

Structural Inefficiencies in Islamic Courts: Ottoman Justice and Its Implications for Modern Economic Life

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Structural Inefficiencies of Islamic Courts:

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Abstract. The transition to impersonal exchange and modern economic growth has depended on the emergence of courts that enforce contracts efficiently. This paper shows that Islamic courts of the Ottoman Empire exhibited biases that would have limited the expansion of exchanges in the Eastern Mediterranean, particularly those between Muslims and non-Muslims. It thus explains why economic modernization in the Middle East required the establishment of secular courts. In quantifying Ottoman judicial biases, the paper also discredits the view that these courts treated Christians and Jews fairly as well as the counter-view that they ruled against non-Muslims disproportionately. Biases against non-Muslims were in fact institutionalized. By the same token, non-Muslims did relatively well in adjudicated interfaith disputes, because they settled most conflicts out of court in anticipation of judicial biases. Islamic courts also appear to have exhibited biases in favor of state officials. The paper thus refutes the Islamist claim that reinstating Islamic law (*sharia*) would be economically beneficial.

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1. Introduction

Underdeveloped countries are often advised to improve their judicial systems in order to strengthen contract enforcement and increase gains from exchange. Specifically, they are urged to institute laws enforced independently from the executive and legislative branches of government and impartially across society, without regard to such personal traits as sex, ethnicity, and religion.¹ The advice typically takes for granted that laws will be secular, in the sense that they will not draw legitimacy from any particular religion.

Yet, in predominantly Muslim countries, there is a demand that legal reforms should draw on Islamic legal traditions stretching back more than a millennium. Sometimes it takes the form of a call for reinstating Islamic law, or the sharia. Certain elements of Islamic law have been studied for their economic implications. They include the prohibition of interest, lack of legal personhood, the Quranic rules of inheritance, and penalties for apostasy.² What has not been analyzed, at least not rigorously, is the Islamic system of commercial adjudication. Did it satisfy the objectives of judicial impartiality and independence? This paper is to seek answers with reference to the Ottoman justice system in the seventeenth century.

There are four reasons for this choice. The first has to do with data availability. Although Islamic law was long the law of the land over a huge land mass, nowhere were Islamic court proceedings recorded as thoroughly, and the records preserved as fully, as in the Ottoman Empire. We have constructed a data base of Ottoman commercial trials spanning the entire seventeenth century. By far the largest such data base, it consists of cases adjudicated in Istanbul, capital of the Ottoman Empire and commercial hub of the Eastern Mediterranean. Second, the seventeenth century constitutes the latest period when Ottoman legal practices were essentially free of Western influences.³ Third, at the time Istanbul was a highly cosmopolitan city with huge Christian and Jewish minorities and also an expanding foreign presence. Given the importance of cross-communal contacts in today's increasingly integrated global economy, it is of interest to examine the operation of Islamic courts in a setting involving inter-faith business ties.

Finally, given that Istanbul was the seat of imperial power, its courts would have operated most closely according to the ideals of justice and impartiality that Ottoman sultans claimed to pursue. Like other Muslim dynasties, Ottoman sultans promised to punish state officials who mistreated their subjects; they also promised that all subjects, regardless of faith, would get fair hearings in imperial courts. Keeping Istanbul's judges essentially honest promoted political stability. Unlike judges in places remote from the capital, those posted in Istanbul also received compensation regularly, which counteracted the temptation to engage in corruption. Thus, the court records of seventeenth-century Istanbul allow us to study Islamic law in a setting where it would be expected to perform as closely as possible to Islamic ideals.

¹ For a few examples, see Heckman, Nelson, and Cabatingan (2010) and Dam (2006).

² On apostasy, see Saeed and Saeed (2004); on the interest ban, El-Gamal (2006); and on inheritance and legal personhood, Kuran (2011, chaps. 5-8).

³ By the eighteenth century non-Muslim Ottoman merchants were beginning to do business under European legal systems (Kuran 2004, Masters 2001).

Critics of the Islamic system of justice, from contemporaneous observers of the Ottoman courts to modern legal scholars, have held that as a matter of practice Islamic justice has been unpredictable, biased in favor of state officials, and rigged against non-Muslims. The pro-state biases of the Islamic courts stem, say critics, from their subordination to the sultan. Indeed, Ottoman judges served as personal representatives of the sultan, who had the duty to deliver justice. As for the courts' pro-Muslim biases, they were rooted partly in the ingroup biases of Muslim judges. Also relevant, however, were procedures that treated Muslim testimony as inherently more credible than non-Muslim testimony. Insofar as they existed, the biases in question could not be countered through formal judicial review. The rulings of a court could be reversed only through a personal appeal to the sultan, which for most litigants was not a realistic possibility.

To one degree or another, pre-modern courts openly discriminated against outsiders everywhere. In the absence of equal-rights norms that are central to modern judiciaries, they favored local interests without apology. The Islamic courts of the Ottoman Empire provide no exception. In barring non-Muslims from testifying as a witness against Muslims, they followed what was once a universal pattern. This procedural discrimination lends credibility, of course, to highly critical western accounts of these courts (Porter 1771, pp. 139-43; Masters 2001, pp. 65-68). Legal reformers of the nineteenth century not only agreed with these criticisms but they considered the biases in question as harmful to Middle Eastern economic development. Revealingly, the modern commercial courts that they established had a secular character.

For all this history of criticism, distinguished Ottoman historians who are familiar with the historical records report that, although these courts were prone to corruption, they were not noticeably biased against local Christians and Jews, or European foreigners, or any other group (Ekinci, 2004, especially p. 43). Lacking evidence of bias, they infer that Ottoman judges treated all groups fairly. This is puzzling. If the evidence-generating procedures of the Islamic courts were stacked in favor of Muslims, how could their judgments have been unbiased? Conversely, if the courts were unbiased against non-Muslims, why did European observers and Ottoman reformers find them blatantly unfair? It could be that the European claims reflect hostility to Islam. Yet, certain critics of Islamic courts heaped praise on other Ottoman institutions, which raises the question of why they were negative in this particular context.

Our unique data set provides an opportunity to reconcile the seemingly contradictory accounts of Ottoman justice. We start with a description of the Ottoman judicial system. Theoretical and empirical insights from the law and economics literature follow. Subsequent sections of the paper address, in turn, the various biases that afflicted Ottoman trials. We conclude with implications for modern attempts to revive Islamic legal institutions. The inefficiencies of the Islamic courts of seventeenth-century Istanbul were not aberrations, we suggest. Rather, they stemmed from structural features of the Islamic legal system that modern promoters of the sharia have not ruled as irrelevant to modern life.

2. Legal Marketplace in Seventeenth-Century Istanbul

In the seventeenth century, the legal system of the Ottoman Empire was based on Islamic law. Although it had its own particularities, it closely resembled the legal systems of previous and contemporaneous Muslim-governed states. Accounts of Mamluk courts in fourteenth-century Cairo and of Abbasid courts in tenth-century Baghdad are strikingly similar to those of seventeenth-century Istanbul. In terms of organization, procedures, and principles of justice, the Islamic courts of the Ottoman Empire did not depart significantly from other Islamic courts.

Every Ottoman court was headed by a judge (*kadi*) who performed, in addition to several executive functions, two distinct judicial functions. On the one hand, he registered, and in so doing authenticated, contracts, settlements, and transactions. A registered contract could be consulted should it become necessary to forestall or resolve a dispute. On the other hand, the judge conducted trials to resolve disputes brought before him.⁴ A dispute could involve a criminal matter or what we would now characterize as a civil matter. In either case, the judge would hear the plaintiff, give the defendant a chance to respond, if necessary conduct an investigation of his own, and pronounce a verdict. Occasionally he would postpone a verdict to allow a litigant to bring evidence. A verdict might involve an order to fulfill a contractual term or pay damages. The records contain disputes involving debt, divorce and custody, estate settlement, guardianship, sale, property transfer, mortgage, pawning, tax payment, guild administration, communal rights, and neighborhood norms. The burden of proof did not differ according to the type of case, and neither did procedures.

Each judge had scribes record accounts of his activities in a “register of cases” (*sicil defteri*), and during his tenure at any one court he might use more than one register. In small towns, judges had scribes record all their court’s business more or less chronologically in a single notebook, moving to a new notebook when the first was full. In major cities, the norm was to use a separate register for estate inventories and perhaps another for official directives. All other records ended up together, sometimes with certain government orders in the back, in “regular” registers.⁵

When the tenure of a judge ended, his registers came to an end as well; his successor started one or more new registers. The departing judge generally handed over his registers to his successor, or, in places with a court building, simply left them behind for storage (Faroqhi 1997). The notebooks used as court registers vary greatly in size. A judge who opted for a thick notebook with huge pages might fit the entire record of his tenure into one book, especially if his tenure was short. If his successor started a skinny notebook, he might go through several notebooks. Many old registers must have been discarded eventually; others perished in fires,

⁴ The executive functions included enforcing public morals and maintaining a record of official orders sent to his area. Ortaylı (1994), Imber (2002, chap. 6), and Gaudefroy-Demombynes (1950, chap. 10) discusses the functions of judges.

