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PARALLELS BETWEEN POLISH AND ENGLISH 13TH CENTURY LEGAL REASONING: CASE COMMENTARY ON THE OWNERSHIP DISPUTE OF THE FOREST OF GŁĘBOWICE IN KSIĘGA HENRYKOWSKA

Abstract

The *Księga Henrykowska* has long been acknowledged by legal scholars as providing prime examples of Polish customary law that still serve as foundations for Polish legal history. In this paper, one of the disputes chronicled in *Księga Henrykowska* is treated as a case study in order to shed light on legal reasoning and argumentation in 13th-century Poland. These developments are paralleled with their contemporaries in England, which laid the foundations for common law. Legal concepts from common law research are then applied to the case, resulting in broader conclusions and speculative research questions that open the door to further research paralleling Polish and English legal history.

Keywords: Księga Henrykowska, Silesia, Polish customary law, common law

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Introduction

The *Księga Henrykowska* (hereafter *KH*), along with *Księga Elbląska* (hereafter *KE*), have been declared the foundational texts of Polish law by many legal historians, who also note the books' immeasurable worth as historical and cultural sources, with the former praised as a "literary monument" (*piśmienny zabytek*).[1] They are particularly important for revealing and elucidating the development of Polish customary law (*prawo zwyczajowe*) in Piast Poland, especially the conflicts between the Poles and the Germans throughout Silesia and the Baltic coast that make the exact nature of Polish law difficult to determine. This is due to the fact that from the 11th through the 14th century, the Silesian and Baltic regions of Poland switched hands between different Polish dynasties and Piast cadet branches, as well as between German princes and religious orders, with various semi-autonomous monastic orders scattered throughout. This led to a mixing of Roman, German and Polish legal systems, with the Poles often having some measure of self-rule under the Order of Brothers of the German House of Saint Mary in Jerusalem, commonly known as the Teutonic Order.[2] Thus, weighing relative importance of these legal systems and assessing their intersection with each other is difficult for legal scholars, both those who lived in the 13th century, as well as in subsequent generations.

The debate between Matuszewski and Vetulani on this topic is instructive.[3] Matuszewski is more or less of the opinion that although the Polish customary law that developed in Silesia was undoubtedly influenced by German law, it also pushed back against it as something distinctively Polish. However, Vetulani is sceptical of the 'Polishness' of this law. The author sides more with Matusze-

[1] "Do we have such a literary monument? – We certainly do, the only one in writing, but important beyond words. Every our writer who studies history knows it, each of them read it and many claim it to be an »invaluable source of information on social relationships in Poland in the 12th and 13th centuries«. Nonetheless, this source has not yet been utilised to the extent it deserves and demands to be used. I mean the book published by Stenzel back in 1854 *Liber fundationis claustra s. Mariae virginis in Heinrichow*, Małecki, A., *Ludność Wolna W Księdze Henrykowskiej*, Odbitka z "Kwartalnika Historycznego", Vol. III, Lwów, 1894, p. 5.

[2] Matuszewski, J., *Najstarszy zwód prawa polskiego*, Warszawa 1959, pp. 66–67; Grodecki, R., *Księga Henrykowska* [Liber Fundationis Clasustri Sancte Marie Virginis in Heinrichow], Poznań 1949, vi-xii.

[3] Matuszewski. J., *Najstarszy zwód prawa…*, pp. 7–8, 11–13, 61–62; Vetulani, A., *Z badań nad katurą prawniczą w Polsce piastowskiej*, Wrocław 1976, pp. 129–127, 144, 148. For a neutral take on Vetulani's view of the *Księga Elbląska*, see: Lis, A., *Świadectwa kultury prawnej w Polsce do 1320 roku*, "Przegląd Prawno-Ekonomiczny" 2013, No. 24, p. 52.

wski, at least in regard to the *KE*: though surviving records of it were written in Old Germanic or Latin, it begins with the Poles declaring that they would not unilaterally accept German law.[4] Górecki makes a similar argument, but from the *KH*: that a critical part of the narrative was that a legal problem arose due to the fact that the Germans did not have a satisfactory understanding of Polish customary law. Polish and German customary law were similar enough to be coherently compared with each other, but not completely interchangeable, or else there would have been no need for this distinction.[5] Thus, both founding texts of Polish law suggest that Polish customs remained relatively intact and autonomous, which the German rulers recognised to some degree.

