The Emergence of English Commercial Law

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Introduction I

- The idea for this paper came from Timur Kuran’s discussion of the Ottoman capitulations (commercial treaties) in his forthcoming book, *Islam and Economic Underdevelopment.*
- A key provision of these capitulations stipulated that foreign merchants were exempted from local Islamic courts and could be tried only in consular courts staffed by Europeans.
- While these provisions may have stimulated trade, they disadvantaged local muslim merchants, who did not have access to legal devices and remedies available to Europeans.
- These provisions also meant that local Islamic courts did not gain exposure to more advanced European commercial techniques and therefore had neither the knowledge nor the incentives to incorporate them into local law.

Introduction II

- England in the 12th and 13th centuries faced a similar economic situation
  - England was an economic backwater, whose primary export was raw wool
  - Italian merchants were far more sophisticated than local merchants
    - Italian merchants dominated the export trade and royal finance
- Nevertheless, by the mid-14th century, England had begun to emerge as a significant commercial power
  - Wool cloth came to dominate its exports.
  - English merchants dominated the export trade and royal finance.

Introduction III

- One reason England was able to emerge as a major commercial power was that it modified its legal system to meet the needs of Italian merchants rather than allowing them to set up their own courts
  - These legal institutions were available both to foreign and English merchants,
  - So English merchants were at no commercial disadvantage
  - And English judges learned how to deal with commercial issues

Foreign Character of English Legal System

- One might wonder whether England and the Ottomans took different paths simply because the English legal system was closer to the legal systems of the Italian cities
  - So Italian merchants were more comfortable with it
  - And there was less need for modification
  - And modifications were more compatible with the preexisting legal system
- Not plausible for two reasons
  - The English legal system, with its juries and writs, was extremely different from that of the Italian cities, which were based on Roman law
  - Local bias was probably more important than differences in legal procedure
    - Italians were very unpopular in medieval England
      - They often collected royal taxes
      - Their loans enabled the king to raise money without Parliament
    - Key issue was mechanisms to overcome legal bias, which are relevant no matter how similar the procedures were

Three Legal Institutions

- Paper uses 3 examples of legal institutions
  - The mixed jury
    - In litigation between Englishmen and foreigners, the jury was composed half of Englishmen and half of foreigners
  - Streamlined debt collection
    - If debt was enrolled in royal registers, creditors could swiftly imprison the debtor and seize his assets
  - Legal pluralism
    - Jurisdictional competition
    - Litigation according to merchant custom in royal courts

Two More Fundamental Factors

- Of course, these three legal innovations merely beg the more fundamental question of why England but not the Ottomans adopted them
- Two explanations
  - 1. The predominately secular nature of English law
    - which made legal change easier
  - 2. The precocious nature of English representative institutions
    - especially the representation of boroughs (cities & towns) in Parliament
    - which meant that the interests of local merchants were taken into account

Mixed Jury

- One of biggest problems facing foreign merchants was biased adjudication
  - Largely solved in England from at least the late 13th century by mixed juries
- In cases involving non-English parties, aliens served as jurors
  - If the case involved 2 aliens, all jurors were aliens
  - If the case involved 1 Englishman and 1 alien, the jury was composed of 6 Englishmen and 6 aliens
  - Where possible, alien jurors were from same nation or city as the alien party
  - The mixed jury was later called the jury *de medietate linguae, i.e. the* jury "of the half-tongue"
- English merchants treated equally
  - Alien entitled to mixed jury, NOT jury entirely composed entirely of aliens
  - In some cases involving 2 Englishmen where 1 was a town-dweller and 1 was not, jury was composed half of town dwellers and half non-town dwellers

Streamlined Debt Collection

- Another big problem facing foreign merchants was debt collection
  - Merchants often extended credit to purchasers or paid sellers in advance
  - Local courts could be fast, but had only local enforcement powers
  - Royal courts had broad enforcement powers, but were slow
- Statutes in late 13th century established a new system
  - Major commercial towns set up royally administered rolls (registers) for recordation of debt
  - If a debt was recorded on the roll and not canceled with the consent of the creditor, the creditor could have the debtor imprisoned and his assets seized without trial
    - Official record was conclusive proof
- System also available to and used by local merchants

Legal Pluralism

- Legal pluralism can be good or bad
  - Bad
    - if privileges one group of traders
    - if encourages wasteful strategic behavior
  - Good
    - if gives parties ability to choose forum offering better law
      - Law can be better procedurally (cheaper and faster) and/or substantively (encourages economically efficient contracting behavior)
    - if encourages jurisdictions (e.g. judges, courts, cities, or nations) to develop better law
- English legal pluralism mostly good
  - Cities had own courts
    - Merchants could usually choose which cities to do business in
    - Cities competed for business
  - Multiple royal courts developed distinctive law and competed for litigation
  - Parliament was aware that foreign merchants had other options, so developed national law to encourage foreign trade
    - including legislation on mixed juries and debt recordation already discussed
- In addition, royal courts sometimes adjudicated law according to the “law merchant”
  - Did not create new courts to administer merchant law
    - Thus facilitating learning by ordinary courts

Religion and Law

- Why did medieval England develop these institutions, but Ottomans did not?
- Religion part of the answer
  - Not that Islam inherently anti-commercial or Christianity inherently pro-capitalist
    - Both had strict prohibitions on interest
- Islam is religion of law
  - Religious law (*sharia*) regulates not just worship and marriage, but also property and contract
  - Religious courts are primary fora for commercial litigation
- Christianity has much more limited legal ambition
  - Canon (ecclesiastical) law regulates primarily clergy, worship, ecclesiastical property, and marriage
  - 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 relating to commerce
- Religious nature of Islamic law may have been beneficial in early middle ages
  - Gave religious sanction to performing contracts
  - Provided uniform law over broad territory
- But religious nature of Islamic law became problematic in the more dynamic context of the later middle ages and early modern period
  - Difficult to adapt religious law to new business needs and techniques
  - Easier to let foreigners use own legal system than to change or adapt *sharia*

Representative Institutions

- England developed representative institutions very early
  - Late 13th century Parliaments included representatives from boroughs (towns)
  - Parliament had power over legislation and taxation
- Commercial representation in Parliament
  - Facilitated legislation that fostered commerce
    - E.g., mixed juries, debt recordation
  - Structured taxation in a way that favored local merchants
    - Export taxes that fell more heavily on foreign merchants

3 Caveats

- English did grant Hanse the right to adjudicate disputes in their own courts
  - Not sure why
  - Shows that not implausible for Italians to have received similar rights
  - Granting rights to Hanse may not have been problematic, because Hanse were not as sophisticated as Italians, so less for English to learn from them
- Immediate cause of shift in English exports from raw wool to wool cloth was tariff policy
  - Export of raw wool taxed much more heavily than export of wool cloth
  - Similarly, English dominance of export trade facilitated by discriminatory legislation
  - But tariff and discriminatory policies succeeded only because English merchants had requisite experience and institutions
  - Also tariffs and discriminatory policies reflect political power of English merchants
- So far, I am unable to trace the movement of any particular commercial practice (e.g. insurance), from foreign use, to litigation in English court, to domestic use
  - May reflect inadequacy of city court records
  - May reflect fact that basic debt collection was only essential legal service

Conclusion

- Non-religious character of English law and commercial representation in Parliament
  - Facilitated legal institutions which
    - made England attractive to foreign merchants
    - but also kept litigation in ordinary English courts
  - Thus stimulating the development of English commercial law
    - And creating the conditions under which English merchants could eventually outcompete Italian merchants
- Three examples of such legal institutions
  - Mixed jury
  - Debt recordation
  - Legal pluralism