⁵ Prior to the nineteenth century, judges had discretion on recording and categorizing. See Mandaville (1966), pp. 313-14.

earthquakes, floods, and wars; still others must have been destroyed deliberately by individuals with something to hide.

A judge's time in any one place was limited to prevent him from developing local political ties. It could last as short as three months, but the norm was about a year, and rarely did a judge serve more than 20 months in any one post. The judges of courts located in politically sensitive places tended to be rotated more frequently than those in strategically unimportant towns, which is consistent with the political considerations that guided appointments (Ortaylı 1994, pp. 16-20). The reassignment probability of a judge depended on his reputation. This provided incentives to minimize complaints by adjudicating consistently and fairly. Complaints about a judge posted in Istanbul would reach the Sultan more easily than those concerning judges posted in courts located far away from the capital. For that reason, too, judicial corruption would have been less common in Istanbul than elsewhere, affording an opportunity to study Islamic adjudication in a setting where it had the best chances of approaching the ideals.

For their services some judges received a salary; all were also authorized to charge litigants fees (*harç*) set by law. Their fees were usually proportional. In a commercial dispute they might collect, for instance, 2% of the amount at stake (Ortaylı 1994, pp. 67-69; Bayındır 1986, pp. 88-89; Gaudefroy-Demombynes 1950, p. 150-51). There appears to have been no set standard concerning the payee. The plaintiff and defendant might be expected to share the cost. In the absence of documentation on the fee structure of the Ottoman judicial system, we do not know whether charges differed by the substance of the dispute or the amount at stake.⁶ We know that the winner of a lawsuit had to pay, at a minimum, a fixed fee for a document certifying the outcome, known as a *hüccet* (*hüccet*).

Although judges were assigned to a jurisdiction, such as the town of Amasya or the Eyüp neighborhood of Istanbul, Ottoman subjects and visitors were not required to use the court located where they lived or worked. They were free to take a dispute to a judge of their choice. In practice, then, the judges of Islamic courts were in competition for legal business.

The vast majority of the Ottoman subjects adhered to one of the three monotheistic religions. Muslims, who formed the largest group, were required to live by Islamic law. This meant that to register a contract legally, or to get a dispute adjudicated formally, they had to use an Islamic court. For their part, non-Muslims enjoyed "choice of law": though entitled to use an Islamic court, on civil matters they were free to use a court of their own choice.⁷ Thus, a Greek Christian could have a debt dispute with a co-religionist litigated before an official of the Greek Orthodox Church. All litigation involving both Muslims and non-Muslims had to be handled by a Muslim judge, because of the rule that Muslims had to live by Islamic law (Kuran 2004). This system of asymmetric legal pluralism meant that, at least in cases among non-

⁶ It appears that as a matter of practice substantial variations existed among courts. Records of the Ottoman palace are replete with complaints about judges whose charges exceeded the authorized amount (Uzunçarşılı 1965, chaps. 9-10).

⁷ All criminal matters, regardless of the identities of the accused and the victims, fell under the responsibility of Muslim officials.

Muslims, Muslim judges competed also with Christian and Jewish courts. Although it is certain that non-Muslims used courts of their own, they left no records, as far as is known. This is undoubtedly because in trying to minimize their tax obligations Christian and Jewish communities sought to withhold information about their financial matters from state officials.

Under Islamic law, the responsibility to deliver justice belonged to the sovereign—in the Ottoman case, the Sultan. He was free to litigate any dispute himself, and in principle anyone could take a case directly to him. In practice, he let his appointed judges try the vast majority of the lawsuits brought to an Islamic court. These judges differed in status and responsibility. Two chief judges (*kazasker*), one for Ottoman provinces in Europe and the other for the rest, handled appointments on behalf of the Sultan. Moreover, the judges of politically strategic places such as Istanbul and Cairo, like those posted in the holy cities of Mecca and Medina, ranked above the rest. The salaries of judges were tied to rank. Presumably higher ranked judges also earned more in fees by virtue of being posted to courts with exceptionally prosperous litigants.

In principle, high-ranking judges did not have greater legal authority than the rest. The youngest judge on his first assignment in a sleepy town had as much authority to deliver a verdict as a chief judge. His verdict was final, and from a doctrinal standpoint it carried as much authority as a verdict delivered by an experienced judge. Under Islamic law there exists no standardized appeals process (Shapiro 1981, chap. 5). Accordingly, an Ottoman disputant could overturn an unfavorable decision only by appealing directly to the sultan. The appeals system was thus biased in favor of elites with access to the sultan's palace. For most Ottoman subjects, appealing a court decision was not a realistic option; and it was particularly costly for the residents of places located far from the sultan's palace in Istanbul. None of this implies that Ottoman judges were free to rule whimsically. As we shall see, they were subject to constraints.

3. Sources of Judicial Bias

The social sciences do not provide a general theory of judicial fairness. Theories of dispute resolution developed within the law and economics tradition show, disappointingly, that one cannot measure the fairness of courts within a homogenous pool of potential litigants. The key problem, as shown in a literature launched by Priest and Klein (1984) and developed by Shavell (1996), lies in heterogeneity among litigants in both information and reputational costs. Because of such heterogeneities one cannot recreate, from the subset of actually adjudicated disputes, the underlying set of potential disputes that might have gone to trial. As van Tulder and van Velthoven (2003) put it, the cases that reach trial represent only the tip of the iceberg of civil disputes.⁸ Because forward-looking and utility-maximizing potential litigants may choose to settle rather than appear in court, one cannot even assess the social optimality of observed litigation and plaintiff victory rates. Questions over whether the lawsuits in a particular society

⁸ Other important contributions include Kessler, Meites, and Miller (1996), Siegelman and Donohue (1995), and Siegelman and Waldfoegel (1999).

contain too many frivolous cases, are socially destabilizing, and are too costly, also pose serious theoretical difficulties.

However, the social sciences have much to contribute to the analysis of judicial decision making involving disparate groups within a population. Three distinct literatures are relevant to the identification of intergroup differences in the application of justice. They involve competition among legal jurisdictions, judicial independence, and in-group bias.

3.1 Fee-for-Service Adjudication and Competing Legal Jurisdictions

In modern courts judges are essentially indifferent to the number of cases that come before them, because it affects neither their promotion prospects nor their compensation. Before the modern era, however, the success of judges did depend on how many cases they adjudicated, because they derived income at least partly through fees collected from litigants. The fee-for-service system fostered inter-court competition when multiple courts were in close proximity. This claim has been tested through a comparison of England's courts before and after the English legal reforms in the early nineteenth century. Daniel Klerman (2007) finds that under the fee-for-service compensation regime of the pre-reform period judges were more likely to rule for plaintiffs than under the salary-based compensation regime that followed.⁹ He reasons that since plaintiffs decide whether to sue and also the adjudication forum, profit-maximizing judges would have tilted their verdicts in favor of plaintiffs.

This finding is obviously relevant to Ottoman courts. Although Ottoman judges received a salary from the sultan, they also collected fees from litigants. Moreover, individual plaintiffs were able to seek out judges known for their propensity to rule in favor of the plaintiff. One would expect judges to have ruled for plaintiffs more frequently than they would in the absence of a choice among courts. They would have exhibited a pro-plaintiff bias, regardless of the religious identities of the litigants.

Following Landes and Posner (1979), Klerman asks what might limit inter-jurisdictional competition from unraveling into a corner solution such that plaintiffs always win. In pre-modern England, he finds, in addition to the Chancery and the Parliament, the monarch's ability to appoint and remove judges limited the pro-plaintiff bias of courts. Biased judges reduced the legitimacy of the monarch's rule. His oversight of the legal marketplace thus constrained judges' ability to compete with each other by tilting decisions in favor of plaintiffs.¹⁰

As in pre-modern England, in the Ottoman Empire any pro-plaintiff bias of the courts would have been known to potential litigants. Moreover, the sultan's executive oversight would have guarded against the excesses of judicial rent-seeking. This oversight brings us to another

⁹ Building on Klerman, Dilanni (2010) adds that jurisdictional competition between courts will not necessarily generate pro-plaintiff bias if both the plaintiff and the defendant must agree on the adjudication forum.

¹⁰ Court fees, too, limit pro-plaintiff bias. If the initiation of adjudication guaranteed the defendant's paying restitution to the plaintiff, the defendant would prefer to settle out of court in order to escape adjudication fees. The plaintiff, too, would prefer to settle, for the opportunity to bargain with the defendant over the distribution of what would have been the judge's fees. Hence, court fees, along with the ability to settle out of court, will make judges cap their pro-plaintiff bias.

potential source of bias in adjudication: the state's influence on judicial decisions. A sultan able to limit the pro-plaintiff bias of judges might have been able to tilt their verdicts in favor of the state in cases that affected him directly.

3.2 *Judicial Independence*

Judicial independence entails, on the one hand, the capacity to exercise judicial review and, on the other, counter-political judicial continuity. Judicial review gives courts the right to overrule executive decisions, challenge the legitimacy of the government and, under extreme circumstances, even to depose a ruler. The review process may result, of course, in the legitimization of government policies. Courts may support government policies and facilitate their enforcement (Feld and Voigt 2003; Ramseyer and Rasmusen 2003).

