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STUDIES IN ENGLISH LEGAL HISTORY. AN INTRODUCTION

Abstract. In this article, the general goals of the following volume of the journal were defined. It was described how Polish-English commercial and political relations evolved. Besides, a short history of the Polish lawyers' interest in English law was presented. Finally, the author referred to the outcomes of the research of Polish scholars who were studying English legal history in the last half a century.

Keywords: England; Poland; Legal History; Cooperation.

The times when the history of English law was a subject of legal research, undertaken solely by the representatives of Anglo-American legal tradition, has passed irrevocably. A brief glance of the programmes of the biggest legal history conference devoted, *inter alia*, to the subject of English legal tradition – *British Legal History Conference* – shows that the history of English law is undertaken by scholars across the world.

For non-common law lawyers, the English law is very often a fascinating story of different methods, visions and ways of approaching the law. Since the very first year of their legal studies, the future continental lawyers are impregnated with the belief that the English law or common law is something totally different. Nonetheless, many are interested in the details of those differences.

In the following issue of the *Acta Universitatis Lodziensis. Folia Iuridica*, several articles devoted to the subject of English legal history are presented. The main aim of this collection was to assemble the texts that illustrate different epochs and problems of English legal history. The variety of methods and methodologies present in these articles demonstrate how the development of the English legal system is a rich field of study.

In addition, another equally important purpose of collecting the following articles was to furnish the space for international dissemination of the research findings of both common law and Polish researchers who are working in the field of English legal history.

The Polish-English legal relations, however, cannot be treated as a new phenomenon. On the contrary, that can be dated back at least

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to the eighteenth-century, while the Polish-English political and economic mutual relations are even older. As far back as 1415, Henry V of England wrote a letter to Polish King Władysław Jagiełło asking "for his military assistance" during the war with King of France (Halicki 1934, 660). In the next centuries, the relations were not very vibrant, but they definitely existed. In the late sixteenth-century an anonymous British author wrote *Relation of the State of Polonia and the United Provinces of that Crown Anno 1598*, which was edited and published half a century ago by Charles H. Talbot (1965). Finally, it cannot be forgotten that the trade relations between the two countries in the sixteenth and most of the seventeenth-centuries was performed through the English Eastland Company (Hinton 1959). Certainly, an important factor in strengthening these political and commercial relations was an establishment of fixed diplomatic relations by the mid-eighteenth century between both countries (Libiszowska 1966).

As to the matter of law, in the mid-seventeenth century Arthur Duck published his treaty *De usu et authoritate iuris civilis romanorum*, where he presented the legal systems of different European states, including Poland. A century later, Thomas Bever spoke about Polish law and Polish constitutionalism during his Oxford civil law lectures (Korporowicz 2019). At the same time, Polish legal authors demonstrated an increased interest in England. The most visible sign of that was the Polish translation of the fourth book of William Blackstone's *Commentaries* published in 1786 by Teodor Ostrowski. Although the translation was based not on Blackstone's original text, but rather on a 1776 French translation by Gabriel-François Coyer (see Bartel 1987). In the nineteenth century, Polish legal authors were eager to make a comparative analysis in their works. English law was used as an example, analogy or simply as a comparative tool. Even brief analysis of the Polish legal and historical works of the epoch shows frequent reference to England, its law and its social organisation (see e.g. such authors as Tadeusz Czacki, Leon Winiarski and Antoni Szymański).

The most systematic Polish work devoted to the English law was, however, a book published in 1944 by Polish émigré lawyer Gustaw Rosenberg (1944). Before the Second World War, he was an advocate in Kraków and then in Warsaw. Shortly before the outbreak of the war he left Poland and settled in London, where he became a barrister. As it was mentioned above, in 1944 the Fortune Press published his textbook of English law. It was a concise work that dealt with all the fundamental aspects of the English legal system. It was divided into three parts: (1) Civil law, (2) Criminal law and (3) The Establishment of Justice and the Court Procedure. The goals of Rosenberg's work are not entirely clear. It is possible that he might have hoped the book would be used by the students of the Polish Faculty of Law which was functioning at Oxford University during the war and immediately after it (Cywiński, Rojewski, and Tomporowski 1997).

In the post-war period, Polish curiosity in English law became even stronger. It is possible, however, to observe a shift in the area of these interest. In the earlier

epochs, Polish scholars were predominantly interested in the then modern English law. Since at least the 1960s, English legal history became a predominant field of study. It was initiated by Wojciech Maria Bartel with his studies regarding the protection of personal liberty in Anglo-Saxon England (Bartel 1965). A history of English criminal law became a subject of numerous studies undertaken since the 1970s until recently by another law professor from Kraków – Kazimierz Baran (for the list of his works see: Halberda 2014). His disciple is Jan Halberda, a prolific scholar whose scholarship is focused on the history of English contracts and quasi-contracts. The civilian tradition of English law is currently researched by two Polish scholars: Łukasz Marzec from Jagiellonian University and by the writer of these words. Besides this, there a number of other scholars who occasionally direct their research attention towards certain aspects of English law and British constitutionalism.

Articles collected in the foregoing volume can be divided into four thematic segments. Methodological matters connected with the research on English legal history were presented by Cerian Charlotte Griffiths (on the difficulties regarding the use of Old Bailey Online database) and Thomas Glyn Watkin (on what should be the main point of interest for the legal history researchers). The doctrinal framework of the English law and its studies were the subjects of research undertaken by Tomasz Tulejski (on Samuel Rutherford's political thought) and Michael Stuckey (on the importance of John Mitchell Kemble for the nineteenth-century English legal historiography). John Patrick Higgins has discussed the similarities of the contexts that led to the creation of English *Magna Carta* and Polish *Księga Elbląska*. His work presents a comparative methodology. And finally, the civilian influence on English law is the subject of an article published by Łukasz Jan Korporowicz (the reference to the Rome and Roman law during the slavery abolition struggles).

It is hoped that the following selection of texts will encourage and inspire further fruitful cooperation between researchers from common law countries and from Poland, in order to mutually contribute to the subject of English legal history.

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Łukasz Jan Korporowicz

STUDIA Z HISTORII PRAWA ANGIELSKIEGO. WPROWADZENIE

Streszczenie. W artykule wskazano na cele towarzyszące wydaniu niniejszego numeru czasopisma. Omówiono rozwój relacji handlowych i politycznych łączących Polskę i Anglię. Ponadto przedstawiono krótką historię zainteresowania polskich prawników prawem angielskim. Na koniec, autor odniósł się do wyników badań polskich naukowców badających w ciągu ostatniego półwiecza historię prawa angielskiego.

Słowa kluczowe: Anglia; Polska; historia prawa; współpraca.

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RESEARCHING EIGHTEENTH-CENTURY FRAUD IN THE OLD BAILEY: REFLECTIONS ON COURT RECORDS, ARCHIVES, AND DIGITISATION

Abstract. This article seeks to provide reflection and guidance to researchers of fraud in Britain during the eighteenth and nineteenth centuries. This reflection explains two reasons why there is a dearth of historical research into fraud offences. These reasons are ontological and methodological. The definitions and laws of fraud are complex and difficult to identify, and one of the most accessible court archive, the Old Bailey Sessions Papers (the Proceedings), needs to be treated with caution by the researcher of fraud. This article uses the in-depth historiography surrounding the Proceedings and applies this to the research of fraud offences which, this article argues, require a particular methodological approach.

Keywords: Fraud; Old Bailey; Digitisation; Legal History; Methodology.

1. INTRODUCTION

The history of fraud and the criminalisation of financial behaviour is an under-researched subject amongst lawyers and historians (Robb 1992, 6). There exists some excellent research on financial crime, both historic and contemporary such as: (Sindall 1983, 23–40; Tomasic 2011, 7–31; Levi 1987; Foreman-Peck 1995). In recent years, academics such as James Taylor and Sarah Wilson have been producing invaluable research on nineteenth-century corporate fraud and banking and joint-stock companies (Wilson 2006, 1073–1090; Taylor 2006). Both Taylor and Wilson frame their analysis around the opportunities to commit fraud created by the joint-stock company (Wilson 2006, 1073–1090; Taylor 2006). However, the research into fraud in earlier periods remains sparse.

This article will address two reasons as to why fraud and financial crime are under-researched in crime and legal history circles, these being ontological and methodological. The offences themselves are ontologically problematic and, more significantly for this article, there are significant methodological challenges with the court and legal records which form useful archives for the research of historic fraud. In keeping with the purposes of this edition of *Acta Universitatis Lodziensis. Folia Iuridica*, this article will reflect on some of the barriers and hurdles to researching

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fraud and financial crime in the eighteenth century. In particular, the unique quasi-official court records of London's Central Criminal Court, the Old Bailey Sessions Papers (The Proceedings) will be analysed from within a heretofore unconsidered framework, a fraud context. As one of the most voluminous and valuable archives pertaining to courts within London, the financial centre of Britain, the Proceedings are a rich source for researchers of fraud and financial crime.

This article will consider three issues. First, the creators and purposes of the Proceedings will be evaluated. In addressing who created this archive and why, the researcher of fraud is better placed to critically assess the information held within. Second, the matter of the relatively recently digitisation of the Proceedings and the consequences this process has for the researcher of fraud. And finally, how the researcher of fraud can locate offences of financial crime within the Proceedings along with the methodological considerations such as opportunities for quantitative research of fraud.

The analysis within this article will hopefully provide some guidance to those interested in researching eighteenth and nineteenth century fraud. It shall demonstrate how the historical investigation of fraud offences requires specific consideration of these offences themselves, of their ontological boundaries, of the lexicon associated with these offences, and how they can be researched within a large digitised archive such as the Proceedings. Additionally, this article will, for the first time in the literature of the Old Bailey, clearly demonstrate that the Proceedings failed to report a number of fraud trials heard within the Court and consequently, some reflections on the perils of quantitative research of the Proceedings will be presented.

2. THE OLD BAILEY PROCEEDINGS: USE AS AN HISTORICAL SOURCE FOR THE RESEARCHING FRAUD

In considering the prosecution of fraud during the eighteenth and nineteenth centuries, the most detailed surviving source of criminal trials is the Old Bailey Proceedings ('the Proceedings'). These Proceedings are the best accounts we have of the administration of criminal justice in England before the mid-nineteenth century (Langbein 1978, 271) and as such, any research surrounding criminal trials during this period must have at its bedrock, the Proceedings. However, the Proceedings are not without their limitations and undertaking any legal or crime history research, based solely upon the Proceedings should be avoided (Langbein 1978, 271).

The Old Bailey Proceedings: an Overview

The Proceedings are a written report of trials heard in the Old Bailey between 1676 and 1913. They were written eight times a year, one issue for each sitting of the Old Bailey (Hitchcock, Shoemaker 2006, 193). Supposedly, barring two brief

periods of time, absolutely all cases appear within the Proceedings (Langbein 1978, 272; Shoemaker 2008, 559–580; Gallanis 2006, 159–173; Devereaux 1996, 466–503). These two exceptions are the first ten years of the life of the Proceedings when not all cases were covered (Archer 2014, 264), and second, between 1790 and 1793 when only cases which resulted in conviction were reported (Devereaux 1996, 481).

It is at this very early stage of considering the Proceedings as an archive that the first methodological pitfalls become apparent. Research carried out for the purposes of my doctoral thesis (Griffiths 2017) has revealed a number of cases reported elsewhere, which almost certainly appeared at the Old Bailey, but which are missing from the Proceedings. The case of *R v Vincent Wright, Anne Fagan and William Elson* (National Archive records: T38/675) is well documented in the summary court accounts, and details are given of the trial at the Old Bailey. However, no reference to this case appears in the Proceedings. A further case, *The King v Benjamin Lara* ([1794] 2 Leach 647 168 E.R. 425), was a Crown Case Reserve case, the report of which clearly states the matter to have been initially tried at the Old Bailey. Again, no reference to this trial appears within the Proceedings. These findings illustrate that, contrary to common belief, the Old Bailey Proceedings do not record *all* cases heard at the Old Bailey.

Had it not been for a methodology which undertook a close reading of all Proceedings cases categorised as fraud between 1760 and 1820, which were triangulated against a range of court records, not just the Old Bailey, such missing cases would not be identified. Such a methodological approach has not before been systematically undertaken, particularly with regard to fraud offences. Due to the digitisation of the Proceedings, research on the Old Bailey has focused on the big data possibilities of such a resource and perhaps it is unsurprising that it took this form of research, the closer reading of all indictments relating to one form of offence, to reveal missing trial reports within the Proceedings. In slicing through vast amounts of data to focus upon the prosecution of a specific offence, a more nuanced picture of the accuracy and completeness of the Proceedings can emerge. Equally significantly, where court and official records from other courts and offices are used to illustrate a bigger and more detailed picture of the prosecution of fraud, this cross-checking allows for the identification of missing trials. The first finding of these reflections is that the Proceedings should not be analysed in isolation as additional records have revealed the missing cases from the Proceedings.

It is perhaps not possible to estimate the number of trials missing from the Proceedings. The complimentary records explored alongside the Proceedings are themselves incomplete (Griffiths 2017). It is likely that cases were missed for reasons beyond the substance or procedure of the offence itself. These reasons included the nature of the reporting itself and the purpose of the Proceedings.

Creators of the Proceedings: Publishers and Shorthand Writers

In order to explore the reliability of an historical source, it is essential to ascertain the creator of the source. From the inception of the Proceedings, the Lord Mayor of London approved of the publication (Archer 2014, 264) but on the condition that the publisher paid the Lord Mayor for the privilege (Devereaux 1996, 468). After 1775, the licence for the Proceedings was transferred from the Lord Mayor to the City of London and the publisher did not have to pay to publish the Proceedings (Devereaux 1996, 482). By 1778, the City of London was subsidising the publication of the Proceedings on the condition that they gave a 'true, fair and perfect narrative' of the trials (Devereaux 1996, 468). This requirement greatly extended the length of the Proceedings, sometimes resulting in one edition having a number of volumes. The length of the Proceedings also increased in the nineteenth century for a range of reasons, partly because of a growing population and partly as trials became more complicated. This is not to say that the Proceedings were, to any extent, a verbatim account. The narratives of the trials were taken down by shorthand writers and copy (the text) was then handed to the editor to decide what to include within the particular edition. For practical as well as political, social and commercial purposes, the details of the trials reported are highly selective.

The greater issue for the researcher of fraud is what the writers chose to leave out of their reports (Langbein 1999, 319). As stated above, these political, commercial, and social considerations were far more influential upon what writers chose to include in their reports than any practical limitation. However, there is suggestion that writers did not work alone when attending the Sessions and rather, at least pairs, if not teams of writers would share the burden between them thereby increasing the possibility of capturing all details of the trial.

One glaring omission from the Proceedings, which will be discussed in more detail below, is the request by editors that legal and procedural argument be ignored by the shorthand writers (Langbein 1978, 264). This was for a range of reasons including not wishing to lose the public's interest by including drier material of the trials and also the belief that revealing too much about criminal processes could act as a guide to the more cunning criminal (Devereaux 1996, 492). Details of legal or procedural matters were omitted for a non-lawyer reading public in the belief that they would be too technical or boring (Gallanis 2006, 161). Perhaps a more practical explanation might be the limited role of lawyers in the criminal trial until 1836 when barristers were allowed, as of right, to represent prisoners (Griffiths 2014, 28). This alienation of lawyers from criminal litigation naturally extended to their role in the compiling and publishing of criminal trial materials, including the Proceedings (Langbein 1978, 264). Consequently, the tone and content of the Proceedings is lacking in legal detail and focus. This is problematic for legal historians occupied with legal issues such as procedure or wider legal argument.

The Functions of the Proceedings

The purpose of the Proceedings reveals more about the historical use of this archive and explains which information the researcher can expect to find, and which information is most likely lacking. Throughout the life of the Proceedings, these reports had a range of functions. These functions depended on the aims of the publisher, the political climate of the day and the readership. The Proceedings needed to be financially viable as a commercial enterprise, they played a procedural role in that they were used for appellant and sentencing purposes, and as a semi-regulated publication the Proceedings inevitably played a political role in the wider discourses surrounding criminal justice. All of these functions effect how the researcher should read this source.

Commercial Venture

From the publisher's perspective, the Proceedings were a commercial venture like any other newspaper or pamphlet. The 1770s saw a collapse in the commercial viability of the Proceedings, as the number of newspapers grew and these newspapers increasingly published crime news. This competition may explain why the publishers so readily accepted subsidies from the City of London in the 1770s. Whilst one printer of the Proceedings in 1727 claimed the Proceedings were not 'to please the vulgar part of the town with buffoonery, this not being a paper of entertainment' (detailed in Shoemaker 2008, 564).

The publication of the Proceedings required a careful balancing of differing aims and objectives. Clearly, the Proceedings needed to appeal to the general public and needed to be entertaining. Consequently, sensational and shocking cases relating to murder, sodomy and rape would be expected to be well reported (Archer 2014, 263). As today, cases of lethal violence received more attention and the Proceedings detail these more than other offences (King 2009, 91). However, as today, murder was relatively rare and thus, other more shocking offences which might interest the public, were focused upon (King 2009, 91). The selection of the trials has been attributed to the sentencing of the offence rather than because of the actual crime; capital offences received more press coverage than non-capital offences (King 2009, 91). Consequently, trials of forgers and arsonists received much coverage as forgery in particular attracted higher execution rates (McGowen 2007).

A further significant shortcoming of the Proceedings is the way in which trials were condensed. John Langbein has rested great faith in the completeness of the Proceedings but he overlooks the attention and detail given to some offences over others. Shoemaker has raised grave, and well-founded concerns, that in every sessions, three to six days of trials were being compressed into eight to twenty four pages (Shoemaker 2008, 560). Such compression leads to a false impression of the length of trials, or the severity with which such offences were

perceived by the courts. This physical compression of the Proceedings perhaps goes some way to explaining why some fraud cases were missed wholesale from the record.

Procedural Tool

Between at least 1775 and 1837, the Proceedings played a procedural role in the administration of justice. The Recorder of London used the Proceedings to construct lists of those convicts sentenced to death who were recommended for mercy to the monarch (Devereaux 1996, 472). These recommendations would be passed to the Privy Council before being presented to the monarch. Simon Devereaux has uncovered convincing evidence to suggest the use of the Proceedings by the Recorder in presenting his recommendations to the monarch; on several occasions direct page references to the Proceedings appear in the Recorder's notice (Devereaux 1996, 473). The Recorder used the Proceedings as a concise resource in order to get an overall picture of the particular trial he was considering (see Hay 2006). With eight sessions of the Old Bailey per year, the Recorder would have been under pressure to decide the cases in good time, partly to have one Sessions completed before the next began, partly because in the interim, the condemned prisoner was left languishing in prison (Devereaux 1996, 479). To the modern historian, and certainly to the modern lawyer, the use of the Proceedings as a tool for deciding any judicial matter is surprising. These reports were not verbatim and more significantly in this instance, did not contain any of the legal or procedural argument (Langbein 1978, 264). However, the Proceedings did contain evidence as to the character of the prisoner and it was this evidence which was used in deciding when to lessen the sentence.

The Proceedings also played a role in the limited appeals process of the day. There is evidence the Lord Chancellor used the Proceedings to inform himself of cases when deciding upon appeals (Devereaux 1996, 473). The Proceedings acted as guidance to the lower courts, in particular the summary courts. There is evidence of magistrates, particularly in Middlesex, regularly purchasing the Proceedings (Treasury Department Accounts – Hatton Garden – Police Office at National Archive ref T38/676). Whilst the use of the Proceedings to the magistrates is not apparent, assumedly one purpose would be to keep magistrates abreast of the work of the assize court and also, to monitor how cases referred to the Old Bailey by their offices were reported.

Political Tool

The Proceedings were a significant political instrument. During the 1770s, radicals such as John Wilkes, the Sheriff of London, called for more transparency in office and particularly in the courts. Wilkes believed that the administration of justice should be open to the public and took a range of steps to make the Old

Bailey more transparent with some being more successful than others (Devereaux 1996, 486). Wilkes saw the Proceedings as the means by which the Old Bailey could be opened up and all trials could be reported (Devereaux 1996, 487). Thus, in 1775, the City of London began to publish the Proceedings on an authoritative footing and the requirement that the Proceedings be a 'fair, true and perfect narrative' description of trials was evidently fulfilling a number of requirements, including the purpose of making transparent the wheels of justice.

Of course, this opening up of the courts did not play a purely democratic role, it also acted to demonstrate to the populace the consequences of crime. It is perhaps no coincidence that the City of London authorities took over the publication. Clearly the City governors such as the Aldermen saw the importance of the criminal justice system and related publications, and the declaratory and normative role reporting of the criminal justice system could play (Griffiths 2017).

As a publication subsidised and guaranteed by the City authorities, it would be tempting to conclude that the Proceedings were no more than state propaganda. But this conclusion would be too simplistic (Devereaux 1996, 501). The government subsidised newspapers in much the same way as the City of London subsidised the publishing of the Proceedings and thus, some parallels can be drawn between the two. Historians largely agree that these subsidies were often too low to actually influence the commercial decisions of the publishers and the press regularly published material which opposed the government such as criminal trials which reflected the failings of the Bloody Code and the justice system as a whole (Devereaux 2007, 9). This is not to say however that the Proceedings were not influenced by the government or the City authorities. Whilst Devereaux suggests there to be 'no evidence that anyone in the City government ever sought to influence the Sessions Paper' (Devereaux 1996, 490), the Proceedings were not published entirely at the will of the editor. The Recorder had a lot of influence over the Proceedings and this partly explains why the reports became so uniform following the 1770s (Archer 2014, 266).

The Recorder and the City authorities wanted the Proceedings to reflect the successful functioning and justice of the criminal trial system. Examples of prisoners not showing due reverence for the law by arguing with judges or not taking the proceedings seriously were very rarely published within the Proceedings (Shoemaker 2008, 569). Moreover, details of any defence were frequently excluded or curtailed. One reason for this may be to give more of an impression of the clarity of the prosecution (Archer 2014, 266). In a time of private prosecutions, reflecting a smooth prosecution process may have acted to encourage more lay prosecutors to utilise the criminal courts. Perhaps more significantly, the focus upon the prosecution case may reflect how the authorities wished to legitimise the sentencing of criminals, which frequently involved their transportation and at times, execution. The speeches made by prisoners, asking the court to spare their lives, were very rarely reported. Again, this is most likely due to the desire of the

authorities to justify the harsh sentences and Bloody Code which underpinned the criminal justice system (Shoemaker 2008, 570).

In 1790, the City of London requested that the Proceedings only publish the convictions secured at the Old Bailey and make no reference to the acquittals. This only lasted for three years before the publishers of the Proceedings demanded to be allowed to publish acquittals alongside convictions; the public were seemingly less interested in the Proceedings when they only listed the convictions (Devereaux 1996, 493). Why the Proceedings became less popular during this period of restriction is not entirely clear however. One explanation might be that the public became aware of this censoring and lost respect for the Proceedings as they knew them to be less than objective. There is certainly evidence that the public were actively involved in correcting the mistakes published in the Proceedings which is demonstrated by a number of corrections which had to published in relation to previous editions (Shoemaker 2008, 576). These public complaints reflect the reality that people were attending the Old Bailey to watch the trials and when the Proceedings published inaccurate details, they were quick to vocalise this. The decision to only publish the convictions of the Old Bailey must have been immediately apparent to a public who had witnessed a day of trials, an average of thirty-nine percent of which would have resulted in acquittal (Shoemaker 2008, 573).

Consequently, the researcher of fraud should be aware when using the Proceedings that these are a deeply valuable, but not unproblematic archive. Where possible, research of the Proceedings should be cross-referenced with other contemporary sources and where this is not possible, an awareness of the limitations of the archives is essential. Many of these limitations were recognised by those pioneering crime and legal historians who began researching the Proceedings in earnest from the 1970s. Those manually researching the Proceedings during this time had many additional methodological barriers given the scale of the records. The digitisation of the Proceedings opened up this treasured archive to the world and has made possible research which was impossible before. However, the contemporary or future researcher of fraud using the digitised version of the Proceedings also faces some methodological considerations.

3. OLD BAILEY ONLINE (OBO): THE DIGITISATION OF THE PROCEEDINGS

From 2000 to 2005, the Old Bailey Sessions Proceedings were digitised and this digitisation project, Old Bailey Online (OBO), has transferred all of the Proceedings onto a database.[1] This process required the digitisation

[1] http://www.oldbaileyonline.org [Accessed 7th January 2017].

of 190,000 pages of the Proceedings alongside 4000 pages of the Ordinary's Accounts.[2] In their entirety, the Proceedings consist of 134 million words (Archer 2014, 259).

The Process of Digitisation

Until digitisation, the Proceedings were recorded on microfilm and it is from these films that the OBO project obtained their data (Bradley, and Short 2005, 13). Due to the Proceedings being so inconsistent in layout and form, optical character read software could not be used, preventing any automated method for digitizing the Proceedings (for a detailed overview of another legal history digitization project see Eiseman *et al.* 2016). Instead, all of the content of the Proceedings was manually entered into the OBO database (Hitchcock, and Shoemaker 2006, 194). To limit error, all content was double rekeyed – entered into the database twice – and then the two versions were checked against each other using recognition software (Hitchcock, and Shoemaker 2006, 194). Errors cannot be wholly eradicated through this method, partly because of the human element involved in the transcription of the Proceedings. However, for every paper, a link to the original image of the report is attached. This is designed to allow users to check and confirm the text themselves (Hitchcock, and Shoemaker 2006, 199). If users identify an error in the transcription, they are encouraged to contact the OBO team in order to rectify this.

