



## ORIGINAL PAPER

# Lex Salica and Common Law from the Historical Perspective

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### Abstract:

The Salic law (*Lex Salica*) is intensely treated as the old Germanic law, which has become the most famous of the so-called barbarian leges. It was created during the victorious reign of Clovis, a founder of the Salian Empire in northern Gaul (Kremer & Schwab, 2018 : 241). The Salic law clearly demonstrated the influence of the Visigothic and Burgundian models (McDaniel, 2012 : 132) and became very influential during the Carolingian regime. It is believed that one could find the most aspects of the Carolingian-style in tenth and eleventh-century England (Wormald, 2014 : 249-250). However, there is no direct evidence of the availability of *Lex Salica* in Britain before the 10<sup>th</sup> century.

The paper presents an innovative attitude towards the study of the relation between the Salians' legal code *Lex Salica* and English common law. The greatest attention is paid to the appropriate historical and juridical contexts, cross-national activities, linguistic and juridical contacts, contact-induced changes, etc. The results of the research reveal that *Lex Salica* could be available in Britain before the 10<sup>th</sup> century. Moreover, there was an evident inter-influence of the Frankish and British legal systems.

**Keywords:** *common law, English law, juridical-linguistic study, Lex Salica, Salian Empire.*

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### **The General Introduction**

*Lex Salica*/Salic law has always been treated as the most Germanic of all the barbarian legislations (except the Anglo-Saxons' law) (McDaniel, 2012 : 132). It became a territorial law code in northern Gaul (McCoy, 2021 : 22).

The legal historians express different ideas regarding the creation of the Salic law. On the one hand, it is believed that *Lex Salica* was made during the 4<sup>th</sup> century for the Frankish military dependants and their families settled in Far Gaul (Poly, 2016 : 35). On the other hand, it is supposed that the Salic law was written between 476-496 (Taylor, 2006 : 543). In accordance to WALLACE-HADRILL's opinion, *Lex Salica* had to be an unamended work of the 6<sup>th</sup> century. Moreover, the bombastic prologue of the longer version had to be written in the 8<sup>th</sup> century. The format of the whole collection might be created in the ninth century (Wallace-Hadrill, 1962 : 76).

Despite the above mentioned, it is more probable that *Lex Salica* came to us from the reign of Clovis (486-511) (Pollock, & Maitland, 1991 : 136) – a founder of the Salian Empire in northern Gaul (Kremer & Schwab, 2018 : 241). The Salic law became very influential during the Carolingian regime. It is believed that one could find the most aspects of the Carolingian-style in tenth and eleventh-century England (Wormald, 2014 : 249-250). However, there is no direct evidence of the availability of *Lex Salica* in Britain before the 10<sup>th</sup> century.

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### ***Lex Salica* from the Historical Perspective**

Let us initially discuss the Salian Franks' law. The majority of scholars agree that this law was created during the reign of Clovis / Chlodwig – a governor, who unified the Salians and the Ripurians. Under Clovis' rule, the Franks controlled present-day France down to the Loire. When Chlodwig died in 511, he left behind the rather large kingdom (Robinson, 1993 : 201).

It is believed that before Clovis' reign, the Franks' customary laws had existed in an unwritten form: those "barbarian" laws were unwritten and committed to the memories of various tribal elders. Moreover, these early fringe peoples did not consider law to be the manifestation of the authority of some state or ruler. In the context of this vision, the law was not something created by a legislator, it was inherited. The recording of the law was carried out by the assistance of the Gallo-Roman jurists (*The Salic Law* : 48), who might reflect the impact of the Roman legal tradition. Moreover, the Frankish legal system clearly demonstrated the influence of the Burgundian and Visigothic models (McDaniel, 2012 : 132).

