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MUSLIMANSKI UTJECAJ NA PRAVNU REFORMU KRALJA HENRYJA II U ENGLESKOJ U XII STOLJEĆU

MUSLIM INFLUENCE ON THE LEGAL REFORM OF KING HENRY II IN ENGLAND IN THE XII CENTURY

Abstract

Undertaking legislative reform becomes necessary when the legal system does not respond to the needs of society in changed social circumstances. The reform can be carried out on the basis of existing sources, within the legal system to be reformed, or by borrowing institutions from more advanced systems, which are already known. After the 11th century, following the revival of the function of the state in Europe, more and more rulers resorted to the reform of the legal system, as a response to the growing problems that society was facing. This reform began in Sicily in 1140, with the enactment of Assizes from Ariano and continued in England with the enactment of The Assize of Clarendon ? (1166) by King Henry II.

In an attempt to point out the possible influence that took place by taking ready-made solutions from one legal tradition to another, the historical and comparative method is used.

Some legal institutions that were part of this reform indicate that these were transplants that the Anglo-Saxon and Norman traditions did not know. The solutions adopted point to similarities with the Sharia legal tradition, and their transposition into the English legal system could have come through people who were in the service of the Norman rulers in Sicily (Roger II) and who later entered the service of King Henry II.

Key words: *legal system, legal transplants, Sharia law, Anglo-Saxon law, common law, jury, traveling judges, writ.*

MUSLIM INFLUENCE ON THE LEGAL REFORM OF KING HENRY II IN ENGLAND IN THE XII CENTURY

Introduction

Reform of the legal system in any country always attracts the attention of lawyers and historians of comparative law. Their task is to discover and point out the basis on which the reform was carried out, what the new elements that have been introduced into the reformed legal system were and where they were taken from. In any legal reform, care is taken to replace those parts that are not in line with the goals of the state government, which has gained power and has the strength to manage social processes. This is taken into account especially when the government that wants to carry out the reform comes from outside, which has imposed its sovereignty by force, and which seeks to protect it with new regulations to ensure its rule.

The history of the Roman and Arab conquests best tell us how this process took place and how the conquerors gradually changed the old legal system and established a new one, which was to serve their purposes. A similar thing happened with the legal system that emerged on the British Isles, which until the 11th century was under constant invasion by Germanic tribes, Angle, Saxon, Jute, and later Norman tribes (the Vikings) from Scandinavia (Denmark and Norway), which conquered and integrated the indigenous elements of the Celts and Romano-Celts.

The mixture of different customary rights of Germanic tribes with the same rights of indigenous peoples, and possible foreign influences, created by exchanges from the Mediterranean, Spain and Sicily in the XI and XII centuries, would allow for the emergence of a new legal system that would expand from the British Isles to influence the legal traditions of the modern world. The tradition of the *common law* system is present on all continents today, whether its presence is a direct basis of the legal system of countries such as England and Ireland, the United States, Canada, Australia and New Zealand, or it is present through a mixed legal system in countries such as South Africa, Namibia, Botswana, India, the Philippines, Guyana in South America, and parts of the territories of countries such as Scotland in Great Britain, Quebec in Canada, etc. The *common law* system is also present in Muslim countries such as Sudan, Jordan, Pakistan, Bangladesh, Malaysia, and others where, together with Sharia law, it forms the basis of the legal system.

ILLUSTRATION ~ Claudius *(Tiberius Claudius Caesar Augustus Germanicus)* conquered the British Isles for almost a century.
ILUSTRACIJA ~ Klaudie (Tiberius Claudius Caesar Augustus Germanicus) je osvajao Britansko ostrvo skoro čitavo stoljeće.

1. The Norman Conquest of Britain

The invasion of the British Isles by the Roman Empire, under the leadership of Julius Caesar, occurred in 55 BC. In this area, the Romans found the tribes of the and Celts, who had inhabited it for several centuries. Roman legions, first under Caesar (55 BC) and then Claudius (55 AD), would continue to conquer the British Isles for almost a century. The Romans could not conquer the northern tribes of Britain and the Roman administration was strengthened by Vespasian (78 AD) and Hadrian (122 AD), through the construction of a massive defensive wall. The final fortification of the borders of the Roman Empire in Britain was undertaken by Antonino Pio (142 AD).[1]

[1] *Britanija*, *Hrvatska enciklopedija*, mrežno izdanje. Leksikografski zavod Miroslav Krleža, 2020. Accessed on 16.8.2020. www.enciklopedija.hr

The presence of the Romans left its mark on British soil. Cities and ports were formed, the economy developed, and literacy and the use of Latin began to spread. State power had also been established.

With the weakening and disintegration of the Roman Empire, during the V and VI centuries AD, there was a settlement of Germanic tribes, namely the Angles, Saxons and Jutes.[2] In the next half millennium, the British Isles recorded the formation of a multitude of local, small states, which were opposed to each other. From time to time, some of them would overpower the other and establish their rule in the wider area of the British Isles. Thus, in a certain period, Mercia was the one who had a dominant influence over other states, and then the kingdom of Wessex, which at the end of the ninth century dominated practically the entirety of the island.[3]

During the tenth and eleventh centuries, the history of Britain records the constant incursions of the Normans, whose plundering raids caused great insecurity and forced the rulers of the divided Anglo-Saxon states to pay tribute. At the beginning of the 11th century, England was under the crown of Denmark, whose rule would last during the reign of kings Sven I (960-1014) and Cnut the Great (995-1035). After the death of King Cnut, power was in the hands of the local nobility, who first elected Edward the Confessor (1042-1066) as ruler, who was Norman by mother, and after his death Harold II (1066).

The appointment of Harold II was opposed by William of Normandy, citing the law linking him to Edward the Confessor. He demanded that the pope pass a verdict in his favour. At that time, the Roman Curia was headed by Hildebrand of Soana, who in 1073 became Pope Gregory VII of Rome. His connections, which he established with the Duke Robert Guiscard would be crucial in the attitude of the Holy See, i.e. Pope Alexander II (1061-1073), towards William of Normandy, later known as William the Conqueror. (Duke Robert Guiscard would later snatch Sicily from the hands of the Muslims.)".

William the Conqueror would defeat the army of Harold II in 1066 and bring the Normans to the throne of England. His dynasty would continue to rule England after his death. Over time, he will bring both Wales and Scotland under his crown. The Normans in England, like their compatriots in southern Italy and Sicily, would establish direct vassalship, tying a large and petty aristocracy to themselves, which was different from the mediating hegemony developed by the ruling houses in continental Europe. In Britain, as well as in Sicily, the Normans showed great consideration for the legal traditions they found in the newly conquered country. Under their rule, there was a rapid development of the *common law* system in England, based on Anglo-Saxon law.

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[2] Šefko Kurtović, *Opća povijest prava i države* (Zagreb: Nakladnik, Šefko Kurtović, 2005.), Vol. I, p. 177.

[3] *Ibid*, Vol. I, p. 177.

ILUSTRATION – In the late 880s or early 890s, Alfred issued a law code consisting of his own laws, followed by a code issued by his late seventh-century predecessor (King Ine of Wessex). Together these laws are arranged into 120 chapters.

ILUSTRACIJA – Kasnih 880-ih ili ranih 890-ih, Alfred je izdao zakonski akt koji se sastojao od njegovih zakona, nakon čega je uslijedio kôd koji je izdala njegova prethodnica s kraja sedmog stoljeća (kralj Ine od Wessexa). Ovi zakoni su zajedno podijeljeni u 120 poglavlja.

1.1. A brief review of the legal system in Britain before the Norman conquest

The Germanic tribes of Angles, Saxons and Jutes, who had inhabited much of the British Isles since the 5th century, had created their own settlements. They brought with them their traditions and customs. Over time, they built their own socio-political system and established strong social and economic arrangements. Information about their social and economic life from that period is scarce. Such is the case with their legal tradition and customs. One way to understand these relations and shed more light on them is to refer to the early period of Norman rule in the British Isles.

Our knowledge of the Anglo-Saxon legal tradition is predicated on several types of sources, which are complementary to each other. Although there was a collection of material from that period, and although collections of Anglo-Saxon law were created, it is still far from giving these collections a complete picture of the relationship between the Celtic and Germanic tribes, who inhabited the area during the 5th-10th century AD.

History records that Anglo-Saxon rulers issued documents containing legal regulations as early as the 5th century AD. Yet their intention here was far from providing a complete written work on the legal relations that prevailed at the time. One of the most famous and earliest written documents from that period is the decision (*ordinance*) of Æthelbercht of Kent, around the 6th century AD, which contained about 90 short paragraphs.[4] The first significant collection to appear in Wessex is known as Ine's Law from the end of the 7th century AD, which contained 76 paragraphs. After that, a significant collection of importance is that of Wessex by Alfred

[4] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I* (Cambridge: Cambridge University Press, Second Edition, 1898.), Vol. I, str. 25-27.; F. W. Maitland, *A Sketch of English Legal History* (New York, London: The Knickerbocker press, 1915.), str. 6.; Henry Adams, *The Anglo-Saxon Court of Law*, in: *Essays in Anglo-Saxon Law* (Boston: Little Brown and Company, 1905). str. 8.; F. L. Attenborough, M.A, *The Laws of The Earliest English Kings* (Cambridge: At The University press, 1922.), p. 4.

the Great from the end of the ninth century, which contained 77 paragraphs.[5] After the Code of King Alfred the Great, there are significant collections of laws of King Edward and Æthelstan, which issued several smaller decrees regulating certain areas.[6]

The centuries that followed the Norman Conquest record efforts to ascertain Old English law. These efforts are reflected in the collection and codification of legal customs into collections. This type of anthology did not always have an official character. The codification of legal customs had a dual purpose. The first was of a practical nature, for these customs were still alive, and had an impact on concrete social relations. The second was of a historical nature, in order to preserve them from oblivion. The most famous collection of customs from that period is the one called *Rectitudines singularum personarum*. Some of them are collections of a private nature. Among them are those apocryphal, which do not refer to the Anglo-Saxon period, but are from a later period, such as the collection *Mirror of Justice*.[7]

Also, as a source of Anglo-Saxon law, there are the land charters granted by rulers to feudal lords, religious institutions and their users that can be used for this purpose. The *Codex Diplomaticus* collection, collected by Kemble, is one of the sources of its kind, notwithstanding some of the omissions it contains.[8]

In addition to charters, chronicles from that period are an important source. Although they do not tell us directly about legal relations, since they were written to gain insight into the socio-economic situation, they also indirectly refer to the legal aspect of the Anglo-Saxon period.[9]

Finally, particularly valuable sources of law are the official documents from the early Norman period. Here we are primarily referring to the *Domesday Book*, which is an important source on the state of law in England before the Norman conquest of the British Isles.[10]

The first two centuries after the Norman conquest cannot be understood without reference to the earlier Anglo-Saxon period. In order to understand the nature of Anglo-Saxon law before the Norman Conquest, we will try to outline the most important terms and their meaning in the Anglo-Saxon legal tradition, such as: personal status, family status, property status, crimes, court system, etc.