In the course of Islamic history, the judiciary's ability to challenge the sovereign's authority has waxed and waned. Initially weak due to innumerable legal controversies, its power grew during the eighth and ninth centuries as schools of Islamic jurisprudence got established and legal traditions took hold. During this period, the judiciary challenged the authority of the sovereign on occasion by attacking legal innovations as deviations from the Quran. However, well before the establishment of the Ottoman state in 1299, sultans gained effective control over the judiciary. They then solidified this control by standardizing the code of law applied in their realms, assuming sole authority over the appointment and dismissal of judges, placing religious and judicial officials on the state payroll, and binding the judiciary's wellbeing to the support of the state (Coşgel, Miceli, and Ahmed 2009; Imber 2002, chap. 6). The cowing of the previously independent judiciary removed the threat of judicial review and bolstered the ability of the courts to legitimize the prevailing regime. In assuming control of the judiciary, the sultan incentivized judges to enforce imperial laws and the chief judge (*şeyhülislam*) to support the sultan whenever consulted on the legality of a decree.¹¹

Counter-political continuity exists when the judicial system allows judges to remain in office following a political change. The Ottoman sultan's policy of rotating and replacing judges regularly, which was meant to decrease local loyalties and reduce corruption, limited counter-political continuity. In keeping the terms of judges short, this policy prevented the judiciary from establishing patterns that could outlive the reign of a sultan.

By the seventeenth century, then, judicial independence was essentially lacking in the Ottoman Empire. Hence, one would expect Ottoman subjects to have shown extreme caution in challenging the state in court.

¹¹ Judges may acquire greater judicial independence when they anticipate the replacement of the reigning sultan. They may begin to enforce the preferences of his successor in a display of proactive loyalty to the new sultan. For the underlying logic, see Helmke's (2002, 2005) work on judicial independence during regime transition.

3.3 Ingroup Bias in Judicial Decisionmaking

All courts are prone to ingroup bias, which is the tendency to give preferential treatment to people perceived as belonging to one's own group.¹² In modern jurisprudence, ingroup bias is a recognized phenomenon that certain institutions are meant to counteract. A formal system of appeals limits a judge's ability to exercise favoritism, because having decisions overturned by a superior court exacts a reputational toll. Likewise, a norm of equal protection under the law makes judicial decision makers strive consciously to consider factors favorable to members of outgroups.

Such institutions may alleviate ingroup bias but not eliminate it. Numerous studies indicate that even in liberal societies that promote the principle of equal protection under the law judges regularly fall prey to ingroup bias. Gazal-Ayal and Sulitzeanu-Kenan (2010) and Shayo and Zussman (forthcoming) demonstrate that Israeli judges presiding over apolitical criminal and low-stakes civil hearings exhibit persistent ingroup bias. Shayo and Zussman show also that the prevalence of ingroup bias is correlated with security-related events that heighten political tensions.

There are also modern institutions that foster ingroup bias. The jury system, whereby evidence is evaluated by the defendant's peers, promotes ingroup bias favorable to defendants facing prosecution by the state. By the same token, it can lead to ingroup bias in trials that pit an insider against an outsider. In a study of international patent enforcement in American courts, Moore (2003) finds that jury trials are more likely to exhibit xenophobic bias than trials decided from the bench.

Islamic jurisprudence requires all lawsuits to be adjudicated before a judge. This reliance on bench trials would have diminished ingroup bias relative to modern jury trials. However, in the absence of clear procedures for appealing a verdict, judges lacked professional incentives to take precautions against ingroup bias (Shapiro 1981, chap. 5). Nor were judges trained to abide by a norm of equal protection in evaluating evidence. On the contrary, they learned to give greater weight to the testimony of Muslims than to those of non-Muslims. This legal tradition was built into the adjudication procedures of Ottoman courts. The transcripts of seventeenth-century trials are replete with references to seeking out Muslims specifically for opinions regarding a dispute at hand.¹³

Given that institutional pressures to counteract intentional or unintentional in-group bias were lacking, the judges of Islamic courts were very likely to favor their co-religionists in inter-religious lawsuits. Since all judges were Muslim by design, non-Muslims would have been at a disadvantage in lawsuits pitting them against Muslims.

¹² Psychological experiments show that group members favor each other even when the "group" they share is random or even arbitrary, such as having the same birthday. See Tajfel (1982) and Mullen, Brown and Smith (1992).

¹³ See, for example, cases Istanbul 9 (1661) 171b/2 and 189a/3, Istanbul 22 (1695) 105a/2, and Istanbul 23 (1696) 20a/1, all recorded in Kuran (2010-11).

4. The Courts of Galata and Istanbul

To test these hypotheses, we turn to the largest existing data set of transliterated and translated Ottoman court records. It includes 10,080 cases from 15 registers in the courts of Galata and central Istanbul (hereafter, simply Istanbul).¹⁴ The registers were selected to provide a more or less uniform distribution over the entire seventeenth century.¹⁵ In each dated account, the scribe would record the identity of the litigants—always including their religious affiliation and title, and often also their neighborhood of residence—the nature of the dispute, the evidence brought to the trial, and the verdict. These two courts were the most prominent of the 16 courts serving the Ottoman capital, which at the time had around 700,000 inhabitants. The Galata court was located near the empire’s main port, and the Istanbul court near the fabled Grand Bazaar. Precisely because of their proximity to Istanbul’s main commercial centers, the caseloads of these two courts consisted primarily of commercial registrations and trials. Only the trials are of interest here.

As Table 1 shows, these records contain 2,291 commercial trials. Its top 15 rows refer to the court registers in the data set. The register number is that assigned by the Turkish archive where the registers have been housed since 1894. Thus “Galata 130” refers to the 130th register in the Galata series within the archive.

Dividing our trials by court, we find that 60.1 percent belong to Istanbul. As shown in Tables 2a and 2b, the two subsamples differ in terms of the demographic composition of the litigants, and also the distribution of cases by topic.¹⁶ Disproportionately few defendants were Muslim in Galata relative to Istanbul. Galata had a higher share of tax cases than Istanbul, but a lower share of cases concerning a *waqf* (Islamic trust). Without controlling for the differences in question, we might conclude, erroneously, that the two courts judged cases according to different standards and differed in their biases. In fact, multivariate analysis to be presented later shows that the court in which a dispute was resolved mattered significantly to the outcome.¹⁷

¹⁴ It is reproduced in Kuran (2010-11), with full transliterations of the records in the Latin alphabet of modern Turkish, along with detailed summaries in both English and Turkish. The records are in Ottoman Turkish, which few Turkish speakers now understand, due to the high number of Arabic and Farsi loanwords. Scribes kept the records, for the most part, in an Arabic script known as broken *divani* (*kırma divani*).

¹⁵ The registers were chosen to provide coverage across the seventeenth century among surviving unspecialized registers; thus, registers reserved for estate inventories or official correspondence were excluded. Over certain time spans, the registers tended to be small; to be able to check for repeat use of a given court over the periods in question, some consecutive registers were included. Big gaps exist in the series due to fires. The main motivation for constructing the sample was to see whether the standards and processes of Ottoman courts, and the economic life that they supported, changed over the course of the seventeenth century.

¹⁶ Cases that present arguments involving more than one topic, such as a dispute over who should inherit a rental property, are counted more than once. There were also topics not listed here. For both reasons the rows of Table 2b do not sum to 100.

¹⁷ The pattern could reflect year-specific fixed effects. The years of the Galata registers do not overlap with those of the Istanbul registers.

Register	Years	N	%
Galata 24	1602-03	46	2.0
Galata 25	1604	139	6.1
Galata 27	1604-05	155	6.8
Istanbul 1	1611-13	78	3.4
Istanbul 2	1615-16	50	2.2
Galata 41	1616-17	40	1.7
Galata 42	1617	85	3.7
Istanbul 3	1617-18	143	6.2
Istanbul 4	1619	107	4.7
Istanbul 9	1661-62	549	24.0
Istanbul 16	1664-65	163	7.1
Galata 130	1683	201	8.8
Galata 145	1689-90	247	10.8
Istanbul 22	1694-96	172	7.5
Istanbul 23	1696-97	111	4.8
Galata total		913	39.9
Istanbul total		1378	60.1
Total		2,291	100.0

Court	Obs	Muslim plaintiff	Muslim defendant ^{***}
Galata	913	71.4	63.0
Istanbul	1378	75.9	70.9
<i>p</i> -value		0.02	0.00

***: Difference between Galata and Istanbul statistically significant at 99.9% level.

Court	Obs	Tax ^{**}	Waqf ^{**}	Rent	Property	Sale	Guild
Galata	913	6.7	12.8	8.8	21.0	26.1	3.5
Istanbul	1378	3.6	17.3	8.9	19.1	27.3	2.8
<i>p</i> -value		0.00	0.00	0.89	0.26	0.52	0.37

** : Difference between Galata and Istanbul statistically significant at 99% level.

Since the vast majority of the litigants enter the records as Muslim, Christian, or Jewish, the lower shares of Muslims among the Galata litigants points to a higher share of non-Muslims. In the seventeenth century Galata had an unusually high concentration of non-Muslim residents, especially Greek and Armenian Christians.¹⁸ That could explain why the Galata court's clientele was more heavily Christian. Yet, in contrast to a modern legal system, plaintiffs in seventeenth-century Istanbul did not need to sue in the district where the dispute arose or where they lived. They could choose among multiple courts within walking distance of one another. Christians might well have favored the Galata court because of greater convenience. Another reason could be that the Galata court had a reputation for ruling in favor of Christians more often than the competing court in Istanbul.

