The Emergence of English Commercial Law: Analysis Inspired by the Ottoman Experience

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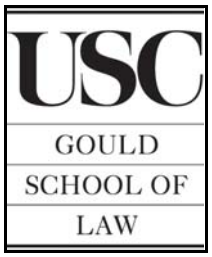

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Abstract:

Thirteenth-century England was a commercial backwater whose trade was dominated by foreigners. To accommodate and encourage foreign merchants, England modified its legal system by creating legal institutions which were available to both domestic and foreign traders. Among the most important of these institutions were streamlined debt collection procedures and mixed juries composed of both Englishmen and foreigners. By introducing institutions which treated locals and foreigners equally, England created a level playing field which enabled English merchants to become increasingly prominent in the later Middle Ages. England's ability to modernize its law was facilitated by the secular nature of English law, the representation of merchants in Parliament, and legal pluralism. Medieval England contrasts sharply with the early modern Ottoman Empire. The latter created special institutions for foreign merchants, which eventually put Ottoman Muslims at a competitive disadvantage.

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1. Introduction

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Modern developing countries often face a choice. They can attempt to modernize commercially relevant aspects of their legal and economic institutions. Alternatively, they can create new institutions, such as special economic zones, foreign direct investment incentives, or international arbitration, which facilitate the economic activity of foreign companies and investors, but leave the bulk of domestic business untouched. Both strategies have significant advantages and disadvantages. Complete modernization, probably the first best solution, is often blocked by powerful local interests. The creation of special, more limited institutions can often be a good second-best solution. Special economic zones and international arbitration can help jumpstart the domestic economy and create constituencies for more thoroughgoing reform. On the downside, by privileging those agents with access to the special institutions, they can distort economic development (Roland 2002; Blomström and Kokko 2003; Franck 2007).

Medieval and early modern nations faced similar choices in dealing with more sophisticated merchants from other nations. They could attempt to modernize their institutions to facilitate trade or set up special institutions for the benefit of foreign traders. This article argues that England and the Ottoman Empire chose different strategies to deal with more sophisticated traders, and that these choices influenced the trajectories of their domestic economies. The Ottoman government largely exempted foreign merchants from Ottoman institutions and allowed foreigners to resolve disputes almost exclusively through special institutions, such as consular courts run by foreigners or ad hoc tribunals appointed by the Sultan. Over time, these special privileges put local merchants at a competitive disadvantage. In contrast, the medieval English government adapted its institutions to meet the needs of foreign traders, but ensured that these new

institutions were also available to local merchants, who were thus able to compete on a level playing field.

In the Ottoman Empire, European merchants were generally exempt from the jurisdiction of local Islamic courts. If a case involved two Europeans, the case would be tried before a European consul (Hurewitz 1975, pp. 3, 9-10), unless both sides agreed to go to an Islamic court.. If the case involved a European and a Turkish subject who was Jewish or Christian, the case could be heard in the consular court, if the non-European consented. Turkish merchants who were members of these religious minorities often derived substantial profit from their position as intermediaries between Europeans and Turkish Muslims. In the nineteenth century, they almost always consented to consular jurisdiction so as to retain their favored status with European traders (Kuran 2004). Disputes between Europeans and Turkish Muslims involving more than 4000 aspers (a moderate sum equal to less than £10 in the seventeenth and eighteenth centuries) were heard not in ordinary Islamic courts, but rather "at the Sublime Port," that is, the Sultan's Palace (Hurewitz 1975, p. 35). In practice, this meant the cases were decided by judges specially chosen by the Sultan and thus susceptible to European influence. Finally, even in cases involving 4000 aspers or less, which had to be heard before ordinary Islamic courts, Europeans had the right to be represented by a "dragoman" (Hurewitz 1975, pp. 3, 9). While a dragoman was technically just an interpreter, in practice he was also a legal expert, whose knowledge gave his European clients an advantage over their Muslim adversaries, who were not usually represented by lawyers.

Timur Kuran argues that the near complete exemption of Europeans from the jurisdiction of ordinary Islamic courts had an ambiguous effect on economic growth in

the Ottoman Empire. On the one hand, it stimulated trade by exempting Europeans from a legal system that they perceived as biased, difficult to comprehend, and insufficiently adapted to modern commercial practices. The consular courts also exposed the Ottomans to Western legal and commercial practices, thus facilitating their eventual incorporation into Turkish law in the nineteenth century. On the other hand, by giving Europeans and their local protégés access to superior legal institutions, European legal privileges put Muslim merchants at a competitive disadvantage over the long term (Kuran 200x). In addition, the creation of separate legal systems for Europeans reduced the pressure that foreign merchants might otherwise have exerted to modernize Ottoman law and legal institutions. The exemption of European merchants from local courts may thus have delayed legal reforms, thus hindering commercial development.

