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Isidore of Seville and the *ius et lex* formula – inspirations for a philosopher of law today

Abstract

Isidore of Seville's *Etymologiae* has always been a subject of interest to lawyers. This concerns in particular its chapter five: *Laws and times*. This article, however, points out that a different fragment of *Etymologiae* carries certain importance to understanding the relation between *ius* and *lex* – an excerpt from chapter twenty. Isidore of Seville analyses there also another meaning of the word *ius*. On this basis, this article attempts to investigate the relation between different notions of law in a philosophical and legal angle.

Keywords: *ius*, *lex*, Isidore of Seville, natural law, philosophy of law

Ledzińska begins her monograph on grammar and liberal arts in the writings of Isidore of Seville with these words: "This book bas been born out of captivation."[1] No wonder she writes this, the works of the bishop of Seville, especially *Etymologiae*, despite the passage of time, still awe with their rich erudite content and precise analytical form. Tatiana Krynicka, an inquisitive Polish researcher of these works, briefly characterizes the most important work by Isidore like this: *Etymologiae* is

1 A. Ledzińska, *Gramatyka wobec sztuk wyzwolonych w pismach Izydora z Sewilli. Origo et Fundamentum Liberalium Litterarum*, Kraków 2014, p. 7.

a work that would have ensured eternal fame to the Bishop of Seville even if he had not written any other; it is a Medieval encyclopaedia that includes information from all then known fields of knowledge […]. It seems that the work of the Bishop of Seville owes its success to the fact that it reflects Isidore's optimism, which tells him to see the world as a wonderful work of the Creator that is worth knowing and describing; his admiration for the genius of man, who pays homage to God, creates an alphabet, establishes laws, sets up countries, makes clothes, travels the seas, brews beer, is a speaker, doctor, farmer, builder, discovers the world and rules it, giving each thing a name […]. The originality of *Etymologiae* lies in the fact that, while describing the world, Isidore starts at the word that names everything and includes an answer to the question about the essence of everything."[2]

This interest has recently inspired Polish lawyers too and great credit must be given to the publication of the Polish translation of this chapter of *Etymologiae*, which concerns the legal matter and the matters of law (chapter V – *Laws and times* (*De legibus et temporibus*)). The authors of this study, Antoni Dębiński and Maciej Jońca, write, among other things: "*Etymologiae* by Isidore of Seville is one of the most valuables sources thanks to which the Antique legal tradition was planted onto the ground of the Middle Ages and the modern era. Its author, archbishop of Seville, made a first attempt to create a work which was to accommodate all available knowledge about the world in a condensed form. Surprisingly, his intention was successful and the compilation immediately gained incredible popularity. In the Middle Ages *Etymologiae* was the only, and universally accepted, encyclopaedia. It was believed that thanks to divine inspiration all knowledge about the world available to man found its place there. From the political and ideological point of view, the Isidorean compilation was not only much more valuable than the writings of ancient pagan writers, but it was also more treasured than the compilations of the Eastern emperor Justinian. The vision of law and the understanding of its individual institutions presented in *Etymologiae* modelled views of generations of university-educated lawyers and those who gained elementary legal knowledge at private homes, schools, colleges or religious seminaries."[3]

The universal[4] fascination with Isidore's works affects me twofold as a philosopher and lawyer. Naturally, the task of historians of thought and historians of law

2 T. Krynicka, *Izydor z Sewilli*, Kraków 2007, pp. 60, 68.

3 A. Dębiński, M. Jońca, *Słowo wprowadzenia,* in: A. Dębiński, M. Jońca (eds.), *Izydor z Sewilli. O prawach*, Lublin 2021, pp. 1, 15 ff.

4 It is worth noting most recent publications on this subject – see e.g. A. Fear, J. Wood (eds.), *A Companion to Isidore of Seville*, Leiden–London 2020 and A. Fear, J. Wood (eds.), *Isidore of Seville and*

involves most of all such interpretation of the works of the Bishop of Seville which places it in the context of place and time of its creation. A philosopher of law may, however, attempt to go beyond this paradigm and look into Isidore's thought to find elements that would inspire today's legal discourse and the discourse of law, especially if the proposals put forward by the Bishop of Seville are treated as an essential link in Europe's universal legal culture shaped for centuries.[5] Thinking *more philosophico et iuridico*, we may allow certain fantasies which are rather ruled out at the level of a solely *more historico* analysis.

