THE PENNSYLVANIA STATE UNIVERSITY
SCHREYER HONORS COLLEGE

DEPARTMENT OF HISTORY AND RELIGIOUS STUDIES

THE POSSIBLE CONTRIBUTIONS OF ISLAMIC MARITIME LAW TO THE DEVELOPMENT OF INTERNATIONAL LAW

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Spring 2011

A thesis
submitted in partial fulfillment
of the requirements
for baccalaureate degrees
in History, Journalism and Political Science
with honors in History

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ABSTRACT

This thesis explores the possible contributions of Islamic maritime law from the 9th to 12th century to modern maritime law in its formative stages against the backdrop of more general contributions of Islamic law to both international and Western law of the time. With regards to the latter, the discussion will focus on Islamic law's influence on various Western legal systems and specific institutions, such as common law, the English trust and French *aval*. Further, the preface to this "contributions" section will differentiate Islamic law from Roman law and Jewish law in its formative stages, and provide a general overview of Islamic law, clearing up points of confusion such as the role of religion and jurists. The analysis of Islamic maritime law in the early middle ages explores its possible influence on formative elements of modern maritime law (here defined as admiralty law as practiced by the majority of countries in the world today). The mode of analysis will be primarily descriptive, and will move through different subjects of maritime law in its medieval Islamic context, and point out similarities along the way. Subjects discussed include: legal personality, contracts, liability and transportation of goods, jettison, salvage, collision and partnership.

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CHAPTER 1

Introduction

Contrary to its name, international law[1] has long been portrayed by legal academics as essentially Western in origin. In his best-selling introductory textbook on international law,[2] Malcolm Shaw says: "The foundations of international law or the law of nations as it is understood today lies firmly in the development of Western culture and political organization."[3] Shaw hurriedly treats non-Western cultures, giving the examples of Hindu and Chinese laws that fashioned an "international ethic" in their respective regions similar to international human rights law today. But as in many histories of modern international law, Shaw is dismissive of non-Western influences on its early development. Hindu and Chinese international law was "extremely limited" in its space and too underdeveloped to possibly influence modern international law according to Shaw.[4] This is just one among many examples. But while Shaw presents a case against theories of influence on international law by more distant cultures (with respect to Europe), a more relevant case lies across the Mediterranean.

Islamic law as it appeared in the Middle Ages was uniquely positioned to influence the development of modern international law. Unlike Hindu and Chinese law, Islamic law developed along the borders of medieval Christendom. Furthermore, it developed at a time when Europe was in the "Dark Ages," and the *Dar al-Islam* was

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[1] Understood here as international law as it is understood today. That is, the body of law governing conduct between independent, sovereign states that has taken shape since the Middle Ages.
[2] Shaw, Malcom. *International Law*. 6th ed. New York: Cambridge University Press, 2008. Print.
[3] *Ibid.* 13
[4] *Ibid.* 14-16

carrying the torch of civilization. This time period was also foundational to international law. Its "founding fathers"—Hugo Grotius, Francisco de Vitoria, Alberico Gentili—carved their theories out of the writings and experiences of merchants, philosophers and kings that arose out of interaction between European powers in the Middle Ages and, substantially, their interaction with the Muslim world across the wide and porous shores of the Mediterranean.

Considering this unique opportunity for transmission between the Muslim and Christian world, and the important role Europe played in the formation of international law as we know it today, it is not difficult to imagine a possible role for Islamic law. The purpose of this thesis is to explore that role, primarily through a body of law where interaction was frequent, substantial and, by definition (because it deals primarily with laws governing actors in an autonomous space) international: maritime law—or the laws and regulations, including international agreements and treaties, that exclusively govern activities at sea or in any navigable waters.[5] Specifically, this thesis describes and analyzes different subjects of private or commercial maritime law—which was restricted to the activities of private actors within the larger body of maritime law—as it operated in Islamic law, in order to understand possible contributions of this body of law to maritime law in particular, and international law in general.

The subjects covered are a broad range of the most important topics of maritime law, relating to everything from when a passenger was allowed on deck to do his laundry, to when a shipper was supposed to pay a customs official for doing his job. Generally,

[5] Hill, Gerald, and Kathleen Hill. "Maritime law." The People's Law Dictionary. New York: Fine Communications, Web.

these topics fall within the following headings: legal personality; contracts; liability and transportation of goods; jettison; salvage; tariffs, taxes and tolls; collision; and partnership. Legal personality deals with the classification of ships and people (including their specific roles) according to certain criteria. Contracts is concerned with the legal mechanisms by which parties arranged the carriage of goods by sea. Liability and transportation of goods is a broad though related category concerned with legal responsibility for damaged or lost cargo, and procedures for transport of goods legally required for both avoiding liability and ensuring safety. Jettison deals with laws governing jetsam—cargo or parts of a ship thrown overboard—and salvage deals with laws governing procedures for found jetsam. Tariffs, taxes and tolls is concerned with legally mandated fees for transporting goods, such as taxes on merchandise and payment for passage. Collision is concerned with the legal criteria and consequences of cases involving the collision of two or more ships. Finally, partnership deals with the financial arrangements that make long-distance trade by sea possible. This list of subjects covered is certainly not exhaustive, but it contains the most important aspects of commercial maritime law.

In exploring these subjects, this thesis will both describe their features in theory and practice through various writings and documentary evidence, and note particular innovations Islamic law may have introduced. This last part is crucial. The approach here is to differentiate these innovations from contemporaneous practice and theory in other, primarily European legal systems, and to connect them to maritime law as it is understood today. Fulfilling both these requirements is difficult for several reasons. First, there is not enough documentary evidence to definitively prove where these innovations

came from and if indeed they were practiced as uniformly as maritime law is today. Second, adequately fulfilling these requirements necessitates research beyond the scope of this thesis, and knowledge of law, language and history beyond the reach of its author. Considering this, it is important to emphasize the difficulty of *proving* these arguments. But it is also important to stress their usefulness. This thesis raises a number of reasons—flawed interpretations, contributions, parallels, means of transmission—to question assumptions about how "firmly" Western international law really is.

To lend perspective to theories of borrowing within maritime law, this thesis will also consider possible roles of Islamic law in other legal contexts of the same time (roughly, the 9th to 13th century). Looking at Islamic law's influence on English legal systems and institutions, and more cursory treatments of institutions in other European countries, will show this. The focus on England is important for several reasons. First, maritime law as it is practiced today around the world—particularly in common law countries—owes much to the admiralty law of England. This is due both to the importance of the British navy on the world stage in the formative centuries following the French Revolution, and the adoption of many of its features by Western countries and, most importantly, the United Nations in the Law of the Sea Convention, which became effective in 1994 after nearly a decade of negotiations. Second, substantial research exists—here, in the work of John Makdisi on the Islamic origins of common law and Henry Cattan on the influence of the Islamic *waqf* on the English trust—on theories of borrowing by the English from Islamic law. Third, discussing theories of influence on English law gives ample opportunity to examine avenues of transmission through which the innovations of Islamic law, both generally and in a maritime context, could have

reached and influenced European legal systems. But first it is important to consider reasons that may have contributed to Islamic law's forgotten role in the evolution of international law. Specifically, the following section will dispel certain perceptions Europeans have held about Islamic law in order to diminish its role and keep the origins of international law exclusively Roman. This is important within the wider context of influence considered in this thesis because understanding how and why Islamic law could have impacted European law is an important step in imagining actual instances of it.

CHAPTER 2

Misconceptions

There are many reasons why academics have neglected Islamic law's role in the development of international law. Language barriers and cultural differences certainly played a part. But so too did European prejudices against the Islamic world, and European aspirations to keep the origins of international law "pure" by mythologizing Roman law and, thereby, excluding Islamic law. In the context of international law, many of our ideas about its origins are shaped by 19th and early 20th century scholars: lawyers and judges who did not fully understand the Islamic world, much less its legal system. [6] Also, the state of the Muslim Middle East during this period—like today—was not reflective of its past greatness. Consequently, the dying Ottoman Empire and its defunct legal system was taken as the embodiment of Islamic law, instead of its older, arguably more complex and certainly more efficient legal system. The following segments will discuss two important sources of confusion about Islamic law in general, along with theories that diminish Islamic law's role in the development of international law during the crucial centuries of the Middle Ages by claiming it was a legal system too underdeveloped and indebted to other legal systems to do so. Overcoming these common misconceptions reveals a legal system at least as complex as its Western counterparts, and one uniquely positioned to influence the geographically restricted space of international law's early development.

[6] Badr, Gamal. "Islamic Law and its Relation to Other Legal Systems." American Journal of Comparative Law. 26.2 (1977): 187-198. 2. Print.

The role of religion

A common source of confusion even today is the role religion plays in Islamic law. Islamic law is not a religious law per se but a body of law with a religious dimension. On a purely abstract level, Islamic law goes further than Roman law and common law in prescribing what *ought* to be done in a given situation.[7] Roman law and common law, by contrast, rarely go beyond what an individual is bound by or entitled to. These prescriptive acts in Islamic law are generally classified as praiseworthy (*mandub*) or blameworthy (*makruh*). As the classification implies, there is little implication beyond religious merit or demerit in most contexts. In neither case are legal sanctions, whether punishment or entitlement, the norm.[8] Furthermore, laws dealing with purely religious matters (*'Ibadāt*), such as religious duties and obligations, are classified under a different heading than laws dealing with the relationships between people (*Mu'amalāt*), i.e. the main content of Roman law and common law. [9] That is not to say that *Mu'amalāt* is exclusively secular—there is certainly a religious influence—just that it is not purely religious.

The formation of Islamic law also attests to its progressively man-made nature. According to former Algerian Supreme Court Justice and Board Member of the Egyptian National Bar Association Gamal Moursi Badr, the Koran is hardly an inflexible legal code for Muslim jurists. Rather, Islamic law has evolved largely out of a discourse among jurists. While influenced by the Koran and Sunnah, it owes much of its development to

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[7] Hallaq, Wael. *An Introduction to Islamic Law*. 1st ed. New York: Cambridge University Press, 2009. 1-4. Print.
[8] Badr 189
[9] *Ibid.*

Fiqh, i.e. human elaboration and interpretation.[10] On that note, another source of confusion about Islamic law is the role jurists play in its formulation.

The role of jurists

The development of Islamic law has differed markedly from its European counterparts. While Roman law and common law lay out laws in direct, abstract terms (as in statutes enacted in common law and elaborations of code in civil law), Islamic law has evolved out of a discourse that offers many different interpretations of law generally according to a given jurist's juristic school (*madh'hab*). The most important Sunni schools are the Mālikī, Hanafi, Shaīfi'ī and Hanbali; in Shia, the Ja'fari and Zaydi.[11] Juristic schools of Islamic law are not formal educational institutions per se or officially-sanctioned law-making bodies, but groups of jurists following the teachings of a founder who was usually around in the early centuries of Islam.[12] This contrasts greatly with European legal systems. In Roman law, the main source of legal provisions is legislation enacted by an official law-making body. In common law, decisions of the King's (and in the U.S., the federal or state government's) courts are the main source of legal rules. Islamic law's sources are, in contrast, more diffuse and less dependent on the government. This discursiveness has often been misunderstood as evidence of an incoherent system. But these schools make up an integral whole; for while they may

[10] Esposito, John L. "Islamic Law." The Oxford Dictionary of Islam. New York: Oxford University Press, 2004. Print.
[11] Kamali, Mohammed. *Shari'ah Law: An Introduction*. 1st ed. Oxford, U.K.: OneWorld Book, 2008. 68-98. Print.
[12] *Ibid.*

differ in certain areas, the essentials of each school are built upon a common, consistent foundation resting on *Fiqh*, Sunnah and the Koran.

The above discussion briefly explained common sources of confusion about Islamic law that ultimately diminish its role in the development of international law. Religion in Islamic law was shown to be less all-encompassing than commonly perceived by some Western scholars.[13] While important in Islamic law, religion (in the Christian sense of the word) is only a part of a progressively man-made body of law. Related is the commonly misunderstood role of jurists in Islamic law. Compared to its Western counterparts, legal formulation in Islamic law is more diffuse and more independent of government. This discursiveness, however, is not incoherence but simply a product of different circumstances. On that note, another source of confusion about Islamic law is its origins.

Underdevelopment

In addition to misunderstood features, another possible reason for Islamic law's forgotten role in the development of international law is its origins. Specifically, Islamic law has been taken by some to be an essentially Roman system in its early stages that only later became developed enough to substantively contribute to international law.[14] These arguments go beyond claiming Roman law played an ancillary role in the development of Islamic law, which is more plausible, to suggest "systematic

[13] Badr 196-7
[14] *Ibid.* 187-198

borrowing."[15] A prime example is Patricia Crone's book, which argues that Roman law and provincial law heavily influenced Islamic law as it developed in Syria. [16] But her arguments, as noted by Wael Hallaq, are by and large unfounded. Crone cites numerous examples of similarities, such as the market inspector, that seem more the product of innate human reasoning (market inspectors would develop out of necessity in almost any culture) than innovations borrowed from Roman law. But the bulk of her case for systematic borrowing rests on one institution—the Islamic patronate—whose likeness to its Roman counterpart is taken as evidence of a system-wide parallel.[17] In other words, Crone assumes that because there is evidence of borrowing in one element, there must be more of it.[18]

But these parallels (if they do exist) take place within different institutional contexts. For example, legal personality in Roman law is patriarchal, with the male head of the house granted substantial legal benefits (*patria potestas*, power of a father), like propriety rights, over other members. This stands in stark contrast to Islamic law. While women and slaves suffer under certain legal limitations, they are recognized legal personalities; moreover, free Muslim men are legal equals regardless of their position in the household. [19] Another example is the law of inheritance. In Roman law, assets and liabilities of the deceased are passed on to the heir with no settlement (hence *damnosa hereditas*, burdensome inheritance, in some cases liabilities are greater than assets

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[15] Hallaq, Wael. "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law." *Journal of the American Oriental Society*. 110.1 (1990): 79-91. Print.
[16] Crone, Patricia. *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate*. 1st ed. New York: Cambridge University Press, 2002. Print.
[17] *Ibid.* 43-88
[18] *Ibid.* 89-99
[19] Badr 191

inherited). In Islamic law, there is no transfer of either assets or liabilities before the liabilities of the deceased are settled. They are settled by way of subtracting liabilities from assets so only the difference remaining after the settlement is transferable. [20] Another important difference in inheritance law is who gets what. In Roman law agnates (relatives through male line of ascent) and cognates (relatives through female line of ascent) are considered equal in inheritance; Islamic law (more specifically Sunni law, Shiites differ on this point) gives priority to agnates over cognates.[21] Yet another difference is the construction of contracts. In Islamic law, contracts are based on intent, in the form of *ijab* (offer) and *qabul* (acceptance), and are bilateral by nature as Badr explains: "A contract results from the meeting of minds of parties but distinct from each party's declaration of intent and binding in its own right."[22] Roman law has a unilateral concept of contracts. Offer and acceptance are rendered binding by observance of a third-party and adherence to required procedure. There is no need for technical terms. Essentially, Roman law's contracts are formalist and Islamic law's contracts are based on consent. One requires separate actions by separate parties; another, agreement by respective parties. Beyond major internal differences, extrinsic evidence also points to the uniquity of Islamic law from Roman law.[23]

The Islamic conquests of the 7th century brought Islamic law in contact with Roman law, but the climate was not exactly conducive to borrowing. First, there was a

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[20] *Ibid.*
[21] *Ibid.* 191-2
[22] *Ibid.* 192
[23] Hallaq 79-91. See also: Fitzgerald, S.V. "The alleged debt of Islamic to Roman law." Law Quarterly Review. 67. (1951): 81-102. Print.

psychological barrier. Islamic law, by incorporating aspects of Islam, made borrowings of law essentially different than borrowings in other areas. Philosophy and science were not as connected to religion in the minds of Muslims as the laws that governed them. Moreover, the philosophy of the ancient Greeks and science of the Romans was acknowledged throughout the Mediterranean as an advancement any culture could appreciate. Roman law, on the other hand, was not as widely accepted. If it was, then it would be a much more prevalent system than it is today. The nature of law itself as opposed to these other areas is also important to consider. Law is backed by force, philosophy and science is not. It requires much more of a justification for me to arrest someone than to non-violently convince them to believe in an idea, particularly if the reasons for that arrest were for breaking rules formulated outside of the given culture. Second, if the Muslims had borrowed from Roman law, why not Persian Sassanian law? While documentary evidence of Sassanid law is far more difficult to come across, the Sassanid Empire had a strong legal tradition that would have been just as appealing as Roman law. Moreover, the Islamic conquests swallowed up the entire Sassanid Empire, while the Byzantine conquests were limited to some outlying provinces.

Yet another argument for Roman borrowings comes from the possible influence of the famous law school in Beirut.[24] True, the school was a famous center of Roman legal education (one of three designated by Justinian), but its peak was between the 3rd and early 6th century. In 551, a tidal wave following a series of earthquakes devastated Beirut, killing an estimated 250,000 in the city. The remaining students of the law school

[24] Hallaq 27

were transferred to Sidon, and by 635 the school was a shadow of its former self.[25] A fourth argument against Roman borrowings is the language barrier. Even if the law school in Beirut had been at its peak, the instruction was in Greek, a language Arabs were generally unfamiliar with. Most famous translations intro Arabic of Greek masterpieces were from Greek to Syriac.[26] Lastly, the subject would have been of little interest to scholars considering the wealth of other, arguably more useful material in science, philosophy and art. In sum, there is little evidence to suggest that Islamic law systematically borrowed from Roman law to any significant degree. Important internal differences between the legal systems, as well as the environment in which the supposed borrowing took place, point to this conclusion. Other arguments try to temper Islamic law's originality by ascribing its origins to Jewish law.

