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The Beginnings of Economic Modernization in the Middle East: Legal Impact of Unequal Trade Treaties

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# **The Beginnings of Economic Modernization in the Middle East**

## **Institutional Impact of the Capitulations**

Chapter 10 of a manuscript in progress:

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

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**Note.** The court data presented in the current draft forms a segment of a 12,000-case sample under construction. When finished, the sample will consist of 23 court registers that span the 1579-1698 period. The two already completed registers are the largest of the group. The reported pilot sample of 500 cases is deliberately unrepresentative. It includes disproportionate numbers of cases involving foreigners, partnerships, state officials, and intercommunal disputes.

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### The Logic of the Capitulations

In 1665, Mehmet bin Mahmut, a Baghdad merchant, sued Heneage Finch, the English ambassador to the Ottoman Empire, in an Istanbul court. A group of English merchants, complained Mehmet, were refusing to repay a debt. The record is silent on why the ambassador was sued, rather than the merchants accused of default.<sup>1</sup> When the trial began, the ambassador showed the judge the text of an Ottoman-English treaty, which stipulates that in cases involving even one trader operating under the English flag neither claims nor witnesses may be heard in the absence of documentary support (*hüccet*). Reminded of this agreement, the judge asked Mehmet to prove his claim through written evidence. Mehmet replied that he lacked documentation, prompting the judge to throw out the case.<sup>2</sup>

Had the alleged defaulters been Ottoman subjects, Mehmet would not have been required to furnish documentary support for a debt contract. Under the prevailing interpretation of Islamic contract law, oral agreement was sufficient to validate the terms of a loan. By contrast, in English courts the trend was toward rejecting oral financial claims, unless backed by documentation. At the time of Mehmet's lawsuit against Finch, centuries of controversy over the relative merits of oral and written evidence was about to make the leading categories of unwritten contracts unenforceable; the coup de grâce would come in

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<sup>1</sup> Finch had probably provided surety for the debt. Under his tenure (1660-69) English representatives obtained the right to guarantee the liabilities of English subjects [Kütüko\_lu, *Osmanl\_-ngiliz\_ktisâdî Münâsebetleri*, p. 32].

<sup>2</sup> Istanbul court records, vol. 15, case 69/2 (9 May 1665). Such cases are not common, but they span many decades. Three decades later, for instance, there was a lawsuit that pitted Ishak veled-i Abraham, a Jewish merchant, against the Englishman "Aved" (possibly Avery). Ishak appeared before an Islamic court in Hasköy, at the time a largely Jewish neighborhood of Istanbul, to make Aved settle a debt of another Englishman, a merchant. Aved, claimed Ishak, had agreed to serve as surety to his co-national. When the kadi opened the trial, Aved referred to a decree by Sultan Mehmet IV (r. 1648-87) and the supportive opinions (*fetvas*) of two of his chief religious officers (*eyhülislams*). According to the decree, said Aved, a surety claim involving a foreign merchant must be certified through a legally valid document. Learning that Ishak had no documentation, the

1677, with the imposition of a “Statute of Frauds.”<sup>3</sup> Evidently business was becoming less personal, and the judicial system was making the requisite procedural adjustments. Our 1665 case thus suggests that Ottoman sultans of the late seventeenth century allowed trials involving English traders to accommodate the ongoing legal transformation in England. In the face of foreign demands, they were beginning to recognize that “impersonal exchange,” the hallmark of modern economic relations, requires a different institutional framework than “personal exchange.”<sup>4</sup>

The stipulation that doomed Mehmet’s case belonged to a class of bilateral treaties known as capitulations. Crafted by Muslim and Christian European rulers, the capitulations provided extraterritorial privileges to foreign merchants conducting business in lands under Islamic law. This chapter argues that these privileges were granted in part, and became increasingly generous primarily, to facilitate trade relations within an evolving global marketplace. The westerners trading with the Middle East belonged to societies that were in the process of discovering and refining institutions aimed at enhancing contract credibility, barring arbitrary taxation, and aligning individual effort with individual rewards. Allowing them to operate under transplanted legal systems served to lower their transaction

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kadi instructed him to drop his case [Istanbul court records, vol. 23, case 7/3 (29 December 1696)].

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

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

costs. For their part, local rulers expected to gain from the consequent stimulation of trade. Trade flows would gain predictability, the volume of trade would expand, and their potential tax revenue would grow.

Although one can identify classes of losers across several centuries, the capitulations also brought, then, lasting general benefits that have been overlooked. In the long run the capitulations served as a vehicle for transplanting various trade-expanding and wealth-producing institutional innovations to the Middle East. They stand out, then, as preliminary steps toward the judicial and economic transformations that eventually, in the nineteenth century, received official stamps of approval through sweeping reforms.