As a philosopher, I have an association that for some may seem slightly odd and too far-fetched, or at least surprising. It is because *Etymologiae* makes me think of Wittgenstein's Logical-Philosophical Treaty. Why? Most of all, because of a few sentences that Wittgenstein wrote in 1918 in the prologue to his work: "This book will perhaps only be understood by those who have themselves already thought the thoughts which are expressed in it or similar thoughts. It is therefore not a text-book. Its object would be attained if there were one person who read it with understanding and to whom it afforded pleasure. The book deals with the problems of philosophy and shows, as I believe, that the method of formulating these problems rests on the misunderstanding of the logic of our language. Its whole meaning could be summed up somewhat as follows: What can be said at all can be said clearly; and whereof one cannot speak thereof one must be silent. The book will, therefore, draw a limit to thinking, or rather not to thinking, but to the expression of thoughts; for, in order to draw a limit to thinking we should have to be able to think both sides of this limit (we should therefore have to be able to think what cannot be thought). The limit can, therefore, only be drawn in language and what lies on the other side of the limit will be simply nonsense […]. If this work has a value it consists in two things. First that in it thoughts are expressed, and this value will be the greater the better the thoughts are expressed. The more the nail has been hit on the head."[6] Keeping to adequate proportions, one may say that Isidore means the same thing in his *Etymologiae*: on the one hand, it is about language and thoughts

his Reception in the Early Middle Ages. Transmitting and Transforming Knowledge, Amsterdam 2016.

5 L. Loschiavo, *Isidore of Seville and the Construction of a Common Legal Culture in Early Medieval Europe,* "Clio@Themis. Revue électronique d'histoire du droit" 2016, No. 10, pp. 1–28; in Polish literature: A. Dębiński, *Wiedza o prawie w ujęciu Izydora z Sewilli*, "Roczniki prawnicze KUL" 2022, No. 1(89), pp. 125–141.

6 L. Wittgenstein, *Tractatus Logico–Philosophicus, with an Introduction by Bertrand Russel, F.R S.,* transl. C.K. Ogden, London–New York, 1922, https://www.gutenberg.org/files/5740/5740-pdf.pdf (access: 16.03.2024).

about the language, on the other, precision and getting to the point. What must enchant is the fact that Isidore formulates his thoughts a dozen or so centuries before Wittgenstein, at the beginning of the 7th century CE.

As a lawyer, in turn, I should concentrate, naturally, most of all on what Isidore writes in the already mentioned chapter V of *Etymologiae*. A certain characteristic fact stands out here – while Isidore was most of all a priest and a theologian, in today's literature he is also classified as a "great jurist," even though he was not a qualified lawyer.[7] However, it is indeed the said encyclopaedic erudition that allowed Isidore to capture the very nucleus of the essence of law, that is – using Wittgenstein's rhetoric – "the nail being hit on the head." Let us use a few examples to show what this common sense genius of Isidore's definitional simplicity is about. First of all, "All laws are either divine or human. Divine laws are based on nature, human law on customs. For this reason, human laws may disagree, because different laws suit different peoples". Secondly, "Jurisprudence is a general term, and a law is an aspect of jurisprudence. It is called jurisprudence *(ius*) because it is just (*iustus*). All jurisprudence consists of laws and customs. A law is a written statute. A custom is usage tested by age, or unwritten law, for law (*lex, gen. legis*) is named from reading (*legere*), because it is written". Thirdly, "A law is a rule for a people – through it those who are nobler by birth, along with the common people, have ordained something."[8]

While etymologically not always and not everything is correct in *Etymologiae*, and Isidore is sometimes taken by creative imagination, perhaps this is exactly why his thoughts may be so inspiring for today's philosopher of law. In his entire legacy he does not write much about law, but what is significant is not how much he writes, but rather what and how he writes it. Here again the above-mentioned Wittgenstein comes to mind – it is because Isidore offers analytical precision of thought in a true Wittgenstein style! Even though from a chronological point of view we should, principally, say the opposite – it is Wittgenstein who thinks equally precisely as Isidore once did centuries earlier! Nevertheless, language dressed in words is for both thinkers a reflection of reality and both search for its sense.