Ostensibly, the OBO project appears to have taken a number of steps to ensure that the transcription of the Sessions Proceedings has been accurate and the use of crowd sourcing to identify errors and problems ensures the accuracy of the OBO as an ongoing project. However, there are several potential concerns of which the researcher should be aware of when using the OBO and whilst safeguards have been put in place by the project, these reduce inaccuracies but do not eradicate them.

The first is the use of the double re-key approach to transcribing the Proceedings. This approach will undoubtedly highlight a number of the typographical errors caused directly by the transcribers. Typographical errors are inevitable and by using two different transcribers to input one trial report, it is assumed that these transcribers will make different errors, thereby highlighting mistakes in both transcriptions. This approach however does not address the potential for both transcribers to misread the original trial reports in the same way. The character and potential concerns regarding the Proceedings themselves have been addressed above but one concern for the modern day transcriber is not the substance of the Proceedings, but the form. Given the number of the Proceedings, there must be a number of these which have typographical or spelling errors. There has yet to be a comprehensive study as to the extent of these errors, however,

[2] http://www.oldbaileyonline.org/static/Project.jsp [Accessed 7th January 2017].

the researcher must assume these errors to be present. How does the transcriber address these errors? One approach is that the digitized versions of the Proceedings ought to be a true reflection of the original source as the source itself is greatly significant to the academic, if not to the family genealogist and the wider public. However, transcribing the Proceedings, warts and all, creates potential for problems in searching the OBO for specific keywords or names.

Digitisation of Archives

Traditionally, databases have been used as an interim aim, to create a tool through which future research can be conducted (Bradley, Short 2005, 3). This is certainly true of the OBO, which includes several statistical tools and searchable material for the researcher. When translating historical sources into databases, one of the most striking problems can be maintaining consistency between entries (Bradley, Short 2005, 4). This can be due to a number of factors such as the original source material being in different forms and layouts and more problematically, an inconsistency in spelling. The Proceedings create a further cause for inconsistency in the substance of the source itself, such as information being laid out in different parts of the Proceedings, or being absent.

A recent critique of the use of digitisation of historical sources suggested that this process removes the researcher for the source itself and prevents the reader from engaging with the nuances of the document as a whole (Ireland 2015, 132). This would certainly be the case were the Proceedings to be read as isolated trial reports as the Proceedings were a commercial as well as a quasi-official publication and, as such, much can be gleaned from reading individual trial reports within the context of the document as a whole. It is partly for this reason that the OBO attached a link to a photograph of the original page of the report to every trial record. However, only the specific page of the original document is attached to the trial transcript and so, reading a case within the context of the document as a whole is not straightforward. It is possible to see a Sessions Paper in its entirety on the OBO if the researcher searches through the 'browse' function by date (Hitchcock, Shoemaker 2006, 199). Whilst it is true that digitisation physically removes the researcher from the source, having images of the material allows for the reading of the document as a whole, including the reading of handwritten notes and annotations that may be written upon the document.

Digitising sources captures the substance of the text but not the form. It is possible through OBO date searches to see the layout of the Proceedings and an image of the original document (Hitchcock, Shoemaker 2006, 199). A digital image will not reveal the quality of the paper upon which the text is written or printed, nor will it always reflect the different uses of ink which may allow the research to draw some conclusions about the order in which handwritten notes are made upon the document. For example, in the case of letters sent during the

eighteenth century, the quality of the paper may be indicative of the wealth of the writer or the esteem with which the writer holds the recipient. In the case of a document that has a number of entries from different authors, the level to which the ink may have faded may indicate the times at which the entries were made. The second of these examples does not impact upon the use of the OBO *per se* however, historians of newspaper and print may be interested in the quality of the paper used in the Proceedings and thus, a digital record will not reveal this information. Form aside, the content of archives, and the OBO in particular, are generally made available in their entirety for the researcher and such records will have the same advantages and limitations as paper-based sources (Hitchcock, Shoemaker, Winters 2011, 355).

A further concern with the digitisation of archives lies in the requirement to categorise information so as to allow searches, both qualitative and quantitative, of the material. This concern is greatly aligned with the wider issue of how historical documents can and ought to be read. There is a growing dialectic in thought surrounding the reading of historical material and within the wider humanities community, with the reading of big data (for example Moretti, 2005). The process of digitising any material and imposing searchable terms, inevitably involves the 'squeezing' of data into pre-defined categories (Bradley, Short 2005, 16). This process of categorisation will be explored further below.

Data-Mining and the Key-Word Search

Data-mining is a process whereby data can be searched to locate specific information. The best example of this would be using search terms to locate the number of times such terms appears across the Proceedings. This can be very successfully achieved for legal historians in particular as the Proceedings are very regular in form (Innes, Styles 1986, 389). There are however, potential pitfalls to data-mining. First, and as Ted Underwood has pithily summarised: 'in a database containing millions of sentences, full-text search can turn up twenty examples of anything' (cited in Robertson 2016, 1052). However, it is not the false positives that the researcher should be concerned with, it is the data that several searches will lose. The process of searching acts to filter out alternative hypotheses: 'If scholars use the wrong search terms, they literally misread their sources, and might not read them at all' (Robertson 2016, 1052).

To the legal historian, it may be tempting to agree that technical legal language makes data-mining searches unproblematic as largely legal language overcomes the problem of changing meanings and context of language in other sources (Robertson 2016, 1050). However, as shall be demonstrated below, when searching for fraud prosecutions, the formulaic use of such language in indictments as 'fraudulent', become deeply problematic.

4. SEARCHING FOR FRAUD OFFENCES WITHIN THE OBO

The biggest challenge in using the OBO to research fraud offences comes in identifying which cases are to be defined as fraud.[3] The OBO separates trials into a number of categories relating to offence: Breaking Peace, Damage to Property, Deception, Killing, Miscellaneous, Royal Offences, Sexual Offences, Theft and Violent Theft. These larger categories are then separated into sub-categories such as Deception-Fraud. When transcribing the Proceedings, the OBO team produced guidelines as to how the transcribers should categorise the trials into these offences.[4] The transcribers were instructed to categorise the trial by the description of the indictment that was generally contained within the first paragraph of the trial report. If the indictment was not present or unclear, the transcribers were to categorise the offence based upon the testimonies of the witnesses within the Proceeding. Indictments were usually written to a formula. Due to this *pro forma*, these indictments do not contain much information (Shoemaker 1993, 147; 149; 155–156) but they should contain enough to roughly categorise the offence. This approach is, for many if not most offences, unproblematic as it is clear which offence applied. However, there are examples within the Proceedings of offences being described ambiguously. As shall be shown below, deception, fraud, embezzlement and forgery cases are the most common offences to have unclear indictments.

Upon first glance, the categorisation of offences within the OBO appears straightforward. There is a category of 'deception' and within this there is a subcategory of 'fraud'. However, these categories are unfortunately far less useful than they appear. The category of 'Deception' itself within the OBO includes forgery, fraud, perjury and bankruptcy offences.[5] This categorisation appears to be somewhat of an afterthought of the OBO in that it is difficult to clearly link all of these offences. It is not the case that all of the offences are connected in that they require an element of 'deception'. For example, many bankruptcy offences involved people not surrendering themselves to Commissioners in good time, with no accusation of deception levelled against them. This categorisation has two fundamental flaws. There is no engagement with the ontological parameters of fraud offences or the interaction between these offences and other property offences. There is great overlap between crimes such as embezzlement, larceny, cheating by false pretences and other such offences (Beale 1892, 44) both in substance and in the manner in which they were prosecuted. Because of this,

[3] For an in-depth discussion on the laws surrounding fraud see Griffiths 2017.

[4] *Proceedings of the Central Criminal Court 1834–1913. Welcome to the CC project Wiki!* http://crimpleb.group.shef.ac.uk/wiki/pmwiki.php [Accessed 3rd December 2014].

[5] *Proceedings of the Central Criminal Court 1834–1913. Welcome to the CC project Wiki!* http://crimpleb.group.shef.ac.uk/wiki/pmwiki.php [Accessed 3rd December 2014].

when searching fraud indictments, there are a number of false positives within the results identified by the OBO. If conducting simple statistical searches of the number of fraud offences, an inaccurate picture would be gleaned. For example, the 1819 prosecution of Alexander Lauder has been categorised by the OBO as a Deception-Fraud. The transposing of the trial by the shorthand writer is a more complete reflection of the indictment and at first glance does appear to be a fraud. However, a closer reading of the text reveals that this case was in fact relating to theft:

> ALEXANDER LAUDER was indicted for that he, on the 30th of August, being servant to David Vines, did, upon trust and confidence, deliver unto him four sacks of flour… his property, safely to keep the same to the use of the said David Vines; and that he, the prisoner, after such delivery, and while he was such servant, did feloniously withdraw himself from his said master, and go away with the said goods, with intent to steal the same, and defraud his said master thereof, contrary to the trust and confidence in him put by his said master, against the statute.

This indictment is clearly larceny firstly, because it stipulates 'intent to steal' and secondly, because it states the offence was a felony which statutory fraud offences were not.

A potential method to overcome these categorisation errors may be the use of search terms such as 'swindlers', 'cheats' or 'artful device', but again, we must be very careful to recognise that the shorthand writers themselves had so much influence over the reporting of the trials, that in most cases the reader hears not the voice of the actors within the trial, but the reporter. This does not result in such searches being useless as word searches may reflect the lexicon of the day. However, any statistical conclusions about the prosecution of fraud at the Old Bailey need to be significantly couched in the context of the Proceedings and their ultimate digitization.

5. CONCLUSION

This article has illustrated and assessed two of the reasons why there is a dearth of historical research into fraud offences. One reason is the ontological complexity of fraud offences, and the difficulties in tracing these offences through legal archives. The ontology of fraud will be discussed in detail in forthcoming publications, but this article has introduced how the complexity of definitions of fraud makes searching these offences in the archives deeply problematic. The majority of this article has focused on the potential pitfalls of legal archives for those wishing to research fraud offences in the early modern period. These archival challenges may go some way to explaining why researchers have largely avoided engaging in fraud research but it is hoped that this article has drawn attention to the more significant concerns for future historians of fraud.

The primary focus of this article has been the Proceedings and this is largely because it is this archive which currently sits at the heart of much crime history research. The Proceedings have been digitised for over ten years and the interest in the OBO has only grown. More recently this archive has been linked to a broader crime history website, the Digital Panopticon[6], which will undoubtedly stimulate even more interest in these records. This interest is to be encouraged as the sheer volume of information held within this archive allows for many avenues of research for academics, students, and genealogists. In light of the explosion of interest in Old Bailey records, this is the ideal time to reflect on the weaknesses as well as the immense strengths and positives of this set of records. It has been demonstrated how this archive is the Proceedings are not complete, nor is it unproblematic and how it is only through triangulating cases from other courts records with the Proceedings, that we see which cases are missing. Until all court records are digitised and are able to be cross-tabulated, it is only through the employment of a methodology of close reading of cases that missed records will be identified. This is not to say that other forms of research including quantitative searches using the search tools available through the OBO should not be employed. For research over longer time-periods and concerning larger case-samples, a close-reading approach will not always be possible, or indeed desirable. Missing data plagues all researchers in one form of another and acknowledging that the Proceedings are not an absolute complete record of all hearings at the Old Bailey does not undermine. However, these missing cases and lack of much legal detail should not dissuade researchers from drawing on what remains the most detailed and colourful record collection of seventeenth to nineteenth century English court records.

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Cerian Charlotte Griffiths

BADANIE OSIEMNASTOWIECZNYCH SPRAW DOTYCZĄCYCH OSZUSTWA PROWADZONYCH W OLD BAILEY: REFLEKSJE NA TEMAT AKT SĄDOWYCH, ARCHIWÓW I DIGITALIZACJI

Streszczenie. Artykuł ma na celu przedstawienie spostrzeżeń i wskazówek pomocnych badaczom zajmującym się przestępstwem oszustwa w Wielkiej Brytanii w osiemnastym i dziewiętnastym stuleciu. Spostrzeżenia te wyjaśniają przyczyny, dla których brakuje historycznych badań nad przestępstwem oszustwa. Są one tak ontologiczne, jak i metodologiczne. Definicje praw dotyczących oszustwa są złożone i trudne do zidentyfikowania, zaś jedno z najbardziej dostępnych archiwów, Akta Sesyjne *Old Bailey* (Sprawozdania), muszą być wykorzystywane przez badaczy z ostrożnością. W artykule wskazano historyczne okoliczności powstania Sprawozdań i zastosowano tę wiedzę do badań nad przestępstwem oszustwa, które w świetle powyższych ustaleń, wymagają wyjątkowego podejścia metodologicznego.

Słowa kluczowe: Oszustwo; Old Bailey; digitalizacja; historia prawa; metodologia.

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MORE IN COMMON (LAW) THAN ORIGINALLY THOUGHT? A THEORETICAL FIRST COMPARISON OF THE *MAGNA CARTA* AND THE *KSIĘGA ELBLĄSKA*

Abstract. Medieval legal scholars generally do not compare the Polish and English legal systems, though in the 13th century they share a surprising number of similarities. This is especially clear if one considers the convergent of evolution of legal institutions in response to socio-historical problems. This is concretely traced through historical and textual analysis of *Magna Carta* and *Księga Elbląska*, two foundational texts in their respective legal systems. Ramifications of this new comparative perspective are discussed, with avenues of further research outlined.

Keywords: *Magna Carta*; *Księga Elbląska*; Comparative Legal History; Convergent Legal Evolution.

1. INTRODUCTION

In the comparative history of European legal systems, Poland and England are nearly never put together in the same sentence. One is an unremarkable member of the civil law family, the other the author of the common law, yet the similarities are deeper than they appear at first: the adoption of civil law was more the choice of the imperial powers that divided Poland, than her natural development, which retains legal developments closer to English law than to the rest of the continent. Indeed, both share a stubborn persistence of customary legal traditions down to the modern era, despite the varied efforts of kings and conquerors (Gałędek, Klimaszewska 2018; Matuszewski 2015; Karabowicz 2014; Milsom 1969, 1; Lobingier 1946, 960; Blackstone 1893a, 34; Blackstone 1893b, 535–536). Stated simply, the classification of Polish law as civil is both anachronistic and over-simplistic.

How is the Polish legal system to be interpreted, then? Comparing works across cultures is always a tricky business, but a combination of certain historiographical and jurisprudential foundations will not only make this possible, if in an introductory manner, but also outline a future program of comparative legal research, beginning with the foundational works of their respective systems

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in the 13th century – *Magna Carta* (MC) and *Księga Elbląska* (KE). Here, the interpretative key is a political and legal understanding of legal development, rather than a more compact, contextualist understanding. While this approach forfeits some exactness from historical circumstances, it gains broader comparability due to shared human nature and experience. Accordingly, the argument is presented as a provocation to, as well as anticipation of, future legal research.

2. THREE JURISPRUDENTIAL AND HISTORIOGRAPHICAL FOUNDATIONS

The three foundations are as follows:

1. *An essentialist (praxeological) understanding of human nature.*

If human beings everywhere in the world are more or less the same, there are only a limited number of human responses to a limited number of social situations, allowing for comparison of meaning, ideas, behaviours, institutions, etc. across societies and cultures.

2. *Law is a solution or "coordinating devise" to socio-political problems.*

"Law is not simply another way of reaching an economic or political result, although law may accomplish both these ends. We recognize the presence or absence of law in a society by its structure, not simply by its results […] [W] e present an account of law as an institution characterized by the two features noted above: a system of distinctive reasoning and processes that is grounded in economic and political functionality" (Hadfield, Weingast 2011, 3).

Thus, law is both a set of general rules as well as processes. They are given meaning by, and are also a reflection of, their specific historical context. This sociological understanding of law is particularly relevant to common law:

> The materials of the common law, therefore, were the custom of true communities whose geographical boundaries had in some cases divided peoples and cultures, and not just areas of governmental authority. But within each body of custom, what we think of as the law was not marked off from other aspects of society (Milsom 1969, 2).

3. *The analogy of a convergent model of socio-historical evolution, rather than common descent.*

Two prevailing theories of evolutionary change are common descent and convergent evolution (Glor 2010; Fried 1999; Griffiths 1996, 521). Though not mutually exclusive, they emphasise e *origin* or *environment*, respectively. Common descent explains how a trait is preserved, for example, only birds have feathers, therefore all birds came from a common ancestor that had feathers. Convergent evolution, on the other hand, explains how different animals evolved the same traits independently, due to similar environments. Most cave fish are not blind due to shared, blind ancestor, but rather that all underwater caves share a common factor – darkness.

This analogy of evolutionary convergence has been used in legal theory before (Saks, Neufeld 2012, 121; Saks, Neufeld 2011, 144; Hostetler 2000, 598, 632), if somewhat reluctantly (Ruhl 1996, 1435). Most comparative legal history, at least in the medieval period, follows the common descendent model, emphasizing legal attributes. Instead, a convergent theory asks: were there similarities in the socio-political situation in England and Poland, and did these lead to similar legal solutions?

Synthesizing these three foundations induces: if people everywhere are more or less the same, with a limited combination of both social problems and solutions, then the *MC* cannot be a completely isolated occurrence: there must be other documents that emerged under similar, comparable circumstances. Thus, the argument is not whether Poland was *a* common law system, but whether it was *common law*-like. As it involves more criteria and dimensions for comparison, adopting a convergence model is less precise, and may only ask *how similar* the Polish legal system was to the common law, with it being ultimately impossible to definitely answer if Poland's law is or is not *the* common law Accordingly, the *MC* and *KE* are selected for comparison both given their similar pre-eminence in their own respective legal systems, as well as the character of legal solutions in both texts.

3. *MC* AND *KE* AS HISTORICAL, RATHER THAN CONSTITUTIONAL TEXTS

One of the foremost difficulties in common law scholarship is how to interpret *MC*, whose meaning and function have varied through time: scholars have defined it as a charter, a treaty, a constitution, etc., and caution that giving it a purely constitutional interpretation is anachronistic (Turner 2003, 106–108).[1] Historians further note that 13th century laws were generally concerned with procedural or practical manners, rather than constitutional or parliamentary concerns (Turner 2003, 121–122, 139; Arnold 1977, 330). The social situation in England since the fall of Rome had become quite complex, with a mix of peoples, cultures, and legal systems. Kings tended to be weak and laws were generally enacted on local, customary levels, until they were partially synthesized by Edward the Confessor, the second to last Anglo-Saxon king of England, often considered as a father of the common law (Brunner 1908, 20).

After Edward's death in 1066, followed by a protracted struggle, William the Conqueror won the throne of England for himself, but promised to more or less uphold the laws of Edward. Further, William and his Norman descendants

[1] "The medieval mind cannot be measured in terms of modern conceptions […] English lawyers were not in the forefront of philosophical thinkers of the day, because naturally they were occupied with more practical problems" (Potter 1948, 29).

continued to follow their own laws, expressing little interest in legislating their new empire or changing the laws of those they conquered (Pollock and Maitland 2010, 67, 72; Plucknett 2010, 318; Baker 1990, 13; Brunner 1908, 21; Maitland 1908, 51, 54–55), and preferred to keep local law intact whenever possible (Milsom 1969, 9; McKechnie 1914, 79). By the time the dynasty passed to the Angevins and the Plantagenets, the Anglo-Saxon and Norman legal institutions fused, with legal historians assigning different weights to the Norman or Anglo-Saxon components (Plucknett 2010; Pollock, Maitland 2010; Baker 1990; Milsom 1968, 1–2, 7–8; Potter 1948; McKechnie 1914, 8), eventually producing the common law.[2]

Common law is thus generally understood in one of three senses: that it is a remnant of the Anglo-Saxon "ancient-constitution" that survived the Norman invasion of England (Blackstone 1893a, *passim*; Blackstone 1893b, *passim*, especially 532–552; Coke 2003)[3]; that it is a primarily administrative approach the Normans, Angevins, and Plantagenets invented where matters of justice and finances were centralized, such as the establishment of the Exchequer (McKechnie 1914, 12, 19); or the obvious, if unequal, synthesis of the two: Norman laws superimposed on an Anglo-Saxon super-structure (Turner 2003, 9). If there was any constitutional value to the laws established by the Normans, it was more *restorative* of pre-Norman Anglo-Saxon laws, as was the original understanding of *Magna Carta* (Pollock, Maitland 2010, 117; Coke 2003, 767–773; Turner 2003, 52, 93–95).

Over the centuries, the Norman barons increasingly mixed with the Anglo-Saxons and began to see themselves as English. By the turn of the 13th century, wars on the Continent to keep control of France became increasingly unpopular and expensive. King John, an unpopular king *before* he disastrously lost his lands in France, found himself on the losing end of social change.[4] An alliance of barons and the church under Stephen Langdon, Archbishop of Canterbury,

[2] The ancient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest (Blackstone 1893a, 34). "This does not mean that there was any general attempt by the Norman kings to replace English customs by Norman Law. This they expressly disclaimed. […] Therefore, law and life in England stayed with little change after the Conquest. The Normans thought of themselves as set apart and did not trouble with the laws of the Anglo-Saxons" (Potter 1948, 10).

[3] Blackstone writes: "The ancient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest" (1893, 34).

[4] "Profound legal and economic changes necessarily suppose a certain change in cultural expectations. That cultural change was embodied in *Magna Carta*. *Magna Carta* in some sense was the consequence of a multiplicity of problems that made King John vulnerable to baronial rebellion. In a deeper sense, however, *Magna Carta* resulted from a change in attitude about the proper role of discretion in lordship: about the nature of justice" (Palmer 1985b, 390).

successfully revolted, forcing John to sign *MC*, acknowledge the rights and privileges of the barons and the church. The extent to which royal powers should be limited remained unsettled and the *MC* was re-issued several times throughout the 13th century. What *was* clear was that the Angevin and Plantagenet kings were weaker than William had been, bound by enumerated rights and privileges.

Some legal historians caution against broader, constitutional interpretation of *MC*, noting that it was a specific agreement made between King John and the rebelling nobles (Plucknett 2010, 23; Turner 2003, 1; Palmer 1985a, 13, 17; McKechnie 1914, 3, 50–51).[5] This pragmatic, *historical* interpretation, opposes the more romantic notion that it was a renewal of some ancient constitution of liberty, as in Blackstone (1893a; 1893b) and Coke (2003). This romantic myth of *MC* was not possible before the modern idea of the state emerged during the Renaissance and the Reformation (Plucknett 2010, 142), as was later associated with the Whig political movement, including the United States' Revolution (Turner 2003, 1–7, 196–199), and anytime there are feelings against the Crown in English history, such as Coke (2003). It is this myth that, in many ways taken on a life of its own, that has become a powerful rallying cry for freedom over the last 800 years.[6] To put it plainly, in every era there is a new interpretation of the *MC*, though one of the unifying threads is that it was a product of the unique, historical circumstances of 13th century England. As such, the myth of the *MC* and the uniqueness of British legal-historical exceptionalism are mutually reinforcing.[7] The *MC* has been previously compared with Polish legal history, but with the Henrician articles, rather than *KE*. At first glance, this may be the more natural comparison, as Malec has done (2016, 140–143), and *KE* risking novelty for its own sake. However, there are two objections to this, both historical in nature: first, the writing of *MC* and *KE* both date to the 13th century, and give insight into a wide variety of secondary issues in Europe at the time, such

[5] "Their [the barons'] complaints, as they appear in the imperishable record of Magna Carta, are grounded on technical rules of feudal usage, not upon any broad basis of constitutional principle" (McKechnie 1914, 49).

[6] Champion et al (2015) give a deeper discussion of this "myth".

[7] Thus, the more romantic commentators, such as Blackstone and Coke, who seek to frame the *MC* as a return to Anglo-Saxon laws and freedom as well as those who interpret the *MC* as a local political act of the barons' to secure their rights rather than an attempt to build a specific constitutional system, both have a tendency to over-emphasize the uniqueness and specificity of British legal history. The approach outlined in this paper agrees with as well as disagrees with different aspects of both approaches. There are two aspects that naturally follow from the recognition of the *MC* as a myth: first, that it was intended locally rather than constitutionally, and should be thought of historically, yet, also that its role as a myth or idea has taken on a life of its own, so to speak. Thus, *thematically*, the approach agrees with the more romantic, "classical" view of the *MC* as a source of inspiration for freedom throughout legal history, whereas *substantively*, it agrees with those who argue for a localized understanding. Ironically, this local understanding allows for more general approaches across time and space if its contextualist epistemology is wedded to a praxeological view of human nature.

as developments in feudalism and within the Catholic Church. Secondly, the Henrician articles *were* the first constitution of Poland-Lithuania, and to compare it with *MC* on *constitutional* grounds is problematic, for reasons outlined above. Thus, while the *myth* of *MC* may be more directly comparable with the Henrician articles, the actual writing of the Great Charter in its own time and context is more appropriately compared with *KE*.

