

**“The Logic of Mediterranean
Commercial Treaties:
The Middle Ages to World War I”**

Chapter 12 of an unpublished manuscript:

Islam and Economic Underdevelopment
Legal Roots of Organizational Stagnation in the Middle East

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Contents

Preface

PART I: INTRODUCTION

1. The Puzzle of the Middle East's Economic Underdevelopment
2. Analyzing the Economic Role of Islam

PART II: ORGANIZATIONAL STAGNATION

3. Commercial Life under Early Islamic Rule
4. Stagnation of Islamic Commercial Organization
5. Retarding Influences of the Islamic Inheritance System
6. The Absence of the Corporation in Islamic Law
7. Barriers to the Emergence of a Middle Eastern Business Corporation
8. Credit Markets without Banks

PART III: THE MAKINGS OF RELATIVE BACKWARDNESS

9. The Islamization of non-Muslim Economic Life
10. The Ascent of the Middle East's Religious Minorities
11. Origins and Fiscal Impact of the Capitulations
- 12. Foreign Privileges as Facilitators of Impersonal Exchange**
13. The Absence of Middle Eastern Consuls

PART IV: CONCLUSIONS

14. Did Islam Cause Underdevelopment?

Bibliography

Index

12

Foreign Privileges as Facilitators of Impersonal Exchange

On May 9, 1665, Mehmet bin Mahmut, a Baghdad merchant, sued Heneage Finch, the English ambassador to the Ottoman Empire, in an Istanbul court. A group of English merchants, complained Mehmet, would not repay a debt. The record is silent on why the ambassador was sued, rather than the merchants accused of default.¹ When the trial began, the ambassador showed the kadi the text of an Ottoman-English treaty, which stipulates that in cases involving even one trader operating under the English flag neither claims nor witnesses may be heard in the absence of documentary support (*hüccet*). Reminded of this agreement, the kadi asked Mehmet to prove his claim through written evidence. Mehmet replied that he lacked documentation, prompting the judge to throw out the case.²

Had the alleged defaulters been Ottoman subjects, Mehmet would not have been required to furnish documentary support for a debt contract. Under the prevailing interpretation of Islamic contract law, oral agreement was sufficient to validate the terms of a loan. By contrast, in English courts the trend was toward rejecting oral financial claims, unless backed by documentation. At the time of Mehmet's lawsuit against Finch, centuries of controversy over the relative merits of oral and written evidence was about to make the leading categories of unwritten contracts unenforceable. The coup de grâce would come in 1677, with the imposition of a "Statute of Frauds."³ Evidently in England business was becoming less personal, and the courts were making the requisite procedural

¹ Finch had probably provided surety for the debt. Under his tenure (1660-69) English representatives obtained the right to guarantee the liabilities of English subjects [Kütükoğlu, *Osmanlı-İngiliz İktisâdî Münâsebetleri*, p. 32].

² Istanbul 15 (1665), 69/2. Such cases are not common, but they span many decades. Three decades later, for instance, there was a lawsuit that pitted Ishak veled-i Abraham, a Jewish merchant, against the Englishman "Aved" (possibly Avery). Ishak appeared before an Islamic court in Hasköy, at the time a largely Jewish neighborhood, to make Aved settle a debt of another Englishman, a merchant. Aved, claimed Ishak, had agreed to serve as surety to his conational. At the start of the trial, Aved referred to a decree by Sultan Mehmet IV (r. 1648-87) and the supportive opinions (*fetvas*) of two of his chief religious officers (*şeyhülislams*). According to the decree, said Aved, a surety claim involving a foreigner must be certified through a legally valid document. Learning that Ishak had no documentation, the kadi made him to drop the case [Istanbul 23 (1696), 7/3].

³ Klerman, "Jurisdictional Competition," pp. 8-9, 12-13. By that time it had become customary for debtors to get a written receipt when a loan was repaid, to protect themselves against fraudulent allegations of default.

adjustments.

Our 1665 case thus suggests that Ottoman sultans of the late seventeenth century allowed trials involving English traders to accommodate the ongoing legal transformation in England. In the face of foreign demands, they were beginning, in effect, to concede that “impersonal exchange,” the hallmark of modern economic relations, requires a different institutional framework than “personal exchange.”⁴ Written contracts help to provide impartial justice in setting where enforcement mechanisms based on personal relations are ineffective. It is for this reason that the requirement constituted a step toward impersonal exchange and, hence, economic modernization. The requirement that doomed Mehmet bin Mahmut also had a downside, however. Limited as it was to cases against foreigners, it also contributed, this chapter will show, to the unfolding economic marginalization of the Middle East’s Muslims and the region’s economic retardation.

Foreign complaints about Islamic courts

In the correspondence of foreign merchants doing business in the Middle East under the capitulations, a frequent theme is that Islamic courts, which litigated many of their disputes with natives, were biased against foreigners.⁵ There is nothing surprising here. For one thing, the traditional procedures of Islamic courts favored Muslims. For another, all over the world courts of the time favored local interests, and foreign litigants suffered also from linguistic handicaps, inadequate local knowledge, and limited connections. But whatever the nature of local favoritism in the Middle East, there is no evidence that it grew over time. Two other issues became increasingly significant over time: the predictability and quality of adjudication.

As western legal systems developed, foreigners found it increasingly difficult to comprehend the logic behind kadi verdicts. Arbitrariness is the key characteristic of what, centuries later, Max Weber would characterize, condescendingly, as “kadi-justice.”⁶ Like the uneasiness of the western mercantile community, Weber’s relevant scholarship rested on superficial knowledge. In principle,

⁴ The movement from personal to impersonal exchange is a critical ingredient of economic growth and modernization. See North, *Process of Economic Change*, pp. 84-85, 119; and Greif, *Institutions*, chap. 10.

