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Preliminary comments on the genesis of the concept of natural law in the approach taken by St. Isidore of Seville

Abstract

The aim of this study is to discuss information on the origins of natural law (*ius naturale*) in *Etymologiae* (*Etymologiarum sive Originarum libri XX*) written by St. Isidore of Seville (d. 636). Such a choice of the subject matter seems reasonable mainly because research on Christian concepts of natural law as a rule places the study of St. Thomas Aquinas's natural law theory as its focal point. Previous Christian concepts are only briefly touched upon. Meanwhile, they have immense historical significance that have determined the entire Christian reflection on the idea of natural law since as early as the 13th century.

The research allows a conclusion that the definition of natural law constructed by St. Isidore of Seville, along with the examples presented in his *Etymologiae*, is an exceptional creation that has no clear archetype in juridical and non–juridical sources. It quite clearly presents elements taken from Ulpian. However, the very essence of natural law as a normative system, that connects all people (not people and animals) due to their "natural instinct" (*instinctus naturae*) and that is independent of the will of the positive legislator, remains under a marked influence of the Christian thought.

Keywords: *ius naturale,* St. Isidore of Seville, *Etymologiae*, Roman law

Introduction

The concept of natural law and the question of its relation to positive law are one of the key issues in the understanding of transformations in perceiving the concept of law throughout the ages. The aim of this study is to discuss information on natural law (*ius naturale*) in *Etymologiae* (*Etymologiarum sive Originarum libri XX*) written by St. Isidore of Seville (d. 636). Such a choice of the subject matter seems reasonable mainly because research on Christian concepts of natural law as a rule places the study of St. Thomas Aquinas's (d. 1274) natural law theory as its focal point. Previous Christian concepts are only briefly touched upon.[1] Meanwhile, they have

1 Cf. for example: H.A. Rommen, *Natural Law. A Study in Legal and Social History and Philosophy*, transl. T.R. Hanley, Indianapolis 1945 (reprint: 1998), pp. 30 ff. (the author never mentions St. Isidore, focusing mainly on St. Thomas Aquinas's doctrine); L. Strauss, *Natural Right and History*, Chicago–London 1953, pp. 120 ff. (the author discusses classic theories of natural law which include the Christian concept of St. Thomas Aquinas, not mentioning St. Isidore of Seville or other Christian writers at all); M.A. Krąpiec, *Człowiek i prawo naturalne*, Lublin 1986, pp. 38–45 (the author only mentions St. Isidore and bases his entire concept of law on thomistic tradition); J. Finnis, *Natural Law and Natural Right*, Oxford 2011, pp. 27 ff. (the author presents his arguments according to subject matter, not chronologically, though references to St. Thomas Aquinas are definitely in the majority among Christian theorists of natural law); Z. Stawrowski, *Prawo naturalne a ład polityczny*, Kraków 2018, pp. 97 ff. (the author – quite rightly – calls Thomas's concept of natural law as a "classic natural law stance"). Research on various aspects of Isidore's legal knowledge also lacks studies that would address the concept of natural law presented in *Etymologiae*. Studies that describe Isidore's entire knowledge about law include A. Garcia Gallo, *San Isidoro Jurista*, in: M.C. Diaz y Diaz (eds.), *Isidoriana*, Leon 1961, pp. 133–141; 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. 8, pp. 115–133; A. Dębiński, *Wiedza o prawie w ujęciu Izydora z Sewilli*, "Studia Prawnicze KUL" 2022, No. 1(89), pp. 125–141; R. Martini, S. Pietrini, *Cognizioni giuridiche nel libro V delle Etymologiae di Isidoro di Siviglia*, in: G. Bassanelli Sommariva, S. Tarozzi (eds.), *Ravenna Capitale. Uno sguardo ad Occidente. Romani e Goti – Isidoro di Siviglia*, Dogana 2012, pp. 57–80; F.J. Andrés Santos, *Derecho y jurisprudencia en las fuentes de Isidoro de Sevilla*, "Antiquité Tardive" 2016, No. 23, pp. 155–162; P.L. Reynolds, *Isidore of Seville*, in: R. Domingo, J. Martinez–Torrón (eds.), *Great Christian Jurists in Spanish History*, Cambridge 2018, pp. 31–48; H.A. Olano Garcia, *Aportes de San Isidoro de Sevilla a nuestra normatividad*, "Revista Mexicana De Historia Del Derecho" 2023, No. 1(42), pp. 3–15. On the importance of the Roman tradition in the understanding of the term *lex* in the writings of St. Isidore, see E. Marey, *La notion de loi (lex) selon Isidore de Séville et ses origines romaines*, "Revista International de Derecho Romano" 2020, No. 24, pp. 508–539. The definition of *ius gentium* proposed by Isidore was a frequent target of scholarly investigations – see S. Ramirez, *El derecho de gentes. Examen critic de la filosofia del derecho de gentes desde Aristoteles hasta Francisco Suarez*, Madrid–Buenos Aires 1955, pp. 29–33; A. D'Ors, *En torno a la definicion isidoriana del 'ius gentium'*, in: *Derecho de gentes y organización internacional*, Vol. 1, Santiago de Chile 1956, pp. 11–40; J. de Churruca, *La definición isidoriana de ius gentium*, "Estudios de Deusto" 1982, No. 30(68), pp. 71–95; S. Puliatti, *Ius gentium e disciplina dei rapporti internazionali in Isidoro di Siviglia*, in: G. Bassanelli Sommariva, S. Tarozzi (eds.), *Ravenna Capitale. Uno sguardo ad Occidente. Romani e Goti – Isidoro di Siviglia*, Dogana 2012, pp. 27–38; B. Wauters, *Isidore of*

immense historical significance that determined the entire Christian reflection on the idea of natural law since as early as the 13th century.

This applies to Isidore's argumentation in particular. *Etymologiae* was the most serious compendium of universal knowledge ever created in early medieval Europe. It was copied already during Isidore's life time.[2] Alcuin, a monk (d. 804), representative of intellectual elites of the Carolingian Renaissance that oversaw the palace school in Aachen, must have known Isidore's *Etymologiae*.[3] Legal education of the youth throughout the 13th and the 14th century relied on it.[4] St. Isidore's comments on the concept and types of law were adopted in *Decretum Gratiani* in the 12th century,[5] and thus were also a reference point for Aquinas's further reflections[6] and provided the underlying basis for the theory of natural law developed by medieval canonists.[7] Not by mistake then does Dante Alighieri (d. 1321) place St. Isidore in *cielo del Sole*, where he sits among most distinguished medieval scholars.[8]

Some reflections on natural law in the works of selected ancient writers

The conviction of the existence of a higher order of things that is rooted in the nature of man or world was already popular among pagan intellectual elites of the Greek–Roman Antiquity. As pointed out by Strauss, natural right was understood

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Seville on Ius Gentium: The View of a Theologian, "The Journal of the History of International Law" 2021, No. 23(5), pp. 529–555; B. Zalewski, *Historyczne znaczenie definicji 'ius gentium' św. Izydora z Sewilli*, "Zeszyty Prawnicze" 2022, No. 22(2), pp. 7–35. For St. Isidore's comments on crimes and punishments, see R. Mentxaka, *Algunas consideraciones sobre los crimina*, *en particular contra el estado*, *en las Etimologías de Isodoro*, *(Et. 5,26)*, "Tijdschirft voor Rechtsgeschiedenis" 1997, No. 65(4), pp. 397–421.

2 A. Dębiński, M. Jońca, *Słowo wprowadzenia*, in: A. Dębiński, M. Jońca (eds.), *Izydor z Sewilli. O prawach*, Lublin 2021, p. 16.

3 P. Riché, *Enseignement du droit en Gaule du Vie au XIe siècle*, "Ius Romanum Medii Aevi" Pars I 5b, Milano 1965, pp. 14–15.

4 Book V of *Etymologiae* survived in two manuscripts as a separate treaty that also included the Breviary of Alaric and *Lex Romana Burgundionum*, and an essay *De gradibus romanorum* which included legal definitions – ibidem, p. 16. See also A. Dębiński, *Wiedza o prawie…*, p. 129.

5 Decr., dist. I, cap. 1 and 7; A. Garcia Gallo, *San Isidoro…*, p. 137.

6 See for example: S.Th. I–IIae, q. 94, 4, arg. 1 and s.c.

7 Cf. H.A. Rommen, *Natural Law…*, p. 34. The author points to the great significance of the concept of natural law included in *Decretum Gratiani*, but does not mention at all whether it is an adaptation of St. Isidore of Seville's previous reflections. The importance of Isidore's concept for further theories of natural law in canon law is, however, noticed in J. Gaudemet, *Quelques remarques sur le droit naturel à Rome*, "Revue Internationale des Droits de l'Antiquite" 1952, No. 2(1), p. 467.

8 Dante, *Div. Comm*., Parad. 10, 130–132.

as a "law which determines what is right and wrong" and binds man "by nature, inherently, hence everywhere and always."[9] Greek philosophy associated natural law with the "right reason" (*orthós logos* – Ορθός Λόγος). Acting according to the orders of the right reason is to lead one to achieve virtue and – in consequence – good life. The term *nomos* (νομός) is used in this context to mean law and it covers a much broader scope than we today are inclined to attribute to it. It covered not only a specific political and normative order stipulated in acts of written legislation, but also customs, moral norms and other rules that made up the order of community life.[10] Some authors are open to an even broader interpretation of the term *nomos*. For example, Voegelin, interpreting Plato's dialogues, concluded that it covers "cosmic order, festive rituals and musical forms."[11]

Among Latin authors who dealt with the theory of natural law, special significance is given to Marcus Tullius Cicero (d. 43 BCE).[12] St. Isidore knew this author perfectly well and – as Marey notes – quoted Cicero more often that the Holy Scripture.[13] Using Plato's dialogue form,[14] Cicero offered a concise lecture on natural law in his *De legibus,* which he had worked on from 53 BCE onwards.[15] The famous orator tried to show in it the actually functioning rights of the Romans in a broad philosophical, anthropological or even theological perspective. This differentiates Cicero's arguments from those of Plato's, whose reflections on the optimal system for a new *polis* included in the dialogue *Nomoi* are largely a hypothetical speculation. The more recent literature usually rejects the thesis about a simple adoption

9 L. Strauss, *On Natural Law,* in: D.L. Sills (ed.), *International Encyclopedia of the Social Sciences*, Vol. II, p. 80 (reprinted in: L. Strauss, *Studies in Platonic Political Philosophy,* Chicago 1983, p. 137).