The most recent legal literature pays special attention to two elements that stimulate our legal imagination. First of all, Isidore, in a thoroughly contemporary

7 See e.g. J.J. Reynolds, *Isidore of Seville,* in: R. Domingo, J. Martinez-Torron (eds.), *Great Christian Jurists in Spanish History*, Cambridge 2018, pp. 31–49 and L. Loschiavo, *Isidore of Seville*, in: P.L. Reynolds (ed.), *Great Christian Jurists and Legal Collections in the First Millennium*, Cambridge 2019, pp. 381–396.

8 *The* Etymologies *of Isidore of Seville*, translated with the introduction and notes by S.A. Barney, W.J. Lewis, J.A. Beach, O. Berghof, Cambridge 2006, 5.II.1; 5.III.1; 5.X.

way, proposes his own definition of the law of the nations (*ius gentium*) that steps outside the classic paradigm of Roman private law: "The law of nations concerns the occupation of territory, building, fortification, wars, captivities, enslavements, the right of return, treaties of peace, truces, the pledge not to molest embassies, the prohibition of marriages between different races. And it is called the law of nations because nearly all nations use it."[9] Second of all, in *Etymologiae* we are dealing with an attempt to set basic criteria for a right/good laws/law in a way that some believe is identical to today's concept of Fuller's inner morality:[10] "A law will be decent, just, enforceable, natural, in keeping with the custom of the country, appropriate to the place and time, needful, useful, and also clear – so that it does not hold anything that can deceive through obscurity – and for no private benefit, but for the common of the citizens."[11]

Both these issues have already been addressed and discussed extensively in today's literature and thus will not be discussed here again in the context of inspiration of today's philosopher of law. I will, in turn, focus on this fragment of *Etymologiae* which albeit concerns the laws, but paradoxically does not come from chapter V, but from chapter XX which is devoted to running a household. While Isidore's comment is short and brief, it has been inspiring interest for long now among Romanists[12] on the one hand and philosophers of law[13] on the other. It is because the author points to a dual and somewhat surprising meaning of the Latin word *ius* (*Etymologiae* 20.2.32): "Teachers of cooking have named broth (*ius*) after the word for 'law' (*ius*), because it is the determining factor in the seasoning of cooking. The Greeks call it *zema*."[14] In this study it gives me, as a philosopher of law, an opportunity to discuss a matter that has been inspiring lawyers for a long time –

9 Ibidem, 5.VI.1; more on this in B. Wauters, *Isidore of Seville on 'Ius Gentium': The View of a Theologian,* "The Journal of the History of International Law" 2021, Vol. 23, No. 5, pp. 529–555 and in Polish literature: B. Zalewski, *Historyczne znaczenie definicji 'ius gentium' Św. Izydora z Sewilli,* "Zeszyty Prawnicze UKSW" 2022, No. 22(2), pp. 7–35.

10 E.g. R. Henle, *Principles of Legality: Qualities of Law Lon Fuller, St. Thomas Aquinas, and St. Isidore of Seville,* "The American Journal of Jurisprudence" 1994, No. 39(1), pp. 47–70; in Polish literature: G. Maroń, *Wzorzec prawa w Etymologiae Św. Izydora z Sewilli jako przyczynek do rozważań nad cechami dobrego prawa,* "Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza" 2009, No. 56, pp. 115–133.

11 *The* Etymologies…, 5.X.6.

12 W. Wołodkiewicz, *"Ius et lex" w rzymskiej tradycji prawnej*, "Ius et Lex" 2002, No. 1, pp. 60 ff. (with a reference to the opinion of Italian Romanist Alessandro Corbino).

13 J. Zajadło, *Minima Iuridica. Refleksje o pewnych (nie)oczywistościach prawniczych*, Sopot 2019.

14 W. Wołodkiewicz, *"Ius et lex"*…, p. 61, footnote 35.

what is the relation between *ius* and *lex* and what the *ius et lex* formula means in the philosophical and legal sense.