A person held a different position in the Anglo-Saxon legal tradition, depending on whether he was free or a slave. In the early period of Germanic societies, we do not find such a sharp line between a free person and a slave, as was the case with the Romans. A slave was, in a way, considered part of the family, and the differences that existed between persons were expressed not only in the relationship between the free and

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[5] Henry Adams, *The Anglo-Saxon Court of Law*, in: *Essays in Anglo-Saxson Law*, str. 10-11.; F. L. Attenborough, M.A, *The Laws of The Earliest English Kings*, p. 34.

[6] F. L. Attenborough, M.A, *The Laws of The Earliest English Kings*, p. 114-172.

[7] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward*, Vol. I, str. 27-28.

[8] *Isto*, Vol. I, p. 28.

[9] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 29.; Vidi opširnije u: J. A. Giles DC.L., *The Anglo-Saxon Chronicle* (London: G. Bell and Sons, LTD., 1914.).

[10] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 29.

the slave, but also between free people. This only signifies that the relations that prevailed within German society in the early Middle Ages were very complex. A number of free people were considered nobles (lords), while other free people were attached to them and in their service. Even the Roman historian Tacitus (56-120) wrote that German leaders had groups of warriors around them, called *comites*. This custom persisted until the Norman conquest of Britain and greatly influenced the development of Anglo-Saxon law. The provisions of Æthelstan mention *lordless man* as suspicious and dangerous.[11]

The title of lord was most often attributed to the king, but it also signified a person to whom other persons were attached. This division into lords and common people, ruled by a king, represented a general division, given the landed property in the medieval period. Until the Norman Conquest, the bond between people depended on a vassal relationship and was stronger than any other hierarchy. The family was considered to be members who were related by kinship, blood ties. They protected each other, supported each other in the fight, were jointly responsible for crimes committed and had the right to blood revenge. Over time, there was a conflict between customs, which governed family relations, and state law.[12]

Also, there were different degrees in the rank of free people. Ordinary free people were called *ceorl*, while persons born as nobles were called *eorl*. In addition to them, there were also persons who were called *gesið*, most often in the service of the king. Later, the name *theng* was adopted for someone who was in the service of important people, most often the king. A special status was enjoyed by church persons, who, in addition to church service, also performed other civil tasks. The separation of church figures from secular authority begins with the Norman conquest.[13]

Slavery as a legal relationship was known in England until the twelfth century. Although there were no precise records, data on *manumission* indicate that this was a significant number. Not only were slaves bought and sold, but their trade took place intensively through British ports. This is evidenced by the regulations that regulated such trade or restricted it. Thus, in Kent, the sale of people across the sea was one of the sanctions for a certain type of crime. A regulation in force in Wessex forbade the sale of people across the sea, even if they were slaves. The regulations in force at the end of the 6th century under Æthelrad already forbade the sale of Christians, and this was later taken over in the codes of the Danish King Cnut and William the Conqueror.[14]

It happened that rich people bought slaves and set them free for their souls or on behalf of the souls of their ancestors. The freed slave became a serf and was still dependent on his patron, who had the right over the freedman's family, until the latter left his place of residence. The church played an important role in freeing the people from slavery through manumisia in front of the altar.[15]

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[11] *Ibid*, Vol. I, p. 30.

[12] *Ibid*, Vol. I, p. 31.

[13] *Ibid*, Vol. I, p. 32-33.

[14] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 35-36.

[15] *Ibid*, Vol. I, p. 37.

It is in the nature of modern legal systems to look at property from multiple directions. In modern law, there is a clear distinction between movable and immovable property. Also, in the area of bonds, modern law distinguishes between sales, leases, gifts, and the like, just as it distinguishes between disposing of property under normal circumstances and those in extraordinary circumstances or disposing of property after death. Also, rights are tied to property, such as easement rights, pre-emptive purchase rights or compensation for destroyed property, etc. Today, we bind a large number of regulations to property that regulate the relations of citizens in their private affairs. Any attempt to look at property in the Anglo-Saxon period with today's eyes would take us in the wrong direction.

Property regulations in Anglo-Saxon law were based on custom. They were not written, and regulations on disposing of property through contracts hardly existed. There were no property regulations in the way we know them today. What modern law calls property is the term *dominium*, taken from Roman law, which early Germanic law did not know. What was known to them in a sense was the notion of possessing movables, which they used for practical purposes. Synonymous with movable property was livestock, while personal belongings, such as Jewellery and utensils, were under personal care or supervision.[16]

The exchange of goods among living persons took place by barter, as the only known form of property transfer. The concept of a written contract was not known. The promises given to the other party were secured by an oath. Payments, which were not made immediately, were secured by a life-guaranteed promise. The oldest form of obligation in German law was the obligation to pay compensation for a life taken (*wergeld/weregild*).[17]

Information on the management of arable land can be found in the charters, through which the land was allocated, and in the wills that were left. We can also get information about this from other sources, such as codifications of the common law of the Germanic peoples, such as the work *Rectitudines singularom personarum*.[18] Anglo-Saxon law knew three forms of arable land at its disposal: *bocland, lóenland, folcland.*

- *Bocland or book-land* were those lands allotted by kings to their charters, most often to high ecclesiastical dignitaries, ecclesiastical institutions, and nobles. The right to dispose of these lands belonged to the new masters, and the population living in the area would be in the service of the new master. The new owner of the *book-land* could assign smaller plots of that land to other persons, to those who were in a dependent relationship with him.[19]
- *Lóen-land* was land under cultivation with some free person with certain obligations to

[16] *Ibid*, Vol. I, p. 57.

[17] *Ibid*, Vol. I, p. 58.; Vladimir Pezo i drugi, *Pravni leksikon* (Zagreb: Leksikografski zavod Miroslav Krleža, 2007.), p. 1786.

[18] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 60.

[19] *Ibid*.

the lord. Most of those who cultivated this land were free people who lived on farms and were responsible for their fence, plot.[20]

- *Folcland or folk-land* is a term mentioned in several sources. It referred to those lands that did not belong to the *book-land* but were lands that were common and belonged to all people, such as large waters, pastures and forests. This term was probably translated from Latin.[21]

The court system in the Anglo-Saxon period could hardly be said to have existed in any organized system as we know it today. The Anglo-Saxon legal tradition knew two types of courts: public and private. Public trials took place in the open air, they did not have formal offices, and public squares were used for that purpose. These courts were not endowed with written laws, nor did they have the state apparatus of coercion as we know it today. Private courts were in the hands of lords and resolved those issues that were of a local character, related to everyday life on large feudal estates. During the trial, custom was invoked, and the execution of the sanction was in the hands of the injured party. In the Anglo-Saxon period, there was no clear division between civil and ecclesiastical courts. Most often the bishop would sit in both courts, and often he was also the only member of the court who understood public law.

The general name for all types of courts in the Anglo-Saxon period was *gemót*.[22] The king, in addition to his military role, also had a judicial function, in cases that required special investigations and the use of force. In addition, he resolved those cases that were related to the dispute over arable land, allocated by the *book-land* charter, if the case could not be resolved in another instance. The reason is clear: only the king could issue such a charter to bishops, church institutions and large feudal lords.[23]

The usual Anglo-Saxon courts of public jurisdiction were the *county courts* and the *hundred court*, which oversaw petty offenses in the community, and which numbered up to a hundred members. The county court sat twice a year, and the hundred court every four weeks. By the manner of the session, it can be concluded that the county court discussed more difficult legal issues, and the hundred court discussed minor disputes.[24] Private courts were under the jurisdiction of large feudal lords. They oversaw those issues which regulated the relations on the property between the nobles and other free people, which were related to them on the basis of land cultivation.[25]

The processing of cases before the courts in Anglo-Saxon law was not clearly demarcated. The only

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[20] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 61.

[21] *Ibid*. ; A. H, F. Lefroy, *Anglo-Saxon period of English law*, in: *Yale Law Journal*, p. 392-394. www.jasror.org, pristupljeno, 21.8.2020.

[22] Henry Adams, *The Anglo-Saxon Court of Law*, in: *Essays in Anglo-Saxson Law*, p. 6.

[23] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward*, Vol. I, p. 40-41.

[24] *Ibid*, Vol. I, p. 42.

[25] *Ibid*, Vol. I, p. 43.

substantive regulations that were in force were those relating to misdemeanours and offenses of a violent nature. There are also those crimes related to theft, mostly cattle. Other property-related regulations were treated under customary law and local practices.

Among the torts that were brought before public courts are acts that disturbed public order and peace, which were related to personal injury and blood crime. One of them is an act against the king's peace. These were acts of disobedience to the king's orders; on acts of injury to the king's house; or injuries to the king's companions and servants.[26] In addition to violating the king's peace, acts of blood crime were also prosecuted before public courts.