⁵ Masters, *Origins of Western Dominance*, pp. 65-68.

⁶ Weber, *Economy and Society*, vol. 2, pp. 976-78. “Kadi-justice knows no rational ‘rules of decision,’” he writes (p. 976).

kadi decisions were based on intricate legal doctrines, and studies of Islamic court records reveal much consistency in practice. Nevertheless, the key doctrines guiding kadi decisions dated from the early Islamic centuries.⁷ The ensuing doctrinal stagnation ensured that foreigners from institutionally dynamic societies would find them increasingly alien to their daily experiences.⁸ In addition to falling legal predictability, foreigners were bound to perceive losses in the quality of kadi verdicts. This is because legal training in the traditional Islamic mode was becoming increasingly inadequate for understanding exchanges involving new business techniques and organizational forms.

The advantages of adjudicating disputes in alternative courts could have grown, then, even as anti-foreign biases remained constant. Indeed, as the economic institutions of the two regions diverged, foreign calls for immunity from Islamic justice grew louder. Successive capitulations responded to the growing demand by broadening the range of cases exempt from the jurisdiction of Islamic courts.

It is relevant again that in Muslim-governed territories anyone, including foreigners, could use Islamic courts. Thus, even foreigners sometimes registered contracts in Islamic courts and even a share of the disputes among themselves came before a kadi.⁹ As with minorities, this right undermined another right: legal autonomy in intra-communal affairs. The problem, discussed earlier in interpreting the economic performance of indigenous minorities, was twofold. First, losers of consul-adjudicated lawsuits could reopen the case before a kadi, whose rulings trumped those of other courts. Second, the right to Islamic adjudication remained even in respect to contracts based on another legal system, which rendered legally unenforceable whatever kadis might fail to understand or find objectionable. All commercial contracts of foreigners were subject, therefore, to opportunistic behavior. In stages, the capitulations sought to enhance the credibility of these contracts. They did so by subjecting Islamic courts to rules that enabled foreign merchants to do

⁷ Vogel, *Islamic Law*, chaps. 1-2, especially pp. 15-23.

⁸ Weber correctly identifies procedural unchangeability as harmful to the quality of kadi judgments: “The more strongly the religious nature of the *Kadi*’s (or similar judge’s) position is emphasized, the more arbitrary—that is, less rule-bound—will the judgment of the individual case be within the sphere where it is not fettered by sacred tradition.” (*Economy and Society*, vol. 2, p. 978). However, there is no necessary connection between attachment to tradition and lack of rationality.

⁹ For instance, Istanbul 15 (1665), 72a/4; Galata 138 (1686), 31b/3; Galata 151 (1691), 9a/2, 9a/3. See also Goffman, *Izmir*, p. 125; and Ekinçi, *Osmanlı Mahkemeleri*, pp. 97-98, 328. The fees charged by Islamic and consular courts influenced choices of forum [Steensgaard, “Consuls and Nations,” pp. 23-24].

business under alien institutions.

The pursuit of contractual credibility

The first significant measure was a ban on kadis adjudicating lawsuits among co-nationals. The French Capitulations of 1536 state:

The kadi or other officers of the Grand Signior [Süleyman the Magnificent] may not try any difference between the merchants and subjects of the King [of France], even if the said merchants should request it, and if perchance the said kadis should hear a case their judgment shall be null and void.¹⁰

This was not the first provision of its kind. Mamluk Egypt had given French consuls the right to settle all cases among Frenchmen.¹¹ Yet the 1536 variant was particularly explicit; and from then on judicial autonomy for foreign “nations” became a fixture of the capitulatory system.¹² The restriction would have benefited the French consuls, who charged for their judicial services. As for merchants trading under the French flag, the main advantage was that local judges could no longer undermine contracts drawn according to French legal norms.

The challenge to the supremacy of Islamic law is self-evident. Although the restriction did not concern lawsuits involving Muslims, it curtailed the jurisdiction of Islamic courts within the abode of Islam. In the previous century the Mamluks had not gone that far. According to their capitulations, any case could be tried by a kadi, except that privileged foreigners could request a transfer to the ruler’s own court.¹³ Under Islamic law, the duty to deliver justice fell, in any case, on the ruler, who merely delegated responsibilities to kadis. There was nothing necessarily un-Islamic, therefore, to having a high-level Muslim tribunal adjudicate a lawsuit involving Venetians.

Blocking kadis from hearing cases among foreign co-nationals would have deprived them of the speedy trials for which kadis were widely praised. On the positive side, by enhancing the credibility of contracts among foreigners operating under the same flag, it would have encouraged

¹⁰ Hurewitz, *Middle East and North Africa* [hereafter *MENA*], doc. 1, article 3; Kurdakul, *Ticaret Antlaşmaları ve Kapitülasyonlar* [hereafter *TAK*], p. 42.

¹¹ *TAK*, pp. 34-35.

¹² See, for instance, *MENA*, doc. 4, art. 17; and *TAK*, p. 162, art. 5.

¹³ Wansbrough, “Venice and Florence” [hereafter *VF*], art. 5, 32.

them to pool their resources in larger amounts and for longer periods. Yet foreign merchants went to Ottoman lands to trade with local residents, not among themselves. So they remained widely exposed to Islamic lawsuits. Any Ottoman subject could still take a foreigner to a kadi. Besides, the Islamic courts continued to claim sole jurisdiction over cases involving Muslims.