While Islamic law does owe certain elements to Jewish law, there is little evidence that it was systematically adopted. The argument is mainly based on the existence of a Jewish community in Medina at the time Muhammad settled there after fleeing persecution in Mecca. It is estimated that around 9,000 Jews were living in Medina at the time.[27] But Badr suggests that the kind of occupations many Jews found themselves in (farmers, artisans, petty traders) was hardly conducive to the formulation of legal rules.[28] This does not mean that such a community couldn't have formed. There is some evidence of rabbinical schools in Medina.[29] But relations between Muslims and

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[25] Badr 192
[26] *Ibid.* 193
[27] Maghen, Ze'ev A. "Medina." *Encyclopaedia Judaica*. Ed. Michael Berenbaum and Fred Skolnik. 2nd ed. Vol. 13. Detroit: Macmillan Reference USA, 2007. 757. *Gale Virtual Reference Library*. Web. 6 Apr. 2011.
[28] Badr 194
[29] Maghen "Medina"

Jews were not exactly friendly in the early 7th century. In fact, there were open hostilities shortly after Muslims arrived in 622. Even after things settled down, rabbinical courts operated in isolation within the Muslim domain. Within Jewish law itself, the principle of *dina de-malkhuta dina* required Jewish lawyers to follow the law of the land except in religious and personal matters. Such a severely circumscribed legal system would have great difficulty influencing another.[30]

The purpose of the preceding chapter, as mentioned, was to analyze possible reasons for Islamic law's forgotten role in the development of international law. Specifically, reasons beyond more practical impediments like language and distance. Among these, was the role religion played in Islamic law and, equally, the role of jurists in legal formulation. Compared to Roman law and common law, these two features, among others, make Islamic law both a unique and commonly misunderstood system. As the above discussion has shown, a religious dimension in Islamic law does not mean inflexibility, and a discursive process of legal formulation does not mean incoherence. The origins of Islamic law show another area in which it was slighted. Contrary to the work of some scholars, there is little evidence to suggest that early Islamic law systematically borrowed from contemporaneous legal systems such as Roman law and Jewish law. While Islamic law was certainly influenced in specific areas by these systems, it also introduced innovations that, within a few centuries, made it a legal system both distinct from others around it, and advanced enough to influence Europe, as the following chapter suggests.

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[30] Badr 194

CHAPTER 3

Contributions

The Islamic world's contributions to Europe have been noted in art and science, even if they are still not widely appreciated, but what about law? This chapter explores that question by surveying some theories of borrowing by various European legal systems from Islamic law. As mentioned, the focus is on England both because of the abundance of evidence and scholarly work on theories of borrowing from Islamic law, and the importance of England in the development of maritime law.

Here, I present a summary of the work of John Makdisi on the possible Islamic origins of common law[31] for several reasons. First, the legal innovations of common law Makdisi claims were adopted by Henry II from the Muslim world occur at a similar time and in a similar context that maritime laws could have been adopted. Second, Makdisi's research presents compelling arguments for more general similarities between the legal systems that show legal innovations, whether in maritime law or procedure, would not have been impractical to adopt. Third, ample room is given in Makdisi's work to avenues of transmission through which the influences of Islamic law could have reached English shores. This topic is useful in discussing how Islamic maritime law could have influenced English law and, eventually, international law.

I also discuss the work of Henry Cattan and Monica Gaudiosi on the Islamic law of *waqf* and its influence on the English trust in order to present theories of borrowing by England from the Islamic world in the context of commercial law, a heading that maritime law also falls under.

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[31] Makdisi, John. "The Islamic Origins of the Common Law." *North Carolina Law Review*. 77.1635 (1999): 1-88. Print.

Additional avenues of transmission are also explored. Further possibilities are briefly discussed in other European countries, before more general arguments imagining Islamic law's role in the evolution of international law.

The case for common law

Makdisi's argument focuses on the unique yet similar characteristics of three features of common law: contracts in the action of debt, property in the assize of novel disseisin, and procedure in trial by jury. He then notes overall similarities between the two systems, along with a possible avenue of transmission through Sicily. For our purposes, beginning with general similarities between Islamic law and common law—along with differences between the two and Roman law—is important because it shows both the infeasibility of Crone's arguments mentioned above, and the feasibility of borrowing from Islamic law to common law.

On a macro level, Islamic law and common law share many similarities, more so, even, than civil law and common law do. Mirjan Damaska notes the remarkable differences between civil law and common law using two archetypes based on function (activist vs. reactive) and structure (hierarchical vs. coordinate). [32] Makdisi adds Islamic law to Damaska's analysis in order to show how close the characteristics of Islamic law and common law are.

In terms of function, Islamic law and common law are classified as reactive, and civil law as active. An active legal system, akin to Plato's Republic, is one that pursues

[32] Damaska, Mirjan. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. 1st ed. New York: Yale University Press, 1991. Print.

and imposes its views on society. In Damaska's words, the extreme example "contemplates an omnivorous state—a leviathan ready to swallow civil society completely."[33] A reactive legal system, on the other hand, supports existing social practice. Rather than Plato, a reactive system finds its inspiration in Adam Smith's "invisible hand." It sees society as self-regulating. In civil law, this has several implications,[34] the most significant of which is that the judiciary acts as righteous decision maker rather than impartial mediator. Citizens serve the state and law is expressed as state policy and personal duties, rather than a network of individual rights. In common law, law is "above" the state. Where the state is directly involve in formulating legal rules in civil law, the state is only indirectly involved in common law. The system is also more flexible, with parties to common law cases able, unlike their civil law counterparts, to bargain with their rights and settle out of court. Parties are also required, in most cases, to bring a claim against another in order to initiate legal proceedings. The judiciary exists to mediate between conflicting parties, not to impose state policy. In other words, the common law judge is passive compared with his civil law counterpart.

Islamic law too can be classified as a reactive legal system. It certainly adheres to Damaska's definition: reactive law is "that of an objective law which guarantees the

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[33] Damaska qtd. in Makdisi 31.

[34] See Makdisi 31. "[Judiciary] is more concerned with ensuring accurate results rather than fair hearings. The doctrine of res judicata is weak; decisions of the highest authority can be altered on substantive grounds in light of subsequent knowledge…[E]xtraneous knowledge of facts is acceptable…State officials control fact-finding process. Parties are expected to cooperate with the state and to disclose evidence without the privilege against self-incrimination…Procedure is the handmaiden of substantive law…Rules of thumb, rather than unbending rules, point to a preference for conequentialism over formalism. There is no personal autonomy and therefore no bargaining rights…The opportunity to be heard is granted to provide information to the state rather than to protect individual rights."

subjective rights of individuals; such a law is, in the last resort, the sum total of the personal privileges of all individuals." In contrast to active law: "the opposite case is that of a law which reduces itself to administration, which is the sum total of particular commands."[35] In his introductory book on Islamic law,[36] Joseph Schacht classifies Islamic law as private and individualistic, despite its religious dimension. It also emphasizes justice, as in fairness, over morality. Again, whether something is good or bad morally in Islam is quite different from whether it is legal or illegal. Accordingly, the law is "above" the state, as the state does not try by way of laws to steer society into a certain direction. Instead, law is the sum total of decisions, as in common law, made by impartial judges. Further, the judge's role is to impartially mediate between conflicting parties, just as in common law, which also means the judge's views are irrelevant to the case, he must be passive. There was also similarly privilege against self-incrimination. Finally, action had to have a claimant. If a person was wronged, he must as in common law initiate the legal proceedings against the accused. These are just a few of the functional similarities between common law and Islamic law cited by Makdisi. Suffice to say, both systems are remarkably similar in purpose, and stand in marked contrast to civil law. Parallels between Islamic law and common law, along with differentiations vis-à-vis civil law, can also be found in the structure of the respective legal systems.

In terms of structure, Makdisi classifies Islamic law and common law as coordinate, and civil law as hierarchical. A hierarchical system is one "characterized by a professional corps of officials, organized into a hierarchy which makes decisions

[35] Damaska qtd. in Makdisi 33.
[36] Schacht, Joseph. *An Introduction to Islamic Law*. 1st ed. New York: Oxford University Press, 1983. Print.

according to technical standards."[37] Conversely, a coordinate system is made up of a non-professional core of decision makers, organized into a single level of authority applying "community standards."[38] As mentioned, civil law is hierarchical in structure. The judiciary has an ascending chain of command with power concentrated on top. As such, discipline is very important because the system depends on uniformity to work. A trial is a drawn out affair compared to common law trials, with a complex system of appeals and review at each stage. It is a "multistage process."[39] Structurally, common law differs most markedly from civil law by its decision makers. In civil law, they are bureaucrats, in common law they are most often jurors. The judge's role, as mentioned, is supposed to be impartial. Consequently, there is an overlap in testimonial and adjudicative function among the jurors. In other words, jurors both determine cases and are witnesses to them (in the sense that they directly observe the presentation of facts during the trial). Also, there was no system of appeal in common law until the 19th century,[40] though the convict could get a retrial if an error in law (not in fact) was found. Dissent, not uniformity, was also important in both the training and opinions of common law judges. Also unlike civil law, aided by the absence of appeal, a trial was supposed to be short. Further, oral testimony plays a key role in common law. In civil law, because of the hierarchical process of review, official documentation is almost a requirement.

Like common law, Islamic law is a coordinate system. Makdisi lists its characteristics (which are explained above) as follows: untrained and transitory decision

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[37] Makdisi 32
[38] *Ibid.*
[39] *Ibid.*
[40] Maitland qtd. in Makdisi 38

makers; overlap in testimonial and adjudicative tasks; judge as moderator, supervisor, announcer and enforce—not adjudicator (this role belongs to the jury); no appeal (due to the lack of religious hierarchy in Islam and the aforementioned insulation of the judiciary from the state[41]); dissent (*khalif* played an important role in determining orthodoxy, often studied by aspiring jurists[42]); day in court (similarly aimed for short trials); importance of oral testimony. Thus structurally as well as functionally, the Islamic legal system as a whole bears some striking resemblances to common law, and both are essentially different than civil law.

This similitude has important implications for theories of borrowing. If Islamic law and common law were substantially different from each other, adaptations from one system to the other would be less feasible. Compatibility, on the other hand, lends plausibility to theories of influence. As a metaphor, it would be difficult to install software designed specifically for Windows on a Mac. These two operating systems differ substantially. Linux, on the other hand, while different in many respects than Windows, shares many hardware similarities that make software more easily distributable on both systems. In short, compatibility is a necessary condition for borrowing. Makdisi shows, using Damaska's mode of analysis, that common law and Islamic law were similar enough—in general—to be compatible. In the context of maritime law, this compatibility is necessary for the plausibility of theories of influence by Islamic law on the maritime laws of England and, eventually, international law as it is practiced today. This is also relevant to previous discussions on Crone. Makdisi has also shown that the

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[41] Shapiro, Martin. *Courts: a comparative and political analysis*. New York: University Of Chicago Press, 1986. 221. Print.
[42] Makdisi 38

"hardware" of Roman law is in many ways incompatible with that of Islamic law and common law, making borrowing less feasible. For Crone's arguments, this is an important condition that she fails to consider. With this compatibility in mind, Makdisi also discusses specific instances of borrowing in contracts, property and procedure that have several implications for theories of influence of Islamic law on common law and maritime law.

In the area of contracts, the writ of debt, which replaced the Anglo-Saxon law based on promise, protected the investments of parties to a contract in a unique way—a development that would also have implications in maritime law. By making the property transferred upon agreement, whatever the buyer or seller had not paid or delivered, in effect, was money or property withheld from the other party. Chief justicar of England under Henry II, Ranulf de Glanvill, described the writ as follows: [43]

> The cause of a debt may also be purchase or sale, as when anyone sells something of his to another; for then the price is owed to the seller and the thing purchased is owed to the buyer. A purchase and sale is effectively complete when the contracting parties have agreed on the price, provided that this is followed by delivery of the thing purchased and sold, or by payment of the whole or part of the price, or at least by the giving and receipt of earnest.

In this definition "owed" can be equated with owned: upon agreement, the seller's goods effectively became the buyer's goods and the buyer's price effectively became the seller's price.[44] Even in death, what was owed passed to the deceased party's legal heir.

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[43] *Ibid.* 8

[44] Effectively because the completion of the contract was conditional on the property or price being transferred, Glanvill: "Provided that this is followed by delivery of the thing purchased and sold, or by payment of the whole or part of that price, or at least by the giving and receipt of earnest." So delivery of either compelled the other party to fulfill his obligation.

The writ of debt stood in stark contrast to similar mechanisms in Europe. Germanic law and Anglo-Saxon law did not traditionally recognize consensual contracts. Instead, contracts were either completed transactions with no duty on either side, or unilateral promises made by formality like oath (*ad*), pledge of good faith (*trywa*), hand grasp (*on hand syllan*) or delivery of chattel (*wed*).[45] Canon law and Roman law required parties to a contract to agree on the price and object of sale, which entailed an obligation to transfer property and pay price. But the agreement did not—in and of itself—transfer ownership. Consequently, the wronged party in Roman law only had a personal right to reclaim property, while the English action of debt had a propriety right to reclamation.

This propriety right was also an effect of the conditions of the Islamic *'aqd*, which shares many similarities with the English writ of debt promulgated by Henry II. Like the English writ of debt, ownership was transferred upon agreement, which also caused an obligation in the buyer to pay the price in exchange for sale of the object the buyer now owns. In legal effect, the mechanisms in Islamic and English law were almost identical. Above transfer of ownership, completion of the contract was conditional on delivery. Consequently, if the seller damages or losses the buyer's paid for object, then the seller was required to pay damages equal to sale price. In Islamic law, this risk of loss was known as *qadb daman* or *daman al-'aqd* (contractual warranty),[46] in English law it became quid pro quo. The two were identical in principal too. Imbalance was the source of contractual obligation in either party, so the law in both cases aimed at preserving

[45] Makdisi 9

[46] A common remedy in the laws of many Arab countries today. For the scope of application of the *daman al-'aqd* in Islamic law see Saleh, Nabil. "Remedies for Breach of Contract under Islamic and Arab Laws." Arab Law Quarterly 4.4 (1989): 269-90. Web. 6 Apr 2011.

equality, not compelling the keeping of a promise as in other European legal systems. In both, "promise as moral justice was replaced by…equality as commutative justice."[47] This is not to say that promise in Islam was not important, but it was strictly separated from law. Breaking a promise was immoral, not illegal. Thus the very essence and structure of the Islamic '*aqd* and the English writ of debt were similar.

In the context of maritime law, as will be discussed in later sections, this similarity is very important. In large part, maritime contracts were simply contracts for the carriage of goods by sea. Because Islamic contracts share many of the characteristics of English contracts during the reign of Henry II, it is not difficult to imagine a possible adoption as Makdisi suggests in maritime law too. This can also be seen in the legal effects of such contracts. Islamic law held that parties who lost or jettisoned their cargo, if found, had a propriety right to reclamation. In Byzantine law, as will be discussed, such parties only had a personal right to reclamation. In the area of property, the assize of novel disseisin was another mechanism English law and Islamic law shared.

The assize of novel disseisin was one of the most significant innovations of common law. In addition to offering a speedy mechanism for tenants to protect their land against greedy landlords, the assize, by replacing trial by battle with trial by jury, "revolutionized the procedures for protecting land ownership in England."[48] The assize was introduced by King Henry II sometime between 1155 and 1166, and soon attracted a number of plaintiffs throughout England. For the first time, the law went beyond title and

[47] *Ibid.* 12
[48] *Ibid.* 14

took possession as proof of ownership. The burden of proof was on the plaintiff, who had to prove to a 12-member jury of his peers that he *de facto* owned the land.

For all its importance, the origins of the assize are unclear. It could not have come from Norman or Anglo-Saxon law, which does not protect the right of the possessor. Nor from Roman or canon law, which emphasized peace and quiet over propriety rights.[49] In the Islamic world, however, the protection of possession as evidence of ownership was well established by the 12th century. The Islamic *istihqaq* was a remarkably similar mechanism for recovery of land. As in the assize, possession of property could be used as evidence of ownership. Similarly, the possessor could prove he had a better right to the property than the usurper, unlike the Roman *interdict unde vi* and the canon *redintegranda*. Ownership was also transferable in both the assize and *istihqaq*. For example, if B usurped land from A, and C the usurped the same land from B, B had an action to recover his land even though A is the proven owner.[50] Substantively, the two shared many features:[51]

> (1) a jury of twelve witnesses was called upon to provide the truth of the matter, which it was incumbent on the judge accept; (2) the action lay against the disseisor as well as against any third party who may have taken the property from the disseisor, though the third party need not be included in the action; (3) the defendant was compelled to appear in court; (4) if the defendant was not available, his bailiff was attached, and if the bailiff was not available, then the action would proceed in their absence; (5) excuses by the parties for being absent were not allowed to delay the proceedings unduly; (6) if the defendant confessed the disseisin, the action was settled on the basis of the confession without a verdict being rendered; (7) defenses could be entered against defects in the judicial process; (8) defenses could be entered to provide prima facie proof of such facts as the

[49] Protection against breaches of peace not protection of ownership, which the assize was created for.
[50] Makdisi 17
[51] *Ibid.* 17-8

> defendant not having disseised the plaintiff, a valid judgment in the defendant's favor, or the status of the defendant's relationship with the plaintiff; (9) the plaintiff must have been in actual possession; (10) a successful plaintiff could recover not only the land but also the movable property that was on it when he was ejected and the income that the land had produced during his absence; (11) the action had to be brought within a limited amount of time; (12) the action could be brought by the public authority or by a private party; and (13) the judgment in a case could be reviewed and reformed if it was contrary to the law or a false application of the law.