In the twelfth and thirteenth centuries, England faced an economic situation similar to that of the early modern Ottoman Empire. Merchants from Southern France, Flanders, and Italy were more sophisticated than local merchants, and they dominated the export trade and royal finance. Unlike the Ottoman Empire, in fact, England was an economic backwater, whose primary export was raw wool. Nevertheless, by the mid-14th century, England began to emerge as a significant commercial power. Its primary export came to be a manufactured product (finished wool cloth) rather than a raw material. In addition, English merchants began to control the export trade and royal finance (Bolton 1980).

There were many reasons for the emergence of England as a commercial power. This article explores one generally overlooked factor. Unlike the Ottoman Empire, England modified its legal system to meet the needs of foreign merchants, rather than

allowing them to set up their own courts. Significantly, these legal institutions were available to English as well as foreign merchants, so the former were at no competitive disadvantage. English merchants could use the same courts and procedures as their foreign competitors, and their transactions were governed by the same legal principles. In addition, because they adjudicated cases involving the more sophisticated commercial practices of the foreign merchants, English judges became familiar with those practices and improved their ability to adjudicate cases involving them when, eventually, they were adopted by English merchants.

One reason why England and the Ottoman Empire took different paths might be that the English legal system was closer to the legal systems of Italy, Flanders, and Southern France than the Ottoman legal system was to that of Italy, France and other early modern European trading powers. If Italian, Flemish, and French merchants were more comfortable with the medieval English legal system, there would have been less need for modification, and desired modifications might have been incorporated into the English legal system more easily, because the systems were fundamentally similar to begin with.

Although this argument has some surface plausibility, it suffers from two very significant flaws. First, the late medieval English legal system, with its juries and writs, was fundamentally different from that of continental European cities, where judges usually rendered decisions without the assistance of laymen and where Roman law and local statutes usually grounded jurisdiction and provided legal principles. Second, and probably more importantly, pro-local bias was probably more significant than differences in legal procedure or substance. Foreigners were unpopular in medieval England.

Italians were especially disliked, because they often collected royal and papal taxes. Foreign merchants therefore had well-grounded reasons to fear that English juries and judges would favor local interests in adjudication. A key issue in any legal system involving long-distance trade is therefore the creation of mechanisms to overcome local bias, which may be a problem no matter how similar the relevant legal systems.

The bulk of this article examines two legal institutions that facilitated the commerce of foreign merchants starting in the late thirteenth century, but which were also available to local English merchants. Because they treated local and foreign merchants equally, they created a level playing field between foreign merchants and Englishmen making possible the eventual triumph of English merchants. The first institution is the mixed jury. In litigation between Englishmen and foreigners, the jury was composed half of Englishmen and half of foreigners. The second institution is streamlined debt collection. If the debt was enrolled in a special royal register, a creditor could swiftly imprison the debtor and seize his assets.

Of course, these two legal institutions merely beg the more fundamental question of why England but not the Ottomans adopted them. This article suggests three possible explanations. First, the predominantly secular nature of English law made legal change easier. Second, the precocious nature of English representative institutions, especially the representation of boroughs (cities and towns) in Parliament, ensured that the interests of local merchants were taken into account. Third, England had a particularly benign form of legal pluralism. Commercial litigation could take place in a variety of courts. Thus, merchants often had the ability to choose among courts according to their suitability to

commercial cases. In addition, at times, the existence of courts with overlapping jurisdictions created competition to create laws and procedures that promoted commerce.

2. Two Institutions

This section considers two institutions, the mixed jury and streamlined debt procedure. Both were designed to help foreign merchants, but both did so in a way that integrated foreign merchants into the English legal system on an equal footing with their English counterparts.

2.1. The Mixed Jury

One of the biggest problems facing foreign merchants was (and remains) biased adjudication. As noted above, this was an especially serious problem in 12th and 13th century England, where Italian merchants were extremely unpopular, because of their role in collecting royal and papal taxes. The problem of local bias was exacerbated by the use of trial by jury, which could easily provide a vehicle for the translation of personal biases into legal decisions. The problem of bias, however, was largely solved in England by the regular use of mixed juries. In cases involving non-English parties, aliens served as jurors. If the case involved two aliens, at least half the jurors were aliens. If the case involved one Englishmen and one alien, the jury was composed of six Englishmen and six aliens. Where possible, alien jurors were from the same nation or city as the alien party. For example, in a case involving an Englishman and a Venetian, the jury would, if possible, be composed of six Englishmen and six Venetians. Because of the small size of foreign merchant communities in medieval England, it was not always possible to recruit six jurors from the relevant foreign city or nation.

Accordingly, in a case involving an Englishman and a Venetian, the jury might be composed of six Englishmen, two Venetians, one Genoese, and three Frenchmen. This mixed jury was later called the jury *de medietate linguae* (the jury of the half-tongue), although that term was not used in the Middle Ages (Oldham 1983, pp. 167-68).