Forum transfers

Foreign negotiators in Istanbul sought to address the matter through a variant of the Mamluk forum transfer rule. By the early seventeenth century, the Ottoman-granted capitulations were stipulating that cases “exceeding the value of four thousand aspers (*akçe*)” be tried in the capital, before an imperial council (*divan-ı hümayun*) consisting of high administrators and possibly headed by the sultan himself, with a foreign representative present.¹⁴ In 1675, when the English won this right, the threshold amounted to 152 times the average daily wage of a skilled construction worker. Due to inflation, the range of cases that met this threshold requirement expanded steadily. By 1838, the year of the Anglo-Ottoman Convention, it amounted to just 4 times that wage (Table 12.1). Certain late capitulations required cases in places far away from Istanbul to be tried by the highest regional authority—in Tunis, for example, “the Council of the Bey, the Dey, and the Divan,” as opposed to “ordinary judges.”¹⁵

Local merchants, Muslim or not, had always been free to petition for a hearing before a tribunal of dignitaries.¹⁶ However, rulers were selective in hearing appeals, and most subjects had neither the resources to pursue a case in the capital nor the clout to prevail. They also lacked an organization to defend them in trials where their foreign adversaries would enjoy the help of consular staff. The forum transfer option thus amounted to a foreign privilege.

One benefit to foreigners was that their major lawsuits became sensitive to international pressures. Another is that adjudication before a relatively slow-changing administration, whose members could be reminded of their own precedents, made contract enforcement more predictable.

¹⁴ For the text of a 1601 stipulations, and an account of the members and procedures of this council, see Boogert, *Capitulations*, pp. 47-52. A 1675 variant of the same stipulation is in *MENA*, doc. 14, art. 24.

¹⁵ *MENA*, doc. 25, art. 16.

¹⁶ On ruler’s courts (*mazālim*) in Mamluk Egypt, see Nielsen, *Secular Justice*; and on Ottoman imperial courts, Üçok and Mumcu, *Türk Hukuk Tarihi*, pp. 206-13; and Uzunçarşılı, *İlmiye Teşkilâtı*, pp. 153-57.

The tenure of a kadi lasted at most two years, and appointees differed in style, temperament, skills, and biases.¹⁷ The resulting judicial uncertainty would have hindered contract enforcement. At least on financially important disputes foreign merchants could escape that uncertainty through the forum transfer rule.

Table 12.1

Threshold for the forum transfer rights of foreigners: 1675-1838

Year	Multiples of average skilled wage
1675	152
1775	56
1838	4
Based on data from Istanbul in Özmucur and Pamuk, "Ottoman Living Standards," Table 1.	

The availability of a legal right does not mean, of course, that it will be exercised indiscriminately. Foreign-local cases above the monetary threshold did not always land before high-level tribunals. For one thing, it was not costless to exercise the transfer right. Apart from incurring possible transportation costs, a foreign merchant initiating a transfer could damage his reputation in the eyes of local clients and suppliers favoring speedy kadi justice to lengthy trials conducted by intimidating high officials. For another, foreigners would have preferred the Islamic courts when they felt confident of winning. The latter factor would explain why the alleged anti-foreign bias fails to show up in court records from the seventeenth and later centuries.¹⁸ Indeed, though few in number, most of the foreigner-subject cases in our sample of court cases support the scholarly consensus of an absence of foreign disadvantage in this period (Table 12.2). What is clear is that foreigners used the forum transfer option frequently enough to make it an issue in their local interactions.

¹⁷ In the Ottoman Empire a kadi's term of appointment in any one place lasted between 3 and 20 months. See Ortaylı, *Osmanlı Devletinde Kadı*, pp. 16-17; and Uzunçarşılı, *İlmiye Teşkilâtı*, p. 94.

¹⁸ Ekinçi, *Osmanlı Mahkemeleri*, especially p. 43.

Table 12.2

Outcomes of civil trials that pitted a foreigner against a subject: 1603-95

Total	Won by foreigner	
	Number	%
17	13	76.5
*Court registers in sample: Istanbul 1 (1612), 2 (1615), 3 (1617), 4 (1619), 9 (1662), 16 (1665), 22 (1695); Galata 24 (1603), 41 (1616), 42 (1617), 130 (1683), 145 (1689).		

It is not self-evident that foreigners would have benefited from the forum transfer option. Yes, it gave them further legal protections against opportunistic behavior by local buyers, suppliers, debtors, and creditors.¹⁹ On the downside, they now had incentives to cheat Ottoman subjects, who would have had to exercise caution in dealings with foreigners and to add a risk premium to their prices. Foreigners would have sought ways to limit the drawbacks of their privilege. But their benefits from the forum transfer option must have outweighed their costs, for foreigners, and increasingly also their protégés, eagerly demanded the transfer of lawsuits involving Muslims. For their part, Muslims felt victimized, as evidenced by their bitter complaints about restrictions on suing foreigners in local courts.²⁰

Foreigners would have sought to limit the drawbacks. The differences in legal status between Muslim and non-Muslim subjects are relevant once again. Recall that in the eighteenth century, and even more easily in the following century, the latter could purchase foreign legal protection. By becoming, say, a French protégé, a Greek-Ottoman merchant could more or less level the legal playing field in his dealings with the French. In the event of conflict, his protégé status would

¹⁹ Goffman, *Izmir*, p. 127; Hanna, *Making Big Money*, chap. 8, especially pp. 172-73.

