RE-SITUATING THE COMMON LAW WITHIN A GLOBAL HISTORY OF LEGAL THOUGHT

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ABSTRACT

The dominant narratives on the origins of English common law have traditionally been confined to a Eurocentric paradigm, emphasizing Roman, Germanic, and Anglo-Saxon roots while overlooking potential influences from other advanced legal systems. This paper argues for a re-examination of common law's genesis within a broader, global history of legal thought, positing that its unique development may be partially explained by cross-cultural legal exchanges with the Islamic world. It critically assesses the established institutional and procedural innovations of the Norman period, particularly under Henry II, which established common law's distinctive framework of writs, itinerant justices, and jury trials. However, the paper contends that the origins of specific substantive doctrines, most notably the law of trust, remain inadequately explained by conventional Roman or Germanic theories. Through a comparative historical analysis, the study explores the compelling structural and functional parallels and the historical context of the Crusades and other points of contact that provided a plausible conduit for the transmission of legal concepts from Islamic Law to Common Law. Adopting a doctrinal and historical methodology, the study relies on primary legal sources, such books, seminar paper, journal article and secondary scholarship in comparative legal history. The findings reveal that the circumstantial and analogical evidence for Islamic influence, while not conclusive, is too significant to ignore and presents a credible challenge to insular narratives of common law's development. The paper concludes by advocating for a more inclusive global perspective in legal historiography, which acknowledges the interconnectedness of legal traditions and can foster a deeper, more nuanced understanding of the evolution of the common law.

KEYWORDS: Common Law, Islamic Law, Legal History, Legal Origins, Cross-Cultural Exchange

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1.1 Introduction

Plucknett[1] expressed the view that legal history is a story, but quite unlike other stories, it cannot be begun at the beginning. The basis for this view is not far-fetched. No matter how remote and distant the date which we begin to examine legal history, it is always true that much of a more distant and remote past must have been left behind. We must also admit that the further we look beyond certain periods to discover the evolution of laws and legal systems, the more controversial our sources and doubtful our interpretation[2].

Scholars and researchers in the field of common law history have had to admit that the origin of common law is somewhat shrouded in mystery[3]. This owes to the fact that till date, no scholar has been able to assert with a degree of certainty, how some of the most distinctive institutions of common law arose[4]. Some historians have averred that common law is a product of many diverse influences, the most important being the civil law tradition of roman and canon law. Ames held the view that the common law had Teutonic rather than Roman origins[5]. He acknowledged that Bracton had introduced some doctrines of Roman law into the English common law while cautioning that this Roman influence was less than previously assumed. The main impact of Roman law, he added, was through the Ecclesiastical Courts and various doctrines of equity. While other scholars disagree with this view, all, it seems are agreed on the fact that the age which saw the early beginnings of English history, witnessed also the decline of Roman law which had prior to this time ran a course spanning a thousand years and undeniably contributing immensely and richly too to the civilization[6]. It is therefore, not only convenient but also expedient to examine

[1] Plucknett, T. F. T. (2010) *A Concise History of the Common Law*, Liberty Fund, incorporation, Fifth Edition, Indianapolis, United states of America, p.3
[2] ibid
[3] Makdisi, J. A. (1999) "The Islamic Origins of the Common Law", *North Carolina Law Review*, vol.77,Number 5 Article 2, p. 1638, See also Strizhakov Ilya V. (2015) "The Problem of the Theory of Origin of British Chancellor of the Court"*, Historical and Social Educational Ideas Tom*,part 2, p.1
[4] Harold J. Berman & William R. G. (1980) *The Nature and Functions of Law*, 4th Ed. ,London, p. 578-79 See also See Samuel E. T. (1968) *Introduction to Bracton on the Laws and Customs of England*, , Harvard University Press, USA, p. 565
[5] Ames, J.B (1913) *History of Common Law*. Harvard University Press, Harvard, p.145
[6] Collingwood, G. R. and Myres, J.N. L. (2013) Roman Britain, In: Oxford History of England, *Journal of the American*
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the history of common law from the period of the decline of the influence of Roman Empire in Britain.

1.2. The Anglo Saxon Period

Plucknett posited that the conquest of Britain by the Roman generals was partly due to the assistance rendered by Britain to the Gauls when the latter battled to resist the Roman Conquest. By A. D 43, the systematic conquest of the island was begun by Agricola and for the next three and a half Centuries, Britain was under Roman rule. The nature and character of this occupation was captured succinctly by Haverfield who stated that:

> From the standpoint alike of the ancient Roman statesman and of the modern Roman historian, the military posts and their garrisons formed the dominant element in Britain. But they have little permanent mark on the civilization and character of the island. The ruins of their fortresses are on our hill-sides. But Roman as they were, their garrisons did little to spread Roman culture here. Outside their walls, each of them had a small or large settlement of womenfolk, traders perhaps also of time-expired soldiers wishful to end their days where they had served. But hardly any of these settlements grew up into towns. York may form an exception… Nor do the garrisons appear greatly to have affected the racial character of the Romano-British population[7].