The practice of mixed juries goes back at least to the early 13th century, when Jews who were litigating in royal courts sometimes made special payments to have their cases decided by a half Jewish, half Christian jury. Later, Gascon and Hanseatic merchants were given similar privileges (Constable 1994, pp. 20-21). Ordinances made by the King while London was under his direct control in the 1280s gave foreign merchants in London the right to mixed juries in most cases, and, in the 1303 *Carta Mercatoria*, Edward I extended the right to all foreign merchants in England (Tucker 2007, pp. 34-35).

The case below, from 1309, provides a vivid illustration of the operation of the mixed jury:

> Richard le Fleytur of Chipping Norton was attached in London to answer Erneric de Friscobaldis and his partners, merchants of the Frescobaldi partnership of Florence, on a plea that he pay £55 which he owes to them. And the same merchants proffered a certain writing which they say is the deed of that Richard, which states that the aforesaid Richard acknowledged himself to be bound to Betinus de Frescobaldis and Coppus Cottene and their partners in the Frescobaldi partnership for £55 for twenty-two striped cloths from Ghent bought from them in the Boston fair to be paid to the same Betinus or his partners in the Friscobaldi partnership or to anyone bearing this letter, at London, in the year 1304.… and

they say that the aforesaid Richard has unjustly detained from them the aforesaid £55 …. to the loss of those merchants £40.

And the aforesaid Richard comes and denies all wrong, etc., and he requests a view of the aforesaid writing. And, when he has had this, he well acknowledges that it is his deed, but he says that this ought in no respect harm him, because he says that, on the day of the making of that writing, the same Richard was imprisoned at Boston in the King's prison, at the prosecution of the said merchants. And, while he was thus in prison, he made the aforesaid writing and sealed it through the pressure of prison. Therefore he is not bound to answer for this debt.

And the aforesaid merchants say that the aforesaid Richard made the said writing and signed it of his own free will and out of prison. …. Therefore … an order is sent to the sheriff of Lincolnshire that he summon ... 12 [jurors], both Lombard merchants and men of Boston to certify, etc….

And the inquisition [jury] comes, both Lombards and other men of this kingdom, according to a charter of King Edward [I], father of the current King [Edward II], which the said merchants proffered and in which it is stated that in every inquisition to be taken between Lombards and other men, whosoever they might be, that one half of the inquisition is to consist of Lombards and the other half of men of England.

The jurors say, by their oath, that the aforesaid Richard made and executed the aforesaid writing by his good and free will and out of prison, and that the aforesaid merchants by reason of the unjust detention of the aforesaid debt had

> loss to the value of £20. Therefore a day is given to the aforesaid merchants … to hear their judgment, etc. Afterwards … the aforesaid merchants asked leave to withdraw from the writ…. (Hall, 1930, pp. 79-80).[1]

According to this account, Richard, an Englishman, bought cloth on credit from Friscobaldi merchants at the Boston fair. Richard was also the king's weigher, perhaps at the Exchequer. The Frescobaldi were a prominent Florentine merchant partnership, which, in addition to dealing in textiles, loaned money to Edward I and II, and collected papal revenue. Richard later defaulted. The Friscobaldi brought suit in Exchequer, a royal court, and proffered a loan document as proof. Exchequer probably had jurisdiction because of Richard's connection to that court, or perhaps because of the close connection between the Friscobaldi and royal finance. Richard argued that the loan document was invalid, because it was produced under duress while he was in prison. The judge ordered the sheriff of Lincoln to summon a jury, half of whom would be Northern Italians ("Lombards") and half Englishmen from Boston. At trial (and probably earlier, at the pleading stage), the Friscobaldi produced a copy of Edward I's *Carta Mercatoria* and claimed their right to a mixed jury. The jurors rendered a verdict which supported the Florentine merchants' principal assertion, that Richard signed the loan document freely, without the duress of imprisonment. As was customary, a date was set for the rendering of the formal judgment. On that date, the plaintiffs withdrew their suit, presumably because they had received payment in the interim or otherwise settled the case.

[1] The translation roughly follows Hall's, but some changes were made to bring out commercially significant aspects of the case. For example, Hall translates "ad respondendum Ernerico de Friscobaldis et sociis suis, mercatoribus de Societate Froscobaldorum de Florencia" as "to answer Erneric de Friscobaldis and his fellows, merchants of the Society of Friscobaldi of Florence." I have rendered that phrase as "to answer Erneric de Friscobaldis and his partners, merchants of the Frescobaldi partnership of Florence."

The case illustrates how a mixed jury could help to counteract the danger of bias against foreign litigants. The Friscobaldi partners were able to prevail in an English court, even though they were foreigners, and even though the debtor was a royal official. Nevertheless, it is important to note that the mixed jury helped insulate foreign merchants from local prejudice without putting local merchants at a disadvantage. Foreign merchants were granted a mixed jury, not a jury composed entirely of aliens.