Also similar was how possession was proven in court. In both Islamic law and English law, there was a limited time within which an action could be brought to establish ownership. In the words of Ibn Rushd: "By consensus, the possession of long duration in itself does not transfer property but manifests it."[52] In England, the limits were usually pegged to a king's coronation or last voyage abroad, by the 13th century the interval was usually around in 10 years. In Islamic law, the period of possession was called *hiyaza*, which was also equivalent to 10 years. In property as in contract, the English royal courts introduced concepts markedly different than others in Europe during the reign of King Henry II. The assize made property a "relative concept," not an "absolute right."[53] Islamic law was the only legal system that shared this unique feature, and it practiced it long before the introduction of common law in the 12th century.

As in the *'aqd* and the writ of debt, the assize and *istihqaq* also had a place in maritime law; specifically, the limited time during which an action could be brought to establish ownership. Again, in the area of salvage, found cargo could only be reclaimed within a certain period, which usually depended on the value of the object (generally, the

[52] *Ibid.* 18
[53] *Ibid.* 22

more expensive the object, the longer the time), and how perishable it was. This mechanism will be discussed in more depth in later sections but it is important to note both the relevance of such parallels in Makdisi's work to maritime law, and the implications such mechanisms had. The assize also spurred the development of the "cornerstone of common law": the jury.

In the area of procedure, trial by jury was a very important innovation of common law. Like the abovementioned assize and writ, the jury was introduced by King Henry II. It replaced the ordeals by fire and water,[54] which were outlawed throughout Christendom in 1215, as a method of proof. It also replaced, though more gradually, proof by duel, a Norman practice not outlawed until the 19th century. Yet another supplanted method was compurgation, whereby a trial was decided based on ritual oath (i.e. whoever had more compurgators, who swore to the party's credibility not the facts of the case, won the trial). Under Henry II, the jury became the dominant method of proof in England.

Like the assize, the origins of the jury are unclear. Of course, canon law and Roman law, by being a religious law and civil law, respectively, did not have a body of peers decide a case. That job was left to a church official or civil judge. The jury does have features similar to the Anglo-Saxon doom, but the doom gave judgment on the law and did not recognize the truth of the matter based on facts of the case. The jury also shared features with the Frankish inquisitio, practiced by the Normans, which similarly required a select number of members of a community to swear to the truth of a matter

[54] The ordeal by fire was performed by holding heavy pieces of hot iron in one's hand or walking over hot plowshares. If the victim was unhurt, then he was innocent. The ordeal by water was performed by being thrown into a river or submerging an arm into boiling water. Again, if the victim was unhurt, then he was innocent.

based on the facts of the case. But the procedure was not used in matters of law per se, as the inquisitio swore to crown officials, and did not decide cases between litigants as in the case of the jury. Islamic law, on the other hand, has a remarkably similar institution in the *lafif*.

The basic characteristics of the English jury as it appeared in the 12th century and the Islamic *lafif* are almost identical. From Makdisi's more detailed analysis: both were a body of 12 witnesses drawn from the community and sworn to tell the truth, both were bound to give a *unanimous* verdict about the facts of the case as presented during the trial, both verdicts were binding on the judge and both judged cases between ordinary people, the accused of which obtained the jury or *lafif* as of right. The only characteristic not shared between the Islamic *lafif* and English jury was the judicial writ, which summoned the jury and directed the bailiff to hear its recognition. The English plaintiff needed the writ in order to remove jurisdiction from local courts to royal courts. Conversely, the Muslim plaintiff only had one system of courts, so a writ was not necessary.

With the writ of debt, the assize of novel disseisin and the jury, common law became a legal system unique enough to be classified under a different heading than civil law. It is curious, however, that many of these innovations parallel practices in Islamic law that have been around for centuries. As shown, these shared mechanisms have implications in maritime law too that suggest influence. The example of salvage law was noted, particularly the role the Islamic equivalent of the writ of debt and assize played in the recovery of lost or jettisoned cargo. Similarly, there is little evidence to suggest that courts existed in the early centuries of Islam that were dedicated solely to maritime law,

so it is possible that some maritime cases were decided by juries. With these specific instances in mind, Makdisi also discusses another necessary condition for borrowing: interaction.

Makdisi's theory of influence—and ultimately the theory of influence concerning maritime law presented in this thesis—rests on an avenue of transmission as much as striking similarities and compatibility. While many points of contact existed between *Dar al-Islam* and Christendom during Henry II's reign, the most interactive was in Sicily neighboring Ifriqiyya (now Libya). Sicily had been a Muslim intellectual center for centuries before it was conquered by the Normans in between 1061 and 1091 (around the same time the Normans were conquering England). It was a center for Mālikī legal scholarship with a collection of famous jurists.[55] In Ifriqiyya too, Mālikī jurists also played an important role. But it was in Sicily where the Normans ruled rather peacefully alongside their mostly Muslim subjects. Muslims were allowed to continue practicing their religion and being governed by their own judges and laws. In return, they furnished a ready supply of infantry for the Norman army. The climate was conducive to borrowing. This became more evident during the rule of Roger II, who inherited the throne after the death of his father Roger I in 1130. Roger II grew up in Sicily and

[55]*Ibid.* 40: Yahya b. 'Umar (d. 903), Maymun b. 'Amr (disciple of Sahnun, d. 928), Dicana b. Muhammad (one of the chief qadis of Sicily, d. 909), Abu Ja 'far Marwazi (arrived in Sicily in 905), Luqman b. Yusuf (served fourteen years in Sicily, d. 930), Abu Muhammad Hasan b. 'Ali (wrote authoritative work on the Mālikī law of inheritance), Ibn Yunus (authoritative commentary on al-Mudawwana, d. 1059), 'Abd al-Haqq b. Muhammad Qurashi (critical commentaries on Sahnun), Muhammad b. 'Ali at-Tamimi (renowned scholar of Mālikī law and scholastic theology in Mazara who had studied in al-Mahdiyya, d. 1142), Ibn Makki (*qāḍī* in Sicily who migrated to Tunis), and Abu Bakr Muhammad b. Hasan ar-Rubaci (taught Mālikī law in Sicily but later left for Ifriqiyya and Egypt, d. 1142).

maintained an "intimate relationship" with his Muslim subjects.[56] His court was full of Muslim scholars and poets; he assumed the Arabic title of *al-Mu'tazz billah*, which appeared on his coinage and inscriptions; his documents and decrees were often written in Greek, Latin and Arabic; he had an *'alama* (a distinguishing mark based on a Qur'anic verse), which he used on official documents like other Muslim rulers; he wore the mantle of an emir; and his physicians and geographer were Arab.[57] As a Spanish traveler to Roger II's court put it, "the whole tenor of his life appears to have been oriental rather than western."[58] Roger II also incorporated many Islamic aspects into his kingship, including the bureaucracy and fiscal arrangements. An Arabic *diwan* acted as the central financial body for the kingdom. The clerks and officers were mostly Muslim, and the registers they used were known by the Arabic term *daftar*. The judiciary was also modeled after Islamic precedent. Judges and juries for Christians were structured along similar lines to the *qadis* and *lafifs* for the Muslims of the island. A mechanism for land recovery similar to the later assize was also adopted. In sum, Islam permeated almost all aspects of Roger II's rule. Coincidentally, he died in 1154, the same year Henry II inherited the throne in England and France.

Despite their distances, Sicily and England, bolstered by the strong sense of nationality among the Normans, were very close. Makdisi suggests that King Henry II was heavily influenced by Roger II, whose successful rule had brought the Normans great wealth and a number of innovations. In fact, it is estimated that the income from Palermo

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[56] *Ibid.*
[57] *Ibid.*
[58] Ahmad qtd. in *Ibid.*

alone was greater than the revenue from the entire Kingdom of England.[59] Added to this is Henry II's legendary reputation for hard work. He was not the kind of king to just rest on his laurels.[60] Even if Henry II had never been to Sicily himself, the steady stream of people travelling to and from Normandy to Sicily offered a ready source of information. Crusaders, particularly, and the island's strong shipbuilding industry ensured a supply. Sicily was also a center for trade, with many goods and merchants making their way up north to Henry II's domain. Ties were also bolstered by an exchange of administrative personnel begun under Roger II, many of which had homes in Sicily and England. Examples include Roger II's chancellor Robert of Selby; Peter Blois who was tutor to King William II in Sicily; Henry II's daughter Joanna, who married the young Sicilian king in 1177; and, most importantly, Henry II's advisor Master Thomas Brown, who previously served under Roger II. It is conceivable that Brown could have "opened the door" for Henry II's common law reforms, which contained possible Islamic elements like the writ of debt, assize of novel disseisin and jury. Added to this theory is the fact that these elements were incorporated during the eight years Brown served as Henry II's advisor.

As the above discussion has shown, Makdisi makes a strong case for the influence of Islamic law on key features of common law as it was introduced by Henry II in the 12th century. The writ, assize and jury, while being remarkably similar in Islamic law and common law, are also markedly different than any contemporaneous European legal

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[59] *Ibid.* 43

[60] In addition to introducing common law, Henry II consolidated the Crown's hold in Scotland, invaded Ireland and successfully (for the most part) defied the Church—projects that have consumed the entire reigns of previous kings.

mechanisms. Moreover, Islamic law and common law, on a whole, bear striking similarities in function and structure. As mentioned, both are reactive—that is, aimed at supporting the status quo—and coordinate—or characterized by non-professional, communal decision makers. Tying these similarities together is the means by which Islamic law could have influenced common law; namely, Norman Sicily. Roger II had the kind of success ruling that would inspire an energetic young king like Henry II, who also had a wealth of sources of information in the form of Brown, among others, to make it possible.

As mentioned, Makdisi's argument is important in the context of maritime law as well. The Islamic counterparts to the writ of debt and assize were an integral part of laws governing lost or jettisoned cargo, which will be discussed in more depth in chapter three. Also, due to the absence of maritime courts in the early Islamic world, a possible though less concrete role can be imagined for the Islamic jury. It is important to take note of borrowings with regards to these specific institutions because maritime law was part of a larger body of laws that, as Makdisi shows, could have influenced common law. Borrowing from one legal system by another, in the area of maritime law among others, was also feasible as the two were compatible. Finally, Makdisi showed that a vehicle for transmission existed in the form of Roger II's Sicily. In maritime law, this avenue could have facilitated borrowing from Islamic law by Henry II who, along with common law, also introduced a new maritime code in England which will be discussed in chapter three. The following section will look at a specific institution within Islamic law that could have influenced the English trust in order to discuss borrowing in a specifically commercial context, which Islamic maritime law falls under, and explore additional avenues of

transmission through which Islamic law could have influenced common law and maritime law.

The Islamic law if *waqf* and the English trust

The purpose of this section is to analyze theories of borrowing by the English from Islamic law in a specific instance within commercial law, and discuss further avenues of transmission by which the Islamic *waqf* (plural, *awqaf*) and innovations of maritime law could have reached England. The specific case of Oxford's Merton College presented in the work of Monica Gaudiosi is also briefly discussed to show these elements of borrowing in action.

The trust in England was originally introduced by Franciscan friars in the 13th century as a feoffment. [61] Because friars could not own land, they needed some legal device by which they could benefit from property without actually having it be theirs. Additionally, property owners on crusade needed an efficient and guaranteed means to ensure management of their property. A feoffor gave benefit of use to a feoffee, who in turn had to use the property, as in the *waqf*, for charitable purposes. The feoffee was further entitled to certain rights—known as *cestui que*—like income from land, defense of the title in law, hiring and firing of employees, and even conveyance.

Several Western mechanisms are often assumed as the prototype for the English trust. Most prominent is the Roman *fideicommisum*. But the definition is essentially different: "[w]hen a Roman testator found that his prospective beneficiary was

[61] Gaudiosi, Monica. "The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College." *University of Pennsylvania Law Review*. 136.4 (1988): 1240. Print.

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."[62] In other words, the *fideicommisum* was more a method of property transference than holding. Where the primary purpose of a feoffment was effective management of property, the *fideicommisum* was concerned with the passing on of property after the owner's death. Another Western institution believed to have influenced the English trust is the French (specifically Salian French) *salmannus*. The *salmannus* (anglicized, salesman) was similarly a legal device for property inheritance that later made its way to Germanic law and, according to some scholars, into English law. Despite different functions, the role of the feoffee was remarkably similar to its *salmannus* counterpart: "the salesman became in England the better known feoffee to uses"[63] Like the feoffee, the salesman held property on account of or use of another. Furthermore, Norman conquerors brought the law over to England in the 11th century. Again, however, the feoffee and *salmannus*, despite their functional similarities, operated for different purposes: where the former acted as a trustee, the latter was more of an intermediary for transfer of property. Additionally, as Gaudiosi notes, "the separation of usufruct [beneficial use] 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."[64] In England, despite possibilities of contact through the Norman conquests, the *salmannus*

[62] *Ibid. 1241*. "Uses" is a term for a person who benefits from assets held in a trust for the beneficiary's use. It is synonymous to beneficiary.
[63] Frederic William Maitland and Oliver Wendell Holmes qtd. in Gaudiosi 1243
[64] *Ibid.* 1244

was not practiced in the 12th and 13th centuries. 12th century English legal historian Henry de Bracton, while describing other contemporary devices for property conveyance, does not mention the *salmannus* at all. The case for the Islamic *waqf* as the predecessor of the feoffee is arguably stronger.

The law of *waqf* emerged during the first couple centuries of Islam as a complex body of law regulating the creation and administration of charitable trusts. A trust was a way for people to pull together capital for an expressly charitable purpose, the ultimate goal of which was *qurba*, or the performance of a work pleasing to God. *Awqaf* usually took one of two forms: the *waqf kairi* (endowment of a religious or public nature) and the *waqf ahli* (family endowment). *Awqaf* were also used to avoid taxes or confiscation of property by rulers, please people, or put a check on the extravagant spending of an heir. Institutions commonly endowed include hospitals, mosques and colleges, among others.[65]

There are four participants in a *waqf* with different rights and obligations: the founder, trustee, judge and beneficiaries.[66]

The founder (or *waqif*), who had to be a Muslim man or women of legal age, was required to relinquish the property being given to the trust for operation by trustees and use by beneficiaries. This does not mean his property was given to another person, rather it was "arrested" or "detained" for the charitable purpose.[67] The trust itself did not "own" the property either. A *waqf* was not a legal person like corporations today, though beneficiaries had legal interest in beneficial use of *waqf* property.

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[65] *Ibid.* 1231-61
[66] *Ibid.*
[67] *Ibid. 1234*

The nature of the relinquishment of property had to follow three principles. First, the *waqif* could not have his property back once it was given up. Second, if the original purpose for the trust ceased to exist (for example, if a bridge was built and funds were still left over or an extraneous circumstance required the abandonment of a planned hospital) the income or property left would revert to another *waqf*. Third, once given, the property was inalienable, it could not be sold, disposed, mortgaged, gifted or inherited, though it could be exchanged for equivalent property or sold (for income that would be reinvested) if the property fell into disuse.

The property being given also had to be owned without restrictions, meaning the *waqif* had no mortgages or loans on the object. Furthermore, the property had to be tangible, immobile and able to yield income. Therefore, real estate was the most common form of dedicated property.[68] As long as these conditions were fulfilled, the *waqif* had wide leeway in determining the terms of his trust including but not limited to appointment of the trustee(s), selection of beneficiaries and distribution of *waqf* income. Generally, "the wishes of the *waqif* are carried out in perpetuity with a force equal to that of a legal enactment" so long as they did not violate the tenets of Islam or the express charitable purpose.[69] Declaration followed no set procedure, though intent had to be made clearly to a judge, either orally or in writing, so he could administer the property to the trustee.

A trustee (or *mutwalli*), who could be the *waqif*, was primarily concerned with implementing the wishes of the founder whom he was selected by. The *mutwalli* himself

[68] *Ibid. 1236*
[69] *Ibid. 1273*

had to be able to complete the tasks assigned and of good moral character, features determined by the *waqif* and corroborated by the relevant judge. Duties entailed preservation of the *waqf*, collection and distribution if its income, resolution of subordinate disputes, and hiring and firing of subordinates.[70]

A judge's role in the creation and maintenance of a *waqf* was comparatively limited. As mentioned, he approved the appointment of a trustee by a *waqif*. Also, as a judge in any context, he was tasked with resolving legal disputes should they arise.