KH was written as the history of a Silesian abbey, and though it largely constrains itself to local events,[6] it chronicles a legal dispute over the interpretation of these customary laws between a local knight and an abbey over a forest, mediated by Duke Henry the Bearded, who oversaw the property, the knights, and the abbey by feudal relations. The book, written by a prior at the abbey, known only to us as Vincent, outlines his legal reasoning on behalf of the abbey, which eventually won the dispute. Throughout his argument, Vincent contextualises the debate by stressing the importance of Polish customary law and how Germans did not understand it correctly, thus leading to potential conflicts.[7] This *legal reasoning* and *form of argumentation*, rather than the exact legal outcome, is what is vitally important for legal scholars, as it sheds insight into how Polish customary law and its interpretation was quite similar to English customary law, with particular interest given to ambiguities between legal *norms* and *rules*, and the situations by which *norms* may become *rules*. Górecki clarifies the distinction, with *norms* as "declaratory propositions" that inform when a behaviour is right (permitted) or wrong (denied), whereas *rules* are "clarified, explicit, formalized, and above all written" down and which have "unquestioned authority."[8] In some sense, the evolution of the common law can be thought of as the tension of norms

[4] Higgins, J.P., *More in Common (Law) Than Originally Thought? A Theoretical First Comparison of the Magna Carta and the Księga Elbląska*, "Acta Universitatis Lodziensis Folia Iuridica" 91, pp. 25–36.

[5] Górecki, P., *A Historian as a Source of Law: Abbot Peter of Henryków and the Invocation of Norms in Medieval Poland*, c. 1200–1270, "Law and History Review" 2000, No. 18, p. 488.

[6] Grodecki, R., op. cit., xliii-xliv.

[7] Górecki, P., *A Historian…*, pp. 483, 522.

[8] Ibidem, pp. 483, 518.

and rules, and how customary law (norms) have evolved into statutory law (rules) over time.[9]

While comparisons of the similarities between Polish and English customary law and legal tradition are not uncommon in the literature, they are often written for specialists in medieval law, history, or philosophy.[10] Presenting the judgment given in *KH* as a case study will allow the comparison of 13th-century English and Polish customary law systems to be more accessible to a wider audience. At first glance, such a comparison may seem academic, as Poland is universally accepted as a member of the civil-law family by contemporary legal historians; however, recent literature suggests that this distinction may not be so clear after all, on several accounts: first, that there were many striking parallels between the intricate system of rights and liberties achieved by the English nobility under *Magna Carta* and the nobility in the Polish-Lithuanian Commonwealth[11]. Sec-

[9] Hale, D., *The Jury in America: Triumph and Decline*, Lawrence–Kansas 2016, pp. 8–10, 14; Lobingier, C.S., *Precedent in Past and Present Legal Systems*, "Michigan Law Review" 1946, No. 44, p. 960; Lubert, H.L., *Sovereignty and Liberty in William Blackstone's 'Commentaries on the Laws of England*, "The Review of Politics" 2010, No. 72, p. 292; Palmer, R.C., *The Origins of Property in England*, "Law and History Review" 1985a, No. 3, pp. 31–50; Palmer, R.C., *The Economic and Cultural Impact of the Origins of Property: 1180–1220*, "Law and History Review" 1985b, No. 33, pp. 375–396; Holmes Pearson, E., *Remaking Custom: Law and Identity in the Early American Republic*, Charlottesville 2011, pp. 11–19; Pojanowski, J.A., *Reading Statutes in the Common Law Tradition*, "Virginia Law Review" 2015, No. 101, pp. 1357–1424; Postema, G.J., *Custom, Normative Practice, and the Law*, "Duke Law Journal" 2012, No. 62, pp. 727, 736; Ernest, R., *On Comparative Research in Legal History and Modern Law*, "Bulletin of the Polish Institute of Arts and Sciences in America" 1944, No. 2, p. 870; Riddel, W. R., *Common Law and Common Sense*, "Yale Law Journal" 1918, No. 27, pp. 995–996, 1005; Seipp, D.J., *Bracton, the Year Books, and the 'Transformation of Elementary Legal Ideas' in the Early Common Law*, "Law and History Review" 1989, No. 7, pp. 175–218; Snow, D., Morton, F.L. (eds.), *Precedents, Statues, and Legal Reasoning*, in: *Law, Politics, and the Judicial Process in Canada, 4th edition*, Calgary 2018, pp. 330, 333–334; Sriram, K., *Roman Impact on Common Law: Legend or Legacy?*, "Student Bar Review" 2004, No. 16, pp. 27, 33; Wesley-Smith, P., *The Sources of Hong Kong Law*, Hong Kong 1994, pp. 3–4, 10–13, 19.