10 M.S. Shellens, *Aristotle on Natural Law*, "Natural Law Forum" 1959, No. 1(1), p. 74.

11 E. Voegelin, *Order and History,* Vol. III, *Plato and Aristotle*, Columbia–London 2000, p. 271.

12 Cf. M. Kaser, *Ius gentium*, Köln–Weimar–Wien 1993, pp. 54–56.

13 E. Marey, *La notion de loi (lex) selon Isidore…*, p. 512. St. Isidore most likely had direct access to Cicero's works – A. Fear, J. Wood, *Introduction*, in: A. Fear, J. Wood (eds.), *Isidore of Seville and his Reception in the Early Middle Ages. Transmitting and Transforming Knowledge*, Amsterdam 2016, p. 17.

14 A reference to Plato's *Nomoi* dialogue was fully intentional – see Cic., *De leg.* 1, 15.

15 K. Leśniak, *Komentarz do dialogu O prawach*, in: Cyceron, *Pisma filozoficzne*, Vol. II, *O państwie. O prawach. O powinnościach. O cnotach*, transl. W. Kornatowski, Warsaw 1960, p. 195. Even a year earlier Cicero worked on his dialogue *On the Republic* (*De re publica*), and then he wrote his work on law at the same time – see Cic., *ad Q. fr.* 2, 12 and 3, 5; Cic., *ad Att.* 4, 16. It needs to be noted that the present study leaves out Strauss's question on how arguments included in his dialogue (which feature pronounced elements of stoic philosophy) correspond to Cicero's own beliefs – see L. Strauss, *Natural Right…*, p. 135.

of Plato's views in Cicero's works[16] and it is even – or perhaps quite exaggeratedly – suggested that the latter took direct inspiration from Aristotle's dialogues (now lost).[17] However, it is worth mentioning that Cicero and his great Greek predecessors Plato and Aristotle aimed for a reform of the political reality around them when creating their works. As Strauss notes, "classical political philosophy pursued practical aims and was guided by, and culminated in, «value judgments.»"[18]

Cicero certainly drew the rationalism of the legal doctrine from Aristotle's thought. He defined law as "the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite" (*lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria*).[19] One may distinguish the *genus* in his definition – law is "the highest reason, implanted in Nature". What distinguished law from other commands of reason (*differentia specifica*) is its ethical nature as it refers to identification of desired models and prohibited behaviours evaluated according to a moral criterion.[20] Law understood this way (*lex*) entails having to make moral judgements, thus Cicero interprets it etymologically *a legendo* (from Latin "to choose").[21] According to Cicero, the genesis of law must

16 See E. Asmis, *Cicero on Natural Law and the Laws of the State*, "Classical Antiquity" 2008, No. 27(1), pp. 1–2.

17 W. Nicgorski, *Cicero on Aristotle and Aristotelians*, "Magyar Filozófai Szemle" 2003, No. 57(4), pp. 44–45. Cf. also: Cic., *ad Att.* 4, 16.

18 L. Strauss, *On Classical Political Philosophy,* "Social Research" 1945, No. 12(1), p. 111. In another place the same author emphasizes that ancient philosophers who addressed politics aimed to achieve the position of "teachers of legislators" – ibidem, p. 105.

19 Cic., *De leg.* 1, 18; transl.: *Cicero in Twenty-Eight Volumes,* vol. XVI, *De re publica, De legibus,* transl. C.W. Keyes, Cambridge-London 1928, p. 317. Cf. Cic., *De leg.* 1, 42: *Est enim unum ius quo deuincta est hominum societas et quod lex constituit una*, *quae lex est recta ratio imperandi atque prohibendi.*

20 See also: T. Banach, *Res publica et res populi. Myśl polityczno-prawna Marka Tulliusza Cycerona*, Łódź 2023, pp. 10–11.

21 Cic., *De leg.* 1, 19: *Itaque arbitrantur prudentiam esse legem*, *cuius ea uis sit*, *ut recte facere iubeat*, *uetet delinquere*, *eamque rem illi Graeco putant nomine nomon <a> suum cuique tribuendo appellatam*, *ego nostro a legendo.* Meanwhile, interpreting the term *lex* from *legere*, St. Isidore clearly refers not to "choosing" but to "reading" (*legere* means both "read", and "choose") – see Isid., *Etym.* 5, 3, 2: *Lex est constitutio scripta. Mos est vetustate probata consuetudo*, *sive lex non scripta. Nam lex a legendo vocata*, *quia scripta est*. See also: P.L. Reynolds, *Isidore…*, p. 35. He thus explains that the term *lex* refers to written law. Cf. also: Aug., *Quest. Hept.* 3, 20. Harries notes that Cicero intentionally breaks the convention typical to his times (and to subsequent centuries) of etymological interpretation of the term *lex* from *legere* – "read" – see J. Harries, *Cicero and the Jurists. From Citizens' Law to Lawful State*, London 2006, p. 55.

be sought in the natural order.[22] Thus natural law has a universal nature that refers to all reasonable beings – since it itself constitutes a command of right reason (*ratio recta*).[23]

Contrary to Cicero, representatives of Roman jurisprudence did not take up a deep theoretical reflection on natural law. While sources do have references to *ius naturale*, it is understood rather intuitively, as a certain type of association with natural processes and phenomena.[24] It is particularly noticeable in Ulpian's approach (d. 223),[25] who called natural law as "that which nature has taught all animals."[26] Even in the 6th century still, this definition was repeated in Justinian's *Institutions*,[27] even though since Ulpian's times the Roman reflection on the natural law was most certainly enriched by works of Christian writers, such as Lactantius

22 Cic., *De leg.* 1, 28: *Sed omnium quae in hominum doctorum disputatione uersantur, nihil est profecto praestabilius, quam plane intellegi, nos ad iustitiam esse natos, neque opinione sed natura constitutum esse ius. Id iam patebit, si hominum inter ipsos societatem coniunctionemque perspexeris.*

23 Cic., *De leg.* 1, 33: *Quibus enim ratio <a> natura data est, isdem etiam recta ratio data est; ergo et lex, quae est recta ratio in iubendo et uetando; si lex, ius quoque; et omnibus ratio.* Reasonable beings must be understood as both humans and deities – Cic., *De leg.* 1. 23: *Est igitur, quoniam nihil est ratione melius, eaque <est> et in homine et in deo, prima homini cum deo rationis societas. Inter quos autem ratio, inter eosdem etiam recta ratio [et] communis est: quae cum sit lex, lege quoque consociati homines cum dis putandi sumus. Inter quos porro est communio legis, inter eos communio iuris est.*

24 This may be seen not only in Ulpian's definition (D. 1, 1, 1, 3 – see below), who referred the concept of natural law to the question of procreation and education of children and also in cases of qualifying some ways of acquisition of ownership as "natural" (see G. 2, 65–79; D. 41, 1, 1–7). Cf. also Levy's comments, who points out that "the jurists then called a rule natural when it seemed to them in conformity with either the physical condition of man or his normal conduct or expectation [behaviour of other people – B.Z.'s note] in social relations," E. Levy, *Natural Law in the Roman Period*, "Natural Law Institute Proceedings of Notre Dame" 1948, No. 2, pp. 54–55.

25 On Ulpian's life and – in particular – his writings see T. Honoré, *Ulpian. Pioneer of Human Rights*, Oxford 2002.

26 D. 1, 1, 1, 3 (*Ulpianus libro primo institutionum*): *Ius naturale est, quod natura omnia animalia docuit* […].

27 Inst. 1, 2 pr.

(d. after 324),[28] whose writings St. Isidore knew very well.[29] It may be assumed that *prudentes* did not create a single cohesive theory of natural law,[30] though they accepted its existence and to a certain degree also recognised its practical gravity relying on *ius naturale*, *naturalis ratio*, *naturalis aequitas* or simply on the *natura* to substantiate his opinions or to point out the ratio of certain legal measures in a more abstract way.[31] In the event of a conflict of natural law with *ius gentium* – as was, for example, in the case of admissibility of slavery – the primacy was given to pragmatic realism which entailed the ultimate acceptance for enslavement.[32]

The reluctance of Roman jurisprudence to creating abstract constructs, definitions and rules is actually considered its characteristic feature.[33] It is for this very reason that the already-mentioned Lactantius, in the introduction to his *Divinae*

28 On the importance of Christianity for the concept of natural law in the Justinian compilation see most of all: B. Biondi, *La concezione cristiana del diritto naturale nella codificazione giustinianea*, "Ius" 1950, No. 1, pp. 2–23. Biondi interpreted sources in his own particular way, attributing almost all manifestations of humanism and all references to the natural law in the Justinian compilation to Christian inspiration. He also ignores the occurring interpretation problems, concluding, for example, that the problem of the relation between the natural law and the given law in Justinian sources does not occur because the absolute primacy of natural law was adopted as an expression of God's will (ibidem, pp. 22–23). Gaudemet took a more moderate position in his *Quelques remarques…*, pp. 446–450 and 459 ff. In his conclusions the author points out that as much as the Byzantines attributed great importance to natural law, in practice its place in the Justinian compilation is modest, as seen in, for example, a consistent concept of *ius naturale* and its relation to *ius gentium*, as well as a lack of interest in the theoretical development of quoted justifications or rulings based on natural law or related concepts – ibidem, p. 466.

29 See J.C. Martín Iglesias, *La biblioteca cristiana de los padres hispanovisigodos (siglos VI–VII)*, "Veleia" 2013, No. 30, p. 272.

30 The absence of an in–depth reflection is seen in particular in the case of Gaius, who derives *ius gentium* from "natural reason" (*naturalis ratio*), completely avoiding the concept of natural law – see G. 1, 1; the case is similar for justification for the consensual nature of a company contract (*societas*) – see G. 3, 154 and in the general description of ways to acquire ownership (D. 41, 1, 1). However, it needs to be remembered that references to nature, natural reason and natural law appear in numerous works of Roman jurists (at the same time not making up a universal theoretical concept) – see J. Gaudemet, *Quelques remarques…*, p. 459.