The 13th century in Poland has many similar parallels to that of England. First, the local dynasty had been in a period of decline due to infighting and invasion of the Mongols, whose internal weakness invited the Order of Brothers of the German House of Saint Mary in Jerusalem (commonly known as the Teutonic Knights or the Teutonic Order) to launch a crusade. The Knights eventually conquered much of northern Poland and Lithuania along the Baltic coast, establishing or heavily fortifying the cities of Gdańsk (Danzig), Elbląg (Elbing), and Toruń (Thorn), which became the wealthiest cities in the region, dominated by foreign, German nobles, adopting their language and culture (Magosci 2018; Hybel 2008, 4–5, 12–14; Unger 2008, xxix, xxxii-xxxiii; Urban 1998; Knoll 1967; Dziewanowski 1963, 444–448).

Legal historians have debated whether *KE* is German or Polish, as it was written in an old German dialect or in Latin, though in his introduction Matuszewski addresses the issue clearly: its name comes from the city of Elbląg as this was the regional capital and where the courts would have been located, but it clearly contains legal elements not present in German law at the time, such as a specific legal argument for casuistry (Matuszewski 1959, 8, 63–65, 68–70, 103–104). Though brutal toward pagans, the Order was relatively flexible in gathering and assimilating local peoples to continue their crusade (Urban 1998, 196, 201, 204–205), even allowing them self-rule according to their own laws and customs. The *KE* is one such example (Matuszewski 1967, 66–67).

Like that of the Normans, the Teutonic Order's rule was challenged over the centuries. As the text demonstrates below, the Poles retained their pride in their local traditions, with the clergy developing the theory of just war, that stated that the only kind of law that was just was to restore man's natural freedom, given by God. To this end, rebellion against the king, the Pope, and uniting with heathens were justified in wars of liberation. Given that the Lithuanians were still pagan at the time, this drew the fates of the Poles and the Lithuanians ever closer together, eventually uniting to drive back the Order (Owczarska 2014, 158–162). Though *KE*, as it was the Teutonic Order's codification of Polish legal traditions in a form of self-rule, was not constitutional per se, it is evidence of the budding Polish identity, especially its opposition against imperial or German rulers, an identity that was carried throughout the centuries.

4. COMPARING THE TEXTS

These religious and socio-historical similarities are evidenced by what effectively serve as the preambles to the texts themselves. The *KE* opens with a bold claim[8]:

[1.1] *Dypolenscherectkonnen wellen, den sie wissintlich, dazdy Polen, von ircristenheitangende, habin den rinyschebstule des bobistesundirtenikgewesinundenict dem styl in synem schirm impfing, dorchdazzedestegernircristenwordin.*
[1.2] *Durch dazorkundegebynzejerlichzcu pflege eynirhande gelt dem vorgenantemstule. | Dazheisetsente Petirspfenning.*
[2.1] *Unde wen irgericht von dem keyser in gywerlt nicht enkumt, alzdutschervurstenunderichter tut, | zoenhabinzedez keine gewoneit, das zeirgerichthegyn | von obirgewalt, alzdutscherichter pflegen zcu tun.*
[2.2] *Wazabirzegerichtin, adirwaz vor in bekantwirt, adirgeloukint, | daz hat zo getane macht, alzemarkgreven | unde etlicher dutschenvursten, dyir ding nicht enhegin.*

[1.1] *Tym, którzy chcą znać prawo polskie, niech będzie wiadomo, że Polacy od chwili (przyjęcia) przez siebie chrześcijaństwa podlegali rzymskiej stolicy papieża, a nie cesarzowi, gdyż ich rzymska stolica wzięła pod swoją opiekę, dzięki czemu tym chętniej stali się chrześcijanami.*
[1.2] *Na świadectwo tego dają corocznie tytułem czynszu wyżej wymienionej stolicy garść pieniędzy, co się nazywa pieniążkiem świętego Piotra.*
[2.1] *A ponieważ ich (tj. Polaków) władza sądowa nie wypływa od cesarza, jak (taż władza) niemieckich książąt i sędziów, dlatego nie mają oni zwyczaju gajenia swoich sądów z mocy władzy zwierzchniej, jak to zwykli czynić niemieccy sędziowie.*
[2.2] *Wszakże co oni osądzą albo co przed nimi się przyzna, albo czemu zaprzeczy, to ma taką samą moc, jakby (wychodziło) od margrabiów i niektórych niemieckich książąt, którzy swego sądu nie gają (z mocy władzy zwierzchniej).*

[1.1] To those who want to know Polish law, let it be known that the Poles have been subject to the Roman capital of the Pope since the moment of (their adoption) of Christianity, and not to the Emperor, because their Roman capital was under their protection, making them all the more willing to become Christians.
[1.2] In testament, each year they give a handful of money for the above-mentioned capital, which is called the Peter's Pence.
[2.1] And because their judicial authority does not flow from the Emperor, as (the authority of) the German princes and judges, therefore they have no habit of adorning their judgments by virtue of supreme authority, as the German judges usually do.
[2.2] After all, what will they judge or what they will admit to them, or what will be denied, it has the same power as (if it came) from the Margraves and some German princes who do not adorn their own court (by virtue of superior authority).

These are not meek works of conquered people, but those who genuinely saw themselves as equals in the eyes of the Church, which gave the Poles the

[8] The Old German-Prussian and the Polish translation are by Matuszewski (1959). The English translation from Polish is my own.

right to their own laws. This rejection of equating the authority of the Emperor with the authority of the Church was somewhat unique for its time, and a point of contention between the Poles and Lithuanians against the Teutonic Order, eventually resulting in the defeat and ousting of the Order and the creation of the Polish-Lithuanian Commonwealth. This statement of asserting their right to rule and rejection of imperial rule recalls the first chapter of *MC*:

> *In primis concessisse Deo et hac presenti carta nostra confirmasse, pro nobis et heredibus nostris in perpetuum, quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illesas; et ita volumus observari; quod apparet ex eo quod libertatem electionum, que maxima et magis necessaria reputatur ecclesie Anglicane, mera et spontanea voluntate, ante discordiam inter nos et barones nostros motam, concessimus et carta nostra confirmavimus, et eam obtinuimus a domino papa Innocencio tercio confirmari; quam et nos observabimus et ab heredibus nostris in perpetuum bona fide volumus observari.3 Concessimus eciam omnibus liberis hominibus regni nostri, pro nobis et heredibus nostris in perpetuum, omnes libertates subscriptas, habendas et tenendas eis et heredibus suis, de nobis et heredibus nostris.*
>
> In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III, before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs forever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.[9]

As such, both *MC* and *KE* are pacts of sorts, worked out between the people and the sovereign. While both represent a kind of legal-social solution, *MC* was made from a position of strength by the barons, and tends to reflect the interests of the barons and the Church, while *KE* is almost entirely concerned with the situation of the peasants and occasionally the knights. A final point of comparison worth making is similarities in legal procedure. The *MC* has become famous for its thirty-eighth and thirty-ninth chapters, which respectively outline the importance of witnesses and jury by one's peers.

> *Nullus ballivus ponat de cetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis.*
>
> No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law," without credible witnesses brought for this purpose (Chapter 38).[10]

[9] McKechnie (1914, 190–191). The original Latin and English translation of the *MC* are taken from McKechnie.

[10] McKechnie (1914, 369).

Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae.

No freeman shall be taken or [and] imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land (Chapter 39).[11]

Surprisingly, the entire fifth chapter of *KE* goes into extensive detail about how to handle witnesses: how much to pay them, what oaths they are to swear, how to ensure that they are not bribed, how to punish bribed witnesses, etc. Section 5.2. gives the greatest detail:

[5.1] Jeśli odpowiadając na skargę mówi, że jest niewinny, wówczas pyta go sędzia, czy ma świadka.
[5.2] Jeśli twierdzi, że go ma, wówczas [sędzia] nakazuje mu, by go [świadka] wymienił, podał jego imię. Gdy on ich wymienia, wówczas po podaniu imienia każdego świadka z osobna, sędzia pyta skarżącego, czy go przyjmuje; on może odrzec: tak albo nie. Którego zaś on przyjmuje, tego sędzia poleca zapisać. Kiedy wszyscy są zapisani, wówczas sędzia poleca, by ich stawił czternastego dnia.

[5.1] If he responds by saying that he is innocent, then the judge asks him if he has a witness.
[5.2] If he claims he has him, then [the judge] orders him to name him [the witness], give [the judge] his name. When he mentions them, then after giving the name of each witness individually, the judge asks the applicant whether he accepts it; he can say: yes or no. Which he accepts, the judge recommends registration. When everyone is registered, the judge recommends that they appear on the fourteenth day.

Though not a right to trial by jury of one's peers *per se*, the individual before the court has great freedom to choose their own witnesses, presumably persons they know and hence a peer. Thus, both the Polish peasanty and minor nobility under *KE* as well as the English lords under *MC* have some degree of legal rights against the arbitrary power of the sovereign, which would not exist in the inquisitorial legal system of an imperial ruler.

5. CONCLUSION

The *Magna Carta* and *Księga Elbląska* were products of similar socio-historical situations where an invading sovereign power compromised with local inhabitants, producing legal systems that limited the arbitrary power of the king or princes. As both documents serve as (at least partial foundations) for their respective legal orders, this casts doubts onto neat categorization of Polish law as civil law and English law as common law as overly simplistic. s. As noted in the paper, the Henrician articles have already been compared with British

[11] McKechnie (1914, 375).

legal history; another interesting practise developed in the Kingdom of Poland and continued through the Polish-Lithuanian Commonwealth was *neminem captivabimus*, which is similar to the development of *habeas corpus*. Can the development of the Polish(-Lithuanian) system due to socio-historical situation be demonstrated as was with the *KE?* Can further comparisons be made between the Polish situation and that of England? Did the *KE* and similar early Polish legal documents continue to play a role in the sociological legal imagination as the *MC* did? Indeed, more comparative, contextualist research is needed emphasizing the emergence, convergence, and differentiation of these legal systems in light of political, social, and historic circumstances.

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J. Patrick Higgins

WIĘCEJ WSPÓLNEGO (PRAWA) NIŻ ORYGINALNEJ MYŚLI? WSTĘPNE PORÓWNANIE TEORETYCZNE *MAGNA CARTA* I *KSIĘGI ELBLĄSKIEJ*

Streszczenie. Uczeni zajmujący się prawem w epoce średniowiecza na ogół nie porównują polskich i angielskich systemów prawnych, choć w XIII wieku cechowała je zaskakująca liczba podobieństw. Jest to szczególnie wyraźne, jeśli weźmie się pod uwagę zbieżność ewolucji instytucji prawnych będącą odpowiedzią na problemy społeczno-historyczne epoki. Bezpośrednio ilustruje to historyczna i tekstowa analiza *Magna Carta* i *Księgi Elbląskiej*, dwóch kluczowych tekstów dla rodzimych systemów prawnych. W artykule omówiono możliwości płynące z tej nowej perspektywy porównawczej, wraz ze wskazaniem kierunków dalszych badań.

Słowa kluczowe: *Księga Elbląska*; *Magna Carta*; Porównawcze historia prawa; zbieżna ewolucja prawna.

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ROME AND ROMAN LAW IN ENGLISH ANTISLAVERY LITERATURE AND JUDICIAL DECISIONS

Abstract. The abolition of slavery by modern states was an important step towards the recognition of what is now known as human rights. The British Empire and its cradle, England, were the leading entities responsible for the support of the international trade slave. For this reason, its antislavery movement is one which deserves particular attention. The argumentation used by the abolitionists has been a subject of many studies. Philosophical, theological or commercial arguments against slavery are well researched. It needs to be emphasised, however, that abolition was a legal step. In this context, it is interesting to seek legal argumentation against the enslavement of people. It is obvious that an appropriate reasoning would be difficult to find. Slavery has been a common social institution since ancient times. The universal principles of Roman law, as well as the significance of Roman civilisation for the development of the Western culture, made it one obvious field of research. The main aim of this article is to check if reference to Roman antiquity has been one of the crucial arguments in the antislavery struggle in Britain.

Keywords: English law; Roman law; Slavery; Abolition.

1. INTRODUCTION

The main purpose of the article is to investigate the scope of the use of arguments derived from Roman law or connected with Roman slavery during the struggles for the abolition of the slavery in England in the 18th and early 19th centuries. The analysis is divided into three parts. The first part examines the presence of Roman argumentation in the antislavery pamphlets. The second part concerns reference to ancient slavery in legal works. And the third part regards the raising of Roman law arguments in the courtroom.

For modern people, slavery is predominantly a historical subject which they heard about during their history classes in school.[1] It needs to be emphasised, however, that such condition is relatively new one. No more than two hundred years ago slavery was still a common social phenomenon. And it had existed since Antiquity. It is true that the legal, political, as well as the social conditions of

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[1] Nevertheless, the problem of slavery is not extinct in the modern world (see e.g. Borg Jansson 2015). It still exists in different forms, including disadvantageous employment of chiefly illegal immigrants all other European countries.

slaves varied greatly in different epochs, but the long-running existence of slavery cannot be denied.[2]

It had already been pointed out by the Romans (the randomly chosen bibliography on Roman slavery includes e.g. Bradley 1994; Buckland 1908; del Prete 1937; Robleda 1976; Watson 1987; Camodeca 2000; Melluso 2000; Starace 2006; Bradley, Cartledge 2011; Korporowicz 2011) that slavery is fundamentally contradictory when analysed from the legal perspective. In Justinian's *Institutes,* it was declared that slavery has its origins in the law of the nations, while according to natural law everyone should be treated as free (I. 1, 5, pr. See also D. 1, 5, 4, 1 and D. 50, 17, 32). This contradiction became even greater when Christianity appeared. In Saint Paul's epistles, it is possible to find many references to slavery, though it is hard to find any direct castigation of the institution. It is possible, however, to find comments on the mitigation of the severity of owners against slaves (Eph. 6, 9; Col. 4, 1). Still, it is important to remember that the lack of condemnation of slavery in the New Testament was primarily connected with the characteristic of Christianity to change of the way of seeing human destiny. As Saint Paul proclaims on many occasions being a Christian is not a matter of being a Jew, Greek or pagan, or the same as being free or a slave (Gal. 3, 28; Col. 3, 11. See also Harrill 1995; Glancy 2011).

According to R.H. Helmholz, slavery was contrary to natural law and because of this, the medieval Church and the canon lawyers believed it reasonable to do everything to avoid the condition of a slave. There could be, however, no direct statement of the illegality of slavery as a part of the law of nations (Helmholz 2012, 21; see also Epstein 1998). It is interesting that in medieval times, the Church did not openly reject slavery, but it tended to emancipate slaves working in ecclesiastical domains. This habit started to be imitated by the lay lords. With time this caused the extinction of peasant slavery in Europe (Berman 1983, 320).

2. ANTISLAVERY LITERATURE IN ENGLAND IN 18TH AND 19TH C.

A new wave of slavery was introduced in the epoch of great geographical discoveries and colonisation. The first black slaves were transported into England as early as the reign of Elizabeth I. The question of slavery was at first of no great importance to English law, since most of the slaves, even if traded by English merchants, remained in the colonies. In the seventeenth century, it was settled that slaves coming to England should be treated as chattels (Baker 2002, 475; Pelteret 1995). It was not until the Asiento agreement (1713), however, that the number of

[2] Although the article focuses on the subject of the abolition of slavery, it must be remembered that Britain also witnessed strong opposition to emancipation (Dumas 2016).

slaves started to increase significantly in England (Shyllon 1974, 3). Pretty much at the same time, however, slavery and especially the poor condition of slaves heightened the awareness of some individuals. They started to struggle for the emancipation of slaves living in England.

The number of larger works and smaller pamphlets regarding the abolition of slavery gradually grew. In the following part of this article, only a few selected works will be discussed, and with the main focus primarily on the use of or reference to Roman law or Roman antiquity (see e.g. Hodkinson, Hall 2011).

To begin with, it seems reasonable to start with an address published on 19 March 1767 in the Virginia Gazette. Although that antislavery statement was published in colonial America, it contains an interesting reference to Roman law. The address was written by Francis Hutcheson, namesake of a Scottish enlightenment philosopher. The author proclaimed that 'slavery then is a violation of justice, will plainly appear, when we consider what justice is'. The definition of justice, indeed, was borrowed from the famous passage in Justinian's Digest that justice is *constans et perpetua voluntas ius suum cuique tribuendi* (D. 1, 1, 10, pr.).

In England, at the same time, the first important abolitionist fighter was initiating his activities. Granville Sharp (Shyllon 1974, 18–39; Ditchfield 2004; Lyall 2017) had involved himself first in helping an injured slave named Jonathan Strong during his legal trial. On the back of the case, he had written and published in 1769 a treatise entitled *A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery.* Although very elaborate, the text contains some limited and indirect Roman crossovers. Sharp himself explained his attitude by saying that: 'the state of Slaves amongst the Romans or other heathen nations, and the imaginary rights of conquerors in those early days to enslave their captives, do not at all concern a Christian government (…) such precedents cannot be of any authority amongst Christians' (Sharp 1769, 6). The Roman comparisons had been rejected by Sharp. Later, he quoted the works of such authors as Grotius and Gronovinus, though both of these writers were discussing Frankish rather than Roman slavery (Sharp 1769, 7). Sharp also cited Pufendorf as authority, but he cited only general remarks of the German scholar on slavery (Sharp 1769, 10). Among the civilians who were quoted by Sharp, the largest number of quotations were attributed to Thomas Wood. Only once, however, did the abolitionist quote Wood's *Institutes* of civil law (Sharp 1769, 6). On the remaining few occasions he quoted the passages from another book by the same author, i.e. *Institute of the Laws of England* (Sharp 1769, 14, 19, 21, 22, 24).

It can be clearly seen that at an early stage of writing on emancipation, the idea of citing Ancient Rome as an authority was rejected. But the publication of *A Representation* was only the beginning of Sharp's literary activity on behalf of slaves. In the following years, he published many other antislavery pamphlets. Among them, an important one for the purposes of this article was entitled

A Letter to a Gentleman in Maryland, published almost twenty-five years after *A Representation.* The beginning of the text is predominantly based on Biblical arguments, supplemented with legal as well as theological references to St. German's *Doctor and Student*. Later some other authorities are quoted, including Sir Edward Coke and *Fleta*, and finally Sharp focussed on the Roman sources. He pointed out that *Fleta*'s assertion *est quidem servitus libertati contrarium, item constitutio quedam de iure gencium qua quis dominio alieno contra naturam subicitur* (*Fleta* 1, 3), is in fact borrowed from Justinian's *Institutes* (I. 1, 3, 2). Sharp's comment on the Roman origins of the text is certainly unexpected. He proclaimed that such valuable appeals to the foundations of the law cannot restrain the bestial power (*belluina potestas*) 'of Roman tyranny in any of the ten kingdoms of the beast' (Sharp 1793, 9). The analogy is based on the apocalyptic visions from the Book of Daniel (Dn. 7, 15–28). Nonetheless, Sharp concluded that every 'friend of liberty' should be thankful to Justinian for the antislavery argument. It is interesting also that in Sharp's opinion the argument against slavery should always be twofold: firstly Biblical, and secondly based on the aforementioned civilian statement (Sharp 1793, 9). It seems that a life full of struggling with his proslavery opponents forced Sharp to appreciate Roman reasoning.

Another passionate English abolitionist was John Wesley, the founder of Methodism. In 1774 he had published for a first time an essay titled *Thoughts upon Slavery.* The Roman reference that appeared in the essay is merely historical. Wesley had written 'it commenced [i.e. slavery – Ł.J.K.] in the barbarous state of Society, and in process of time spread into all nations. It prevailed particularly among the *Jews*, the *Greeks*, the *Romans*, and the ancient *Germans*: And was transmitted by them to the various kingdoms and states, which arose out of the *Roman* Empire' (Wesley 1775, 4). This historical illustration of slavery's development did not influence Wesley's argumentation much. In the case of the Roman legal argument, it can be found in Wesley's essay, but only in the form of a long quotation of a relevant passage from William Blackstone's *Commentaries* (Wesley 1775, 17).

Similar material to that just presented can be found in Joseph Wood's *Thoughts on the Slavery of the Negros* published in 1784. Wood, who was a supporter of the abolition movement, enumerated in his pamphlet a number of arguments used by adherents of the preservation of slavery. He had written: 'lastly, slavery has always been practised, it is said, amongst the most liberal and enlightened nations, the Greeks, the Romans, and even the Jews under the theocracy'(Wood 1784, 12). Later, however, he noticed that 'slavery amongst Greeks and Romans was frequently mitigated to servitude' (Wood 1784, 21) and finally he explained his statement by pointing out that Roman slaves were 'indulged with some property of their own' (Wood 1784, 22). Wood also explained that this kind of property was defined by the Romans as the *peculium*.

The year 1784 also saw the publication of a much bigger and systematic work concerned with the problem of slavery: James Ramsey's *Essay on the Treatment and Conversion of African Slaves in the British Sugar Companies.* The Roman references used by Ramsey were barely historic. It is, however, worth quoting a passage from Ramsey's book that well illustrates his attitude towards Roman slavery: 'in the infant state of Rome, slaves worked, and lived with their masters, without much distinction of rank or usage. But in proportion as luxury increased among the Romans, the condition of their slaves sunk gradually down to the lowest degree of wretchedness and misery. And indeed such representation as the statue of the dying gladiator, which exhibits the life of a brave useful man sacrificed, not to the safety of his country, but to the barbarous whim of, perhaps, the most worthless set of men that ever were assembled together in one place' (Ramsey 1784, 25).

Both authors took extreme views of Roman slavery. Wood presented an idealistic and almost romantic vision of slaves working hand by hand with their masters, while Ramsey was convinced about the gradual barbarisation of slavery and its devastating effect on every aspect of human dignity among the Romans as an entire people. There is no need to demonstrate that two such opinions about slavery were exaggerated, though in both of them it is possible to find a grain of truth.

Another author who deserves attention due to his importance to the antislavery cause is Cambridge alumnus Thomas Clarkson (Gibson Wilson 1989). In 1785 he won the first prize for the best dissertation. In the following year, he had enlarged and translated it from Latin into English and entitled it *An Essay on the Slavery and Commerce of the Human Species, particularly the African.* The book was divided into three parts: (1) 'The History of Slavery', (2) 'The African Commerce or Slave Trade' and (3) 'The Slavery of the Africans in the European Colonies'. Besides the multiple references to Roman history that were inserted into the first part of the book, Clarkson also analysed Roman legal sources. In the seventh chapter of the second part of *An Essay*, the author discussed the problem of prisoners of war as slaves. At first, he referred to the Digest's passage *iure gentium servi nostri sunt, qui ab hostibus capiuntur* (D. 1, 5, 5, 1). Clarkson proclaimed that the principle upon which the Roman solution was based was the 'right of capture'. He confirmed that suggestion by referring to Pomponius's passage *servorum apellatio ex eo fluxit, quod imperatores nostri captives vendere, ac per hoc servare, nec occidere solent* (D. 50, 16, 239). Clarkson made further arguments on the authority of the historians Justin, Cicero and Livy.

A zealous abolitionist of the next generation was William Wilberforce who devoted most of his life to fighting for the emancipation of all slaves both within the Realm as well as in its colonies (see e.g.: Metaxas 2007; Tomkins 2007; Hague 2008). Among his literary works, one deserves close attention. In the year 1807 Wilberforce published *A Letter on the Abolition of the Slave Trade,*

Addressed to the Freeholders of Yorkshire. Here, the abolitionist presented a careful analysis of slavery. He discussed in detail the history of the enlargement of the Roman Empire that eventually allowed him to proclaim that the Romans had sold war captives into slavery (Wilberforce 1807, 76–78). Finally, he asserted to his readers that Britons also were the subject of such commerce: 'our own island long furnished its share towards the supply of the Roman market' (Wilberforce 1807, 82).

In the later part of the letter, Wilberforce inserted a paragraph described in the margin as 'West Indian compared with ancient slavery'. He had pointed out that in ancient times slavery played an important role in social and political life and that some slaves were elevated to occupy high offices. Due to this reason, they were – in Wilberforce's opinion – frequently freed. Although his argument relating to the frequency of manumissions can be treated as an exaggeration, it is interesting that the politician added in a footnote the relatively long passage taken from Seneca the Younger's epistle forty-seven, a fundamental Stoic approach to slavery (for more about Seneca's letters see Joshel 2011, 227–230).

The use of similar ancient arguments was also characteristic of Wilberforce during his parliamentary speeches though it may be noted that reference to Roman slavery by Wilberforce was primarily rhetorical. A review of his private correspondence, published in the 1840s, proves that in everyday life Wilberforce did not seek such fanciful arguments to support his views.

3. ANTISLAVERY ARGUMENTS IN THE LEGAL WORKS

Next, to the antislavery propagandists, ancient arguments were also used by the legal authors who supported the abolitionist attempts or at least were simply added to several precedents already decided in English courts.