It is also noteworthy that the Salic Law Ordinance found in the Franco-Germanic Salic Law Code actually regulated inheritance to lands in families (*allodial lands*) (Hanley, 1994 : 107). Moreover, *Lex Salica* contained the civil and criminal law statutes (Kremer & Schwab, 2018 : 241). It was revised by the first emperor of the revived medieval Roman Empire of the West, King Charlemagne, who tried to substitute the Roman legal ideas and law for the Teutonic usages (Sherman, 2014 : 319). Around 800, King Charlemagne issued the laws for the Saxons and the Frisians. Moreover, he revised the Salic law as *Lex Salica Karolina* and issued the series of capitularies for

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other peoples under his rule. The Salic law was definitely used as the basis for the Frankish preparation of laws for the Alemanni (in the 7<sup>th</sup> century) as well as the Saxons, the Thuringians, the Bavarians and the Frisians (in the 8<sup>th</sup>-9<sup>th</sup> centuries). These laws constituted what could be collected of the whole body of the tribal custom by which the Germanic peoples lived and their analysis is less advanced than is that of the capitularies and diplomas. They may not tell us very accurately how the tribes of the immediate post-migration period lived, but they definitely indicate how the educated men of the Carolingian age thought they had lived. Accordingly, these laws are significant in the sense not intended by their compilers (Wallace-Hadrill, 1962 : 94).

The Salic law survived as the personal law of the Franks long enough to be remembered at the time of the French Revolution (McDaniel, 2012 : 143-144). Although *Lex Salica* was expanded and revised under the Carolingian and Merovingian kings, it was slowly forgotten. However, in the middle of the fourteenth century, the Salian Franks' legal system was rediscovered by Richard Lescot and the monks of Saint-Denis. It enjoyed the second lease on life from the beginning of the fifteenth century, when it was officially adopted by the French Crown as the post factum justification for the exclusion of women from the royal succession (Taylor, 2006 : 543). Nowadays, *Lex Salica* exists in about ninety manuscripts written between the eighth and twelfth centuries and recopied in the fifteenth and sixteenth centuries (Kremer & Schwab, 2018 : 241).

It is supposed that the Frankish laws were closely related to the Saxon laws (McDaniel, 2012 : 133). It is also believed that the British legal system could be influenced by the Franks' legal system in the 7<sup>th</sup> century, when some parts of the so-called Ine's laws might be written following the Frankish model (Liebermann, 2022 : 1-13). Moreover, some scholars claim that similarly to the Laws of Æthelberht of Kent, the Frankish code dates from the immediate post-conversion period (*The Cambridge Companion to Old English Literature*, 1991 : 4).

We believe that looking through the appropriate historical and juridical contexts may be useful for finding more relevant implications regarding the relation of *Lex Salica* and the English law codes created by different kings.

### **The Frankish-British Relations – the Historical Overview**

The question of Frankish-British relations has attracted various scholars' attention. On the one hand, it was claimed that the Anglo-Saxons had communications with the continent, for instance, King Æthelbert of Kent's wife Bertha was Frankish (McDaniel, 2012). This marriage signified contacts between two kingdoms – Francia and Kent. The material culture of the latter showed the strong Frankish influence (Rowley, 2011: 101-102). On the other hand, it is believed that the missionary works strengthened the links binding England to the continent in the seventh and eighth centuries. Bede's work implies a key role for Frankish Gaul in the conversion of Wessex and East Anglia, while Biscop's glaziers and masons as well as some of his books came from Gaul (*The Cambridge Companion to Old English Literature*, 1991 : 5). It is also supposed that Pope Gregory might have deliberated to deploy the Anglo-Saxon missionaries, brought up and educated in the continental monasteries, for the mission to England (Lemke, 2015 : 29; 306). Moreover, the Carolingians were much indebted to the great missionary school of York for the sent books and men. Wherever the English missionaries settled, the British manuscripts appeared. Some reached the big Frankish monastic libraries, for instance, Corbie, Tours and St. Denis (Wallace-Hadrill, 1962 : 106).