31 For example, in said ways of acquisition of ownership, but also in reference to "kinship under natural law" (G. 1, 156), in natural obligations (D. 44, 7, 14), as justification for the charge of deceit (D. 44, 4, 1, 1) or lack of capacity to perform acts in law of a mentally ill person (D. 44, 7, 1, 12). See also: E. Levy, *Natural Law…*, p. 50 ff.; H.A. Rommen, *Natural Law…*, p. 24; M. Kuryłowicz, *Prawo rzymskie. Historia – tradycja – współczesność*, Lublin 2003, p. 42.

32 See D. 1, 5, 4, 1 and D. 1, 5, 5, 1. Cf. also: P. Bonfante, *Corso di diritto Romano*, vol. I, *Diritto di famiglia*, Roma 1925, pp. 142–144; O. Robleda, *Il diritto degli schiavff.ell'antica Roma*, Roma 1976, pp. 5–6; N. Brockmeyer, *Antike Sklaverei*, Darmstadt 1979, p. 182.

33 Jurists displayed tremendous fondness for examining especially complex and interesting cases associated with important legal problems – see M. Kuryłowicz, *Prawo rzymskie…*, p. 67.

Institutiones, which he intended to be a textbook on God's moral law, referred to Ulpian's *Institutiones* with ridicule.[34] The apologist concluded in his *Institutiones* that he shall not speak about rain-droppings, or the turning of waters, referring to practically momentous and at the same time prosaic measures related to protection of the ownership right.[35] Even though *iuris prudentia* meant "knowledge of divine and human laws,"[36] and references to natural law, to the nature of things, to the natural reason and the like are numerous, there are no extensive theoretical reflections on natural law, its sources and the essence of creative work of learned lawyers.[37]

At this point it needs to be highlighted that Roman jurists' reflection on *ius naturale* is known today mainly from Justinian's *Digests*. The relevant literature usually suspects that St. Isidore of Seville did not know the Justinian compilation.[38] As noted by Dirksen, author of this thesis himself, the description of public law pre-

34 Cf. B. Zalewski, *Humanitas w ustawodawstwie Konstantyna Wielkiego. Religia–polityka–prawo*, Lublin 2021, pp. 60–61.

35 Lact., *Div. Inst.* 1, 1, 12: *Et si quidam prudentes, et arbitri aequitatis, Institutiones civilis juris compositas ediderunt, quibus civium dissidentium lites contentionesque sopirent: quanto melius nos et rectius divinas Institutiones litteris persequemur; in quibus non de stillicidiis, aut aquis arcendis, aut de manu conserenda, sed de spe, de vita, de salute, de immortalitate, de Deo loquemur, ut superstitiones mortiferas, erroresque turpissimos sopiamus?* Cf. also: E. DePalma Digeser, *The Making of Christian Empire. Lactantius and Rome*, New York 2000, pp. 56–63.

36 D. 1, 1, 10, 2 (*Ulpianus libro secundo regularum*): *Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.* This definition refers to known definitions of philosophy widespread in the Antiquity that described it as, i.a., "knowledge of divine and human things". Late Antiquity sources addressing this matter are discussed in J. Domański, *"Scholastyczne" i "humanistyczne" pojęcie filozofii*, Kęty 2005, p. 13 ff.

37 The same also in: E. Levy, *Natural Law…*, p. 50.

38 Cf. most of all: H.E. Dirksen, *Ueber die durch Isidor von Sevilla benutzten Quellen des römischen Rechts*, in: idem, *Hinterlassene Schriften zur Kritik und Auslegung der Quellen römischer Rechtsgeschichte und Alterthumskunde*, vol. I, Leipzig 1871, pp. 193 ff.; J. de Churruca, *Presupuestos para el estudio de las fuentes jurídicas de Isidoro de Sevilla*, "Anuario de Historia del Derecho Español" 1973, No. 43, pp. 429–444 (on pp. 441–442 the author provides a synthetic review of older research); R. Martini, S. Pietrini, *Cognizioni giuridiche…*, pp. 57–58; A. Dębiński, *Wiedza o prawie…*, p. 130; F.J. Andrés Santos, *Derecho y jurisprudencia…*, pp. 158 and 161; B. Zalewski, *Historyczne znaczenie definicji…*, p. 14. A careful presumption that Isidore could have known certain fragments of *Digests* is formulated by Marey in *La notion de loi (lex) selon Isidore…*, pp. 511–512. It seems most probable that Isidore had at his disposal works that were excerpts from Roman jurists – cf. for example Garcia Gallo's comments (*San Isidoro…*, p. 134), or those from F.J. Andrés Santos (*Derecho y jurisprudencia…*, p. 158). The practice of using such abridged studies was widespread in that epoch, as pointed out by Krynicka in the context of sources of inspiration for the creation of Isidore's *Synonyms*: "The library of Sevillian bishops was lost in the depths of time, therefore the following will always remain unknown – very important for the understanding of Isidore's reading culture in particular, and also the Late Antiquity and Early Middle Ages in general: glossographic texts (glossaries, scholia, onomasticons, comments), textbooks, various abridged works (excerpts, breviaries, florilegia) and sometimes also sources on the basis of which these were written" –

sented in *Etymologiae* and noticing specific historical "layers" (*Schichten* – a term proposed later by Kaser)[39] in *ius* that took the form of *ius naturale, ius gentium* and *ius civile* clearly suggests that Isidore was familiar with Ulpian's works.[40] Juan de Churruca expressed a more modest view on this subject stating that despite certain similarities between *Institutiones Ulpiani libri duo* and *Tituli ex copore Ulpiani* and certain paragraphs of *Etymologiae*, there is no basis to infer unequivocally about Isidore's direct knowledge of Ulpian's works, though their works did certainly enjoy great respect in the circles of Roman–Iberian aristocracy of the 7th century.[41]

Irrespective of de Churruca's doubts, a closer analysis of the concept of natural law presented by Ulpian is justified for the correct understanding of sources of Isidorean inspiration. St. Isidore certainly did have knowledge of the works of Roman jurisprudence.[42] He knew Gaius's writings, which we will touch upon later, and he also quoted Paulus directly.[43] He might also have had a chance to read Modestinus's *Differentiae*,[44] though in the light of most recent findings we cannot be sure of that.[45]

Most of all we need to point out that according to the jurist's view, the term *ius naturale*, similar to *ius gentium* and *ius civile*, refers only to private law, which is "threefold":

T. Krynicka, *Izydor z Sewilli*, *Synonimy: tematyka*, *styl*, *źródła dzieła*, "Vox Patrum" 2018, No. 38(69), p. 412.

39 M. Kaser, *'Ius publicum' und 'ius privatum'*, "Zeitschrift der Savigny–Stiftung fur Rechtsgeschichte. Romanistische Abteilung" 1986, No. 103, p. 13. Cf. also: M. Kuryłowicz, *Prawo rzymskie…*, pp. 46–47.

40 H.E. Dirksen, *Ueber die durch Isidor von Sevilla…*, pp. 190–192. See also: B. Hoyos Pérez, *La obra juridica de San Isidorio*, "Revista Universidad Pontificia Bolivariana" 1959, No. 23(83), p. 149; P.L. Reynolds, *Isidore…*, p. 36; J. Ruggiero, *Gli stemmata cognationum: Pauli Sententiae ed Etymologiae*, in: G. Bassanelli Sommariva, S. Tarozzi (eds.), *Ravenna Capitale. Uno sguardo ad Occidente. Romani e Goti – Isidoro di Siviglia*, Dogana 2012, p. 103.

41 J. de Churruca, *Presupuestos…*, p. 443.

42 However, for the question of whether he drew his knowledge from original works or, as has been suggested was most probably the case, from later re–editions, summaries or excerpts – see footnote 38.

43 See Isid., *Etym*. 5, 14.

44 See J. Baviera (ed.), *Fontes Iuris Romani Anteiustiniani*, part II, *Auctores*, Florentiae 1940, p. 450.

45 See U. Agnati, *Un frammento delle Differentiae di Modestino nelle Differentiae di Isidoro?*, in: G. Bassanelli Sommariva, S. Tarozzi (eds.), *Ravenna Capitale. Uno sguardo ad Occidente. Romani e Goti – Isidoro di Siviglia*, Dogana 2012, pp. 129–145; G. Viarengo, *Un confronto tra Modestino e Isidoro sulle facoltà della legge*, in: G. Bassanelli Sommariva, S. Tarozzi (eds.), *Ravenna Capitale. Uno sguardo ad Occidente. Romani e Goti – Isidoro di Siviglia*, Dogana 2012, pp. 117–127.

> D. 1, 1, 1, 2 (*Ulpianus libro primo institutionum*): *Huius studii duae sunt positiones, publicum et privatum.* […] *Privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.*
>
> Transl.: There are two branches of legal study: public and private law. […] Private law is tripartite, being derived from principles of *jus naturale, jus gentium,* or *jus civile*.[46]

The fragment of Ulpian's *Institututiones* cited by Justinian compilers points out that "natural rules" (*praecepta naturalis*) are one part of the "threefold" (*tripertitum*) private law. Analysing the quoted fragment from Ulpian, Kaser notes, however, that the attributes of the division of private law into *ius naturale*, *gentium* and *civile* was mainly didactic, and that jurist intended to show not so much the "parts" of private law, but its "layers."[47] This becomes understandable only if the exegesis of D. 1, 1, 2 is done with consideration to the jurist's attempt to establish the relation between *ius naturale*, *ius gentium* and *ius civile*:

> D. 1, 1, 6, pr. (*Ulpianus libro primo institutionum*): *Ius civile est, quod neque in totum a naturali vel gentium recedit nec per omnia ei servit: itaque cum aliquid addimus vel detrahimus iuri communi, ius proprium, id est civile efficimus.*
>
> Transl.: The *jus civile* is that which neither wholly diverges from the *jus naturale* and *jus gentium* nor follows the same in every particular. And so whenever to the common law we add anything or take anything away from it, we make a law special to ourselves, that is, *jus civile,* civil law.[48]

Ulpian emphasizes directly that natural law, *ius gentium* and civil law are not separate orders. Kaser's observation is very apt in this sense. He claims that in essence it is not about parts (which would assume a separate existence of three sets of norms within private law), but about layers that develop in the hypothetical (that is not confirmed in sources, but only assumed) historical process of evolution of law and state. Chronological priority in such a process would go to *ius naturale* norms, followed by *ius gentium* norms and only then, with the emergence of *civitates* understood as political civil communities, *ius civile* norms. The jurist does, however, offer an additional criterion of the differentiation between norms of natural law, *ius gentium* and *ius civile*. It is subjective and refers to addressees of norms

46 *The Digest of Justinian*, vol. 1, transl. A. Watson, Philadelphia 1985, p. 1.

