
*“Who Acknowledges His Rights?”:
Prelude to the “Modernization” of the Judicial System
in Mid-nineteenth Century Iran as Seen in Persian Legal Documents*

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Introduction

Around the mid-nineteenth century, the European powers began to ratify so-called “unequal treaties” with Middle Eastern and Asian countries. These treaty arrangements came as many European states engaged in commercial activities in Asia with more energy than in previous centuries and they were sometimes ratified under military pressure. One of the essential conditions of the unequal treaty was consular jurisdiction. Part of this consular jurisdiction was the so-called “mixed tribunal system” or “commercial court system,” which was introduced in Asian and Middle Eastern countries, for example in the Ottoman domain (Istanbul) in 1839, in Beirut and Damascus in 1850, in Egypt in 1876, etc. In theory, this system dealt with civil affairs between European and local peoples and resulted in the beginning of the modernization of law.

This article verifies the establishment of this kind of commercial court in mid-nineteenth century Iran, which is neither analyzed nor even hardly referred to in previous studies, as a prelude to the “secularization” as well as the modernization or westernization of law in Iran. In order to clarify my argument concerning secularization, it is necessary to explain the relation between law and religion briefly.

In the pre-modern period, “religion” sometimes included not only faith, belief and ethics but also social practices, law and politics. So when we consider the process of “secularization,” we sometimes encounter the problem of the “separation of law and religion.” This matter has been well discussed in the case of other countries (e. g. France).¹

1. Jean Baubérot suggests that the separation of family registration and marriage contracts

As for the case of Iran, there is little scholarship on this issue from the viewpoint of the commercial court (of course the study on the commercial court in Iran itself is lacking). Thus, focusing on the acknowledgement of private rights in Iran, I will indicate arguments to help understand the beginning of the secularization of Iran and the relationship between the state and religion in Modern Iran. Additionally I would like to take the “plaintiffs” into consideration as well, who went to this newly-established commercial court in Iran in order to understand the realities of this new legal institution and its effects on the local society.

Hereafter in this article, first I would like to refer to the recent discussion on the relation between the state and law in nineteenth-century Iran as a background of my argument. And second, I examine the context of the establishment of the commercial court in Iran, that is the Russo-Iranian commercial treaty of 1843. Third, through a study of Persian legal documents, I will analyze the character of the commercial court, that is in Persian language *Dīvānkhāne-ye Tejārat*, where the registration of private contracts and settlements of litigation and disputes took place. Forth, the plaintiffs or contractors who appealed for their rights in this commercial court will be also studied in order to reveal the divergence between the theoretical concept of the establishment of this court and its realities.

Hence, we can find the primary transition of the relationship between the state and religion in the legal system of Modern Iran.

1. the State and Law in Nineteenth Century Iran

Recently there has been an important discussion concerning the judicial system of nineteenth-century Iran under the Qajar dynasty. Willem

from the church in 1792 is a very significant phenomenon in the development of laïcité (the separation of church and state) in France (Jean Baubérot, *Histoire de la laïcité en France*, 2nd ed. (Paris: Presses universitaires de France, 2004), 11–13). Jacques-Olivier Boudon also emphasizes the importance of this process in the history of laïcité in France (Jacques-Olivier Boudon, *Religion et politique en France depuis 1789* (Paris: A. Colin, 2007), 10).

Floor, representing the traditional view, argues for the existence of the dual judicial system i.e. *ʿorf* court for criminal cases and *sharīʿa* court for civil affairs as well as the existence of a hierarchy of state-appointed *ʿulamā*.² More recently, Christoph Werner takes issue with Floor, denying the dual judicial system and hierarchical system of official *ʿulamā* in his work on socio-economic history of Tabriz.³ He insists it is reasonable to assume that law (i.e. *sharīʿa*) and executive power co-existed in that period of Iranian history and that the *ʿorf* court did not exist. Based on an analysis of one case study of a *waqf* litigation in the nineteenth century, Nobuaki Kondo agrees with Werner.⁴

From Werner’s point of view, the judicial system was occupied by independent *ʿulamā* and the state did not concern itself with the acknowledgement of private rights and the settlement of litigation in nineteenth-century Iran. In fact, until now we have not been able to verify the existence of official *sharīʿa* court registry books in nineteenth-century Iran. Recently the *ʿulamā*’s private registries from that period were located and published.⁵ So in this field we see a great difference between the Qajar Iran and the Ottoman Empire where *sharīʿa* courts operated as legal courts and register offices under the control of the central government.