For a period of over three Centuries or so, that the Romans occupied Britain, there was relative peace and prosperity until the invasion of the Anglo-Saxons. The Anglo-Saxon period was very long and it witnessed a great deal of development. It has correctly been asserted that right from the time of St. Augustine, the stream of legal sources was definitely Anglo-Saxon in character and this continued up till the Norman Conquest of 1066[8].

[7] Haverfield, F. J. Cambridge Medieval History cited in Plucknett, op. cit. p. 6
[8] McLean, J. (2013) "Ideologies in Law Time: The Oxford History of the Laws of England", *Journal of the American*
Bar Foundation, Law & Social Inquiry, vol. 38, Issue 3, p.746

During the 9th Century, for reasons not clearly established, the Norse became active on the Sea with the resultant effect that maritime raids resulted in the colonization of Iceland, parts of Ireland and Scotland, the Orkneys, Shetland, Hebrides and portions of Northern France known as Normandy. The spread of foreign culture in England increased immensely during this period which in some aspects seems a sort of peaceful Norman Conquest[9].

1.3. The Norman Conquest

One of the results and perhaps the greatest of the Norman conquest was the importation of precise and orderly methods into the government and law of England. When Duke Williams took over the throne of England, he immediately introduced reforms which changed the status quo from what was obtainable during the Anglo-Saxon era. He reorganized the casual treasure of the Anglo-Saxon kings as an exchequer on business lines which he utilized to maintain a firm hold on the sheriffs and local government generally[10].

During the reign of Henry I, he introduced a lot of reforms. It was however during the reign of his successor Henry II that most of what became common law was birthed. In essence, in the discourse of the development of common law, the period of Henry II is agreed upon by legal historians to be the most critical and crucial epoch in the history of common law.

It is instructive to note here that the Norman Conquest did not bring about an immediate end to the Anglo-Saxon law, rather, a period of colonial rule by the mainly Norman conquerors produced change[11]. The change referred to here came to crystallization during the reign of Henry II. Royal officials roamed the country, inquiring about the administration of justice. Church and State were separated and later developed their own law and legal systems[12]. When it was later realized that one court was not enough for the whole of England, the country divided into several regions called circuits. In each of the circuit, a judge was appointed. These judges used to tour from one circuit to another per annum[13].

[9] Plucknett, op. cit. p. 15
[10] ibid
[11] McLean, J. op. cit. p.750
[12] ibid
[13] ibid

The enormous development of common law as was witnessed under Henry II made some scholars and historians to refer to him as the father of common law[14]. The reign of Henry II has long been regarded, and rightly, as a period of major importance in the history of English law because for most legal historians it is the period when it first becomes possible to recognize the existence of an English Common Law in terms of both a set of national legal institutions bringing law and justice to the whole of England, and a body of legal rules applicable over the whole or almost the whole of England. The clearest overall view of the then newly emergent English Common Law is to be found in the pages of the legal treatise known as Glanvill, which was completed in the final years of Henry's reign, between 1187 and 1189[15].

Although some writers have stated that royal justices visiting more than one county and holding sessions in them began as early as the reign of Henry I, there is no doubt that the General Eyre, which was a systematic arrangement for the nation- wide visitation of all counties within a limited period of time by groups of royal justices possessing both civil and criminal jurisdiction and bringing royal justice to the countryside and also with a remit to make local enquiries on the king's behalf, was indeed a creation of the reign of Henry II[16]. The General Eyre thus continued to play an important, though gradual role in the functioning of the English legal system down to the end of thirteenth century. It was not in a strict sense a single court with a continuous institutional existence. In many respects, however, it functioned as though it were such a court, with multiple divisions each possessing the same jurisdiction, but with the court itself enjoying only a discontinuous existence and mutating in shape and even in jurisdiction over time[17].