However, the narrative of common law as evolving from tradition and custom is contested. Wesley Smith stresses how there may be multiple interpretations and definitions of common law. For those who outright oppose this narrative, see: Epstein, R.A., *The Static Conception of the Common Law*, "Journal of Legal Studies" 1980, No. 9, pp. 253–275; Rudolph, J., *Common Law and Enlightenment in England, 1689–1750*, Woodbridge, Suffolk 2013, p. 267; Vermuele, A., *Common Law Constitutionalism and the Limits of Reason*, "Columbia Law Review" 2007, No. 107, pp. 1482–1532.

[10] Górecki, P., *Viator to Ascriptititus: Rural Economy, Lordship, and the Origins of Serfdom in Medieval Poland*, "Slavic Review" 1983, No. 42, p. 25 Cf 51, 31 Cf 77; Wieacker, F., Bodenheimer, E., *Foundations of European Legal Culture*, "The American Journal of Comparative Law" 1990, No. 38, p. 16.

[11] Rau, Z., Żurawski vel Grajewski, P., Tracz-Tryniecki, M. (eds.), *Magna Carta: A Central European Perspective of Our Common Heritage of Freedom*, London and New York 2016.

ondly, the Księga Elbląska, the other major source of 13th-century Polish law, was created under similar socio-political situations as the *Magna Carta*.[12] Next, that Poles were slow to adopt Roman law and other civil codes in the period before and during the Polish-Lithuanian Commonwealth, with much of the day-to-day legal practice remaining informal and customary law for a period spanning nearly 700 years.[13] While many of the institutions in Poland bore Latin names, this does not mean that they were the same institutions. This was an oversimplification by past Polish historians.[14] Finally, the imperial civil codes imposed upon Poland by Austria, Prussia or Russia were often resisted or incompletely or inconsistently implemented.[15]

Thus, while the last two hundred and fifty or so years of Polish legal history represents various attempts to codify it, both by the Poles themselves and by foreign rulers, for about three times as long in duration the Poles were governed by customary law. Given Poland's rich political and social history, it is only sensible that its legal history should be equally complex, with customary law, civil law and concordant methods of interpretation all playing a role. This paper will contribute a more robust historical inquiry to this budding contemporary literature by building off recent comparative work on the beginning of the Polish legal and political system, contending that the legal argumentation presented in *KH* is highly reminiscent of those in 13th-century England, and suggesting that deeper, comparative research is necessary.

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[12] Higgins, P.J., op. cit.

[13] Lewandowicz, M., *Is there a Polish Legal Tradition? – On the Margins of Considerations Regarding the 1933 Code of Obligations*, "Journal of European History of Law" 2013, No. 2, pp. 74–75; Karabowicz, A., *Custom and Statue: A Brief History of Their Coexistence in Poland*, "Krakowskie Studia z Historii Państwa i Prawa" 2014, No. 7, pp. 112–119, 126–127; Matuszewski, J., *Dlaczego nie uczono prawa polskiego na akademii? Praw zwyczajowe w kulturze oralnej i w kulturze pisma*, "Krakowskie Studia z Historii Prawa" 2015, No. 3, pp. 215–228.

[14] "The entire organisation of court and territorial offices in Poland, according to that researcher, whose opinions were shared by others, was a transposition of foreign solutions to the Polish land."

"This opinion cannot be supported. A hasty conclusion was drawn from Latin, i.e. western terminology that adoption of the names of certain institutions means transposition of those institutions," Vetulani, A., op. cit., p. 12.

[15] Gałędek, M., Klimaszewska, A., *A Controversial Transplant? Debate over the Adaptation of the Napoleonic Code on the Polish Territories In the Early 19th Century*, "Journal of Civil Law Studies" 2018, No. 11, pp. 269–298; Matuszewski, J., *Dlaczego nie uczono…*; Karabowicz, A., op. cit.

The facts of the case[16]

The original holder of the lands, Duke Henry the Bearded, gave land to Nicholas, a local lord, as well as other peasants known as the 'heirs of Cienkowice'. These peasants had also received land from Nicholas.

Nicholas had given lands as a gift in perpetuity, including a forest, to the local abbey at Głębowice. The forest was near the property of a local knight, Stephen Kobylagłowa.

Upon Nicholas' death, his lands were to be distributed to his heirs, and the peasants, incited by Stephen, claimed to the Duke that they were the heirs of the forest property as well.