5. Pro-Plaintiff Biases

Given that two courts competed with one another for lawsuits, their judges were all incentivized to tilt verdicts in favor of plaintiffs as a means of attracting cases. With all judges playing this game, the pro-plaintiff bias would have grown, and in the limit plaintiffs would have won all cases in every court. The limit would never be reached, of course, if potential defendants started refusing to appear before the most biased of judges. By the same token, insofar as judges were predisposed to compete for cases by favoring plaintiffs, the temptation to launch frivolous lawsuits would have increased, especially if judges made side deals with plaintiffs to share whatever could be extracted from hapless defendants.

In fact, the verdicts delivered in our two courts do appear to have favored plaintiffs. They won 59.7 percent of all cases submitted to adjudication. As already noted, it is theoretically impossible to assign a benchmark of how a court insulated from inter-jurisdictional competition would perform. Hence, one cannot say whether this plaintiff victory rate deviates from the social optimum. Yet the number is clearly below the 100 percent figure we would have found if judges decided cases with a single goal, namely, encouraging people to bring them lawsuits. Other considerations must have been in play. Fairness is, of course, the most obvious competing consideration. The sultan's executive oversight would have ensured that it played a significant role. For the sake of maintaining political stability, the sultan would have limited the profit-seeking tendencies of even the most corrupted judge.

Table 3a gives the breakdown of the trials in terms of the nine possible pairings among our three religious communities, and Table 3b the corresponding plaintiff victory rates.¹⁹ We see that irrespective of the pairing the plaintiff wins more frequently than the defendant. The plaintiff victory rate is significantly greater than 50% in intra-Muslim, intra-Christian, and intra-Jewish cases, but also when the litigants are from different faiths.²⁰

¹⁸ Population estimates for seventeenth-century Istanbul do not distinguish between neighborhoods, so we are unable to quantify the demographic differences between central Istanbul and Galata.

¹⁹ The figures exclude the small number of trials involving gypsies, foreigners, and new converts to Islam (*mühtedi*).

²⁰ Testing the intra-faith results in Table 3 against the null hypothesis that the plaintiff victory rate equals 50%, we reject the null for Muslims and Christians at the 99.9% level of statistical significance and for Jews at the 90% level

Plaintiff	Defendant			
	Muslim	Christian	Jewish	All
Muslim	1411	223	41	
Christian	96	377	7	
Jewish	20	29	20	
All				

Plaintiff	Defendant			
	Muslim	Christian	Jewish	All
Muslim	59.0	57.9	65.9	
Christian	71.9	59.4	57.1	
Jewish	65.0	55.2	70.0	
All				

Religion itself was not irrelevant to the probability of victory. Focusing on the Muslim-Christian cases, where the numbers are high enough for meaningful statistical analysis, we find that the plaintiff victory rate differs depending on the side of the Christian. In view of the debates concerning abuses against Christians, the nature of the difference may come as a surprise. The plaintiff victory rate is higher, not lower, when a Christian sues a Muslim than when the roles are reversed.²¹ Equally surprising, it may seem, is that Christian plaintiffs do better when the defendant is Muslim than when he is a co-religionist (71.9% vs. 59.4%). For Muslim plaintiffs, by contrast, the defendant's religion does not matter.²² Not even the Ottomanists who reject the strident charges of anti-Christian bias in Islamic courts would have predicted these findings. Based on casual observations, they have suggested that the Islamic courts treated Christians fairly, not that Greek and Armenian Ottoman subjects benefited from judicial discrimination in their favor.

(*p*-values: 0.00 for Muslims, 0.00 for Christians, 0.07 for Jews). We reject the null also in inter-faith cases involving Christians and Muslims (*p*-values: 0.00 for Christian suing a Muslim, 0.02 for Muslim suing a Christian), but cannot do so consistently in cases involving Jews or "others," in all likelihood due to their small numbers in the data.

²¹ It is relatively higher in the former case at the 95% level of statistical significance ($t=2.52$).

²² For Christian plaintiffs the victory rate is greater when the defendant is a Muslim at the 95% level of statistical significance ($t=2.37$). For Muslim plaintiffs, the null hypothesis that the rates are equivalent cannot be rejected ($t=0.39$). For the sake of completeness, we may compare across plaintiffs, holding the defendant's religion constant. When the defendant is Muslim, it matters whether the plaintiff is Muslim or Christian at the 99% level of significance ($t=2.69$). When the defendant is Christian, the plaintiff's religion does not matter ($t= 0.44$). The standard error for all terms in Table 3b is 0.5.

Counter-intuitive as these findings may seem, they will not surprise students of modern litigation involving foreigners. In American courts xenophobia in adjudication goes hand in hand with a high foreign victory rate in foreign-initiated lawsuits against Americans. Studying patent disputes, Clermont and Eisenberg (1996) find that American courts rule in favor of foreign firms suing American firms at a higher rate than they do in favor of domestic American firms suing other American firms.²³ Yet foreigners consider American courts xenophobic and, hence, that in patent cases pitting a foreign firm against an American firm the foreign side will generally lose. The authors reconcile this perception with their finding by invoking selection bias. Expecting American juries to be biased against them, foreign firms will sue an American firm only if they consider their case very strong. Their high victory rate thus reflects not xenophilia but the strength of their lawsuits. This interpretation is supported by Bhattacharya et al. (2007), who study the impact of litigation on stock prices as a measure of expected judicial outcomes. They find that foreign firms sued in American courts are expected to do substantially worse than American firms sued in the same courts.²⁴ Our finding for seventeenth-century Istanbul mirrors these findings. Like foreign plaintiffs in America today, non-Muslim Ottoman litigants did better in court than Muslims precisely because they had good reason to fear discrimination.

One may wonder whether American courts differ at all from Ottoman courts of the seventeenth century in regard to anti-outsider biases. The institutional biases of the Ottoman courts have no parallel in American courts, where American and foreign litigants enjoy identical rights concerning witnesses, and where witnesses are not limited in terms of creed or nationality. What has not disappeared is ingroup bias, which cannot be eliminated through legislation. Like juries everywhere throughout history, American juries are drawn from people predisposed to give the benefit of the doubt to people like themselves, in other words, Americans rather than foreigners. Likewise, judges are predisposed to seeing conflicts from the perspective of American litigants.²⁵

6. Non-Muslim Participation in Islamic Courts

If selection bias accounts for the high victory rate of Christians in their lawsuits against Muslims, they would have had special reasons to avoid Islamic courts. To determine whether Christians underutilized Islamic courts, we need to know the shares of each religious group in

²³ In lawsuits between domestic firms, the plaintiff victory rate is 64 percent. By contrast, in those that involve a foreign plaintiff and a domestic defendant, it is as high as 80 percent. The difference is significant at the 99.9% level. In lawsuits by domestic firms against foreign firms, the plaintiff victory rate drops to 50 percent. This percentage differs statistically from 64%, again at the 99.9% level of significance.

²⁴ The authors employ a Heckman two-step regression process. In related work, Moore (2003) examines the number of international patent disputes while controlling for U.S. patents held by foreign and domestic firms, thus weighing the foreign litigation rate in U.S. courts against the number of foreign-held US patents, in order to examine how often international firms sue relative to American firms. She confirms that foreigners sue disproportionately less, given the distribution of patents held. This result is consistent with the inference that sample selection bias drives the high foreign victory rate in foreign-initiated lawsuits.

²⁵ Bodenhausen (1988) presents experiments concerning the psychological mechanisms through which juries interpret and internalize evidence presented in trials. Evidently individual jurors tend to retain evidence that confirms their preexisting stereotypes and to discount exculpatory evidence at odds with their stereotypes.

Istanbul's population. Although no population census was conducted in the seventeenth century, Mantran (1962) estimates that at the time Istanbul was 58.8 percent Muslim, 34.8 percent Christian, and 6.4 percent Jewish (Fig. 1).²⁶ Although Christians formed numerous subgroups, the vast majority were either Greek and Armenian.