However, Werner and Kondo did not insist clearly whether the state did not concern itself with the acknowledgement of private rights in Iran all through the nineteenth century. Thus naturally, we ask one question,

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2. Willem Floor, “Change and Development in the Judicial System of Qajar Iran (1800–1925),” in Bosworth ed. *Qajar Iran: Political, Social and Cultural Change 1800–1925* (Edinburgh: Edinburgh University Press), 113.
 3. Christoph Werner, *An Iranian Town in Transition: A Social and Economic History of the Elites in Tabriz, 1747–1848* (Wiesbaden: Harrassowitz, 2000), 235–241.
 4. Nobuaki Kondo, “Nijū no wakufu’ soshō: 19 seiki Iran no sharīʿa hōtei,” [The case of “Doubled Waqf”: A study on Qajar Sharīʿa Courts], *Nihon Chūtōgakkai nempō* 19, no. 2 (2004): 117–142. Even though Werner and Kondo showed new idea of sharīʿa court in nineteenth century Iran, many scholars rely on the Floor’s old view yet. For example Irene Schneider’ recent work is based on the Floor’s view. See Irene Schneider, *The Petitioning System in Iran: State, Society and Power Relations in the Late 19th Century* (Wiesbaden: Harrassowitz, 2006), 20–25.
 5. For example, *Dar Mahżar-e Sheykh Fażl Allāh Nūrī: Asnād-e Hoqūqī-ye ʿAbd-e Nāserī*, ed. Manşūre Etehadīye and Saʿīd Rūhī, Tehrān: Nashr-e Tārikh-e Īrān, 1385sh; *Asnād-e Mahkame-ye Sayyed Şādeq Tabatabaʿī (Sangelajī)*, ed. Omīd Reżāʾī, Tehrān, 1387sh.

“Who acknowledges his (i.e. ordinary people’s) rights in Iran?” Omīd Reżā’ī explains in his recent work that “among the European powers, Russia showed a strong interest in the registration of contracts in Iran.”⁶ His claim is based on the articles of the Russo-Iranian commercial treaty of 1843. In the next section, I examine the contents of an article in this treaty of 1843 from the viewpoint of official registration.

2. *The Russo-Iranian Commercial Treaty of 1843*

After the foundation of Qajar dynasty at the end of the eighteenth century, Iran was faced with the Russian Empire’s ambition of territorial expansion in the Caucasus. Russo-Iranian wars broke out in 1804 ending with the defeat of Qajar Iran in 1828.⁷ The two states resolved the conflict with the Treaty of Torkomanchāy, the first unequal treaty for Iran. As a result of this treaty, the Iranian government ceded the northern part of the Aras river, i. e. Caucasus to Russia and admitted consular jurisdiction.

After the treaty of Torkomanchāy, Qajar Iran and Imperial Russia concluded a new commercial treaty in 1843. According to its opening line, the purpose of this treaty was to prevent disguised bankruptcies. Here, I would like to focus, above all, on the first article of the treaty which indicates the establishment of the “*Dīvānkhāne-ye Mo’tabar*” i.e. the “reliable court.”

All deeds, such as contracts of sale, loan agreements, etc., must be registered from now on in the Reliable Court’s particular registry book in which the local governor of each province places the state seal. In the said registry, all the affairs including the date and other relevant information must be registered. The date and number of the registry must be written on the surface of the deeds and the registry number must appear on each page of the registry in order to prevent falsification.⁸

6. Omīd Reżā’ī, *Dar āmādi bar Asnād-e Shar’ī-ye Dowre-ye Qājār* (Tokyo: ILCAA, 2008), 7.

7. As for the background and the overview of Russo-Iranian War, see Muriel Atkin, *Russia and Iran 1780–1828* (Minneapolis: University of Minneapolis, 1980).

8. Translation of Article 1 of the Russo-Iranian Commercial Treaty of 1843 is from Lesān

This article has great significance from the viewpoint of the registration of contracts if “the reliable court” was established in this period of Iranian history. According to this article, we can understand the Iranian government established the reliable court as a state-controlled registry institution for the acknowledgement of private rights and contracts. That means the Iranian government was responsible for the private rights of people, even though this settlement is intended mostly to apply to foreigners, especially Russian merchants. I suggest this phenomenon is the beginning of the separation of religion and law (i.e. Islam and the law). It is worth pointing out that this action was not taken freely by the Iranian authorities but because of the pressure by Imperial Russia.