²⁰ Masters, *Christians and Jews*, pp. 125-26, relates one such complaint from a Muslim merchant in Aleppo in 1764. For other such cases, see Goffman, *Izmir*, pp. 128-30.

dampen the pro-French bias of the French officials who would step in to adjudicate. The protection system thus reduced the significance of the forum transfer rule with respect to protected minorities. Therein lies another reason why minorities came to play a disproportionate role in economic dealings with foreigners, and why their rapid economic ascent coincided with the explosion in interregional trade. Minorities advanced partly by intermediating between foreigners and Muslims under a dual legal status—operating under Islamic law in interacting with Muslims and under a foreign legal system in dealing with foreigners.²¹

In the sixteenth century, chapter 10 showed, foreigners and, to a lesser extent, indigenous non-Muslims exercised caution in dealing with Muslims, to avoid entanglement in lawsuits against them.²² For the same reason, European consuls picked their dragomans almost exclusively from among religious minorities. As the judicial rights of foreigners expanded, we now see, the tables turned. At least in the leading commercial centers, it is Muslims who had reasons to avoid cross-communal ventures. “No wise Egyptian will ever enter into a partnership with a foreigner, or accept his surety,” wrote *The Times* of London in 1870.²³ For their part, foreign merchants and their protégés had progressively less need to avoid interactions with Muslims, because increasingly their consuls could keep them out of Islamic court and, beginning in the nineteenth century, even out of secular local courts. Besides, in the event a local court found them guilty, their consuls could appeal directly to government officials beholden to western governments.

The emerging Muslim legal handicaps played a role in restricting Muslim economic interactions with foreigners, becoming increasingly serious with growing foreign participation in the Middle Eastern economy. No longer could these handicaps be dismissed on the ground that

²¹ Having a dual legal status was not a frictionless process. Complex disputes involving multiple contracts could generate struggles over jurisdiction. For instructive cases, see Boogert, *Capitulations*, pp. 179-99, 226-59.

²² This is a common theme in economic histories of the region. See Frangakis-Syrett, *Commerce of Smyrna*, pp. 91-92; Masters, *Origins of Economic Dominance*, especially pp. 65-68, 78-79; and Faruqi, “Venetian Presence,” p. 335.

²³ *The Times*, 12 February 1870, p. 4.

economic relations with India and the Far East were relatively more significant.

The local norm of oral contracting

Concerns about the Islamic legal system's inadequacies in giving the contracts of foreigners credibility stemmed from more than the biases of local courts. Another factor was that Islamic courts based their decisions mostly on oral evidence.

From the rise of Islam, Islamic adjudication relied primarily on oral testimony. Though documents could be presented as evidence, they were viewed with suspicion, partly because of the possibility of forgery, but also because written texts could be misread to illiterate and innumerate litigants. Low levels of education doubtless fed this mistrust, and it became the norm to consider a document valid only if attested by morally upright witnesses.²⁴ A document could be invalidated by casting doubt on the authenticity of a seal or signature, or by impugning the character of a witness to its creation. To ensure the availability of credible corroborating oral testimony in case of litigation, written contracts always furnished the names and attestations of multiple witnesses. Consequently, a huge demand existed for witnesses whose integrity and reliability had been certified. Found at every court, certified witnesses (*shāhid 'adl*, but usually just *shāhid* or *'adl*) exercised the function of a modern notary.²⁵ They assisted and observed the registration of private contracts and also the recording of kadi judgments. No written instrument, not even the archives of a kadi court, carried legal value without the corroboration of multiple witnesses of good character.²⁶

Although documents lacked independent value under Islamic law, they were used in the pre-

²⁴ Wakin, *Documents in Islamic Law*, p. 6; Cook, "Opponents of Writing"; Messick, *Calligraphic State*, pp. 25-28.

²⁵ Certified witnesses are present in every single case in the database from which this chapter's tables are drawn. On early Islam, Tyan, *Organisation Judiciaire*, pp. 236-52; Wakin, *Documents in Islamic Law*, pp. 7-10; on the thirteenth century, Ibn Khaldun, *Muqaddimah*, vol. 1, p. 462; on the high-Ottoman period, Ortaylı, *Osmanlı Devletinde Kadi*, pp. 51-61; El-Nahal, *Judicial Administration*, pp. 18-19.

²⁶ Tyan, *Organisation Judiciaire*, pp. 236-52; Wakin, *Documents in Islamic Law*, pp. 6-8. In general, only Muslim witnesses could validate the records of an Islamic court.

Islamic Middle East, and the pattern continued uninterrupted under Islam. The Qur'an itself contains evidence to this effect:

Believers, when you contract a debt for a fixed period, put it in writing. Let a scribe write it down for you with fairness. ... Do not fail to put your debts in writing, be they small or big, together with the date of payment.²⁷

In requiring the documentation of debt contracts, the same verse also says, however, that two men must witness the recording, so that "if either of them commits an error, the other will remember." Further, it says that when "a bargain [is] concluded on the spot, it is no offence ... not [to] commit it to writing." Taken in its entirety, this verse on documentation may reasonably be interpreted as (1) requiring documentation when the *quid* and the *quo* are separated in time, (2) making documentation optional in other transactions, and (3) tying the validity of documents to their authentication by credible witnesses to their preparation.

