhetoricians, according to which the *magister* divided the case to be discussed among the students in a way that half of them had to defend their point of view based on the *aequitas*, the other half based on *ius strictum*, then they changed the roles.¹⁴³

In as much as we do not consider *aequitas* to be an abstract idea in these cases, but as a freely applicable rhetoric device, Cicero's rather liberal handling of the concept of *aequitas* harmonises with the other statements dealing with the essence of eloquence.¹⁴⁴ Within the boundaries designated by legal science—which in a given case can mean the facts of the case, determined by the *iuris consultus*—the *orator* can freely move concentrating his attention on the task of the defence, all the more so, as he is not striving for proving the truth, but for convincing the audience of the *veri simile*.¹⁴⁵ (To illustrate this, Cicero tells the following example. A simple man from the country wanted to ask P. Crassus *iuris consultus* for advice, but the jurist sent him away, as he thought that he could do nothing for him. However, Servius Galba, the rhetor, presented him so many examples, parallels, arguments interlarded with humor, based on *aequitas*, and not on *ius*, in support of the *rusticus*, that the jurist—still not sharing the rhetor's point of view—had to admit that his arguments were so probable that they almost sounded like truth.¹⁴⁶) The freedom of movement of the rhetor is considerably greater than that of the jurist, as Gellius puts it, he is not closely tied to the truth content of the facts.¹⁴⁷ The rhetor had to be able to argue for or against the same case, as this technique constituted a substantial part of rhetoric studies.¹⁴⁸ The difference between legal and rhetorical methods was long preserved in Rome, as Quintilian admits in his *Institutio oratoria*, in the chapter in which he emphasises the importance of the rhetor's acquiring legal knowledge.¹⁴⁹ In the course of time, this difference even became wider,

¹⁴³ Cicero: *De oratore* 1, 244; Quintilianus: *Institutio oratoria* 7, 6, 1; Cf. Schulte, H. K.: *Orator – Untersuchungen über das ciceronianische Bildungsideal*, Frankfurt a. M., 1935. 37. sqq.

¹⁴⁴ Bürge: *op. cit.* 63.

¹⁴⁵ Cicero: *Partitiones oratoriae* 90; *De officiis* 2, 51. *Iudicis est semper in causis verum sequi, patroni non numquam veri simile, etiam si minus sit verum, defendere.*

¹⁴⁶ Cicero: *De officiis* 2, 40.

¹⁴⁷ Gellius: *Noctes Atticae* 1, 6, 4. *Rhetori concessum est sentiis uti falsis, audacibus, versutis, subdolis, captiosis, si vero modo similes sint et possint movendos hominum animos qualicumque astu inrepere.*

¹⁴⁸ Cicero: *De oratore* 2, 30.

¹⁴⁹ Quintilianus: *Institutio oratoria* 12, 3, 2. sqq.

when, at the beginning of the Principate, political eloquence faltered, whereas eloquence lost its connections with jurisprudence by dealing with fictitious examples and solving more and more artificial rhetorical situations.¹⁵⁰

IV. Investigating the use and explanation of the *proverbium* „*summum ius summa iniuria*” in Erasmus of Rotterdam seems substantiated not so much due to the historical and depth of the Erasmian interpretation—as this idea was made the object of much more through-going legal theoretical scrutiny by numerous humanists e. g. Claudius Cantiuncula, Bonifacius Amerbach or Symon Grynaeus (if only due to Erasmus’s slighter interest for historical study)—, but for the immense influence over the centuries feeding on the enormous authority of this excellent humanist.¹⁵¹ Without entering a more meticulous genetic and influence study of Erasmus’s *Adagia*, it can be stated that from its first edition in the XVI century until the end of the XVIII century, it was used as a widely appreciated scholarly text book, thus it can be safely assumed that the „*summum ius summa iniuria*” *paroemia* gained considerable popularity among humanists, theologians, philosophers, as it is proved by its being frequently quoted in the most various context.¹⁵²

As Erasmus was taking effort to perfect the *Adagia* until the end of his life, several versions and explanations of this idea are to be encountered in the Erasmian *corpus*. The first edition dating from 1500 mentions the proverb in two places,¹⁵³ first in connection with the Terentian quotation „*summum ius summa malitia*”,¹⁵⁴ later referring to Plato and Cicero under the title of „*ad vivum summo iure*”.¹⁵⁵ The text appearing in Basel in 1540,¹⁵⁶ but dating from

¹⁵⁰ Norden, E.: *Die antike Kunstprosa*, Leipzig, 1909. I. 126. *sqq.*

¹⁵¹ 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.

¹⁵² Kisch, G.: *Summum ius summa iniuria*. In: *Aequitas und bona fides, Festgabe Simonius*. Basel, 1955. 211.

¹⁵³ *Desyderii Herasmi Roterdami veterum maximeque insignium paroemiarum id est adagiorum collectanea*, Parrhisiis M. Iohanne Philippo Alamanno diligentissimo impressore Anno MVc.