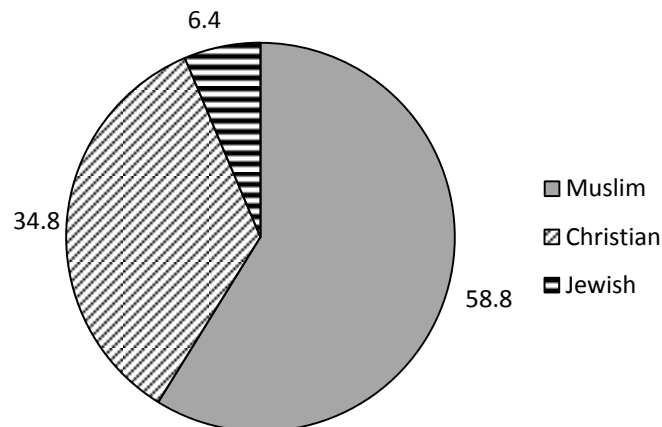


Figure 1. Population shares of the religious communities in seventeenth-century Istanbul

Given these shares, let us conduct a counter-factual exercise to determine how often the three groups would have faced one another in an Islamic court if, irrespective of faith, the residents of Istanbul interact in pairs randomly. For the purpose of this exercise, we will assume that for every type of pairing (Muslim-Muslim, Christian-Muslim, etc.), interactions result in litigation with the same probability, and that all litigation takes place in an Islamic court. Under this random interactions and random litigation scenario, the distribution of pairwise litigation would be as shown in the first column of Table 4. The intra-faith cases equal the squared shares of the communities in the population.²⁷ The interfaith disputes are, of course, symmetric: the share of Christian-initiated lawsuits against Muslims equals that of Muslim-initiated cases against Christians.

²⁶ In his monumental history of Istanbul Mantran (1962, p. 44-47) provides, on the one hand, the population size of the Christian and Jewish communities in 1690, and on the other, the Muslim and non-Muslim shares in the sixteenth century. There is no reason to believe that population shares changed significantly between the sixteenth and seventeenth centuries. By holding the relative sizes of the Muslim and non-Muslim communities constant, we are able to extrapolate the three shares.

²⁷ For example, the Christian intra-faith share is $(0.35)^2=12.3\%$. If Christians and Jews had an outside option, namely, adjudication in a court of their own religious community, their intra-faith shares would be lower than those given.

The second column of Table 4 provides the observed adjudication shares in seventeenth-century Istanbul.²⁸ Clearly intra-Muslim cases are vastly overrepresented relative to random adjudication, as are intra-Christian cases. The reason is that pairings did not occur randomly; Muslims interacted disproportionately with Muslims, and Christians with other Christians, resulting in disproportionately many intra-faith disputes. Interactions were more likely among co-religionists because people found it advantageous to deal with individuals known to them personally; and typically they knew more about a co-religionist than about a religious outsider. For Christians, another reason was that the two major Christian groups, Greeks and Armenians, favored Islamic courts over their own communal courts as a neutral ground for adjudication.

It is in inter-faith disputes that the selection bias in question is detectable. Whereas under random interactions the share of Muslim lawsuits against Christians would equal the share with the roles reversed, in fact the two shares were starkly different: 9.9% of all disputes consisted of a Muslim lawsuit against a Christian, but only 3.7% involved a Christian lawsuit against a Muslim.²⁹ This asymmetry holds regardless of whether the cases were adjudicated in Galata or Istanbul.³⁰

The asymmetry in question suggests that Christians considered the courts biased against them, at least in cases in which they faced a Muslim. Two sources of institutionalized bias have already been mentioned. First, the judges and assistant judges of Islamic courts were exclusively Muslim, as were the court-appointed professional witnesses (*şuhud ül-hal*) present at every adjudication or registration procedure. These officials would have been attuned to the customs, perspectives, and aspirations of their co-religionists. As such, even if they tried to be meticulously impartial, they would have been more receptive to arguments of Muslims than to those of non-Muslims. Hence, in Muslim-Christian cases, the benefit of any doubt would have gone to the former.

Second, Muslims and Christians did not have equal rights as regards testifying in court as a litigant-invited witness. Whereas a Muslim witness could testify against anyone, non-Muslims were allowed to testify only against other non-Muslims. Our own sample of cases shows that the ban on non-Muslim witness testimony against Muslims, which became institutionalized early in Islamic history, was obeyed in seventeenth-century Istanbul. A total of 1177 witnesses were called to testify in our 2280 commercial lawsuits. Of these, an overwhelming majority were Muslim. Equally striking is that not one Christian or Jewish witness appears in any intra-Muslim lawsuit. In sharp contrast, Muslims represent the majority of all witnesses called to testify in intra-Christian disputes (56.6%).

²⁸ These calculations exclude cases involving a state official, because they involved matters between individuals and the state, rather than between private parties. They also exclude the few cases involving others (gypsies, foreigners, and new converts to Islam).

²⁹ The two inter-faith proportions differ at the 99.9% level of statistical significance ($t=8.54$).

³⁰ In both courts, Muslim-Christian trials exceed Christian-Muslim trials at the 99.9% significance level ($t=8.28$ for Galata and $t=4.39$ for Istanbul).

Litigants		(1)	(2)
Plaintiff	Defendant	Random	Observed
Muslim	Muslim	34.6	63.3
Muslim	Christian	20.5	9.9
Muslim	Jewish	3.7	2.0
Christian	Muslim	20.5	3.7
Christian	Christian	12.1	18.1
Christian	Jewish	2.2	0.3
Jewish	Muslim	3.7	0.9
Jewish	Christian	2.2	1.0
Jewish	Jewish	0.4	0.9
Total		100.0	100.0

Note: For each of the nine religious pairings, the hypothesized and observed shares differ at the 99.9% level of statistical significance ($t=27.66$ for MvM, $t=7.15$ for Cvc, $t=15.31$ for JvJ, $t=16.06$ for MvC, $t=40.21$ for CvM, $t=5.73$ for MvJ, $t=14.04$ for CvJ, and $t=5.77$ for JvC).

Litigants		Witnesses			
Plaintiff	Defendant	Muslim	Christian	Jewish	Total
Muslim	Muslim	741	0	0	741
Muslim	Christian	62	12	0	74
Muslim	Jewish	42	0	0	42
Christian	Muslim	39	16	0	55
Christian	Christian	99	76	0	175
Christian	Jewish	0	4	0	4
Jewish	Muslim	5	0	0	5
Jewish	Christian	9	5	0	14
Jewish	Jewish	0	0	13	13
All above combinations		997	113	13	1123
All three religious groups		27	0	0	27
Other combinations ^a		23	4	0	27
All lawsuits	number	1047	117	13	1177
	%	89.0	9.9	1.1	100

^a: Lawsuits in which one or both sides includes a foreigner (*müstemen*), gypsy (*çingene*), or recent convert to Islam (*mühtedi*).

Category	(1) Christian suing Muslim	(2) All cases with Christians and Muslims	(3) Muslim suing Christian	<i>t</i> -test of equivalency (1 and 3)
Guild	6.3	3.8	2.7	1.31
Debt	53.1	65.5	70.9	2.97
Waqf	14.6	17.9	19.3	1.05
Property	22.9	11.0	5.8	3.72
Tax	7.3	6.0	5.4	0.62
State	19.8	11.9	8.6	2.51
Sales	36.5	30.1	27.4	1.58
Partnership	29.2	21.0	17.5	2.20
Inheritance	29.2	20.7	17.0	2.29
Number	96	319	223	

Note: Columns sum to more than 100% because many cases involved several of these topics simultaneously.

The presence of institutionalized judicial biases raises the question of why Muslims and Christians sued each other at all on economic matters. After all, Christians could have avoided the possibility of commercial lawsuits involving Muslims simply by doing business with other Christians. Yet potential gains from trade would often have trumped the risk of biased litigation. A content analysis of the issues over which cases arose shows that Christians and Muslims interacted most commonly through credit markets. Of all trials between Christians and Muslims, 65.5% concerned debt. Typically, the plaintiff accuses the defendant of having failed to settle a debt linked to an installment sale with an implicit interest charge; hence, in the data debt and sale are positively correlated.^{31,32}

To sum up thus far, we have (1) found a higher pro-plaintiff bias for Christians than for Muslims, (2) observed that, in line with the global norm of anti-outsider judicial bias, Islamic courts were institutionally biased against non-Muslims, and (3) inferred that the anti-Muslim bias of the courts led Christian subjects to avoid suing Muslims except when their cases were particularly strong, resulting in a selection bias in the available data. Table 6 raises a potential problem with the first and third points. Could the figures in question be reflecting differences across the religious groups in the types of issues they brought to court? This possibility will be addressed in due course, after we deal with a possible objection to point 2.

³¹ The coefficient of correlation between debt and sale is 0.16. It is significant at the 95% level.

³² The plaintiff is the creditor and the defendant the debtor 94.1% of the time. Given that the Muslim litigant is the plaintiff in 75.6% of the Muslim-Christian lawsuits involving a debt, we can infer that the Muslim was more often the creditor and the Christian generally the debtor. Evidently, in the seventeenth-century, in contrast to later times, Muslims supplied more credit than Christians. This disparity does not reflect a sample selection bias, because our usual indicator is absent: even though the number of Christian-initiated lawsuits is lower than those brought by Muslims, the plaintiff win rates of the groups are statistically identical ($t=1.37$).

7. State Officials in Islamic Courts

Because the Islamic legal system lacked a concept of legal personhood, in none of our cases does the state per se appear as a litigant. Individuals with a grievance against the state had to sue the state official responsible for the offending act. Likewise, individuals who shirked a civic responsibility could be taken to court by a state official rather than the state itself. The authority and responsibility of the state were thus personified. The officials who appeared in court most frequently were tax officials and estate supervisors. Palace employees sometimes showed up in connection with guild matters and communal affairs. Of the 173 state officials in our data, 12.1 percent were either Jewish or Christian (Table 7).³³ Non-Muslims were commonly employed as tax collectors, so this is not surprising. It bears reiteration that data drawn from adjudicated cases need not mirror the underlying religious distribution of officials.