The British-Frankish relations could be strengthened by 688, when the West Saxons were in possession of the safe harborage of the Solent from which a direct crossing could be made to the part of north Francia (afterwards, called Normandy) (Yorke, 1995 : 300). Moreover, the Isle of Wight and Kent (mainly, its eastern part) were two territories that showed the strongest links with the Frankish world. The distribution of imports in the early Anglo-Saxon sites (dated c.450–650) revealed that a wide number of communities had had access to the items or materials from Francia. The Franks and the Anglo-Saxons imposed control on the merchants of Byzantine and Roman origins (McDaniel, 2012 : 121). It is also significant that imports from the Frankish world were found in many cemeteries in Kent and in the Isle of Wight. For instance, Chessell Down, shows a high percentage of the people buried with the imports between the late 5<sup>th</sup> century and the end of the 6<sup>th</sup> century (Bavuso, 2021 : 298-301).

The history reveals other facts depicting of the Frankish-British relations, for instance, in 856 in the Frankish palace of Verberie, Æthelwulf – the son of Egbert of Wessex – was betrothed to Judith, a daughter of Charles the Bald. When Æthelwulf died in 858, Judith married his son and successor Æthelbald (Yorke, 1995 : 197-198). It is important that contrary to the custom, the king took an unusual step of having Judith sit beside him on the throne. Supposedly, it meant that the Carolingians were highly respected in Wessex.

It is significant that during the reign of King Alfred (Æthelbald's brother), the relations with Francia were intensified. The connection between the Gaulish / Frankish and Anglo-Saxon England episcopate was close. This fact may be attested by Grimbold of St Bertin's presence at Alfred's court and by Archbishop Fulco of Rheims' letters (Lemke, 2015 : 381). Alfred recruited the Franks and the Mercians to help rejuvenate West Saxon Church. The same king recruited some scholars from Mercia, including Bishop Waerferth of Worcester, in the early 880s, followed by Grimbold of St. Bertins and John, the Saxons from the Frankish empire around the middle of the decade (Yorke, 1995 : 199-200). It was obvious that the English liturgy borrowed from the Frankish one (Wormald, 2014 : 86).

The study of the sphere of medicine seems also important to highlight the British-Frankish relations. Famous scholar D'ARONCO paid attention to the development of medicine of tenth-century Anglo-Saxon England. As a result, he indicated that the new trends in the medical writing and thus in the medical studies began earlier, after the Anglo-Saxon reform of Benedictine monasteries. That reform drew on the fruitful, well-established connections with the Lotharingian as well as the Carolingian monasteries in continental Europe. From Saint-Bertin, Corbie, Fleury sur Loire and Saint Peter in Ghent there was a continuous flow of books and men to England, among which there were the medical writings that flourished in the Carolingian monasteries (D'Aronco, 2007 : 57-58). Moreover, the medical works were gradually included in the coherent miscellanies that were made up of various patristic and biblical texts as well as different philosophical, medical, rhetorical and historical works. Those miscellanies became a model for the entire Carolingian period.

It seems important that the British-Frankish relations were depicted in the free rendering of *Orosius's Historiarum adversum paganos libri VII* (c. 417) – “*The Old English Orosius*” – which may be treated as a product of the transfer of knowledge or learning (*translatio studii*) from Carolingian Francia to Anglo-Saxon England. This transfer facilitated the spread of the new ideas about the history, religion, kingship, philosophy and empire (Leneghan, 2015 : 658). Moreover, the new standards were set

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for the book typology and educational strategies (conjectural and partially unrecoverable) influencing the surrounding countries, including the British Isles. In the ninth century, the continental copies of the Carolingian works arrived in England. Despite this fact, at the initial stage, the response to the Carolingian learning was moderate. It is also noteworthy that in tenth- and eleventh-century England, the educational texts mainly comprised different grammar primers and the study of various Latin authors – some classical and several Christian works, a few Carolingian and some native writers (Lendinara, 2007 : 59-67).