Various characteristics distinguished the court of the General Eyre and the civil-jurisdictional side of the Exchequer that had been created in Henry's reign, and the other royal courts that were to be created later in the thirteenth and fourteenth centuries, from the earlier types of communal, feudal and even royal courts that had hitherto existed in England.[18] Judgments within these newer courts were made by relatively small groups of justices who were commissioned to act by the king, as opposed to suitors groups of local landowners with a tenurial obligation to attend court and

[14] Brand, P. (2002)*Henry II and the Creation of the English Common Law in*: Harper-Bill, C. and Vincent, N. (Eds.) Henry II New Interpretations, The Boydell Press, London, p. 215
[15] ibid
[16] Brand, P. (1992) *The Making of the Common Law*, Oxford University Press, London, pp. 79–86.
[17] Brand, P. (1990) *The Origins of the English Legal Profession,* Oxford University Press, London, p. 22
[18] ibid

participate in the making of collective judgments there in accordance with the custom of the court or of the community or lordship[19].

The royal justices who ran these new courts also required specific royal authorization for all the business they heard. In the case of civil litigation, this took the form of a royal writ ordering the local sheriff to have the defendant summoned to appear on a specific day to answer a specific case in that court, and also instructing the sheriff to produce the writ in court on that day[20]. In the case of criminal pleas (pleas of the Crown), it took the form of a more general authority from the king to hear pleas of the Crown in the county where the Eyre was holding its sessions. No such specific authorization had ever been required by communal or feudal courts[21].

The institutional developments associated with Henry's reign went further than the development of new nationwide royal courts with the novel characteristics described above. Writs issued by chancery in the name of the king and authenticated by his seal had been used since at least the reign of William the Conqueror as a way of initiating litigation or authorizing particular commissioners to hear litigation in the king's name, and inevitably these writs show some use of particular, recurrent phrases[22].

It is, however, only in Henry II's reign that we find what were later to be called writs 'of course' (decursu), a limited range of standard forms of writs available from Chancery apparently on demand for the initiation of litigation not just in the king's courts, but also for some types of litigation in county courts and even over a small range of types of litigation in seignorial or feudal courts[23]. Their forms varied only in the specific details of the names of the litigants and of what was at stake in the litigation and in the names of the counties to whose sheriffs they were addressed or the lord to whom they were addressed, in the case of writs initiating litigation in seignorial courts[24].

[19] ibid
[20] ibid. See also Van Caenegem, C. R. (1959) *Royal Writs in England from the Conquest to Glanvill: Studies in the Early History of the Common Law*, Selden Society, P. 77
[21] Carr, J. P. (2007) Feudal Strength: Henry II and the Struggle for Royal Control in England, *An Unpublished* Senior Thesis submitted to the Eastern Michigan University In Partial Fulfillment of the Requirements for Honors in History and Philosophy.
[22] Bryson, J. (2002) Henry II and the English Common Law, *Supreme Court,* Plantagenet Society of Australia, *Lawlink NSW*, p. 5
[23] ibid
[24] ibid

One other important development seems also to have taken place in respect of writs during the course of Henry's reign, though only in respect of writs initiating or issued in the course of litigation in the king's court. This was the invention of the 'returnable' writ: a writ that ordered the appropriate local sheriff not just to have the defend ant summoned or, in the case of judicial writs, to have other measures taken to ensure the appearance of the defendant or others involved in litigation for a specific day in court, but also to return that writ to the court by that day. This not only demonstrated that the sheriff had indeed received the writ, but also allowed the writ itself to function as a warrant for the court to hear the case and for the issuing of further process in the case. During the thirteenth century it became the practice for the sheriff to report in writing on what he had done, on the dorse of the writ or on a separate schedule when he returned the writ which was latter called making a 'return' to the writ[25]. This practice had only just begun by the end of Henry II's reign.

There is also some evidence for the occasional use of sworn local juries as fact-finders in litigation prior to Henry II's reign[26]. Again, it was only during his reign that jury trial became available as a standard procedure in the king's courts, though only in civil litigation, and then only for certain specific types of civil litigation[27]. There were two different forms of jury trial in Henry's reign. In some of the standard original writs created during the reign, a jury was summoned to appear in court at the same time as the defendant, and was provided in advance with a specific question or series of questions to answer, typically questions that mixed questions of law and fact[28]. This was the procedure of the petty assizes, and the initiative in securing jury trial in them lay with the plaintiff. The defendant was, however, given a chance to show why the questions as formulated might give misleading answers, or other reasons why the assize should not be allowed to proceed[29].

The second form of jury trial was that represented by the grand assize. Here, proof by jury trial was not indicated in the writ summoning the litigation, but was something chosen by the defendant during the course of litigation. Here, too, the question put to the jury had to be framed in terms of one of a limited stock of formulas, and the questions also typically mixed what would later be seen

[25] Brand, P. (2002) op. cit., p. 219
[26]Macnair, M. (1999) Royal Writs: Vicinage and the Antecedents of the Jury', *Law and History Review*, vol. 17, p. 566
[27] ibid
[28] ibid
[29] ibid

as questions of fact and questions of law[30]. Even by the end of the reign of Henry II, jury trial was used only in litigation about land and similar types of property. It had not yet developed into the all-purpose fact-finding procedure for all kinds of civil litigation that it was to become in the thirteenth century and beyond. It seems also at this time to have been a procedure confined to the king's courts proper, and not yet to have become available as it was later in the county court, in litigation initiated by the king's writ[31].