Beneficiaries, who the trust was explicitly in place for, were entitled to the benefit of the property of *waqf*. This sometimes entailed duties, like property maintenance and, if applicable, training. Additionally, beneficiaries were entitled to know the nature of their duties and, if necessary, a copy of the *waqf* contract; a document that, as Gaudiosi notes, would have if translated been strikingly familiar to an Englishman.[71]

Some scholars, including jurist Henry Cattan, believe the *waqf* lay at the origins of the English trust.[72] The two had remarkable similarities. Under both, property is donated for the express purpose of benefitting others. The principal actors—the *waqif* and *mutwalla*, and the feoffor and feoffee—are the same in both systems. Furthermore, the three principles required by a *waqf* (irrevocability, perpetuity, inalienability) were also required by a feoffment. The feoffment also had a similar distinction between family endowments and religious or public trusts. The only significant distinction is reversion of

[70] *Ibid. 1237-38*
[71] *Ibid. 1239*
[72] See "The Law of Waqf" by Henry Cattan in Khadduri, Majid, and Herbert J. Liebesny. Origin and Development of Islamic Law. Clark, NJ: Lawbook Exchange, 1955: 203-22. Print.

property. Reinvestment was not required by a feoffment if the charitable purpose ceased to exist, most likely at the behest of returning crusaders.

On that note, the theory is strengthened by contact between the Islamic world and England at the time. These additional avenues of transmission will also be useful in understanding how Islamic maritime law could have influenced English laws and, ultimately, international law. In addition to the obvious example of crusaders, Franciscan friars, who are believed to have introduced the device, visited the Islamic world in increasing numbers during this time as scholars and missionaries. St. Francis himself spent a couple years in Islamic territory from 1219 to 1220.[73] The crusaders, who also played a role in the introduction of feoffment, were by definition in the area, and they had historically brought back a lot of Islamic ideas to England. For example, the Knights Templar are believed to have used Islamic *madrasas*, with a mosque and adjoining inn, as prototypes for the Inns of Court in England. In fact, the Inns system formed the basis of the early development of law schools in England.[74] Another important point of transmission was abovementioned Norman Sicily.

Making use of these avenues of borrowing, Gaudiosi analyzes the statutes of Oxford's Merton College, which was founded as an unincorporated trust in 1264. The founder, Walter de Merton, was known to have close contact with the Knights Templar. Also, as Chancellor of England, Merton had significant contact with the Middle East, and particularly Norman Sicily. The statues fulfill a number of *waqf* conditions. They set

[73] Gaudiosi 1244

[74] For more on the influence of Islamic *madrasas* on English Inns of Court see: Makdisi, George. "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court." Zeitschrift für Geschichte der Arabisch-Islamischen Wissenschaften. 1. (1984): 233-52. Print.

forth a charitable purpose as the reason for the College's creation, allowed trustees and beneficiaries similarly flexible rights and duties, declared perpetuity of property, and donated only tangible immovable property that yielded income, among others. As Gaudiosi concludes: "were the statutes written in Arabic...they would have certainly been accepted as a *waqf*."

The above discussion detailed arguments for theories of borrowing by the English from the Islamic law of *waqf*. The duties and obligations of specific actors, along with the overall purpose and function, were remarkably similar. Also, as Gaudiosi shows, while other European mechanisms were similar on certain points, none fit the description of the English trust as well as the Islamic *waqf*. As mentioned, the purpose of discussing the case of the Islamic *waqf* and English trust was to present a specific example of borrowing within the larger heading of commercial law that maritime law falls under. Also, presenting Gaudiosi's work provided ample opportunity to discuss more avenues of transmission through which Islamic law could have influenced English law and international law. Furthermore, the founding of Merton College gave a specific example of the use of these means of borrowing. The following section will briefly discuss non-English European legal mechanisms that may owe their origins to Islamic law, along with more general theories on the possible influence of Islamic law on international law.

Further possibilities

Outside of England, other Europeans legal systems have similarly benefited from contact with the Islamic world, particularly in the realm of commercial law. In France,

the *aval*, derived from the Arabic *hawala*, was a bill of exchange made popular in the 12th to 13th century. The only essential difference between the two was the element of foreign exchange, which was used to hide interest payments forbidden by the Church's doctrine on usury.[75] Similarly, the Genoese *mohana*—used to finance long-range trade or military ventures—is also remarkably similar to its Islamic counterpart. Furthermore, the first recorded use of the *mohana* coincides with the Genoese conquest of the Almohad city of Ceuta in modern-day Morocco, where the peace settlement was paid for by way of the Islamic *mohana*. [76] Another form of commercial arrangement that may owe its origins to Islamic law is the *commenda*, which was used on land and sea to finance trade. This legal mechanism, since its first European appearance in 12th century Italy, was vital in expanding trade.[77] It combined the advantages of a loan with that of a partnership. As in a partnership, the investor risked capital and the agent time and effort for an agreed upon share of the profits; as in a loan, the investor incurred no liability beyond the sum invested and the agent no liability beyond the principle and interest.[78] In short, the *commenda* offered investors a means to make money that required equivalent risk to that of a loan, but carried an added expectation of profit beyond interest because he or she was investing in a specific project. The *commenda* is remarkably similar to the Islamic *qirāḍ*, which will be discussed in depth in the partnership section of the chapter on maritime law.

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[75] Lieber, Alfred E. "Eastern Business Practices and Medieval European Commerce." Economic History Review 21.2 (1968): 230-43. Web. 29 Mar 2011.
[76] Gaudiosi 1245
[77] Udovitch, Abraham L. "At the Origins of the Western Commenda: Islam, Israel, Byzantium?" Speculum 37.2 (1962): 198-207. Web. 29 Jan 2011.
[78] Udovitch 198

Research on Islamic law's contributions to international law is much less developed. Certainly, there were many points of contact. Legal ideas could have been propagated by the travelers, pilgrims, merchants, philosophers and intellectuals, among others, who frequently travelled between the *Dar al-Islam* and Christendom.[79] Evidence of this contact is abundant. For example, Miguel de Cervantes, the author of *Don Quixote*, was imprisoned in Algiers for several years in the 16th century; Saint Vincent de Paul was a former slave in Tunisia from 1605 to 1607; Fortun Garsias, heir to the throne of Navarre in the 9th century, was the great-grandfather of the Umayyad Caliph Abdel Rahman III; King Alfonso VI of Castile married the daughter of the Muslim King of Seville in the late 11th century.[80] Along commercial routes, contacts between the Muslim East and Christian West were frequent at ports like Salermo, Sicily, Venice, Genoa, Pisa, Jerusalem and Tripoli, among others. European consulates were also established in Islamic lands by Venice, Genoa and Provence (southern France). In the 13th century, Marseilles guaranteed the foreign property of Muslims in times of war. A treaty signed in 1489 between Florence and the Mamluk Sultan Qa'itbay guaranteed equal treatment of merchants in rights and customs (set at 14 percent), as well as establishing juridical principles for arbitration between Florentine-Muslim parties.[81] As the above examples show, the East and West were not monolithic blocks but a collection of divergent, intermingling parts. The most abundant points of contact, however, were in conquered territories.

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[79] For some of these interactions, particularly from Italy to the rest of Europe, see "the Migration of Merchants and Craftsmen: a Mediterranean Perspective (12th-15th century)" in Jacoby 553-560
[80] Boisard, Marcel. "On the Probable Influence of Islam on Public International Law." *Cambridge University Press*. 11.4 (1980). Print.
[81] *Ibid.* 432

Makdisi mentions Sicily, but there are numerous other examples of places where Muslims ruled Christian lands and Christians ruled Muslim lands. In terms of international law, the most important is Al-Andalus, where a little over a century after the expulsion of Muslims in 1492, Grotius, the "founder" of international law, was born. For Boisard, the seven centuries of Muslim rule in Spain did not just leave influences, but "impregnated" it with ideas that would spread throughout Europe. For example, Alfonso IX, perhaps inspired by Muslim *madrasas*, established the University of Salamanca in 1212, which became a center for early elaborations of modern international law. Furthermore, Alfonso IX produced the first codification of laws in Europe: *Las Siete Partidas*. The *Partida* deals with a number of laws including civil, public, ecclesiastical, political and diplomatic laws, as well as laws of war, which bear striking similarities to Islamic laws of war.[82] In Sicily, Frederick II of Hohenstauffen, who founded the University of Naples where Aquinas later studied, brought back a rich library of translated Arabic texts from Egypt.[83]

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[82] *Ibid.* 436. For example: "Spanish military institutions are copied from the Muslim system, including the fighting tactics of the *ghazzia* (conquest), described as *cavalgada*. The corps of frontier guards, the *almogavares* (from *al-mujawirun*) were organized and had the same functions as the Muslim soldiers in Ribat, an institution of a military and religious nature. Stipulations assess the value of animals, arms, and goods brought by a private soldier into battle for indemnifying him in case of loss. Last but not least, the proper naming of the leading officer is an Arabic term: *Almucadem* (from *al-muqaddum*, the one presented at the front). A full chapter dealing with the distribution of booty expresses Koranic rules and laws developed by legal speculation in the Muslim world during the eighth and ninth centuries…Chapter xxx deals at length with the treatment and ransom of prisoners of war. An officer, *alfaqueqe* (from *al-jakik*), was given special charge of negotiating and ransoming prisoners in enemy or Muslim hands. And, finally, in the seventh Partida, stipulations are found regarding the security of foreign and "infidel" envoys, which are clear copies or direct translations of the detailed Muslim rules on safe conduct (*aman*)."

[83] For more on the Islamic origins of the scholastic method in Medieval legal education see: Makdisi, George. "The Scholastic Method in Legal Education: An Inquiry into its Origins in Law and Theology." Speculum 49.4 (1974): 640-61. Web. 6 Apr 2011.

The preceding chapter presented several theories of influence by European legal systems from Islamic law. First, the case for the Islamic origins of common law was summarized in order to briefly show the use of several institutions claimed to be adaptations from Islamic law in the context of maritime law (namely: the writ of debt, the assize of novel disseisin and the jury); the general compatibility between common law and Islamic law necessary for borrowing was also discussed; and the avenues of transmission through which legal innovations presented in Makdisi's work—and in maritime law in the following chapter—could have reached England.

Next, the case of the Islamic *waqf* and the English trust were presented in order to show borrowing under the heading of commercial law—which maritime law also falls under—and further avenues through which these ideas could have influenced England. The importance of England in the context of this thesis, as mentioned, is due to the central role it later played in the development of maritime law as it is practiced today.

Finally, further possibilities for borrowing under the purview of commercial law were briefly discussed in other European contexts (namely: the French *aval*, the Genoese *mohana* and the *commenda*), along with additional points of contact through which these legal mechanisms could have moved.

The following chapter presents a descriptive analysis of Islamic maritime law in the Early Middle Ages in order to explore its possible influence on international law. Specifically, different elements of Islamic maritime law will be explained, compared to Byzantine law, and compared to English law as embodied in the Rôles d'Oléron in order to explore possible points of influence.

CHAPTER 4

Maritime Law

This chapter presents an argument, aided by the perspective added by the previous chapters, for the possible influences of Islamic law on maritime law. As noted in the introduction, it is important to emphasize the tentative nature of any argument that attempts to prove that Islamic law influenced maritime law and, in turn, international law. Beyond lack of a full historical record, fulfilling the dual requirements of differentiation from contemporaneous practice during the time period covered (roughly, 9th to 13th century) and connection to current practice through antecedent practice is, in many cases, beyond the reach of this paper's author. Still, imagining a possible role for Islamic law in the development of international law raises many questions about commonly held assumptions regarding its origins that is valuable both in terms of future research and in dispelling the imagined cultural apartheid between the Islamic world and the West. In presenting the subjects of maritime law, this thesis will describe their features in theory and practice through various writings and documentary evidence, and note particular innovations Islamic law may have introduced.

The subjects covered concern passengers, shippers and sailors, but are primarily concerned with the carriage of goods by sea. Generally, these topics fall under the following headings: legal personality; contracts; liability and transportation of goods; jettison; salvage; tariffs, taxes and tolls; collision; and partnership. As noted, this list of subjects is certainly not exhaustive, but it contains the most important aspects of commercial maritime law.

The perspective garnered through discussions in the previous chapters has added important benefits to the forthcoming analysis of maritime law. The first chapter both cleared up dangerous assumptions about Islamic law, and showed that it was a legal system innovative enough in its early centuries to have influenced the early development of international law. Expanding on this last claim, the second chapter gave specific instances of borrowing by Europeans, particularly the English, from Islamic law. Notably, avenues of transmission were also discussed, by which innovations of Islamic law, whether they be in the context of maritime law or otherwise, could have influenced European legal systems and, consequently, international law. On that note, the following section details a specific avenue, or rather a woman, through which the maritime laws of the Islamic world could have reached Henry II.

Avenues of transmission

Maritime law is a body of law that regulates the carriage of goods on all waterways, including rivers, lakes, canals, bays and the high seas, among others. Additionally, maritime law includes legal regulations for ships and their passengers. Many legal historians believe international maritime law is an essentially Western enterprise that developed in the relatively limited space of the Mediterranean.[84] Greek, Roman, Byzantine and English sailors, captains, kings and merchants, among others,

[84]For example, the U.S. Navy's first uniformed expert on international law, Charles H. Stockton, in a paper on the historical codification of the laws of naval warfare—presented at an annual meeting of the American Society of International Law in April 1912—makes no mention of Islamic law despite treating contemporaneous medieval maritime systems such as the Rôles d'Oléron, the Baltic Laws of Wisby, and Spanish Consulate of the Sea.

played an important role in this process according to these sources. But, as the following discussion suggests, Muslims could have played a role too.

Modern international maritime law is often traced back to the Rôles d'Oléron ("The laws of Oleron are conceded to be the foundations of all European maritime codes" [85]), the first maritime code in northwestern Europe. The Rôles found their way to Europe by way of the famous Eleanor of Aquitaine. Eleanor, who had been married to Louis VII at the time, spent several years during the Second Crusade at the court of King Baldwin III of Jerusalem (it should also be noted that there was a strong Norman Sicilian presence at Baldwin's court). Reportedly impressed by the complex maritime legal system she observed in the Levant, Eleanor supposedly took it back with her to the island of Oléron off the Atlantic coast of France in 1160.[86]

Eleanor later married the same Norman king discussed by Makdisi: Henry II, who included the Rôles as part of his overhaul of the English legal system. Many legal historians claim the Rôles are the sole source, beyond customary law, of what later became British admiralty law, whose influence on today's international maritime legal regime has been both substantive and widespread.

It is believed that the Rôles were adopted directly from the lost Maritime Assizes of the Kingdom of Jerusalem or some other Romano-Byzantine source. But while the Rôles are very similar to Byzantine law, they do not include many innovations of English maritime law developed shortly afterwards in the 14th and 15th centuries, some of which are strikingly similar to earlier developments in Islamic maritime law. As mentioned,

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[85] Coxe, Alfred C. "Admiralty Law." Columbia Law Review 8.3 (1908): 177. Web. 7 Apr 2011.
[86] Weir, Alison. *Eleanor of Aquitaine: A Life*. 1st ed. New York: Ballantine Books, 2001. 37-89. Print.

common law was institutionalized in England during this time, and it is possible that Islamic maritime laws could have made it into English maritime law. However, because the Maritime Assizes of the Kingdom of Jerusalem are lost, this assertion is difficult to prove.[87] Still, Eleanor's case adds a valuable example of a mode—in addition to Norman Sicily, Al-Andalus and the Knights Templar, among others—through which the maritime laws of the Islamic world could have not only *reached* England, but substantially influenced the evolution of maritime law there. The following sections explain different subjects of Islamic maritime law, noting—when relevant—possible innovations that may have influenced maritime law as it is practiced today.

Legal personality

This section describes the legal classifications of ships and people in Islamic maritime law. This sorting of different actors on the sea was common to many legal systems, including Byzantine sea law, during the time. Today, similar categorizations are found in maritime courts. Thus, on the whole, Islamic law of the early Middle Ages did not differ substantially from Byzantine law when it came to legal personality. However, there were important differences in Islamic law, such as sailor wage-pay which will be discussed, that are also found in the Rôles.