47 M. Kaser, *'Ius publicum'*…, p. 13; idem, *Ius gentium*…, pp. 69–70. As meticulously listed by Jean Gaudemet, references to *ius naturale* in the preserved fragments of Ulpian's works can be found five times, of which three were in *Institutiones* – J. Gaudemet, *Quelques remarques*…, p. 457. This would have confirmed Kaser's thesis about the didactic nature of the jurist's clear distinction of three layers of private law.

48 *The Digest*…, p. 2.

that fall under one of these categories. In this angle, *ius naturale* is to be binding on "all living creatures" (*omnium animalium*). As is pointed out in the literature, it is a view not seen in preserved fragments of works of other jurists:[49]

> D. 1, 1, 3 (*Ulpianus libro primo institutionum*): *Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri.*
>
> Transl.: *Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals-land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law.[50]

The jurist points out that natural law is composed of those institutions of community life (social, tribal), that pertain to all living creatures to which Ulpain classifies people too. This pertains to heteronormative unions, procreation and upbringing of offspring. Contrary to Cicero's views, Ulpian's concept is not based on linking natural law with reasonability of beings that are its addressees. Ulpian identifies natural law, therefore, with an instinct, rather than reason.[51] Commenting on the cited fragment, Kaser notes that referring to institutions pertaining to intimate relations and to the upbringing of children, Ulpian wanted to emphasize that these issues had to be regulated in a way that corresponds with nature.[52] On the other hand, Mossakowski pointed out that in Ulpian's approach "natural law is understood directly naturalistically, environmentally, as if outside civilization. *Ius naturale* understood like this would be a set of environmental rules, almost functioning physically. The world of the fauna and the world of humans is an indistinguishable unity here."[53]

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49 See M. Kaser, *Ius gentium…*, p. 70; T. Honoré, *Ulpian…*, pp. 78 ff.

50 *The Digest…*, p. 1.

51 Cf. M. Kaser, *Ius gentium…*, pp. 70–71. Honoré presents a different view as he assumed that it is not so much about instinctive actions, but rather about actions derived from experience – T. Honoré, *Ulpian…*, p. 82.

52 M. Kaser, *Ius gentium…*, p. 72.

53 W. Mossakowski, *Ius naturale w świetle źródeł prawa rzymskiego*, "Prawo kanoniczne. Kwartalnik prawno–historyczny" 2001, No. 44(1–2), p. 216. Ulpian did not treat animals as reasonable beings. As pointed out by Kasprzak, the term *pertitia* used by him does not necessarily have to refer to proficiency on the intellectual dimension, but also to a certain physical fitness in using one's own body – A. Kasprzak, *Ulpiana definicja prawa naturalnego i jej filozoficzne inspiracje*, "Zeszyty Prawnicze" 2023, No. 23(1), p. 9. The author puts forward a thesis at the same time that Ulpian

It is sometimes pointed out in this context that Ulpian, creating his definition of natural law, was under the influence of neo–Platonic rather than stoic philosophy, thought this issue is very strongly disputed in the literature.[54]

According to Ulpian, the three layers mentioned above are not a set of norms that may be ordered within a structure of hierarchical dependence either. The author of *Institutiones* does not condition the force of *ius civile* on its compliance, or at least non–contrariness with "shared" orders – recognising their existence, he accepts the actual primacy of norms of civil law, which de facto may derogate the application of *ius naturale* and *ius gentium* norms.[55] There is a fundamental difference here between Ulpian's concept and Cicero's older theory. Cicero refused the value of law to man–made norms that were contrary to natural moral law:[56]

> Cic., *De leg.* 2, 13: *Quid quod multa perniciose, multa pestifere sciscuntur in populis, quae non magis legis nomen adtingunt, quam si latrones aliqua consensu suo sanxerint? Nam neque medicorum praecepta dici vere possunt, si quae inscii inperitique pro salutaribus mortifera conscripserint, neque in populo lex, cuicuimodi fuerit illa, etiam si perniciosum aliquid populus acceperit.*
>
> Transl.: What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly. For if ignorant and unskilful men have prescribed deadly poisons instead of healing drugs, these cannot possibly be called physicians' prescriptions; neither in a nation can a statute of any sort be called a law, even though the nation, in spite of its being a ruinous regulation, has accepted it.[57]

Contrary to Ulpian, Cicero recognized therefore not only the existence of natural law, but also its primacy against man–made law.[58] Gaudemet's statement that for Roman jurists *ius naturale* was by no means some sort of a "higher order" which

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treats nature itself – according to the stoic tradition – as a reasonable instance (ibidem, p. 35). A contrary view: T. Honoré, *Ulpian…*, p. 82.

54 See T. Honoré, *Ulpian…*, pp. 81–82. In the Polish-language literature, the thesis about the stoic inspirations of Ulpian's concept of natural law is shared in P. Sadowski, *Filozofia prawa w życiu i nauczaniu Ulpiana*, "Zeszyty Prawnicze" 2008, No. 8(1), pp. 101–102 and A. Kasprzak, *Ulpiana definicja prawa…*, p. 35.

55 Cf. P.L. Reynolds, *Isidore…*, p. 37.

56 Jill Harries believes that Cicero's view was determined mainly by his personal experiences associated with his political activity and exile – J. Harries, *Cicero and the Jurists…*, pp. 55–57. The interdependence between Cicero's life experience associated with his public activity and the development of his doctrine is pointed out by T. Banach, who devoted a longer essay to it in *Res publica…*, pp. 55–67.

57 *Cicero…*, vol. XVI, p. 385.

58 Cf. T. Banach, *Res publica…*, p. 12.

the positive legislator was to observe is valid.[59] In the case of Ulpian, such a pre–positivist view cannot be a surprise – it would have been odd for a jurist who held incredibly responsible functions in the emperor's administration to undermine the latter's actually absolute power.[60] It is from Ulpian himself that the famous maxim "what pleases the emperor has the force of law" (*quod principi placuit, legis habet vigorem*) comes from.[61] On the other hand, Cicero's view was adopted in the works of the previously–mentioned Christian apologist Lactantius. In the monumental *Divinae Institutiones* this author pointed to the absolute primacy of Divine moral law over norms of written law, and most of all those that constitute a basis for the persecution of Christians.[62] Hence serious charges against the Roman law:[63]

> Lact. *Div. Inst.* 5, 11, 19: *Quin etiam sceleratissimi homicidae contra pios jura impia condiderunt. Nam et constitutiones sacrilegae, et disputationes jurisperitorum leguntur injustae. Domitius, de officio proconsulis libro septimo, rescripta principum nefaria collegit, ut doceret, quibus poenis affici oporteret eos qui se cultores Dei confiterentur.*
>
> Transl.: Moreover, most wicked murderers liave invented impious laws against the pious. For both sacrilegious ordinances and unjust disputations of jurists are read. Domitius [Ulpianus], in his seventh book, concerning the office of the proconsul, has collected wicked rescripts of princes, that he might show by what punishments they ought to be visited who confessed themselves to be worshippers of God.[64]

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59 J. Gaudemet, *Quelques remarques…*, p. 449. This author concludes that natural law was considered "a lower system of the law" – ibidem.

60 Cf. Honoré's comments on obligations of the proconsul of imperial rescripts aimed against Christians included in Ulpian's monograph – T. Honoré, *Ulpian…*, p. 83.

61 D. 1–4, 1. It is assumed in the literature that this thesis could have been based on Hellenistic concepts of monarchical power – see E. DePalma Digeser, *The Making of Christian Empire…*, p. 49.

62 This thought had already appeared in the works of Christian writers before – see E. DePalma Digeser, *The Making of Christian Empire…*, pp. 47 ff.

63 In this context, theses put forward by Francesco Amarelli are difficult to uphold. He claimed that juridical concepts included in Ulpian's works could have been adopted into the jurisprudence of emperor Constantine the Great through Lactantius – see F. Amarelli, *Vetustas – innovatio. Un'antitesi apparente nella legisalzione di Costantino*, Napoli 1978, pp. 11, 133 ff. Interestingly, in the course of his argument, Amarelli noticed Lactantius's negative attitude towards the Roman law to the degree in which it limited Christian worship and gave basis for persecution – ibidem, p. 77. Still though, Amarelli claimed that Lactantius had relied significantly on Ulpian's *Institutiones* because they were "full of legal and natural concepts" – ibidem, p. 140. However, the author completely avoids the importance of Cicero's concepts for Lactantius's works, and also, as it seems, he overestimates the importance of the idea of natural law for Ulpian's views. He does not perceive pronounced differences in the understanding of the concept of natural law in the works of the pagan jurist and the Christian apologist.

64 *The Works of Lactantius,* vol. 1, transl. W. Fletcher, Edinburgh 1877, p. 319.