In Sharp's opinion, his efforts were supported by Sir William Blackstone (Shyllon 1974, 55). It is true that in his *Commentaries*, Blackstone noticed that 'this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman, though the master's right to his service may *possibly* still continue' (Blackstone 2002, 123). Blackstone returned to the subject of slavery once more in chapter fourteen of the *Commentaries*. The chapter entitled 'of Master and Servant' concerns different forms of that relationship, though slavery is described as the first in the list. Blackstone first confirmed his earlier opinion 'that pure and proper slavery does not, nay cannot, subsist in England' (Blackstone 2002, 411). On this basis, he proclaimed that the Roman origins of slavery presented in the *Institutes* of Justinian (I. 1, 3, 4) are 'false foundations'. The enslavement of captives, according to Blackstone, is against the law of war. He believed

that it is possible only to kill an enemy in the cases of absolute necessity or self-defence, or to imprison him. Enslavement according to the *ius civile* is again invalid. Blackstone stated that the sales referred to may mean only the 'contracts to serve or work for another'. And he continued that such enslavement: 'when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible' (Blackstone 2002, 412). In Blackstone's opinion, every contract of sale implies a price and a *quid pro quo*, which is defined by him as 'an Equivalent given to the Seller in Lieu of what he transfers to the Buyer'. In the author's belief, however, nothing can be given as an equivalent of life and liberty. He noticed also that as the master acquires the whole property of his slave this is also contrary to the contractual relationship. He stated that the 'Buyer gives nothing, and the Seller receives nothing'. In the case of the *servi nascuntur* circumstance, the lawyer added simply that this prerequisite was built upon two former ones that were already condemned by him as a false.

For that reason, Blackstone solemnly stated that 'the law of England abhors, and will not endure the existence of, slavery within this nation as well as that with the moment when the slave lands on English territory he becomes a freeman'. It is worth mentioning, however, that Blackstone changed his opinion on slavery in one respect. In the first edition of his *Commentaries*, Blackstone did not include the passage referring to the master's right to a slave's service after his landing in England. This became the subject of controversy and accusation from Sharp (Shyllon 1974, 63–67; Prest 2006, 138–139).

It seems that some reference to Roman law appeared also in the anonymous treatise on *Laws Concerning Masters and Servants*. This volume was first published in 1767 and was republished again a year later. The author described himself as a 'Gentleman of the Inner-Temple'. The reference to the Roman tradition that appears at the very beginning of the treatise – in its preface – is, in fact, a plagiarism. The author rewrote Blackstone's considerations on Roman slavery, which have already been discussed.

Besides the pure common law approach of Blackstone and his anonymous imitator, it is interesting to look also at the writings of eighteenth-century English civilians. The first author to engage with both the common law and civilian worlds is Thomas Wood (Robinson 1991). He published two systematic works: *A New Institute of the Imperial or Civil Law* (first edition published in 1704) and *An Institute of the Laws of England* (in 1720).

In the earlier work, it is much harder to find references to the condition of eighteenth-century slaves according to English law. Nevertheless, Wood proclaimed that 'slaves may claim freedom as they come into England, Germany, France etc.' (Wood 1704, 31). It is surprising to find the statement in a civilian *Institute*, but it may be interesting that the author based his statement on the work of Vinnius who discussed the problem of prisoners of war. In this context, indeed, the Dutch scholar referred to the relevant passages taken from Justinian's Digest

(D. 49, 15 and D. 49, 16). The civilian also compared the Roman, English and canonical positions of children born from slave-freeman relationship. For the position in English law, he referred to John Fortescue's *Laudibus Legum Angliae* and for the canon law, he identified as the source of his knowledge the title *De coniugio servorum* of Gregory IX's Decretals (see also Korporowicz 2018, 88). This comparative reflection, however, does not say much either about Wood's pro or con approach to the question of slavery in England or his eventual use of possible arguments against slavery.

Wood's second book, *An Institute of the Laws of England*, does not help in solving that problem either. In no part of his systematic study of English law does Wood mention the question of slavery. Even the subchapter 'Liberty' that might seem promising at first glance is not helpful, insofar as Wood discussed in it only the question of being free and imprisoned. This lack of slavery-themed considerations is, in fact, interesting from the legal point of view. It means that as late as the 1720s, the legal condition of slaves was not a pivotal subject of significance for English law.

In the *Elements of the Civil Law* written by John Taylor thirty-five years later, it is possible to find a great deal of valuable material about Roman slavery. Only occasionally, however, did Taylor decide to link the subject with the problem of slavery in his own times. Indeed, an interesting passage may be found in the essay on servitude. After recalling St. Paul's observations on slavery, Taylor noted that 'several of his Hearers improved upon so comfortable a Doctrine, and gave him some pains to reduce them, and correct their Misapprehensions' and then he added: 'The same Opinion prevails with many at this day, who maintain that Slavery and Christianity are inconsistent, and that Baptism into the Christian Church shall work the Effects of Manumission' (Taylor 1786, 435). In another part of his book, Taylor presented parts of the post-Roman history of slavery, but it seems striking that he avoided comparisons between ancient slavery and the British slave trade.

A very promising tome is Samuel Hallifax's textbook on Roman law published first in 1774. Its subtitle reads: 'An Analysis (…) in which a comparison is, occasionally, made between the Roman laws and those of England'.

In one of the very first chapters of the textbook, dedicated to the subject of freemen and slaves, Hallifax briefly noticed that 'villenage, as formerly known in England, was a state little better than Slavery among the Romans'. Later, the civilian presented some additional information about villeinage. Hallifax's last statement seems, however, to be the most appealing: 'the revival of Domestic Slavery in America affords no proof, that the introduction of a new Slavery into England is now lawful' (Hallifax 1774, 8–9). In spite of expectations generated by his earlier discussion, the aforementioned comparison is the only one that can be found in Hallifax's textbook on Roman and English slavery.

4. THE JUDICIAL CASES INVOLVING THE CONDITION OF SLAVES[3]

The earliest case that is important for this study was decided in the late seventeenth century. According to the decision of Holt CJ in *Chamberlain v. Harvey* case (1697), from the moment a black slave arrives in England, he 'cannot be demanded as a chattel'. In one of the reports of the case, it is possible to notice a brief reference to the Roman law. The judges were analysing, *inter alia*, the origins of the enslavement of the slave in question. They pointed out that the slave was born of parents who were already enslaved. They commented: 'now the children of such parents are slaves as well as they. So it was amongst the Romans' (*Chamberlain v. Harvey* (1696) 5 Mod. 186, 187; 87 Eng. Rep. 598, 599). A few years later, Holt CJ decided in another case known as *Smith v. Brown* (a.k.a. *Smith v. Gould*) that 'as soon as negro comes into England, he becomes free' (*Smith v. Brown* (1706?) 2 Salk 666; 91 Eng. Rep. 566). In one of the reports of the case, it is possible to find an even more solemn statement: 'the common law takes no notice of negroes being different from other men. By the common law no man can have a property in another' (*Smith v. Gould* (1706) 2 Ld. Raym. 1274, 1275–1276; 92 Eng. Rep. 338). There is no direct civilian reference in the reports of the case, but it is important to notice that according to the judges the only restrictions on the freedom allowed in English law are villeinage and hostile capture. In the latter, it is possible to detect a slight association with the civilian tradition. Nevertheless, according to Sir John H. Baker, neither of these two cases had an effect on the practice of law (Baker 2002, 475; van Cleve 2006, 617–618).

In the following decades, slavery cases were heard by English judges, but not many of these cases are widely known. Their impact, again, was rather limited. Among these cases was the one of Jonathan Strong. He was an abandoned slave who received much-needed help from Sharp. In fact, Strong's case drew Sharp's attention to the antislavery movement. As to Roman law, however, there are no traces of its use during the proceedings (Lyall 2017, 42–46, 91–100).

In 1772 probably the most famous case concerning slavery, *Somerset v. Stewart*, or *Somerset's case*, was decided. The principal figure behind the decision was Lord Mansfield.

The official report of the case does not contain any direct references to Roman law, but it is worth noticing that the argument recounted in the official report closely resembles the logic of Blackstone's deliberations aforementioned. The report contains information about captivity and contract as a source of slavery. These passages were based on the relevant fragments of Grotius and Pufendorf (*Somerset v. Stewart* (1772) Loft 1, 2–3; 98 Eng. Rep. 499, 500). There is no doubt, however, that their thoughts on that matter were based on Roman sources.

[3] For the Scottish eighteenth century cases regarding slavery and the use of Roman law arguments in them see one of the recent works of John Cairns (2012, 68–77).

Although the similarities between Roman and modern (British) slavery were quite tempting and obvious, they do not appear in many late eighteenth century cases. The existence of slavery in 18th century England, however, made it a popular subject of reference in different trials which were not concerned with slavery. Predominantly, it is possible to trace slavery references in the sphere of inheritance law. The example of inheriting slaves or the requirements to be a Roman citizen, adult and freeman were occasionally mentioned (sometimes with the addition of Justinian's sources) by English judges.[4] Another example of mentioning the slave's condition and their legal situation in Rome was as a parallel to the condition of ordinary servants, as in the case of *Newby v. Wiltshire* decided in 1785.[5]

Finally, in 1824 in *Forbes v. Cochrane*, it is possible to find a brief reference to Roman law. The judges stated: 'we have the authority of the civil law for saying that slavery is against the rights of nature, Inst. lib. 1, tit. 3, 2' (*Forbes v. Cochrane* (1828) 2 B & C 448, 472; 107 Eng. Rep. 450, 459). This one statement allowed the judges to ignore a great deal of material on Roman slavery, merely to utilise it for their antislavery purposes.

It is ironic that after the abolition process finally succeeded in England, a highly controversial decision was issued by the civilian judge Lord Stowell in the High Court of Admiralty. In 1827 in *The Slave Grace* he proclaimed that although English law does not recognise slavery, a former slave who returns to the place of his origin, where slavery is legal, becomes a slave again (*The Slave Grace* (1827) 2 Hagg. Adm. 94; 166 Eng. Rep. 179. See also Holdsworth 1952, 688). Roman law was not mentioned in the case. Nevertheless, while commenting on Lord Mansfield's decision in *Somerset's case* and its later aftermath, Lord Stowell noticed that the rapidness of the change of mind of English lawyers towards slavery 'puts one in mind of what is mentioned by an eminent author (…) in the Roman History, "*Ad primum nuntium cladis Pompeianae populus Romanus repente factus est alius*": the people of Rome suddenly became quite another people' (*The Slave Grace* (1827) 2 Hagg. Adm. 94, 106; 166 Eng. Rep. 179, 183). The quotation is taken from Isaac Casaubon's critique of Athenaeus's *Deipnosphistae* first published in Lyon in 1600 (Casauboni 1600, 267).

5. CONCLUSIONS

As has been shown, Roman law and Roman culture as such were regular, but certainly not frequent, elements of antislavery discussions in eighteenth and early nineteenth-century England. Nonetheless, their occurrence was not

[4] *Windham v. Chetwynd* (1757) 1 Burrow 414, 426; 97 Eng. Rep. 377, 384; Hatton v. Hooley (1773) Loft 122, 129; 98 Eng. Rep. 566, 570; Ridges v. Morrison and Others (1784) 1 Bro. 389; 28 Eng. Rep. 1195.

[5] *Newby v. Wiltshire* (1785) 4 Dougl. 284; 99 Eng. Rep. 883.

treated as a mischief, but rather a logical part of the emancipation rhetoric. The struggling advocates of the slave cause rarely referred to the specific issues of Roman slavery law. They were focusing rather on the phenomena as such. Their evaluation, however, was very bipolar. For some of them, ancient slavery was simply a tyrannical institution of oppression. The others, those who were more willing to compare ancient and modern slavery, tried to highlight the brighter side of ancient personal captivity. They were pointing out formal as well as informal modes of honouring slaves (high offices, *peculium*). Unfortunately, there is a lack of more balanced opinions – the one that could be called the golden mean.

Besides general references to ancient slavery, two legal sources were used more frequently. First, the abolitionists willingly used the famous contrast between slavery according to the law of nations and the law of nature. The second source of debates was the one which dealt with the origins of slavery. It became a subject of criticism for its lack of coherence. After all, the most common "ancient" argument for the abolitionists was a simple comparison of the Roman and modern slave systems.

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Łukasz Jan Korporowicz

RZYM I PRAWO RZYMSKIE W ANGIELSKIEJ LITERATURZE I ORZECZNICTWIE ANTYNIEWOLNICZYM

Streszczenie. Zniesienie niewolnictwa przez nowożytne państwa było ważnym krokiem zmierzającym do uznania praw człowieka. Imperium Brytyjskie, jak i jego matecznik – Anglia – były jednymi z głównych organizmów państwowych odpowiedzialnych za wspieranie międzynarodowego handlu niewolnikami. Z tego względu rozwijający się w nich ruch abolicyjny zasługuje na szczególną uwagę. Argumentacja stosowana przez jego przedstawicieli stanowiła dotąd przedmiot licznych badań. Argumenty filozoficzne, teologiczne czy handlowe przeciwko niewolnictwu są dobrze znane. Należy podkreślić jednak, że dokonanie abolicji miało być krokiem prawnym. Stąd interesujące wydaje się poszukiwanie prawnych argumentów służących potępieniu zniewalania ludzi. Oczywiste jest, że znalezienie odpowiedniego uzasadnienia byłoby trudne. Niewolnictwo była przecież powszechną instytucją społeczną od czasów starożytnych. Jednak uniwersalne zasady prawa rzymskiego, jak i cywilizacji rzymskiej wykorzystane do tworzenia zachodniej tradycji prawa, czynią z prawa starożytnych interesujące źródło odniesień. Głównym celem artykułu jest ustalenie czy odwołania do starożytności rzymskiej stanowiły ważny argument w brytyjskich zmaganiach o zniesienie niewolnictwa.

Słowa kluczowe: prawo angielskie; prawo rzymskie; niewolnictwo; abolicja.

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JOHN MITCHELL KEMBLE'S ANGLO-GERMANIC LEGAL HISTORIOGRAPHY

Abstract. Ideas about legal and constitutional systems in the British Isles, based upon a native genius, and ultimately upon the racial composition of the nation(s), were developed and deployed during the nineteenth century. The work of John Mitchell Kemble can be counted here amongst the developers of the literature informing this evolving historiographical norm of the Common Law tradition. Kemble's work was fundamental to the establishment of a historical theory which underlay the development of the Common Law and its institutions with a specific and conscious Germanic attribution and constructed derivation. Kemble's role was critical, in this creative discourse, as a polymath aggregator, whose work crossed modern-day conceptions of disciplinary boundaries. The developed and acquired Germanic historico-legal convention consistently emphasised a narrative of the Common Law's uniqueness, and it was a tradition which eventually gained a fundamental intellectual position.

Keywords: Legal History; Legal Theory; Historiography; Anglo-Saxon Laws; Methodology.

1. INTRODUCTION

Over the course of the nineteenth century, with the emergence of constitutional theory and legal history, certain ideas about legal and constitutional systems in the British Isles based upon a native genius, and ultimately upon the racial composition, of the nation(s) were developed and deployed – both by serious scholars and by polemicists. Put simply: the existence of an elemental Germanic constitution, carried as a birthright by Anglo-Saxon invaders and planted on British soil, and whose ancient roots firmly anchored the populace and the polity of the nation, was held to have ensured the development of a free and independent state which, over time, became the ideal-type of modern democratic governance. This ideal-type was to be contrasted, on the one hand from the autocratic centralisation of Roman-derived continentalism, and on the other hand from undirected and uncivilised Celticism of the wild and wet fringes. The work of John Mitchell Kemble, and then of Freeman, leading to that of Stubbs and Maitland, and so many others, can all be counted here amongst the developers of the literature informing the evolving historiographical norm

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of the Common Law tradition (Maine 1861; Maine 1875; Maine 1883. On Maine, see Cocks 1988; Mantena 2010. A more recent and concise account in Lobban 2012, 4–13). This norm which Maitland ultimately designated "Die Germanische Rechtsgeschichte" (Fisher iii 1911, 457).

The acquired historico-legal conventions of the Common Law, as ostensibly revealed by the Coke-Hale-Blackstone rectilinear historiographical descent, congruently emphasised a narrative of the Common Law's unique growth and status. It was a pedigree which, by the mid nineteenth-century, had gained a primary intellectual position. Although (of course) its position was never simply axiomatic – the historiography of the Common Law was by degrees established as a dominant theory in a context of other competing theories which vied for acceptance. During the early part of the nineteenth century this particular historico-legal model had not yet so dominated the historico-legal epistemological environment so as to deprive alternative theories and approaches some space for development. For example, against the sere conventionality of this Common Law orthodoxy; of secure belief in an "ancient constitution" in the distant (Anglo-Saxon) past and the subsequent unbroken continuity of limited monarchy, parliament and the rule of the common law throughout England's history; there also stood competing schools of historical jurisprudence, including the historical school of Friedrich Carl von Savigny maintaining that law was the product of *Volksgeist* (Kantorowicz 1937; Haferkamp 2018), and (conversely) the anti-historical positivist school led by Jeremy Bentham and John Austin (Millon 1989, 669). Although Bentham was somewhat older, these scholars were John Mitchell Kemble's immediate contemporaries, and all offered possible alternatives to the ancient constitution of Common Law legend. This article seeks to demonstrate, accordingly, how the work of Kemble was fundamental to the establishment of a historical theory which underlay the development of the Common Law and its institutions with a specific and conscious Germanic provenance.

The article begins with a brief biography of John Mitchell Kemble, situating the man and his work, and then proceeds to consider Kemble's part in the development of a Germanic pedigree in British history, legal traditions and historiography. The initial focus is on Kemble's published work, and his public engagement with these intellectual cultures. There are then some questions which require further consideration, in relation to how we might make contact with Kemble's influence (or otherwise) on these legal, historical and academic cultures, from his unique, individual and arguably marginalized position. These questions afford the opportunity to look beyond Kemble's published works, into some archival materials, which will enable us to think through these issues more in the round.

2. JOHN MITCHELL KEMBLE: A BRIEF BIOGRAPHY[1]

John Mitchell Kemble was born on the 2nd of April, 1807 and was the eldest son of the actors Charles Kemble and Maria Theresa Kemble (nee De Camp or De Fleury). The Kemble family was a very famous thespian clan: the most famous of his near relatives were his uncle John Philip Kemble and his aunt Sarah Siddons, but a great many of his extended family were also celebrated actors. Kemble's sister, Fanny, who was also an actor, became in later life a prominent slavery abolitionist.

Kemble's initial schooling was with the lexicographer Charles Richardson, at his Clapham Common school, and it is possible that this early connection inspired in Kemble his passion for philology. From Clapham Kemble went to the grammar school at Bury St. Edmunds, and from there in 1826 he was admitted to Trinity College Cambridge. Among his friends at Cambridge was Alfred (later Lord) Tennyson. Although he apparently read much, and widely, Kemble apparently would not follow the prescribed curriculum and when he was sent up for examination in 1829 his degree was deferred pending further assessment. Kemble was also, around this time, admitted to the Inner Temple, however he evidently only studied those parts of the law which expounded legal history or ancient customs, and there is no evidence to indicate that he completed the Readings. Afterwards he travelled to Heidelberg and Munich, and it was during this trip to the Germanic states Kemble began to explore Teutonic philology.

On his return to England, and Cambridge, he graduated with the Bachelor of Arts in 1830, and later proceeded to Master of Arts in 1833, with the ostensible intention of taking holy orders. He was a member of the Apostles Club. Also at this time, 1830–31, Kemble joined a number of other young English gentlemen in the futile attempt to aid General Torrijos in his rebellion against the Spanish King Ferdinand VII; but in fact he travelled only as far as Gibraltar – and according to his sister Fanny he spent his time there "smoking, and drinking ale and holding forth on German metaphysics" (Kemble 1878, 62, 83. On Kemble see Lubenow 1998).

Abandoning his plans to take holy orders, in 1831 Kemble then travelled to Göttingen (and other places in Germany) to study under philologists, principally Jacob Grimm. His reputation as an Anglo-Saxon scholar was established by the publication of his edition of the poems of *Beowulf* in 1833, and this was reinforced in the following year by the delivery of a course of lectures on Anglo-Saxon language and literature at Cambridge. These lectures were, significantly, the subject of severe criticism in a pamphlet entitled *The Anglo-Saxon Meteor: a Plea in Defence of Oxford*, seemingly authored by Joseph Bosworth, on the basis that Kemble was unduly influenced by Danish

[1] Wiley 1971, 5–18; Burrow 1981, 162–163.

and German scholarship. The criticism did not, however, appear to have had any destructive effect on Kemble's reputation.[2]

From 1835 to 1844 Kemble was the editor of the *British and Foreign Review*. In about 1836 he married Nathalie Auguste, daughter of Professor Amadeus Wendt of Göttingen, and after their marriage Kemble appears to have lived in London and worked at transcribing Anglo-Saxon charters in the British Museum and various collegiate and cathedral libraries. Much of this work was later published in his *Codex Diplomaticus*, which was published in six volumes between 1839 and 1848. By 1847 Kemble was working on his *Saxons in England* (published 1849); but after this time it appears that he spent most of his time in Germany, chiefly in Hanover where, in 1854, he was engaged to conduct archaeological investigations around Luneburg and to arrange and catalogue the collections in the Royal Museum.

Returning to England, he sent accounts of his discoveries in Germany to the Society of Antiquaries and to the Archaeological Institute, the sum of which was eventually published in 1857 with the title *Horae Ferales, or Studies in the Archaeology of Northern Nations*. Following this, the organising committee at the Art Treasures Exhibition at Manchester employed him to curate the collection of Celtic and Roman antiquities for them. In February 1857 he went on this business to Dublin, where he delivered an address on archaeology at the Royal Irish Academy. While in Dublin he apparently "over-exerted" himself, caught cold and died on the 26th of March 1857.

The publication of Kemble's collection of documents belonging to the Anglo-Saxon period may be said to form the foundations of much of the knowledge of the ensuing centuries' scholarship of the institutions, laws and customs of the English before the Norman Conquest. In particular, Kemble's *Codex Diplomaticus*, containing over 1,400 documents, set a model for the future editors of charters and other ancient documents. It is conspicuous for its careful attention to detail, and (where applicable) its interpolation of critical commentary. Together with his *Saxons in England*, which despite its sometimes tendentious conclusions, was regarded as the finest source for pre-Norman material and commentary until the publication of Stubbs's *Constitutional History* in 1873.

In addition to the *Codex*, the *Saxons in England* and *Horae Ferales*, Kemble published another thirteen monographs, mostly covering Anglo-Saxon and antiquarian subjects. Kemble's other remaining published work is to be found in journals. He contributed to a wide range of periodicals, publishing approximately fifty discrete articles, although the bulk of his contributions are to be found in the *Foreign Quarterly Review*, the *British and Foreign Review*, *Archaeologia*, the *Journal of the Royal Institute* and *Fraser's Magazine* (See Dickins 1938, 31–36).

[2] See *Gentleman's Magazine*, new series, 1834, i 391 sqq; *Gentleman's Magazine*, new series, 1834, ii 483; *Gentleman's Magazine*, new series, 1835, i 43.

3. KEMBLE'S PART IN THE DEVELOPMENT OF A GERMANIC PEDIGREE IN BRITISH HISTORY, LEGAL CULTURES AND HISTORIOGRAPHY: THE PUBLISHED AND PUBLIC SIDE

As we have noticed, the focus of Kemble's studies was directed towards the Anglo-Saxon period through the influence of Jacob Grimm, under whom he had first studied at Göttingen in 1831. Kemble's comprehensive knowledge of the Teutonic languages, and his critical proficiencies, were of course shown in his translation of the Anglo-Saxon poem of *Beowulf* (1833). Kemble's *Codex diplomaticus aevi Saxonici* (1839–1848), and his *History of the Saxons in England* (1849), then set out a new direction for English scholarship: one which was squarely oriented towards a Germanic pedigree in British history, culture and historiography. Kemble's historical world-view can be expressed thus: the kingdoms formed by the successor nations, including England, out of the Roman Empire, were connected with it by the adoption of many institutions, and monarchical authority based on these imperial rules underscored the advancement of the barbaric kingdoms; however in England it was the distinguishing legal institutions of the Germanic communities which prevented imperial traditions and customs from leading to absolutism. Underlying this critical and bivalent relationship was a racial *grundnorm* which situated a distinctively Teutonic Britain as the factual foundation of meaning and import.

As indicated, Kemble was a prolific writer, and almost as prolific a publisher. Reckoning on Dickins' bibliography (Dickins 1938, 31–36), he was the author of sixty-four discrete articles or monographs, some in multiple volumes, published between 1832 and 1863. The scope of the present discussion precludes a detailed examination of the full extent of these writings, and so it will be necessary, and it is hoped sufficient, to confine examination to some analysis of Kemble's two major oeuvres on Anglo-Saxon laws and institutions: the *Codex Diplomaticus Aevi Saxonici* and *The Saxons in England*.