According to various Geniza documents, *fatāwā*, historical sources and travel accounts from the 9th-14th centuries, Islamic maritime law defines a ship as any vessel navigable on inland waters, along coasts and the high seas. This includes ships propelled

[87] Runyan, Timothy. "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England." *American Journal of Legal History* 19.2 (1975): 95-11. Web. 15 Mar 2011.

by oar or sail (or both), used for commercial or military purposes.[88] Examples include everything from skiffs to galleys. During the 10th to 12th century, a ship was usually put into one of three categories primarily based on size. A *qārib* was a light vessel, propelled by oar or sail, used to transport cargo from inland waters to costal quays, and occasionally to and from nearby coastal ports. The term also described a lifeboat or fishing craft. A *markab* was a smaller ship (though larger than a *qārib*), also propelled by oar or sail, used for longer-range transport and occasionally for war, navigable on inland waters, coastlines and the high seas. A *safīna* was a large ship, propelled exclusively by sail, used for transport and war, navigable on major inland waterways, coastlines and the high seas. There were exceptions to these categorizations depending on time period and geographic location. For example, later classical sources, especially from the 1400s, based their definition of a ship on whether the vessel was river faring or seagoing.[89] In 14th century Egypt, local historians al-Nuwayrī and al-Maqrīzī classified ships based on whether they were used for war or commerce.[90]

Islamic maritime law also required a ship to have a name. Geniza documents show numerous accounts of harbors requiring a ship's name in order to dock.[91] In sales contracts too, the ship's name was required along with its description to be valid. For example, a sales contract formula from the 15th century states: "both parties involved in a transaction should conclude the contract by indicating the name of the purchased

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[88] Khalilieh, Hassan S. *Admiralty and Maritime Laws in the Mediterranean Sea (ca. 800-1050): The Kitab Akriyat al-Sufun vis-a-vis the Nomos Rhodian Nautikos*. 1st ed. The medieval Mediterranean; v. 64. The Netherlands: Koninklijke Brill NV, 2006. 27. Print.
[89] *Ibid.* 26
[90] *Ibid.*
[91] Khalilieh, Hassan S. *Islamic Maritime Law: An Introduction*. 1st ed. Studies in Islamic law and society; v. 5. The Netherlands: Koninklijke Brill NV, 1998. 26. Print.

vessel."[92] Names of vessels were also legally required in ship-leasing contracts. For example, Maīlikī jurist Muḥammad Ibn 'Umar Ibn Yūsuf Ibn 'Amir al-Kinānī held in his maritime treatise that leasing contracts were invalid unless the ship's name was included. Shāfi'ī jurist al-Minājī and Andalusian philosopher Ibn Rushd held similar points of view.[93] Ships were usually named after their owner (given name or surname), or, less frequently, the captain (*qayyimān*), destination or point of origin. A couple of examples from various letters found in the Geniza: "I loaded fifteen *ziqqs* of oil in Ibn al-Shubkī's ship;" "the ship of Ibn 'Aqīl entered the port of Sfax;" "I sent you a copy with Salāma Ibn Khalīl who traveled aboard the ship of al-Ba'shūshī, and another copy in the ship al-Andalusī."[94] Commercial ships sometimes added decorations to their name: "that with the rose who captain was Hajjās;" "the ship of the sultan called the golden;" "the spinning top;" "the blessed".[95] In addition to having a name, ships also had to pass technical specifications.

A ship had to pass certain legally required standards before it could set sail. First, raw materials and construction had to be of sufficient quality to "avoid human and financial losses."[96] Evaluation was usually left up to the discretion of the *muḥtasib* (market superintendent), who was supposed to be learned in shipbuilding by virtue of his profession. Second, ship construction had to adhere to certain safety standards. Chief among these were the age and possible damage of the craft. Legal sources show that

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[92] *Ibid.* 27
[93] *Ibid.* 28
[94] Grotein, S.D. *A Mediterranean Society*. 1st ed. v. 1. Berkeley: University of California Press, 2000. 302, 312. Print.
[95] Khalilieh "Islamic Maritime Law" 28
[96] *Ibid.* 30

Islamic maritime law, like Rhodian sea law, distinguished between the legal status of old and new ships. In practice, this meant owners of new ships paid a higher indemnification than owners of older ships.[97] While Islamic law does not insist that ships be equipped with lifeboats, Maritime practice suggests they were common.[98] Third, to prevent sinking and the overexertion of rowers, a ship could not be overloaded. Ship capacity was determined by marking the waterline along the outer hall. If a ship was overloaded, the waterline would be above a certain depth. The 12th century poet and historian Ibn Bassām writes: "The ship can be freighted with cargo as long as the waterline alongside the outer hull is visible."[99] Commercial ships were further rated by the quantity of commodities, total number of passengers and *irdabb* (monetary value of commodities) to determine liability.

Maritime law required these standards to be upheld throughout a ship's life. In the shipyard, a *muḥtasib* inspected a given ship's raw materials, construction, safety standards and capacity. If any defects were found in the final product, sailors (who were often paid in full before a voyage—a rule unique to early Islamic maritime law that will be discussed) and lessees were not required to honor the ship-owner's contract. At sea, these inspections were maintained by a technical crew which every vessel was legally required to have. Their duties entailed maintaining safety standards and capacity requirements, in addition to periodic inspection of the hull, tackle and nautical instruments.[100] Moving on from the ship to the people on or inside it, early Islamic

[97] *Ibid.* 32
[98] *Ibid.* 34
[99] *Ibid.* 32
[100] *Ibid.*

maritime law was concerned with three categories of people: owners, sailors and passengers.

The primary duties of a ship owner were to guarantee the safe delivery of cargo and ensure professional behavior of employees on board. They were also legally required to indemnify the cargo owner if any damages occurred due to negligence. Conversely, if the cargo owner did not pay up, the owner was entitled to an equal-value share of the lessee's cargo. Islamic maritime law recognized five methods of acquiring ownership: construction, transfer, inheritance, usurpation and confiscation. Despite the many methods of acquiring a ship, ownership was confined to a small, wealthy sector of society (governors, courtiers, wealthy merchants, religious institutions, etc.).[101] Ships could also be owned jointly, by two or more Muslim men and sometimes women. Joint ownership, in principal, had to be based on consensus and reciprocity. The amount of profits received or expenses paid by a partner depended on his or her holdings relative to other partners. Additionally, if a partner decided to sell his or her shares, the remaining owner(s) had preferential purchasing rights.

Sailors—or on-board employees of the owner—had certain rights and duties under Islamic maritime law. They were hired explicitly to navigate the vessel from the port of origin to a destination (or multiple legs), but their service included other duties like maintaining proper conduct while at sea and fulfilling specific tasks required by their position, which included cook, scribe, chief navigator, helmsman, watchmen, carpenter, seamen on deck, servant, armed personnel and representative of the ship owner, among

[101] Khalilieh "Admiralty" 37-9

others.[102] The amount paid to sailors depended on duration, cost of living, and quantity and quality of shipment. Sailor's legal label was *ajīr khāṣṣ*—shorthand for someone "hired by a contract of employment for a specific period [and] a fixed sum, provided he commits no action defined as transgression or negligence."[103] Interestingly, Byzantine law of the time as defined in the *Nomos Rhodion Nautikos* (henceforth, N.N.) viewed sailors as "slaves" in the language of the document. This suggests that Islamic law, at least in principle, had a better developed system of employee rights for seamen at the time, a point reinforced by the contract conditions under which Muslim sailors were employed.

While sailor service contracts and forms of employment and pay had many similarities in Islamic and Byzantine maritime law, there were important differences in Islamic law that, by being almost identical to features of modern maritime law, could have possibly influenced it. The two main arrangements of sailor wage pay in the early medieval Mediterranean were "profit-sailing" and "wage sailing." Byzantine law adopted the former. While wages were fixed in Articles II:1-7 of the N.N., they were valued in shares, which in turn depended on the success (or failure) of the venture.[104] Consequently, if a sailor decided to cash his shares before the venture, he would ultimately be paid less if the venture turned out to be successful and vice-versa. The purpose of this pay arrangement was to tie the self-interest of the employees to that of the employer. In practice, however, it made the sailors shoulder a good portion of the risk for little reward. Logically, this would lead to a smaller, though not necessarily more skilled,

[102] *Ibid.* 57
[103] *Ibid.*
[104] *Ibid.* 60

labor force and increasing labor costs, i.e. inefficiency due to wasted productive output (because increasing labor costs should lead to increasing specialization). The system in place under Islamic maritime law was arguably more efficient. "Wage sailing" meant sailors were paid a fixed amount before a venture. Additionally, Muslim jurists required the journey (estimated to the best of the owner or lessor's ability) to have a fixed duration.[105] As an added incentive, Islamic law and custom also required merchants to pay a gratuity (*barṭīl*) to the sailors after reaching their destination safely. There were numerous benefits to this approach. Employees did not assume (beyond their personal well-being and time) any risk. Added to the *barṭīl* incentive, "wage sailing" helped ensure a larger, more competent labor force at lower costs. Owners, in turn, assumed the full risks of the venture but had better resources (besides their capital) to ensure it was a success.

The Islamic system of sailor wage pay also had important practical benefits. The Romano-Byzantine system caused a lot of problems if, either by natural disaster or otherwise, the venture did not reach its conclusion. Sailors still put in their time and labor, and many felt entitled to some compensation. In the Islamic system, a failed venture was approached from the other end, i.e. sailors had to first give up their gratuity then pay from their wages in cases where the venture was unsuccessful.[106]

In the Rôles adopted by Henry II, sailors were hired one of three ways. They were either granted a share of the profits (as in Romano-Byzantine law), allowed to freight their cargo, or paid a set wage for the journey. As Runyan points out: "Only the first of

[105] Khalilieh "Islamic Maritime Law" 49
[106] *Ibid.* 51

these methods of payment is known to Roman law."[107] Thus, while the wage system set forth in the Rôles was much simpler than in Islamic law, it is possible that this innovation could have been influenced by Muslim maritime practices.

In contrast, the legal status of passengers was very similar in Islamic law, Byzantine law and the Rôles. In both Byzantine, passengers were required to obey the orders of the captain and remain, unless otherwise told, at their assigned places on board fixed by the ship owner and captain.[108] The movement of the passenger on board was restricted to "seeking the captain's advice, use of the baking oven and access to the water tank."[109] They were also allowed to perform religious duties and receive immediate assistance in case of emergency. Nevertheless, if any of the passengers' actions endangered or even annoyed the captain or sailors, they were required to return to their quarters. Passengers also had to bring their own supplies (unless explicitly included in their contract) and were allowed on the ship only so long as their contract permitted. With regards to the former (passenger supplies), there were certain exceptions. Maritime law required ships to have adequate drinking water for the employees and passengers of the ship for the entirety of the journey. Also, ships had to be equipped with bucks for ritual ablution (*wuḍū'*) and washing clothes. For this reason, many large-sized ships sailing across the high seas had bathrooms on board. Evidence of this is found in Ibn Shahriyār's 10th century "Book of the Wonders of India": "I was told by Muḥammad Ibn Babishād that this *'allāma* had told him that, when he was crossing from India to China and passing one of these seas, the time for the dawn prayer came, and he went to the lavatory to make

[107] Runyan 99
[108] Khalilieh "Islamic Maritime Law" 54
[109] *Ibid.* 55

the ritual ablution."[110] Unfortunately, laundry was not so easy a task for passengers: they weren't even allowed to spread their garments out on the bow or any other visible part of the ship.

This section described the legal personality of the actors that are of concern to Islamic maritime law. Overall, the legal classification of ships and people is very similar to Byzantine laws of the time. However, as noted, there is an important difference in how sailors were paid. In Byzantine law, sailors were mostly paid in profit. As mentioned, this caused a number of problems. The Islamic system, by contrast, was more logical. Here, sailors were paid before the venture regardless of its outcome. This is the standard practice for paying sailors today. While it is possible that this development could have happened without the influence of Islamic law, it is also possible that maritime practice in the Muslim world served as an example which was later adopted. The Rôles included wages as an option for paying sailors. The following section deals with a similar subject: contracts.

Contracts

Before discussing contracts it is important to differentiate commercial maritime law (or private maritime law) from law of the sea (or public maritime law). Commercial maritime law, also known as admiralty law, is generally concerned with the conditions surrounding the carriage of goods by private entities at sea. It is distinct from law of the sea, which deals with jurisdiction, and navigational and mineral rights of states. Islamic

[110] Shahriyār qtd. in Khalilieh "Islamic Maritime Law" 55. See also, Grotein 460, "Portrait of a Medieval India Trader."

admiralty law can be divided into seven subjects: contracts of affreightment (or ship-leasing contracts); liability for damaged cargo and transportation of goods; jettison; salvage; tariffs; collision and partnership. This section is specifically concerned (as the heading suggests) with contracts. By and large, the structure for ship-leasing and affreightment contracts was similar in Byzantine and Islamic maritime law. But again, Islamic law elaborated certain innovations in the area of contracts that could have influenced maritime law as it is practiced today.

The ship-leasing or affreightment contract was fundamental to carriage of goods by sea. A lessee could hire space for his own goods or the goods of a third party, or charter a whole ship or fleet of ships. The quantity of cargo was recorded in a bill of lading at the embarkation point.[111]

Ship-leasing contracts also had to contain certain terms. Most important was the type of leasing. Islamic maritime law generally distinguished between two types of leases: *kirā'* and *ijāra*. While the terms are synonymous, Khalilieh notes their differences under law:[112]

> The word *kirā'* mean leasing or hiring out. It aims at the beneficial use or enjoyment of a thing for a fixed period of time in return for a hiring fee… *ijāra*, however, is a contract by which one person makes over to someone else the enjoyment, by personal right, of a thing or of an activity, in return for payment. The period of the *ijāra* must be stated, but no limit is necessarily fixed.

In other words, *kirā'* grants use of the ship, while *ijāra* grants use of the services of a lessor, who might own the vessel(s) or a non-vessel-operating common carrier

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[111] Khalilieh "Admiralty" 85
[112] *Ibid.* 89

(NVOCC). An NVOCC, or a "guaranteed personal service," was new to maritime law. While common carriers had existed before, their legal personality in contracts was analogous to that of an individual ship. Furthermore, in the important sources of Byzantine law (the N.N. and Digest), the development is only "scarcely addressed."[113] A *kirā'* contract of affreightment was constructed by Al-Jazīrī as follows:

> So-and-so has chartered from so-and-so his entire ship—so-called the Cutter, or the Kingfisher, the Galley, including her rigging, sails, masts, external parts, grapnels, ropes, oars and other equipment, in addition to her full complement of officers and crew named [all names listed], after the lessee has become acquainted with the specified ship, examined her as well as her equipment—for such-and-such *dīnārs* paid fully in advance to so-and-so, or received from him such and such amount providing for the remained such-and-such amount be paid on such appointed time. He is required to transport so-and-so, his commodities—which are such and such, describing their weight and measure (in accordance with the normative standard at the market place of the port of embarkation)—aboard the specified ship and will have to carry for him his provisions, water, apparel for clothing and bedding, utensils, and other food additional to bread needed for his voyage. After loading the specified ship described above, he will have to depart from such and such town on such and such date, provided that he sails the known trunk routes until he brings him, God willing, to such and such destination. This is a lawful leasing contract. You, then, formulate it in accordance with the abovementioned guidelines.[114]

Almost identical formulae are drawn by Egyptian Hanafite scholar al-Taḥāwī, Mālikī jurist Ibn Salmūn and Iraqi scholar Ibn Rajab, as well as a more detailed formula by Shāfi'ī jurist al-Minājī.[115]

The abovementioned formula, as well as al-Minājī's expanded version, establishes two principles. First, the ship owners were obligated to describe the ship in

[113] *Ibid.* 149
[114] *Ibid.* 89
[115] *Ibid.* 91

detail, including its type, name, equipment, employees, journey route, point of origin and destination, safety measures and freightage. Second, the shipper (who arranged the goods for transit) had to specify the names, weight, quality, quantity and arrangement of cargo onboard; transportation fees, time schedules and provisions.[116] Technical crews also had to inspect the ship to ensure she was ready to sail. The object of the conditions of the contract was to ensure a seaworthy vessel was indeed what the lessee was paying for.

The type of shipping contract was further subdivided based on the period of hiring. Contracts for a specific destination generally required payment of fee only upon arrival at the destination. But as Khalilieh notes, there were differences among jurists. One group[117] argued that, in cases where the ship did not reach its final destination, compensation proportionate to the distance covered was due. Another group argues that partial compensation was only due when the distanced covered could be determined. On the high seas, for example, it was difficult to give an exact enough estimate. There were also seasonal leasing contracts. As the name implies, seasonal contracts entailed the leasing of a vessel for a fixed period, which could last days or years. Freightage would be paid by installment, or lump sum at the outset or end of the leasing period.[118] On that note, a ship owner was not entitled to impose extravagant fees or conditions if the contract expired while the vessel was still at sea. Instead, the terms of the contract had to be renegotiated, with the fee for the added duration taken at a rate comparable to that originally charged.

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[116] *Ibid.*
[117] Generally, Mālikī and Andalusian jurists such as Sahnun ibn Sa'id ibn Habib at-Tanukhi and Abu al-Qasim Khalaf ibn al-Abbas Al-Zahrawi, also known as Abulcasis.
[118] Khalilieh "Islamic Maritime Law" 63

The amount charged for the carriage of goods depended on a variety of conditions. Generally, freightage was supposed to be comparable to the standard rate charged at the port of embarkation on the day of departure, which usually fell as the sailing season neared its end.[119] In wartime, when commercial ships were regularly commissioned, freightage could skyrocket. This happened when the Normans invaded Sicily in 1065. The rates for the route affected, Sicily to Ifrīkiya, doubled.[120] Similarly, piracy along a given route could drastically affect shipping rates. Political turmoil also had effects. Exemplary of both tendencies was the devastation of Tunisia by Banū Hilāl and Sulaym in the 1050s. Surrounding routes were greatly affected, but even more so with the emergence of piracy off the Maghribian shores. Soon, shippers were paying more in protection fees than transportation fees. If the ship was plundered, the ship owner was required to bring the case to court, or risk being liable for the lost or damaged cargo. Turning the ship around, either to avoid hostile forces or bad weather, raised a number of questions, namely, who would pay for what? Ibn Rushd offers six possible solutions:[121]

1) If the passengers agreed voluntarily to the request of the ship owner to turn around, then the passengers were obliged to pay the entire fee
2) If the ship owner prevented the passengers from continuing the voyage, then the passengers were not obliged to pay anything
3) If the passengers requested the ship owner to turn back, they were obliged to pay him something (though not necessarily the entire fee)

[119] *Ibid.* 64
[120] Khalilieh "Admiralty" 110
[121] Khalilieh "Islamic Maritime Law" 71

4) If the passengers requested the ship owner to turn back under clear and present danger, then the leasing contract would be nullified
5) If the ship anchored at the first stopover and the passengers able to leave with their cargo did not do so, then they were obliged to pay *kirā'* (for use of ship not for service rendered) going and coming
6) If the ship owner prevented the unloading of passengers' cargo at the first stopover, they would not be entitled to collect a fee (the implication is that the ship owner has the right to renegotiate the route stipulated in the contract)

While not necessarily affecting shipping rates, other factors, like negligence and misconduct aboard, could affect the payment terms of the contract. In the case of fire, for example, a lessee's damaged goods were not compensated by the ship owner but by the individual who started the fire (usually the cook or whoever was using the kitchen last). If a captain or ship owner docked at an unsafe port without consulting his passengers, he had to pay whatever additional taxes (with the base taken as the standard rates at the point of embarkation) the passengers incurred.[122] Insolvency of the lessee could also affect freightage. If the shipper was unable to pay, law stipulated that he had to surrender a similarly-valued portion of his goods.