Compensation was awarded for the offence crime of blood crime, which had to be accepted when offered. The death penalty could only be considered if the person found guilty refused to pay compensation.[27]

Quarrels and feuds were resolved before the courts, which resulted in physical injuries. The verdicts for the quarrel ended with the payment of compensation, by the one who was found guilty. These compensations were fixed and regulated mainly by customary law.[28] Anglo-Saxon criminal law was predicated on Germanic law, and in particular on the Salic Law, which generally recognized material damages and the payment of blood money for blood offenses.[29]

Harmful acts in Anglo-Saxon law were generally classified into three classes: *wer, wite* and *bót*.

- *Wer* was compensation paid for a breach of public order, and its amount depended on the significance of the person who committed the act and his social rank.
- *Wite* was compensation paid for injuring the king or some public figure from his entourage.
- *Bót* was compensation of a general nature. It was paid for harmful acts against the community.[30]

Anglo-Saxon law, along with Norman law, created a separate legal system (*common law*), which spread throughout the world. *Common law* today is an offshoot of the Anglo-Saxon and Norman legal tradition, which together with continental and Sharia law represents the most developed legal systems in the world.

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[26] Frederick Pollock, F. William Maitland, T*he History of English Law Before The Time of Edward I*, Vol. I, p. 44-45.

[27] *Ibid*, Vol. I, p. 47.

[28] *Ibid*, Vol. I, p. 46.

[29] Šefko Kurtović, *Opća povijest prava i države*, Vol. I, p. 171.

[30] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 48.; A. H, F. Lefroy, *Anglo-Saxon period of English law*, u: *Yale Law Journal*, p. 390., at: www.digitalcommons.law.yale.edu, accessed 21.8.2020.

ILLUSTRATION ~ The Register of William I the Conqueror is considered to be the most comprehensive document that speaks of the way a class society was organized in the Middle Ages.

ILUSTRACIJA ~ Registar Williama I Osvajača smatra se najiscrpnijim dokumentom koji govori o načinu na koji je bilo organizirano jedno klasno društvo u srednjem vijeku.

1.2. Reform of the legal system in the time of King Henry II

The Norman Duke William I (1066-1087) managed to consolidate his power despite constant revolts. He made an inventory of all property and population in England. In 1086, a register was made, known as the *Domesday Book*, which is considered to be the most comprehensive document on the manner in which a society was organized in the Middle Ages. The king tied the English nobility to the crown and weakened the large vassals by fragmenting their estates and dividing them into various counties. At the head of the county was the king's steward, the sheriff, who reported directly to the king. In this way the king prevented the concentration of political power in the hands of large feudal lords. William the Conqueror paid special attention to revenues and state taxes, which enabled him to finance the army, regardless of the obligation of the feudal lords to support him.[31]

After the death of William the Conqueror, the territory that was under unified administration was divided between his two older sons Robert (Normandy) and William II (England). Over time, William II will succeed in uniting this territory under his crown, as a lien, thanks to the debts of his brother Robert. After the death of William II (1087-1100), his younger brother Henry I had to issue a *Coronation Charter* (considered by some to be the first constitutional act of England), in which he had to affirm certain rights belonging to the nobility

[31] Šefko Kurtović, *Opća povijest prava i države*, Vol. I, p. 179.

such as: that the crown be acquired under certain conditions and that it is decided by the nobility; that the church is the greatest feudal lord and that bishops, as vassals, have greater rights than other feudal lords.[32]

Henry I left the English throne behind to his daughter Matilda, which provoked revolt and developed conflicts among the pretenders to the throne. The dispute lasted for a full two decades. Eventually this conflict ended with the accession to the throne of Matilda's son (grandson of Henry I) Henry II (1154-1189) of the French lineage Plantagenet, who is considered one of the greatest medieval kings of England.[33]

The reign of Henry II seems extremely important for the strengthening of the legal system and the development of the central organs of the state in England. As F. Pollock and F. W. Maitland note, its significance lies more in the fact that during his reign he sought to develop mechanisms to strengthen the application of law, and not so much in the issuance of new legal acts of a substantive nature.[34] The first significant document was the *Assize of novel disseisin*, enacted after 1155, which concerned the restitution of rights over usurped property. An important moment in his reign occurred in 1164, when he passed a legal act at the Council of Clarendon known as the *Assize of Clarendon*, which limited the judicial power of the church. Some historians consider this charter an important constitutive act, which will influence the development of the state in England.

ILLUSTRATION ~ During the reign of Henry II – Two judges, prisoner court officer and gallows. Man hanging from gallows. 14th century – British Library Public Domain.

ILUSTRACIJA ~ Za vrijeme vladavine Henrika II – Dva suca, sudski službenik zatvorenik i vješala. Čovjek koji visi s vješala. 14. stoljeće – Javna domena Britanske biblioteke.

[32] *Ibid*, Vol. I, p. 179-180.

[33] *Ibid*, Vol. I, p. 180.

[34] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 136.

As early as 1166, Henry II reconvened the council at Clarendon and passed assizes (decisions made at periodical assemblies) introducing changes in administration and criminal law. In 1170, he introduced an investigation against a sheriff, which he removed from office, which would later be extended to the rest of the state administration. In Northampton in 1176, he issued new instructions for traveling judges, thus restricting the private courts of the feudal lords, and thus placing the judicial system in the service of strengthening the central government.[35] He then made several more decisions (assizes), such as the one of 1181 on the armed people; then 1184 on forests; and the decision to collect Saladin's tithe from 1188, for the purpose of financing the Crusades, etc.[36]

The long period of rule, which Henry II spent on the royal throne of England, was used to centralize power and unify state institutions. The mechanisms he used to achieve his goals were reflected in the following: the establishment of a permanent court with professional traveling judges across the country; introducing the *inquest, recognition* and *writ* of execution into the judiciary; and by introducing a *jury* into judicial practice.[37]

The emergence of a jury in the English judiciary during the reign of Henry II has caused great confusion among legal historians. The question arises as to where this institution draws its roots from. The jury was made up of ordinary people under oath. They provided the official with certain information about the facts known to them in the civil proceedings before the court. Law historians, such as F. Pollock and F. W. Maitland, have tried in their work *The History of English law* to provide an answer to this question, bringing the jury into contact with either the Church Synod or the French and Scandinavian legal traditions. But they, as well as legal historians dr. Šefko Kurtović and Raifa Festić in our country, they admit that its origin is indefinite, and controversial among law historians. Dr. Šefko Kurtović, as well as Raifa Festić, like F. Pollock and F.W. Maitland, assume that the jury has its roots in Germanic legal traditions, but I cannot confirm this with any degree of certainty.[38]

The concept of jury in the time of Henry II was gaining momentum. He tried in various ways to limit the feudal courts, relying on the people. There were two types of jury: the one that presented information on property rights (*civil jury*) and the one that presented information on criminal proceedings (*criminal jury*). Also, there were small and large juries. The small jury consisted of twelve people, and the large one of twenty-four. Jurors answered questions about the facts before the judges, which were known to them with yes or no, and their appearance before the court cannot be understood as a hearing. The jury was a judge of the facts known to it, while the professional judge was a judge of law, concludes Dr. Šefko Kurtović.[39]

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[35] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 137-138.; Šefko Kurtović, *Opća povijest prava i države*, Vol. I, p. 180.

[36] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 138.

[37] *Isto*.

[38] Šefko Kurtović, *Opća povijest prava i države*, I knjiga, p. 239.; Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 142-143.

[39] Šefko Kurtović, *Opća povijest prava i države*, Vol. I, p. 238-239.; See also: Raifa Festić, *Nastanak porote u Engleskoj*, in: *Common Law*

A completely different approach in relation to the mentioned historians of law was taken by dr. John A. Makdisi, professor of law at Harvard. He believes that the jury in English law has its roots in Sharia law, more precisely in the Maliki madhhab, in which there is a legal institution called *shahādah al-lafīf*, and, when it comes to the jury in the *common law* system, that it is a legal transplant from Sharia law.[40]

Another specificity of the reform undertaken by Henry II is the institution of traveling courts. As in the case of the jury, it is not entirely clear in the traveling courts where this institution of law has its roots. Henry II officially introduced it in 1176, and by his death in 1189 it had become an important element of the English judicial system. Traveling judges toured the districts and settled disputes for which the king authorized them. In addition to lay judges, whose jurisdiction was limited, there were also professional judges, whose jurisdiction was of a general nature. They most often resolved disputes arising from contract law and delict.[41]

There is still a debate among legal historians as to where the institution of the traveling judge draws its roots. There is a possibility that it was imported from abroad, through a legal transplant. The search for an answer to this question should include the history of Sharia law, as John A. Makdisi did with the jury in the common law legal system, pointing to its Sharia law roots. We should not ignore the influences that Sharia law had on the Norman rulers in Sicily, and the influence that flowed from Andalusia and the Maghreb countries, as well as the meeting of legal traditions through the Crusades in the Eastern Mediterranean.