The dictionary of the Latin language has two different terms for the Polish word *prawo* – it is *ius* on the one hand and *lex* on the other. From the point of view of Latin legal terminology, the differentiation between *ius* and *lex* is particularly important because almost all known legal maxims, those theoretical-legal and philosophical-legal and those applicable in specific legal doctrines alike (administrative law, civil, European, financial, criminal, constitutional, international law, etc.) refer to one of those two terms. *Ius* in these maxims is most often a synonym of law in general – the idea of law, sometimes also of justice (*iustitia*), whereas *lex* is identified with a law established by way of a decision of a law-making body (*auctoritas)* – a normative act, positive law, written law and also law in force. While this phenomenon does have its Roman origin and its meaning runs much further than the Roman private law, on the other hand it is a solely historical phenomenon and is extensively applied in today's science and practice of law. Of course, we can go even deeper into the history of human thought and point out that even ancient Greeks: "Differentiated between *dike* and *nomos*, that is what is justice and what is a custom,"[15] which later corresponded to certain extant to the Roman division between *ius* and *lex*. What is more, literature points to the occurrence of similar, though naturally culturally slightly different differentiations of the notion of law in non-European civilisations, e.g. in China or in Japan.[16] Today it is reflected in various languages, e.g. English (*right* and *law),* French (*droit* and *loi*), Spanish (*derecho* and *ley*), German (*Rechts* and *Gesetz*), Polish (*prawo* and *ustawa*), Russian (*prawo* and *zakon*) or Italian (*diritto* and *legge*). Most often, perhaps with the exception of English, it is about the differentiation between the law and a statute: however, while the term "statute" is quite precise, the term "law", quite the contrary, has many meanings. A certain peculiar feature emerges in the English language too, because the *ius et lex* formula is translated into "law and statute."[17]

It seems, however, that a simple differentiation between the law and a statute does not provide an in-depth philosophical-legal sense of Latin terms *ius* and *lex*, especially in their current meaning. It needs to be emphasised that no definitions of

15 J. Woleński, *Okolice filozofii prawa*, Kraków 1999, p. 9; see also S. Bratkowski, *Prehistoria poczucia sprawiedliwości*, "Ius et Lex" 2002, No. 1, pp. 87–105.

16 G.P. Fletcher, *Na cześć "Ius et Lex". Kilka refleksji nad pojęciem prawa*, "Ius et Lex" 2002, No. 1, pp. 20 ff.

17 E.g. R. Dworkin, *Taking Rights Seriously*, Cambridge 1978, p. 38 (with a reference to R. Pounda, *An Introduction to the Philosophy of Law* (rev. ed. 1954)). Cf. J. Zajadło, in: J. Zajadło (ed.), *Łacińska terminologia prawnicza*, Warsaw 2013, p. 15.

these terms were preserved in ancient sources, because: "Roman lawyers, who were most of all practitioners, did not care much about the definition of law"[18] and "They approached theoretical and abstract issue rather modestly, and were extremely cautious when it comes to the difficult art of defining."[19] The best expression of this comes in the following words from Javolenus in his *Digests* (D. 50, 17, 202): *Omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset* (All definitions are dangerous. There is hardly one that cannot be subverted). We must note on the side that today's legislative technique pays particular attention to the the problem of definition – cf. e.g. Article 146(1) of the Principles of Legislative Technique (annex to the regulation of the President of the Council of Ministers of 20 June 2002 on "Rules of Legislative Technique" (Dz. U. (Journal of Laws) No. 100 item 908): "In a statute or other normative act, the definition of a given term shall be formulated if: 1) a given term is ambiguous; 2) a given term is vague and this vagueness needs to be restricted; 3) the meaning of a given term is not universally understood; 4) a new meaning of a given term needs to be established due to the field of matters regulated there."[20]

In ancient Rome, the term *ius* was primary in a historical sense, but at the same time much more ambiguous. As law that pertained to the sphere of human action protected by the state, it was juxtaposed with the term *fas* – divine law that pertained to the religious sphere. The Roman law literature offers five meaning of the term *ius*: 1) set of legal norms that regulate a certain realm of life (material law), e.g. civil law; 2) an entitlement (personal law) resulting from material law, e.g. ownership right; 3) place of carrying out of jurisdiction or a body carrying out jurisdiction; 4) the first stage in a regular civil process; 5) law in general. The term *lex* (pl. *leges*), in turn, emerged later (*lex Hortensia* of 287 BCE is mostly quoted here) and was a synonym to a statute in its basic meaning (or more broadly: normative act). In the times of the republic, *leges* were the basic source of law, enacted at the assembly of all citizens with full legal rights. In other meanings the term *leges* was also applied to specify, e.g., emperor's ordinances and ordinances of his officials, contractual clauses included in legal acts, statutes of corporations.[21]

The one problem, however, is the semantics of the terms *ius* and *lex*, the other – the interrelation between them. In the last context, we may interpret Isidore's