The lessee could pay charges in cash or cargo, and the ship owner could collect the charges at the outset or by installment. A contract was invalid if the lessee insisted on paying after departure, and judicial literature rarely mentions payment by credit.[123] In short, the lessor was paid something before his ship set sail. The loading of cargo was

[122] *Ibid.* 68
[123] *Ibid.*

generally the responsibility of the shipper (this is corroborated in the documents of several classical Geniza traders); while the ship owner was responsible for its safekeeping once loaded (liability in case of damage will be discussed in the following section). Contract terms and local custom could override the above.

Here, we find another possible contribution of Islamic law to modern maritime law in the calculation of freight. In contrast to Byzantine law, which required freightage to be paid prior to departure, Islamic law had a more intricate system. For the first time in maritime legal history, freight rates were linked with both the distance covered and the market prices of cargo at the point of embarkation. As Khalilieh notes, "no comparable legal reference has been found in Romano-Byzantine judicial codes."[124] This had important implications if problems arose en route to the destination as it allowed—by presenting a guaranteed and conditional reference for pay—for a reasonable settlement to be reached between contracting parties.

On that note, breach of contract in Islamic law adheres to the Prophetic tradition that "there shall be no harming of one man by another."[125] Thus the undue cancellation of a contract by either party without valid grounds entitled the other to full compensation of damages incurred. Valid grounds for breach of contract depended on the type of contract. A lessee of a specific ship was not entitled to a refund or substitute if a ship was wrecked prior to completing its journey, though they could get a refund if the vessel was unseaworthy. In the case of a carrier contract, an unseaworthy or wrecked vessel usually required a substitute ship or compensation. Another grounds for breach is inconvenience.

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[124] Khalilieh "Admiralty" 126
[125] *Ibid.* 146

If a merchant decides to unload his cargo just before the ship is to set sail, he is required to pay full freightage to the ship owner. Conversely, as the Khārijite jurist al-Kindī states: "If the merchant, without a compelling reason, refuses to load the shipment, he has to pay duties."[126] Some jurists further argue that damage to freight was valid grounds for a breach of contract.

The above section analyzed the law of contracts in the context of Islamic maritime law from the 10th to 12th century. In describing this subject, conditions of contracts, legal formula, types, breach of contract and, importantly, factors affecting freightage were discussed. As in sailor wage-pay in the previous section, certain innovations were introduced. First, common carriers (specifically, NVOCCs or "guaranteed personal services") were given their own legal personality in ship-leasing contracts. Also, the calculation of freight was expanded in Islamic law to include both distance covered and price of cargo at the point of embarkation. The Rôles, while making no mention of common carriers, contain an article strikingly similar to calculation of freight in Islamic law in that it linked wage pay, and presumably freightage, to the distance covered:[127]

> Article XIX—If the master hire the mariners in the town to which the vessel belongs, either for so much a day, week or month, or for such a share of the freight; and it happens that the ship cannot procure freight in those parts where she is arrived, but must sail further to obtain it: in such case, those that were hired for a share of the freight, ought to follow the master, and such as are at wages ought to have their wages advanced course by course, that is, in proportion to the length of the voyage, in what it was longer than they agreed for, because he hired them to one certain place. And if they go not so far as that place for which the contract was

[126] Khalilieh "Islamic Maritime Law" 78
[127] "The Rules of Oleron (circa 1266)." 30 Federal Cases 1171-1187. Admiralty Law Guide, Web. <http://www.admiraltylawguide.com/documents/oleron.html>.

> made, yet they ought to have the whole promised hire, as if they had gone thither; but they ought likewise to bring back the vessel to the place from whence she at first departed.

As the excerpt shows, the Article XIX of the Rôles describes a flexible system similar to the calculation of freight in Islamic law (though no mention is made of the price of cargo at the point of embarkation). The following section deals with the liability of sailors, captains and passengers in cases of lost or damaged cargo, and the procedures for transporting goods by sea.

Liability and transportation of goods

The following section deals with a standard subject in almost any legal area: liability and procedure. By and large, standard practice did not differ much between Byzantine law and Islamic law. Still, the following discussion is useful in better understanding an important feature of maritime law.

In contrast to breach of contract, jurists did agree that damaged or lost freight compelled liability on the responsible party provided certain conditions were filled. Grounds for liability were limited to negligence and misconduct (with the exception of absolute liability discussed below). Examples include faulty handling of cargo, theft, selling of cargo and intentional damage, among others. In cases of *force majeure*, hostile attacks or unforeseeable damages, the responsible party was usually absolved of liability. Furthermore, if the prior contract explicitly cleared the ship owner of liability regardless of outcome, then he was exonerated.

Generally, the responsible party was divided into *ajīr mushtarak* (common carrier), "a person with whom a contracts is made for a specific task,"[128] usually the ship owner, and *ajīr kāṣṣ* (private carrier)—captain, crew, servants, etc. In most cases, the ship owner, as *ajīr mushtarak*, was responsible for the actions of *ajīr kāṣṣ* during employment, though the ship owner could and did make the employee pay compensation for damaged or lost cargo.

According to the Kitāb Akriyat al-Sufun wal-Nizā' bayna Ahlihā (treatise concerning the leasing of ships and the claims between contracting parties) by 10th century Mālikī jurist Muḥammad Ibn 'Umar, there are three types of liability: absolute, vicarious and liability based on fault.[129] Absolute liability is defined as liability regardless of negligence. In other words, the party responsible is liable whether they prove they are at fault or not. This form of liability had to be agreed on in the ship-leasing contract, otherwise fault could preclude liability. As mentioned, a variety of conditions could preclude negligent liability. *Force majeure*— acts of God such as storms—unavoidable damages, faulty packaging (discussed below) and piracy barred liability. Following the prophetic tradition that states "profit follows responsibility,"[130] vicarious liability is the liability of employers for their employees. It was the ship owner's responsibility to ensure a well-trained, adequately equipped crew. If the crew was found to be at fault, compensation ultimately fell to the ship owner. In cases of joint ownership, liability was proportionate to shares, unless one partner improperly took over a ship.

[128] Noble qtd. in Khalilieh "Admiralty" 102
[129] *Ibid.* 102
[130] *Ibid.* 103

Almost all forms of cargo required compensation. This includes most categories of merchandise, like clothing, precious metals, weapons, armor and jewelry, among others, and even foodstuffs, generally divided into five "staple" categories: grains (barley, wheat, rye, spelt, corn, millet), legumes (fava beans, lentils, chickpeas, black-eyed peas, chuckling vetch), shortening (cooking fat, honey, oil, vinegar), dried foods (dates, raisins, olives spices) and salt. However, fresh fruits and vegetables, and fish and meat did not require compensation.[131]

To avoid liability for damage or loss of cargo both parties followed certain procedures when transporting goods. As mentioned, the ship was inspected before it set sail, and waterproofed with tar, fish glue and oil. Merchants used several methods to ready their cargo for transport. For example, strong canvas was usually used to wrap bales of flax and other expensive goods; sacks of coarse drill (*tillis*), strong durable cotton, was used for grain; coarse haircloth was used to transport wax; liquids, like oil and wine, along with silk and other precious items, were transported in animal skins or leather bags; common articles (like books, copper, glass bowls or cups, antimony and sal ammoniac used for jewelry and ornamentation) were carried in wicker crates and baskets. Additionally, the receiver's name, and sometimes the sender's, was written on the crate in Arabic or Hebrew (if the receiver was Jewish).[132]

Once the goods were packed, they had to be loaded at the port of embarkation, stowed in the ship, unloaded at the final arrival port (or intermediately if required) and stowed at the final destination. At the loading phase, the shipper was required to have his

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[131] *Ibid.* 105
[132] *Ibid.* 106-112

cargo ready at a designated place and time, at which point the cargo was appraised by customs officials and registered by the ship's scribe.[133] The crew usually loaded the heaviest items first, like metals, shipping ballasts and grains, in the bottom of the hold to lower the center of gravity and increase ship stability. Additionally, the cargo had to be placed appropriately to avoid unloading delays and damage. This usually meant a specific part of the hold was reserved for certain goods. In terms of unloading cargo, the captain was not obliged unless stipulated by contract or it was required by local custom: "If the ship owner's custom established that they unload the cargo, then they are bound to do so in completion of the leasing contract."[134] Once the cargo was unloaded at the point of destination, the ship owner's responsibility ended, and the merchant, agent or representative of merchants (*wakīl al-tujjār*) was required to unload it and store it in a warehouse (*dār al-wakāla*).

The preceding discussion summarized the basic conditions for liability in cases of lost or damaged cargo, and procedures by which goods were transported by sea. Overall, as noted, these features in the area of liability and transportation of goods were very similar in both Islamic law and Byzantine law. The Rôles too contained analogous clauses in Articles III, XXI and XXVII:[135]

> Article III—If any vessel, through misfortune, happens to be cast away, in whatsoever place it be, the mariners shall be obliged to use their best endeavors for saving as much of the ship and lading as possibly they can: and if they preserve part thereof, the master shall allow them a reasonable consideration to carry them home to their own country. And in case they save enough to enable the master to do this, he may lawfully pledge to some honest persons such part thereof as may be sufficient for that occasion. But if they have not endeavored to

[133] Khalilieh "Islamic Maritime Law" 79
[134] Al-Wansharisi qtd. in Khalilieh "Islamic Maritime Law" 81
[135] "The Rules of Oleron"

> save as aforesaid, then the master shall not be bound to provide for them in anything, but ought to keep them in safe custody, until he knows the pleasure of the owners, in which he may act as becomes a prudent master; for if he does otherwise, he shall be obliged to make satisfaction.
>
> Article XXI—If a master freight his ship to a merchant, and set him a certain time within which he shall lade his vessel, that she may be ready to depart at the time appointed, and he lade it not within the time, but keep the master and mariners by the space of eight days, or a fortnight, or more, beyond the time agreed on, whereby the master loses the opportunity of a fair wind to depart; the said merchant in this case shall be obliged to make the master satisfaction for such delay, the fourth part whereof is to go among the mariners, and the other three-fourths to the master, because he finds them their provisions.
>
> Article XXVII—A vessel being arrived at her port of discharge, and hauled up there into dry ground, so as the mariners deeming her to be in good safety, do take down her sails, and so fit the vessel aloof and aft, the master then ought to consider an increase of their wages kenning by kenning; and if in hoisting up wines, it happens that they leave open any of the pipes or other vessels, or that they fasten not the ropes well at the ends of the vessel, by reason whereof it slips, and falls, and so is lost, and falling on another, both are lost; in these cases the master and mariners shall be bound to make them good to the merchants, and the merchants must pay the freight of the said damnified or lost wines, because they are to receive for them from the master and mariners, according to the value that the rest of the wines are sold; and the owners of the ship ought not to suffer hereby, because the damage happened by default of the master and mariners, in not making fast the said vessels or pipes of wine.

The above excerpt notes a couple important similarities between Islamic law and English law. For example, Article III requires sailors to save cargo in cases of emergency in order to avoid liability ("But if they have not endeavored to save as aforesaid, then the master shall not be bound to provide for them in anything, but ought to keep them in safe custody, until he knows the pleasure of the owners, in which he may act as becomes a prudent master"). Article XXI obliges merchants to load cargo at a specific time without delay. Also, if they do delay the ship, merchants are required to pay an indemnity ("obliged to make the master satisfaction for such delay"). Article XXVII deals with lost or damaged cargo, specifically when it is incurred during unloading. Namely, the article requires responsible parties to pay the merchant for damages ("master and mariners shall be bound to make them good to the merchants, and the merchants must pay the freight"). All these examples parallel discussions of Islamic law

and Byzantine law noted above. Consequently, due to the similarity between all three systems presented in this thesis—Islamic law, Romano-Byzantine law, and early English admiralty law—in the area of liability and transportation of goods, it is difficult to draw any conclusions about one borrowing from the other. The following section discusses liability in another context, i.e. jettisoned cargo.

Jettison

Jettison deals with the laws governing responsibility and entitlement when cargo is thrown overboard at sea. Islamic law and Byzantine law dealt with these subject similarly, through the former was more developed than the latter in this area and in salvage.

During the course of a voyage it was sometimes necessary to throw cargo overboard. The Geniza deals extensively with jettisoned cargo. For example, a letter dating from around 1120 follows the loss of three ships, valued at 200,000 dīnārs, along with the belongings of 10 Jews from Tripoli carrying 7,000 dīnārs worth of jettisoned merchandise; another deals with the sinking of a large ship on its way to Alexandria from Sicily with 400 passengers on board.[136] Because the jetsam (jettisoned cargo) was not always owned by the person jettisoning the cargo, certain conditions had to be fulfilled to avoid responsibility. No emergency, including *force majeure* and hostile attacks, alone legitimized jettison. Islamic law required that jettisoning somehow led to, or was intended to lead to, the salvation of the imperiled ship, as it might make a ship less of a target for nearby pirates or more maneuverable in a storm.

[136] Grotein 320-21

The decision to jettison cargo was made by three parties—the captain, the crew and the owner of the merchandise—and neither solely had a legal right to jettison the cargo. Instead, they had to reach a consensus, after which the captain would order the decided amount overboard. But prior negotiation was not always an option; some emergencies required the immediate jettison of cargo. In this case, the captain had sole authority, from 12th century Almoravid Qāḍī ʻIyāḍ: "The ship owner is entitled to demand the merchants to throw their cargo overboard to lighten the ship."[137] Still, either because of emergency or neglect, other situations could come about. Islamic law offers several solutions: If owner A voluntarily threw his cargo overboard without consulting the captain, A was solely liable for losses; if owner A threw owner B's cargo overboard, A was liable for B's cargo. If A asked B to voluntarily sacrifice B's cargo, and B agreed, B had no right to compensation by A, except if an amount was agreed upon before the cargo was jettisoned; if A asked B to jettison C's cargo, and A guaranteed B to indemnify C if C sought compensation, then B would be liable.

Most important to the vessel as a whole was the distribution of losses. If cargo was jettisoned, the owners of all cargo onboard entered into an "involuntary partnership," where the value of the jetsam was carried collectively. The calculation of general average (the amount each owner paid for the jettison) differed in Byzantine law and Islamic law. The former assessed jetsam by its value at the port of debarkation. Among Muslim jurists, the majority assessed value on the basis of the current price at the port of origin. Furthermore, Byzantine sources (the Digest and N.N.) do not refer to the inclusion or exclusion of customs and tariffs in the calculation of general average. Islamic law, by

[137] Iyāḍ qtd. in Khalilieh "Islamic Maritime Law" 90

contrast, ruled they could not be included in the general average since they are by nature non-refundable. Also, Islamic law excluded personal effects of goods thrown overboard in distribution of losses, while Byzantine law included the value of all goods thrown overboard.[138]

What to jettison was another important consideration. Generally, the rule was the heaviest cargo had to go first regardless of value, but how this played out depended on how the cargo was stowed. On shorter, coastal trips cargo was arranged according unloading preference, since balancing the ship was not as important.[139] For example, if A was unloading at town X, and B further north at town Y, then A's cargo would be most accessible and likely jettisoned first. Conversely, on longer voyages on the high seas, the heaviest cargo was usually put at the bottom to stabilize the ship's center of gravity. In an 11th century Geniza letter from Ephraim Ibn Ismā'īl al-Jawharī, an agent of Maghrebian business owner Ibn 'Awkal, he describes how two ships headed for Sicily were forced to jettison 100 bales of cargo in the vicinity of Pharos:[140]

> I have already informed you that I loaded all the bales destined for Palermo and al-Mahdiyya after an arduous effort…and that the ships bound for Sicily jettisoned approximately 100 bales. Sixteen of them, which belong to my master—God prolong his esteem—eight bales were in Daysour's ship, and another eight bales were in the ship of Prince 'Alī. Even the ships heading for al-Mahdiyya jettisoned cargo into the sea, but nothing of yours was thrown since all your bales were in the hull, none on deck. By God, my master, when I recovered the 16 bales which were thrown overboard the Sicilian ships, I suffered harder than if I were to load 100 bales, since the ships were fully loaded and whoever I asked to transport them turned me down. Therefore, ten of yours were among the 30 bales shipped to al-Mahdiyya aboard the new ship of Hussayn al-Lakkī,

[138] Khalilieh "Admiralty" 151-57
[139] Khalilieh "Islamic Maritime Law" 91
[140] Grotein qtd. in *Ibid.* 92

> and the remaining six bales were transported in the ship of Yaḥyā al-Sāḥilī al-Sfāxī.