Some facts suggest that Sharia law could be a source of the institution of a traveling judge. It is known that Sharia law recognizes two types of jurisdiction: property law and spatial law. Both jurisdictions can be of general and special character. The territorial jurisdiction of a judge is divided into local and regional jurisdiction. Local jurisdiction can be of general or special character, and regional is mostly of general character. One of the specifics of regional jurisdiction is that a judge is not tied to one place, but he can establish his court in different centres and at different times during the year. This type of judge is known in the Sharia judiciary as qādī al-aqālīm, as evidenced by the author of the work *Quḍāh Dimišq: Aṭ-Ṭaġr al-Bassām fī Ḏikr man Wuliya Qaḍā aš-Šām*, Šamsuddin ibn Ṭulūn (1475-1546.).[42]

Also, here we want to point out the institution of the Judicial Council, as pointed out by Aḥmad bin Yaḥyā al-Wanšarīsī (1430-1508) in his work ʿUdah al-Burūq fī Ǧamʿi mā fī al-Maḏhab min al-Ǧumū ʿi wa al-Furūq. He states that Abū Walīd al-Bāǧī (1013-1081) mentioned "that in some cities in Andalusia, three judges were appointed at the same time, with the same powers, without any of the lawyers disputing it at the time." Abū Walīd al-Bāǧī did not agree with this practice of appointing several judges, with the same powers, in Andalusia, referring to the practice from the time of the Prophet Muhammad, a.s., to his days, considering it inadmissible. However,

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i druge pravno-historijske teme (Sarajevo: Pravni fakultet Univerziteta u Sarajevu, 2008.), p. 41-60.

[40] See: John A. Makdisi, *The Islamic Origins of the Common Law*, Vol. 77, N.C.L. Rev. 1635, No. V, Article 2. (1999). www.scholarship.law,unc.edu, accessed 22.8.2020.

[41] Raifa Festić, *Common Law i druge pravno-historijske teme*, p. 186-187.

[42] Šamsuddin ibn Ṭulūn, *Quḍāh Dimišq: Aṭ-ṭaġr al-Bassām fī Ḏikr man Wuliya Qāḍā aš-Šām* (Dimišq: Maṭbūʿāt al-Ǧāmiʿ al-ʿIlmī al-ʿArabī bi Dimišq, 1956.), p. 294.

the famous Maliki jurist and Imam Abū bin Abdullah Muḥammad bin ʿAlī al-Māzirī (1061-1141) considered that this was not forbidden by the Sharia, if there was a need and a legitimate interest.[43] What had been a common practice in the Muslim judiciary in the Maghreb and Andalusia was for a judge to choose counsellors from among the lawyers, who could attend the trial and help him make the right decision. This is testified by ʿAbdulwaḥid al-Marākašī in his work Al-Mu ʿğab fī Talhīṣi Ahbār al-Maġrab, where he says that it was the practice of the ruler Abī al-Ḥasan ʿAlī bin Yūsuf bin Tašfīn (1061-1106) to oblige him when appointing a judge not to render judgments in any matter without the presence of four lawyers.[44] Probably Abū Walīd al-Bāğī referred to this practice, which had taken root in the Maghreb.

He disputes it, and Abū bin Abdullah Muḥammad bin ʿAlī al-Māzirī, as bin Abdulwaḥid al-Marākašī points out, legitimizes, and states that it was common in the Maghreb and Andalusia, and probably in Sicily. It was a kind of judicial council, which existed at the time in the Muslim West, given the dominant role of the Maliki madhhab in the area. What establishes us in this assumption is that they were all contemporaries and witnessed the same or similar practice, which existed at the time. Important information about the prevalence of this practice can be found in the printed work *Tārīh Quḍāh al-Andalus* by Abū al-Ḥasan bin Abdullah bin al-Ḥasan an-Nubāhī al-Mālqī (1313-1390) Supreme Judge of Granada, under the original title of the author *Kitāb al-Marqabah al-'Ulya fīman Yastaḥiq al-Qaḍā wa al-Qaḍā wa al-Futyā*.[45]

In Anglo-Saxon law, the word writ means a written order issued on behalf of a king or state body to initiate judicial or administrative proceedings. The appearance of the writ is tied to William the Conqueror using it for administrative purposes. Since the time of Henry II, *writ* has been used in the judiciary, to initiate and conduct court proceedings. The writings varied in strength. The strongest was the *writ* issued by the king's office, for the purpose of initiating civil or criminal proceedings. Disobedience to the writ meant at the same time disobedience to the king and violation of the king's peace, which, in itself, was punishable. Like the traveling courts and juries, the *writs* also served as a means of strengthening the king's power, and thus state centralism, which was promoted by the Norman rulers in England.[46]

[43] Aḥmad bin Yaḥyā al-Wanšarīsī, *ʿUdah al-Burūq fī Ğamʿi mā fī al-Maḍhab min al-Ğumūʿi wa al-Furūq* (Beirut: Dār al-Ġarb al-Islāmī, 1990.), p. 495.

[44] ʿAbdulwaḥid al-Marākašī, *Al-Muʿğab fī Talhīṣi Ahbār al-Maġrab* (Cairo: Dār al-Farğānī, 1994.), p. 150.

[45] See also: Abū al-Ḥasan an-Nubāhī al-Māliqī, *Tārīh Quḍāh al-Andalus* (Beirut: Dār al-Āfāq al-Ğadīdah, 1983.).

[46] Raifa Festić, *Common Law i druge pravno-historijske teme*, p. 192.

ILLUSTRATION – Thomas Brown bore the Arabic title of *qāid*, and was secretary to Henry II, who also worked on the revision of the *Domesday Book*.

ILUSTRACIJA – Thomas Brown nosio je arapsku titulu *qāid*, a bio je sekretar Henrija II, koji je radio i na reviziji registra *Domesday Book*.

1.3. The impact of the legal reform of Roger II from Sicily on the legal reform of Henry II in England during the XII century

In the twelfth century, signs of a revival of civic rights in the West began to appear. With the conquest of Sicily and England by the Normans of Normandy during the 11th century, it would introduce a new view of the organization of the state. It was the first attempt of feudal rulers in their effort to suppress feudal particularism, to centralize the administration under their crown, in order to govern the state more efficiently. Many of the institutions of the legal system established by the Norman rulers in Sicily and England have similarities and commonalities. The rulers Roger II (1095-1154) in Sicily and Henry II (1133-1189) in England stood out in this effort. What immediately catches the eye, and what legal historians especially point out, is that these two Norman dynasties established a strong central government, which until then had been unknown in the Western Roman Empire since its fall in 476.

Roger II introduced the famous *assize* of Ariano in 1140, while Henry II in 1164 brought in the assize of Clarendon. These decrees were not acts of a subjective nature in the true sense of the word, but rather legal acts governing the organization of state power; regulations governing family relationships and the relations between the state and the church; and prescribed sanctions for criminal offenses. This is to argue they were legal acts of a constitutive nature. For these reasons, these two kings could be called legislators, given that they left behind the ordinances of *assize* of a constitutive character.

The time difference between these two constitutive acts is almost a quarter of a century. The solutions that were applied indicate that there was a transfer of ideas. Given that the assize of Roger II of Ariano as older

in origin, the solutions it contained could have influenced Henry II and the further course of his reform. The link that connected these two reforms was Thomas Brown. He bore the Arabic title of *qāid* (Latinized *gaitus*) and he was a servant of King Roger II in Sicily. He held important positions in the judiciary and financial administration.

After the death of Roger II (1154), he returned to England. Some believe that he did so at the urging of Henry II, where in 1160 he appointed him his secretary, who prepared official/royal decrees for him. In addition, he was the king's personal financial representative, who also worked on the revision of the *Domesday Book* register.[47] His return to England coincided with the reforms undertaken by Henry II in whose administration he took a prominent place.[48]

We have already said that the reforms undertaken by Roger II in Sicily and Henry II in England were of an organizational nature. They sought to restructure the state administration (*Curia Regis*) on the basis of feudal centralism. In Sicily, the *Curia Regis* was the central administration: a place to which all lower authorities could turn, where important state issues were resolved, particularly more serious criminal cases and disagreements between the king and his vassals. Within the central administration, headed by the King (*Curia Regis*), there was the *Privy Council*, which had the role of a ministerial council. The members of the *Privy Council* were high - ranking state officials, and the highest position in that council was held by the ammirutus ammiratorum (Arabic: *amīr al-umarā*).[49]

The state administration in Sicily was divided into two administrations, which were called dohanæ (Arabic: *dīwān*). The first administration was called *Dohanæ de Secretis* (Arabic: *dīwān at-taḥqīq*), in whose jurisdiction were the financial matters connected with the king's estates, and another which was called *Dohanæ Baronum*, in whose jurisdiction were the taxes paid by the nobility to the state treasury. In the time of Roger II, the organization of the judicial system was also established. The *Curia Regis* also had jurisdiction over civil and criminal matters. The king sent judges to different parts of the country to settle civil disputes. In addition, they had the role of appealing to the Curia Regis in those matters where the local administration could not resolve the dispute. Judges did not have permanent territorial jurisdiction, but were traveling officials of the king, which is irresistibly reminiscent of the institution of a traveling judge in England during the reign of Henry II. Judges were appointed in Sicily for a longer period.

In the period after Roger II, the state administration was divided into two territorial provinces, which had both regional and local administration.[50] At the head of the judiciary in the provinces were appointed the

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[47] Frank Barlow, *The Feudal Kingdom of England 1042-1216* (London:Longmans, 1961.), p.311, 328, 375.; Edmund Curtis, *Roger of Sicily and The Normans in Lower Italy 1016-1154* (New York: The Knikerbocker press, 1912.), p. 269-270.; Reginald L. Poole, *The Excheguer in The Twelfth Century* (Oxford: University of Oxford, 1911.), p. 118-120.

[48] Edmund Curtis, *Roger of Sicily and The Normans in Lower Italy 1016-1154*, p. 269-270.

[49] *Ibid*, p. 341-342.

[50] *Ibid*, p. 346.

magistri justiciarii, who tried civil matters, while criminal matters remained under jurisdiction *Curia Regis*.[51] This later division is reminiscent of the Muslim regional organization of the judiciary, headed by a regional judge (Arabic: *qāḍī al-aqālīm*), who did not have a strictly defined seat of the court, but could establish his court in any place within its jurisdiction. It is probable that the institution of the traveling judge was taken over from the organization of Muslim courts, first in Sicily and then, through the influence of Thomas Brown on King Henry II, also in England.