By the end of the reign, the new king's courts had come to exercise jurisdiction over a number of very important areas. In land law, perhaps the key area of civil jurisdiction, they provided a series of important and valuable remedies that seem from the first to have proved attractive to litigants. One (the assize of novel disseisin) protected a tenant in possession of a free tenement from wrongful dispossession (from being disseised 'unjustly and without a judgment'), whether by his lord or by a third party, and also protected his right to some of the appurtenances of his free tenement (such as rights of common) and against certain types of 'nuisance' that might cause damage to his property without wholly dispossessing him of it[32].

A second remedy, the assize of mort d'ancestor enforced the right of a close heir to succeed to the inheritance of an ancestor who had died in seisin (possession) of land, although the remedy was available only against the lord of whom the land was held or a stranger, not against a rival heir[33]. A third important remedy was that provided for the widow. A widow who had received none of the dower to which she was entitled on the death of her husband, whether this took the form of a specific assignment of particular lands made at the church door at the time of the marriage, or a general entitlement to a third of the lands the husband had held during the marriage, could bring an action of dower *unde nichil habet* in the king's court to assert her rights[34].

A second significant area over which the king's courts had come to exercise jurisdiction by the end of the reign of Henry II was in relation to litigation between patrons about the advowson of churches which is the right to nominate suitable candidates to ecclesiastical benefices when they fell vacant, for institution to those benefices by the local ordinary. The king's courts offered two

[30] ibid
[31] ibid, p.570. See also, Palmer, R. C (1982) The County Courts of Medieval England, Princeton, pp.215–217.
[32] Biancalana, J. (1988) 'For Want of Justice: Legal reforms of Henry II', *Columbia Law Review*, vol. 88, p.484
[33] Brand, P. (2002) op. cit, p. 222
[34] ibid

different kinds of remedy. One, the assize of darrein presentment which was intended for use where the living was currently vacant; the other, the writ of right or precipe of advowson which was intended for use where the living was not currently vacant and the dispute was about the right to present at future vacancies[35]. They also offered patrons a mechanism (one form of the writ of prohibition) to prevent litigation in ecclesiastical courts between clerks with rival claims to the possession of a living, where the outcome might be prejudicial to the patron's right of advowson. Although there was to be a later expansion in the range of remedies offered, the basic principle of royal jurisdiction was already clearly established[36].

One final major area of jurisdiction for the king's courts by the end of the reign of Henry II was over 'pleas of the Crown' regarding those major criminal offences that were punishable by death or mutilation. The most important of these were homicide, arson, robbery, rape, treason and the forgery of the king's seal or coinage[37]. Two quite different procedures were involved. One was private prosecution brought by the individual against whom the offence had been committed or in the case of homicide by a close surviving relative. The other was prosecution 'at the king's suit', when an offender was named by a presentment jury of the locality as having committed an offence or when an appeal had been withdrawn or had failed on technical grounds[38]. Thirteenth-century practice required appeals to be commenced in the county court and allowed them to proceed to the outlawry of the appellee if he did not appear. If the appellee did appear, he was arrested and imprisoned pending trial before the king's justices at the next session of the Eyre[39].

There is less that can be said about the Common Law as a general system of legal concepts and legal rules and about how much had been achieved by the end of Henry's reign. The very idea of a Common Law of England was, perhaps, only a possibility once there were superior courts with a nationwide jurisdiction that could apply and develop it, as opposed to a multitude of local courts serving particular local or 'feudal' communities and with no regular mechanisms to review their

[35] Ibid, p. 223
[36] Brand, P. (2003) *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century* Cambridge, England, p.100
[37] Mooers, S.L. (1988) "A Re-evaluation of Royal Justice under Henry II of England", *The American Historical Review*, vol. 93, No. 2, p. 350
[38] Brand, P. (2002) op. cit., p. 221
[39] ibid

exercise of their jurisdiction, though some of the features of that Common Law may perhaps have been prefigured in the common customary law followed in these courts.

In essence, much of the early Common Law that we see in Glanvill was procedural law, about the measures that were to be taken to secure the appearance of defendants in court, the availability of essoins, i.e excuses for absence at different stages in specific types of litigation, the availability and workings of the view of land in dispute and the kinds of proof that a plaintiff was required to offer or the defendant might choose[40].