The Duke believed the peasants and agreed to award them the land. Stephen then approached the Duke and gave him a horse worth 28 silver marks. The Duke was pleased with the gift and granted Stephen the forest as a favour, rather than to the peasants.

Stephen, who was poor, tried to sell the land but did not receive any immediate bidders.

The Church was upset that the forest land had been taken away, but would not accept buying it from Stephen. As the land had been granted to Stephen by the Duke, it would revert from the Church to his heirs upon his death.

The prior of the abbey, a local noble by the name of Vincent, convinced the Abbot that, because the Abbot was German, he had misunderstood Polish inheritance law and that the land would not return to Stephen's heirs on his death. The abbey bought the land again from Stephen, in perpetuity.

They brought the case before the Duke for settlement about whether the land would return to Stephen's heirs after his death.

The original case is as follows:

> "In diebus antique ducis Heinrici sedebat non longe ab ispa silua quidam miles Stephanus nominee cogomine uero Cobylaglova. Hic idem Stephanus post mortem domini Nycolai incitauit qosdam rusticos qui uocabantur tunc

[16] Grodecki, R., *Księga Henrykowska*, pp. 54–90. Since the author of the article is not a Latinist, he relies on Górecki's translation of the KH, as presented in: Górecki, P., *A Historian*, pp. 519–523. For those interested in the original Latin text digital scans may be accessed at: *Liber fundationis claustra Sancte Marie Virginis in Henrichow* (Księgozbiór Wirtualny Federacji, pp. 1268–1273), xvi-xvii in the original manuscript. http://digital.fides.org.pl/dlibra/doccontent?id=744&fbclid=IwAR0LqSOWHd8nxtEzL_BEO0QC_fQc5JLcP6CYRIwFNEqWbNDW-FtuRFnIT51U. Accessed on: 30.05.2020.

temporis Pyrosovizci ut a domino dvce peterent sibi siluam Glambowiz. Sed quia hii rustici errant proprii ducis et diuites et errant heredes de Cenkowitz, dixerunt ad ducem, Domine hec silua est nobis per potentiam notarii tui domini Nycolai uiolenter ablata. Nos autem si est gratia tua iure hereditario tenemur eam possidere. Quia antiquus Glambo erat uterinus frater aui nostril Pyrosonis. Quibus dux ut suis pro priis rusticis credidit abstulit siluam tunc claustro et dedit earn eisdem rusticis. Videns autem prefatus Stephanus de Cobylaglova suam astuciam in eisdem rusti cis preualuisse accessit ad ducem offerens ei dextrarium qui tunc coram duce com Putabatur pro uiginti et viiiO marcis argenti. Quem equum dominus dux lete sus Cipiens dixit ad Stephanum, Pro hac gratia et tuo munimine si quicquam rogaueris inpetrabis. Quod audiens Stephanus reuerenter et lete accessit ad ducem dicens, Domine tu scis quia tibi libentissime seruio sed habeo modicas possessiones. Vnde rogo ut tibi domino meo tanto melius ualeam seruire mihi siluam que tibi modo cessit digneris conferre. Hiis auditis dominus dux uocatisque dictis rusticis con tulit eidem Stephano iam sepedicto siluam. Ecce ratio quare filii et heredes eiusdem Stephani minantur eximere a claustro eandem siluam. Sed insequentibus ostendemus qualiter dicta silua sit claustro postmodum in perpetuam possessionem confirmata, et quodfilii Stephani et ipsorum heredes in praefata silua nullamhabent iurisdictionem requirendi uel redimendi.

Hec silua prescripto modo perdita est primo anno post mortem domini Nycolai. Sed cum sepedictus Stephanus hanc siluam modico tempore tenuisset prebuilt earn diuersis personis uenalem ea uidelicet ratione quia indigens erat et illo in tem pore mimime curabatur de aliqua deserta possessione. Erat autem in diebus illis in Camenz quidam prepositus Vincentius nomine qui prepositus erat uir nobilis patruus uidelicet comitis Mrozkonis et erat fundator illius claustri de Camenz. Huic preposito prebita est a Stephano dicta silua Glambowiz aliquociens uenalis. Sed idem prepositus sicut erat uir grandeuus et ualde timoratus noluit nostum claustrum hac silua priuari. Misit ydoneum nuncium domino H. huius loci abbati suadens ei ut dictam siluam suo claustro quocumque modo posset redimeret. Quod audi ens dominus abbas propria persona adibat prepositum, dicens ei, Si hanc siluam emero heredes Stephani postmodum iure Polonico requirent.