The *Codex Diplomaticus* was, and remains to this day, the only thorough and wide-ranging collection of Anglo-Saxon charters, deeds, grants and other documents covering the entire period from the late seventh century until the Norman Conquest. Its arrangement is somewhat irregular, owing to the fact that as Kemble worked, on compilation, editing and commentary, new discoveries were made by him, and therefore included (out of order, or sequence, or taxonomy) as successive volumes – six over a period of nine years – were finalised and published. Indeed, in the preface to the sixth volume Kemble mentioned that he still had many charters still unprinted, and to the end of his life he hoped to publish an enlarged and corrected edition of the *Codex*. The scope of the work, encompassing more than 1,400 documentary artefacts, transcribed, plus commentary, the fastidious and at times painstaking attention to detail, and concreteness of philological exegesis mark out the *Codex* as a work of astonishing accomplishment, setting it

apart from anything which had come before. It is, even so, possible to be critical of Kemble's methods and scholarship – and Maitland himself was one such critic in relation to Kemble's standard of editing of legal documents. All the same, Kemble claimed, entirely defensibly, that in his *Codex*:

> "The extraordinary amount of information to be derived from these documents, renders their publication an era in the studies of Teutonic scholars; for law, language, and history, they are full of data, without which no enquiry in this field, however industrious and conscientious, could possibly be successful; … though it belongs immediately to England, it contains many notices which will be valued both north and south of the Elbe." (Kemble vi 1848, v)

and this was a declaration, in its general tenor, which Maitland did not dispute:

> "to say at once that no one who has felt the difference between genius and industrious good intentions can ever differ with Kemble lightly or without regret. Kemble's work often requires correction; but if Kemble's work had not been, there would have been nothing to correct" (Pollock and Maitland 1898, 32)

As important, and certainly cutting-edge, as the *Codex* was – contemporaries most widely knew Kemble as the author of *The Saxons in England*. Indubitably written in a more accessible style than the *Codex*, this two volume work (still totalling near 1,100 pages) traversed the properties and aspects of Anglo-Saxon history and society rather than attempting to present a chronology or narrative of history. As such the work can be seen as thematic, its topics and divisions grouped around the significant legal institutions of land ownership, relationships, social hierarchies and economic power. It is, nonetheless, marked by the same rigour towards sources and scaffolded by Kemble's synthesis of historical, legal, literary and archaeological perspectives. So, more strongly and obviously than in the more methodological and technical *Codex*, Kemble's racial legal historiography, exemplified and encapsulated by the concept of *volk,* in *The Saxons in England* makes clear his thesis that the Anglo-Saxons were part of a collective Germanic culture and legacy, not as a separate race, but compelled by the evidence of the known historical and documented facts of European Germanic tribes evidencing how the ancestors of the English existed.

In addition to Kemble's published works, there is also a large body of unpublished papers, some mere fragments and brief notes, while others are virtually complete encyclopaedias, running to thousands of pages. We will turn, if ever so briefly, to these towards the conclusion of this article – if only to glimpse these peripheries of Kemble's thinking about some of the topics germane to this treatment of his historiographical significance.

Kemble was not, of course, the first English writer to appeal to Germanic antecedents. Why is it that John Mitchell Kemble, and not these earlier writers, is advanced here as the avant-gardist, given a tradition of English Germanism which was at least one hundred and fifty years established by the time of Kemble's arrival on the academic scene? It is because Kemble was really the first English scholar

to eschew Tacitus as the initiator of Germanic tradition; and the first to examine, thoroughly and methodically, Anglo-Saxon sources from a self-consciously legal and historical perspective. Although it would be true to say that these earlier sources had, from time to time, been referenced by some of the less politicised writers, significantly Henry Spelman, Kemble brought his knowledge of the language to bear in a way which transformed English Germanism from a political gloss to a genuine historiography.

For at least one hundred and fifty years prior to Kemble's time there had been a tradition, in English, of appealing to a Germanic version of antiquity to create a lineage of respectable intellectual convention in history, the law and particularly politics. As Samuel Kliger has shown, in his now almost unnoticed *The Goths In England* (Kliger 1952. See also Kliger 1945), the seventeenth-century champions of parliamentary prerogative created a Gothic myth, for propaganda objectives, according to which the Goths appeared as heroic progressives and prototypical democrats of the ancient world. Beginning, typically, with Tacitus' *Germania*, writers such as Richard Verstegan whose *Restitution of Decayed Intelligence* (first published in 1605, and then republished four times up to 1673), firmly brought the English folk within the wider gens of a Germanic race and created a separate (and older, and thus more lawful) tradition to parvenu Royalist Normanism. Other early writers included some of the members of the so-called Society of Antiquaries, such as Francis Tate, John Dodderidge, William Camden, William Lambarde, Henry Spelman and Robert Cotton, whose collective works were first published (in part) in 1658, but which were written down and spoken in private conferences about fifty to seventy years earlier (Piggott 1967, 11–15. See also Stuckey 2012 and Stuckey 2006.). Kliger devotes a lengthy chapter to the originators of this Gothic apologue, placing especial emphasis on the role of Nathaniel Bacon, principally in his *Historical and Political Discourse of the Laws and Government of England* (1647), along with Thomas Hobbes and John Milton, as the chief intellectual polemicists of the parliamentary cause – every one, unfailingly and exclusively, referring back to the fons of Tacitus for the ancient, and thus precedential, "history" of Germanic democracy (Kliger 1952, 112–209).

Kliger's work foreshadowed that of Hugh MacDougall – his *Racial Myth in English History: Trojans, Teutons and Anglo-Saxons*, which was published in 1982, advanced the Germanic exegesis thesis of English historiography. With Kliger, MacDougall's presentation of an almost identical line of descent, from the classics to the politicised legalities of the seventeenth-century, traces the generated Teutonic viscera of Whig historiography: culminating, for MacDougall, with the publication by Sharon Turner of his *History of the Anglo-Saxons* in four volumes between 1799 and 1805, where "one can find all the ingredients necessary for an explicitly racist interpretation of English History" (MacDougall 1982, 96).

We shall return to this question of race shortly, however, one distinct topic raised by MacDougall, by way of demonstrating Kemble's representation of early

Saxon forms of social and legal organisation is that of the Mark – ostensibly the *sine qua non* of elemental Teutonic landed and legal social bonding. MacDougall notes, relevantly, that Kemble's treatment of the Mark was derived more from philological abstraction than from tangible evidence – and the criticism (on this topic, at least) is justified. Equally justified, however, is the fact that despite evident weaknesses on this topic, Kemble's thesis was, as we shall see, adopted and propagated by the likes of Freeman and Stubbs (MacDougall 1982, 96).

Turning the frame of reference from the origins of authority to the place of language, Clare Simmons' *Reversing the Conquest*, published in 1990, completes a portrayal of Kemble's antecedents with a focus on how the control of the written vestiges of culture was turned to historiographical command of a present, and enduring, discourse. Simmons, correctly, discounts the significance of Sharon Turner, on the basis that he had no interests in the Saxons outside of England and did not utilise Germanic literary source materials, and she gives precedence to that of Kemble, and (to a lesser degree) that of Benjamin Thorpe. The assessment and evaluation is apposite, and insofar as the work of Thorpe (1782–1870) is relevant for our purposes here, it needs to be admitted that his very fine scholarship was neither focused on any explicitly legal historiographies nor on any specifically Germanic tradition – his work being dedicated to Scandinavian and linguistic heredities. Nor can it be said, as Simmons readily acknowledges, that Thorpe's works, which were very poor sellers, had any really significant impact on wider or longitudinal intellectual consciousness (Simmons 1990, 16–19, 49 and 66–70).

Kemble thus established a racial archetype, solidly supported by attentive documentary scholarship, as well as archaeological data (Williams 2006)[3], which was assumed and amplified by others over the course of the latter part of the nineteenth century. Its chief proponent, and it is not too extravagant even to say polemicist, was A.E. Freeman (1823–1892): the famous English historian, and Liberal politician. He held the position of Regius Professor of Modern History at Oxford from 1884, and published 239 distinct works, perhaps the best known being *History of the Norman Conquest* (published 1867–1876). However, while Kemble certainly regarded the peoples subdued by the Germanic tribes as 'degenerate races' (Kemble 1876, 232), Freeman's racial essentialism was, by contrast to that of Kemble's, even more developed, specific and all-embracing. As 'an ardent

[3] "It has often been implicitly assumed that nineteenth-century antiquarians and archaeologists constructed their interpretations in a theory-free environment because of their focus upon the description and illustration of objects and sites. In contrast with the speculations of eighteenth-century antiquaries, mid nineteenth-century archaeologists emphasised their reliance on facts and the scientific nature of their discipline. This is illustrated by Kemble's efforts to contrast his own 'rational' interpretation to those made by 'curiosity hunters' of earlier centuries who failed to adequately record their excavations and finds … Kemble explicitly warned his archaeological colleagues to refrain from theorising … Yet as we have argued, historical and philological theories inspired Kemble's archaeology." (Williams 2006, 7).

Teutonist' Freeman can be seen as having cultivated his antipathy toward the non-Aryan, and even towards non-Germanic Aryans such as the Celts. Kemble's theory of laws, institutions and government certainly sprang from his theory of race, but it is apparent, for example, that his representation was in some respects idealised rather than entirely empirical and that, for instance, Kemble's handling of the *Mark* as a material economy was particularly abstracted (Dewey 1972, 301–302[4]).

These traits, nonetheless, exemplify the distinctive qualities of Kemble's legal history: not only in his broad view about the compelling inspiration of the Germanic idea as an archetype of exceptionality; but also in his method and practice as an historian of legal forms. This premise sets Kemble, foreshadowing Freeman (Freeman 1872, 40. This essay was first published in 1860) and ultimately Powicke (Powicke 1931, 15 and 23. See also Prestwich 1963, 41–43), and so many others, and in the almost dynastic sense prefigured by Levine, as the innovative and prototypical English proponent of insular uniqueness over continental uniformity, of national progress over transnational fusion (Pocock 1987, 385; Levine 1986, 10–11 and 77ff. See also Hollister 1961, 642ff; Melman 1991, 578–584; McClelland 1971, 43–44 and 102). Burrow's seminal *Liberal Descent* devotes an entire chapter to 'The Germanic Inheritance', and there Kemble's work is singled out as the "watershed" – with Kemble as the innovator both in terms of Germanic hypothesis and applied method. In Burrow's account it was Kemble who made the break from the earlier (late eighteenth-century) "self-congratulatory racialist historiography" which was "fanciful and ephemeral" to a more serious, research-based scholarship of documentary analysis (Burrow 1981, 116 and 120).

However simply because the debt, in establishing the framework for the exclusivity theory of English history to be fashioned into advanced histories, which was owed by future historians to Kemble can be recognised, it is important to not fall into the very kind of anachronism and teleology for which Whig history is often criticized. In Blaas' adroit treatment of the ideas and conflicts within Victorian historiography, *Continuity and Anachronism*, this tension is specifically considered. Furthermore, Blaas portrays, as the key to this essential characteristic of historiographical anachronism and teleology, the determined political preoccupation of Freeman as campaigning intellectual polemicist (Blaas 1978, 90–100 and 109–110. Cf. Collini, Winch, Burrow 1983, 186–188). More

[4] As detailed by Dewey: "The building-blocks of Kemble's Saxon society were the village communities; the basic units in a hierarchic political federation. Existing families threw out fresh households within the community; existing villages threw out fresh villages within the waste; and the process was repeated until the family became a tribe, and the tribe a kingdom." (Dewey 1972, 301–302; Dewey cites Kemble 1849, 5–6 and 39–40). Dewey also cites, interestingly, Francis Palgrave (Palgrave 1867) although Dewey does not cite a specific page reference to Palgrave at this point or indeed expand upon the noted connection (See also, on this specific point, Burrow 1988, 64–69).

precisely however, but nonetheless consistent with the estimation of Blaas, it is critical to acknowledge that Kemble's influence on the larger figures of Stubbs, Freeman and Maitland needs to be characterised as more intricate and nuanced – as Blaas demonstrates with exegetic deftness (Blaas 1978, 154–157 and 161–171; Stubbs 1883, 187–188; Freeman 1872, 272–273; Pollock, Maitland 1898. See also Frantzen, Niles 1997).

Certainly, in the second half of the nineteenth century, and extending into the early years of the twentieth, two remarkable Professors dominated the scholarship of English medieval history. As Campbell explains, William Stubbs and his younger contemporary Frederic William Maitland were, respectively, the establisher of medieval history as a subject for study in British universities, and the extraordinary historian of English law. Both owed much to German historiography, and their commitment was part of an Anglo-German intellectual affiliation in the study and appreciation of history. Although this relationship was wrecked by the First World War, and the underpinning theory (insofar as it related to and depended upon the Teutonic origins of representative government) was publically debunked by Beard (Beard 1932; Fleming 1997), the legacy and tradition of Anglo-Germanism generally, and Anglo-German legal historiography specifically – with its origins in Grimm and Kemble, settled by Stubbs and Maitland, and upheld by disciples such as Tanner, Powell, Tait, Tout, Powicke, Trevelyan and Milsom – remained strong enough to organize much of the intellectual paradigm of constitutional history and associated historico-legal discourse throughout the twentieth century (Campbell 2000. See also Bentley 2005. On Maitland, in particular, see Maitland 1897, 365 and Fisher ii 1911, 313–365. See also Hudson 2007. On Stubbs, see Stubbs 1883, i and 2–3. Similarly, Vinogradoff 1893 and Vinogradoff 1905, 25–27). It is a perspective, unsurprisingly, not at all lost on Welsh scholars (Dawkins 1882; Williams 2014; Davies 1979, 14–24; and more prosaically, for example, Dawkins 1889, 6). Lobban's 2012 survey of this historiography of the Common Law, although differing on the position of Freeman vis-à-vis "Germanic method", nonetheless corroborates this solid genealogy of English legal history since the late nineteenth century (Lobban 2012, 4–13).

4. KEMBLE'S PART IN THE DEVELOPMENT OF A GERMANIC PEDIGREE IN BRITISH HISTORY, LEGAL CULTURES AND HISTORIOGRAPY: THE UNPUBLISHED AND PRIVATE SIDE

John Mitchell Kemble did not live to a great age, nor was it his fortune to fully develop and realise many of the projects which he commenced and which might have extended his extant works into a more mature and worked-through corpus of legal and historical scholarship. His death, at age 49 in 1857, cut short a career which had not always met with institutional recognition. He was never successful

in obtaining a permanent academic post, and in this sense it is fair to consider him as an outsider to the traditional academic establishment. In terms of how the lack of sinecure affected his publishing, also, Kemble's livelihood depended to a certain degree upon paid employment, for example: as the editor of the *British and Foreign Review* from 1835 to 1844; from 1840 to his death Kemble was examiner of plays, which carried a small stipend; and from commissioned work, such as his *State Papers and Correspondence Illustrative of the Social and Political State of Europe from the Revolution to the Accession of the House of Hanover* (1857).

Aside from the sixty-four distinct articles and monographs published by Kemble, there exists a quite substantial body of his unpublished materials, now dispersed. The Kemble papers are scattered in various locations, mostly in research libraries located in the United Kingdom and the USA. Professor Simon Keynes, at Trinity College in Cambridge, has catalogued the whereabouts of all known Kemble manuscripts.[5] The majority of these MSS are letters, fragments and short notes; however there is also a fairly significant number of items which represent preparatory and draft work of some considerable detail and development. Again, constrained by the scope of the present commentary, it is possible to highlight only a small selection of these artefacts, for germane demonstrative purposes; however some of Kemble's letters are, in fact, very important in evidencing his German source materials, emphases and influences.[6]

Possibly more important amongst Kemble's unpublished papers, from the perspective of this article[7], are six volumes held by the Library of Congress in Washington DC.[8] These volumes include three volumes which are notebooks from Kemble's time at Cambridge as an undergraduate, from about 1827, and demonstrate his early thinking about Anglo-Saxonism, and his first contacts with German scholarship. Then, in two volumes which are entitled "Anglo-Saxon Notebook", both of which appear to date from about 1832, we can see the development of this Germanic scholarship. And then, most significantly, the sixth item (dated 1832–1833) is a very major volume entitled "Collections for the Early Law of England"[9], which runs to 931 folios, representing the draft of an encyclopaedic work which was never realised or completed. In it Kemble is very conscious of this work improving and correcting earlier writers: he forgives Spelman, Coke, Selden and Somner (because they had limited access

[5] http://www.kemble.asnc.cam.ac.uk.

[6] Particularly those at Oxford, Bodleian Library MS Eng. lett. B. 4 (Fols. 68–79), Cambridge University Library MS Add. 7652 II CC / 32 and British Library BL Add. MS 36531 and BL Add. MS 52184 fols. 194b and 204b.

[7] Excepted here, but worthy of note, is his now famous, possibly even infamous "Gibraltar Diary" held at the Pierpont Morgan Library, New York City, reference MA 3321.

[8] LAW MSS 8–13.

[9] LAW MS 12.

to manuscript sources); but he does not likewise forgive Palgrave and Turner.[10] The overall organisation is by named topic – usually separated by some blank pages – so obviously Kemble set it out, with space between each topic so he could add more detail later. Sometimes this is evident, with a different ink and style. Other times there are just short entries, then many blank pages (when he did not come back with more). There are a few instances of just a heading, then nothing but blanks. The work is replete with references to German scholarship and original research.[11]

To this compendium we can also relevantly add a number of Kemble's annotated collections, such as two held by Cambridge University Library[12], and Kemble's holograph annotations on his own copy of *Codex Diplomaticus*, held at British Library[13]. Kemble's unpublished review of Jakob Grimm's *Deutsche Grammatik* is similarly of evidential value, showing this intellectual commitment.[14] Lastly, it is important to notice from the point of view of race theory, Kemble's so-called "Races of Europe" essay[15], and particularly the part entitled "The Kelts and Germans" (Kemble's own title) – its more detailed racial theory / history / archaeology, setting out Kemble's self-conscious way of doing historical method. It is heavily footnoted and referenced – a nearly finished draft, almost ready for submission for a publication which never eventuated. More clearly, and more directly, than in published references, Kemble's reliance on, and elaboration of, German sources and research, is strongly evident in these, and many other, unpublished manuscript sources.

5. CONCLUSION

This article has argued ideas about legal and constitutional systems in the British Isles, based upon a native genius, and ultimately upon the racial composition of the nation(s), were developed and deployed during the nineteenth century and that the existence of an elemental Germanic constitution, and whose ancient roots firmly anchored the populace and the polity of the nation, was held to have ensured the development of a free and independent state as the ideal-type of modern democratic governance. The work of John Mitchell Kemble, and many

[10] LAW MS 8–9.

[11] For example, and relevantly to our discussion, in relation to the "Mark" LAW MS 441.

[12] Cambridge University Library, GG. 5. 35 and Tracts MS. Ii. 1. 33.

[13] BL Add. MS 32126 – BL Add. MS 32131.

[14] Originally set out for the *Foreign Quarterly Review*, but never published, eventually printed in 1981 (Wiley 1981).

[15] Amongst the loose papers held at the Rubenstein Library (Special Collections) at Duke University (North Carolina), in the fourth folder of the loose papers constituting the "John Mitchell Kemble Papers, 1829–1857".

others, can all be counted here amongst the developers of the literature informing the evolving historiographical norm of the Common Law tradition. Kemble's role was critical, as an innovator, in this creative discourse, not just as an historian, or a linguist, but really as a polymath aggregator, whose work crossed modern-day conceptions of disciplinary boundaries. It is worth citing the recent work of Howard Williams on this point:

> "…the archaeological interpretations and practices of John Mitchell Kemble were influenced by his philological and historical writings in a variety of ways. He was not simply *describing* his discoveries in an empirical or objective manner, but constructing a theoretical interpretation drawing on a range of sources from his wide ranging studies of northern European societies with an explicit Germanist and Anglo-Saxonist ideological programme in mind. Heathen graves were used as a metaphor for Anglo-Saxon racial and socio-cultural status set against a background of origins in northern Germany. … by comparing Kelts and Saxon in terms of successive phrases [sic] or invasions, he seems to implicitly assert the superiority of the latter over the former. … Kemble's use of archaeological evidence was not simply a response to his existing beliefs and ideas gained from his other studies. His archaeological practice and theory reflects the use of material culture and cemeteries as a powerful metaphorical representation of a clustering of racial and philological values that Kemble believed reflected the primitive, pagan, noble Teuton. By turning to archaeology, Kemble was providing the origin myth of the Anglo-Saxons with new historical legitimacy and a physical component." (Williams 2006, 11. See more generally Kohl, Fawcett 1995; Brooks 1998)

The developed and acquired Germanic historico-legal convention consistently emphasised a narrative of the Common Law's uniqueness, and it was a tradition which eventually gained a fundamental intellectual position. This article has sought to demonstrate, accordingly, how the work of Kemble (both published, and unpublished) was fundamental to the establishment of a historical theory which underlay the development of the Common Law and its institutions with a specific and conscious Germanic attribution and constructed derivation.

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Michael Stuckey

ANGLO-GERMAŃSKA HISTORIOGRAFIA PRAWNICZA JOHNA MITCHELLA KEMBLE'A

Streszczenie. W dziewiętnastym stuleciu doszło do rozwoju i rozprzestrzenienia się różnych koncepcji dotyczących porządków prawnych i ustrojowych Wysp Brytyjskich, które wywodziły się z ducha narodowego, a ostatecznie opierały się na rasowej kompozycji narodu (bądź narodów). John Mitchell Kemble może być zaliczony w poczet twórców literatury prezentującej ten ewolucyjny wzorzec tradycji *common law*. Działalność Kemble'a była kluczowa dla ustanowienia doktryny historycznej, która leży u podstaw rozwoju *common law* oraz jego instytucji, ze szczególnym i świadomym uwzględnieniem germańskich oraz pochodnych wpływów. Pozycja Kemble'a była ważna, w trakcie twórczego dyskursu, jako erudycyjnego zwornika, którego działania wykraczały poza współczesną koncepcję ograniczonych dyscyplin naukowych. Rozwinięta i przyjęta germańska konwencja historyczno-prawna konsekwentnie kładła nacisk na narrację dotyczącą wyjątkowości *common law*. Była to również tradycja, która ostatecznie zyskała fundamentalne znaczenie dla nauki.

Słowa kluczowe: historia prawa; teoria prawa; historiografia; prawa anglosaskie; metodologia.

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SAMUEL RUTHERFORD – MONARCHIA PRAWA CZY MONARCHIA ŚWIĘTYCH?

Streszczenie. Samuel Rutherford – szkocki prezbiteriański pastor i myśliciel polityczny okresu angielskiej wojny domowej – uważany jest powszechnie za jednego z teoretyków koncepcji monarchii prawa, ustroju mieszanego oraz prawa oporu. Wszystkie te idee, konstytuujące nowożytny angielski konstytucjonalizm w opozycji do monarszego absolutyzmu, wywodzi z koncepcji umowy społecznej, co czyni zeń autora, do którego odwoływali się dla przykładu Ojcowie Założyciele w swym sprzeciwie wobec arbitralnej władzy metropolii. Tymczasem analiza całości jego dorobku każe poddać w wątpliwość wiele obiegowych opinii na temat autora *Lex, Rex*. W niniejszym artykule autor dowodzi, że hermeneutyczna analiza teologii politycznej Rutherforda skłania do wniosku, że nie był on teoretykiem monarchii prawa w jej powszechnym znaczeniu, lecz w istocie teonomicznej wizji państwa.

Słowa kluczowe: Rutherford; monarchia prawa; angielska wojna domowa.

Król, jako Król, powinien mieć z sobą księgę prawa zasiadając na tronie, by była jego przewodnikiem.[1]

Samuel Rutherford, *A free disputation against pretended liberty of conscience*

1. WPROWADZENIE

Monarchia prawa jest bez wątpienia jednym z fundamentalnych zagadnień związanych z klasyczną angielską refleksją polityczno-prawną. Za sprawą choćby Henry'ego Bractona, Johna Fortescue'a, czy Thomasa Smitha rozważania nad zakresem monarszej prerogatywy oraz uprawnieniami poddanych stały się jądrem argumentacji na rzecz takiej czy innej wizji ustroju politycznego. Były też asumptem do analizy istoty i genezy prawa królestwa oraz jego relacji z osobą monarchy. Niewiele w tym względzie zmieniło odłączenie się przez Henryka VIII od wspólnoty katolickiej, a nowa reformowana anglikańska teologia, choćby za sprawą Richarda Hookera, dalej tkwiła w siatce pojęciowej wyznaczonej przez wcześniejszych fundatorów tego stylu myślenia o polityce i prawie. Stylu, który przemożny wpływ kładł

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[1] Tłumaczenia fragmentów dzieł pochodzą od autora artykułu.

na tradycję polityczną wspólnoty i jej zaszłość, w tle mając jedynie teologiczny kontekst, w którym funkcjonowała, był on bowiem przedmiotem niekwestionowanego konsensusu i naturalnym normatywnym środowiskiem, w jakim prowadzone były rozważania nad monarchią prawa. Choć bowiem *Akt Supremacji* uczynił z króla Anglii zwierzchnika kościoła, to zachował on w istocie katolicką doktrynę polityczną i społeczną, dostosowując je jedynie do nowych okoliczności i używając pojęć wypracowanych jeszcze w średniowieczu. Nie wszyscy jednak pojęcia te interpretowali w tym samym duchu, nadając im mimowolnie lub z premedytacją całkowicie nowy sens, tworząc koncepcje polityczne, które tylko z nazwy odwoływały się do starej i szacownej angielskiej tradycji. Klinicznym niejako przykładem może być tutaj postać Samuela Rutherforda, prominentnego szkockiego prezbiteriańskiego teologa, którego filozofia, a właściwie teologia polityczna, znalazła się w centrum angielskiej debaty za sprawą konfliktu Karola I z Parlamentem. Już wcześniej widoczna była szkocka infiltracja angielskiej debaty teologicznej i politycznej (choćby przez myśl Johna Knoxa i George'a Buchanana), lecz za sprawą *Uroczystej Ligi i Przymierza* oraz *Westminsterskiego Zgromadzenia Świętych* refleksja polityczna północnego sąsiada zdominowała dyskurs, jaki toczył się w okresie przed i w trakcie Wielkiej Rebelii. Zapewne z tego powodu najważniejsze dzieło polityczne Rutherforda – *Lex, Rex* (opublikowane w trakcie negocjacji pomiędzy królem i parlamentem w Oxford i Ubridge, Campbell 1941, 211) – do dnia dzisiejszego uchodzi za jeden z kamieni węgielnych koncepcji monarchii prawa, ustroju mieszanego oraz prawa oporu. Wszystkie te idee, konstytuujące nowożytny angielski konstytucjonalizm w opozycji do monarszego absolutyzmu, wywodzi z koncepcji umowy społecznej, co czyni zeń autora, do którego odwoływali się dla przykładu Ojcowie Założyciele w swym sprzeciwie wobec arbitralnej władzy metropolii. Diagnoza ta jest jednak spowodowana faktem, że na myśl Rutherforda patrzy się jedynie lub przede wszystkim przez pryzmat jego najważniejszego dzieła. Tymczasem analiza całości jego refleksji odnoszącej się do przedmiotu niniejszej analizy każe poddać w wątpliwość wiele obiegowych opinii na temat autora *Lex, Rex*. Stąd moim celem będzie wykazanie, że hermeneutyczna analiza teologii politycznej Rutherforda skłania do wniosku, że nie był on teoretykiem monarchii prawa, lecz w istocie teonomicznej wizji państwa. Na początku zarysuję koncepcję kontraktowej genezy społeczeństwa i państwa w teologii politycznej Rutherforda. Przejdę następnie do jego koncepcji ustroju i rządów prawa. W ostatniej części zestawię ją z koncepcją starożytnej konstytucji, by wykazać, że jest ona nie do pogodzenia z głoszonym przez Rutherforda absolutnym prymatem prawa Bożego.