18 W. Wołodkiewicz (ed.), *Prawo rzymskie. Słownik encyklopedyczny*, Warsaw 1986, p. 81.

19 K. Kolańczyk, *Prawo rzymskie,* 5th edition, Warsaw 2007, p. 26.

20 Cf. J. Zajadło, in: J. Zajadło (ed.), *Łacińska…*, pp. 15–16.

21 W. Wołodkiewicz (ed.), *Prawo rzymskie…*, pp. 81, 88. Cf. J. Zajadło, *Co łączy medyków, prawników i Gdańsk*, "Gazeta AMG" 2014, No. 2, p. 23.

comment quoted above to mean that in Latin the word *ius* denoted not only laws, but also broth, soup or gravy. Given this, Wołodkiewicz writes about the relation between *ius* and *lex* in the approach of Roman jurists, but interestingly, he quotes indeed the above-cited fragment of chapter XX of *Etymologiae*: "The quality of broth – gravy (*ius*) is determined by its ingredients and the skill of the cook who prepares it. The high quality of law (*ius*) is determined by the sources on which the legal order is based (*leges at mores*) and their suitable processing and preparation by a jurist. In this sense, the activity of a jurist as an indispensable element in the process of making law suggests an association with the activity of a cook who, when preparing a dish, uses adequate ingredients and methods. This analogy of meanings is clearly emphasised by Isidore of Seville, who writes that «Teachers of cooking have named broth (*ius*) after the word for 'law' (*ius*), because it is the determining factor in the seasoning of cooking». In the context of these reflections, we must look at the famous definition of law by Celsus, passed on by Ulpian and included in the beginning of Justinian *Digests*, which goes as follows: law is the art of knowing what is good and just (*ius est ars boni et aequi*). A jurist appears there as a master who, by means of his skills (*ars*), develops the law. When developing a legal norm, he should apply the criterion of justice, that still fits within the positive legal order."[22]

It must be acknowledged that today's philosophy of law gives a lot of focus to the problem of the relation between *ius* and *lex*, in all realms of this phenomenon of law – creation, application, interpretation, force and compliance. Immediately after WWII this was associated with criticism of legal positivism and a rapid renaissance of doctrines of the law of nature. This discussion was particularly heated in the German science of law and although it lasted for a relatively short time (merely dozen or so years), it left a permanent mark on German legislature. It is best seen in Article 20(3) of Germany's Basic Law: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice". This provision is subject to major controversy in the German science of law and decision-making of the Federal Constitutional Court, but the majority of authors believe that the reference to *justice* and *law* is undoubtedly a reference to the Latin terms *ius* and *lex*. Binding the executive and the judiciary by justice and law (that is*: ius et lex*) means that this formula gains particular importance at the level of application and force of law. In the former, it is about the fact that law, in its *lex* meaning, means only the possibility of achieving justice in the *ius* meaning in the conditions of a particular legal ruling. This, we should not automatically see these terms as synonyms, neither can they be separated, because without a legal norm (*lex*) we are not able to achieve

22 W. Wołodkiewicz, *"Ius et lex"*…, p. 61.

a specific right legal decision (*ius*). The legal reality, as claimed by the 21st century German philosopher of law, Arthur Kaufmann, is a coupling of positivity and justice. Justice as a pan-positive principle is only real in positive law, and positive law is binding only on the condition that it participates in the idea of justice; [moreover,] in the law application process *lex* is logically first, and *ius* is ontologically and historically first.[23]

The relation between *ius* and *lex* in the second dimension, that is the force of law, is even more complicated. We are entering here a more controversial element of the dispute between the doctrines of the law of nature and legal positivism (today: positivism and neo-positivism), that is the problem of force of a legal norm that is extremely contrary to a moral norm.[24]

In the law application process lawyers in general move within a certain scale determined by two extreme values. On the one pole we have the *dura lex sed lex* maxim (the law is hard, but law). Today, however, this saying has become such a threadbare and banal slogan that no lawyer may, or in fact should, treat is truly seriously. Especially that we are not really sure who and when formulated this principle as it stands now – its original sounded completely different. Such a maxim does indeed appear in Justinian *Digests*, where Ulpian claims: *durum sed ita lex scripta est* (strictly, but this is how the law is written). This is, however, something completely different that the categorical and generalizing *dura lex sed lex.* Ulpian did not write about laws in general, but about a very specific statute (law), which he believed to be harsh. It was about a law which prohibited a woman accused of adultery (*adulterium*) from freeing her slaves. Why? Mainly because most often it was the slave who was the source of infidelity of his mistress and courts did not want to lose this source of evidence. A slave, unlike free and freed persons, could be tortured to get testimony out of them. This is harsh, as Ulpian writes, but this is how a specific law was written.[25]