Ad quod prepositus respondens dixit, Nequaquam. Sed scire debetis Domine abbas quod aput attauos nostros et patres ex antiquo statutum est, ut si quisquam de genere Polonorum uendiderit quodlibet patrimonium suum

eius heredes post modum poterunt redimere. Sed forte uos Teuthonici non plene intelligitis quid sit patrimonium. Vt ergo plenarie intelligatis uobis exponam. Si quicquam possideo quod auus meus et pater michi in possessionem reliquerunt hoc est meum uerum patrimonium. Hoc si cuiquam uendidero heredes mei habent potestatem iure nos tro requirendi. Sed quamcumque possessionem mihi dominus dux pro meo seruicio uel gratia donauerit illam uendo etiam inuitis amicis meis cuicumque uoluero quia in tali possessione non habent heredes mei ius requirendi. Vnde quia scitur et con stat quod iam dicta silua Glambovicz non erat nec est patrimonium Stephani sed donacio ducis, [unde] libere et absque timore potestis eam emere secure. Quia nullus heredum Stephani habet nec umquam habebit in ea aliquod ius requirendi, si sunt uel erunt in claustro uestro qui sciant se iure Polonico et had ratione defendere […]Auditis hiis uerbis dominus abbas a preposito emit a Stephano de Cobylaglova supradictam siluam pro uiginti et octo marcis argenti huic claustro inperpetuam possessionem."[17]

Legal issue

The legal issue behind the case was the weighing of claims on land by *patrimony and inheritance* vs acquisition by *gift*. The property right to the land was held by the noble family and returned to the family on the death of either the lord or his vassal. The property rights granted by patrimony between a lord and his vassal could not be alienated without the consent of the family members (*nie można było alienować bez zgody członków rodziny*).[18] However, at any time, the Lord was capable of having the right of the land return to him, especially in the case of a new lord inheriting the land due to death of his ancestor, or the death of the tenant. The only exception to this rule is if the lord granted it as a gift and permanently transferred the ownership.

As Vetulani explains in full:

Land given by a duke remained to be his property and even if it was passed down from father to son or from son to sons, the duke still had the right to take it back. Also, every new duke could take back land given by his predecessor, as this involved the property rights of the ruling family, which could

[17] Górecki, P., *A Historian*…, pp. 519–520, *Liber fundationism*…, pp. 38–39.

[18] Vetulani, A., op. cit., p. 30.

not be permanently reduced by a discretionary decision of a given ruler. On the other hand, the party receiving land from a duke could freely alienate the land without any participation of the members of his own family. In time, this could lead to a relatively speedy distinction between patrimony, land passed down by predecessors and belonging to the entire family and acquired goods, regardless of the method of acquisition. Only the first category of property (patrimony) could not be alienated without the consent of family members. However, acquisition became a component of patrimony and was subject to alienation limitation on par with other family property, if it was passed, together with other property, down to a new generation, to the acquirer's descendants.

Family rights to patrimony remained very stronger in the late historical period, which was manifested, for example, by the right of closer proximity. Patrimony sold without the consent of authorised family members could be bought back by them at the selling price. But even if the family consented to alienation, they still kept the pre-emption right to land. If the new purchaser or his descendants wanted to sell land, the family members of the former owner had the pre-emption right to buy that land back.[19]

Holding

The Duke sided with the abbey and reclaimed the right to the forest, which he then permanently gifted to the abbey, which cancelled out the claim of Stephen and his heirs. Stephen was compensated the 28 silver marks for his horse. The Duke gathered all of his local lords to inform them of the purchase and then remeasured the land to confirm the bounds of the abbey's property.

The Duke announced this to Stephen:

"Volo ut hoc factum decetero sit claustro firmum. Vnde scias quia prius erat mea donatione domini Nycolai qui omnes suas possessiones mea auctoritate claustro de Heinrichov confir mauit. Veni et resigna coram me et meis baronibus claustro quod prius suum fuer at. Et dominus abbas de Heinrichow restituat tibi equum tuum in ea summa pecunie sicut tunc fuerat taxatus uidelicet xx et viii marcas pro eo. Quam summam pecunie cum Stephanus de Cobylaglova ibidem accepisset, Dixit iterum dominus dux, Vos domini

[19] Vetulani, A., op. cit., pp. 30–31.

barones et omnes qui nunc presentes adestis sciatis quod Stephanus pro suis peccatis nunc resignauit et restituit claustro de Heinrichow siluam suam Glambovicz, quam licet nostra donatione tamen iniuste tenuit."[20]