The relation between England and Francia was depicted in the collection “*Cambridge, Corpus Christi College 190*”, which was probably made in stages at Worcester, with additions made at Exeter in the mid-eleventh century. The Exeter additions seem to attest to a shift in the focus of the collection, from the reproduction of the documents from the Carolingian Church «to which the [ Anglo-Saxon ] Benedictine reformers went for the regulatory literature they needed», to their vernacularisation. It is important that among the core texts of “*Cambridge, Corpus Christi College 190*”, we may single out “*Excerptiones pseudo-Ecgberti*” – the selection of the Frankish *Capitulare episcoporum*, which comprised the laws for the clergy drawn up at the synod held under King Charlemagne (Sciacca, 2007 : 94-96).

### The Frankish and Anglo-Saxon Monuments of Law

After looking through the appropriate historical context, let us discuss the juridical context, namely, the relation between Frankish and Anglo-Saxon monuments of law.

Some scholars express their opinions regarding the connection of the British and Frankish legal systems, for instance, it is believed that similarly to the Laws of Æthelberht of Kent (d. 616), the Franks’ code was created in the post-conversion period. However, *Lex Salica* was written in Latin, while Æthelberht's laws were issued in the English language (*The Cambridge Companion to Old English Literature*, 1991 : 4). It is also believed that similarly to the continental legal systems, the laws of Æthelbert could be created in Latin. However, after a particular period of time, they might be translated into the vernacular i.e. into the English language (Tveit, 2016 : 43).

The apparent similarities between the English and Frankish laws can be seen in case of a dower. The dower of the English legal system derived in the unbroken historical development through the *dos ad ostium ecclesiae* of Bracton and Glanville, the Norman *douaire* and the Frankish *tertia*, from the purchase price or *weotuma* and the *morgen-gifu* of the heathen Germans (Young, 1905 : 174). Moreover, in case of the English legal system, the boc-land was essentially the same estate as the Merovingian. Additionally, in accordance to Duke Alfred's will, the British estate of folc-land, would seem to be the analogue of the Carolingian benefice (Lodge, 1905 : 94).

The relation between the English and Frankish legal systems can be seen in case of the trial by jury that dates from the institution by King Henry II of the inquest of jurors or recognitors. What was the origin of the jury? The prevailing opinion now is that the jury is not of Anglo-Saxon, but of Frankish or continental European origin, familiar to the Normans and imported into England by them. This Frankish inquest used by restored Roman Emperor Charlemagne and his royal successors quite naturally seems to imitate certain features of the Roman legal procedure. The Roman root – the most important, if not an exclusive source – of the English trial by jury is probably the

judices, or persons selected by a praetor in the Roman law to determine the facts in the legal controversies (Sherman, 2014 : 324).

The influence of the Salic law may be found in the British law books and treatises. Let us discuss some of them. At the initial stage, it is important to overview the earlier laws, for instance, Kentish King Æthelberht's law. According to famous scholar DEANSLEY, the charter evidence might signify that even in the 7<sup>th</sup> century Æthelbert modelled his court on the literate Frankish court prior to the arrival of Augustine's mission (Rowley, 2011 : 102). The same idea was expressed by FULK and CAIN. These scholars claimed that Æthelberht had placed Augustine and his mission under his own protection by copying into his code the provisions for their security inspired by the Frankish laws (Brooks, 2015 : 117). It was also believed that at the end of the sixth century, *Lex Salica* functioned as an example for the law code of Æthelberht. This fact became clear from the stylistic similarities as well as from the inclusion of the Frankish word *leode*, the word which means vassals of the king and which was not used with this meaning in other Anglo-Saxon monuments ( Kerkhof, 2018 : 42). It is also important that nineteen of Æthelberht's chapters had 'parallels' with early *Lex Salica* (Brooks, 2015 : 117).

Æthelberht's code was expended by his heirs – Hlothere, Eadric and Wihtræd. It is significant that the twenty eighth chapter of Wihtræd's laws seems to be identical to the twentieth chapter of King Ine's laws. The latter survived due to the efforts of Alfred the Great, who presented Ine's laws as the appendix to his laws (Fulk & Cain, 2003 : 150-153).