In certain places and times kadis took to treating written records as valid even without supportive oral testimony. In parts of eleventh-century Spain and North Africa, for instance, authentication through a kadi's handwriting could constitute sufficient validation.²⁸ This practice was rationalized on the basis of the necessity principle (*darūra*), which legitimizes a normally illegitimate practice to prevent hardship.²⁹ Writing around 1200, the jurist Ibn al-Munasif explained that it may prove impossible to find two witnesses able to travel to the trial site, delaying resolution of a conflict.³⁰ However, where tolerated, the practice of accepting documents lacking oral authentication was treated as abnormal. Ibn al-Munasif did not object to a witnessing requirement per se; where feasible, he supported it.

²⁷ 2:282.

²⁸ Hallaq, *Authority, Continuity and Change*, p. 211.

²⁹ The principle finds justification in Qur'an 2:185: "God wants things to be easy for you."

³⁰ Hallaq, *Authority, Continuity and Change*, pp. 211-13. Expedient adjudication was considered a supreme virtue of Islamic litigation.

Generally, then, written contracts lacked validity without live witnesses to testify to their authenticity.³¹ Moreover, oral contracts were more common than written contracts, and they remained enforceable everywhere, even in localities where written documents carried validity on their own. In the seventeenth century, when the capitulations were being expanded through new judicial provisions, only a minority of all kadi trials turned on documentation. A document was introduced in about a fifth of disputes over a sale, a sixth of those involving a partnership, and a seventh of those over debt (Table 12.3). A court could refuse to recognize its own records.³²

Ordinarily, cases were decided on the basis of oral testimony alone. An outcome could even turn on an oath. Faced with a dispute unresolvable on the basis of verbal testimony, the kadi would ask the defendant to clear his name, or the plaintiff to establish the veracity of his claim, by swearing on his “book” (Qur’an, Bible, or Torah). In the late seventeenth century, about a fifth of civil lawsuits were decided in this manner (Table 12.4). Cases that modern courts would dismiss for lack of written evidence were thus resolved through a procedure that presumed repeated interactions among litigants, and between them and the rest of society.³³

In closed and small societies, litigants have repeated interactions, and judges tend to be well informed about the circumstances of the disputes that came before them, the characters of the

³¹ See, for example, the court records Istanbul 1 (1612), 20b/2; Galata 41 (1616), 28b/5; Galata 42 (1617), 2b/3; Istanbul 4 (1619), 23a/3; Istanbul 9 (1662), 170b/3; Galata 130 (1683), 69a/3; Galata 145 (1689), 32a/3, 32b/2. Masters, “Aleppo,” pp. 43-44, offers examples from seventeenth-century Syria.

³² See the court record Galata 41 (1616), 6b/1.

³³ A thoroughly selfish and asocial defendant accused of default would choose, if the outcome of the trial hinged on it, to swear that he had paid. Hence, in a society whose members fit that characterization, an oath will carry little informational value. However, in a society consisting of religious people who interact with one another repeatedly, its informational value is not negligible. In the pre-modern Islamic world litigants included genuinely God-fearing individuals, who did not take an oath lightly. Even today, many Muslims believe that a false oath will bring divine retribution [Rosen, *Anthropology of Justice*, pp. 34-35]. Moreover, in conflicts rooted in contractual ambiguity defendants eager to maintain a good reputation might have been reluctant to win on the basis of an oath, rather than the judgment of a kadi. Indeed, in court records one encounters refusals to take an oath even when compliance would almost certainly have resulted in exoneration [Istanbul 1 (1612), 56a/1; Istanbul 2 (1615), 28a/1; Istanbul 16 (1665), 101a/1; Galata 130 (1683), 50b/2; Galata 131 (1683), 12b/5; Galata 145 (1689), 37b/2, 87b/2; Istanbul 23 (1697), 30a/1].

litigants, and the consequences of alternative judgments.³⁴ These factors contribute to the efficiency of oral litigation procedures. But those procedures are subject to serious abuse on matters involving interactions with outsiders. Just as paid experts testify in today's secular courts, so in premodern Islamic courts litigants could hire witnesses prepared to testify on their behalf. Kadis were supposed to inquire intimately into the character of any witness presented in court, and to dismiss unreliable testimony. However, they were not always motivated to find the truth, because their own tenure was very short. If for no other reason, the conditions under which oral procedures work ideally were lacking in the major commercial centers that attracted foreigners. Judicial corruption is a major theme in Middle Eastern history.³⁵ Also, character reading, never an infallible process, was particularly unreliable where visitors or foreigners were involved, and where, therefore, contract enforcement could not rely on personal relations. Even where the kadi was honest and unbiased, then, the possibility of false oral testimony threatened business relations with foreigners.

³⁴Rosen, *Anthropology of Justice*, especially chaps. 1 and 3, provides further details, claiming that the conditions are present in parts of modern Morocco.

³⁵In the period under focus, renowned Ottoman chroniclers, including Koçi Bey (d. 1650) and Kâtib Çelebi (1609-57), complained of rampant corruption in the courts. For extensive quotes and additional evidence, see Uzunçarşılı, *İlmiye Teşkilâtı*, chap. 18. See also Mumcu, *Osmanlı Devletinde Rüşvet*, especially pp. 134-41, 182-202.

Table 12.3

Use of documents in civil trials: 1603-95

Source of actual or potential dispute	Registration	Trial performed				Total
		Document(s) used		Only oral testimony used		
		Number	%	Number	%	
All commerce	5592	334	17.9	1529	82.1	1863
Partnership	300	24	15.5	126	84.5	155
Sale	1872	96	20.4	375	79.6	471
Debt	1624	148	13.4	955	86.6	1103

Court registers in sample: Istanbul 1 (1612), 2 (1615), 3 (1617), 4 (1619), 9 (1662), 16 (1665), 22 (1695); Galata 24 (1603), 41 (1616), 42 (1617), 130 (1683), 145 (1689).