Most of the cities also had local judges, who were the king's servants and assisted in their work by a jury composed of eminent men (*boni homines*), who were most often Muslims.[52] It is very likely that the issue of the jury, which arose during the legal reform undertaken by Henry II, was taken from Sicily, and that its roots are in Muslim law, developed by Muslims within the Maliki school of law, known as *shahādah al-lafīf*.

Even Reginald L. Poole, the author of *The Exchequer in the Twelfth Century*, who is not otherwise inclined to emphasize the influence of the legal system of Sicily on the legal system of England, considered that this influence was in the area of the organization of the treasury.[53]

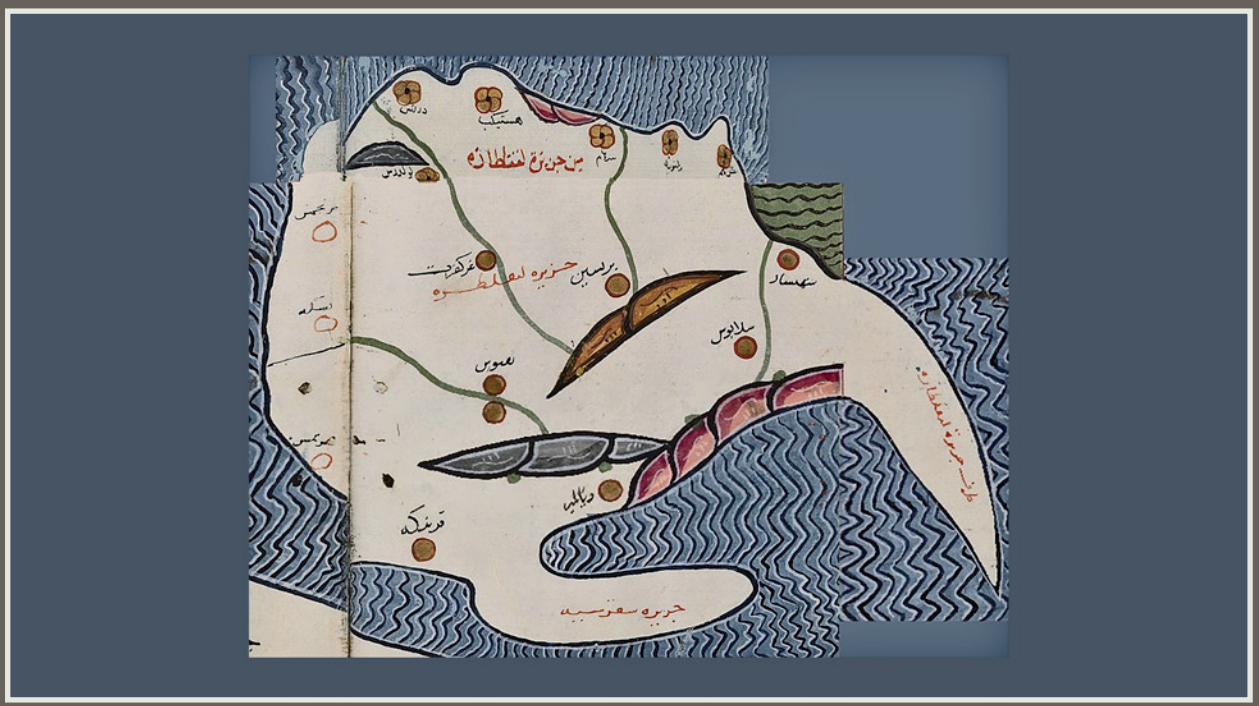

ILLUSTRATION ~ Al-Idrisi's mid-twelfth-century Arabic map of Britain.
ILUSTRACIJA ~ Al-Idrisijeva arapska karta Britanije sredinom dvanaestog stoljeća.

[51] *Ibid*.

[52] *Ibid*, p. 347.

[53] Reginald L. Poole, *The Exchequer in the Twelfth Century*, p. 67.

ILLUSTRATION – Ranulf de Glanvill (sometimes written Glanvil or Glanville) was chief justiciar of England during the reign of King Henry II and reputed author of a book on English law.
GLANVILLE (RANULF DE)
Tractatus de legibus et consuetudinibus regni Angliae, first edition.

ILUSTRACIJA – Ranulf de Glanvill (ponekad se naziva Glanvil ili Glanville) bio je glavni tužitelj Engleske za vrijeme kralja Henrika II i cijenjeni autor knjige o engleskom pravu.
GLANVILLE (RANULF DE)
Tractatus de legibus et consuetudinibus regni Angliae, prvo izdanje.

2. Thomas Brown and Ranulph de Glanville in the service of Henry II

Thomas Brown, a high official in the service of two Norman kings (Roger II in Sicily and Henry II in England), played a significant role in transmitting knowledge of the legal tradition of Sicily, which originated under the influence of Muslim, Greek, Latin and Germanic customs and law. We do not know much about his life, except that he arrived in Sicily with a group of Englishmen, and then entered the service of the Norman King Roger II. In time he progressed and became a member of the royal council. He remained in that service until 1159, when he returned to England and entered the service of Henry II, probably as his personal secretary. He acquired the Arabic title in Sicily *qāida* (lat. *gaitus*) and is thought to have been well acquainted with the legal traditions of Sicily and the manner in which the *Curie Regis* functioned under the rule of Roger II.

He is believed to have died in 1180. It is not recorded that he left behind written authorial works, except that it is mentioned that he was engaged in the revision of the King's Register of the Domesday Book, the most important document on feudal relations in medieval Europe.

Unlike Thomas Brown, there is much more information about Ranulph de Glanville (1130-1190). It is very likely that these two royal officials cooperated, given that they were members of the *Curia Regis*. Ranulph de Glanville was born in England around 1130. His grandfather came to the British Isles in the time of William the Conqueror. Ranulph de Glanville's public life began in 1164, when he was appointed sheriff of Yorkshire by Henry II. After that, in 1171, we find him in the position of Governor of Richmond Castle, and in 1174 in the position of Sheriff Lancashire. His rise began in 1174, when, as commander of the royal army, he defeated King

William of Scotland and took him as a slave. This victory made him one of the closest men to King Henry II. He held many functions for the needs of the crown of Henry II in addition to the position of sheriff of Yorkshire until his death. From 1176 he was a judge of the royal court, and from 1180 he was also the supreme judge. In addition, the king entrusted him with the diplomatic missions involving negotiations with ambassadors and other rulers; he was the commander of the king's army, and we find him as an agitator for the Crusades in the Holy Land. In a word, he was an ambassador, an administrator, a general, a judge and a lawyer. He died in Acre in 1190, while on a crusade, from disease.[54]

According to some authors, the work *Tractatus de legibus et consuetidinibus regni Angliae* is attributed to him, but there are those who challenge this. At the very least, we can say that he was an initiator of the debates on the law to be recorded, given that he held the position of Chief Justice during the reign of Henry II.[55] According to some, the work is the result of the joint effort of R. Glanville and the nephew of his wife Hubert Walter, who also held a high position in the royal administration. Frederick Pollock and F. W. Maitland also consider it unlikely that the work was written by R. Glanville himself. They believe it was done by one of the priests, or his secretary Hubert Walter. According to them, however, this treatise could not have been written without his permission, or the permission of King Henry II. However, oral tradition still attributes it to R. Glanville.[56]

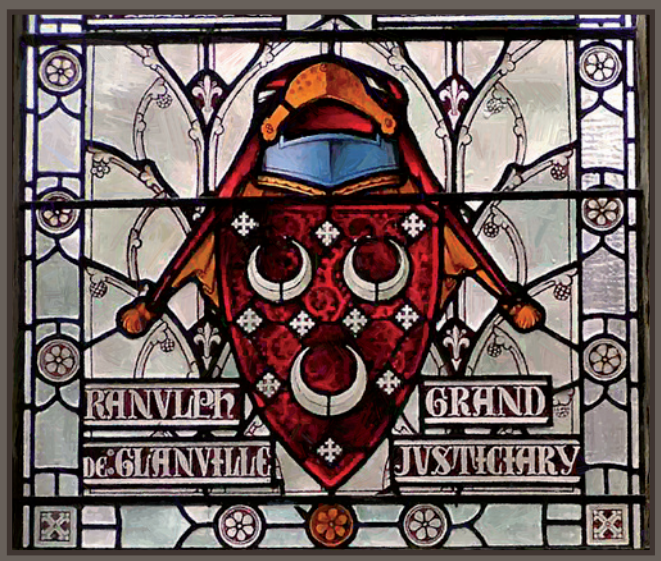

ILLUSTRATION ~ Historical coat of arms of Ranulf de Glanvill.
ILUSTRACIJA ~ Povijesni grb Ranulfa de Glanvilla.

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[54] Joseph Hanry Beale, *Introduction*, in: John Beames ESQ., *A Translation of Glanville* (Washington D.C.: John Byrne and Co., 1900.), str. III-VI.; Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 162-163.

[55] Frank Barlow, *The Feudal Kingdom of England 1042-1216*, p. 328

[56] Joseph Hanry Beale, *Introduction*, in: John Beames ESQ., *A Translation of Glanville*, str. VIII-IX.; Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 163-165.