1.4. Origin of Common Law

Burton was of the view that the leap forward which was taken in the development of the law and of the judicial system in England from the reign of Henry I to the end of Henry II's is surprising in every respect and in some almost incredible[41]. The stage of development in law and judicial institutions reached by the changes under Henry II is made abundantly clear to us in the remarkable and enlightening book of Glanvill.

Burton contends further that if we consider the development which goes on in Normandy under the father of Henry II, as we must, as an epoch in the growth of English institutions, then it becomes manifest how natural is the continuation of that growth under Henry II, and how broad a foundation had been laid in the past for his work[42]. Looking forward, we are compelled to say that there is scarcely to be found in history a group of changes which make so little innovation upon what had gone before, and yet were followed by so wide reaching and profound results. This is true whether we consider them as individual institutions or in their united constitutional effects. Not merely did the judicial institutions and processes, writ and jury, the judge and his relation to the trial, the system of courts, and equity and the common law, come directly from these changes[43].

The expansion of earlier practices in the reign of Henry to which we may attribute these results concerns not so much the actual content of the law, regulating conduct and business, substantive law, as it does the administration and enforcement of the law through the judicial system and

[40] ibid
[41] Burton, G. A. (1924) "The Origin of the Common Law", *Yale Law Journal*, vol. 34, no. 2, p. 5
[42] ibid
[43] ibid

processes[44]. They were primarily and in their character institutional rather than legal changes and were accomplished through new regulations in regard to the writs, the jury and the system of courts. Combined together and regarding strictly the institutional and not the constitutional results, they gave rise to the English common law, which also took up into itself a body of pre-existing substantive law which had not been affected by these changes[45]. Regarded from this point of view, as giving rise to the common law, these institutional changes established three things which may be stated in this way: first, new courts of more extensive and summary powers; second a new method of getting the defendant or the accused before the court; and third, a new method of proof. In other words these are again: the itinerant justice and common pleas courts, the writs, and the jury in their later forms, including the assizes, and these were only extended applications of the courts of the king's commissioner or missus, the writs, the jury and the recognitions of William I's time[46].

Plainly these changes concerned procedure and, putting them together, it can readily be seen that they furnished a nearly complete substitute for the old judicial system in which procedure was as strongly emphasized as in the new. But it is equally clear that they furnished no substitute for the old substantive law and scarcely any addition to it[47]. At the end of the reign of Henry II it was possible to try a case to judgment and execution with hardly any use of the old procedure, but it was not possible to try it without constant recourse to the old substantive law as defining and determining rights and obligations. Upon such subjects as the holding, transfer, renting and inheritance of land, the property, inheritance and dower rights of women, debts, contracts and distraint, personal status, the obligations of the warrantor, the right of advowson, and many such topics of substantive law, the new law had nothing to say. It might be true that there was during the period some modification of the law of these things, made generally by special enactment, but such modifications were by the way, of minor importance, and they were not necessary parts of the new whole[48]. That provided new courts and new remedies but not new definitions of right[49].

[44] ibid
[45] ibid
[46] Priel, D. (2013) "The Political Origins of English Private Law", *Journal of Law and Society*, vol. 40, No. 4, pp. 490
[47] ibid
[48] Brand, P. (2003) *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century* Cambridge, England, p.100
[49] Burton, G. A. op. cit. p. 119, see also The Origin of the English Constitution (I920) I46.

It is clear then that the new common law considered as a whole comes from two different sources; its substantive law from one source and its adjective law from another. Its adjective law as made a part of the national judicial system was new; its substantive law as defining rights and obligations was old, that is, it was old as compared with the new judicial system which could now be used to enforce it. It belonged in the time of the old judicial system of the popular courts which was now beginning to be pushed out of use. But it was not itself pushed out of use with the old system to which it originally belonged. Taken up by the new system, it formed nearly the whole of the body of substantive law which was enforced by the courts, at least until the first great legislative age of English history, which was opened by the statute of Marlborough in 1267[50].

As to the origin of the near revolutionary changes in specifically procedural law, Makdisi[51] is of the view that though historical research has focused almost exclusively on Roman, Germanic, Anglo-Saxon, and other European legal systems as potential origins for the revolutionary changes introduced by King Henry II to English law in the twelfth century. Yet, despite hashing and rehashing the modes by which transplants could have taken place between these legal systems and English law, historians have had to admit that the fit is just not there. Consequently, some have suggested that King Henry I's great contribution in the assize of novel disseisin was really the product of original thinking through many wakeful nights[52].