Table 12.4

Use of oaths in civil trials (1603-95)

Total trials	Kadi requests an oath	
	Number	%
	1863	341

Court registers in sample: Istanbul 1 (1612), 2 (1615), 3 (1617), 4 (1619), 9 (1662), 16 (1665), 22 (1695); Galata 24 (1603), 41 (1616), 42 (1617), 130 (1683), 145 (1689).

Foreign complaints about oral procedures

Foreigners complained about oral legal procedures tirelessly, as they believed that the burden of abuses fell disproportionately on them.³⁶ In a letter written in 1567, a Venetian official in Istanbul fumes that the local legal system is unused to written evidence. “All cases,” he suggests contemptuously, “even the most important, are ... summarily dispatched by verbal evidence.”³⁷ An added problem for foreigners was that only locally drawn documents were even considered.

Yet another concern stemmed from the perceived devaluation of non-Muslim, and particularly foreign, testimony. The records are replete with cases in which a kadi treated the word of a non-Muslim as more credible than that of a Muslim opponent.³⁸ For centuries, however, the principle that a Muslim is relatively trustworthy by virtue of his faith remained an irritant in relations between foreign merchants and Muslims. They even complicated relations with local Jews and Christians, who were usually trusted more readily than foreigners, might have Muslim partners or protectors, and were accustomed to the Islamic judicial system. The mere possibility of a devaluation of foreign testimony threatened enforcement of commercial agreements. The frequent rotation of kadis posed another problem: if one kadi adjudicated impartially, his successor might give the benefit of the doubt always to Muslims.

For foreign merchants active in the Middle East the local court system was problematic, then, for two distinct reasons. In the first place, the rules of evidence appeared stacked against them in lawsuits against local subjects. Second, the weight given to oral testimony diminished the quality of kadi judgments, all the more so as the use of written contracts gained prevalence and documents drawn abroad became common. Absent the quality issue, foreign merchants would have been satisfied with measures to eliminate discrimination. They might have lobbied for, say, special Islamic courts with “mixed” tribunals on which foreigners had representation.

This option had seen use. In medieval northern Europe, for instance, alien merchants often enjoyed a right to a “half-tongue” (*de medietate linguae*) trial, in which the jurors would include

³⁶ Cevdet Paşa, *Tezâkir*, vol. 1, pp. 62-63; Ubicini, *Letters on Turkey*, vol. 1, p. 184; Masters, “Aleppo,” pp. 43-44; Ekinçi, *Osmanlı Mahkemeleri*, pp. 28-41.

³⁷ As recorded by Arbel, *Trading Nations*, p. 122.

³⁸ For examples, see the following cases: Istanbul 15 (1665), 37/5, 39/2, 58/2; Istanbul 22 (1696), 1/3; Galata 138 (1687), 83/3. Variations in the evaluation of testimony are found also in the Syrian court data compiled by Al-Qattan, “*Dhimmis in the Muslim Court*,” pp. 437-38.

speakers of the defendant's language.³⁹ In the same vein, a 1348 treaty between the Seljuk Aydin and the Sancta Unio coalition of Latin powers, which included Venice and the Pope, allowed for mixed courts to adjudicate disputes involving Turks and Latins.⁴⁰ But the Mamluk and Ottoman capitulations sought to overcome foreign qualms about Islamic courts in a different way. As we shall now see, they sought to have kadi courts use special procedures in their own trials. The consequent privileges helped to adapt the kadi courts, at least in contexts involving foreigners, to Europe's ongoing transition from personal to impersonal exchange.

Legal beginnings of the Middle East's transition to impersonal exchange

At the time of the early Ottoman capitulations, commercial trials based solely on oral testimony were the norm also in parts of western Europe.⁴¹ Oral evidence created problems analogous to those in kadi courts. The hiring of false witnesses and judicial corruption are prominent themes of European legal history as well.

However, the use of oral testimony and the discounting of written evidence became increasingly controversial as commerce expanded and a growing portion of exchanges became impersonal, in the sense of being conducted between individuals lacking reliable knowledge about each other's character.⁴² During the transition, there was resistance to imposing a documentation requirement, partly because the literate would benefit disproportionately. Moreover, documents were treated with suspicion, and trials often centered on whether a document was authentic. A litigant who appeared to have endorsed a document might claim that his seal was stolen or that, being illiterate, he was tricked into accepting a clause quite obviously detrimental to his interests. For their part, the expected beneficiaries of documentation sought to improve the credibility of their written contracts

³⁹ Oldham, "Origins of Special Jury," pp. 167-71.

⁴⁰ Fleet, "Turkish-Latin Diplomatic Relations," p. 611.

⁴¹ Klerman, "Jurisdictional Competition," especially pp. 8-9; Baker, *English Legal History*, especially pp. 67-68, 324-25. According to De Roover, *Medici Bank*, p. 18, Medieval European finance showed a preference for oral transfer orders over written assignment, which was later called a check. In Barcelona, checks were forbidden up to the sixteenth century, and in Venice prior to the eighteenth century bookkeepers were not allowed to enter a transfer unless the order was dictated by the depositor or his attorney.