At the second pole of this scale is another known maxim *lex iniusta non est lex* (an unjust law is no law at all). Us lawyers are somehow drawn to this maxim, but to be true we are not really sure that to do with it. We are aware of the danger of a situation where each judge were to be allowed to undermine the binding force of the law on the basis of their subjective sense of justice. But also in this case we

23 J. Zajadło, *Formuła "Gesetz und Recht"*, "Ius et Lex" 2002, No. 1, pp. 37–49. Cf. J. Zajadło, *Co łączy medyków…*, pp. 23–24.

24 Cf. J. Zajadło, *Co łączy medyków…*, p. 24.

25 Cf. J. Zajadło, *Sędziowie w ciężkich czasach,* 2.10.2017, Konstytucyjny.pl, https://konstytucyjny.pl/sedziowie-w-ciezkich-czasach/ (access: 22.05.2024).

are dealing with a certain distortion of the original. Even though we find a similar maxim in St. Augustus's *De libero arbitrio* (*On the free will*) dialogue, it sounds less categorical: *Nam mihi lex esse non videtur, quae iusta non fuerit* (For I think a law that is not just, is not actually a law).

We are not dealing here with a categorical thesis, but with a doubting hypothesis – Augustine has reservations (*non videtur*) about laws whose purpose is not justice (*quae iusta non fuerit*). The difference then is material.[26]

The problem, anyway, touches not only the issues of the force of the law, but also its creation. Let us point out that before the above-mentioned Article 20(3) of the German Basic Law was created, a well-known German philosopher of law Gustaw Radbruch wrote the following in a 1947 article with a characteristic title *Law and Justice*: "«Law and justice – we believed that we were expressing the same thing with these phrases. Each law was justice for us, and all justice was a law; the science of justice meant interpretation of a law and the judiciary – solely the application of a law. We called ourselves positivists and the positivism that identifies a law with justice is co-responsible for the contribution of the German science of law in creating the legal status of the years of national socialism. Positivism has made us helpless against lawlessness if it gave importance only to the form of a law. We had to understand that there is lawlessness in the form of a law (statute) – «statutory lawlessness» – and that the only by the measure of pan-statutory law may we specify what justice is, regardless of whether we call this justice above any laws the laws of nature, the divine laws or the laws of reason."[27] Addressing the problem of so-called statutory lawlessness, Radbruch posed a fundamental and still timely question before any other lawyer had: when creating a law in the meaning of *lex*, does the legislator not encounter any barriers and restrictions, or is it the contrary – is he bound by certain values immanently inscribed in the very idea of laws in the meaning of *ius*? Fundamentally, it is also a question about *minima iuridica*, thus about certain basic paradigms of legal reasoning.[28]

We can only hope that studying Latin legal terminology against the background of Isidore's *Etymologiae* will allow lawyers to answer this question. Let a certain Arab tale make it easier for them. A well-known modern German theoretician of law Günther Teubner often refers to it. It goes as follows "A certain old Bedouin

26 Ibidem.

27 G. Radbruch, *Ustawa i prawo*, transl. J. Zajadło, "Ius et Lex" 2002, No. 1, pp. 159 ff.

28 More and recently on this subject in: M. Florczak-Wątor, A. Grabowski (eds.), *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz,* Kraków 2021. Cf. J. Zajadło, in: J. Zajadło (ed.), *Łacińska…*, pp. 17–18.

sheikh wrote his last will. He divided his property (a large herd of camels) between his three sons. Ahmed, the oldest, was to inherit half of the assets; Ali, the middle son, was to get a quarter; and the youngest Benjamin was to get one sixth of the herd. After the sheikh's death it turned out that the herd only had eleven camels. Ahmed, therefore, demanded six camels, which his brothers opposed. Not being able to reach an agreement, the sheikh's sons turned to a caliph. He decided: «I offer you one of my camels. Return it to me, by Allah, as quickly as possible». Dividing a herd with twelve camels was not difficult. Ahmed received his half, that is six camels. Ali got his quarter, that is three camels; Benjamin was given a sixth, that is two camels. The pleased brothers fed the twelfth camel which was left after the herd was divided and returned it to the caliph."[29]