	Muslim	Christian	Jewish	All
Number	152	7	14	173
Percent	87.9	4.0	8.1	100.0

State officials appear in about 7 percent of all of our seventeenth-century disputes, a total of 158 cases. In 15 of these lawsuits they face each other, leaving 143 cases in which a state official faces a subject. State officials appear as both plaintiff and defendant, at a statistically equal frequency (Table 8a).³⁴

Plaintiff	Defendant		
	Subject	Official	All
Subject	2066	77	
Official	66	15	
All			2224

Turning our attention to the outcome of these adjudications, we find significant variation in the plaintiff victory rate depending upon the side of the state official. Whereas it is 59.6 percent when neither litigant is an official, it plummets to 30.3 percent when the plaintiff is an official and jumps to 85.7 percent when the defendant is an official (Table 8b).³⁵ When officials face each other, the plaintiff victory rate is indistinguishable statistically from the baseline case.³⁶

³³ All of these cases are recorded in Kuran (2010-11), vols. 3-4, where additional statistical breakdowns may be found.

³⁴ We fail to reject the hypothesis of symmetry at a meaningful level of significance ($\chi^2(1) = 0.85$).

³⁵ The hypothesis of equality is rejected at the 99.9% significance level in both cases ($t=5.05$ and $t=6.29$, respectively).

³⁶ The hypothesis that the two plaintiff victory rates are equivalent is not rejected ($t=1.16$).

Plaintiff	Defendant		
	Subject	Official	All
Subject	59.6	85.7	
Official	30.3	73.3	
All			59.7

It appears, then, that cases between officials and subjects are very likely to be decided in favor of the latter. However, in these cases we do not observe an inequality in the number of cases adjudicated. Hence, the sample selection bias argument is not applicable here.

Plaintiff	Defendant		
	Subject	Official	<i>t</i> -test
Muslim	57.9	83.3	5.54
Christian	60.9	85.0	2.8
Jewish	62.3	---	---

Plaintiff	Defendant		
	Muslim	Christian	Jewish
Subject	60.7	59.9	64.6
Official	37.5	33.3	100.0
<i>t</i> -test	3.22	2.96	5.92

Intriguingly, the change in the plaintiff victory rate is invariant to the religion of the subject (Tables 9a, 9b). Evidently, the courts weight the testimony of a state official equally regardless of the religion of his opponent in court. This finding confounds the previous result of judicial bias against non-Muslims. Irrespective of religion, when a non-official agrees to confront a state official in court, his case is sufficiently strong to withstand any pro-state judicial bias. Indeed, this may account for the symmetry displayed in Table 8a. In disputes involving a state official the sample selection bias is so great that subjects go to court only if certain of victory. Such cases are sufficiently rare to maintain statistical symmetry.

Table 10. Adjudication categories according to involvement of state officials			
Category	Subject	Official	<i>t</i> -test
Guild	2.9	7.0	1.99
Debt	58.7	38.0	5.14
Waqf	15.9	12.7	1.78
Property	19.7	15.8	1.29
Tax	2.8	32.3	7.86
Sales	27.5	20.9	1.94
Partnership	19.7	22.8	0.89
Inheritance	28.1	55.7	6.76
Number	2066	158	

Note: Columns sum to more than 100% because many cases involved several of these topics simultaneously.

Finally, we turn our attention to substance of the cases that involve a state official. Table 10 shows the topics covered in adjudications whose litigants included at least one state official. Tax, inheritance, and debt disputes involve officials more frequently relative to the baseline where no official is involved. Tax disputes typically entailed disagreements between tax collectors and subjects over tax obligations; in some of the cases a subject complains of harassment by an official when he has already paid his tax to another collector. Inheritance disputes stemmed from the Ottoman law that assigned the estates of heirless individuals to the state. The state’s confiscation of an estate would be challenged by a person claiming to be a rightful heir. Similarly, debt adjudications will involve an official because unpaid taxes are considered a debt to the state.

It is curious to observe the tremendous predictive power that the presence of a state official brings to the ability to forecast the outcome of adjudication. As a rule, judges decide against litigants employed by the state. Given the judiciary’s lack of independence from the executive, this observable outcome is almost certainly caused by extreme sample selection bias. No individual who chooses to appear in court opposite an official would do so unless highly certain of winning. However, this result does not mirror that found in our analysis of anti-minority bias, since the number of observed cases brought against the state is nearly identical to the number of cases the state brings against private individuals. While this is most likely caused by extreme sample selection bias, we are unable to test this hypothesis adequately due to the lack of extra-judicial data pertaining to the cases settled out of court.

8. Documented Contracts as Insurance against Judicial Bias

We already know that Ottoman courts did more than adjudicate lawsuits. Of the 10,080 records in our 15 court registers, 6,494 comprised the registration of a contract or settlement. Ottoman subjects registered agreements in court to have a record in writing as insurance

against misunderstandings. When an agreement was entered into a court register, each side received a copy. Either copy, or the record in the register itself, could be consulted in the event of a dispute.

Could the institutionalized biases of the Islamic courts be mitigated through documentation of agreements? One might expect non-Muslim Ottoman subjects to have alleviated the risks of pro-Muslim litigation by documenting their commercial interactions with Muslims. Likewise, subjects of all faiths might have lessened the dangers of pro-state litigation by documenting their transactions involving the state. In fact, some of our litigants did present documents to bolster their testimony. As Table 11 indicates, a document was introduced by one side or the other, or both, in 15.2% of all trials. The table also shows that the presentation of a document massively increased the chances of victory. The plaintiff win rate, which is 60.2% when the sides make their cases without reference to any documentation, jumps to 83.9% when the plaintiff alone introduces a document in support of his case. Equally striking, it plummets to 7.2% when the defendant alone presents a document.³⁷

Table 11. Document use in trials					
	No Document	Presented by plaintiff	Presented by defendant	Presented by both	Total
Plaintiff win rate	60.3	83.9	7.2	21.1	59.6
Number of cases	1938	218	111	19	2286

By themselves, these figures do not establish the commonness of documenting commercial transactions. A potential plaintiff's decision to seek a judicial ruling would have been influenced by whether he had supportive documentation. By the same token, he would be motivated to avoid court fees by settling out of court insofar as the document would convince the defendant that he would lose. A better proxy for the extent of document use is the rate at which defendants introduced documents, because it was not they who sought adjudication. But defendants, too, could settle, and they could deter a lawsuit simply by showing a potential plaintiff their relevant documents. Nevertheless, potential defendants probably ended up in court at a higher rate if they had documentary evidence likely to exonerate them. Thus, the share of trials involving documents probably overstates the level of commercial documentation in seventeenth-century Istanbul.

We are still left with the question of why documentation use was so low. The courts charged for documents. The judges of our two courts collected a 2% ad valorem fee registering an estate settlement and between 8 and 30 aspers for a document certifying a court registration or verdict (*hüccet*); lesser fees were collected by their assistants (Uzunçarşılı 1965, pp. 85-86). All in all, the cost of registering a debt or sale contract corresponded to what a

³⁷ The two differences (83.9% vs. 60.1%) and (7.2% vs. 60.1%) are both statistically significant at the 99.9% level ($t=8.69$ and $t=19.61$, respectively).

skilled worker made in one to three days.³⁸ For small transactions, these fees alone would have discouraged registration. Low literacy rates—no greater than 10% for any group—would also have limited the demand for documentation. Yet another reason to forego documentation was that in Islamic jurisprudence documents themselves lacked evidentiary value in the absence of corroboration by witnesses to their preparation. The witnesses could charge for their services.

In a modern economy, a signed and notarized contract signals that the signers accepted its contents and that the terms of a transaction were set in advance. In a lawsuit it will serve as evidence that the parties understood their duties associated with the transaction. In the present context, the document includes a list of witnesses to its creation and indicates that they could resolve any conflict as to what was agreed. If parties to a court-registered contract end up in court, and one side introduces the contract, it serves notice that witnesses are available to speak to its validity and testify to its particulars. The other side might concede the case at that point.³⁹ In the absence of a concession, witnesses will be called, and it is their testimony that will clinch the case for the document presenter.⁴⁰ Hence, witnesses play the same role as the documented contract in a modern legal system.

Any contract between a Muslim and non-Muslim posed a special challenge in terms of the identity of the witnesses. Given the ban on non-Muslim testimony against a Muslim, the witnesses had to be Muslim for the contract to be of value to the non-Muslim side. The need was met partly through witnesses for hire—individuals prepared to witness contracts for a fee. Although the compensations were not recorded, we know that the practice of hiring witnesses was common, and its abuses constitute a major theme in accounts of the Ottoman legal system.⁴¹ The upshot is that registering a contract in court was not simply a matter of drafting and recording its terms. A cadre of mutually agreed witnesses had to be found. And a special challenge was present whenever the sides included one or more Muslims along with one or more non-Muslims. The rules of Islamic jurisprudence put non-Muslims at a disadvantage in documenting such contracts. The degree of trust would have been higher between co-religionists than between members of different communities. Hence, we would expect the use of documentary evidence to be greater in inter-faith cases than in intra-faith cases. While the raw numbers tentatively support this hypothesis—document use in 16.3 percent of all inter-faith cases versus 14.3 percent of all intra-faith cases—the paucity of observations precludes statistical significance.