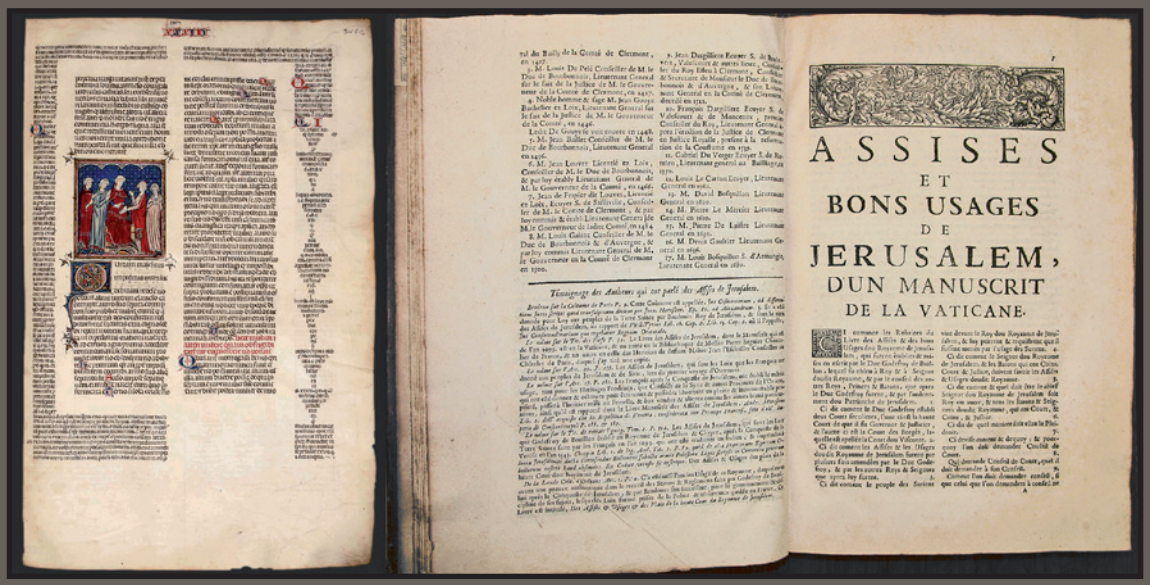

ILLUSTRATION – Decretum Gratiani (1140) and Assizes of Jerusalem (1100).
ILUSTRACIJA – Gracijanov dekret (1140.) i Asidi iz Jerusalima (1100.).

2.1.The Origin of the work of Ranulph de Glanville: *A Debate on the Law and Customs of the Kingdom of England* (*Tractatus de legibus et consuetidinibus regni Angliae*)

It is presumed that the work Tractatus de legibus et consuetidinibus regni Angliae originated in the period 1187-1189. years. Namely, in Book VIII of the treatise, in Chapter II, which refers to a writ on debt settlement before the court, it is mentioned that it was written in the 33rd year of the reign of Henry II, which corresponds to 1187.[57] How the work was created is not completely known, just as we are not sure who the author is. Some believe that it is the product of the work of several people, who participated in its creation. It is assumed that the collection of writings, published by the King's Office of Henry II, was started first, followed by the writing of comments, editing and preparation of materials, and their binding into a book. What is taken for granted is that the treatise mentions in several places the writing of writs in the presence of Ranulph de Glanville.[58]

As Joseph Henry Beale, a former professor of law at Harvard University, points out, if one accepts the assumption that the collection of material was the work of R. Glanville and Hubert Walter, then it is likely that the collection began in 1185 or 1186, and perhaps earlier, with given that R. Glanville was appointed spiritual judge in 1180.[59]

Another important fact is pointed out by prof. Joseph Henry Beale, and that is that R. Glanville and Hubert Walter from 1187 worked together at Westminster as judges. It was, according to him, a quiet period, and the

[57] Joseph Hanry Beale, *Introduction*, in: John Beames ESQ., *A Translation of Glanville*, p. VIII and p. 162.

[58] John Beames ESQ., *A Translation of Glanville*, p. 5, 12.

[59] Joseph Hanry Beale, *Introduction*, in: John Beames ESQ., *A Translation of Glanville*, p. XI.

year 1188 was the last year of R. Glanville's service to Henry II. Professor Joseph Henry Beale assumes that the work was written by R. Glanville himself, and that it was edited by Hubert Walter.[60]

Although Frederick Pollock does not rule out the assumption that the work may have been written by R. Glanville, he is of the opinion that it is less probable. He refers to the practice, which was valid at that time, that the persons who held such high positions did not write books. He also believes that the style in which the work was written was more suited to a lawyer than to a statesman, such as R. Glanville. He leans towards those who think that perhaps the author is his secretary, and later the chief judge Hubert Walter.[61]

The *Tractatus de legibus et consuetidinibus regni Angliae* is one of the earliest legal monuments of feudal law. Slightly older than him are the works *Decretum Gratiani* (1140), which is a collection of canonical, Roman, and Germanic law, and *Assizes of Jerusalem*, which is based on the customs and practices prevalent in the West. The work was written at the request of Godfrey of Bouillon (1100), the first crusader ruler of Jerusalem. However, unlike others, the *Tractatus de legibus et consuetidinibus regni Angliae* is a work in which the existing law is exposed, which was in real application. It was a modern commentary on law at the time, which served as a guide for later commentators who imitated it.

For legal historians *Tractatus de legibus et consuetidinibus regni Angliae* represents much more than one book, a monument of medieval law. The treatise is a witness to the time and rule of one of the greatest reformers of law in the history of Europe. By coming to power in England, which was in disarray at the time, Henry II succeeded in unifying the legal system, limiting the jurisdiction of ecclesiastical and aristocratic courts, and subordinating them to the jurisdiction of the king's court. The work *Tractatus de legibus et consuetidinibus regni Angliae* tells us in what way and by what methods Henry II reformed the law in England. With his coming to power and the reforms he carried out, the life of one of the most famous legal systems of today's world, *common law*, predicated on the Anglo-Saxon and Norman tradition, began. However, other legal traditions, apart from the Germanic one, had a share in it: such as the Romanesque (Latin and Byzantine) and Muslim legal traditions.

ILLUSTRATION – Henry portrayed alongside his mother, Empress Matilda, in a 12th-century manuscript. A political map of England and Wales in 1153; blue indicates those areas broadly under Henry's control.

ILUSTRACIJA – Henri je prikazan zajedno sa svojom majkom, caricom Matildom, u rukopisu iz 12. stoljeća. Politička karta Engleske i Velsa 1153. godine; plava označava ta područja općenito pod Henrijevom kontrolom.

[60] *Isto*, p. XII.

[61] Frederick Pollock, F. William Maitland, *The History of English Law Before The Time of Edward I*, Vol. I, p. 164.

ILLUSTRATION ~ Detail of a visual representation of the transmission of *writings* by the king's office.

ILUSTRACIJA ~ Detalj vizualnog prikaz prenošenja *writova* od strane kraljeve kancelarije.

2.2.Review of the work Debate on the Law and Customs of the Kingdom of England

(*Tractatus de legibus et consuetidinibus regni Angliae*)

The treatise attributed to R. Glanville, gives us a picture of what *common law* looked like at the end of the reign of King Henry II in England. It also gives us an insight into how the king's *writ*, an order in the form of an order or prohibition, acted, in the process of reform. The *writ* had an important, dual role: either it required an investigation into something; or granted or revoked a right to someone. The treatise is a commentary on the king's orders or writs. In this way, it appears as an important, first work of legal science - *common law* jurisprudence.

From the work itself it can be understood that there were several types of writs. Writings or orders were sent by the king's office to: sheriffs, judges, ecclesiastical courts, bishops or ordinary subjects. They usually started with the following words:

a) The King to the Sheriff, Health. I order you to...
b) King to the Judge. Health ...
c) King to the Ecclesiastical judge. Health ...
d) King to the Archbishop. Health ... I send them to You and command You...
e) King for M. Health. I order you to...[62]

From the manner in which the king's office composed the *writ*, it is evident that it was an order: an order

[62] John Beames ESQ., *A Translation of Glanville* (Washington D.C.: John Byrne and Co., 1900.), p. 1 and so on.

or prohibition, to which everyone was subject: the sheriff, the judge, the ecclesiastical court, the bishop, and the subject. The ecclesiastical courts were subordinate to the king and his court, since he used *writs* to order or forbid something. This is evident from several examples, say, from Book IV, chap. XIII.[63] Although there were ecclesiastical courts, Henry II managed to limit their jurisdiction to the question of the clergy and some questions of family law.

The treatise is divided into 14 books, of different lengths. Each book dealt with one topic to which the writings related. The author cited the writs as legal arguments for the views he advocated and the conclusions he made. The way of writing is highly reminiscent of the literature associated with Muslim jurists of the era, who developed a methodology for writing legal works referring to sources. In the 12th century, Muslim jurists reached an enviable level of writing legal works, which consisted of dozens of volumes. The work *Tractatus de legibus et consuetidinibus regni Angliae* tells us, among other things, that European jurists have only rediscovered legal science by compiling smaller treatises on it. However, this new beginning should not deceive us. Sharia law, which had reached its zenith, may have served as a good example to others, but it was increasingly slipping into legal traditionalism, while law in the West was gaining momentum for a new, modern age.

The first book refers to lawsuits and excuses for not appearing in court. The lawsuit could be filed before the royal court or before the district courts, which were headed by sheriffs, the king's officials. There were two types of lawsuits: a lawsuit for crimes committed and a civil lawsuit related to a rights dispute.

The criminal lawsuit was discussed before the royal court, if it referred to the offense of disobeying the king's orders (violation of the king's peace), a blood crime or a tort against someone else's property, such as arson, robbery, forgery, etc. A criminal lawsuit for theft and other crimes was filed before the district courts.

The civil suit was also divided into that brought before the royal court and that brought before the district court. The King's Court discussed issues related to the nobility and high clerics, as well as issues of widows' inheritance, if they were excluded from the inheritance and the like. The civil lawsuit before the royal court also referred to the determination of ownership of the items. A lawsuit in the district courts was initiated by other residents in matters of property rights, if the feudal courts failed to establish that right.[64] Most of the first book deals with apology procedures (*essoin*)[65] for failure to appear in court.[66] The book is dedicated to lawsuits and discusses various situations in which it is possible to file a lawsuit before the courts, whether it is a criminal or civil lawsuit. The book consisted of thirty-three chapters.

The second book refers to the procedures before and during the civil proceedings, and about the ways of proving the right to enjoy permanent ownership of things. Proof of ownership of property took place either

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[63] John Beames ESQ., *A Translation of Glanville*, p. 80-81.