Makdisi[53] contends that a wider sweep in the search for origins of these changes will most likely end in Islamic law. This is because the Islamic legal system was far superior to the primitive legal system of England before the birth of the common law. It was natural for the more primitive system to look to the more sophisticated one as it developed three institutions that played a major role in creating the common law. The action of debt, the assize of novel disseisin, and trial by jury introduced mechanisms for a more rational, sophisticated legal process that existed only in Islamic law at that time.

[50] Burton, G. A. op. cit. p. 119
[51] Makdisi, J. (1999) op. cit., p.1638
[52] ibid
[53] Ibid, p. 1731

Furthermore, the study of the characteristics of the function and structure of Islamic law demonstrate its remarkable kinship with the common law in contrast to the civil law[54]. Finally, one cannot forget the opportunity for the transplant of these mechanisms from Islam through Sicily to Norman England in the twelfth century[55]. Motive, method, and opportunity existed for King Henry II to adopt an Islamic approach to legal and administrative procedures. While it does not require a tremendous stretch of the imagination to envision the Islamic origins of the common law, it does require a willingness to revise traditional historical notions[56].

1.5 Law of Trust asan Areas of Influence of Islamic Law on Common Law

For some scholars, a historical connection to Islam is a "missing link" that explains why English common law is so different from classical Roman legal systems that hold sway across much of the rest of Europe.It is a controversial idea given that Common law has inspired legal systems across the world and calls for the UK to accommodate Islamic Sharia law have caused public outcry. Brand says many branches of Western learning, from mathematics to philosophy, owe a debt of gratitude to Islamic influence[57]. Advanced Arabic texts were translated into European languages in the Middle Ages. But there's no record of Islamic legal texts being among those influencing English lawyers[58]. While there exists no absolute concrete proof of a direct connection, circumstantial historical evidence supports the possibility of an exchange of legal ideas.

There are conflicting theories on the origin of the trust in England. While Western legal scholars dispute the origin of the trust in England, whether Roman or Germanic, it is well established that the institution developed from a medieval English device for holding land known as the "use"[59]. Indeed, until the enactment of the Statute of Uses[60] in 1535, trusts were commonly referred to as

[54] Potz, R. (2011)Islam and Islamic Law in European Legal History, *European Online History*, Institute of European History. See also Badr, G. M. (1978) Islamic Law: Its Relation to other Legal Systems, in: *The American Journal of Comparative Law*, vol. 26 pp.187–198.
[55] Makdisi, G. (1976) Interaction between Islam and the West, *Revue Des Etudes Islamiques*, vol. 44, p287; See also Makdisi, G. (1985) The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court, *Cleveland Law Review*, vol. 34s, p. 16
[56] On the need to revisit and shatter some widely held theories on the origins of the common law, see Potz, R. op. cit. p. 245
[57] Potz, R. op. cit., p. 112
[58] ibid
[59] Fratcher, F. (1969) "Uses of Uses", *Montana Law Review*, vol. 34, p. 39.
[60] An Act Concerning Uses and Wills, 27 Hen. 8, ch. 10 (1535), reprinted in the Complete Statutes of England 51 (1930). The Statute of Uses was designed to curb the abuse of this device by turning the purely equitable interest of the beneficiary into a legal interest and destroying the legal interest of trustee.

uses. The Franciscan Friars are generally credited with the introduction of uses in thirteenth-century England. Under the laws of their Order, the Friars were not permitted to own property. They could, however, be named the beneficiaries of a use. This arrangement was soon expanded to other contexts as well, for it provided a beneficiary with all of the benefits and none of the liabilities of land ownership. In form, the owner of the property, called the feoffor, gave legal estate in that property to the "feoffee to uses[61]." Thus, the feoffee to uses was vested with the full ownership rights of the feoffor. The feoffee to uses, however, was bound to exercise his rights over the property of the benefit of another, known as the *cestui que use*.

Most uses were passive. The legally imposed duties of the feoffee to uses were: (1) to permit the cestui que use to occupy the land and enjoy the rents and profits; (2) to defend the title in actions at law by and against third parties; and (3) to convey the land as directed by the cestui que use[62]. From the earliest stages of the use, however, active trusts existed providing for efficient management of the property, and were employed, for example, while the beneficiary was on crusade.

Until the nineteenth century, legal scholars considered the Roman *fideicommissum* to be the origin of the trust in England. Under this device, it is said that:

> When a Roman testator found that his prospective beneficiary was incapacitated to receive a testament, he transmitted to his legatee the intended legacy through a person capable of receiving, . . . trusting . . . that the legal beneficiary would honor his moral obligation and pass the legacy to the real beneficiary of the trust[63].