Several other aspects of this case are noteworthy. First, the loan document seems to have been a bearer note. The debt seems to have been owed originally to Betinus de Friscobaldis and Coppus Cottene and their partners in the Frescobaldi partnership. Nevertheless, anticipating that they might not be in the best position to collect on the loan, perhaps because they might return to Italy, these merchants drafted a loan document which obligated Richard to repay not only Betinus, but also other members of the Friscobaldi partnership, or "anyone bearing this letter." This probably explains why the plaintiff in this case was Erneric de Friscobaldis, not Betinus or Coppus.[2]

[2] Whether this case actually involved a bearer note is a matter of controversy. James Rogers, the most recent historian of English bills and notes, argues that thirteenth-century documents including the phrase "to A or bearer" were not transferable notes but rather an instrument used by the original creditor to designate a representative to collect the debt on his behalf (Rogers 1995, pp. 45-48, 173-74). Rogers's primary arguments in favor of this more limited interpretation are that (a) the judgment in such cases is often rendered in favor of both the original creditor and the bearer, and (2) litigation about such documents tends to focus on the transaction (that is, on, whether the debtor actually owed money to the original creditor) rather than on the document itself. It is noteworthy that the application of these arguments to this case is ambiguous. Although judgment was not formally given, the date of judgment was given to "the aforesaid merchants," presumably "Erneric de Friscobaldis and his partners." The original creditors, "Betinus de Frescobaldis and Coppus Cottene," are not specifically mentioned, although the phrase "aforesaid merchants" might include the entire Friscobaldi partnership. As to Rogers's second argument, the case does seem to hinge on the validity of the document, rather than on the underlying transaction (e.g. whether Richard owed £5 for the twenty-two cloths that were allegedly sold to him). On the other hand, Richard's duress argument could be seen as implicitly denying that he had received the cloths, denying that the cloth was worth £55, or asserting that he had already paid the debt. In any case, even today, duress is a valid defense in a negotiable instrument case, even if the plaintiff received the instrument in good faith and was completely ignorant of the duress. So this case does not test whether transfer of the note reduced the defenses available to the debtor, as might be true of negotiable instruments today.

In addition, the bearer aspect of the note may not have been necessary for resolution of the case, because the "partners in the Frescobaldi partnership" are mentioned in the original note and as plaintiffs in

The fact that the Florentine merchants claimed £40 in "loss" as a result of non-repayment of the loan is also noteworthy. Because of the Christian ban on usury, loan documents could not explicitly claim interest. Nevertheless, it was common to claim "damages" for late payment, which were functionally equivalent to interest. The jury did not grant the entirety of the £40 loss claimed, but they did award £20. This is equivalent to a compound annual interest rate of about seven percent. Seven percent is low by medieval commercial standards, but it is significant that any interest was awarded.

The case is also noteworthy for the way that it exposed English judges and lawyers to the commercial practices of the sophisticated Florentine merchants, including the operation of a large partnership and possibly the use of bearer notes. This personal exposure of judges and lawyers to business practices was particularly important in the middle ages, because legal reporting was very uneven. The official record of cases was not published, and usually contained only the names of the parties, procedural notes, and who won. It did not ordinarily contain a description of the underlying transaction or of the legal reasoning used to resolve the case (Baker, 1979, pp. 303-4), Unofficial reports often contained more pertinent information, but only some cases were reported and circulation of reports was erratic and frequently delayed by many years (Baker, 2002, pp. 178-83). The fact that commercial cases involving foreign merchants were tried before ordinary English judges, with the assistance of ordinary English lawyers, thus provided an important channel for the dissemination of commercial techniques. In contrast, commercial cases involving foreigners in the Ottoman Empire were usually tried either in

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this case, so Erneric might have been able to sue simply as a partner rather than as a bearer of the note. On the other hand, if all that was envisioned by the note was that fellow partners could sue to recover the debt, it would not have been necessary to use the phrase "or to anyone bearing this letter" in the first place. Perhaps the bearer aspect enabled Erneric to sue without proving that he was a member of the partnership.

consular courts (where there were neither local judges nor local jurors) or in ad hoc tribunals in the Sultan's Palace. No reports survive of cases in these ad hoc tribunals, and it is likely that none were ever composed. It is unclear whether these courts were staffed by administrators, professional judges, or some combination of the two.