[64] *Ibid*, p. 1-5.

[65] Milica Gačić, *Englesko-hrvatski rječnik prava i međunardnih pravnih odnosa* (Zagreb: Školska knjiga, 2010.), p. 554.

[66] See: John Beames ESQ., *A Translation of Glanville*, p. 6 and so on until First book.

by invoking a duel or by placing under the jurisdiction of the Grand Decree (*grand assize or assize novel disseisin*), which required an investigation and a jury verdict on the facts of the dispute.[67] The book discussed various aspects of proving property rights and consisted of twenty-one chapters.

The third book refers to guarantors and their summons; their appearance or non-appearance before the court; and about two landlords who are disputing about the recognition of ownership and their appearance or non-appearance before the court.[68] The book discusses various aspects of the appearance of guarantors and landlords in court and their disputes, as well as investigations and the allocation of rights. The book consists of eight chapters.

The fourth book refers to goods under ecclesiastical protection (eccl. *advowsons*) and corresponding disputes.[69] These disputes were most often due to abandoned churches and church properties that belonged to them. In order to adjudicate, it was necessary to investigate their status and rule on it. The book discusses the various disputes of the parties before the court regarding church property and their rights and consists of fourteen chapters.

The fifth book refers to the status of serfs (*villeins-born*) and the conditions under which they are born, and of disputes about their affiliation with the patron. A serf was considered to be a person born to both parents who were in the status of a serf, and also if the father was free and the mother a serf and vice versa, provided that in the latter case it was the subject of investigation. However, if a child were born from parents who were serfs and who belonged to different masters, the child would belong to the patrons as a serf proportionally and equally (Book V. chap. VI).[70] The book consisted of six short chapters.

The sixth book refers to the widow's share (*dower*) in the husband's estate (*dowry*). institution of dowry or widowhood[71] (*dower*) was used in two meanings: to denote the gift given to the wife at the wedding itself at the "church door" and to denote the widowhood or dowry that was in the husband's estate after his death. This part of the dowry was 1/3 of the husband's land, and in case he left her more it would be reduced to 1/3 (Book VI., Chap. I). The book discusses various forms of granting and violating this right to women, and consists of eighteen chapters.[72]

The seventh book refers to legal heirs, illegitimate male and female progeny, and adult and minor children; about the ultimate heirs of the patrons and about the ultimate heirs of the patrons and those individuals to whom compensation is owed; about the heirs of a person who has not left a will; about moneylenders and their heirs; about marriage or kinship (marriage-hood) and gifts of heirs; on wills and debts, etc.

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[67] *Ibid*, p. 31-58.

[68] *Ibid*, p. 59-68.

[69] *Ibid*, p. 69-82.

[70] *Ibid*, p. 83-92.

[71] Milica Gačić, *Englesko-hrvatski rječnik prava i međunardnih pravnih odnosa*, p. 493.

[72] See more code: John Beames ESQ., *A Translation of Glanville*, p. 93-112.

The book discusses various rights among heirs within a wider family community or cooperative, such as: sons and daughters, grandchildren and great-grandchildren, siblings, grandparents, uncles, and the like. For instance, according to Chapter III, it is evident that the eldest son inherited all, if the testator was a landowner by birth or by military service. However, if it was a person who acquired the property through his work, all his sons inherited equally.

In Chapter V, a will to a lord, church, or someone else is recommended. The bequest of a will was left to the free will of the person. After settling the funeral expenses and settling the debts, the inheritance was divided into three parts: for the heirs 1/3, for the wife 1/3 and for the will 1/3. If the husband did not leave his wife behind, 1/2 of the property could be disposed of in favour of the will. Other similar issues were discussed. The book, given the multitude of issues being discussed, is somewhat larger in scope than the others. It consisted of eighteen chapters.[73]

The eighth book refers to settlements in court; on court registers; on the dissolution of the settlement before the court; on fines in court and on similar issues. Chapters II and III mention the writing of writs in the 33rd year of the reign of King Henry II, corresponding to 1187. In addition, it is mentioned that they were written in the presence of King Judge R. Glanville. The book contains eleven chapters.[74]

The ninth book refers to an oath of allegiance to the king, of the obligation to support the king, of service and assistance to the king, and similar matters. It was the duty of all subjects, especially feudal lords, to swear allegiance to the king, to respond to his call to service, and to provide him with every kind of assistance, in exchange for the property allotted to them. The book discusses this type of relationship and resolving disputes in court, based on vassal relationships. The book consisted of fourteen chapters.[75]

The tenth book refers to receivables arising from different types of contracts, such as: purchase, gift, lease and rental, rental and leasing of movable property, pledge and guarantee of movable or immovable property and documents containing receivables. This chapter regulates the obligatory relations and the appearance of the parties before the court in case of a dispute over the claim. The book consists of eighteen chapters.[76]

The eleventh book refers to proxies when presenting in court. A person is allowed to appoint a proxy, who will take the subject of the dispute to court instead, in his presence during the trial. Representation in the royal court was allowed in the case of a civil suit. This book discusses various aspects of representation in court and the consequences that arise from it. The book is not large in size and consists of five chapters.[77]

The twelfth book refers to lawsuits for exercising rights; about the different types of writs by which the right is exercised, and which are addressed to the sheriff or lord. These types of lawsuits were discussed by

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[73] *Ibid*, p. 113-160.

[74] *Ibid*, p. 161-174.

[75] *Ibid*, p. 175-197.

[76] *Ibid*, p. 198-222.

[77] *Ibid*, p. 223-230.

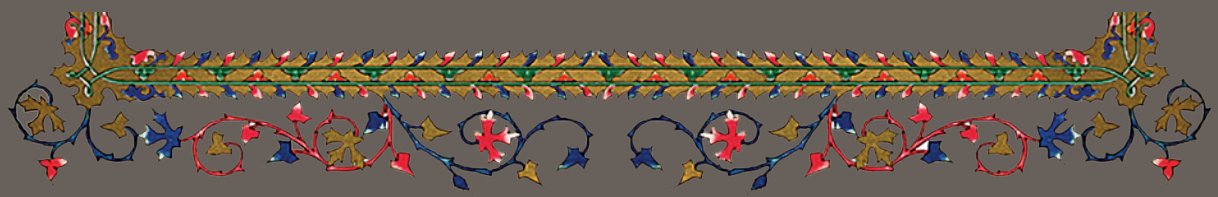
the royal court, directly. Some of them came indirectly, in case other courts failed to establish the right. Any lawsuit for the exercise of rights had to be based on a writ issued by the king or his judge. The book discusses various aspects of exercising rights before the courts. It consisted of twenty-five chapters.[78]

The thirteenth book refers to lawsuits under the king's order of assize and testimony, and on the various kinds of confiscation of property and rights by the court. Compared to other books, it is more extensive and contains thirty-nine chapters.[79]

The fourteenth book refers to criminal lawsuits belonging to the crown. These are those lawsuits accusing someone of intending or committing acts that led to or could have led to the king's death, or it was an accusation of military rebellion, regardless of whether the plaintiff appeared with the lawsuit or the plaintiff is public. In the case of an accusation that is the result of public opinion, the accused will be brought before the Court of God (*Ordeal*), a public trial. If a person is found guilty in this court in that case the punishment is death or forgiveness by the king.

The book also discusses other criminal offenses of violating other people's property, such as falsifying feudal charters, market measures, money, etc. The crime of rape was considered an act against the king's peace, and there are also the crimes of arson and plunder. The theft was under the jurisdiction of the district courts, under the sheriff's jurisdiction. The last XIV book gives us an insight into the criminality of the deeds and the manner of their prosecution in the royal court. This book contains a total of eight chapters.[80]

Considering the topics to which the treatise is dedicated, it is noticeable that it is a feudal law in which the state apparatus is expressed, and the subordination of all subjects of society to state power, which determines rights, protects and defends them, and ensures that they are respected among subjects. Undoubtedly, the treatise indicates the beginning of a great reform, in relation to the earlier Anglo-Saxon period, where the king's centralism came to the fore through the king's court. The strengthening of state centralism in England will lead to the creation of a strong monarchist government, in relation to the feudal lords, which will also be a prerequisite for the transformation of the whole society from feudalism to the capitalist form of social relations. In this, England, as an imperial power, aided by the industrial revolution, would take the lead over continental Europe.



[78] *Ibid*, p. 231-245.

[79] *Ibid*, p. 246-277.

[80] *Ibid*, p. 278-291.

ILLUSTRATION – Detail of an illuminated manuscript - a session of the Sharia court in the 12th century.
ILUSTRACIJA – Detalj iluminiranog rukopisa - zasjedanje šerijatskog suda u 12 stoljeću.

2.3. Some similarities of the legal system of Henry II with certain institutions of Sharia law

When we talk about similar solutions that appear in different legal systems, we must first pay attention to whether these confluences are the product of similar circumstances in which different societies have developed throughout history. This can be verified by examining the sources that constituted the legal system, the actual doctrines of that paradigm, and the theories and principles it developed. However, if it turns out that the legal system in a certain period of time suddenly introduces previously unknown laws or institutions, in that case there is a high probability that it is a matter of lending or legal transplantations.[81] This borrowing from a foreign legal system can go in different directions. One of the possibilities is to accept legal doctrines, theories and principles, and for particular solutions to differ from each other. Another possibility is to accept a foreign legal institution in full, or to a limited extent, by taking over ready-made solutions and including them in the legal system due to the convenience and compatibility with the prevailing system in which the transplant is performed.

When comparing the legal system established by King Henry II, discussed earlier, it seems that this reform should be seen as the product of several well-composed elements from different legal predecessors that have already been developed in the legal traditions of the Germanic and Mediterranean peoples. Central to the reform of King Henry II is the reorganization of the judicial system or courts. There are four key points in this reform: the filing of a lawsuit, the appearance of a jury in court, the appearance of traveling judges, and the central role of the kings of the court, as the ultimate court instance.