Written norms, even if coming from competent public authorities, were thus a merely pretence of law insofar as they were just.[65] In this context, Lactantius, using his excellent education and exquisite knowledge of Latin literature, referred to Cicero's views:[66]

> Lact., *Div. Inst.* 6, 8, 6–9: *Suscipienda igitur Dei lex est, quae nos ad hoc iter dirigat: illa sancta, illa coelestis, quam Marcus Tullius in libro de Republica tertio pene divina voce depinxit; cujus ego, ne plura dicerem, verba subjeci: «Est quidem vera lex, recta ratio, naturae congruens, diffusa in omnes, constans, sempiterna; quae vocet ad officium, jubendo; vetando, a fraude deterreat: quae tamen neque probos frustra jubet, aut vetat; nec improbos jubendo, aut vetando movet. Huic legi nec obrogari fas est, neque derogari ex hac aliquid licet, neque tota abrogari potest. Nec vero aut per Senatum, aut per populum solvi hac lege possumus. Neque est quaerendus explanator, aut interpres ejus alius. Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac: sed et omnes gentes, et omni tempore una lex, et sempiterna, et immutabilis continebit; unusque erit communis quasi magister, et imperator omnium Deus, ille legis hujus inventor, disceptator, lator; cui qui non parebit, ipse se fugiet, ac naturam hominis aspernatus, hoc ipso luet maximas poenas, etiamsi caetera supplicia quae putantur effugerit».*
>
> Transl.: Therefore the law of God must be undertaken, which may direct us to this path; that sacred, that heavenly law, which Marcus Tullius, in his third book respecting the Republic, has described almost with a divine voice; whose words I have subjoined, that I might not speak at greater length: "There is indeed a true law, right reason, agreeing with nature, diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding; which, however, neither commands or forbids the good in vain, nor affects the wicked by commanding or forbidding. It is not allowable to alter? The provisions of this law, nor is it permitted us to modify it, nor can it be entirely abrogated? Nor, truly, can we be released from this law, either by the senate or by the people; nor is another person to be sought to explain or interpret it. Nor will there be one law at Rome and another at Athens; one law at the present time, and another hereafter: but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common Master and Ruler of all, even God, the framer, arbitrator, and proposer of this law; and he who shall not obey this will flee from himself, and, despising the nature of man, will suffer the greatest punishments through this very

65 In this context Lactantius refers, naturally, to imperial constitutions that provided a legal basis for persecuting Christians. An in-depth discussion of the above in: A. Nogrady, *Römisches Strafrecht nach Ulpian. Buch 7 bis 9 De officio proconsulis*, Berlin 2006, pp. 40 ff.

66 The reference to Cicero was a perfectly reasonable manoeuvre because he upheld the will of the divine as a source of natural law – see Cic., *De leg.* 1, 21–23. Cf. also: B. Biondi, *La concezione cristiana…*, pp. 3–4; E. DePalma Digeser, *The Making of Christian Empire…*, pp. 47, 58.

thing, even though he shall have escaped the other punishments which are supposed to exist."[67]

Therefore, relying on the natural law concept proposed by Cicero, Lactantius creates a framework of the Christian understanding of *lex naturalis.* One may name its specific features, that is:

a) reasonable nature of natural law – following Cicero, Lactantius recognized law as an executive act of reason, as a result of which its addressees are only reasonable being, not all creations. In the epistemological dimension it means that the understanding of natural law as a set of orders or prohibitions of conduct proceeds through application of relevant intellectual manoeuvres that in their basic form are available to all people. God, who is also a reasonable being, is the creator of this concept of natural law, which justifies identifying *lex naturalis* with the imperative of the highest, right divine reason;
b) immutability of natural law – natural law is not subject to changes either in time or in space. It is thus a universal law in its fullest meaning. This, in turn implies the primacy of natural law over written law and the fact that a positive legislator may not be derogate it;
c) ethical character of natural law – natural law in Lactantius's approach is equated with moral divine law, that is it allows a human behaviour to be evaluated based on the criterion of good and evil. Taking into account the reasonable character of natural law it is therefore noticeable that is involves making moral judgements in which human behaviour is assessed as righteous or wicked.[68]

In Lactantius's approach, natural law has two dimensions. On the one hand, it is transcendent towards a human because it comes from a being that is outside the earthly universe, thus from God himself. On the other hand, it was God who inscribed natural law in the nature of humanity itself (*humanitas*), thus it is somehow immanent to humans. This is why Lactantius specifies natural law as *ius humanitatis,* a phrase he took from Arnobius.[69] In other fragments of *Divinae Institutiones* Lactantius offers a lecture on rules of conduct that correspond to orders of natural law and that should guide all people, especially followers of Christ. He refers there to *humanitas*.[70]

67 *The Works of Lactantius,* Vol. 1, pp. 370–371.

68 The ethical dimension of Cicero's concept on which Lactantius relied on is pointed out in J. Harries, *Cicero and the Jurists…*, p. 54 and T. Banach, *Res publica…*, pp. 10–13.

69 See B. Zalewski, *Humanitas w ustawodawstwie…*, p. 74.

70 Ibidem, pp. 77 ff.

The analysed sources allow a conclusion that the definition of natural law included in *Etymologiae* could refer to one of two concepts. The first, older, is found primarily in Cicero's works and Lactantius's works that base on them. It equates natural law with an order of reason, highlights its primacy towards written law and its ethical character. In Lactantius's approach, natural law was an expression of God's will and respecting it involved participation in the plan of Providence, leading men to salvation. Thus, natural law may be identified with God's moral law.

The second concept of natural law comes from Ulpian. It is naturalistic, approaching natural law as certain schemes of behaviour and phenomena common to both people and animals. This, of course, opened up the possibility of a Christian interpretation of the concept of natural law as a certain instinctive order of the functioning of humans and animals which God inscribed in the nature of these beings.[71] It needs to be remembered, however, that in line with Ulpian's views, natural law did not enjoy primacy over written law, and as the operation of the institution of slavery shows, it had to actually yield to the will of the positive legislator.

Natural law according to St. Isidore of Seville

The definition of natural law is included in Book V of *Etymologiae*. Isidore places it following a passage on great legislators throughout the ages[72] and an explanation of the difference between divine and human laws,[73] and also between the terms *ius, leges* and *mores*.[74] This composition is no accident. It first includes historical issues to then move on questions that – using today's terminology – may be described as a general theory of law.[75] A broad philosophical–theological perspective is typical to Isidore.[76] The Sevillian explains that all laws (*leges*) are either divine (based on nature) or human (based on custom):[77]

71 This is how medieval glossary writers interpreted the term *natura* included in D. 1, 1, 3 – see B. Biondi, *La concezione cristiana…*, p. 6; J. Gaudemet, *Quelques remarques…*, p. 448.

72 Isid., *Etym.* 5, 1, 1–7.

73 Isid., *Etym.* 5, 2, 1–2.

74 Isid., *Etym.* 5, 3, 1–4.

75 Cf. A. Dębiński, *Wiedza o prawie…*, pp. 130–131; P.L. Reynolds, *Isidore…*, p. 34; F.J. Andrés Santos, *Derecho y jurisprudencia…*, p. 158.

76 F.J. Andrés Santos, *Derecho y jurisprudencia…*, p. 157.

77 Philip L. Reynolds describes this division as metaphysical – P.L. Reynolds, *Isidore…*, p. 35.

> Isid., *Etym.* 5, 2, 1–2: *Omnes autem leges aut divinae sunt, aut humanae. Divinae natura, humanae moribus constant; ideoque haec discrepant, quoniam aliae aliis gentibus placent. Fas lex divina est, ius lex humana. Transire per alienum fas est, ius non est.*
>
> Transl.: All laws are either divine or human. Divine laws are based on nature, human laws on customs. For this reason, human laws may disagree, because different laws suit different peoples. *Fas* is divine law; jurisprudence (*ius*) is human law. To cross through a stranger's property is allowed by divine law; it is not allowed by human law.[78]

Divine laws are also called *fas*, while human laws are called *ius*. This opens up the first interpretation difficulty in the context of the concept of natural law in St. Isidore's approach because he may seem to become conflicted by using the term *ius naturale*. Natural law, even though it is not rooted in customs but in human nature, belongs to the sphere of human law (*ius*).

To understand this fragment correctly, one must first look at the example given by Isidore about crossing through a stranger's property: *transire per alienum fas est, ius non est.* The bishop calls this behaviour *fas*, not *ius*. The terms *fas* and *ius* in this context mean how behaviour of a given person in assessed rather than a certain subjective order. Therefore, it could be said that St. Isidore believes that crossing through a stranger's property is an unlawful act, but not impious. The term *fas* that in other fragments of Book V of *Etymologiae* does not appear means a "divine law" (*lex Divina*) in its strict sense and thus only describes moral divine law. As much as it relies on nature, its content is established most of all by participation in the Revelation. This is why St. Isidore uses the term *lex* in this context. He refers to written norms included in the Holy Scripture.[79] One may suspect that it is most of all about orders and prohibitions in behaviour included in the Decalogue and Gospels.

Also, when writing about human law (*lex humana*), Isidore refers most probably only to written laws (statutes, constitutions),[80] that are only a part of the order called *ius*. This results from further arguments quoted in *Etymologiae*:

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78 *The* Etymologies *of Isidore of Seville*, S.A. Barney, W.J. Lewis, J.A. Beach, O. Berghof (eds. and transl.), Cambridge 2010, p. 117.

79 More on this in: E. Marey, *La notion de loi (lex) selon Isidore…*, pp. 531–533. See also: P.L. Reynolds, *Isidore…*, p. 35.

80 Cf. footnote 21. Marey suspects that Etymology of the term *lex* adopted by Isidore, which, as we know, does not refer to the works of Cicero but to Varro's arguments, is associated with how to make and promulgate laws in the Visigothic Kingdom of Toledo – see E. Marey, *La notion de loi (lex) selon Isidore…*, pp. 514–516. It is possible since St. Isidore was directly involved in the kingdom's political life and even lead the 4th Council of Toledo in 633 (see F.J. Andrés Santos, *Derecho y jurisprudencia…*, p. 155). On St. Isidore's political activity see J.T. Crouch, *Isidore of Seville and the Evolution of Kingship in Visigothic Spain*, "Mediterranean Studies" 1994, No. 4, pp. 9–26.