Perhaps the most important reason for the low rate of documentation observed in our registers is not the cost of documentation itself but that in the seventeenth century the

³⁸ Özmucur and Pamuk (2002) estimate that in Istanbul a skilled worker made around 22.5 aspers per day at the start of the seventeenth century and about 36.9 aspers at the end.

³⁹ In our data set, one or more documents is introduced in 351 of 2287 trials. In 184 (52.9%) of these, no witnesses were called because the other side conceded the case.

⁴⁰ One or more documents was presented in 351 lawsuits, of which 11 produced no verdict. In 148 of the cases, the opposing party decided not to contest the document. In only 6 of the contested cases did the judge rule on the favor of the document-submitting party without authentication by witnesses. On the roles of witnesses in certifying documents, see also Tyan (1955; 1960, pp. 236-52).

⁴¹ Uzunçarşılı (1965, chap. 18). The theme appears in one of our registers: Istanbul 22 (1695), 93a/1.

Ottoman economy had not yet begun the transition from personal to impersonal exchange. Commercial organizations were tiny and short-lived, and business took place largely among acquaintances (Kuran 2011). Irrespective of religion, people enforced contracts largely through reputation-based means, turning to courts only as a last resort and in extraordinary circumstances. Indeed, extrapolating from the average number of disputes in our registers, we find the probability of any given business transaction leading to litigation to be around 0.05%.⁴² In borrowing from acquaintances, or buying an object from a seller with whom one has interacted repeatedly, the expected benefit of documentation is limited. In fact, it may damage the relationship itself by signaling mistrust.

Nevertheless, document use should be more prevalent in the court records when the risk of losing is greater. That risk should peak on matters involving a state official, since the courts are predisposed to rule in favor of the state. Table 12 shows that document use does indeed rise when a state official is involved, relative to the full sample of cases⁴³

Table 12. Document use in state trials					
	No Document	Presented by subject	Presented by official	Presented by both	Total
Subject win rate	74.8	95.8	33.3	80.0	72.8
Number of cases	111	24	18	5	158

In Table 12, 47 of the 158 (29.7%) cases that involve a state official, documentary evidence is presented to the court. As with the full sample, the side presenting a document has a much greater chance of winning. Moreover, the extreme sample selection bias discussed in Section 9 still results in the subject winning the majority of all cases involving a state official. But the value of a document remains high. When a subject submits documentary evidence, he wins 95.8% of the time, as opposed to 74.8% when no documentary evidence is submitted. Similarly, when the state official submits documentary evidence, he is much more likely to win.⁴⁴

9. Multivariate Analysis of Judicial Decisionmaking

Having examined the institutional biases in the Ottoman judicial system, noted the apparent asymmetries in court participation among Istanbul's religious communities, and explored the role of documents as insurance against pro-plaintiff and pro-state bias, we are left

⁴² This estimate is based on the assumption that every adult participates in 20 important commercial interactions per year and that the adult population of Istanbul amounted to 66.7% of 700,000 residents.

⁴³ Documentary evidence appears in 29.7% of all trials involving a state official. In those that do not involve an official, documentary evidence is submitted in only 13.6% of all cases. The difference is significant at the 99.9% level ($t=4.32$).

⁴⁴ The two differences (95.8% vs. 74.8%) and (33.3% vs. 74.8%) are both statistically significant at the 99.9% and 99% level, respectively ($t=3.58$ and $t=3.41$).

to question to whether the differing plaintiff victory rates between religious communities—specifically the asymmetries involving Muslim-Christian trials—were driven by inter-group differences concerning the substance of trials. Muslims and Christians might have appeared in debt or waqf cases at disproportionate rates, and any judicial bias may have varied according to topic. A related factor that could sway a judge is the presence of an official among the litigants.

The relative weights of such influences can be disaggregated through a logistic regression framework. This exercise will enable us to separate the impact of the litigants' religion, their status in relation to the state, the substance of the dispute, and document use. To facilitate interpretation, we provide the results through odds ratios.

Model

The logistic regression estimates the equation

$$P_{it} = \frac{1}{1 + \exp(-\beta_0 - \beta_1 \text{Muslim} - \beta_2 \text{Official} - \beta_3 \text{Evidence} - \beta_4 \text{Year}_t)}$$

where P_{it} is distributed logistically with mean zero. More specifically, we decompose the vector β as equal to

where β_0 when the adjudicator of case i in year t rules in favor of the plaintiff and otherwise; and β_1 and β_2 are vectors that identify, respectively, whether either or both litigants are Muslim, whether either litigant is employed as a state official, and which litigant introduced documentary evidence at the trial. The vector β_4 consists of year-specific dummy variables to control for fixed effects on cases adjudicated in the same year.

Since the religion-specific variables are not interacted with the employment or document variables, we are assuming that the weight of documentary evidence in the judge's decision making is invariant to the faith of the party introducing the evidence. In addition, we are assuming that the testimony of state-employed individuals is weighed by the judge consistently irrespective of their religion.

Specifications

Under these assumptions, we present in Table 13 estimates for four specifications, each of which adds a new class of controls. (1) controls for religion of the litigants; (2) adds controls for cases where the litigants include an official; (3) adds controls for the dispute topic; and (4a-c) control for documentary evidence. Of the final trio, (4a) simply adds controls to specification (3); while (4b) and (4c) estimate specification (3) on cases that either include or exclude documentary evidence.

In all the regressions, our reference specification involves a non-Muslim plaintiff and a non-Muslim defendant. Hence, the odds ratio for the variable "Defendant Muslim" indicates the change in the relative probability of the judge ruling for the plaintiff when the defendant is Muslim rather than non-Muslim. The specifications determine whether the above-discussed plaintiff victory rate differences in Muslim-Christian trials are robust when controlling for factors that might have influenced judicial decisions.

	(1)	(2)	(3)	(4a)	(4b)	(4c)
	All	All	All	All	No Doc	Doc
Plaintiff Muslim	0.97	1.03	1.07	1.07	1.07	1.14
Defendant Muslim	2.02**	1.81**	1.71*	1.56	1.67*	2.18
All Muslim	0.50**	0.51*	0.51*	0.51*	0.47*	0.64
Plaintiff state official		0.36***	0.35***	0.31***	0.28***	0.55
Defendant state official		4.41***	4.62***	4.45***	3.55***	11.01***
Waqf			0.80	0.79	0.71*	1.37
Sale			1.11	1.10	1.02	1.61
Property			1.38**	1.61***	1.62***	0.59
Tax			0.98	1.24	1.35	0.45
Guild			2.31**	2.09*	1.73	4.07***
Plaintiff document				3.52***		
Defendant document				0.05***		
All document				0.15**		
Year-specific fixed effects	Yes	Yes	Yes	Yes	Yes	Yes
Number of trials	2286	2286	2286	2286	1935	345
Pseudo R ²	0.04	0.05	0.06	0.13	0.06	0.14

*, **, ***: Regressor is statistically significant at the 95, 99, and 99.9 percent significance level, respectively.

Religion of litigants

Interestingly, in no specification does the plaintiff's religion affect the judge's decision making process. Consistently, this variable turns out statistically insignificant. Furthermore, the religion of the defendant is significant at the 99% level in specification (1), and at the 95% level in (2), (3), and (4a). Hence, without controls for documentary evidence, a judge is more likely to rule in favor of the plaintiff when a Christian sues a Muslim than in the reverse case. This mirrors the results in Table 3b.

To interpret the lack of statistical significance in specification (4a), we estimate specification (3) twice more while limiting our dataset first to cases without documentary evidence and then to those with documentary evidence. The estimated results of specification (4b) are similar to those presented in (3). By contrast, in specification (4c) the evidence of sample selection bias indicative of prejudicial bias is no longer significant. Evidently, non-Muslim apprehensions about encountering a prejudiced judge are alleviated when documentary evidence is present. Although documentation cannot change the judge's attitudes toward non-Muslims, it keeps him from disregarding persuasive evidence, thus limiting the impact of his ingroup bias. That is why, in specification (4a), which controls for documentary

evidence, the previously observed effect of non-Muslims suing Muslims only when certain of a win is diminished.

Finally, the statistical significance of the variable “All Muslim” helps interpret the odds ratio of “Defendant Muslim.” In each specification it indicates that when a Muslim sues another Muslim, the probability of a plaintiff victory returns to the baseline specification of adjudication among non-Muslims. Evidently, judges were just as likely to rule in favor of the plaintiff in intra-Muslim cases as in cases among non-Muslims.⁴⁵

Presence of a state official

Specifications (2)-(4c) all control for the presence of state officials among the litigants. The controls reflect the expectation that judges would have avoided putting themselves in conflict with state authority. Each of these specifications points to a strong anti-state bias. Specifications (2)-(4a) indicate that judges are about 4 times more likely to rule in favor of the plaintiff when the defendant is a state official. Moreover, the plaintiff is 3.3 times more likely to lose a case if he is a state official, all else being equal.