⁴² When a company share is traded through the stock market, the buyer and seller need not be aware of each other's identity, to say nothing about information concerning character.

by having them notarized.⁴³

Over many centuries, in some places faster and more broadly than elsewhere, reliance on documents grew. Also, financial claims based solely on oral testimony became increasingly suspect and eventually legally invalid. These transformations drew strength from the growth in literacy and numeracy.⁴⁴ Given this background, one would expect foreigners to try to transplant to the eastern Mediterranean the institutions of impersonal exchange with which they were becoming increasingly familiar. That the Islamic rules of evidence discriminated against foreigners constituted an added motive for making documentation mandatory. If it is the substance of a written contract that decides a case, the religion or nationality of the litigants ceases to matter.

As early as the fifteenth century kadis had been required to use special procedures in regard to commercial dealings between local merchants and certain foreigners. In 1486, for instance, the Ottomans imposed a documentation requirement for cases involving merchants from Dubrovnik. These cases were to be heard only if the transactions had been recorded in a court register (*sicil*) and a kadi had issued a document stating the facts of the case (*hüccet*).⁴⁵ In the same vein, the Mamluk-Florentine treaty of 1497 required Florentine contracts with Mamluk subjects to be recorded in writing in the presence of certified witnesses.⁴⁶ A documentation clause is found also in the first French capitulations:

In a civil case against Turks, tributaries, or other subjects of the [Ottoman] Grand Signior, the merchants and subjects of the [French] King can not be summoned, molested, or tried unless the said Turks, tributaries, and subjects of the Grand Signior produce a writing from the hand of the opponent, or a “heudjet” from the cadî.⁴⁷

This clause harbors a striking asymmetry: French subjects may sue locals on the basis of oral testimony, but cannot be sued without documentation. Its purpose was to lessen the kadi’s reliance on Muslim witnesses whenever the defendant was a Frenchman, focusing attention in such cases more on the written agreement than on matters of probity, religious observance, faith, and national origin.

⁴³ Hoffman, Postel-Vinay, and Rosenthal, “Notaries,” show how notaries helped to dampen informational asymmetries between borrowers and lenders.

⁴⁴ Stone, “Literacy and Education.”

⁴⁵ Biegman, *Turco-Ragusan Relationship*, pp. 70-71 and docs. 22-24. The guarantee was renewed in 1575.

⁴⁶ *VF*, art. 2. It is unclear about whether a lawsuit could proceed without presentation of a notarized contract.

⁴⁷ *MENA*, doc. 1, art. 4; *TAK*, p. 42.

With documentation, witnesses could still be heard if its validity was questioned.⁴⁸ But the burden of proof would fall on the challenger of the document, so the possibility of escaping a contractual obligation, or of fabricating a liability, would diminish. Partly to protect French merchants against the invalidation of documents by paid witnesses, the capitulations of 1536 stipulated also that a kadi “may not hear or try ... subjects of the King without the presence of their dragoman.”⁴⁹ As an Ottoman subject in command of local vernaculars, a dragoman was better equipped than the typical French merchant to discredit fraudulent testimony. The requirement concerning his presence, like the documentation provision, became a standard feature of subsequent capitulations.⁵⁰

In our seventeenth-century sample of court cases, 46 of the 7455 commercial cases included one or more foreigners. Of these, 30 resulted in the drawing or recording of a written contract, eight were trials in which documentation was presented, and the remaining nine were trials decided solely on the basis of oral testimony. Of the latter nine, four were initiated by a foreigner, and five by an Ottoman subject. Eight of these nine cases were won by the foreign litigant, which suggests that when they were confident of winning a case without documentation, they accepted traditional procedures, without invoking a capitulary privilege.⁵¹ In the sole case that the foreigner lost on the basis of oral testimony alone, the amount at stake was small; in all likelihood the defendant, an English ship captain accused stealing a roll of iron, had reasoned that the reputational costs of invoking capitulary immunity outweighed the potential gain.⁵² All in all, it appears that by the seventeenth century the capitulations were providing foreign merchants fairly strong protection against frivolous lawsuits.

For disputes involving foreigners operating under different flags, through the sixteenth century the default rule was that the Islamic courts had jurisdiction. Given foreigners’ mistrust of Islamic justice, this may seem odd. Yet the nations competing for commercial influence in the region mistrusted each other as well, sometimes more intensely. Besides, a kadi court offered a neutral forum for adjudication. The word of one foreigner was weighted equally as that of another, and each side

⁴⁸ Faroqhi, “Venetian Presence,” pp. 340-41.

⁴⁹ *MENA*, doc. 1, art. 4; *TAK*, pp. 42-43.

⁵⁰ For example, *MENA*, doc. 4, art. 10, 16.

⁵¹ Cases with a foreign plaintiff: Galata 145 (1689), 45b/1, 57b/4, 67b/3, 96b/4. Cases with a foreign defendant: Galata 130 (1683), 17b/1; Galata 145 (1689), 24a/2, 36b/1, 107a/7.

⁵² Galata 145 (1689), 78b/2.

had an equal ability to summon local witnesses.

In any case, foreign communities interacted much less with each other than with the local population, which limited the number of “mixed” foreign cases. With growth in the volume and complexity of interregional trade, both interactions among foreigners and their aversion to using kadi courts at all, would have increased. Predictably, rival foreign communities eventually negotiated ground rules for trying mixed cases without reliance on the kadi courts.⁵³ Sometimes a mixed tribunal was formed; at other times the case was heard by a mutually agreed foreign judge or consul.⁵⁴

Appraising the capitulations

The previous chapter showed that foreign merchants in the Middle East benefitted from capitulatory protections against arbitrary taxation, and from immunities against sundry levies borne by their local competitors. Whatever the fiscal advantages of foreigners, they must have been swamped by the benefits from carrying their institutions into the region. Immunities against undocumented legal claims lowered their costs of exchange. In stimulating the use of documents, they laid the groundwork for the introduction of organizations that pool the resources of strangers and enjoy legal standing, such as incorporated banks. They also extended the terms over which traders could plan and make credible commitments. Over time, such advances allowed foreigners in the region to exploit the economies of scale and scope afforded by evolving technologies. All these advantages made it profitable for minorities to incur the expenses of obtaining foreign legal protection. Thus, in facilitating the foreign economic domination that gained high visibility in the nineteenth century, the capitulations also contributed critically to the ascent of the region’s indigenous minorities.