Isid., *Etym.* 5, 3, 1–2: *Ius generale nomen est, lex autem iuris est species. Ius autem dictum, quia iustum [est]. Omne autem ius legibus et moribus constat. Lex est constitutio scripta. Mos est vetustate probata consuetudo, sive lex non scripta. Nam lex a legendo vocata, quia scripta est.*

Transl.: 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.[81]

In the context of the fragments from St. Isidore's work quoted above one may conclude that the term *ius naturale* will refer to norms what are by principle devoid of a strictly religious meaning and thus understanding them will depend on the knowledge of a Christian doctrine.[82] However, they are made by God as a creator of human nature and the order of things.[83] In this sense, *ius naturale*, similar to *fas*, is based on nature that may be understood as a certain kind of consequence of God's will.[84] However, it belongs to a secular sphere, similar to *ius civile* and *ius gentium*:

Isid., *Etym.* 5, 4, 1–2: *Ius autem naturale [est], aut civile, aut gentium. Ius naturale [est] commune omnium nationum, et quod ubique instinctu naturae, non constitutione aliqua habetur; ut viri et feminae coniunctio, liberorum successio et educatio, communis omnium possessio, et omnium una libertas, adquisitio eorum quae caelo, terra marique capiuntur. Item depositae rei vel commendatae pecuniae restitutio, violentiae per vim repulsio. Nam hoc, aut si quid huic simile est, numquam iniustum [est], sed naturale aequumque habetur.*

Transl.: Law is either natural, or civil, or of nations. Natural law is common to all nations, and, because it exists everywhere by the instinct of nature, it is not kept by any regulation. Such is the union of a man and woman, the children's inheritance and education, the common possession of everything, a single freedom for all, and the right to acquire whatever is taken from the sky, the earth, and the sea. Also the return of something which was entrusted and of money which was deposited, and the repulsion of violence

81 *The Etymologies…*, p. 117.

82 However, it needs to be remembered that natural law – despite in principle concerning man's operation in a sphere not directly associated with worshipping God – places a moral sanction on human behaviours, that is it allows for them to be assessed according to moral criteria. Therefore, Callaso rightly points out that Isidore's concept accepted by the Church (mainly through *Decterum Gratiani*) made law binding also on the conscience of all Christian believers — F. Calasso, *Medio evo del diritto*, Milano 1954, p. 200.

83 See Gen. 1, 26–31 and 2, 7. Cf. also: A. Garcia Gallo, *San Isidoro…*, pp. 138–139.

84 Cf. E. Marey, *La notion de loi (lex) selon Isidore…*, p. 530.

by force. Now this, or whatever is similar to it, is never unjust, but is held to be natural and fair.[85]

In an attempt to define *ius naturale*, St. Isidore begins his argument with a systematising note. The bishop of Seville points out that *ius* comprises natural law (*ius naturale*), civil law (*ius civile*) and the law of nations (*ius gentium*). This gives rise to obvious associations with the already discussed Ulpian's statement about private law being "tripartite".[86] As is pointed out in the literature, Roman jurists from the period of classical law operated a dichotomous division of the concepts of *ius* into *ius civile* and *ius gentium*.[87] The authenticity of Ulpian's *Institutiones* is not questioned nowadays.[88] This means that the concept included in them on the "tripartite nature" of private law is an original solution of the jurist of Tyre. Despite certain differences between Ulpian's approach and that of Isidore – mainly the bishop's referring of the said trichotomy to the entire *ius*, not only private law – it needs to be assumed that Ulpian's concept was adopted in *Etymologiae*.[89]

When defining the very concept of natural law, St. Isidore concludes that it is "common to all nations, and, because it exists everywhere by the instinct of nature, it is not kept by any regulation" (*commune omnium nationum, et quod ubique instinctu naturae, non constitutione aliqua habetur*). The use of the phrase that natural law is applied *instinctu naturae* is especially interesting in this definition. We will not find a similar linguistic expression in any of the definitions of natural law analysed before. The literature sometimes sees it as modification of the phrase used by Ulpian that natural law is that which "nature has taught all animals" (*quod natura omnia animalia docuit*).[90] The term *instinctus* itself appears in various contexts in

85 *The Etymologies…*, p. 117.

86 D. 1, 1, 2 (*Ulpianus libro primo institutionum*): […] *Privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.* See also: P.L. Reynolds, *Isidore…*, p. 36.

87 G. Lombardi, *Sul concetto di 'ius gentium'*, Roma 1947, pp. 191 ff. (Lombardi believed that this justifies the thesis that the trichotomous division into *ius naturale*, *ius gentium* and *ius civile* is a Justinian interpolation or at least a classic re–make – ibidem, pp. 195–196); M. Kaser, *Ius gentium…*, p. 66.

88 M. Kaser, *Ius gentium…*, p. 66.

89 We need to point out that it is about the adoption of the very idea of division of law into *ius naturale*, *ius gentium* and *ius civile*, because the understanding of these terms is in itself Isidore's original concept – see A. Garcia Gallo, *San Isidoro…*, pp. 139–140. It is visible in particular in the original definition of *ius gentium* which somehow anticipates today's understanding of public international law – ibidem; cf. also B. Zalewski, *Historyczne znaczenie…*, pp. 30–31.

90 See R.A. Greene, *Instinct of Nature: Natural Law*, *Synderesis*, *and the Moral Sense*, "Journal of the History of Ideas" 1997, No. 58(2), pp. 173–175.

imperial constitutions of the Late Antiquity.[91] It means various kinds of motivation, including also religious motivation (*sanctae religionis instinctus*).[92] It would suggest that the word *instinctus* does not need to denote instinct understood as a certain natural impulse to act or to refrain from acting typical to animals.[93]

In turn, the term *naturalis intentio*, similar to *instinctu naturae* appears in Boethius's works (d. 524). St. Isidore knew his writings, but we do not know whether

91 See C.Th. 2, 8, 18 (= C.Th. 11, 7, 13); C.Th. 9, 5, 1 (= C. 9, 8, 3); C.Th. 16, 2, 27. In the times of St. Isidore, imperial constitutions collected in *Lex Romana Visigothorum* were applied in the juridical practice of the kingdom of Visigoths towards the Roman people (in line with the principle of legal personalism, which was to be repealed only by the promulgation of *Liber Iudiciorum*) – see P.D. King, *King Chindasvind and the First Territorial Law–Code of the Visigothic Kingdom*, in: E. James (ed.), *Visigothic Spain: New Approaches*, Oxford 1980, pp. 131–157; idem, *Law and Society in the Visigothic Kingdom*, Cambridge 2006, p. 18; H. Wolfram, *Historia Gotów*, transl. R. Darda–Staab, I. Dębek, K. Berger, Warszawa–Gdańsk 2003, pp. 227–228; S. Koon, J. Wood, *Unity from Disunity: Law, Rhetoric and Power in the Visigothic Kingdom*, "European Review of History" 2009, No. 16(6), p. 796. We do know that Isidore held functions of a judge – see J.T. Crouch, *Isidore of Seville…*, p. 12. Thus he must have had a grasp of imperial *leges* texts. Cf. also Isid., *Etym.* 5, 1, 7; H.A. Olano Garcia, *Aportes de San Isidoro…*, p. 5. Literature also emphasizes that the content of *Lex Romana Visigothorum* must be taken into account in research on legal aspects of St. Isidore's works due to the significance of this set of laws as a foundation of Roman legal culture of the Visigoth Kingdom in the scope discussed – see V. Crescenzi, *Per una semantica del lavoro giuridicamente rilevante in Isidoro da Siviglia, nella Lex Romana Visigothorum, nell'Edictum Theoderici, e nella Lex Visigothorum*, in: G. Bassanelli Sommariva, S. Tarozzi (eds.), *Ravenna Capitale. Uno sguardo ad Occidente. Romani e Goti – Isidoro di Siviglia*, Dogana 2012, p. 219. Isidore's knowledge of the law was a result of receiving thorough general education, not specialist studies. There were no such schools of law in the territory of the former Western Roman Empire – see F.J. Andrés Santos, *Derecho y jurisprudencia…*, pp. 156–157.

92 C.Th. 2, 8, 18 (*Imppp, Gratianus, Valentinianus et Theodosius aaa. ad Principium praefectum praetorio*): *Solis die, quem dominicum rite dixere maiores, omnium omnino litium, negotiorum, conventionum quiescat intentio; debitum publicum privatumque nullus efflagitet; nec apud ipsos quidem arbitros vel iudiciis flagitatos vel sponte delectos ulla sit agnitio iurgiorum. Et non modo notabilis, verum etiam sacrilegus iudicetur, qui a sanctae religionis instinctu rituve deflexerit. Proposita iiff.on. nov. Aquileiae, accepta viii k. dec. Romae Honorio n. p. et Evodio conss.* This constitution, elaborated in the chancellery of Emperor Gratian, was adopted in Aquileia in 386 – O. Seeck, *Regesten Der Kaiser und Päpste*, Stuttgart 1919 (reprint: Frankfurt–am–Main 1984), p. 270. Initially it was only in force in the territory of Italy, Africa and Illyricum – see J. Wiewiorowski, *Christian Influence on the Roman Calendar. Comments in the Margins of C. Th. 9.35.4 = C. 3.12.5 (a. 380)*, "Studia Prawnicze KUL" 2019, No. 4, p. 220. The author points to, for example, the phrase *sanctae religionis instinctu*, as confirming motivation driven by Christian religion when passing this constitution (ibidem, p. 221, footnote 25). It is suspected in the literature that St. Isidore knew the content of the Theodosian Code (he could have certainly read *Lex Romana Visigothorum*, but he is likely to have known the Code directly) – see F.J. Andrés Santos, *Derecho y jurisprudencia…*, p. 161.

93 It is pointed out in P.L. Reynolds: *Isidore…*, pp. 38–39. The author believes that *instinctus* used by Isidore may refer to the phrase *instinctu divino* ("divine inspiration").

he had the chance to read *Consolatio Philosophiae*.[94] In the light of the findings made by historians, *Conosolatio Philosophiae* was not known in Spain before Arab conquests.[95] However, it is worth learning the context in which one of the most distinguished intellectuals of the Late Antiquity – and Boethius is one of them – uses a phrase so close to *instinctu naturae*, that was preserved in *Etymologiae*. This is not only down to the fact that St. Isidore knew other works by Boethius, but also to the similarity of the education model that most likely both scholars experienced as they were raised in the same social class of Roman elites at the turn of Antiquity and the Middle Ages.[96]

Boethius uses the term *naturalis intentio* to call natural inclinations of both humans and animals. This is thus about a natural inclination of "earthly creatures" (*terrena animalia*) to seek happiness.[97] Boethius refers the phrase *naturalis intentio* to biological processes that happen in living organisms, such as digestion or breathing.[98] He also believes that a strive to preserve one's own existence and fear of death are also determined by a natural inclination.[99] *Naturalis intentio* also means all beings' natural drive, implanted by God, to good.[100] The term *naturalis officio,* similarly, has a broad meaning which refers to natural capabilities understood as a certain physical ability, such as in the case of a natural ability to walk using one's

94 J.C. Martín Iglesias, *La biblioteca cristiana…*, p. 265; F.J. Andrés Santos, *Derecho y jurisprudencia…*, p. 160.

95 D. Briesemeister, *The Consolatio Philosophiae of Boethius in Medieval Spain*, "Journal of the Warburg and Courtauld Institutes" 1990, No. 53, p. 61.