As with the high plaintiff victory rate for minorities, these results probably reflect a sample-selection bias. Potential defendants threatened with a lawsuit by a state official would have opted to settle out of court unless very confident of prevailing in court. Similarly, potential plaintiffs would have refrained from suing a state official before a state-appointed judge unless their case was very strong.⁴⁶ In brief, the observed lawsuits involving a state official represent the disputes in which the official case was particularly weak.

In specification (4c), the results for trials involving state officials differ from those of the preceding specifications. For cases where documentary evidence is presented, a plaintiff who is an official has the same probability of winning as a plain subject, irrespective of religion. In other words, document-holding officials who initiate adjudication have no greater chance of winning than any other document holder. Revealingly, these results are not repeated in instances where the defendant is an official. Since state officials are more likely than subjects to possess documentary evidence, when we limit the sample to trials where documents are submitted as evidence the plaintiff will have to be highly certain of victory to challenge an official; in itself documentary evidence does not provide a high likelihood of winning since the defendant may be able to rest his case on documents of his own. However, in the sample restricted to cases with documents, plaintiffs suing an official are 11 times more likely to win, relative to our baseline specification.

⁴⁵ When both litigants are Muslim, the Plaintiff Muslim, Defendant Muslim, and All Muslim indicator variables are equal to 1. In this case, the statistically negligible coefficient of Plaintiff Muslim plays no role, but the coefficient on All Muslim is statistically the negative of that of Defendant Muslim. In each specification, the sum of the two coefficients is statistically equal to 0 ($\chi^2=0.01$ for specification (1), $\chi^2=0.35$ for specification (2), $\chi^2=0.81$ for specification (3), $\chi^2=2.41$ for specification (4), $\chi^2=0.83$ for specification (5), and $\chi^2=2.16$ for specification (6), all with 1 degree of freedom.).

⁴⁶ Unfortunately these hypotheses cannot be tested directly without data on settlement rates, which are unavailable.

Topic of dispute

When the dispute topic is controlled for, the estimates of the earlier regressions remain statistically significant and constant (specifications (3)-(4c)). Evidently, the qualitative nature of the dispute, while undoubtedly germane to the adjudication process, does not make the judge weigh the religion of the litigants differently. The last four specifications suggest also that judges were more likely to rule for the plaintiff when adjudicating disputes over guild business and property transactions.

Documentary evidence

Specification (4c) offers overwhelming support to our earlier observation that documents carry significant weight in trials. According to Table 13, if the plaintiff introduces documentary evidence to the court, his odds of winning increase fourfold. More dramatically, when a defendant challenges the plaintiff's account through documentary evidence, the judge is 25 times less likely to rule in favor of the plaintiff! As proposed earlier, putting contracts in writing provides substantial insurance against breach of contract. Whatever the biases of the Ottoman judicial system, people could boost their chances of winning a commercial lawsuit merely by having a written document to support their case.

10. Conclusions and Implications for the Present

Since no existing country has a fully functioning Islamic legal system, studying its past applications can provide the necessary clues as to whether it satisfies basic conditions of the rule of law. Through an examination of seventeenth-century Ottoman court data, we have shown that lack of judicial independence from the government and discrimination against non-Muslims may be among the consequences of instituting a legal system modeled on past applications of Islamic law.

As practiced within the Ottoman Empire, Islamic law was characterized by institutionalized judicial biases against religious minorities and lack of judicial independence from executive authority. Courts were biased against non-Muslims in practice as well. We drew this inference from a comparison of lawsuits involving a non-Muslim plaintiff and a Muslim defendant with lawsuits in which the roles are reversed. Though relatively fewer, inter-faith lawsuits of the first kind exhibit a greater plaintiff victory rate, which suggests that non-Muslims preferred to settle claims outside the court unless reasonably confident of winning. The institutionalized biases of the courts must have been among the major reasons. The result holds up in a multivariate analysis that controls for involvement by a state official, the issue in dispute, and the use of documentary evidence. In lawsuits pitting a subject against a state official, the plaintiff victory rate is much higher when the lawsuit is initiated by the former. It appears that subjects were reluctant to sue a state official unless very confident of prevailing, though the asymmetry in numbers lacks significance.

Legal reformers of the nineteenth century invoked these factors, along with the unsuitability of Islamic courts to modern financial and commercial practices, in campaigning for secular commercial courts. They considered traditional Islamic courts to be contributors to the region's deepening economic problems. By the 1850s, they had managed to establish secular commercial courts in Istanbul, Cairo, and Alexandria. Insofar as their justifications were grounded in fact, and the secular courts did adjudicate more impartially, the new courts would have contributed to jump-starting the Middle East's catch-up process. Native Christians and Jews were becoming increasingly important economic players, and leveling the playing field in their favor would have stimulated trade, especially internal trade involving Muslims. Studying the records of the commercial courts should enable the testing of whether the biases identified here did, in fact, diminish.

One might object that conditions in the twenty-first century are different enough that the foregoing findings are irrelevant to the re-imposition of Islamic law. Another possible objection is that the Ottoman courts of the seventeenth century are unrepresentative of genuinely Islamic courts that existed only in the early centuries of Islam, in the religion's Arab heartland. Both of these objections involve empirical matters. Did the courts of early Islam not discriminate against non-Muslims? Did their judges avoid favoritism toward state officials? If one or both of these questions has a negative answer, one would want, of course, to know why practices differed. With respect to the first objection, one would want to know exactly what differs now. Is it that judges are insulated from political pressures? Have the proponents of Islamization agreed to abrogate the longstanding practice of treating Muslim testimony as inherently superior to that of non-Muslims?

The proponents of reinstating Islamic law have tended to avoid such questions by focusing on ideal conditions that are unlikely ever to be attained. In the Islamic society of their imagination, all public officials have infused an Islamic morality, which makes them averse to corruption and favoritism. Accordingly no judge rules in favor of a state official merely for fear of state reprisals, and no state official would expect him to do so anyway.⁴⁷ Yet there is no evidence that morality alone can eliminate the biases in question. In no known society are public officials immune to material incentives. Moreover, according to Muslim accounts widely accepted among Islamists, no known Muslim society after the year 661, the end of Sunni Islam's canonical golden age, has been free of corruption. These accounts beg the question of how the biases identified in this paper would be eliminated. There is an additional reason why today's proponents of Islamic law avoid addressing the possibility of injustices toward non-Muslims: the presumption, discredited here through econometric techniques, that historically Islamic courts ruled impartially on cases involving non-Muslims.

There is a difference in conditions that would mitigate the biases identified in this paper, were courts similar to those of seventeenth-century Istanbul to go into operation. The use of documentation is much more widespread in the modern Middle East than in the time period covered in our empirical work. Documentary evidence mitigated the biases inherent in Islamic

⁴⁷ For examples of social designs that treat Islamic morality as an antidote to corruption, see Afzal-ur-Rahman (1980, chap. 7); Chapra (1992, especially chaps. 7, 9), and Naqvi (2003, chaps. 4-5).

justice. Subjects could protect themselves against pro-state biases and non-Muslims against pro-Muslim biases simply by documenting their transactions. It is impossible, however, to write a complete contract that accounts for every possible contingency. Conflicts on matters that could not have been anticipated are inevitable, as are disagreements over contract wording. Hence, documentation alone would not eliminate the biases.

Economic globalization has raised the importance of judicial independence. As one of the determinants of investment risk, it affects capital flows. In particular, capital generally flows toward countries where the courts are relatively independent of the executive branch of government. Sooner or later, therefore, the supporters of an Islamic legal system will have to come to terms with potential costs of a lack of judicial independence. They will need to deal with the structure of courts staffed by corruptible judges who are responsive to material incentives.

Insofar as globalization promotes economic interactions across national and religious boundaries, it also raises the potential costs of pro-Muslim judicial biases. The adoption of a legal system that weights witness testimony by the religion of witnesses would pose an impediment to commerce and thus economic growth. Companies setting up shop in a country under Islamic law would expect compensation for the risks incurred by their employees. In countries with a substantial non-Muslim population, such as Egypt, where estimates of the Christian Coptic population ranges between 10 and 20 percent, pro-Muslim judicial biases would take an economic toll both by weakening minorities and by impeding cross-religious commercial interactions. In predominantly Muslim countries without a substantial non-Muslim minority, such as Saudi Arabia, similar costs could arise from judicial biases against socially unpopular or officially disfavored Islamic sects. The very logic of disregarding non-Muslim testimony could be used to justify the discounting of, say, Shii testimony.

The demand for reinstating Islamic law receives a sympathetic hearing from some intellectuals and policy makers committed to preserving or reviving local cultures. Insofar as multiculturalism is itself desirable, one can make a case for using the Islam's rich legal heritage as a basis for legal reforms in the Islamic world. Nevertheless, there are tradeoffs that should be recognized and considered. Imposing Islamic law could harm Muslims economically by restricting their participation in the global economy.

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