Reasoning

The prior's argument, which the abbey and then the Duke accepted, was as follows: in the Polish feudal legal system, if a family had received land from a noble above them in a 'patrimonial' relationship, it would be passed from a man to his heirs. Even if the father sold the land to another person, upon his death, the right to the land would return to the original owning family. This estate could only be forfeited with some degree of familial consent, i.e., that the heirs would also be forfeiting their rights and would have to agree to it. However, if land was acquired as a gift, then the owner was able to freely dispossess it, regardless of the consent of their heirs. As the Duke had given the land to Nicholas, who then had gifted it to the abbey, Nicholas' original 'heirs,' which were dubious, would not have had legal claim to it.[21] The peasants who were Nicholas' tenants did not understand the Polish customary law of gift-giving or had misrepresented the situation to the Duke, and the Duke had erroneously given them the forest in violation of customary law. As he was German, the Abbot had been unfamiliar with Polish customary law, and had not been sure whether or not to buy the forest again from Stephen, which technically should have belonged to the Abbey.[22] The only way to correct the situation was for the Duke to retract his gift to Stephen, recompensate him the value of the horse in order to then re-gift the land back to the monastery. In this sense, the weight of claiming a gift was apparently stronger than that of inheritance.

[20] Górecki, P., *A historian*…, p. 520; *Liber fundationism*…, p. 39.

[21] Górecki P., *A historian*…, p. 487.

[22] When the Abbot inquired of Vincent whether upon the Abbot's death the land would return to Stephen's heirs, he clarifies:

"Nequaquam. Sed scire debetis Domine abbas quod aput attauos nostros et patres ex antiquo statutum est, ut si quisquam de genere Polonorum uendiderit quodlibet patrimonium suum eius heredes post modum poterunt redimere. Sed forte uos Teuthonici non plene intelligitis quid sit patrimonium. Vt ergo plenarie intelligatis uobis exponam. Si quicquam possideo quod auus meus et pater michi in possessionem reliquerunt hoc est meum uerum patrimonium. Hoc si cuiquam uendidero heredes mei habent potestatem iure nos tro requirendi. Sed quamcumque possessionem mihi dominus dux pro meo seruicio uel gratia donauerit illam uendo etiam inuitis amicis meis cuicumque uoluero quia in tali possessione non habent heredes mei ius requirendi," Górecki, P., *A historian*, p. 520; *Liber fundationism*…, p. 39.

Case impact: deriving principles of legal reasoning from 13th-century Polish customary law

KH has traditionally received weight from Polish legal historians for two main reasons: its cultural-historical value and legal-historical value.[23] Regarding the first, it contains the first sentence ever written in Polish,[24] and presents one of the few glances into the complicated social and political situation of Poland at the time, particularly in Silesia.[25] As a legal-historical source, it is of equally important value, and as one of the few surviving legal texts from the time period, it has 'no analogy in [Poland's] entire medieval historiography'. From it, generations of legal scholars have tried to extrapolate the system of Polish customary law from its painstaking details and lucidity of presentation. At its core, the book is the 'history of establishing and furnishing' the monastery and then details its properties through time in order to 'prepare the most effective defence of the property rights of the monastery.'[26]

Generations of legal historians have tried to extrapolate much of the 13th-century Polish legal system from *KH*. Lis, for example, suggests that it gives a definitive answer to the right of relationship (*Ius propinquitatis*) regarding *patrimonium* vs purchasing of land,[27] of which Górecki and Grodecki are sceptical. The latter explicitly comments on how the book was 'practical,' 'narrow,' 'one-sided' in content, presented no 'word about the religious-church activity' of the time, and that the unknown writer explicitly mentions that he is avoiding discussing political matters or the affairs of individual princes.[28] Górecki emphasizes that not only did Prior Vincent need to clarify the situation of property rights for the Abbot and the other monks, some of whom were presumably Poles, but that Duke Henry, the peasants, and Stephen either did not know the rule themselves or there was enough ambiguity for Stephen to dupe them. However, even after the case was settled, the property rights had to be reconfirmed by the Duke's son and the monastery preserved their

[23] Grodecki, R., *Księga Henrykowska*…, XVI–XLI; Lis, A., *Studies on the legal culture of the 13th and 14th century – the Book of Elbląg and the Book of Henryków*, "Przegląd Prawno-Ekonomiczny" 2013, No. 23, p. 9.

[24] Mateuszewski, J., *Najstarze polskie zdanie prozaiczne: zdanie henrykowskie i jego tło historyczne*, Wrocław 1981; Lis, A., *Studies on the legal culture*…, p. 8.