2.2 Streamlined Debt Collection

Another problem facing foreign merchants was debt collection. Merchants often extended credit to purchasers. In collecting debts, merchants often had to choose between local and royal courts, both of which had significant drawbacks. Local courts could be fast, but had only local enforcement powers. Royal courts had broad enforcement powers, but were usually comparatively slow. Avner Greif has documented one solution to this problem, the community responsibility system, which enabled foreign merchants to collect their unpaid debts from any English merchant who happened to be in the foreign merchant's home city. Nevertheless, as trade expanded, the community responsibility system became increasingly impractical, as it imposed liability on merchants who had no connection to the original obligation and, in addition, led to retaliatory trade wars (Greif 2006). In its place, England enacted a series of statutes that facilitated debt collection.

The first legislation was the statute of Acton Burnell (1283). It provided that the creditor and debtor could appear before the mayors of London, York, or Bristol to have a debt enrolled on a special register. The creditor was also given a bond which bore a special royal seal. If the debtor repaid the debt, the bond would be returned or cancelled. If the debt had not been paid by the due date, the creditor would take the uncancelled

bond to the mayor for enforcement. Without the need for a lawsuit or even a summons to the debtor, the mayor would immediately seize the debtor's movable goods and urban property, procure orders for the seizure of the debtor's property in other places, and, if these were insufficient, imprison the debtor. Later statutes substantially amended these procedures. For example, the Statute of Merchants (1285) expanded the number of cities and towns which could enroll debts. It also provided for immediate imprisonment of the debtor, before the search and seizure of assets had begun (Plucknett, 1949, pp. 136ff).

The preambles to these statutes make clear that their purpose was the encouragement of foreign commerce. For example, the 1283 statute of Acton Burnell begins:

> For as much as Merchants, which heretofore have lent their Goods to diverse persons be greatly impoverished, because there is no speedy Law provided for them to have Recovery of their Debts at the Day of Payment assigned; and by reason hereof have withdrawn to come into this Realm with their merchandises, to the damage as well of the Merchants, as of the whole Realm…. (Statutes of the Realm, I.53)

Although the claim of foreign merchant poverty is certainly exaggerated, the problem of debt collection was real, and Parliamentary interest in resolving it for the benefit of commerce is palpable. Also noteworthy is the concern with foreign merchants who, it was feared, might otherwise refrain from coming to England.

The following case, from 1297, and illustrates the operation of these statutes:

> Because Thomas Aumerey of the town of Brixworth acknowledged before Thomas Sely and William of Benham, citizens of London, and John of Bakewell

> the King' s clerk, deputed to receive recognizances of debtors in the Boston fair, that he owed Tydemann le Swerte and Elyas Russel, citizens of London, £43, 8 s., 6 p., … and he has not paid them …, the sheriff was ordered to take the body of the aforesaid Thomas and keep him safely in the King's prison, according to the form of the King's statute put forth at Acton Burnell and Westminster concerning recognizances of the sort, until satisfaction be fully given to the aforesaid Tydemann and Elyas for the aforesaid debt. And the sheriff, by virtue of the King's order, took the aforementioned Thomas to be kept in the aforesaid form of custody… And the same Thomas after more than a year, fully satisfied the aforesaid Tydemann and Elyas in respect of the whole debt aforesaid. And nonetheless, he is still detained in the King's prison… [The sheriff is ordered] to cause to come before the King … the aforesaid Tydemann and Elyas to account with the same Thomas for the goods and chattels of him, Thomas, received on the aforesaid occasion (Hall 1932, pp. 12-13). [3]

In this case, Tydemann le Swerte and Elyas Russel loaned Thomas Aumerey a large amount of money. The debt was acknowledged before officials authorized to record debts at the Boston fair. Thomas defaulted and was imprisoned in accordance with the Statute of Acton Burnell and subsequent statutes. As envisioned by those statutes, there is no evidence that Thomas was given a trial or had other opportunity to contest his liability prior to his imprisonment. While in prison, he paid his debt, but nonetheless remained in prison. Thomas then brought suit, and the king ordered the sheriff to summon the relevant parties to determine whether Thomas should be released.

[3] The translation roughly follows Hall's, but the author made a few changes.

In addition to illustrating the draconian procedure envisioned by the statutes for the collection of debt, and its effectiveness, the case also shows how the statutes, which were designed for the benefit of foreign merchants, came to benefit English merchants as well. In this case, the plaintiffs who availed themselves of the streamlined debt collection procedures were citizens of London. As with the mixed jury, although streamlined debt collection was an institution designed to encourage foreign trade, it did so by leveling the playing field rather than tilting it in favor of the foreign merchant.[4] Although the statute was designed with the interests of foreign merchants in mind, its remedies were available also to English merchants, who could and did use it to collect debts owed by foreign and local merchants.

3. Three Possible Explanations

The existence of these two institutions – mixed juries and streamlined debt collection -- helps explain the ability of the English system to accommodate foreign merchants without exempting them from local courts. Nevertheless, one must also ask why the English legal system was able to develop institutions which accommodated foreign merchants, while the Ottomans decided to create a separate legal system for foreign traders. This section explores three potential explanations: the relationship between religion and law, the development of representative institutions, and legal pluralism.