¹⁵⁴ *Summum ius summa malicia. Non ascripturus eram, ut sententias non adagia dicerer conscribere, ni a servo Comino nominatim pro adagio referretur. Verum illud Cherme dicunt „Ius summum sepe summa malicia est.” Quo proverbio monemur equitatem potius quam legum litteras sequi.*

¹⁵⁵ *Ad vivum summo iure. Id est ad cutem usque, ita loquimur nimis exactam rationem significantes, videlicet quum rem nimis acriter urgemus. Thrasymachus apud Platonem Socratem Sicophantam appellat, id est, calumniatorem, quia orationem suam ad nimis arctam rationem exigat, depravans potius recte dicta quam incautius dicta in meliorem*

1536 synthetizes every known occurrence of this idea in Latin authors.¹⁵⁷ 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, finally finding his acquittal in quoting the Terentian *nominatim*.¹⁵⁸

Erasmus himself—not being a jurist—dedicated less attention to the legal *paroemia*, except a few explanations referring to *Iustitia*. Only four years before his death, in 1532 Erasmus became 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 having received the two-page-long collection, he urged his friend to send him some more. It is highly probable that this was how the quotations provening from the Roman sources found their way into the 1540 edition of the *Adagia*.¹⁵⁹ In Erasmus's interpretation the *aequitas* often mentioned to highlight the „*summum ius summa*

sensum trahens. Additque. Quare sequundum exactam rationem, quando et tu ad vivum resecas, nullus artifex peccat. Nec huic dissimile illud apud Ciceronem pro Cecinna (§ 65). Nam caeteri, inquit tum ad istam orationem decurrunt, quum se in causa putant habere equum et bonum quod defendant, si contra, verbis et literis et (ut dici solet) summo iure contenditur, solent eiusmodi iniquitanti et boni et aequi nomen dignitatemque opponere. Est igitur summo iure contendere, leges ad vivum et nimis severam rationem exigere, und et illud: Summum ius summa malicia.

¹⁵⁶ Des. Erasmi Rot. Operum Secundus Tomus Adagiorum Chiliades Quatuor cum Sesquicenturia Complectens, ex postrema ipsius auctoris recognitione accuratissima, quibus non est quod quicquam imposterum vereare accessurum, Basileae ex Officina Frobeniana AN. M.D.XL.

¹⁵⁷ *Summum ius summa iniuria. Summum ius summa iniuria, hoc est, tum maxime disceditur ab aequitate, cum maxime superstitiose haeretur legum literis. Id enim summum ius appellant, cum de verbis iuris contenditur, neque spectatur quid senserit is qui scripsit. Nam voces ac litterae, quasi legum summa cutis est, Eam ineptiam quorundam superstitiosorum iuris interpretum, copiose simul et eleganter illudit M. Tullius in actione pro Murena (§§ 25–27). Terentius (IV, 5, 47; v. 796), Verum illud Cherme dicunt, ius summum saepe summa malitia est. M. Tullius Officiorum libro primo (10, 33): Ex quo illud, summum ius, summa iniuria, factum est iam tritum sermone proverbium. Columella primo rei rusticae libro (7, 2): Nec sane est vindicandum nobis, quicquid licet. Nam summum ius antiqui summam putabant crucem. Citatur et Celsus adolescens libro Pandect. Quadragesimo quinto, titulo De verborum obligatione, Cap. Si servum Stichum (D. 45. 1. 91. 3, i. f.): qui scripserit quaestionem esse de bono et equo, in quo genere plerunque sub auctoritate iuris scientiae periculose erratur. Itidem Paulus libro quinquagesimo, titulo, De regulis iuris (D. 50. 17. 90): In omnibus quidem, maxime tamen in iure aequitas spectanda est. Simili figura Seneca libro De ira primo dixit, summo animo. Si intelligis non ex alto venire nequitiam, sed summo, quod aiunt, animo inhaerere.*

¹⁵⁸ Kisch: *op. cit.* 207.

¹⁵⁹ Kisch: *op. cit.* 208.

iniuria” *paroemia* probably did not so much mean equity as legal interpretive principle, but rather justice, that should be enforced even against the letter of the law.¹⁶⁰ For the explanations Erasmus usually makes appeal to antique authors generally with the exact documentation of the sources but at times without summarizing their content; the concept of *aequitas* is most often 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*, according to which 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.¹⁶¹ It is interesting though, that Erasmus does not make reference to Aristotle in the early editions of the *Adagia*. It is only the edition of 1536 and 1540, which permit us to assume that probably he had in mind the specific locus from *Ethica Nicomachea*. 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—rather on an ideological level not so much in the concrete wording—in the reference to the intention of the legislator opposed to the letter of the law.¹⁶² The „*voces ... quasi legum cutis est*” picture, 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 these rather as a kind of illustration without examining either their historical or dogmatic background.¹⁶³

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 proverbium „*summum ius summa iniuria*” the object of our scrutiny, enumerating its occurrences in the antique literary sources, namely in Terence, Columella 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*, playing the letter of the law against its spirit. Following this we tried to trace the different meanings, the formation, and developmental stages of the expression *inter-*

¹⁶⁰ Büchner: *op. cit.* 13. sq.

¹⁶¹ Aristoteles: *Nicomachea ethica* 1138 a

¹⁶² Aristoteles: *Ars rhetorica* 1374 b

¹⁶³ Kisch: *op. cit.* 210.

pretatio itself, in the course of which *interpretatio*, combining *mutatis mutandis* the nuances of the religious sphere on the one hand, and those of the grammatical field on the other hand, until it reached the semantic content of interpretive activity, becoming a determininal factor by the classical age. The Celsian „*ius est ars boni et aequi*” *sententia* 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*. Although jurists never clearly defined the concept of *aequitas*, it became a very important means of legal development as a thought emerging from the interaction of iurisprudence and eloquence. 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 becoming *regula iuris*—apart from its direct legal application—became an integral part of today’s legal common knowledge.