The Mamluk and Ottoman rulers who granted capitulations gained, apart from political advantages, from keeping western merchants interested in trading. They were able to appropriate some of the resulting trade surplus through tariffs, fees, and tolls, although their capacity to do so

⁵³ Cevdet Paşa, *Tezâkir*, vol. 1, pp. 62-63; Ekinci, *Osmanlı Mahkemeleri*, pp. 49-50, 97-100; Steensgaard, “Consuls and Nations,” pp. 22-23; Anderson, *English Consul*, p. 207.

⁵⁴ Akyıldız, *Osmanlı Merkez Teşkilâtı*, p. 130. Up to the eighteenth century, Ottoman rulers, and later semi-autonomous Egyptian governors as well, refused to recognize this extension of the judicial rights specified in the capitulations. [Brown, *Foreigners in Turkey*, pp. 67-68; Watson, *American Mission in Egypt*, pp. 463-64]. But some of the late capitulations, for example, those given by the Ottomans to the Russians in 1782 and by the Moroccans to the British in 1856, formalized the consular right to try cases among different nationalities [*TAK*, p. 182; *MENA*, doc. 107, art. 9]. On judicial applications of the latter capitulations, see Ryan, *Last of Dragomans*, pp. 240-44.

diminished the bargaining power of foreigners increased. For several centuries, they were able to benefit from external productivity gains, without undertaking domestic legal reforms. The capitulations offered a substitute for reinterpreting or updating Islamic law.⁵⁵ The substitution entailed giving foreign merchants opportunities to conduct business under institutions different from those prevalent in the Middle East. Eventually, as western and Middle Eastern commercial institutions grew increasingly dissimilar, Muslim merchants found themselves economically marginalized vis-à-vis foreigners as well as their protégés. Concentrated in traditional economic sectors, which still operated mainly under Islamic law, they could not participate in any significant capacity in the most dynamic and newest economic sectors—banking, mass transportation, mass production, and large-scale trade.

These long-term consequences were unintended. The sultans who agreed to the early capitulations for immediate political or economic gain may not have wanted to promote Muslim merchants, but neither did they seek to marginalize them vis-à-vis either indigenous minorities or foreigners. The observed outcomes depended on the subsequent institutional evolution of the West, which no one foresaw. Had the economic institutions of England, France, and the Netherlands stagnated after the sixteenth century, foreign privileges would not have posed a major problem for local mercantile communities. Western-inspired institutional transplants would have been much less significant. Moreover, if only because there would have been no explosion in foreign trade with the West, Muslim merchants and producers would not have lost market share to minorities and foreigners.

Another unintended consequence, of lasting significance, has been the de-Islamization of economic life in the Middle East. It started within small enclaves—the markets within which foreigners operated. The legal privileges extended to foreigners within those limited settings triggered a dynamic through which Islam's role in the region's economic life diminished far beyond anything once imaginable. In encouraging western merchants to establish lasting commercial enterprises, the capitulations familiarized the region's peoples with business practices, organizational forms, and legal procedures without a basis in Islam. Judicial defeats such as the one that Mehmet bin Mahmut

⁵⁵ Faced with the challenge of making it profitable for Italian merchants to keep visiting England, the rulers of thirteenth-century England opted to create new legal institutions available to both domestic and foreign traders. Klerman, "English Commercial Law," argues that in leveling the playing field, England triggered a dynamic that enabled its merchants to become a global powerhouse in later centuries.

suffered against Heneage Finch taught the local population the advantages of documenting contracts in a world of expanding commerce and increasingly impersonal exchange. The growing powers of foreign representatives enabled their protégés to reduce their dependence on Islamic courts, at least on matters of business. Most significant for the present, foreign economic successes made Muslims recognize the benefits of institutions developed outside the realm of Islamic law. They demonstrated, for example, the advantages of binding the tax-collecting hand of the state and of pooling savings within banks.

The capitulations set the stage, therefore, for momentous economic reforms of the nineteenth and twentieth centuries—momentous because they essentially severed the connection between daily economic life and Islamic law. Specialized commercial courts, corporate law, and stock markets—all of which presume largely impersonal exchange—were adopted and disseminated, for the most part, without even lip service to Islamic principles. In the twentieth century they would become part of the institutional fabric even in countries, like Saudi Arabia, whose economy is nominally under a divine and time-invariant law. Institutions and practices of foreign provenance became a visible part of Middle Eastern economic systems partly through emulation of prototypes already present in the region's most dynamic sectors, through the capitulations.

This chapter has simply presumed that commercial interactions between westerners and the Middle Easterners took place in lands of the latter. Indeed, as western merchants came to the region and took to spreading their institutions, few of their Middle Eastern counterparts went to the West. The institution that best symbolizes this asymmetry is the consulate, which supported the foreign merchants in the Middle East. Until quite late, Middle Eastern merchants did not benefit from analogous institutions in Western cities. From this new angle, we now return to an earlier theme, the origins of the institutional divergence that turned the Middle East into an underdeveloped region.