[4] In one respect, the statutes may have favored foreigners over locals. Englishmen were more likely to have the bulk of their property in England, while Italians and other foreigners were more likely to have the bulk of their assets overseas. As a result, the statutory procedure is more likely to have been effective against English debtors than against foreign debtors. Nevertheless, to the extent that English merchants were competing with foreign merchants, and both were primarily middlemen who extended credit to producers and others farther up the supply chain, the statute put English and foreign merchants in the same position vis a vis their English debtors.

3.1. Religion and Law

That religion plays (and continues to play) an important role in shaping legal institutions seems, on the one hand, incontrovertible, and, on the other hand, rather hard to demonstrate. It is certainly not the case that Islam is or was inherently anti-commercial or Christianity inherently pro-capitalist. Both, for example, had prohibitions on interest in the medieval period. A creditor who collected more than the original loan amount was a usurer, even if the interest rate were a moderate three or five percent. Nevertheless, there are important differences between the two religions which may have had a significant impact on the development of commercial law.

The most important difference may be that Islam was (and is) a religion of law. Religious law (*sharia)* regulated not just worship and marriage, but also property, contract, and tort. Religious courts were the primary fora for commercial litigation, and religiously trained judges were the primary adjudicators. Christianity, in contrast, had a much more limited legal ambition.[5] Canon (ecclesiastical) law regulated primarily the clergy, worship, ecclesiastical property, and marriage (Greif 2006). There were separate ecclesiastical and secular courts in England from at least the 11th century. Common law courts and Parliament had undisputed authority to make, change, and enforce laws and procedures relating to commerce. The institution of mixed juries and streamlined debt collection procedures are just two of the many examples of innovation and change in commercial law which were made by Parliament, the king, or secular judges without any hint of influence or interference from religious authorities. Christianity certainly had

[5] This paragraph refers primarily to Western Christianity – Catholicism and later Protestantism. Orthodox Christianity's relationship to law and the state was somewhat different.

something to say about the performance of contracts, and ecclesiastical courts did sometimes adjudicate ordinary contractual disputes. But contractual enforcement was never seen as the exclusive province of ecclesiastical jurisdiction. Moreover, as secular courts expanded their jurisdiction, ecclesiastical courts ceded jurisdiction over contract litigation without resistance (Helmholz 2004, pp. 108ff, 358ff).

The religious nature of Islamic law may have been beneficial in the early Middle Ages. The sharia, especially its provisions relating to commercial partnerships, seems to have been particularly well adapted to the conditions of early medieval trade (Harris 200x). The suitability of the early sharia to commerce may reflect the secular occupations of many of the early Islamic jurists (Cohen 1970). In addition, by emphasizing the brotherhood of all Muslims and by endowing contractual performance with religious significance, Islamic law encouraged the development of social norms favorable to commercial activity. The fact that Islamic law provided a relatively uniform system of law governing a broad swath of territory, from Spain in the West to India in the East, provided the legal predictability prized by merchants.

Nevertheless, the religious nature of Islamic law became problematic in the more dynamic context of the later Middle Ages and early modern period. It was difficult to adapt religious law to new business needs and techniques, whether they be insurance, lending at interest, or fair adjudication of disputes with non-Muslims (Rubin 2008). A particular problem was the absence of legislative authority in Islamic jurisprudence (Tyan 1960). Legal change, therefore, had to be accomplished through interpretation rather than statute. Because of the absence of a recognized institutional hierarchy of interpreters, it was easier to exploit or create legal loopholes than to change the law. Legal change,

when it occurred, was slow and incremental. Moreover, in contrast to the earlier period, Islamic judges and jurors of the later Middle Ages and early modern period tended not to come from commercial backgrounds.

In this context, it was easier to let foreigners use their own legal system than to change or adapt the sharia. As a matter of practice, of course, the sharia did change, and strategies were found to avoid apparently strict prohibitions on lending at interest (Rodinson 1973). Nevertheless, as Timur Kuran points out, strategies to avoid or circumvent Islamic principles imposed substantial transaction costs and thus were not substitutes for explicit change in the law (Kuran 200x).

3.2. Representative Institutions

Another important difference between England and the Ottoman Empire was the very precocious development of representative institutions in England. Starting in the late thirteenth century, Parliament began to assert power over legislation and taxation. Who was entitled to participate in Parliament was in substantial flux until at least the mid-fourteenth century. Nevertheless, it is notable that representatives from the boroughs (cities and towns) were often summoned in the thirteenth century, and with regularity from the early fourteenth. For example, representatives from twenty-one towns, including London, Bristol, and York, were summoned to the 1283 Parliament which passed the first statute streamlining debt collection (McKisack 1932, pp. 6-7).[6]

[6] Whether the borough representatives were responsible for the debt legislation is not known. Although representatives from 22 boroughs were summoned, it is not known how many were actually present when the legislation was drafted and discussed. The passage of this legislation is especially obscure, because the 1283 Parliament met in two phases. The first phase occurred in Shrewsbury and probably included everyone. The statute on debt collection was finalized in the second phase, which was held at Acton Burnell, a nearby village where the chancellor had a residence. It is probable that a relatively small number of representatives participated in this second phase. (Butt 1989, pp. 136-37).