[25] Grodecki, R., op. cit., v–xii.

[26] Ibidem, xliii; Lis, A., *Studies on legal culture*…, p. 9.

[27] Lis, A., op. cit., p. 9.

[28] Ibidem, xliii–xliv.

legal records for centuries. All of this suggests that the weighing of acquisition by gift and by patrimony may not have actually been so clear for its time after all. Górecki goes on to further suggest that heritability vs acquisition was itself dependent upon a set of norms that determined the appropriate legal forms, and compares the *KH* with other legal sources and anecdotes.[29]

Though Górecki does not say it explicitly, his discussion about, as well as the evaluation of the 'eclectic approach' to norms differ from the interpretation of Grodecki in that it is wider in scope. Indeed, it appears to fuse together these two historical strands in a legal-sociological manner. He then concludes by speculating on how the abbey's defence of its property was in fact a highly contextualised process where the monks themselves became translators of 'norms into rules – and in that sense, as one of their sources of law.'[30] This method of legal interpretation, which necessarily combines the social-cultural with the legal, is a process that has long been explored and noted as a feature in the evolution of common law. In this sense, it is necessary to think about both what is meant by 'common law' and what is meant by 'legal interpretation,' or the transformation of norms into legal rules. Only if similarities in legal interpretation can be demonstrated, then is it possible to speculate about likeness in the evolution of Polish customary law with English common law.

For this exercise, it is necessary to go beyond the *nominative* discussion of common law as a system (e.g., compared and contrasted with civil law or statutory law), to a more *substantive* discussion of common law as a *way of thinking* about law, that is, as a set of meanings about law and also the process of law.[31] For example, there is a historically based explanation of common law emerging from when the Norman kings synthesised various legal systems into one law that was *common* throughout the territory. Another interpretation is that common law comes from judicial decisions, rather than legislative fiat. Another is a variation of the second, but that common law only emerged from a specific set of courts. Finally, there is a systematic comparative way, that tries to contrast common law with Roman law, civil law, etc.[32] Of these four perspectives, the most useful interpretation to facilitate comparison is a combination of the first and third option: historical expla-

[29] Górecki, P., *A Historian*…, pp. 488–492, 504.

[30] Ibidem, pp. 513–518.

[31] Edlin, D.E., *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review*, Ann Arbor 2008, p. 22.

[32] Wesley-Smith, P., op. cit., p. 4.

nation and judicial decisions. This combination must be qualified, however: while there may be parallels between the Teutonic Order in Silesia and the Norman conquerors in terms of foreign rulers attempting to synthesise local customary law into one general system, this clearly did not happen in the 13th century. Indeed, the whole legal reasoning of *KH* and *KE* point to an absence of such a synthesis. Further, the law is being interpreted, but in this case, it is through feudal relations, rather than some formal legal system. Thus, the judgment reached in *KH* would be specific only to its particular circumstance, hence why the records would have to be kept. In other words, while there is more room for optimism in further comparative research, one or two cases are more indicative rather than definitive.

Whatever one's conception of common law, it is clear that it has some historical and sociological character, as this is what provides the context for legal interpretation. Thus, the nature of common law is to 'craft' practical reasoning that balances judicial and normative meanings, where the latter is situationally determined in each case. Common law is driven by the cases first, rather than by legal principles.[33] This, by its very nature, gives common law a greater diversity of legal arguments and methods than civil codes, such as in German or French law,[34] and operates by precedent and analogy. Rather, civil law systems rely more on the 'interpretation and application of codified legal rules to cases' that are specific to certain areas, i.e., commerce vs criminal codes. If there is a gap in the legal codes, only then does following the precedent of other cases come into importance. [35] Put another way, civil legal reasoning sees gaps *as exceptional*, whereas in common law they are *constitutive*.[36]

An important issue that arises in common law is how to proceed when there are incomplete or differing understandings of how to interpret legal criteria. In common law, this puts emphasis on argument, interpretation, and comparison of the current case with previous ones. This is accomplished through common law

[33] Balganesh, S., Parchomovsky, G., *Structure and the Common Law*, "University of Pennsylvania Law Review" 2015, No. 163, pp. 1302–1304.

[34] Prott, L.V., *Judicial Reasoning in the Common Law and Code Law Systems*, "Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy" 1978, No. 64, pp. 432–434.

[35] Nievelstein, F. et al., *Effects of conceptual knowledge and availability of information Sources on law student's legal reasoning*, "Instructional Science" 2010, No. 38, p. 24.