3. *The Document Establishing the Commercial Court in 1858*

The Archive of the Iranian Foreign Ministry preserves the document establishing the *Dīvānkhāne-ye Tejārat*—the commercial court in 1858/1275AH.⁹ In order to verify whether we can recognize this *Dīvānkhāne-ye Tejārat* as the reliable court referred to in Russo-Iranian Treaty of 1843 it is necessary to investigate this document. The document includes the following points:

1. This commercial court belongs to the foreign ministry.
2. This court is established in the city of Tabriz, the most important city in the border area along the Imperial Russia.
3. This court is established in order to settle the disputes and litigation between foreign merchants and domestic Iranian merchants.
4. This court consists of a member from the “*Dīvānkhāne-ye ‘Adliye*” (i.e. the council of justice),¹⁰ members representing Iranian Muslim merchants, Iranian Christian merchants, and members from consulates of friendly countries.

al-Molk Sepehr, *Nāsekh al-Tavārikh*, vol. 2, ed. Jamshīd Kiyānfar (Tehrān: Enteshārāt-e Asātir, 1377sh), 821–23.

9. Center for Archives and History of Diplomacy, Ministry of Foreign Affairs of Islamic Republic of Iran (hereafter CAHDI): GH1275-8-42-4.

10. Kondo pointed out that that The *Dīvānkhāne-ye ‘Adliye* was reformed during the period of Amīr Kabīr’s prime ministry (see Kondo, “Nijū no waku,” 140n25). However, we need more investigation into this governmental institution in nineteenth-century Iran.

5. Foreign merchants can sit with an interpreter from his consulate in the court session.¹¹

The conditions laid out in the document suggest that the Iranian government established a commercial court in order to separate the settlement of disputes related to foreign merchants from the *'ulamā*.

However, this document does not refer to registration of contracts. It is therefore necessary to examine the registered documents themselves in order to ascertain whether this commercial court was the so-called "reliable court" mentioned in the Russo-Iranian treaty.

4. The Character and the Content of Registered Documents

A great number of documents registered in the commercial court are stored in the Archive of the Iranian Foreign Ministry.¹² According to my research, some of the apparent features seen in the registered documents are compatible with the conditions of the "reliable court" mentioned in the first article of the Russo-Iranian commercial treaty.

First of all, we can recognize the "nomre" or number on the surface of the registered documents (see the translation of Article no. 1 of Russo-Iranian Treaty). Second, on the reverse side of the documents we can confirm the seal of the commercial court with the inscription of "Seal of the commercial court of Supreme state of Iran in 1262AH/ 1845." This seal includes the design of the "Lion and Sun," a symbol of the Iranian state and monarchy. This inscription and the design of Lion and Sun clearly showed this seal as a "state seal" in the Russo-Iranian treaty (see also translation of the treaty).

Additionally we see the seal of the Russian general consulate in Tabriz which includes the design of a double-headed eagle representing Imperial Russia. Thus, these documents show that the commercial court is indeed the "reliable court" indicated in the treaty of 1843. It is clear that the commercial court registered the documents for the acknowledgement of private rights. At the same time we can assume that the registration of

11. See my critical edition of this document in the appendix.

12. I located, for example, CAHD: GH1270-7-24-1; GH1270-7-24-27; GH1279-10-2-54; Mokammel-157-298 and also from NAI (National Archives of Iran) : 296012508.

private rights and the settlement of litigation were inseparable because both of them were essential functions of commercial court in Iran.

Based on the investigation of these registered documents, it is plausible to infer the following:

1. The documents themselves were issued by the *‘ulamā*, and moreover the style of the registered documents is same as *sharī‘a* documents, which means the registered documents are *sharī‘a* documents.
2. Contracts were concluded between Iranian Muslims and Iranian Christians or between Iranians and Russians including Shī‘i Muslims (Caucasian Shī‘is).
3. The topics of the contracts were mostly concerned with loans and sales.
4. From the inscription of the seal of this court, the date of the court’s establishment was 1845 or 46 (1262AH).

Point no. 1 and no. 2 clearly make the situation surrounding this court very complex. The Iranian government did not introduce a whole western legal and judicial system in the mid-nineteenth century. Rather, it managed to adopt traditional legal documentation to the new commercial court. This shows the limitations of the legal system in this period.

Moreover, the Russian merchants who appeared in the registered documents included Shī‘i people from the Caucasus. As I mentioned above, the Caucasus was ceded to Russia by Iran in the Torkomanchāy Treaty of 1828 after the Russo-Iranian War. For the Caucasian Shī‘i merchants and also for the Iranian Christians, there were no difficulties in settling their disputes in the traditional *sharī‘a* court by the Shī‘i *‘ulamā*, however, they made use of the Russia’s support in order to strengthen their position in the contracts or transactions in the Iranian domain.