2. GENEZA SPOŁECZEŃSTWA I PAŃSTWA

Dla Rutherforda społeczeństwa ludzkie są realizacją zaszczepionej przez Boga skłonności do jednoczenia się, będącego wyrazem społecznej natury człowieka. Skłonność tę odnajduje naturalny rozum, który Rutherford nazywa

„osądem Boga" (Rutherford 1843, 5). Jest on częścią prawa natury wiodącego ludzi ku społeczeństwu politycznemu. Lecz choć idea ta jest częścią porządku natury, to jej realizacja następuje w porządku konwencji, co w sposób istotny odróżnia społeczeństwo od rodziny, do której przynależność nie jest kwestią wyboru. Zatem, mimo że idea społeczeństwa stała się częścią ludzkiej natury przez sam akt Stworzenia, to samo powstanie konkretnego społeczeństwa ma charakter dobrowolny i wolicjonalny.

> Ponieważ – twierdzi więc Rutherford – społeczeństwo domowe jest naturalnym przykładem, tak społeczeństwo obywatelskie jest naturalne *in radice* w swych korzeniach, lecz dobrowolne *in modo*, w sposób koalescencyjny. Zakładając więc – kontynuuje – że ludzie łączą się w społeczeństwo, lub że społeczeństwo nie zawiera się w rodzinie, wtedy naturalne jest, że ludzie przyłączają się do społeczeństwa obywatelskiego, choć sposób zjednoczenia w ciele politycznym, jak mówi Bodin, jest dobrowolny (Rutherford 1843, 1–2).

W odróżnienia więc od tradycji średniowiecznej i wczesnonowożytnej, u Rutherforda społeczeństwo przyjmuje, przynajmniej na poziomie koncepcyjnym, formę dobrowolnej organizacji wolnych i równych jednostek jednoczących się dla wspólnego celu istniejącego już wcześniej w ich świadomości. Jeśliby szukać genezy tak radykalnego odwrotu od tradycji arystotelejskiej, sięgnąć należy, co istotne dla dalszej części wywodu, do charakterystycznej dla radykalnych koncepcji kalwińskich idei przymierza (*covenant*). Nie wdając się przy tym w szczegółowe rozważania, koncepcja ta doszukiwała się archetypu wszelkich ludzkich agregacji i porozumień w biblijnym Przymierzu zawartym pomiędzy Adamem i później Abrahamem a Bogiem, które stało się w kalwińskiej teologii rodzajem specjalnej konstytucji danej przez Stwórcę rodzajowi ludzkiemu. Zwłaszcza w Szkocji idea ta trafiła na podatny grunt, gdzie od dawna istniała tradycja kontraktów pomiędzy klanami i ich grupami. Związki, pakty i przysięgi zawierane były tu dla celów wspólnej obrony i polubownego załatwiania sporów. W konsekwencji powstał tam pomysł, by konstrukcję tę wykorzystać dla uzasadnienia prawowitości i celów relacji publicznych (Elazar 1996, 271), co nadaje całej szkockiej myśli prezbiteriańskiej zdecydowanie bardziej indywidualistyczny charakter. Doszło do tego dzięki przetłumaczeniu języka biblijnego na język polityki, by zaaplikować starotestamentowe prawdy do porządku społecznego. W narracji tej przymierze jest moralnie uzasadnioną umową bazującą na dobrowolnej zgodzie ustanowionej poprzez przysięgę lub przyrzeczenie pomiędzy ludźmi lub ich agregacjami na zasadzie niezależności i równości stron. Zawarte jest ono pod określonymi warunkami, dla określonych celów i respektowane przez wszystkie strony. Figura przymierza służyła w ten sposób protestantom jako instrument uzasadnienia takiego, a nie innego charakteru relacji społecznych i politycznych. W tej optyce są one prostym przedłużeniem przymierza zawartego pomiędzy Bogiem i ludźmi, przekształcającego ich w chrześcijańską wspólnotę, a do samej ich istoty należy zgoda i obietnica (Elazar 1995, 22–23). Stąd samo społeczeństwo,

choć realizujące przyrodzone człowiekowi skłonności, powstaje wedle Rutherforda w taki właśnie dobrowolny i konwencjonalny sposób. Idąc dalej, wszystkie relacje społeczne, tak prywatno- jak i publicznoprawne, zostały oparte na zgodzie i wzajemnej odpowiedzialności (Miller 1956, 48–49), stąd wniosek, że organizacja kościelna i relacje pomiędzy władzą a poddanymi oparte powinny być na tych samych zasadach (Gough 1975, 84).

U Rutherforda ów kontraktualny woluntaryzm obejmuje nie tylko powstanie samego społeczeństwa, lecz także władzy politycznej. Podobnie jak rzecz ma się ze społeczeństwem, także sama idea władzy jest elementem porządku naturalnego danego przez Boga i zaszczepionego w naturze człowieka.

> Cała władza polityczna – pisze więc – wywodzi się bezpośrednio z Boskich korzeni, ponieważ: 1. Bóg uczynił człowieka istotą społeczną i ten, kto pragnie być rządzony przez człowieka, z pewnością musiał umieścić tę moc w ludzkiej naturze z dobrego powodu, jak naucza Arystoteles. 2. Bóg i natura mają na celu politykę i pokój ludzkości, stąd Bóg i natura dały ludzkości moc, by zmierzyła się z tym celem i musi nią być władza rządu (Rutherford 1843, 1).

Z samej więc społecznej natury człowieka wynika potrzeba istnienia władzy mogącej zapewnić wspólnocie przetrwanie i pokój. Jak w całej niemal tradycji reformowanej, dla Rutherforda państwo jest więc ustanowionym przez Boga porządkiem narzuconym na upadłego człowieka jako remedium na jego grzech.

> Jeśli – pisze Rutherford – wszyscy byliby bezgrzeszni, nie czyniliby innym gwałtu, prawo mogłoby rządzić wszystkimi i wszyscy ludzie mogliby je egzekwować, *agendo sponte*, przez czynienie dobra z własnej woli, to nie potrzebowaliby króla, który zmuszałby ich do tego. Ale ponieważ ludzie z natury sprzeciwiają się dobrym prawom, dlatego istnieje potrzeba władcy (Rutherford 1843, 101).

By społeczeństwo mogło trwać, musi więc istnieć siła, która zdolna będzie poskromić indywidualne rządze grzesznych ludzi i zjednoczyć ich wysiłki w jednym kierunku. Dlatego Bóg, najwyższy Pan i Król całego świata, namaszcza urzędników, by będąc Mu podlegli, sprawowali władzę nad ludem dla Jego chwały i dobra wspólnego. „Królewskie imperium – przekonuje więc Rutherford – jest zasadniczo po to, by nakarmić, kierować, obronić oraz rządzić w pokoju i pobożności (1 Tm. II.2), jak czyni to ojciec swych dzieci" (Rutherford 1843, 64). „Chrystus – pisze dalej – używa chrześcijańskich urzędników jako swe sługi, by przegonić wilki od swej trzody" (Rutherford 1649, 192). Bóg wyposażył ich więc w prawo miecza, by karali upadłych oraz nakłaniali do podążania ścieżką prawa, dobra i cnoty. Król jest zatem publicznym sługą, który chroni społeczeństwo i wykonawcą woli Boga dla dobra, bezpieczeństwa, pokoju i zbawienia ludzi. Choć więc człowiek jest z natury grzeszny, to dzięki światłu naturalnego rozumu możliwe jest powołanie do życia porządku politycznego, by skłonić ludzi do porządku i dyscypliny. Dlatego oświecone prawem natury, zjednoczone w społeczeństwie jednostki dojść muszą do konkluzji, że konieczne jest istnienie władzy wyposażonej w prawo miecza.

Analizując sposób jej powołania, Rutherford nie wątpi, że ma ona konwencjonalny charakter. Na mocy prawa natury ludzie posiadają zdolność wyznaczania sobie władców i podporządkowania się prawu. Gdy więc ludzie gromadzą się, w naturalny i oczywisty sposób pojawia się konieczność istnienia władzy, jako nieodzowna konsekwencja pragnienia samozachowania, zaszczepiona w ludzkiej duszy przez Boga. Ten naturalny, przyrodzony instynkt kieruje ludzi ku władzy powodując, że „przekazujemy naszą władzę w ręce jednego lub większej liczby władców" (Rutherford 1843, 2). Odkąd więc Bóg zaszczepił w ludzkiej duszy pragnienie przetrwania, ustanowił konieczność istnienia tych, którzy będą o nie zabiegać, ograniczając jednak równocześnie analogiczne prawo jednostki. Dlatego:

> Indywidualne osoby powołując władzę nie zrzekają się swych uprawnień, lecz zrzekają się swej władzy zadania gwałtu innym członkom wspólnoty. Zatem nie będą mieć moralnego prawa czynienie krzywdy bez kary; i to nie jest uprawnienie czy wolność, lecz służebność, ponieważ władza stosowania przemocy i czynienia krzywdy nie jest wolnością, lecz służebnością i poddaństwem (Rutherford 1843, 25–26).

W ten sposób rządzący są danym przez Boga remedium na przemoc i niesprawiedliwość będące skutkiem grzesznej ludzkiej natury – „żywym, racjonalnym, oddychającym prawem zwanym królem, sędzią, ojcem" (Rutherford 1843, 116). Ta władza wynoszenia królów jest immanentnie przypisana ludowi, którego zgoda każdocześnie legitymizuje króla.

> Władza ta – pisze – jest radykalnie naturalna, tak samo jak pszczoły (jak sądzą niektórzy) mają moc wyboru swej królowej, tak wspólnota ma naturalną władzę bronić się i ochraniać; i Bóg objawił w *Deut*. XVII. 14, 15 sposób wyboru naczelników i królów, który jest specjalnym środkiem obrony i ochrony; a lud jest głównym źródłem i fontanną władzy królewskiej (Rutherford 1843, 203).

3. USTRÓJ I RZĄDY PRAWA

O ile sama idea władzy dana jest przez Boga, będąc częścią stworzonego przez Niego porządku naturalnego, to Rutherford nie znajduje w nim żadnych wskazówek, jaki sposób jej realizacji miły jest Stwórcy. Wybór tej czy innej formy rządu należy więc do „pozytywnego i wtórnego prawa narodów" (Rutherford 1843, 2), jest więc wynikiem okoliczności mających źródło w woli człowieka (Sanderson 1989, 19). Bóg nie formułuje jednego jasnego rozkazu co do wyboru formy rządów. Prawo natury mówi tylko, że muszą być ojcowie i matki w rodzinie i rządcy w społeczeństwie politycznym. Nawet monarchia, będąca ustrojem biblijnym i elementem powszechnego doświadczeniem w czasach Rutherforda, nie ma charakteru koniecznego (Rutherford 1843, 52). „Ponieważ – pisze – wolność jest naturalna dla wszystkich, z wyjątkiem wolności od bycia poddanym rodzicom, polityczne podporządkowanie jest jedynie przypadkowe, wynikające z pewnych

pozytywnych praw ludzkich" (Rutherford 1843, 51). Dlatego kiedy ludzie przekazują władzę nad sobą w ręce jednego lub większej liczby ludzi, wtedy nie dzieje się to już za sprawą ich wolnej decyzji. Bóg wyświęca samą władzę, lecz to ludzie ustanawiają jej konkretną formę i tych, a nie innych rządców. Władza polityczna nie przynależy bowiem naturalnie żadnemu człowiekowi, ponieważ z natury ludzie nie podlegają żadnemu rządowi. Władza urzędnika powstała przez rezygnację jednostek z ich wolności jest więc sztuczna i opiera się na jakiejś formie zgody czy porozumienia (Rutherford 1843, 2). I to właśnie ma dla Rutherforda najważniejsze znaczenie, determinuje bowiem istnienie wzajemnych praw i obowiązków oraz określa charakter uprawnienia i zobowiązania politycznego. Władza rządzących pochodzi wprawdzie od Boga, lecz nie bezpośrednio, a poprzez dokonujących jej wyboru ludzi. Ma też swe źródło w umowie, czyli wzajemnym porozumieniu zawartym na określonych warunkach. Dlatego „jest to oczywiste zobowiązanie Króla wobec ludu w akcie koronacji i ludu wobec króla, jak w umowach pomiędzy panem i wynajętym sługą, czy między dwoma kupcami" (Rutherford 1649, 218–219). Z samego prawa natury wynika równocześnie, że „Bóg wyznaczył króla lub naczelnika, który troszczył będzie się o tę wspólnotę, będzie rządzić nią w pokoju i ochroni wszystkich przed wzajemnymi aktami przemocy" (Rutherford 1843, 69). Powołanie rządcy nakłada na niego zatem konkretne obowiązki i Rutherford ujmuje to następująco:

> Po pierwsze, wyznaczenie przez rzeczpospolitą władców, by rządzili, nie jest czynem obojętnym, lecz moralnym, ponieważ ich nieustanowienie jest, jak myślę, naruszeniem piątego przykazania. Po drugie, w zakresie wolnej woli ludzi nie ma wyboru pomiędzy istnieniem a nieistnieniem rządu, ponieważ nie należy do wolnej woli posłuszeństwo lub nieposłuszeństwo wobec sądu natury, który jest sądem Boga, a sąd ten stwierdza, że społeczeństwa cierpią a ludzkość ginie, gdy nie wyznaczy się żadnego rządu (Rutherford 1843, 5).

Reasumując, do jego powołania dochodzi wskutek horyzontalnie rozumianego przymierza, gdzie równe sobie, umawiające się strony dokonują powołania państwa; jedna strona kontraktu staje się władcą, pozostałe jej poddanymi. Dochodzi przy tym do wzajemnego zobowiązania (*mutual covenant*), wedle którego król rządzi zgodnie z prawem, a ludzie są zobowiązani do posłuszeństwa władzy, a obie strony uprawnione są do wzajemnego przymuszenia do przestrzegania warunków umowy. Kontrakt ten nie może zostać w normalnych warunkach anulowany, chyba że na mocy zgodnej woli obu stron. Zatem król nie stoi ponad przymierzem i ponad prawem, które uczyniły go królem. Królowie, którzy są rozumnymi ojcami i przewodnikami swego ludu, którzy władają zgodnie z prawem, dbają o pokój wewnętrzny i bezpieczeństwo, wyprowadzają swą władzę z kontraktu i przymierza z ludem, stając się strażnikami wszystkich dobrych praw. Zatem z samej swej istoty władza polityczna podlegać musi prawu i nie może być tyrańska, a jeśli taką się staje, stoi za nią nie Bóg, lecz szatan. „Władza absolutna – pisze więc Rutherford – to zasadniczo władza, która obywa się bez prawa

lub stoi ponad prawem, władza, by czynić zło, by niszczyć, zatem nie może ona pochodzić od Boga" (Rutherford 1843, 228). Władza, która pochodzi od Boga, z natury swej jest ograniczona, ponieważ, zdaniem Rutherforda, Stwórca nie daje władzy, by czynić zło. Wykonywanie jej musi być sprawiedliwe, a jej czyny moralne. Istnienie monarchii absolutnej sprzeczne jest więc z prawem natury: „Być królem i absolutnym władcą jest dla mnie sprzeczne. Król zasadniczo jest żywym prawem, ten zaś, kto ma władzę absolutną, jest stworzeniem zwanym tyranem, a nie legalnym królem" (Rutherford 1843, 111). Ludzie nie mają ponadto możliwości „zrzec się takiej władzy na rzecz księcia" (Rutherford 1843, 46). Wolność jest bowiem częścią porządku natury i elementem przyrodzonej ludzkiej konstytucji.

> Jest fałszem – czytamy w innym miejscu – że ludzie mogą za sprawą prawa natury złożyć całą wolność w ręce króla. 1. Nie mogą odstąpić tego, czego nie posiadają, *Nemo potest dare quod non habet;* bo ludzie nie mają w sobie absolutnej władzy, by zniszczyć siebie, bądź wykonywać tyrańskie czyny, o których mówi 1 Sam. VIII. 11–15, ponieważ ani Bóg, ani prawo natury nie dało im takiej władzy. 2. Ten, który czyni siebie niewolnikiem, czyli gorszym od wszystkich wolnych ludzi, jest zmuszony przez przemoc, przymus lub skrajną konieczność do tego nienaturalnego aktu alienacji od wolności, którą ma przez urodzenie od swego Stwórcy. Lecz ludzie nie czynią z siebie niewolników, gdy ustanawiają króla nad sobą, ponieważ Bóg, dając ludowi króla, najlepszego i najwybitniejszego naczelnika na ziemi, daje błogosławieństwo i szczególna łaskę (Rutherford 1843, 81–82).

Skoro więc przeciwstawienie się władzy sprawiedliwej jest występkiem przeciwko Bogu, to opór wobec tyranii nie niesie z sobą negatywnej moralnej oceny. „Nie ma żadnego powodu – pisze Rutherford – by zastrzeżenia wyrażone w przymierzu pomiędzy królem i ludem były czymś więcej, niż te zawarte w kontrakcie małżeńskim pomiędzy mężem a żoną. Obok dożywocia powinien zawrzeć klauzulę, że jeśli mąż będzie próbował zabić żonę lub żona męża, to w takim przypadku będzie legalne, by rozwiązać takie małżeństwo. Jak powiedział dr Feme: «Osobista obrona jest legalna, jeżeli napaść króla jest nagła, nielegalna lub niechybna». Lecz zastrzeżenie o możliwości obrony przed władzą nie musi być wyrażone w kontrakcie pomiędzy królem i ludem. Zasady prawa natury nie mogą zostać unieważnione w przymierzach prawa pozytywnego, ponieważ to one są ich podstawą" (Rutherford 1843, 118).

> Król, jako król – czytamy zaś w innym miejscu – i na mocy swego królewskiego urzędu, jest ojcem królestwa, wychowawcą, obrońcą, tarczą, przywódcą, pasterzem, mężem, patronem, stróżem, pasterzem ludu, nad którym panuje, a zatem urząd ten zawiera przede wszystkim akty ojcowskiego uczucia, troski, miłości i życzliwości dla tych, nad którymi jest ustanowiony, zatem jak ci, którzy są obleczeni w te wszystkie relacje miłości nie mogą wykonywać swych działań przeciwko ludziom wbrew ich woli i za pomocą przemocy. Czy można być ojcem, przewodnikiem i patronem wbrew naszej woli i wyłącznie dzięki mocy krwawego miecza? (Rutherford 1843, 47)

Tym zatem, co czyni króla królem i rodzi skuteczne polityczne zobowiązanie, jest podleganie prawu – „król, jako król, będąc *lex animata*, oddychającym

i żywym prawem, królem, jako król musi być podporządkowany prawu, które uczyniło go królem" (Rutherford 1843, 98). Dlatego dla Rutherforda: „Prawo posiada konstytucyjną supremację nad królem. Ponieważ król nie jest królem z natury, jak zostało udowodnione, dlatego musi być królem za sprawą rozważnej konstytucji i prawa i dlatego prawo stoi ponad królem" (Rutherford 1843, 126).

Jeśli idzie o konkretne rozwiązania ustrojowe, w ramach których ma mieć miejsce supremacja prawa nad królem, to Rutherford odwołuje się do tradycji ustrojowej i klimatu intelektualnego ówczesnej Brytanii. Biorąc je pod uwagę, jest więc przekonany, że:

> Ograniczona i mieszana monarchia, taka jak w Szkocji i Anglii, wydaje mi się najlepszym ustrojem. (…) Ustrój ten ma chwałę, porządek, jedność od monarchy; od rządu wielu najmądrzejszych ma pewność rady, stabilność, siłę; z wpływu ludu czerpie wolność, przywileje, szybkość posłuszeństwa (Rutherford 1843, 192).

W ustroju takim to Parlament, zdaniem Rutherforda, zajmuje centralne miejsce w systemie instytucjonalnym państwa, będąc wyrazicielem woli i strażnikiem praw ludu, będącego źródłem władzy politycznej monarchy. Dlatego przekonuje, że:

> Parlament jest zazwyczaj równorzędny królowi we władzy tworzenia prawa; ale równorzędność króla pochodzi od parlamentu, *orginaliter et fontaliter*, jako jej źródła; 2. W zwykłym biegu spraw mamy do czynienia z równorzędnością, lecz jeśli król zamienia się w tyrana, wtedy stany używają swej pierwotnej władzy (Rutherford 1843, 115).

Władza królewska sprawowana jest z woli Parlamentu dokonującego wyboru monarchy bądź akceptującego jego władzę, jest władzą pierwotną wobec urzędu królewskiego. „Sądzę – pisze więc Rutherford – że byłoby dziwne i pozbawione sensu, by władza dana królowi przez parlament lub stany wolnego królestwa (…) mogła tworzyć, regulować, ograniczać, pozbawiać, zaprawdę, i anulować władzę, która ją stworzyła" (Rutherford 1843, 185). Oddzielony od Parlamentu król nie może zdziałać niczego, dlatego władza króla i Parlamentu są skoordynowanymi częściami najwyższej władzy królestwa podlegającymi Bogu: „Parlament daje najwyższą władzę królowi, dlatego, by zapobiec tyranii, musi mieć równorzędną z królem władzę w najważniejszych sprawach" (Rutherford 1843, 114). Podobnie Rutherford określa pozycję sędziów wobec króla, starając się uczynić ich maksymalnie od niego niezależnymi. Wiąże się to oczywiście z absolutnym prymatem prawa nad arbitralną wolą władcy. Sędzia jest w istocie zastępcą króla i sądzi w jego imieniu, równocześnie będąc sędzią, poddany jest tak samo władzy i rozkazom Boga jak król, który go mianował. Król, czyniąc to, przekazuje sędziemu swe prawo sądzenia otrzymane od Boga, przez co sędzia nie podlega odtąd jego woli w akcie orzekania, a „zadowolenie króla nie może być regułą sumienia niższego sędziego, ponieważ dostaje on natychmiastowe upoważnienie od Boga" (Rutherford 1843, 137). Sędziowie podlegają zatem prawu bożemu i naturalnemu, które jest jedynym probierzem legalności prawa stanowionego, a nie kaprysom króla. Sędziowie bowiem, jak wszyscy funkcjonariusze państwowi, wyprowadzają ostatecznie

swą władzę z woli Boga, miecz w akcie tworzenia państwa przekazany został tak królowi, jak i podwładnym mu urzędnikom, stąd „święty majestat jest we wszystkich niższych sędziach, w każdym zwierzchniku, dlatego zasługują oni na cześć, strach i szacunek" (Rutherford 1843, 175). Stąd nie tylko król, lecz „wszyscy posiadający władzę są zobowiązani, by dbać o to, by poddani prowadzili spokojne i pokojowe życie w pobożności i uczciwości" (Rutherford 1843, 92). Zobligowani są więc do ochrony i zachowania prawdziwej religii oraz obrony poddanych przed przemocą i gwałtem niezależnie od działań monarchy. Stąd natura i źródło władzy króla i wszystkich urzędników jest identyczne, a „wyrok wydany przez niższych sędziów – dowodzi więc Rutherford – jest wyrokiem Pana, dlatego śmiertelny król nie może przeszkodzić w jego wydaniu" (Rutherford 1843, 91). Można zatem stwierdzić, że urzędnicy i sędziowie są odpowiedzialni przede wszystkim przed Bogiem i to Jego wolę w pierwszym rzędzie muszą realizować, nie mniej niż król reprezentują na ziemi jego władzę, będąc wikariuszami i zastępcami Stwórcy.