In addition to the changes that have been introduced in the judicial system and procedural law, there

[81] See also: Alan Votson (Alan Wotson), *Pravni transplanti* (Beograd: Pravni fakultet Univerziteta u Beogradu, 2010.).

are visible changes in both mandatory and inheritance law. These changes were manifested in the cases of mutual claims (*debt*) of the contracting parties under the contract; the woman's right to inherit and dispose of property; will; and the responsibilities of the estate after the settlement of the debt.

On the similarities of the institution of *shahādah al-lafīf* and juries in England in the time of Henry II, as well as traveling judges in England and judges with regional powers among Muslims (*qāḍī al-aqlīm*) we have already spoken. Here we want to point out a few similarities related to the will, the status of inheritance with respect to debt and the issue of debt or receivables arising from the contractual relationship.

In Book VII, Chapters V-VIII of the *Tractatus de legibus et consuetidinibus regni Angliae* is a will or testament. At the beginning of Chapter V it is stated that any free man, who is not burdened with debts, may leave a will on his deathbed to a lord, a church, or someone else. However, he is not obliged to do that, but it is his free will. A woman is also allowed to do so on her property, but not on her husband's property, without his permission. If a person in whose property there are no claims by third parties decided to leave a will, he will divide his property into three equal parts, of which 1/3 will belong to his heirs, 1/3 to his wife, and 1/3 will leave to himself with the right disposition to assign it to whomever he wishes. If the person does not leave his wife behind, then he will be able to freely, on his deathbed, dispose of 1/2 of the property. However, if a person wishing to make a will has debts to third parties, he will not be allowed to leave a will, because his property is encumbered with debts, without the consent of his heirs. Once the debt from the property is settled, the remainder will be divided into three equal parts. In this case, the person will be able to dispose of 1/3 of the property for the purpose of the will. A will is valid in both movable and immovable property.[82]

If we compare the contents of Book VII of the *Tractatus de legibus et consuetidinibus regni Angliae* (Chapters V-VIII) with the regulations of Sharia law, we will notice many similarities with its provisions. This similarity is reflected in the restrictions on three grounds: (first) on the basis of debt, because prior settlement of the debt is required before the will; (second) on the basis of seeking the consent of the heir, if the amount of the will exceeds 1/3 of the property; (third) if a person leaves a will that exceeds 1/3, the will will be corrected to 1/3, which is the position of the Maliki school of law among Muslims as well. In addition, both rights allow a will in both movable and immovable property.[83] This similarity of the will in the early period of development of the common law system from the 12th century was pointed out by dr. Alija Silajdžić in his work *Testament u šeriatskom pravu* ("The Testament in Sharia Law").[84]

Another issue that points to the similarity between Sharia law and *common law* of the twelfth century is the question of the status of the estate after the death of the testator. Over time, Roman law adopted the principle of universal succession, while Sharia law adopted the principle of ideal succession. According to the

[82] *Ibid*., p. 133-138.

[83] Ibn Rušd, *Bidāyah al-Muǧtahid wa Nihāyah al-Muqtaṣid* (Cairo: Dār al-Ḥadīṯ, 2004.), Vol. IV, p. 119-121.

[84] Dr. Alija Silajdžić, *Testament u šeriatskom pravu* (Sarajevo: Državna tiskara u Sarajevu, 1941.), p. 63.

first pattern, the heir inherits the total assets, both assets and liabilities, and it is considered that there has been no interruption of the continuity of ownership. Sharia law, and according to the T*ractatus de legibus et consuetidinibus regni Angliae* and *common law*, has adopted an ideal succession, in which the heir inherits the testator's property only after the debts and funeral expenses have been settled. In this way, the heir is not responsible for the encumbrances on the property, thus there is a break in the continuity of ownership, between the testator and the heir.[85]

According to the *Tractatus de legibus et consuetidinibus regni Angliae*, a bond claim may be for a loan, sale or loan, lease or deposit, or for something else that provides a basis for claiming a particular debt. A claim or debt arises when a person with something that can be counted, weighed, or measured is indebted to another person, and demands that more than the indebted be returned. In that case, the person is considered to have committed interest, which is considered a criminal offense.[86] The prohibition of interest is inherent in the religious rights of both Islam and Christianity, and to some extent Judaism, and therefore this prohibition has common roots.

ILLUSTRATION ~ Giving a will before a qadi (judge) among Muslims, 10th century.
ILUSTRACIJA ~ Davanje oporuke pred kadijom (sudijom) kod muslimana, 10 stoljeće.

[85] John Beames ESQ., *A Translation of Glanville*, p. 137-138.; Dr. Alija Silajdžić, *Testament u šeriatskom pravu*, p. 56.
[86] John Beames ESQ., *A Translation of Glanville*, p. 199-200.

ILLUSTRATION ~ Illustration of a jury among Muslims from an illuminated manuscript.
ILUSTRACIJA ~ Ilustracija porote kod muslimana iz iluminiranog rukopisa.

3. John A. Makdisi's position on Islamic sources in the common law system

In his paper entitled *The Islamic Origins of the Common Law*, John A. Makdisi, a professor at Loyola University in New Orleans, was among the first to point out the possible connection and influence of Sharia law on the development of certain *common law* legal institutions This influence, according to him, took place in the twelfth century through the exchange of knowledge and experiences about the organization of the state, between two Norman royal houses, Hauteville in Sicily and Plantagenet in England. According to him, Roger II and his successors in Sicily had a direct influence on the reign of Henry II in England and his successors. In his work, he points to the connection that the Muslim West (Sicily, Andalusia and the Maghreb) may have had with the development of the common law legal system. In his work, he seeks to point out how this influence occurred, revealing the institution of Sharia law that have been transferred to the *common law* system. He points to several points that show that Sharia law was the one that shaped the institution of the jury in the common law system by taking over the institution of *shahādah al-lafīf*. He dedicated most of his work to this institution, pointing to its origin and development in the Muslim West in the 11th century. In the absence of just witnesses (*al-ʿudul*), the Maliki School of Law allowed the number to be expanded from two just witnesses to twelve locals, who had information about a certain event and presented their knowledge to the court.[87]

In addition to the institution of the jury, he considers that the notion of the nature of the contract, which R. Glanville included in his treatise, is basically a definition of the contract transferred from Sharia law.

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[87] Burhanuddīn Ibrāhīm bin ʿAlī bin Abī Qāsim Ibn Muḥammad bin Farḥūn al-Mālikī, *Tabṣiratu al-Ḥukām fi Uṣūl al-Aqḍiyah wa Manāhiǧ al-Aḥkām, na marginama djela: Muḥammad Aḥmad ʿUlayš, Fatḥ al-ʿAliyya al-Mālik fī al-Fatāwā ʿalā maḍhab al-Imam Mālik* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1958.), Vol. I, p. 416.

The Roman and Germanic legal traditions did not recognize the transfer of ownership when concluding a contract before the transfer of the case between the contracting parties, as pointed out by John A. Makdisi.[88] Sharia law gave the treaty that meaning, so such an understanding of the treaty was introduced into the *common law* system.

Also, John A. Makdisi pointed to the institution of restitution of ownership of the subject of usurpation in *common law*, which, according to him, has its roots in Sharia law. It is an *assize of novel disseisin*, enacted between 1155 and 1166, which restored ownership of the land that was usurped. For historians of law, according to John A. McDisi, this institution is in itself a mystery. It is not known where he came from in the *common law* system. Many have tried to give an answer to this question, such as F. Pollock and W. Maitland, referring to Roman foundations. However, such claims are, according to John A. McDisi, problematic because their argumentation is weak. He considers that the basis for issuing the *assize of novel disseisin* was the institution of sharia law *al-istiḥqāq*, i.e. the vindication or renewal of the right to the subject of usurpation.[89]

Importantly, John A. Makdisi substantiated his claims, on jury, contract, and restitution of ownership of the usurped object, with valid arguments, linking them to Sharia law. At the end of the paper, the author provided a historical basis for his claim, linking the Normans in Sicily and England, and the role of some people, such as Thomas Brown, in the transmission of knowledge about the Sharia legal tradition from Sicily to England.

Conclusion

Any significant legal reform requires the introduction of new elements into the system, in order to give it new vitality and the ability for harmonious and dynamic development. Legal reforms that have been undertaken in Europe since the 12th century (first in Sicily, then in England, and later in France) show that in the meeting of different legal traditions there is an interpenetration, adoption of new legal doctrines and theoretical solutions from a more advanced legal tradition to the legal order. The experience and knowledge gained by the Norman rulers in Sicily, in the face of the remnants of the Aglebian and Fatimid states, were of utmost importance for the advancement and reform of the legal order in Sicily and in England, during the twelfth century. The emergence of certain legal institutions in the *common law* system has long been speculated. Their strangeness and departure from the Romanesque and Germanic legal traditions was mysterious. Legal historians have sought to explain their appearance by different interpretations, speculating as to where their roots might have originated. The emergence of transplants from the Muslim legal tradition in the common law system was pointed out by Professor John A. Makdisi. He, unlike others, did not rule out the

[88] John A. Makdisi, *The Islamic Origin of the Common Law*, Vol. 77 N.C.L. Rev. (1999): p. 1647.

[89] *Ibid*., p. 1660-1666.

impact of Sharia law from the Mediterranean on ongoing reforms. Research in this direction could be used in discovering the roots of certain legal institutions, which have shaped modern Europe. Such research can also provide us with knowledge of how and by what means this reform was carried out.

This research helps us to better understand the world we live in, because in its creation there were and are deposits on which our world is built. These deposits come from different cultures and traditions that intertwine. In the Middle Ages, the Muslim legal tradition strongly influenced the law of medieval European states, just as today European rights affect Muslim countries. History teaches us that in the encounter of different legal traditions the benefit is always on the side of the common man and human civilization.

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