Very different lessons may be learnt from this tale for law and lawyers. We wish to point to this one: the work of any lawyer, theoretician and practitioner alike, boils down in essence to searching for the twelfth camel. A law in the meaning of given law (*lex*) is often not perfect and we are faced with having to find a certain "surplus" (*ius*) that allows the taking of a rational and right decision. Sometimes when the norm is unambiguous and the facts do not raise doubt this process of looking for the twelfth camel will be relatively easy. In practice, especially where a law touches other normative systems, we can encounter so-called hard cases. Then, having to establish the relation between *ius* and *lex* presents itself to us with all its precision.[30]

Ius and *lex* may clash not only in the process of application of law and in evaluating its force, but also in the context of its creation, interpretation and obeying it. This problem gains special importance in the period of historical breakthroughs.[31] This "caliph," who loans us the twelfth camel (*ius*) to solve a legal equation (*lex*) and to whom we need to return it to later is the broadly understood idea of law (again: *ius*) expressed in the harmony of three elements: security, purposefulness and justice. The hard cases show that there is an immanent connection between *ius* and *lex*. For the needs of this study then, we propose the following directive that outlines relations between those terms, fundamental for lawyers: *ius* without *lex* turns out helpless, and, in turn, *lex* without *ius* is often heartless. Therefore, Isidore is right to point to the multiple meanings of the word *ius* and its metaphoric potential – in the law application process even *lex* that meets basic criteria of rightness seems insufficient; we also need a lawyer–cook who will enrich the final effect of the

29 G. Teubner, *Sprawiedliwość alienująca. O dodatkowej wartości dwunastego wielbłąda*, "Ius et Lex" 2002, No. 1, pp. 109 ff. Cf. J. Zajadło, *Co łączy medyków…*, p. 24.

30 Cf. J. Zajadło, *Co łączy medyków…*, p. 24.

31 Z. Ziembiński, *"Lex" a "ius" w okresie przemian*, "Państwo i Prawo" 1991, No. 6, pp. 3–14.

dish understood as *ius*, built upon the foundation of *lex,* with suitable ingredients: knowledge, experience, intuition and, last but not least, common sense. This applies in particular to such situations where the lawyer stands in the face of so defined hard cases.[32]

Isidore did not, of course, develop his thought about the ambiguity of *ius* and the juxtaposition of a lawyer's reasoning with the activity of a cook. Perhaps, however, this is where the essence of the enchanting dimension of his *Etymologiae*, mentioned at the beginning, lies; even if it does not give us ready-made solutions, it certainly does encourage reflection. Of course, Isidore's work is deeply immersed in a historical context of place and time, but the erudite and encyclopaedic reflections of its author mean that it may be today a subject of different, often very subjective interpretations, because it inspires imagination and this, inter alia, is what its universal wisdom is about. Does it stimulate too much at time? Well, this is what the essence of all interpretational encounters with literature involves – it is never too much in this sphere of imagination. Of course, we cannot distort historical facts, we may, however, learn certain lessons from history – if it is written in a language typical to Isidore, a certain intellectual surplus is created that entitles us to a timeless associative interpretation that goes beyond a simple, solely literal, description of text.

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Izydor z Sewilli a formuła *ius et lex* – inspiracje dla współczesnego filozofa prawa

Streszczenie

Etymologie Izydora z Sewilli zawsze były przedmiotem zainteresowania ze strony prawników. Dotyczy to w szczególności rozdziału piątego tego dzieła: *O prawach i miarach czasu*. W niniejszym artykule zwrócono natomiast uwagę, że dla zrozumienia relacji pomiędzy *ius* i *lex* pewne znaczenie może mieć też inny fragment *Etymologii* – tym razem z rozdziału dwudziestego. Izydor z Sewilli analizuje tam jeszcze inne znaczenie słowa *ius*. Na tej podstawie autor podejmuje próbę filozoficzno-prawnej analizy relacji zachodzącej pomiędzy różnymi pojęciami prawa.

Słowa kluczowe: *ius*, *lex*, Izydor z Sewilli, prawo naturalne, filozofia prawa

CYTOWANIE

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