4. PRAWO KRÓLESTWA CZY PRAWO BOŻE?

Widać do tej pory, że argumentacja Rutherforda wpisuje się w długą, angielską tradycję monarchii prawa i takie wrażenie odnieść mógł angielski czytelnik *Lex, Rex*, odnoszący jego treść do postulatów parlamentarnych prawników, formułowanych od czasów Jakuba I. Gdy bowiem Rutherford pisze o prawie, to naturalnym punktem odniesienia była przede wszystkim konstrukcja *ancient constitution* Edwarda Coke'a. Zgodnie ze sformułowaną przez niego koncepcją, nie istniało coś takiego, jak historia angielskiego prawa, pozostało ono bowiem niezmienione od najdawniejszych czasów, sięgających jeszcze okresu sprzed normańskiego najazdu. Jego treść była więc niezależna od politycznych wstrząsów, targających przez stulecia Wyspami. Było też prawem doskonałym, efektem odwiecznego zwyczaju, swoistego mistycznego procesu, udowadniającym wartość poprzez skuteczne funkcjonowanie sięgające czasów niepamiętnych. *Starożytna konstytucja* nie była przy tym dziełem żadnego mitycznego prawodawcy, a jej początki niknęły w pomroce dziejów (Pocock 1957, 36). Nie można było więc odnaleźć ich ani w ludzkiej pamięci, ani w dokumentach historycznych, a jedynie w kolejnych jego potwierdzeniach przez monarchów i sądy. Podstawą argumentacji Coke'a była *Wielka Karta*, traktowana przez niego jako ucieleśnienie ponadczasowych maksym *common law*, święty tekst, nieodwołalny, fundamentalny statut, prawo praw, potwierdzała bowiem odwieczne prawo Anglii (Coke 1817, 14). Skoro tak, to oczywista była wyższość i pierwszeństwo tego starożytnego prawa przed prawem stanowionym przez jakiegokolwiek prawodawcę, które może być jedynie potwierdzeniem odwiecznego zwyczaju, podobnie jak wyroki sądów oznajmiające jedynie i potwierdzające starożytne prawo królestwa. *Common law* stało więc ponad jakimkolwiek politycznym autorytetem i nie mogło być przez niego

zmienione. Coke splótł więc jego niezmienność z niezmiennością i odwiecznością instytucji życia zbiorowego, ze starożytnym charakterem angielskiej konstytucji oraz swobód Anglików, którymi mieli cieszyć się od czasów najdawniejszych. Wynikało stąd podporządkowanie władcy autorytetowi prawa i zasadom odwiecznego ustroju (Coke 1826 – *Calvin's Case* 4a, 6), które nie powstały w efekcie ludzkiej działalności, lecz wyrażają rozumność prawa natury oraz boskiego porządku. Opierający się na takim założeniu program polityczny polegał więc na restytucji starożytnej konstytucji zagrożonej przez królewskie prawodawstwo i renesansową koncepcję suwerenności (Brooks 2008, 54). Zamiast wspierać więc króla, zgodnie z rzymskimi tradycjami, prawo powinno stać ponad królem, być bezstronnym arbitrem w sporach toczonych w królestwie. *Starożytna konstytucja* stałą się więc dla Coke'a i obozu parlamentarnego punktem odniesienia dla wizji ustroju forsowanego przez Stuartów oraz konkretnych działań monarszych.

Wydaje się jednak, że nie dla Rutherforda, w ojczyźnie którego dążenie do ograniczenia władzy monarszej miało całkowicie inne podłoże. Choć więc na pierwszy rzut oka posługuje się terminologią miłą i znaną angielskiemu uchu sprzeciwiającemu się tyrańskim zapędom królów, to rozumie przez nią coś zgoła innego. Kluczem do wyjaśnienia tej dychotomii jest bliższa analiza jego kontraktualnej genezy władzy politycznej. Nie można bowiem umowy, o której pisze Rutherford, redukować jedynie do jej horyzontalnego wymiaru pomiędzy ludem i królem. Pamiętać należy, że wybór ludu kierowany jest przez Boga, zatem, co bardzo dla Rutherforda istotne: „nie możemy mówić tutaj o dwóch aktach, jednym Boga, drugim ludzi, ale o jednym i tym samym działaniu; Bóg poprzez wolny wybór i głos ludzi czyni takiego człowieka Królem, pomijając tysiące innych" (Rutherford 1843, 7). W ten sposób władza pochodzi bezpośrednio od Boga i bezpośrednio od ludzi, zatem „Bóg tylko przez działanie ludzi jako jego narzędzia, może uczynić królem" (Rutherford 1843, 202). Kontraktowy, wertykalny (Coffey 1997, 165) charakter mają wiec także relacje pomiędzy królem i Bogiem. Otrzymując władzę rządcy, przyjmuje na siebie przede wszystkim zobowiązanie wobec Stwórcy do przestrzegania prawa Bożego. Zobowiązanie to jest szczególnie silne, jeśli chodzi o władców Szkocji i Anglii. Rutherford był bowiem przekonany o przymierzu, które wzorem starożytnego Izraela łączy Szkocję z Bogiem. Jej historia podobna jest do dziejów starożytnego Izraela i tak samo, jak Izrael, Szkocja stała przed wyborem: posłuszeństwo Bogu przynieść miało błogosławieństwa, nieposłuszeństwo zaś przekleństwo i katastrofę. Katastrofę, której można było uniknąć przez całkowite zawierzenie Bogu i stanie się początkiem powszechnego odkupienia poprzez odrzucenie rzymskiego Antychrysta i ustanowienie rządów Boga nad wszystkimi narodami ziemi. „Dwa parlamenty Szkocji i Anglii – pisze Rutherford – odnowiły przymierze nie przeciw królowi, ale by przywrócić religię do starożytnej czystości, mając to prawo wyraźnie od króla Jakuba i Karola oraz wiele aktów parlamentu, by utrzymać religię czystą" (Rutherford 1843, 136).

„Te dwa królestwa mają przed sobą cel, jakim jest przymierze, by być ludem Bożym" – pisze gdzie indziej.

> Niech błogosławi im Pan – kontynuuje – który pośredniczy dla zapobieżenia ich zerwaniu i działa dla trwania tego braterskiego przymierza. Chrystus jest jednoczącym Zbawcą, jedynym Bogiem, jedną wiarą, jednym Panem Jezusem Chrystusem, powinna być więc jedna religia, dlatego prosimy Boga pokoju, by połączył złotymi łańcuchami te dwa narody razem *in uno tertio*, by były zgrupowane i połączone w jednym Panu Jezusie (Rutherford 1646a, strony nienumerowane).

Konsekwencją tego „Narodowego Przymierza jest obowiązek wykorzenienia wszystkich fałszywych religii, które są przeciwne prawdziwej doktrynie" (Rutherford 1649, 270). Anglia zaś winna dokonać tego samego – odnowić przymierze zerwane przez odstępstwo na rzecz rzymskiego bałwochwalstwa (Rutherford 1843, 182) – opierając swą konstytucję na przymierzu i wzorując na prawie naturalnym (Coffey 1997, 144). Herezja „jest bowiem grzechem przeciwko pierwszemu przykazaniu i tej nieskazitelnej zasadzie natury wyrytej w sercu człowieka, «że jest tylko jeden prawdziwy Bóg i tylko jemu trzeba służyć»" (Rutherford 1649, 187). Dlatego jako chrześcijanin nie może ograniczać jedynie celów człowieka i całej wspólnoty do wymiaru doczesnego.

> Każda władza – pisze Rutherford – by rozkazywać, grozić, obiecywać, karać, więzić, nagradzać jest władzą daną przez Boga rodzicom, głowom rodzin, nauczycielom, opiekunom, Królom i Książętom, jest darem Boga i musi być wykorzystywany dla dobra dusz, by przestrzegać przykazań pierwszej Tablicy przez każdego, wedle jego pozycji (Rutherford 1649, 145).

Stąd, argumentuje dalej: „Książę, Parlament, podobnie Urzędnicy, zgodnie ze swą pozycją jako ojców wspólnego dobra, muszą się o nie troszczyć" (Rutherford 1649). Dlatego celem najważniejszym i ostatecznym musi pozostać ciągle zbawienie człowieka, a państwo personifikowane osobą władcy ma w tym pomóc i na nim ciąży ten szczególny obowiązek. Celem rządu jest stosowanie i realizacja prawa Bożego, odkrytego przez doświadczenie i danego wprost przez słowa *Pisma Świętego*. Jest zatem formalnie ucieleśnieniem prawa Boga. Dlatego królowie

> są Boskimi narzędziami i Sługami w: 1. Przedkładaniu i objaśnianiu praw Bożych; 2. W egzekwowaniu ich i obronie przed przemocą ludzi; 3. W tworzeniu praw politycznych, dla rządu politycznego, które wiążą sumienie, dopóki zgodne są z Prawem Bożym (Rutherford 1646b, 208).

W jego narracji rolę *starożytnej konstytucji* pełni więc zawarty w Biblii, przede wszystkim zaś w Starym Testamencie, przekaz Boga. Konsekwencją jest ambicja powołania opresyjnego państwa, w którym starożytne wolności i *common law* nie mają priorytetu, lecz muszą ustąpić miejsca prawu biblijnemu. Celem polityki jest bowiem przygotowanie miejsca nowemu królestwu, poprawa świata, gdzie człowiek jest pobożny i sprawiedliwy. Z tego powodu właśnie władca musi „wywrzeć zemstę za bluźnierstwo, bałwochwalstwo, jawną niewiarę" (Rutherford 1644, 395).

5. REKAPITULACJA

O ile więc celem koncepcji monarchii prawa w wieku XVII w Anglii było, zwłaszcza w kręgach parlamentarnych, przywrócenie właściwych, uświęconych tradycją prawną i polityczną, relacji instytucjonalnych, o tyle Rutherford, posługując się identyczną niemal terminologią, pragnie dokonać czegoś innego. Jego archetyp zaklęty jest nie w starych precedensach i praktyce konstytucyjnej, lecz w prawie Bożym, zrównanym przez niego z prawem naturalnym. Prawo natury zaszczepione zostało w człowieku, by mógł się nim kierować i odróżniać dobro od zła. Pochodzi od samego Boga, który zapisał je swą dłonią w naszych sercach i powiązał z ludzką naturą tak, by człowiek poznał, co to sprawiedliwość i dobro. Choć zgodnie z klasyczną kalwińską tradycją (Calvin i 1960, 206) Bóg jest „powszechnym i całkowitym Panem i Właścicielem nieba, ziemi i wszystkich, którzy w nich są" (Rutherford 1655, 38), to w naturalnych ludzkich skłonnościach odbijają się Boskie zamiary. By jednak móc argumentować w prawdziwie chrześcijańskim stylu, Rutherford musi znaleźć w swej teorii prawa miejsce na łaskę. Zatem reguły te mogą być jednak rozpoznane, na skutek Upadku Adama, tylko za sprawą działalności Ducha Świętego, dlatego „natura nie jest wystarczającą wskazówką tego, co czynić, by osiągnąć życie wieczne" (Rutherford 1646b, 76). Bóg zaszczepił poprzez prawo natury w sercu człowieka pewne naturalne skłonności, które przyjmują formę nakazu i każą mu działać w określony sposób. Lecz człowiek naturalny, który nie zna prawdziwego Boga, jest nieświadomy podstaw swych zobowiązań. Dlatego jego naturalne dobre działania są niedoskonałe, ponieważ motywowane są przez cielesną wolę i żądzę, a nie ponieważ rozkazał tak Stwórca w prawie natury (Rutherford 1646b, 79) . Do porządku natury należy z samej istoty bycie częścią Bożego dzieła, do porządku łaski zaś jedynie na mocy wybraństwa. Skoro więc sama natura nie wystarcza jako źródło norm moralnych, potrzebne jest Słowo Boże, by zrozumieć zamiar Stwórcy wobec rodzaju ludzkiego. Do pełnego rozumienia natury konieczny jest więc Boski autorytet *Pisma Świętego*. Słowo i Duch muszą działać więc razem, Słowo jest rozumne, lecz wymaga Ducha, a Duch działa tylko przez Słowo. Monarchia prawa nie polega więc na podleganiu władzy państwowej starożytnemu prawu, które wciela we właściwy dla danej wspólnoty sposób zamysł Stwórcy, lecz Jego bezpośrednim nakazom wyrażonym w Biblii. Odrzuca zatem to, co charakterystyczne dla angielskiej tradycji i co najlepiej wyraził przed nim Hooker, dla którego większość ludzi nie jest w stanie poprzez indywidualną refleksję poznać nakazów prawa naturalnego, a przez to wskazać treści naturalnych zobowiązań. Dlatego dla większości źródłem zobowiązania politycznego jest po prostu prawo pozytywne jako takie, bez odnoszenia do treści prawa naturalnego, ostatecznie więc przestrzeganie prawa wypływa z nawyku wytworzonego przez taką postawę. Dlatego historia i tradycja mają dla Hookera fundamentalne znaczenie, stając się podstawą obrony

średniowiecznej tradycji angielskiej, z której wywodzą się wszystkie urządzenia społeczne (Preece 1980, 16). Rozum indywidualny musi bowiem czasem ustąpić przed rozumem zbiorowym, ukształtowanym przez mądrość i doświadczenie minionych generacji (Wolin 1953, 36).

> Świat – pisze więc Hooker – nie zniesie tego, gdy usłyszy, że jesteśmy mądrzejsi, niż ci, którzy byli wcześniej. W tym właśnie tkwi przyczyna, dla której powinniśmy być opieszali i niechętni zmianie, bez bardzo pilnej konieczności, starożytnych Nakazów, Obrzędów i długo istniejących Zwyczajów naszych czcigodnych poprzedników (Hooker 1820, 27).

Dla Rutherforda tymczasem stare wolności Anglików nie są efektem ewolucyjnego rozwoju, lecz polegają ostatecznie na prawie do wyznawania jedynej prawdziwej religii, a więc „tolerancji", rozumianej w prezbiteriański, a zatem ostatecznie opresyjny, sposób. Rutherford jest bowiem dzieckiem kalwińskiej reformacji podkreślającej absolutną supremację Prawa Bożego, a zawarte w Słowie nakazy traktującej jako jedyny probierz dobra i zła oraz przewodnik po teorii politycznej, stare instytucje służyć mają zaś jedynie jego realizacji.

> W tej wewnętrznej skrytce – pisze Rutherford – naturalnym zwyczaju moralnych zasad przetrwał rejestr wspólnych pojęć zostawionych nam przez naturę, starożytne zapiski i kroniki z czasów Adama i dwa tomy Prawa Natury. Pierwsza Tablica mówi, że jest jeden Bóg, który jest stworzycielem i władcą wszystkich rzeczy, że jest jeden Bóg, nieskończenie dobry, sprawiedliwie odpłacający za zło i dobro. Druga dotycząca ludzkich działań mówi, by kochać swych rodziców, słuchać zwierzchników, nie krzywdzić innych ludzi (Rutherford 1649, 7).

Jego absolutny prymat powodował, że nikt, ani król, ani wspólnota, nie mogły podążać inną ścieżką, niż ta wytyczona przez Biblię, a w istocie jej prezbiteriańskich interpretatorów. Odstępcy zaś, na mocy prawa Bożego, są zwykłymi złoczyńcami, na równi ze złodziejami i mordercami i na równi z nimi spotkać ich musi zasłużona kara.

> Ponieważ tylko Bóg – pisze Rutherford – nie Mojżesz czy inny podległy mu prawodawca, określa, że na śmierć zasługuje cudzołożnik. I tylko On określa karę za umyślne morderstwo, uderzenie ojca lub matki, kradzież, czarnoksięstwo, sodomię, oddawanie czci obcemu bogu. Na tej samej zasadzie Bóg tylko, a nie jakiś śmiertelnik, musi określić karę należną dla tych, którzy zwodzą dusze dla wiecznego potępienia (Rutherford 1649, 309).

Tolerowanie takich występków „jest nie tylko sprzeczne z zewnętrznym spokojem wspólnoty i naturalnym szczęściem społeczeństw, lecz również sprzeczne z nadnaturalnym szczęściem Kościoła jako wspólnotą wiernych w drodze do szczęścia wiecznego" (Rutherford 1649).

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Tomasz Tulejski

SAMUEL RUTHERFORD – THE MONARCHY OF LAW OR THE MONARCHY OF SAINTS?

Abstract. Samuel Rutherford – Scottish Presbyterian priest and political thinker who lived in the times of English civil war – is commonly considered as one of the theorists of the monarchy of law concept, the mixed constitution and the right of revolution. All these ideas are fundamental for modern English constitutionalism which is in opposition to the idea of monarchical absolutism which is based on the concept of the social contract. For this reason, he was among the authorities quoted by the Founding Fathers during their opposition against the arbitrary powers of the Metropole. Meanwhile, the global analysis of his achievements put in doubts many circulating opinions regarding the author of *Lex, Rex*. In this article, an author proves that the hermeneutic analysis of Rutherford's political theology suggests that Rutherford was not the theorist of the monarchy of law in its common meaning, but rather theonomic vision of the state.

Keywords: Rutherford; monarchy of law; English Civil War.

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EFFICACY, IMPACT AND ENGLISH LEGAL HISTORY

Abstract. Theorists of law and of social policy distinguish between the efficacy and the impact of laws and legislation. Efficacy concerns the achievement of the effects intended by law-makers. Impact refers to the actual consequences. At times, the two diverge. Sometimes, it is only after a lengthy period that the impact is appreciated. The impact sometimes requires intervention by legislators or judges acting purposively in order to correct unforeseen or unfortunate consequences. The extent of judicial intervention is not always clear from the surviving records. This article argues that an awareness of the possibility of such occurrence is essential if legal history is to present the whole truth concerning legal developments.

Keywords: Legal history; legislation; efficacy; impact; judiciary; interpretation; purposive.

Mrs Lintott Now. How do you define history, Mr Rudge?
…
Rudge How do I define history?
It's just one … thing after another.

Alan Bennett, *The History Boys*, Act 2.

1. INTRODUCTION

Students of political and legal theory distinguish between the efficacy or intended effects of a policy and a policy's impact (e.g. Miers, Page 1990, 204–206). The efficacy or intended effects relate to the results which are intended by the proponents of the policy whereas the impact refers to the consequences which the implementation of the policy actually brings about in practice. Sometimes the two correspond; sometimes they do not. Where the policy has been implemented by means of making changes to the law, that is by means of legislation, the lack

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of correspondence may only emerge after a considerable period of time has passed. Only with hindsight can it be seen that certain later developments are consequential upon the change made earlier, an additional change unforeseen by those responsible, a change in other words which was not an intended effect of the policy but part of its impact.

Some examples from modern times will serve to illustrate what is meant. It is best to begin with modern examples because the modern period furnishes more evidence in the form of preserved documentary sources than is the case with developments from earlier periods. Nevertheless, having presented the modern examples, some earlier developments will be examined in relation to which the question will be posed as to whether in those earlier examples one is also encountering changes which were unintended or unforeseen consequences of policies, that is part of those policies' impact rather than their efficacy. Sometimes the impact of a policy in this sense can undermine its intended effects. In such circumstances, the question arises of what should be done by those charged with its implementation, those administering justice in accordance with the laws concerned. Should they confine themselves to administering the law regardless of its unintended impact or should they seek to develop the law in accordance with the intended effects? In contemporary terms, this question could be posed by asking whether they should engage in purposive rather than literal application of the laws in question. This leads to the question which will also be asked as to what it is that legal historians study – the impact of legal changes as evidenced by the surviving records or the ideas which shaped the legislative policy – the effects which were intended, even if these are shrouded as a consequence of the impact.

2. LAW, EQUITY AND THE JUDICATURE ACTS

Until the middle of the nineteenth century, the common law of England was administered in the courts of common law – the courts of King's Bench, Common Pleas and Exchequer. In situations where the common law had been perceived not to provide a remedy or at least not an adequate remedy, litigants could turn to the Court of Chancery for a remedy. The rules which this court administered had become known as equity, a system of rules distinct from, but supplementing and complementing, those of the common law.[1]

The existence of two systems of rules could be inconvenient for litigants. A claimant for example who sought remedies for suffering as the result of

[1] The development into a system of rules took place gradually over several centuries. It was during the later fourteenth and fifteenth centuries that litigants would initially have petitioned for a remedy on the basis of the lack or inadequacy of a remedy at common law, while the refinement of equity into a system of rules occurred mainly between the later seventeenth and the early nineteenth century.

the ongoing wrongful conduct of another would have to sue at common law to obtain damages but turn to equity in order to obtain an injunction to prevent the conduct continuing in the future. Likewise, a litigant complaining of an ongoing breach of contract would have to seek damages at common law for the losses caused thus far by the breach but in order to compel compliance in the future would have to turn to Chancery for the equitable remedy of specific performance. During the 1850s, legislation was enacted to overcome these inconveniences by allowing the courts of common law to grant equitable remedies such as injunctions and specific performance and allowing the Court of Chancery to award damages alongside its own equitable relief.[2]

The major change, however, occurred in the 1870s. The Judicature Acts of 1873–75 totally reshaped the English legal system. The Acts abolished the common law courts of King's Bench, Common Pleas and Exchequer, together with the Court of Chancery as well as the Admiralty Court and two courts established by statute in the 1850s – the Probate Court and the Divorce Court. These last two had assimilated within the secular jurisdiction causes of action which had previously been adjudicated within the ecclesiastical courts of the Church of England.[3] The distinct jurisdictions of all of these now defunct courts were transferred to a new statutory creation, the Supreme Court of England and Wales, consisting of a High Court and a Court of Appeal. Business before the High Court was allocated to one of three divisions, but all three were equally competent to apply the rules of any of the jurisdictions which had previously been separate but which were now all incorporated within the jurisdiction of the new Supreme Court.[4]

Despite the new Supreme Court having jurisdiction to administer the rules both of common law and equity, the accepted view was that it was the administration of these two, erstwhile distinct, bodies of law which had been fused and not the bodies of law themselves. In other words, common law and equity remained distinct sets of rules even though they were now administered in the same court. They were not only distinct historically; they were intended to be distinct for the future as well. That was the intended effect of the legislation which created the new court and the fused jurisdiction.

[2] This was achieved by the Common Law Procedure Act 1854 and the Chancery Amendment Act 1858.

[3] Both courts had wider jurisdictions that their ecclesiastical forerunners: the Probate Court derived parts of its succession jurisdiction from the former common law courts and Chancery, while the Divorce Court could, for instance, grant decrees of divorce *a vinculo matrimonio* which the Church courts did not.

[4] The Supreme Court of England and Wales was renamed the Senior Courts of England and Wales by the Constitutional Reform Act 2005 in order to prevent confusion with the new statutory creation, the Supreme Court of the United Kingdom, to which was transferred in 2009 the pre-existing appellate jurisdiction of the House of Lords.

However, what of its impact? Legal writers, describing the fusion of common law and equity as late as the start of the twenty-first century, continued to state that the 'orthodox' view was that 'only the jurisdictions have been fused' (Martin 2001, 20). A famous metaphor, coined by Ashburner, was frequently quoted: "the two streams of jurisdiction, though they run in the same channel, run side by side, and do not mingle their waters" (Ashburner 1933, 18).[5] Famous the metaphor may be, but one would be fully entitled to enquire as to when the learned author had actually encountered such a phenomenon in the real world. When streams mingle, their waters are no longer distinguishable downstream.

One of the most distinguished English judges of the second half of the twentieth century, Lord Diplock, considered that the metaphor had 'become most mischievous and deceptive'. He believed that the Judicature Acts had fused not only the administration of the rules employed by the former separate jurisdictions, but that they had fused the systems of law themselves. He attributed the slowness of the legal professions to recognize this as being due to the 'innate conservatism of English lawyers' (*United Scientific Holdings Ltd.* v. *Burnley Borough Council* [1978] AC 904, 925).

The remark is telling. Had the Acts required the fusion of the previous separate systems, this would have been stated in terms or at least been a necessary implication. That the courts had been able for a century to hold that the systems themselves were not fused but only their administration suggests that the greater fusion was not an intended effect of the legislation. Equally, the fact that some could believe that the greater fusion was possible indicates that the Acts had not limited their effect to the lesser fusion. In that the greater fusion was not an intended consequence, developments which are based on its having occurred are predicated upon its having been an impact of the legislation.

Examples of that impact can be found. In *Lloyds Bank* v. *Bundy*, the Court of Appeal – and in particular Lord Denning MR – drew on equitable rules regarding undue influence and rules from the erstwhile Admiralty jurisdiction to state a principle 'of English law' ([1975] QB 326. Discussed in Watkin 1977). In *Foskett* v. *McKeown*, Lord Millett in the House of Lords expressed his dissatisfaction with the continued demarcation between the process of tracing property at common law and tracing property in equity. He stated that:

> "there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough. The existence of two has never formed part of the law in the United States… There is certainly no logical justification for allowing any distinction between them to produce capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship as a precondition of applying equity's tracing rules" ([2000] 2 WLR 1299, 1324).[6]

[5] The first edition by Walter Ashburner himself had been published in 1902.

[6] Whereas the *legal* owner of property at common law could follow the property into the hands of another, he was not able to trace the property should it become mixed, for example with that

Many took his remarks as amounting to an indication that he would restate, and thereby in effect fuse, the relevant rules as rules of English law should the opportunity be given him through an appeal involving the issue to come before him in the highest appellate court. Unfortunately for proponents of the greater fusion, no such case materialized before he retired from the bench in 2004 and therefore in this instance the impact did not materialize. Nevertheless, Lord Millet's words make it clear that such an impact is possible – a possibility created by the fusion of law and equity regardless of whatever effect was originally intended by that fusion.