Commercial representation in Parliament facilitated legislation that fostered commerce, such as the legislation on debt recordation discussed above. Because they were represented, merchant interests were heard and acted upon. Of course, unlike the Italian cities, which were governed exclusively by the merchant class, merchants were only one of several interests represented in Parliament. Nevertheless, their power was sufficiently strong to ensure legislation and taxation policies conducive to trade (Greif 2005).

In contrast, the Ottoman Empire had no representative institutions. The closest analogue to the English Parliament was the Imperial Council (*divan*). Depending on the power of the Sultan, the Council either advised the Sultan on policy and decrees, or it formulated policy and enacted decrees in the Sultan's name. It was composed solely of officials – viziers, military judges, chancellor and treasurers. Unlike the English Parliament, no representatives of local communities or towns were summoned to participate (Imber 2002, pp. 154-76).

3.3 Legal Pluralism

In England, as in many pre-modern societies, a large number of institutions provided adjudicatory services—the king and his bureaucracy, the church, cities, and feudal lords, to mention just a few. Legal pluralism can be good or bad. It can be bad if it privileges one group of merchants over another, or if it encourages wasteful strategic behavior. It can be beneficial, if it gives parties the ability to choose a forum offering better law. Different courts might adjudicate disputes according to both different substantive law and different procedure, and such differences might matter. Some procedures might be cheaper or faster than others, and the substantive law enforced by

some courts might be better at encouraging economically efficient contracting behavior. To the extent that parties have the ability and incentive to choose a court which offers better law, legal pluralism can facilitate commerce. In addition, over time, jurisdictional competition can sometimes facilitate the development of more efficient law. For example, if court fees generate income for judges or other legal actors, and if litigating parties have incentives to choose courts with better law, courts will have an incentive to improve their procedure and ensure that the legal principles enforced accord with commercial needs.

English legal pluralism was mostly beneficial.[7] Most cities had their own courts, and merchants could usually choose which city to do business in. Since commerce brought revenue to the city, each city had an incentive to improve its courts so as to attract more business. Similarly, even within the royal court system, there were multiple courts and each developed distinctive law in order to compete for a larger portion of judicial business (Klerman 2007). On a national scale, the king and Parliament were aware that foreign merchants could divert their trade to other countries, and so developed national law to encourage foreign commerce. The legislation on debt collection procedure discussed above recognized that England must compete with other nations for foreign commerce and demonstrates the salutary effects of that competition.

Even within a particular court system, pluralism might flourish. So for example, English royal courts were sometimes directed to adjudicate cases according to the "law merchant" instead of the ordinary principles of the common law (Kadens 2004). By doing so, the courts were able to resolve cases with procedures and substantive legal

[7] In this respect, England may have been distinctive even within Europe. For example, in France, legal pluralism seems mostly to have fostered costly and duplicative litigation in multiple fora, without any beneficial effect on the development of the law.

principles more suitable to commercial cases. In addition, adjudication under the law merchant in the ordinary courts, rather in special merchant courts, allowed common law judges to learn international merchant customs, which facilitated their eventual incorporation into the common law.

Legal pluralism was also present in the Ottoman Empire. Christian and Jewish minority communities were able to run their own courts, and, Christians and Jews could choose to litigate either in the courts of their own community or in the Islamic courts, as long as the case did not involve Muslims. Europeans also were allowed to set up their own court system, and, in some circumstances, Christian and Jewish Ottoman subjects could litigate in the European courts as well. In contrast, Muslim subjects were allowed to litigate only in the Islamic courts. As a result, in effect, there was legal pluralism only for members of the Christian and Jewish minority communities. For them, legal pluralism provided the substantial commercial advantage of being able to litigate in courts which were most suited to commercial transactions.[8] In the Middle Ages, this meant that Christians and Jews often litigated in Muslim courts, but in the early modern period it meant that they often availed themselves of the European consular courts. The effect of this legal pluralism, therefore, was to help the religious minorities and to disadvantage the bulk of Ottoman subjects, who had to litigate in the Islamic courts (Kuran 2004).

4. Caveats

[8] For example, the Islamic courts did not give full credit to written documents, did not recognize corporations as legal persons, and were unfamiliar with modern accounting practices. See Kuran 200xx

So far, this article has argued that the creation of legal institutions which brought the disputes of foreign merchants into the ordinary English courts facilitated the development of English commerce. Nevertheless, it should be noted that there are three potential problems with this argument.