96 Cf. F.J. Andrés Santos, *Derecho y jurisprudencia…*, p. 157.

97 Boeth., *Cons. phil.* 3, 5: *Uos quoque, o terrena animalia, tenui licet imagine uestrum tamen principium somniatis uerumque illum beatitudinis finem licet minime perspicaci qualicumque tamen cogitatione prospicitis, eoque uos et ad uerum bonum naturalis ducit intentio et ab eodem multiplex error abducit.*

98 Boeth., *Cons. phil.* 3, 21: *Neque nunc nos de uoluntariis animae cognoscentis motibus, sed de naturali intentione tractamus, sicuti est quod acceptas escas sine cogitatione transigimus, quod in somno spiritum ducimus nescientes.*

99 Boeth., *Cons. phil.* 3, 21: *Nam saepe mortem cogentibus causis, quam natura reformidat, uoluntas amplectitur, contraque illud quo solo mortalium rerum durat diuturnitas, gignendi opus, quod natura semper appetit, interdum cohercet uoluntas. Adeo haec sui caritas non ex animali motione, sed ex naturali intentione procedit* […].

100 Boeth., *Cons. phil.* 3, 23: *Cum deus, inquit, omnia bonitatis clauo gubernare iure credatur eademque omnia, sicuti docui, ad bonum naturali intentione festinent, num dubitari potest quin uoluntaria regantur seque ad disponentis nutum ueluti conuenientia contemperataque rectori sponte conuertant?*

legs.[101] Boethius also refers specifically to people talking about natural action of virtues (*naturali officio virtutum*).[102]

Therefore, a comparative analysis does not provide a basis to state unequivocally whether the phrase *instinctus naturae* used by Isidore may be treated as equal to Ulpian's phrase *natura omnia animalia docuit* or Boethius's *naturalis intentio* and *naturalis officio.* St. Isidore's argument itself, however, suggests that he means the concept of natural law to apply only to humans. It is by no accident that the bishop of Seville concludes that natural law is common to all nations (*ius naturale [est] commune omnium nationum*), not to all living creatures (*ius naturale [est] commune omnium animalium*). Such a position is rooted in Christian anthropology,[103] according to which human is an exceptional being, created in the image and likeness of God.[104] Only humans are reasonable beings and thus law may only apply to them. Law, as pointed out by Reynolds in reference to St. Isidore's works, is "reasonable by definition".[105] This is why, different than Ulpian, St. Isidore assumes primacy of natural law as an order reasonable by default, which derogates from its essence norms contrary to natural reason.[106]

Examples used by St. Isidore in his descriptions of natural law are at least partially taken from Ulpian. The bishop of Seville includes among institutions of natural law most of all the union of a man and woman (*viri et feminae coniunctio*) and children's inheritance and education (*liberorum successio et educatio*). The literature rightly interprets these examples as a reference to Ulpian's views.[107] However, certain modifications may be seen, including in particular the emergence of the

101 Boeth., *Cons. phil.* 4, 3: *Rursus, inquit, si duo sint quibus idem secundum naturam propositum sit, eorumque unus naturali officio id ipsum agat atque perficiat, alter uero naturale illud officium minime amministrare queat, alio uero modo quam naturae conuenit non quidem impleat propositum suum sed imitetur implentem, quemnam horum ualentiorem esse decernis? — Etsi coniecto, inquam, quid uelis, planius tamen audire desidero. — Ambulandi, inquit, motum secundum naturam esse hominibus num negabis? — Minime, inquam. — Eiusque rei pedum officium esse naturale num dubitas? — Ne hoc quidem, inquam. — Si quis igitur pedibus incedere ualens ambulet alius que, cui hoc naturale pedum desit officium, manibus nitens ambulare conetur, quis horum iure ualentior existimari potest? — Contexe, inquam, cetera; nam quin naturalis officii potens eo qui idem nequeat ualentior sit nullus ambigat.*

102 Boeth., *Cons. phil.* 4, 3: *Sed summum bonum, quod aeque malis bonisque propositum boni quidem naturali officio uirtutum petunt, mali uero uariam per cupiditatem, quod adipiscendi bonff.aturale officium non est, idem ipsum conantur adipisci; an tu aliter existimas?*

103 Cf. especially apt findings in A. Garcia Gallo, *San Isidoro…*, p. 139.

104 See Gen. 1, 26–27.

105 P.L. Reynolds, *Isidore…*, p. 35. Cf. also: A. Garcia Gallo, *San Isidoro…*, p. 139.

106 Cf. F. Calasso, *Medio evo…*, p. 203.

107 P.L. Reynolds, *Isidore…*, pp. 37–38.

term *liberorum successio* in place of *liberorum procreatio* referred to by Ulpian. One may speculate that this change was driven by religious considerations – mainly an affirmative approach to sexual abstinence as a form of Christian asceticism.[108]

Another example of an institution of natural law quoted by Isidore is *communis omnium possessio, et omnium una libertas, adquisitio eorum quae caelo, terra marique capiuntur. In fine* this phrase clearly corresponds with the description of acquisition of property by appropriation included in Gaius's *Institutiones* (*occupatio*).[109] The term *communis omnium possessio* seems more mysterious. It may be a reference to the concept of *res omnium communes*, which was adopted into Justinian's *Digests* from Marcianus's *Institutiones*.[110] There is some speculation in the literature that Isidore might have relied on the works of both those jurists.[111] His knowledge of Gaius's *Institutiones* is substantiated by including its abridges version (*Gai Institutionum Epitome* or *Liber Gai*) in *Lex Romana Visigothorum*,[112] though it needs to be ruled out that the fragment on acquisition by appropriation of things that

108 Sexual abstinence was treated as a desired behaviour and celibates had enjoyed much respect in Christian communes even before – see B. Zalewski, *Humanitas w ustawodawstwie…*, pp. 225–226 (in the context of marriage orders included in Emperor Octavian Augustus's legislation). It is worth remembering that it is the Council of Elvira held in Spain (approx. 306) that imposed penance for virgins who violated vows of chastity and exercised sexual activity before getting married (*Conc. Elbertianum* 13–14). The council's provisions also stipulated a prohibition for married clergy to undertake sexual activity – *Conc. Elbertianum* 33. See also: E. Griffe, *Le Concile d'Elvire et les origines du célibat ecclésiastique*, "Bulletin de littérature ecclésiastique" 1976, No. 77, pp. 123–127; J. Lewandowicz, *On the Wording and Translation of 33rd Canon of the Council of Elvira – the Oldest Official Text of the Church on Celibacy of the Clergy*, "Vox Patrum" 2013, No. 60, pp. 209–219.

109 G. 2, 66: *Nec tamen ea tantum, quae traditione nostra fiunt, naturalff.obis ratione adquiruntur, sed etiam quae occupando ideo adepti erimus, quia antea nullius essent, qualia sunt omnia, quae terra mari caelo capiuntur.*

110 D. 1, 8, 2, 1 (*Marcianus libro tertio institutionum*): *Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.* As Reynolds suspects, Isidore believed that in the original natural state private ownership did not exist, while its role was played by some form of community administration of things. In this sense, a property right constitutes limitation of nature what proceeds along with the development of civilisation – P.L. Reynolds, *Isidore…*, p. 38. This would be contrary to the views of Roman jurists, who treated some ways of acquiring an ownership right as deriving from natural law – Cf. J. Gaudemet, *Quelques remarques…*, p. 464. Besides, Isidore himself would not have been too consistent in this historiographical vision of the state of nature, as a certain primary community of ownership, because he then presents an example of restitution of items of property as deriving from natural law (it is also pointed out by P.L. Reynolds, *Isidore…*, p. 38).

111 See J. de Churruca, *Presupuestos…*, p. 443; P.L. Reynolds, *Isidore…*, p. 36.

112 See G. Haenel (ed.), *Lex Romana Visigothorum*, Leipzig 1849, pp. 314 ff.; *Gai Institutionum Epitome*, in: J. Baviera (ed.), *Fontes Iuris Romani Anteiustiniani*, part II, *Auctores*, Florentiae 1940, pp. 229 ff. Cf. also: F. Calasso, *Medio evo…*, pp. 72–73; G. Cervenca, *Le leggi romano-barbariche*, in: M. Talamanca (ed.), *Lineamenti di storia del diritto romano*, Milan 1979, p. 710.

belonged to no-one was inspired by an excerpt preserved in the Roman-Barbarian collection.[113] However, this does not mean that Gaius's *Institutiones* or its fragments were not available to St. Isidore in a different form.[114] This may mean most of all its post-classical re-edition created for strictly didactic purposes.[115] Gaius's name is also mentioned in the content of one epigrams, authorship of which is attributed to St. Isidore.[116]

Depositae rei vel commendatae pecuniae restitutio is also an example of an institution of natural law quoted by Isidore. The problem of restitution of items placed in a deposit based on natural law was discussed by Tryphoninus in his *Disputationes*.[117] The bishop of Seville treats analogically the problem of recovering items given for use and also loaned money. It seems more probable that the examples given by him are thus a result of his own reflection on natural law.[118] There is no basis to believe that St. Isidore knew *Disputationes*.

113 Given that the relevant fragment of Gaius's *Institutiones* (G. 2, 66) was not included there. However, the very fact that an excerpt from *Institutiones* did have its place in the collection proves the great reverence Gaius enjoyed not only in spheres that were subject to Byzantine authority and also in Barbarian kingdoms. Naturally, Roman elites in particular must have held him in high regard. Cf. G. Cervenca, *Le leggi romano-barbariche…*, pp. 710–711.

114 In the light of research so far, it seems most likely that St. Isidore knew Gaius's works form one or several indirect sources. In this context a reference is needed to the basic monograph by J. de Churruca, *Las instituciones de Gayo en San Isidoro de Sevilla*, Bilbao 1975.