As mentioned, in most cases the captain has authority, even in the absence of the cargo owner or his agent, to jettison cargo. The exception is in cases involving especially valuable cargo. Here, the legal procedure is more complex, requiring a higher standard of proof that jettison was necessary in general, and that jettison of the specific piece of cargo was particularly required. This indisputable evidence (*bayyina*) could take several forms: oral depositions, physical examination of ship, written evidence. The price of the jetsam also had to be substantiated. As mentioned, a scribe was usually required to take down the amount and value of cargo in a loading book (*al-shāmil*) before it was stowed on the ship. In his maritime treatise, Muḥammad Ibn ʻUmar states: "regarding the articles of the shipment, they have to be registered in the cargo book."[141] In cases where there was no book or its authenticity was disputed, sworn testimony from crew and seller of cargo could also strengthen a case. Yet another source could be the *daftar*, a booklet used by Geniza merchants to record business transactions. Often, these entries were verified by both parties to the transaction (buyer and seller). Also, the leasing contract usually contained records of cargo, as well as express letters usually sent ahead of time to merchants at receiving ports for warehouse space and pick up.

Jettison is covered in articles III, VIII and IX of the Rôles. Overall, their stipulations are very similar to Byzantine and Islamic law. The following is a passage from Article VIII:[142]

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[141] ʻUmar qtd. in *Ibid.* 93
[142] "The Rules of Oleron"

> If a vessel be laden to sail from Bordeaux to Caen, or any other place, and it happens that a storm overtakes her at sea, so violent, that she cannot escape without casting some of the cargo overboard for lightening the vessel, and preserving the rest of the lading, as well as the vessel itself then the master ought to say, Gentlemen, We must throw part of the goods overboard; and, if there are no merchants to answer him, or if those that are there approve of what he says by their silence, then the master may do as he thinks fit; and if the merchants are not pleased with his throwing over any part of the merchandise, and forbid him, yet the master ought not to forbear casting out so many of the goods as he shall see to be for the common good and safety; he and the third part of his mariners making oath on the Holy Evangelists, when they arrive at their port of discharge, that he did it only for the preservation of the vessel, and the rest of the lading that remains yet in her. And the wines, or other goods, that were cast overboard, ought to be valued or prized according to the just value of the other goods that arrive in safety. And when these shall be sold, the price or value thereof ought to be divided livre a livre among the merchants. The master may compute the damage his vessel has sustained, or reckon the freight of the goods thrown overboard at his own choice. If the master does not make it appear that he and his men did the part of able seamen, then neither he nor they shall have anything. The mariners also ought to have one tun free, and another divided by cast of the dice, according as it shall happen, and the merchants in this case may lawfully put the master to his oath.

This excerpt reveals a number of things. First, it raises questions about how distributions of losses were calculated ("And the wines, or other goods, that were cast overboard, ought to be valued or prized according to the *just value* of the other goods that arrive in safety"). It is difficult to say whether just value means price at the point of embarkation or debarkation. Second, the article clearly shows a complex process for deciding whether to jettison cargo. Like Islamic law, it was a process that involved the captain, sailors and whoever's cargo was being jettisoned. While not very different than Byzantine law, this procedure for jettison in the Rôles fits much more closely with Islamic law. Finally, another parallel between Islamic law and the Rôles can be seen in the authority of the captain ("the master may do as he thinks fit"). Overall, the laws of

jettison presented in the Rôles are not dissimilar to Byzantine law, but are remarkably similar to Islamic law. While it is difficult to connect these developments to today, because telecommunications makes consultation a fundamentally different process, it seems possible that Islamic law could have influenced English maritime law in this area. The following section deals with the consequence of jettison: salvage.

Salvage

Jetsam, if found, became salvage. Legally though, salvage was not just the object found, but the labor the salver put in to find it. Provided the service was voluntary, successful, and the cargo was at risk of loss on navigable water, the salver was entitled to compensation. This section will detail the rules and procedures of salvage law in Islamic maritime law. With few exceptions, Islamic *fuqahā'* adopted Byzantine salvage law as expressed in the Digest. In both, the salver is neither entitled to salvage nor barred from profit.

Procedurally, when someone finds lost or discarded goods—whether on the shore, surface or bottom of the sea—they are required to return the derelict property. While salvers are required to report found jetsam to authorities, they did not have to give up the property until the owner showed up. Mālikī jurists further stipulated that the authorities had no business holding property because there was no connection between the article and the imam or governor.[143]

Unlike Byzantine law, the salver is not entitled to compensation by way of part of the goods found. The amount of compensation is strictly left up to the owner; though the

[143] Khalilieh "Admiralty" 215-17

rate is supposed to be market wage for day labor plus freight charges if transported by sea (if, for example, ship A picked up B's salvaged goods on the way to town X where B lives). An 1139 Geniza letter discuses expenses incurred for salvage:[144]

> The pepper was lost completely; God did not save anything of it. As to the iron, marines were brought from 'Aden, who were engaged to dive for it and salvage it. They salvaged about one-half of the iron, and, while I am writing this letter, they are bringing it out of the Furḍa [the customs house of 'Aden] to the storehouse of the illustrious elder, my master Maḍmūn b. al-Hasan. All the expense incurred for the diving and for transport will be deducted from whatever will be realized for the iron and the rest will be divided proportionally, each taking his proper share.

The general attitude of the Sunni schools of law was that jetsam found on the shore or on bottom of sea must be returned to the owner. However, some Mālikī *fuqahā'* claimed the finder was entitled to claim ownership of salvaged merchandise if found on the seabed because it had been jettisoned under circumstances of desperation. Regardless of religious affiliation of the merchant, salvaged cargo had to be turned over to the real owner, the court of his religious community or legal heirs if dead. Actual practice shows this: in an 1143 Geniza letter, a foreign Jewish merchant Samuel ha-Nagīd drowned near Alexandria. The cargo was first submitted to the *qāḍī*, who in turn delivered it, along with two Jewish witnesses, to the rabbinical court in Alexandria.[145]

If the salver did not make any efforts to contact the owner or report the salvage to authorities, then he would be fined. If the jetsam was sold or lost, then the salver must pay an additional penalty equivalent to the value of the object.[146]

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[144] Khalilieh "Islamic Maritime Law" 110
[145] *Ibid.* 111
[146] *Ibid.* 113

A statute of limitations usually applied to salvaged goods, the expiration of which entitled the salver to ownership. The length of time usually depended on the value of the object. For example, an object worth 20 dīnārs or more must be kept for one lunar year (*hijrī*), 355 days. Conversely, a low-priced article only had to be kept for a few days.[147]

As the preceding discussing suggests, Islamic law laid down clear procedural guidelines for salvage, which were almost nonexistent in the Digest and *Nomos Rhodian Nautikos*. As mentioned, salvers had to contact the rightful owners if the name was marked, otherwise they must notify civil and/or religious authorities. Also, Byzantine law makes no mention of salvor liability, where Islamic law rules that if the salvor is found guilty of negligence, looting, or spoilage of salvaged property, a proportionate part of his award must be forfeited.

Generally, the owner had to pay for salvager costs. If the cargo was picked up en route, then the owner must pay freight charges (dependent on distance covered and the quality of salvaged cargo). Muḥammad Ibn ‘Umar explains salvage en route:[148]

> The qāḍī of Tripoli wrote to Saḥnūn (776-854) asking him about a vessel which suffered a wreck off Barqa. A person who brought six bales to Tripoli claimed that they were salvaged from that wrecked ship. While some of the bales were identified and retained, the unidentified units were sold for a certain amount of dīnārs. When the owners of the identified salvaged bales appeared in Tripoli, the salvager handed them their bales, but they (the owners) decided to donate them to the salvager because they were damaged by water. Meanwhile, the ship owner, for his part, demanded payment from the merchants for the freight. He responded: “If the article of charter was established to transport the goods from Cairo to Tripoli, then, as Mālik ruled, the fee is payable at the destination, whereas Ibn Nāfi‘ ruled that the merchants must pay the freight in accordance with the distance covered. But in your inquiry since a part of cargo arrived at

[147] *Ibid.*
[148] *Ibid.* 114

> Tripoli…therefore, the ship owner is entitled to collect the fee proportional to the benefit accrued to the merchants at Barqa.

In sum, Islamic law required that salvage be reported wherever it was found. Further, salvage must be given to the original owners if ownership can be determined, for example if the name appears on the cargo. Only if owners do not come forward during a set period of time is the salvager allowed private ownership. The rightful owner, however, does have to pay expenses the salvager might have incurred for labor, transport and storage of the found property.

As in jettison, the Rôles deal extensively with salvage and, in general, seem more in line with Islamic law than Byzantine law. As mentioned, Byzantine law entitled the salvor to a share of found jetsam, and gave little space for the procedures through which salvors should preserve property, or a statute of limitations for how long it should be preserved. On that note, salvage was assumed to be the property of the finder provided he notified proper authorities and the owner did not show up. This kept found jetsam in a kind of limbo: the finder owned it but only on condition its true owner did not seek reclamation. Islamic law, on the other hand, allowed ownership to revert to the salvor after a certain period of time. The same is true of English maritime law as expressed in the Rôles. Articles XXXIII, XXXIV, XLIII, XLV and XLVI detail extensively rules surrounding the responsibilities and entitlements of salvors and owners. For example, Article XXXIII requires salvors go through proper procedures when they find derelict property:[149]

> If a ship, or any other vessel, hath cast overboard several goods or merchandises…it is to be presumed, that they who did cast such goods

[149] "The Rolls of Oleron"

> overboard, do still retain an intention, hope, and desire of recovering the same: for which reason, such as shall happen to find such things, are obliged to make restitution thereof to him who shall make a due enquiry after them.

Article XLIII, as in Islamic law, prohibits conversion of ownership of salvage by the finder:[150]

> [I]f there be a presumption that these [found goods] were the goods of some ship that perished, then neither the said lord, nor finder thereof, shall take any, to convert any part of it to their own use.

Also similar to Islamic law is Article XLV, which, unlike Byzantine law, requires compensation for the salvor, but leaves the ultimate amount up to the owner. Finally, Article XLVI affirms the Islamic tenet that salvage be kept for a certain period in order to allow for the owner to reclaim his property (though a specific time is not stated):[151]

> If any ship, or other vessel, by any casualty or misfortune happens to be wrecked and perish, in that case, the pieces of the hulk of the vessel, as well as the lading thereof, ought to be reserved and kept in safety for them to whom it belonged before such disaster happened, notwithstanding any custom to the contrary.

As the previous section has shown, in salvage as in jettison, the Rôles shared many characteristics with Islamic law. Furthermore, these characteristics were shown to be different than standard practice in the Byzantine legal system. This section also explained the laws of salvage in Islamic maritime law, such as the procedures that had to be followed by salvors and the views of different schools of law. The following section summarizes various tariffs, taxes and tolls Islamic mariners encountered while at sea.

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[150] *Ibid.*
[151] *Ibid.*

Tariffs, taxes and tolls

The daily costs of doing business as a mariner in the Islamic Mediterranean of the 9th to 12th century is an important aspect of maritime law because it shows these actors and rules operating within a larger space, whose limits were very much determined by the governments that owned the ports and territorial waters. Within the context of international law, this section also shows the basic interaction of merchants, shippers and sailors with states that has heretofore been avoided. This interaction is important because it serves as a conduit through which the customs and rules of private individuals trading goods by sea reached governments and, eventually, were integrated into the maritime codes that international law is based off of. One of the main forums for interaction were the tariffs, taxes and tolls mariners had to pay to governments, which are discussed in the following paragraphs.

Whenever a ship docked at a port it usually had to pay a number of fees to be allowed harbor and permission to unload cargo. Generally, these fees were either canonical or non-canonical. In Islamic law, canonical taxes were the tenth (‘*ushr*) or fifth (*khums*) of merchandise levied in principle according to religion, citizenship and, sometimes, political and social status. For example, a dimmī trader (non-Muslim subject of a state governed by Islamic law) paid a different, often greater customs rate than a Muslim; a dimmī, in turn, paid less than a ḥarbī (subjects of a non-Muslim country).

Khalilieh describes non-canonical taxes as “ubiquitous.” They were levied along routes (*marāṣid*), at gates (*qabāla*) and as transaction taxes (*maghārim rusūm, itāwa,*

mukūs, *adā'*, *wājib*, etc.).[152] Classical historical sources and travel literature from the medieval ages show that the collection of maritime taxes, tariffs and tolls was standard practice in the Mediterranean. Particularly noticeable was the ubiquitous official waiting to add to government coffers, from 13th century traveler Ibn al-Mujāwir:[153]

> Aden governmental observers stationed in watchtowers on hills on the coast tracked the movement of commercial ships at sea. When a vessel was sighted offshore the watchmen transmitted the message by loud voice from one station to another until it reached the customs officials at the port. Afterward, as the vessel approached the port, the wālī sent officials aboard small crafts to meet it at sea and register all details regarding its port of origin, and the type, quantity and purchase price of its shipments, as well as the name and citizenship of each passenger…[A]mong the tax receivers were old women, who, as their male counterparts did to male passengers, thrust their hands into waistbands of female travelers in search of what might be hidden under their clothes.

Once the ship passed this preliminary inspection, cargo was unloaded, unpacked, weighed in front of port officials, and taxed. It is estimated that governments received sizeable revenues from the combination of fees charged to shippers. In Aden, for example, geographer al-Muqaddasī notes: "It is estimated that the royal treasury receives about one-third of the goods of merchants."[154]

The process, an all-day affair which usually took place in the agency house of the representative of merchants, was not pleasant; and some Muslim chronicles complain of the inhumane behavior of customs officials towards arriving passengers and merchants at Islamic ports. For example, Ibn Jubayr gives the following account of his arrival at the port of Alexandria in 1183:[155]

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[152] Grotein qtd. in Khalilieh "Islamic Maritime Law" 83
[153] *Ibid.*
[154] *Ibid.* 84
[155] Jubayr qtd. in *Ibid.* 85

> The day of our landing, one of the first things we saw was the boarding of the agents of the sulṭān (umanāʾ) to record all that had been brought in the ship. All the Muslims in it were bought forward one by one, and their names and descriptions, together with the names of their countries, recorded. Each was questioned as to what merchandise or money he had, that he might pay zakāt (alms), without any inquiry as to what portion of it had been in their possession for a complete year and what he had not. Most of them were on their way to discharge a religious duty and had nothing but the bare provisions for the journey. But they were compelled to pay the zakāt. Aḥmad Ibn al-Hassan of our members was called down to be questioned as to the news of the Maghreb and as to the ship's cargo. Under watch he was in turn conducted first to the sulṭān, then to the qāḍī, then to the officials of the customs, and then to the group of the sulṭān's suite, and after being questioned concerning everything, and his statements recorded, he was released. The Muslims were then ordered to take their belongings, and what remained of their provisions, to the shore, where there were attendants responsible for them and for carrying to the customs all that they had brought ashore. There they were called one by one, and the possessions of each were produced. The customs was packed to choking. All their goods, great and small, were searched and confusedly thrown together, while hands were thrust into their waistbands in search of what might be within. The owners were then put to oath whether they had anything else not discovered. During all this, because of the confusion of hands and the excessive throng, many possessions disappeared. After this scene of abasement and shame, for which we pray God to recompense us amply, they (the passengers) were allowed to go.

The harsh collection of fees was the same for Muslims and non-Muslims alike, while the latter got a receipt for paying poll taxes, the former got a receipt for almsgiving. It was a similar tax under different names. Al-Makhzūmī (d. 1189) provides extensive accounts of tax collection at numerous ports in Egypt—including Alexandria, Damietta, Tinnīs and Rosetta along the Mediterranean, as well as Qulzum and ʻAydhāb on the Red Sea—that attest to the similarity of taxation and treatment of Christians and Muslims. Furthermore, numerous accounts show that, at least in payment, there was no distinction between local and foreign traders. Added to taxes was a plethora of other fees. Depending on their function, new arrivals had to pay for an unloading permit; entry and exit permit;

and, customarily, tips to the weigher, customs house messenger, revenue officer, packers, inspector, warehouseman, porter, sealer, herald and mosque janitor. If a merchant or passenger could not pay, their merchandise or personal belongings were seized as security. Those that did pay were granted a written certificate, *barā'a*, as a receipt for their troubles.

The pervious section gave a view of the day-to-day life of Islamic mariners through the window of tariffs, taxes and tolls. It also served as a reminder that governments were very much involved in maritime life and, indirectly in this case, its laws. The following section discusses the rules and regulations of collision.

Collision

Collision was probably the worst situation that could befall a ship owner because it resulted in both damage to his ship, and—possibly—the compensation for damage to another. Additionally, cargo, buildings and human lives could be lost, all of which a ship owner was potentially responsible for. This section details the conditions of that responsibility in Islamic law, as well as certain parallels in Byzantine law and English law.

Generally, liability in collision depended on its nature. Similar to liability for damaged cargo, collision caused by nature, provided it was unintentional and unavoidable, required no compensation by either party. But if other conditions, such as negligence or intent, were found, then the collider was required to pay compensation.