In both these cases, one sees the willingness of judges to recognize that, whatever its intended effect, the impact of the legislation in question permitted them to develop the law in a particular way. Some would decline to take advantage of such an opportunity on the basis that such changes to the law should only take place if expressly intended by the legislature or at least that the change was a necessary implication of the legislature's intentions; others however are prepared to embrace the opportunity for change which the legislation's impact has permitted.

3. THE ABOLITION OF THE FORMS OF ACTION

One of the most celebrated instances of a judge being prepared to develop the law on the basis of the impact of much earlier legislation is the speech of Lord Atkin in the House of Lords in the case of *Donoghue* v. *Stevenson* ([1932] AC 562). The case came before the House of Lords on appeal from Scotland, but the decision is regarded as creating the so-called tort of negligence in English law. Until 1832 – that is a century prior to the litigation – litigants making a claim at common law had to select a writ which was suitable for their claim. If they selected a writ which was not appropriate, they would be wrong suited and their claim dismissed. These writs were collectively known as the forms of action at common law. The rules of liability at common law had developed as rules pertinent to the several writs rather than as rules of general application.[7]

other's own. In equity on the other hand, the *beneficial* owner of property could trace the property into a mixed fund, but tracing was only permitted in equity where the beneficial owner was within a fiduciary relationship such as being the beneficiary under a trust. The different rules reflected conditions existing prior to the merging of the erstwhile jurisdictions.

[7] Despite regular protestations from the judiciary that the boundaries between the forms of action needed to be maintained to prevent confusion, the distinctions relevant to choosing the correct writ were not always easy to apply. For instance, the distinction between the writs of trespass for direct, immediate wrongs and trespass on the case for consequential harm proved difficult in cases of road traffic accidents which could be viewed as instances where injury was occasioned by the defendant driving a vehicle into the plaintiff (trespass) or as instances in which the plaintiff suffered harm as a consequence of the defendant's negligent driving (case).

The Uniformity of Process Act 1832 abolished the several writs. Henceforth, only one writ of summons was to be used. However, the Act required the plaintiff to mention in the writ of summons upon which of the erstwhile forms of action the claim was based. The Common Law Procedure Act 1852 expressly provided that such mention of a former form of action was no longer necessary.[8] Nevertheless, English lawyers, displaying perhaps what Lord Diplock called their 'innate conservatism' – continued to distinguish between various claims at common law for wrongful damage in terms of the now defunct individual writs. Thus, textbook writers continued to treat of separate torts of trespass, case, nuisance, detinue, conversion, and so on, retaining the distinct rules of liability for each of the torts which corresponded to the abolished writs. Whether or not negligence, for instance, was a necessary ingredient for a successful claim depended upon the tort (corresponding to the former writ) which it was claimed had been committed.

The House of Lords in *Donoghue* v. *Stevenson* was faced with such a claim. The claimant had purchased a product from a retailer with whom she therefore had a contract. The product was found to be contaminated. Having been sold in a sealed receptacle, the contamination could not have been the fault of the retailer, but must have occurred during the process of manufacture. The claimant chose to sue the manufacturer. It was argued that she could not sue the manufacturer for wrongdoing because she had a claim in contract against the retailer. In other words, she had to choose the appropriate category of claim albeit that the forms of action upon which the categories were based had been abolished.

By a bare majority of three to two, the Law Lords refused to be confined by the 'innate conservatism of English lawyers'.[9] The effect of the abolition of the forms of action may only have been to make it unnecessary to select a writ or to refer to a particular cause of action in the writ of summons, but Lord Atkin saw that the impact of the reform might be far greater. He saw that one could unify the principles of liability which had previously been specific to each writ and thereby state a general principle of tortious liability in English law.

He said:

> "the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist…
> …in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances"

and he went on to expound the neighbour principle which duly became the basis of liability for negligence in the English law of torts. Lord Atkin refused to be cowed by that 'innate conservatism' which Maitland, the founding father of the modern study of English legal history, had summarised in his aphorism "the forms

[8] Common Law Procedure Act 1852, 3.

[9] Tellingly, the two dissenting judges were English. They were outvoted by two Scottish judges and Lord Atkin, who was an Australian-born Welshman.

of action we have buried, but they still rule us from their graves" (Maitland 1909, 296). In a later case, Lord Atkin developed Maitland's metaphor, manifesting his awareness of the significance of what he had done, saying: "When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred" (*United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] AC 1, 29). The abolition of the boundaries between the erstwhile writs also allowed the boundaries between the categories of tort based upon them to be overridden.[10] Whatever effect it was intended to achieve by abolishing the forms of action, the impact of their abolition has been to allow the English law of liability for tortious wrongdoing to be changed in quite a fundamental manner.

One can perhaps see the fulfilment of this potential in the case of *Letang* v. *Cooper* in 1964 ([1965] QB 232). In that case, Lord Denning MR in the Court of Appeal declined "to go back to the old forms of action" to deal with the issues before him. He asserted that they had "served their day". "They did", he said, "at one time form a guide to substantive rights; but they do so no longer". Whereas in earlier years, causes of action reflected the previously existing forms, "we divide the causes of action now according as the defendant did the injury intentionally or unintentionally" (*Letang* v. *Cooper* [1965] QB 232, 240). Whatever the intended effect of the abolition of the forms of action, the impact has been to allow the courts to restate the English law of torts regarding personal injuries in terms of the degree of fault attaching to the alleged wrongdoer.

4. IMPACT AND PURPOSIVE INTERPRETATION OF LEGISLATION

Over the last half century, the United Kingdom's membership of the European Union has also contributed to the fund of examples of legislative impact as opposed to efficacy. Entry into what was then the Common Market or the European Communities involved the United Kingdom accepting that its laws must be compatible with those of the European Union and that those laws would enjoy primacy over the domestic laws of the UK. However, the impact of that step has been greater than that, with consequences which were possibly neither intended nor foreseen when the European Communities Act 1972 became law.

The traditional approach to statutory interpretation in English law had for some centuries been literal, as opposed to the logical or purposive approach to legislative interpretation in the civilian jurisdictions of the six founding member states. The British judiciary realized, however, that to apply a literal

[10] It is pertinent to note once more that *Donoghue* v *Stephenson* was an appeal from Scotland, where the relevant law had not been developed in the context of forms of action, a circumstance which may have provided both inspiration and impetus to liberate English law from its 'mediaeval chains'.

approach to the interpretation of EU law might and probably would result in the interpretation of EU law in UK courts being at variance with that in the courts of the other member states. Accordingly, it was decided that a purposive approach should be adopted when dealing with EU law in the same manner that such an approach had previously been used in the interpretation of international treaties. To discover the purpose of an item of EU legislation, the British judiciary also realized that courts in the other countries followed the civilian style of utilizing *travaux préparatoires*, background material pertinent to an understanding of what the legislation sought to achieve. This approach was diametrically opposed to English law's utter refusal to consult the parliamentary record for illumination when interpreting a statute.

Having taken the step of employing a purposive approach to the interpretation of EU law and having been prepared to consult *travaux préparatoires* in doing so, and having experienced the benefits of so doing, it was not long before the courts began to question why the same approach should not be adopted and the same benefits sought when interpreting domestic UK legislation. The result – the impact – has been a steady growth in the use of a purposive approach to statutory interpretation and the abandonment of the refusal to use background material to assist in the task.[11]

In all these instances, the impact of UK membership of the EU upon its domestic law has been greater than the intended effects of the relevant legislation passed upon joining.[12]

5. SOME QUESTIONS FOR LEGAL HISTORY

In all three of the examples given above, drawn from the relatively recent legal history of England and Wales, it can be seen that the impact of a piece of legislation – and of the policy behind that legislation – has been greater than the effects which the legislation was intended to achieve. One can see too that the legal professions and the judiciary in particular play a significant rôle in determining whether those impacts are to be countenanced or not. Whereas an 'innate conservatism' may be encountered in some quarters, in others there is a readiness to embrace the opportunity afforded by a piece of legislation to take

[11] The decisive step to allow reference to Parliamentary Debates was taken in *Pepper (Inspector of Taxes)* v. *Hart* [1993] AC 593. The question of when it is appropriate to consult additional background materials is discussed in Lord Nicholls' speech in *Wilson* v. *First County Trust Ltd. (No. 2)* [2003] UKHL 40; [2004] 1 AC 816. The application of the EU's principle of proportionality to subordinate legislation made to implement EU law within the UK has also resulted in the principle being applied to subordinate legislation generally within the UK.

[12] It seems very unlikely that if and when UK leaves the EU, there will be any appetite among the legal professions for the reversal of these impacts.

the law in a direction which may or may not have been either desired or foreseen by those who framed it.

Questions therefore arise as to whether, in periods when the documentary evidence is not so great, legal historians should be aware of such tensions possibly having existed, and also what part that awareness should play in their interpretation of legal developments. The discussion will, therefore, now move to examples from earlier centuries to illustrate circumstances in which it was or may have been the impact rather than the effect of legislation or policy which shaped legal development.

6. THE EFFICACY AND IMPACT OF THE STATUTE OF USES

The Statute of Uses of 1536 is one of the famous pieces of English legislation. Its purpose was to prevent loss of revenue to the King as a result of freehold land being held by feoffees to the use of beneficiaries. The feoffees were the legal owners of the property, while the beneficiaries had the use and enjoyment of it. Provided the number of feoffees was maintained, no feudal incidents such as wardship, marriage or the payment of a relief would arise when the land passed from one generation of beneficiaries to another.[13] To combat the loss of revenue to the Crown, the statute executed uses of freehold land where the feoffees had no active duties to perform, that is where they 'stood seised to the use of another'. The effect was to pass the seisin, the legal title to the freehold land, from the feoffees to the beneficiaries making them the legal owners and thereby ensuring that feudal incidents would be payable by them as the land passed from generation to generation[14].

One impact of this policy was either foreseen or recognized very swiftly. It was that the statute could be used to convey land secretly from one person to another, making it difficult to keep track of who were the legal owners from whom the feudal incidents should be sought. No formality attended the creation of a use, and,

[13] The relief was a sum fixed by law which was payable by an heir on taking possession, or seisin, of freehold land in succession to a deceased relative. More importantly for the royal revenue, if the heir were under age and the land held by a military tenure, the wardship of the heir's land would be enjoyed by the Crown while the heir remained a minor, and this entitled the Crown to keep the profits. Where the infant heir was a female, the Crown also enjoyed the incident of marriage, that is the right to give the girl in marriage. This would often be to the highest bidder.

[14] The statute in effect confirmed in legislation the consequence of the judicial decision in the case of Lord Dacre of the South the previous year, where it had been held that the beneficiaries under a use could only enjoy the same interest in the land as that held by the feoffees. It would appear that that decision was in part the result of political pressure placed upon the judges by the royal government (see Baker 1978, 92−203). *Dacre's case* is discussed at pp. 200−202, and its significance for the statute on pp. 202−203. The political pressure placed on the judiciary is dealt with at p. 140. Spelman's report of *Dacre's case* can be found in Baker 1977, 228−230.

as a consequence of the statute, if the feoffees had no active duties to perform, the beneficiaries immediately became legal owners without any form of publicity. This impact was addressed by the Statute of Enrolments passed in the same year which provided for the enrolment, that is the registration, of agreements to sell freehold land, thus ensuring that there was a record of who was the legal owner (Kaye 1988).

The consequences of a further impact, however, were either not foreseen or not fully appreciated. Putting land to uses had enabled freeholders to achieve something which the common law did not allow, namely the giving of land by will on the owner's death. Where the land was vested in feoffees, they could hold the land for the benefit of a beneficiary during his lifetime and then hold it for the benefit of anyone whom he chose after his death. The legal ownership was unchanged, only the right to enjoy the use of it. The execution of the use by the statute meant that this device could no longer be employed to the great inconvenience and dislike of landowners, many of whom had increased their landed wealth as a consequence of acquisitions made following the dissolution of the monasteries. The unpopularity occasioned by the loss of this device is thought to have contributed to a rebellion in the succeeding years known as the Pilgrimage of Grace. The royal government responded by passing the Statute of Wills in 1540 which, for the very first time, permitted freeholders to dispose of their land on death by means of a will – two-thirds of their land in the case of those holding by military tenures and all in the case of others. One can legitimately regard the advent of the right to make a will of freehold land therefore as being occasioned by the impact of the Statute of Uses.

Some impacts, as is so often the case, were not apparent until much later. The ability of the Crown to ensure that its revenues from the feudal incidents were not lost meant that the King enjoyed an income which was not dependent upon taxes voted by Parliament. Indeed, it was an accepted principle of mediaeval government that the king should 'live of his own'. The efficacy of this in the century which followed was such that both Elizabeth I and James I were able to govern without calling Parliament for significant periods, and Charles I was able to govern without calling a Parliament for over a decade from 1629. That King's ability to govern without Parliament, however, undermined the constitutional arrangements which had been developing in England since the thirteenth century, and the tensions which resulted led to the Civil War. In turn, to prevent such a situation arising again, upon the Restoration of the monarchy in 1660, the Tenures Abolition Act abolished the military tenures from which the lucrative feudal incidents arose, thereby making the King dependent upon Parliament for the fiscal means to govern. The impact of the Statute of Uses was far reaching.[15]

[15] Military tenures had been abolished during the preceding Commonwealth period (1649−1660), but the 1660 Act ensured that they would not be resuscitated as a result of the monarchy's Restoration.

The impact of this policy and the legislation which delivered it is readily apparent. That is not always the case. That is why an awareness on the part of historians that policies and legislation can have impacts beyond the effects which they are intended to achieve is so important if their historical accounts are to reflect the whole truth.

7. THE SARUM OATH AND THE LEGAL REFORMS OF HENRY II

The Sarum Oath is a justly famous moment in the reign of William the Conqueror, although some have doubted its constitutional significance (Douglas 1964, 355–356). Faced with the threat of rebellion involving members of his own family, the King realized that if the knights invested with lands by his nobility obeyed their immediate overlords rather than the King, the foundations of his authority were in truth weak. Accordingly, at Salisbury in 1086, he convened an assembly at which he took an oath of allegiance from the freemen of his realm, thereby ensuring that his free subjects owed him a loyalty greater than the loyalty owed to their lords. The effect was to introduce a personal nexus of direct loyalty between the king and his free subjects, alongside the pre-existing tiered loyalty existing between lords and their tenants culminating in that owed by the barons to the king.

While it is probably the case that this was the effect which William sought to achieve, and that he might not have perceived in this any constitutional significance for his kingship, that does not mean that the impact of the policy might not have been to enable such a constitutional development. Following his conquest of England, he had granted his followers lands within the realm in return for their services, and the barons had done the same by granting land to the knights who would in return perform military services. The knights in turn had granted lands to free tenants who would perform agricultural services for their lords on their manors. At every level, land was given in return for services, but also at every level the tenants pledged loyalty to their lords and in return the lord promised to be a good lord to his tenants, one element of which as to hold a court at which any disputes or grievances could be adjudicated and a just result provided. The nexus of loyalty in return for justice existed alongside the nexus of land in return for services. However, if the free tenants owed the king allegiance over and above the loyalty they owed to their lords, what, it might be asked, were they to receive in return. It may be that the question did not arise when the policy of getting them to swear allegiance was instigated, but that does not mean that the question would never arise nor that it was not pertinent in the aftermath of the Sarum Oath.

It is, as so often with the impact of English legal developments, about eighty years later that one sees developments which appear to deliver the logical

outcome of William's policy. It was his great-grandson, Henry II, who opened access to the king's court to his free tenants generally. In that they owed him allegiance, Henry as a good lord was obligated to provide them with justice, and that he did by framing remedies for their use within his courts, remedies which saw the birth of the common law, the law common to all his free tenants. Tellingly, as he did this, he began to describe himself not just as 'king' but as 'lord king', emphasizing the relationship of allegiance which had been created by his great-grandfather, albeit that the impact of the new relationship was only felt almost a century later (as to the background to Henry II's adoption of the style 'lord king' see Watkin 1997).[16]

8. UNDESIRED IMPACTS AND PURPOSIVE INTERPRETATION

Thus far, the examples chosen have involved the realization of potential impacts by later rulers or the judiciary, or have involved the reversal of deleterious impacts by legislative changes of policy. The question however must also be asked as to what, if any, is the rôle of the judiciary if an unforeseen impact threatens to undermine the achievement of a legislative goal. The answer to this question places in opposition two approaches to statutory interpretation discussed earlier – the literal and the purposive. The former approach would have the judges doing nothing to resolve the difficulty but leaving it to the legislature, while the latter would permit them to interpret or even develop the law in order to minimise if not eradicate the impact's undesired effects. Can and should an awareness that judges may be faced with such dilemmas inform the legal historian's work?

That judges are faced with such dilemmas is a recorded fact. Ralph de Hengham, himself one of the ablest drafters of statutes, is famously remembered when he was Chief Justice of the Court of Common Pleas for rebuking counsel who attempted to interpret a statutory provision in his presence, saying "do not gloss the statute; we know it better than you, for we made it" ("Ne glosez point le statut; nous le savons meinz de vous, quar nous le feimes": YB 33–35 Ed. I (RS) 83), but the words which follow are also significant: "one often sees one statute undo another". Better evidence of what is meant by impact as opposed to intended effect can hardly be furnished.

The question however is what should judges do in such a situation. If they are aware, as Hengham certainly was, that the undoing of the earlier statute by the later had not been intended, should they acquiesce in the undesired

[16] The time gap is remarkably similar to that which separates the removal of references to the former forms of action from writs of summons by the Common Law Procedure Act 1852 and Lord Atkin's speech in *Donoghue* v. *Stevenson*, discussed above.

consequence and leave it to the legislature to correct the contradiction, or should they themselves take steps to achieve the underlying purpose of each enactment?

In modern times, judges only very sparingly employ the *casus omissus* principle. Its use has been demarcated most recently by Lord Nicholls in *Inco Europe Ltd.* v. *First Choice Distribution*. He said:

> "A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or the provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the bill been noticed." ([2000] 1 WLR 586, 592)

While in modern times, the willingness of the judiciary to do this is confined to patent errors in the drafting, examples of a more generous approach to the correction of legislation can be discerned in the late thirteenth and early fourteenth centuries when the judges themselves according to their own testimony produced the statutory record. There are certainly instances there of a readiness to prevent not merely an error in one statute proving mischievous to the success of the underlying policy but of acting to prevent a later statute inadvertently undermining the policy of an earlier enactment.

There are two well-known instances of this. The first is the case in which Hengham CJ uttered the words quoted above about counsel not glossing a statute. In it, it had been argued that chapter 2 of the Statute of Westminster II 1285 had restricted the application of a rule in chapter 9 of the Statute of Marlborough of 1267. Hengham was not prepared to allow the later statute to 'undo' the policy of the former, and therefore, as Plucknett observed, one had the 'remarkable spectacle' of the later statute being undone by the earlier (YB 21 & 22 Edward I (RS) 397; Plucknett 1949, 72–73).

The second example also involves the Statute of Westminster II, but this time its first chapter, which provided remedies aimed to prevent a person who had been granted freehold land with the express intention that it should pass to his lawful descendants from alienating the land so as to defeat their expectations. Such grants to persons and the heirs of their bodies had been interpreted by the courts as grants conditional upon the birth of such an heir and allowed the grantee to alienate the land once an heir was born. Chapter 1 of the Statute of Westminster II, known by its opening words as *De donis conditionalibus* or simply *De donis*, gave the heir in such circumstances a remedy by which he could recover the land – the writ of *formedon* in the descender, together with other remedies to protect others who might succeed to the land from an alienation which went against the form of the gift, *forma*

doni, hence formedon[17]. What was unclear however was for how long the land was to continue to descend from heir to heir before, if ever, one could lawfully alienate it. The author has argued elsewhere that what had been anticipated by *De donis* was that the arrangement would end when the grantor or his general heir was prepared to terminate the entail, as this type of grant was called, and convert it into a normal tenurial holding by receiving payment of a relief and accepting the homage and/or fealty of the grantee in tail or an heir of his body. At that point, the grantor or his heir would become the lord of the grantee or his heir and feudal services would become due from the tenement. Unfortunately for this policy, a later statute – the Statute *Quia emptores* of 1290 – put an end to thecreation of such new feudal arrangements, thereby making it impossible for the entail to be brought to an end and therefore making the entail perpetual. That this was not an intended effect of either statute but rather an unforeseen impact is, it is submitted, implicit from remarks made by Bereford CJ with regard to the intended duration of entails. He said:

> "He that made the statute intended to bring within it not only the donees but also the issue in tail until the entail was fully accomplished in the fourth degree; and the fact that he did not do so by express words concerning the issue, was only due to his negligence…" (Bolland 1915, 176–177; Bolland 1916, 226)

The charge of negligence against 'he who made the statute' – whom we know to be Ralph de Hengham – is little if anything short of defamatory. Plucknett refused to put the problem down to negligence on the part of Hengham, preferring to believe that the text had been 'clumsily, perhaps hurriedly, amended' and that in the intervening quarter century 'the tradition may have been warped' (Plucknett 1949, 133–134). The author has argued elsewhere (Watkin 1991) that the more likely explanation is there was no need to provide in the statute for how long the entail should last; as long as it could be terminated by the parties, no statutory determination of length was required. It is far more likely that it was the impact of the provisions of *Quia emptores* upon entails that caused the problem, an impact which was not an intended effect of the later statute. Not surprisingly therefore, within a generation of the problem arising, the judges were seeking to implement the purpose of the enactments and not the impact of their combined effect. The extent to which the judges were prepared to go to achieve this forms

[17] S.F.C. Milsom has shown that writs to enforce the *forma doni* existed prior to *De donis*, but these were not used in the circumstances of a subsequent alienation as anticipated by the statute. The earlier writ to protect the gift in reversion was available where the issue in tail had died out, and the writ to protect the heir in tail was used in the perhaps exceptional circumstance where, the donor having remarried and made a settlement in tail upon the issue of the later marriage, the entailed property had been wrongly taken by the heir general, being the issue of the first marriage (see Milsom 1956, 391–397, reprinted in Milsom 1985, 223–229). For formedon in the remainder before *De donis*, see Brand 1975, 318–323, reprinted in Brand 1992, 227–232.

the fascinating tale of the development of the rules allowing for the barring of entails by warranty, fine and the common recovery – a purposive response to an unintended impact.

9. CONCLUSION

Despite the best endeavours of drafters and legislators to assess the outcomes of their work, circumstances change and there is in any event a limit upon what human beings can foresee. The consequence is that legislation often has impacts which are other than the effects intended or foreseen. Sometimes those impacts are merely accepted; at other times, the legislator may legislate afresh to correct the situation. Sometimes, however, it is the judiciary which realizes – in both senses of the word – the impact, taking advantage of the opportunity afforded to develop the law when it is deemed propitious, or at other times exercising ingenuity to prevent outcomes occurring which are patently contrary to what is known to have been intended.

For historians of the law, this raises a question. Is the object of their study simply what has occurred – the impact, or does it extend to what was intended to occur, even where the impact was otherwise? The latter course is more readily pursued in relation to periods when the evidential record preserves what was intended as well as what occurred, but is both more difficult and therefore likely to be more speculative with regard to ages when the record is less abundant. To what extent should an awareness that effect and impact can be at variance inform the response of historians of the law when faced with puzzling developments, so as to ask not merely what is occurring, but why and how it is occurring, including what underlying, but possibly unstated, principles or concepts enable the developments to take place?

The stance taken by legal historians in relation to these issues shapes the very nature of legal history as a discipline. It has been the purpose of this paper to suggest that to limit the discussion to what can definitely be stated to have occurred is to ignore a known facet of legal development, namely that laws have impacts as well as intended effects, and that to ignore that facet prevents a full appreciation of what legal developments actually involved. That legal historians search for the truth is axiomatic, but recognition that the historical record does not contain the whole truth should not confine but rather kindle their efforts to discern what the whole truth may be. Legal history, as part of the history of ideas, must of necessity be more than simply “one … thing after another”.

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SKUTECZNOŚĆ, ODDZIAŁYWANIE I ANGIELSKA HISTORIA PRAWA

Streszczenie. Teoretycy prawa i polityki społecznej rozróżniają pojęcia skuteczności oraz wpływu praw i prawodawstw. Skuteczność dotyczy osiągania celów zamierzonych przez prawodawcę. Wpływ odnosi się do rzeczywistych konsekwencji. Niekiedy obie kategorie różnią się od siebie. Bywa, że dopiero po upływie długiego czasu wpływ zostaje doceniony. Kiedy indziej wpływ wymaga interwencji ze strony ustawodawcy czy działających rozmyślnie sędziów, tak aby skorygować nieprzewidziane bądź nieszczęśliwe skutki rozwiązania prawnego. Rozmiar sędziowskich interwencji nie zawsze jest oczywisty na podstawie zachowanych dokumentów. W artykule dowodzi się, że świadomość możliwości wystąpienia takiego zjawiska jest niezbędna, jeśli historia prawa ma przedstawiać całą prawdę na temat jego rozwoju.

Słowa kluczowe: historia prawa; ustawodawstwo; skuteczność; wpływ; sądownictwo; interpretacja; celowość.

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