First, the English did grant the Hanse (German merchants) the right to adjudicate disputes in their own courts. It is unclear, however, whether this right applied only to disputes in which all parties were Hanseatic merchants, or whether it applied even when one party was English (Compare Dollinger, 1970 p. 187 to Tucker, 2007, p. 285). The fact that Hanseatic merchants appear very rarely in London court records supports the latter interpretation. It is also unclear why this right was granted to the Hanse, but not Italian or Southern French merchants. On the one hand, the granting of jurisdictional rights to the Hanseatic merchants supports the general argument in this article by showing that it was not implausible for English to have granted similar rights to Italian merchants. Perhaps exempting the Hanse from the ordinary courts did not unduly hinder the development of English commerce, because the Hanse merchants were not as sophisticated as the Italians, so there was less for the English to learn from them (Lopez, 1976, p. 118). So the fact that English judges were not exposed to the customs and practices of the Hanseatic merchants did not hinder the development of English commercial law.

Second, the immediate cause of the shift in English exports from raw wool to cloth was probably tariff policy. Starting in the fourteenth century, the export of raw wool was taxed much more heavily than that of woolen cloth. Similarly, English dominance of the export trade was facilitated by legislation which discriminated against

foreign merchants (Power 1941; Bolton 1980). Nevertheless, as the failure of protectionist policies in so many modern developing countries shows, tariffs and discriminatory legislation lead to the expansion of local commerce only when appropriate institutions are in place. It is only because English merchants already had appropriate institutions and commercial experience that they could benefit from the opportunities that discriminatory tariffs and policies provided.

Third, so far I have been unable to trace the movement of any particular commercial practice (for example, insurance) from foreign use to litigation in English courts, to domestic use. This probably reflects the inadequacy of medieval legal records. It may also reflect the fact that basic debt collection was the only essential legal service.

5. Concluding Remarks

The nonreligious character of English law, legal pluralism, and the representation of commercial interests in Parliament facilitated legal institutions—including mixed juries and streamlined debt collection—which made England attractive to foreign merchants while keeping litigation in ordinary English courts. They thus stimulated the development of commercial law and created the conditions under which English merchants could eventually outcompete foreign merchants.

The English experience suggests the possible long-term advantage of modernizing domestic institutions rather than creating special institutions for foreigners. Institutions which serve foreign and domestic parties enable courts and other government officials to learn about more sophisticated foreign practices. In addition, the involvement of both

locals and foreigners in these institutions provides political pressure to keep them fair and efficient.

The Ottoman comparison also helps understand Islam's role in underdevelopment. During the early middle ages, the Islamic conquest of large parts of the globe and the relatively commerce-friendly content of Islamic law provided an important stimulus to trade and economic activity. A relatively uniform law of partnerships and contracts backed by both state enforcement and religious ideology provided important legal infrastructure for long-distance trade. Nevertheless, by embedding commercial law in religious law, Islam made it more difficult to adapt law to changing economic conditions. As western European merchants began to develop new techniques during the "commercial revolution" of the later middle ages, the delegation of jurisdiction over the interpretation of commercial law to a decentralized cadre of Islamic judges and scholars inhibited adaptation and innovation. Moreover, the idea that Islamic law was largely personal (applying to Muslims but not Christians or others) made it easier to respond to the needs of foreign merchants by, in essence, creating a special legal system for them, rather than modernizing the legal system which served the bulk of Ottoman subjects.

The analysis here also provides an illustration of the benefits of a comparative approach. English legal and economic historians have generally taken for granted the fact that the English legal system provided a relatively level playing field for English and foreign merchants. Comparison to the Ottoman experience, however, suggest that a level playing field is a key institution which requires explanation.

More generally, this paper highlights the importance of institutions. England's experience highlights the positive role of representative institutions. The representation of merchants in Parliament helped ensure the formulation of legislation and policy which did not discriminate against (and often favored) local merchants. While North and Weingast have famously argued for the importance of representative institutions to economic growth in the seventeenth and eighteenth centuries, the positive role of representative institutions in the middle ages has been largely neglected (North and Weingast 1989).

More generally, what mattered for commerce was not primarily religious or cultural beliefs, but the institutions which mediated between beliefs and actions. The religious doctrines of early medieval Christianity and Islam were equally hostile to interest, and early Islam was generally more favorable to commerce. Nevertheless, because England, and to some extent other western European countries, developed legal institutions which were at least partially autonomous from religious institutions, commercial law could develop in ways that, in the long run, favored economic growth. In contrast, until the reforms of the nineteenth century, commercial disputes in the Ottoman Empire were resolved by religiously trained judges who applied religious law (sharia). These institutional differences had lasting effects on economic development.

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