Let us discuss the post-conquest legal text-books and treatises. The study of "*Leges Henrici Primi*", a textbook, which was written in 1108-1118, shows that the author made the use of the Anglo-Saxon laws. He referred to *Lex Ribuarica* for the canon of inheritance and fetched the rule, which we should be rash in applying to England of the twelfth century ( Pollock & Maitland, 1898 : 267). However, in some cases, the author stopped gaps with some extracts from *Lex Ripuarica*, *Lex Salica*, the Frankish capitularies and some collections of the canons (Maitland, 1908 : 73). It is also believed that he stole the passage from *Lex Ribuarica*, which has been regarded as one of the oldest testimonies that we have to the growth of the community of conquests among the Franks. Supposedly, the author did not have anything English to set against this (Pollock & Maitland, 1898 : 402).

Another significant legal source is the first book of the legal treatise "*Quadripartitus*". The study reveals that it used some Anglo-Saxon juridical lexical units and presented the traces of the Frankish terminology. It employed the term "intertiare" for *anefang* instead of the Anglo-Saxon *befon* or *aetfon*. "*Quadripartitus*" called the *outlaw forisbannitus* and translated *meldefeoh* by *delatura* (Brunner, 1908 : 15). It is also worth mentioning that the English writ of praecipe had its prototype in the Frankish *indiculus commonitorius* (Brunner, 1908 : 28).

Some scholars suppose that equity derived from the Salic law. According to ADAMS, the Franks, at a very early period, seem to invest their king / ruler with equitable powers. Consequently, King Charlemagne facilitated the development of the Frankish law in this direction. The Franks' equitable procedure survived in Normandy and was carried by the Angevin and Norman kings to England, where it made the foundation of the later development of the common law (Adams, 1905 : 24). It is significant that the Title 46 of *Lex Salica* presented the rules of transferring assets / ownership to an intermediary. This transfer implied the disposal of the assets in favor of

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the indicated persons, the so-called beneficiaries, after a transferor's death. The similar rules of disposition of the property has been presented in the common law (Tendan, 2021: 28) since the Norman conquest.

It is noteworthy that after the Norman invasion, the Germanic-Norman laws were united with the Germanic-Anglo-Saxon laws. Therefore, for more than a century after the invasion, only minor changes might occur in the substance of the Anglo-Saxon legal system (Tucker, 1991 : 130-136). Moreover, for a considerable time, the Anglo-Norman law adhered to the ancient Frankish tradition in not distinguishing between a contract and a title (Holmes, 1908 : 713). Even the common law *trust* seems to be formed in accordance to the legal institution *affatomie* presented in the Title 46 of *Lex Salica*.

### The Major Conclusions and Outcomes

The above presented overview of the sources depicting the legal history of the U.K. shows that at the earlier stages the common law might stand in a particular connection with the legal codes of the continent, mainly, of Francia. *Lex Salica* and *Lex Ripuaria* influenced the development of jurisprudence in Britain.

Moreover, the study of the historical context reveals that the appropriate missionary and monasterial works strengthened the links binding England to the continent in the 7<sup>th</sup>-9<sup>th</sup> centuries. The royal marriages of the Kings of Wessex and Kent stipulated the spread of the Franks' culture and language. The distribution of imports in the early Anglo-Saxon sites indicated that a wide number of communities had access to the items or materials from the continent, mainly, from Francia. The development of the sphere of medicine and maritime life clearly depicted the British-Frankish relations.

Accordingly, it can be concluded that the contacts with the continent, namely, with Francia, could facilitate the transplantation of the Frankish legal institutions as well as lexical units / terms into the Anglo-Saxon soil. It seems acceptable that the copies of the Frankish legal texts, namely, *Lex Salica* and *Lex Ripuaria* could be in circulation in England before the Norman Conquest. They might be accessible to the lawmakers, royals as well as some ecclesiastical figures.

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