Included in these conditions, and important for collision, is navigational error. On the high seas, the owner of a colliding ship had to compensate the other in cases of navigational error—Al-Shaīfi'ī: "*wa-in ṣudimat safīna bi-ghayr an yu'mad bi-hā al-ṣadm, lam yuḍman sahy'an*"[156]—but on rivers, jurists usually assigned fault to the boat travelling downstream. The reasoning is based on the relative immobility of boats travelling upstream contra boats travelling downstream; jurists analogized the former to a boat on the high seas, and the latter to an anchored boat. Still, if the captain of the upstream boat was found negligent, he was responsible for compensation. 12th century Hanbali scholar Ibn Qudāma summarizes assignment of responsibility in collision as follows:[157]

> If the two captains owned both ships including their contents, they jointly and proportionately share the losses and the costs of the damage to both vessels, and each party receives his share. If the captains were employees, they are indemnified against any losses since the responsibility for damages and losses is laid upon their employers. If there were freemen who perished on both ships, and, if the collision was intentional which would usually cause the loss of lives, the ships' captains had to be held responsible, and they were to be penalized for this incident. If the victims were slaves, then the captains of both, if they were freemen, are exempted from penalty. If the collision was not intentional and was not life threatening, it is incumbent upon the ship owners to pay blood money (*diyya*) to the families of the victims (*wajubat diyyat al-aḥrār 'alā 'āqilat al-qayyimayn*), and the value of the slaves to their owners. If both captains happened to be slaves, they are still liable for the losses. If all of them (passengers and crews of both ships) drowned, the guarantee becomes invalid. If the collision was unintentional, then no party is to be held responsible. If there were deposits and commercial merchandise on both ships, these are not guaranteed so long as the captain was not negligent or transgressive. If both ships were leased, they must be considered as a trust and they are not liable for retribution. If both captains were carrying money to another country, they are not liable for the losses since the collision was unavoidable.

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[156] Shaīfi'ī qtd. in Khalilieh "Admiralty" 106
[157] Qudāma qtd. in *Ibid.* 108

In general, if the cause of collision was due to natural and unavoidable causes, the collider owed the injured party no compensation provided he was in no way negligent. River traffic was unique in that the boat travelling downstream could still be liable even if he was not negligent. Additionally, in cases where both captains were found liable, each had to pay half the cargo of the other's ship.

In general, Byzantine law was very similar to Islamic law with regards to collision. It required compensation in cases when the collider was found negligent, but did not require it when collision was due to *force majeure*. Unlike Islamic law though, no mention is made of river traffic.[158]

The Rôles also did not differ markedly from Byzantine and Islamic law. Neglect is grounds for liability and *force majeure* exempted both parties from responsibility for damages. However, unlike both Byzantine and Islamic law, both parties were equally liable in cases of accident (even if the other party was entirely at fault). This comes up in Article XIV:[159]

> If a vessel, being moored, lying at anchor, be struck or grappled with another vessel under sail, that is not very well steered…In this case the whole damage shall be in common, and be equally divided and appraised half by halt and the master and mariners of the vessel that struck or grappled with the other, shall be bound to swear on the Holy Evangelists, that they did it not willingly or willfully [i.e. it was an accident]. The reason why this judgment was first given, being, that an old decayed vessel might not purposely be put in the way of a better, which will the rather be prevented when they know that the damage must be divided.

The rational given for this article in the last sentence is interesting. It effectively prevented older ships from getting in the way of better vessels in order to recover

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[158] *Ibid.* 195-203
[159] "The Rolls of Oleron"

damages that might be used toward another ship because, in the event of collision, the owner of older ship would be equally liable and, thus, owe equal compensation. Of course, this could also cause a number of problems. For instance, what if the newer ship really did hit the older ship without the owner of the older ship wanting him to? Still, this uniquity in the Rôles shows that it was not just a copy of previous laws, whether they be Islamic or Byzantine, but an adaptation.

The previous section reviewed the laws of collision in Islamic maritime law, and briefly explored its similarities between Byzantine law and English law as represented in the Rôles. Furthermore, collision as elaborated in Article XIV showed a departure of previous maritime laws in the form of equal-party compensation when a newer ship hit an older one. The following section discusses partnership in the context of maritime law.

Partnership

Integral to maritime law were the forms of investment that made long-distance trade possible. Most prominent in the early medieval Mediterranean were the Byzantine sea loan and *chreokoinōnia*; and the Islamic *qirāḍ* (commenda) and *sharika* (partnership). This final section will briefly explore these different forms, and make the case for the Islamic origins of the European *commenda*.

The sea loan—a forerunner to the *chreokoinōnia*—was a straightforward loan specifically for commercial voyages by sea. Money was lent either for a one-way or return voyage, and repaid with interest if and only if the ship arrived safely at its port. Because of the obvious risk for the lender, interest rates were high. While cargo and (if

the borrow was the ship owner) the ship were sometimes used as collateral, rates hovered between 12.5 and 30 percent.[160] The Byzantine form of the loan, which has been in use as far back as the Sumerians, was taken most directly from Rome and in turn ancient Greece.[161] Significantly though, Byzantine law as elaborated in the *Nomos Rhodian Nautikos* and Digest left interest unrestricted where Roman law fixed it at 12.5 percent. Khalilieh claims that documentary and legal evidence of the use of sea loans by Muslims is sparse, most likely because of religious prohibition against such financing.[162] Geniza letters from the 10th and 11th century make very little mention of the sea loan except a few instances by Jewish lenders and bankers.[163]

A more prevalent and influential means of funding maritime commercial enterprises in the early medieval ages among Christians and Muslims, respectfully, was the *chreokoinōnia* and *qirāḍ*.

The *chreokoinōnia* combined the advantages of a loan with those of a partnership. Like a loan, the investor incurred no liability beyond the sum he invested; like a partnership, the risks and profits were divided between the lender and borrower (in this case, investor and manager). Article III: 17 of the N.N. defines a *chreokoinōnia* as follows:[164]

> A gives gold or silver for the (needs) of a partnership. The partnership is for a voyage, and he writes down as it pleases him till [the time], when the partnership is to last. B, who takes the gold or the silver, does not return it to A when the time is fulfilled, and it comes to grief through fire of

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[160] Khalilieh "Admiralty" 225
[161] *Ibid.*
[162] First, the sea loan involved a risk for the lender, the Prophet Muhammad "has ordained against risk." Second, the borrower had to pay the *ribā* if the trading venture was successful.
[163] *Ibid.* 230
[164] *Ibid.* 232

> robbers or shipwreck. A is to be kept harmless [blameless] and receive his own again. But if, before the time fixed by the contract is completed, a loss arises from the dangers of the sea, it seemed good that they should bear the loss according to their shares and to the contract, as they would have shared in the gain.

According to the above, the *chreokoinōnia* was a kind of "quasi partnership." One party provided the fiscal capital ("gold or silver") while the other provided the physical and human capital. Also, it is implied that both loses and benefits must be proportionate ("if…a loss arises…they should bear the loss according to their shares…as they would have shared in the gain.). This last point is the most distinguishing feature of the *chreokoinōnia*. As mentioned, risk in the sea loan was borne solely by the lender. In the *chreokoinōnia*, risk and reward were proportionate to a respective party's investment in the venture. In practice, parties were allowed to change certain condition, like contribution and distribution of profits, currency of investment, type and duration of business venture, where they traded, what was traded and how it was traded.[165] This flexibility was the main difference between the Byzantine *chreokoinōnia* and the more developed Islamic *qirāḍ*.

The *qirāḍ*, also known as the *muqāraḍa* and *muḍāraba*,[166] was an important part of the larger body of commercial law that governed trade in the Islamic world of the Middle Ages. As Udovitch notes, the common origins of the *qirāḍ* in Islamic schools of law meant differences were miniscule across the Muslim world.[167] The *qirāḍ* was an arrangement between an investor (*muqāriḍ*) or group of investors and an agent (*'āmil al-*

[165] *Ibid.*
[166] *Ibid.* 234
[167] Udovitch, Abraham L. Partnership and Profit in Medieval Islam. Princeton, NJ: Princeton University Press, 1970: 170-76. Print.

qirāḍ). The *muqāriḍ* invested capital in an agent, who used it to trade provided he repay the principal plus an agreed upon share of the profits. In the event of an unsuccessful business venture, the agent was not liable for loss (he only lost his time and labor), and the *muqāriḍ* only lost the principal he invested.

Both the *qirāḍ* and *chreokoinōnia* are similar to the European *commenda*, which was used extensively throughout Europe on land and sea as a means to finance long-distance trade. The origins, however, are disputed. Pryor argues that the *commenda* was influenced by the Roman *societas*.[168] However, his argument falls short. While there are certain similarities, Pryor is not able to link the *commenda* to the *societas* historically. Considering this shortcoming, he tries to associate the *chreokoinōnia* to the *societas*, and the *chreokoinōnia* to the *commenda.* However, his evidence is weak. As Khalilieh notes, there are no written contracts of the *societas* remaining, and it is little corroborated in the N.N. or Digest.[169] It is hard to conclude from Pryor's article that the *societas* laid the legal foundations for something as important and complex as the *commenda*.

The Islamic *qirāḍ* presents a more convincing case. Muslims were very active in the Mediterranean during the *commenda*'s formulation in the 10th to 12th century. It is not difficult to imagine that their extensive trading left an impression on European mariners of financing methods. But influence often requires more than just impressions. What is more convincing is the resemblance of the *commenda* to the *qirāḍ*. In chapter 32 of his *Muwaṭṭa*', Mālik Ibn Anas (one of the most highly respected jurists in Islamic law) lays

[168] Pryor, John H. "The Origins of the Commenda Contract." Speculum 52.1 (1977): 5-37. Web. 29 Mar 2011.
[169] Khalilieh "Admiralty" 247

down *qirāḍ* rules that are strikingly similar to those in the *commenda.*[170] Furthermore, the rules in both the *commenda* and *qirāḍ* are also much different and more developed than those in the Byzantine *chreokoinōnia*. For example, where the former prescribed special roles for ship captains as agents, the latter was silent on the distinction. Suffice to say, it is possible that Islamic law—in addition to possible contributions from other subjects of maritime law—could have influenced Western law in the area of partnership by way of the *qirāḍ*.

[170] *Ibid.*

CHAPTER 5

Conclusions

Islamic maritime law as it appeared in the 10th to 12th century was uniquely positioned to influence the geographically restricted space in which modern international law began. During this time, the Mediterranean was a Muslim sea. Also, as advances in science and art during this time have shown, the lights of civilization were brighter in the Islamic world. In the context of international law, the seeds that would eventually grow into landmarks like the Treaty of Westphalia, the Lieber code, the Law of the Sea Convention and, even, the UN Charter, were planted and sustained in their early life by the Muslim world. Considering this, it is not difficult to imagine a role for Islamic law in the development of international law.

The purpose of this thesis was to explore that role. First, the stage was set in the chapters two and three. Islamic law, like much of the Muslim world, has faced great prejudice throughout its history that has led to even greater misunderstandings among Westerners. This is especially prevalent today, but was also rife among legal scholars, lawyers and judges of previous centuries who conveniently forgot the role Islamic law played while building perhaps the greatest project mankind has ever seen. The role of religion and jurists in Islamic law are among such misconceptions. Contrary to popular belief, Islamic law is not just *Sharīʿah*, or purely religious law, but *Fiqh*, or man-made law, as well. In fact, the bulk of Islamic law as it is practiced today is the product of human, not divine, innovation. Similarly, the many juristic schools in Islamic law do not

represent incoherence, but that same innovation that has kept Islamic law alive for centuries. Also addressed in this chapter were theories that diminish Islamic law's ability to influence international law in its formative stage due to its underdevelopment. As was shown, Islamic law was both complex and original enough by the 10th century to have contributed substantively to international law.

The following chapter gave concrete examples of and arguments for those substantive contributions in the areas of common law and the English trust, among others. In common law, the work of John Makdisi on the Islamic origins of Henry II's 12th century legal reform demonstrates that specific institutions, such as the writ of debt, assize of disseisin and jury, were starkly different than mechanisms in proximate European legal systems, yet remarkably similar to those in Islamic law. With relation to maritime law, it was shown that the writ of debt and assize (and perhaps the jury) had concrete implications for the carriage of goods by sea, and that the two legal systems were, for the most part, compatible enough to allow for one to adopt features of the other. Strengthening this theory were the avenues of transmission explored through Roger II of Sicily, whose kingdom could have been a conduit through which the writ of debt, assize and jury reached common law, and Islamic law's maritime laws could have influenced Henry II. Within commercial law—a heading that maritime law falls under—the possible influence of the Islamic *waqf* on the English trust was explored. This discussion also offered an opportunity to both explain additional avenues of transmission—namely through the Knights Templar and other organizations—and give a specific instance in which these avenues were used in the case of Oxford's Merton College Next, further possibilities of Islamic origins were briefly explored in the instances of the French *aval*,

Genoese *mohana* and the *commenda*. And finally, an additional point of contact through which the innovations of Islamic law could have reached Europe and the "founding fathers" of international law was mentioned in Spain.

With the stage set, the next chapter explored the main argument of this thesis: that Islamic maritime law influenced international law by way of English law in the 10th to 12th century (embodied here in the Rôles d'Oléron, which are foundational to the maritime laws of Europe, the United States and international law). As noted, "explored" must be emphasized both because of the lack of documentary evidence on Islamic maritime law to sufficiently *prove* how it worked on each and every front, and the lack of knowledge on the part of this paper's author in languages, history and law to, again, sufficiently *prove* that Islamic law did indeed influence English law and therefore international law in the specific area of maritime law. Still, imagining a possible role for Islamic law in its development is advantageous because it questions assumptions about the aforementioned Western origins of international law.

The subjects covered were as follows: legal personality; contracts; liability and transportation of goods; jettison; salvage; tariffs, taxes and tolls; collision; and partnership. Legal personality deals with the classification of ships and people (including their specific roles) according to certain criteria. Contracts is concerned with the legal mechanisms by which parties arranged the carriage of goods by sea. Liability and transportation of goods is a broad though related category concerned with legal responsibility for damaged or lost cargo, and procedures for transport of goods legally required for both avoiding liability and ensuring safety. Jettison deals with laws governing jetsam—cargo or parts of a ship thrown overboard—and salvage deals with

laws governing procedures for found jetsam. Tariffs, taxes and tolls is concerned with legally mandated fees for transporting goods, such as taxes on merchandise and payment for passage. Collision is concerned with the legal criteria and consequences of cases involving the collision of two or more ships. And finally, partnership deals with the financial arrangements that make long-distance trade by sea possible. As mentioned, this list of subjects covered is certainly not exhaustive, but it contains the most important aspects of commercial maritime law.

Critically, the introduction to this chapter introduced a maritime-specific means through which Islamic law could have influenced English admiralty law in the guise of the Rôles d'Oléron, introduced in England by Henry II. However, authorship of this maritime code is ascribed to his wife Eleanor of Aquitaine, who travelled extensively throughout the Middle East while in her previous marriage to Louis VII. Eleanor was reportedly so impressed by the maritime laws of the Levant that she brought them back with her and put them into writing in the form of a 47-article maritime code, the first in northwestern Europe.

With this in mind, the aforementioned subjects of Islamic maritime law were explained, and specific instances in which possible influences could be found were explored. In the area of legal personality, wage sailing was found to similar in both the Rôles and Islamic law. Conversely, both were dissimilar to the profit sailing system found in Byzantine law. In contracts, the flexible calculation of freight system was shown to similar in Islamic law and the Rôles, while standing in stark contrast to the rigid system in place under Byzantine law. In liability and transportation of goods, responsibility for lost and damaged cargo and procedures for carriage of goods by sea

was shown to be similar in all three systems. In jettison, on the other hand, English maritime law in the 12th century was shown to be very similar to Islamic law. Specifically, procedure for deciding to jettison cargo and the authority of the captain in cases of jettison was alike in both systems. While not dissimilar to Byzantine law in these areas, the Rôles fit more closely with Islamic law. This can be found in salvage laws too. Islamic law and English law were procedurally more complex when it came to salvage, required a different standard of ownership (unlike Byzantine law, a salvor did not assume ownership of found goods), and left compensation up to the owner (while Byzantine law entitled the salvor to a definitive amount of compensation). Finally, the section on partnership presented a strong case for the Islamic origins of the *commenda* by both pointing to similarities between it and the Islamic *qirāḍ*, and differentiating both, such as in the role of ship owners, from the Byzantine *chreokoinōnia*.

Overall, there is ample evidence of similarities between Islamic maritime law, English maritime law and, thus, international law. Specifically in the case of English maritime law, this thesis has shown that it differs from Byzantine law on important points, yet shares many of those points with Islamic law. In a wider context, Islamic law was also shown to have influenced Western law during the crucial centuries of the 10th to 12th century, when Europe was emerging from the throes of medievalism. Despite ample evidence and contrary to its name, the origins of modern international are still, by and large, portrayed by legal academics as an essentially Western enterprise. This thesis may not have sufficiently answered questions surrounding the influence of Islamic maritime law on international law, but it did raise questions regarding the foundations of perhaps humanity's most ambitious project. What can be concluded is this: it *cannot* be safely

assumed that the foundations of international law are exclusively, or even firmly, Western. As this thesis has shown, Islamic law, among other non-European legal systems, likely played a part.

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