Conclusion

Dīvānkhāne-ye Tejārat, the commercial court, which was established in accordance with the Russo-Iranian Treaty of 1843, was to be free from the interference of Islamic clerical jurists, i.e. the *‘ulamā* as seen in the commercial treaty and the document of 1858 for the establishment of the commercial court.

With the investigation of Persian documents surrounding the court, we can now confirm the following three points:

1. The state directly acknowledged the private rights and contracts which were registered in the commercial court in Tabriz.
2. The commercial court was responsible for settling disputes between Iranian and Russian merchants.
3. The legal documents themselves were issued by the *'ulamā*, the Islamic clerical jurists.

Point no. 1 shows the beginning of secularization in Iran. The inscription of the court's seal "the supreme state of Iran" tells us that Iran had acquired some kind of "state consciousness" (not national identity) by that period and that the Iranian state began to concern itself with the acknowledgement of private rights albeit in a limited number of cases.

The foregoing verifies the existence of the official registration of private rights and of a "secular court" separated from Islamic juridical authority i.e. the *'ulamā* in mid-nineteenth century Iran. The introduction of this "secular court system," however, had a limitation because legal affairs themselves were strongly connected with the *'ulamā*.

Even so, it seems plausible to say that the establishment of the commercial court reflects a "prelude" to the secularization of the legal sphere in Iran and obviously this "secular court" is completely different from Floor's *'orf* or a secular court treating not civil cases but only criminal and penal cases.

Additionally, we find Caucasian Shī'i Muslims as Russian subjects and Iranian Christians who registered their documents in the commercial court. Thus, it seems reasonable that these new Russian subjects requested the establishment of the commercial court in which private rights were acknowledged by the state and not by the *'ulamā* and then Iranian Christians made use of it effectively.

If further investigation in both the Iranian and Russian archives supports my argument, we can reconsider the beginning of the Iranian state's modernization as a response to pressure applied by the Western Powers but by the ordinary people's initiatives, at least in the field of the legal and judicial system in the nineteenth century.

Lastly, I would like to suggest that we reevaluate the system of commercial courts or mixed tribunal systems, not only in Iran but also in

other Middle Eastern and Asian countries from macro and micro perspectives. The former is from the viewpoint of “secularization” and the latter, that is more important for the future research, is from the grass roots point of view, i.e. from the side of “plaintiffs” or “contractors.” In short, this means that it is necessary to ask another question: “Who wanted his rights to be acknowledged by the state?”

Appendix: edition of the document establishing the commercial court in 1858 (CAHDI: GH1275-8-42)

بسفرای دول خارجه نوشته میشود

رای انور اعلیحضرت اقدس همیون شاهنشاهی روحی فداه بجهت رفع جمیع اختلافها و احقاق حقوق کسبه و تجار مملکت

آنربایجان /

اعم از داخله و خارجه بر این قرار گرفته است که در دار السلطنه تبریز قرار دیوانخانه و مجلس تجاری داده شود و

بریاست مقرب الخاقان /

میرزا عباس خان معاون وزارت امور خارجه با اجزای مفصله که در تبریز معین خواهد شد و نظیر آنها در دار الخلافه

طهران /

معین و بر قرار خواهد شد هر قسم گفتگو و ادعا و اختلافی که فیما بین تجار - دولت علیه و دول خارجه - واقع میشود

رجوع به مجلس مزبور شود /

از دیوانخانه عدلیه از تجار معروف دولت علیه ایران و معتبر از تجار دول متحابه هر دولتی دو نفر

یک نفر که در تبریز معین خواهد شد که قونسولها معین نمایند

۵ نفر

مسلمان مسیحی

۳ نفر ۲ نفر

هر یک از متداعیین که تاجر و رعیت دول خارجه باشند ترجمان قونسولخانه دولت متبوعه آن تاجر از برای گوش دادن /

و حالی شدن سؤال و جواب طرفین حضور بهم رسانند هر قسم که مطلب باهل آن مجلس ثابت و محقق شد /

موافق عهد نامجات دایر مابین قطع و فصل شود که دیگر من بعد اختلافی فیما بین تجار واقع نشود و هر تاجری /

نتواند بمیل و خیال خود خودش را مفلس و بی چیز قلمداده مال مردم را بهدر بدهد محض اطلاع /

خاطر آنجناب نگاهشته ضمناً زحمت می دهد که مراتب را بقونسولخانه دولت /

متبوعه خود در تبریز اعلام دارند فی ۲۴ شهر ربیع الثانی سنه ۱۲۷۵ .

حاشیه : صحیح است

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