By the nineteenth century, this theory had been replaced by one focusing on Germanic influences, with scholars agreeing that any analogies between the *fideicommissum* and the use were merely of a superficial kind[64]. A specific criticism of the theory was that the Roman device was purely testamentary, while the early English use seldom arose by will. This evinces a divergence of

[61] A person to whom land was conveyed for the use of a third party. The feoffee to uses, who was directed to hold the land for the benefit of other persons, had bare legal title.
[62] Fratcher, F. op.cit., p. 59
[63] Vasey, S. (1982) "Fideicommissa and Uses: The Clerical Connection Revisited", *Jurist*, vol. 42, p. 201.
[64] Holdsworth, W. (1945) *A History of English Law*, Crestworths, England, 3rd ed., p.417

purpose between the two transactions, the former existing primarily to ensure proper passage of the property and the latter being a mechanism to increase the efficient management of property and to minimize the costs of ownership.

Furthermore, most scholars[65] agreed that, had the use developed from the *fideicommissum*, no term other than *fideicommissum* would have been used. The word "use", on the other hand, was derived from the phrases *ad opus* and *ad usum*, signifying an origin independent of the *fideicommissum*.

The currently accepted theory among Western legal scholars as to the origin of the trust in England was promulgated at the end of the nineteenth century by Frederic William Maitland and Oliver Wendell Holmes. Maitland and Holmes attributed the trust to the Salic *salmannus*[66]. Fifth-century Salic law employed a third party, known as a *salmannus* or, in an anglicized form, saleman, to aid in the transfer of property. The term *salmannus* is said to be derived from "sala," to transfer, the salmannus being a person through whom effect is given to a transfer[67]. Property was transferred to the *salmannus* for specific purposes to be carried out during the lifetime or after the death of the person conveying it. This occurred primarily in cases involving the appointment or adoption of an heir.

Holdsworth describes the *salmannus* as the ancestor of the executor, and points to the Germanic institution as the source of the doctrines of bailment and agency, as well as the use[68]. A symbolic staff was passed from the donor to the salmannus who eventually presented the staff to the donee. This same ritual was to be found in the transfer of copyhold land in England. Thus, Maitland and Holmes theorized that the *saleman* became in England the better known feoffee to uses. Like the feoffee to uses, the *salmannus* held property on account of or to the use of another and was bound to fulfil his trust[69]. Adoption of such an institution would give a landowner greater flexibility in the disposition of his property than was allowed under the restrictive common law of medieval England.

[65] ibid
[66] Holmes, O.W. (1899) "Law in Science and Science in Law", *Harvard Law Review*, vol. 12, p. 212; Maitland, F. W. (1894) "The Origin of Uses", *Harvard Law Review*, vol. 6, p. 170.
[67] Holdsworth, W. op. cit., p. 417
[68] ibid
[69] ibid

This theory of Salic influence is strengthened by the fact that following the withdrawal of the Roman legions from Great Britain in the fifth century the primary racial infusions into England were Germanic, and the Norman conquerors of the eleventh century imported Salic law into England. The concept of the *salmannus* did not hold, however, until the legal Renaissance of the twelfth and thirteenth centuries, when we get the beginnings of the common law; and with the beginnings of the common law we can see the position which this idea of holding property on account of or to the use of another will take in.[70] The theory, however, has been criticized by scholars of both Western and Islamic legal history as being based exclusively on a superficial resemblance between the positions of the *salmannus* and the *feoffee* to uses, rather than any fundamental similarity between the two devices. For example, the role of the *salmannus* was strictly that of an intermediary for a conveyance, while the *feoffee* to uses acted more as a trustee[71].

Further, such concepts as "the separation of usufruct from ownership, the creation of life estates, and the power of the original owner . . . to direct the passing of the usufruct from one beneficiary to another" were unknown to Salic law. Moreover, as one Western le-gal scholar has pointed out, use of a *salmannus* was not a usual form of conveyance in medieval England, among the Saxons or the Normans[72]. It was apparently not a thirteenth-century practice to give a guardian legal estate over property. Nor does Bracton, the thirteenth-century English legal historian, make mention of the salmannus, although he describes other contemporary devices for the conveyance of property.

Given the deficiencies in the prevailing theories, some scholars have turned to Islamic law for the origin of the trust. Sufficient contact existed between Islam and the West to warrant further investigation of such a theory. The emergence of the trust coincides with a period of increased contacts between Europe and the Muslim world. The very Franciscan Friars who are believed to have introduced the use in England were active in the Middle East. Saint Francis himself spent parts of 1219 and 1220 in Islamic territory. Pilgrimages to the Holy Land were quite common during the eleventh and twelfth centuries, while the Crusades, which lasted from approximately 1095 to 1291 A.D., sent tens of thousands of Europeans to the Middle East[73].