115 See F.J. Andrés Santos, *Derecho y jurisprudencia…*, p. 162.

116 J. de Churruca, *Presupuestos…*, p. 443.

117 D. 16–3, 31, (*Tryphoninus libro nono disputationum*): *Bona fides quae in contractibus exigitur aequitatem summam desiderat: sed eam utrum aestimamus ad merum ius gentium an vero cum praeceptis civilibus et praetoriis? Veluti reus capitalis iudicii deposuit apud te centum: is deportatus est, bona eius publicata sunt: utrumne ipsi haec reddenda an in publicum deferenda sint? Si tantum naturale et gentium ius intuemur, ei qui dedit restituenda sunt: si civile ius et legum ordinem, magis in publicum deferenda sunt: nam male meritus publice, ut exemplo aliis ad deterrenda maleficia sit, etiam egestate laborare debet.* This text faces charges of interpolation from Justinian compilers: G. Lombardi, *Sul concetto…*, p. 175. The mere reference to both the concept of natural law and the law of the nations in one phrase (*si tantum naturale et gentium ius intuemur*) does not seem a sufficient enough premise to believe this text to have been modified by Tribonian's commission. As we know, both Cicero and Gaius believed that the law of the nations has a natural character.

118 An additional argument in favour of this thesis is the fact that Tryphoninus analyses the problem of restitution of an item from a deposit in the context of the nature of this contract as based on good will (*contractus bonae fidei*). The concept of "good will" contracts was known to St. Isidore (see Isid., *Etym.* 5, 25, 20). Meanwhile, among the three contracts listed by the bishop, there is one that was classified to the category of *stricti iuris contracts*, that is a loan (*mutuum*). Therefore, this is how the phrase concerning *pecuniae restitutio* should be interpreted. Isidore classifies, therefore, restitution of loaned money (that is the debtor's carrying out the performance – cf. for example the Visigoth *interpretatio* to P.S. 1, 20, 1, which talks about *restitutio debiti*) as an activity that belongs to natural law detached from the description of a loan as a *stricti iuris* contract.

The bishop of Seville also lists under *ius naturale* institutions such as *violentiae per vim repulsio*; self- defence that involved "pushing power back with power" (*vim vi repellere licet*) was considered an institution of natural law as early as by Cicero.[119] Ulpian too expressed such a view following Casius.[120] The natural character of the right to self-defence was also emphasised by Gaius in his commentary to a provincial edict.[121] Paulus's argument included in the *ad Sabinum* commentary also stipulated that "all laws and statutes allow one to defend himself against violence" (*vim vi defendere omnes leges omniaque iura permittunt*),[122] which naturally suggests a legal-natural genesis of the right to self-defence. As we know, St. Isidore of Seville was familiar with those Roman authors, and Cicero enjoyed particular reverence.[123] The phrase applied by St. Isidore is most similar to the one that appears in Ulpian's commentary to the praetorian edict, though it is doubtful that the bishop of Seville knew the content of the commentary itself. The case is similar to the quoted works by Gaius and Paulus. As much as the bishop of Seville's evident continuation of an earlier tradition is noticeable, it does not seem possible to identify unequivocally the source that he used directly. It may also be assumed that the conviction of the legal–natural genesis of the right to self-defence was common place in Antiquity. It is worth noting that killing a man, not necessarily in self-defence, was not treated as violation of natural law in Late Antiquity. Some sources actually suggest the contrary. Apart from the texts mentioned before concerning self-defence, one may point out here one of Cassiodorus' letters written while he was working in the chancellery of the king of Ostrogoths, in which he emphasized that *ius occidendi maritis iure* has its origins in natural law.[124]

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119 J. Gaudemet, *Quelques remarques…*, p. 465; K. Amielańczyk, *Czy kontratyp obrony koniecznej ma rzymską tradycję? W poszukiwaniu przesłanek dopuszczalności prawa do samoobrony w rzymskim prawie karnym*, in: K. Amielańczyk (ed.), *Quid leges sine moribus? Studia nad prawem rzymskim dedykowane Profesorowi Markowi Kuryłowiczowi w 65. rocznicę urodzin oraz 40–lecie pracy naukowej*, Lublin 2009, p. 63. On self-defence in Roman law see also E. Loska, *Zagadnienie obrony koniecznej w rzymskim prawie karnym*, Warszawa 2011.

120 D. 43, 16, 1, 27 (*Ulpianus libro sexagenesimo nono ad edictum*): *Vim vi repellere licere Cassius scribit idque ius natura comparatur: apparet autem, inquit, ex eo arma armis repellere licere.*

121 D. 9, 2, 4, pr. (*Gaius libro septimo ad edictum provinciale*): *Itaque si servum tuum latronem insidiantem mihi occidero, securus ero: nam adversus periculum naturalis ratio permittit se defendere.*

122 D. 9, 2, 45, 4 (*Paulus libro decimo ad Sabinum*): *Qui, cum aliter tueri se non possent, damni culpam dederint, innoxii sunt: vim enim vi defendere omnes leges omniaque iura permittunt.*

123 Cf. in particular references to natural law included in Cicero's speech delivered in the defence of Milo – Cic., *Pro Milone* 4, 10.

124 Cass., *Variae* 1, 37, 2–4: *Feris insitum est copulam suam extrema concertatione defendere, dum omnibus est animantibus inimicum, quod naturali lege damnatur. videmus tauros feminas suas cornuali concertatione defendere, arietes pro suis ovibus capitaliter insaevire, equos adiunctas sibi*

One may also see that St. Isidore quotes a number of very different and highly original examples of institutions of natural law. Some of them were already classified as legal-natural by Roman jurisprudence. For others, such as lending something for use or a loan, there are no sources to confirm previous claims that they were rooted in natural law.

Conclusions

Concluding the discussion resented above, it needs to be stated that natural law definition by St. Isidore of Seville, along with the examples presented in his *Etymologiae*, is an exceptional creation that has no clear archetype in juridical and non–juridical sources. Elements taken from Ulpian are relatively well-pronounced, such as the term *ius naturale* as one of the three components of *ius* and also heteronormative relations and education of children as examples of institutions of natural law. However, the very essence of natural law as a normative system, that connects all people (not people and animals) due to their "natural instinct" (*instinctus naturae*) and that is independent of the will of the positive legislator, remains under a marked influence of the Christian thought. St. Isidore's approach relies on a conviction about a special ontic status of man as a being created in God's image and likeness. A comparison of the preserved fragments of Ulpian's works along with St. Isidore's definition of *ius naturale* and the catalogue of examples of institutions of natural law also allows a thesis that the bishop of Seville had access to at least a few studies compiled by Roman jurists or at least excerpts from works of *prudentes*. He most certainly did not base his knowledge about law solely on Ulpian's works.

However, there is no ground to believe that the definition of natural law proposed by St. Isidore of Seville adopts Cicero's or Lactantius's views. The concepts presented by the pagan orator and the Christian apologist were largely a philosophical speculation referring to the abstract understanding of reason (*summa ratio, ratio recta*), which were replaced in St. Isidore's work by *instinctus naturae*. His definition does not provide the basic principle of natural law in the Cicero's and

feminas colaphis ac morsibus vindicare. ita pro copulatis is sibi animas ponunt qui verecundia non moventur. Homo autem quemadmodum patiatur adulterium inultum relinquere, quod ad aeternum suum dedecus cognoscitur omisisse? et ideo si oblatae petitionis minime veritate fraudaris et genialis tori maculam deprehensi adulteri sanguine diluisti nec sub praetexta cruentae mentis causam pudoris intendis, ab exilio, quod tibi constat inflictum, te praecipimus alienum, quoniam pro amore pudicitiae porrigere ferrum maritis non est leges calcare, sed condere. See also D. Stolarek, *Adultera w świetle lex Iulia de adulteriis coërcendis*, Lublin 2012, pp. 38 ff.

Lactantius's approach either – good must be sought and evil must be avoided. For this reason, it seems much more rooted in the Antique legal literature rather than in ethics-focused works which must include Cicero's dialogues *De re publica* and *De legibus,* as well as Lactantius's *Divinae Institutiones*. However, it is certainly under a general influence of Christian Revelation, according to which human nature – including also natural law – were created as a result of God's act of will. *Ius naturale*, therefore, is binding only on people and does so independently of the will of the positive legislator.

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Uwagi wstępne na temat genezy koncepcji prawa naturalnego w ujęciu św. Izydora z Sewilli

Streszczenie

Celem prezentowanego opracowania jest omówienie informacji dotyczących genezy prawa naturalnego (ius naturale) w *Etymologiach* (*Etymologiarum sive Originarum libri XX*) autorstwa św. Izydora z Sewilli (zm. 636 r.). Taki dobór tematyki wydaje się uzasadniony przede wszystkim ze względu na to, że badania nad chrześcijańskimi koncepcjami prawa naturalnego z reguły najwięcej miejsca poświęcają studium nad teorią prawno-naturalną św. Tomasza z Akwinu. Wcześniejsze koncepcje chrześcijańskie traktowane są w sposób zdawkowy. Mają one tymczasem ogromne znaczenie historyczne, determinując całą refleksję chrześcijańską nad ideą prawa naturalnego w okresie aż do XIII w.

Przeprowadzone badania pozwalają sformułować wniosek, że zbudowana przez św. Izydora z Sewilli definicja prawa naturalnego wraz z podanymi przez autora Etymologii przykładami stanowi twór oryginalny, który nie znajduje wyraźnego pierwowzoru

w zachowanych źródłach jurydycznych lub pozajurydycznych. Stosunkowo wyraźnie zarysowane są w niej elementy zaczerpnięte z twórczości Ulpiana. Sama jednak istota prawa naturalnego jako systemu normatywnego, który wiąże wszystkich ludzi (nie zaś ludzi i zwierzęta) z uwagi na „naturalny instynkt" (*instinctus naturae*) i jest niezależne od woli prawodawcy pozytywnego, pozostaje pod wyraźnym wpływem myśli chrześcijańskiej.

Słowa kluczowe: ius naturale, św. Izydor z Sewilli, *Etymologie*, prawo rzymskie

CYTOWANIE

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