[36] Whalen-Bridge, H., *The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills*, "Journal of Legal Education" 2008, No. 58, p. 368.

courts being an adversarial system, which is 'essentially a competitive model of evidence production' that incentivises litigants to produce the best evidence and compose the most coherent legal reasoning. Often, the discovery and debating process between the litigants provides more evidence and thus proves more efficient under common law than under inquisitorial law, for example, where the prosecuting authorities may underproduce legal information when they believe that they have won their case.[37]

There are two broad forms of legal reasoning in common law: reasoning by analogy, and reasoning by distinction. This is essentially a judgment by the legal interpreter: if the logic of the two cases is similar, they are compared, if the logic is too dissimilar, they are contrasted. These arguments, however:

> "[A]ssume that when an interpreter knows the appropriate result in a particular case, but cannot identify the criteria that make that result appropriate, he can still know enough about what the criteria might be to sense whether a given circumstance should matter. If that assumption is right, then analogising and distinguishing cases in this way are valid methods of reasoning, although they seem puzzling and disappointing because they cannot spell out the argument fully. One cannot explain why, according to criteria, one cannot state a given circumstance should not matter."[38]

In light of this difficulty, common law argumentation often tries to use similar cases to construct general rules, which, as they come from imprecise and specific legal sources, are likely to be themselves imprecise. This form of argumentation will try to examine both exceptions to the rule and the normal circumstances in which the rule should be applied. To simplify, these rules must themselves be simple enough and clear enough, or else there is no point in producing them in the first place. Though many different criteria may be used to construct these rules, the two most relevant to this discussion are classificatory rules and legal principles, i.e., rules that sort circumstances of cases together so that similar logic may be applied.[39]

The process outlined above is nearly the same as indicated by Górecki's evaluation of *KH* and its social context. The existence of the book as a defence

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[37] Zywicki, T.J., *Spontaneous Order and the Common Law: Gordon Tullock's Critique*, "Public Choice" 2008, pp. 45–46.

[38] Gordley, J., *Legal Reasoning: An Introduction*, "Columbia Law Review" 1984, No. 72, p. 148–149.

[39] Ibidem, pp. 147–152, 153–156.

of the abbey's property claims was itself a form of precedent – which the monks themselves constructed – and displays a historically based reasoning, rather than appealing to natural law, canon law, or some other legal source.[40] The central legal issue in the case was not the definition of norms and criteria for property, as both the acquisition of property by patrimony as well as by gift were well-known at the time; the issue was how to weigh these two understandings. In this sense, the precise ways in which property could be passed between persons does not matter: *any* combination of methods would do, so long as this process of refining norms into rules through an evidentiary, adversarial process was present. Given that these concepts of property ownership and acquisition were embedded in the culture at the time, there was enough similarity for there to be a legal case, but not enough clarity for it to be resolved clearly. The inherent adversarial nature between Stephen and the abbey allowed for precedent and norms to be generalised into legal rules. Górecki notes that the Abbot even constructed a strict syllogism to outline the reasoning, similar to how common law processes would use analogy today.[41] This is exactly how common law legal arguments develop.

Conclusion

Górecki claims that the legal defence presented by the abbey was 'eclectic' and often typical for its time in 13th century Poland, implying that Polish law was not well-developed and systematised during this period. He also cautions that any attempts by legal historians to make definitive judgements about this complex mix and to draw broad conclusions risks historic anachronism.[42] That being said, it is quite possible that much of Polish legal historical scholarship itself suffers from a recency bias, in that many of the historians were treating Poland as part of the civil, Roman, and statutory law traditions uncritically. Countervailing research on the *Magna Carta* and Piast Poland suggests that these categories cannot be applied so simply, and that giving more weight to comparing Polish customary law with English customary law may help reduce some of these 'eclecticisms.' It may be that while Piast Poland was a complex society going through a series of political and legal transitions, the models used to describe it from the reference

[40] Górecki, P., *A Historian*…, pp. 480, 483, 487, 512–515.

[41] Ibidem, pp. 517–518.

[42] Ibidem, pp. 485, 506, 511, 517.

of codified law may be obfuscatory. Along these lines, this article's examination of similar styles of *legal thinking* between Polish and English customary law is intended to be propaedeutic, rather than definitive. If the model of the transition from *customary law* to *common law*, rather than from *customary law* to *statutory law*, proves to be fruitful in clarifying 13th century Polish institutions, then broader investigations into a Polish common-esque law may be warranted.

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