[70] ibid, p. 419
[71] ibid
[72] ibid
[73] Gaudiosi, M. M. (1988) "The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College", *the University of Pennsylvania Law Review*, vol. 136 p. 1261

Jerusalem was a particularly significant point of contact between England and the Muslim world because of the presence there of the Orders of the Templars and Hospitallers. These orders were religious/military organizations active during the Crusades. The Knights Templars were established in Jerusalem around 1120, remaining there until the end of the thirteenth century. The Templars established the principal House of their Order in London in 1128. The Order of the Hospitallers was founded in Jerusalem in the eleventh century[74].

These religious orders appear to have been quite influential in the development of the Inns of Court in fourteenth-century England. The Inns of Court were the successors to earlier law schools associated with churches, which had emerged between 1135 and 1189, soon after the Templars established their London house[75]. It has been theorized that these institutions were modelled after the Islamic college of law in its early form of a mosque with an adjoining inn, with which the Crusaders would have become familiar during their stay in Jerusalem. The example of the Inns of Court provides some evidence of the transmission of legal institutions from the Arab world to England.

The similarities between the waqf and the early English trust are striking. As one scholar noted:

> Under both concepts, property is reserved, and its usufruct appropriated, for the benefit of specific individuals, or for a general charitable purpose; the corpus becomes inalienable; estates for life in favor of successive beneficiaries can be created . . . without regard to the law of inheritance or the rights of the heirs; and continuity is secured by the successive appointment of trustees or *mutawallis*[76].

The same actors are found in both institutions: the *waqif* or settlor, the *mutawalli* or trustee, and the beneficiaries, both present and future. Indeed, because it was permitted to retain the feature of perpetuity with regard to application of the trust income even after the rule against perpetuities

[74] Makdisi, G. (1985) "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court," Cleveland State Law Review, vol. 34, p. 5
[75] ibid
[76] Cattan, H. (1955) The Law of Waqf, in: Majid Khadduri et al. (eds.), Law in the Middle East, Washington 1955, vol. 1, p. 210

limited the duration of other trusts, the English charitable trust is more similar to the *waqf* than to either the *fideicommissum* or the *salmannus*[77].

The only significant distinction between the *waqf* and the English trust is the express or implied reversion of the *waqf* to charitable purposes poses when its specific object has ceased to exist. This difference arises because of the invalidity under Islamic law of a *waqf* without an ultimate charitable purpose[78]. Such a distinction only arises, however, as between the Islamic family trust, *waqfahli*, and a non-charitable English trust. The *waqf khairi*, on the other hand, was required to be devoted to a charitable purpose from its inception and therefore no re- version provision was required.

Another difference is the English vesting of legal estate over the trust property in the trustee. However, while the trustee may nominally be the owner of the trust property, he is nonetheless bound to administer that property for the benefit of the beneficiaries. The role of the English trustee therefore does not differ significantly from that of the *mutawalli*[79]. Thus, it appears that the English trust bears a closer resemblance to the *waqf* than to the Salic *salmannus*. The *waqf* and the trust are remarkably similar in form, and ample opportunity for transmission of the Muslim institution existed at the very time the trust began to emerge in England.

1.6 Conclusion

This paper discussed the historical development of English common law, tracing its origins from the Roman and Anglo-Saxon periods through the transformative Norman Conquest, with a particular focus on the pivotal reforms of Henry II. It further examined the contentious scholarly debate surrounding the origins of key common law institutions, critically assessing the prevailing Roman and Germanic theses before exploring the more recent and provocative argument for Islamic influence, using the law of trust as a primary case study.

A central finding of this examination is that while the institutional and procedural framework of common law was decisively shaped by the administrative innovations of the Norman and Angevin periods, the origins of its substantive concepts, such as the trust, remain ambiguous and

[77] Makdisi, G., op. cit., p.15
[78] Cattan, H. op. cit., p.212
[79] ibid

inadequately explained by traditional Eurocentric narratives. The evidence presented suggests that the circumstantial case for Islamic influence, particularly through the structural parallels between the English Trust and the Islamic waqf, is compelling enough to warrant serious scholarly consideration as a plausible missing link, though not yet conclusive.

In light of this finding, it is recommended that scholars and educators actively work to illuminate this interconnected history for both academic and public audiences. Elucidating the shared heritage and mutual influences between major legal systems, such as the potential links between Islamic law and common law, can serve as a powerful tool for fostering intercultural dialogue. By moving beyond insular narratives and highlighting the synergistic development of human jurisprudence, we can promote a deeper, more nuanced understanding between cultures and contribute to greater global harmony and mutual respect.