The received literature, which focuses primarily on the Ottoman Empire, generally considers the capitulations a terrible mistake from the standpoint of the Middle East. It also treats the rulers who issued capitulations as economically irrational, which conflicts with the shrewdness they displayed in other contexts.<sup>5</sup> A related deficiency is that it offers few insights into the substance of foreign privileges. It leaves unexplained, for example, why westerners insisted that lawsuits against them should rest on documentary evidence, and why Ottomans agreed to grant foreigners protections denied to their own merchants.

To observe that the capitulations ultimately benefitted the Middle East is not to deny that they turned into instruments of discrimination against the local population, at least against the majority left without foreign legal protection. Just as a state that provides public goods may serve also to sustain social inequality, so the capitulations, in spreading efficient institutions, set the stage for *de facto*, if not also *de jure*, pro-foreign protectionism. Once the commercial functions of the capitulations are understood, these two patterns—efficiency-enhancing institutional diffusion and efficiency-reducing pro-foreign discrimination—will appear as two sides of a single process of

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<sup>5</sup> Their tax policies, for instance, varied according to the relative costs of monitoring tax agents and identifying taxable wealth. See Co\_gel and Miceli, “Risk, Transaction Costs.”

institutional transformation.

## Origins

Contrary to a common supposition, the practice of granting foreigners extraterritorial privileges did not originate with Islam. From 1082 onward Byzantium provided Venetian merchants preferential treatment in trade, freeing them from tariffs incumbent on natives.<sup>6</sup> The Byzantines allowed Venetians also to maintain courts of their own. Over time concessions of one sort or another were made to other nations. Predictably, foreigners came to play a key role in Byzantine commerce.<sup>7</sup> Around the same time various French and Italian cities exempted each other's merchants from customary commercial tolls. To one degree or another, they also allowed foreign merchants to base their internal affairs on laws of their own.<sup>8</sup>

As far as is known, Arab rulers of the first Islamic century did not grant extraterritorial privileges to foreign merchants. After their successors made it a practice of giving foreign traders special rights, for a while non-Muslim foreigners were taxed more heavily than local subjects, as required by Islamic law. On passing a customs station in either direction, a non-Muslim foreigner typically paid 10 percent of the value of his merchandise. By contrast, a Christian or Jewish subject paid 5 percent and a Muslim, irrespective of political status, only 2.5 percent. The nature of this discrimination suggests that the ruling classes of early Islam intended to favor Muslim traders, in whose activities they invested; non-Muslims professing allegiance and paying tribute to a non-Muslim ruler were to hold "least favored" status.<sup>9</sup> The rate structure indicates also that Arab rulers, who derived revenue from trade, did not expect to lose from favoring Muslim traders over

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<sup>6</sup> Nicol, *Byzantium and Venice*, especially pp. 59-64, 248-49; Lane, *Venice*, pp. 68-69.

<sup>7</sup> Mango, *Byzantium*, pp. 83-87; Depping, *Histoire du Commerce*, vol. 2, chaps. 8-9.

<sup>8</sup> All of these concessions amounted to treating law as "personal" and therefore mobile, as opposed to "territorial," in other words, circumscribed by political frontiers. See Borel, *Origine et Fonctions des Consuls*, pp. 4-5, 13-14, 94-97; Puente, *Foreign Consulate*, especially pp. 11-13, 18-20; Verlinden, "Markets and Fairs," pp. 128-29.

<sup>9</sup> Goitein, "Rise of Near-Eastern Bourgeoisie," p. 596.

foreigners. Were Islamic commercial institutions somehow inadequate, this protectionism would have entailed observable costs. Blocking taxable potential exchanges, it would have dampened rulers' enthusiasm for pro-local protectionism.

Later Muslim rulers adopted the Byzantine practice of granting foreign communities rights, privileges, and exemptions through treaties (Arab. *imtiy\_z\_t*, meaning privileges; Turk. *ahidnâmes*, meaning covenant letters). In the twelfth and thirteenth centuries the Fatimid and Ayyubid rulers of Arab lands, like the Seljuks of Turkey, were giving Venetian, Genoese, and Pisan merchants rights to trade at customs rates as low as 2 percent, along with judicial privileges to settle disputes with other foreign Christians in courts of their own.<sup>10</sup> At least one subsequent trade treaty, negotiated in 1337 between the emir of Seljuk Ayd\_n and the duke of Venetian Crete, exempted Venetians from all import duties on most commodities.<sup>11</sup> Significantly, these forerunners of the capitulations include treaties that granted privileges also to Muslims, or secured reciprocal entitlements. In the thirteenth century, Arab merchants in Corsica and Sicily could face trial in kadi courts, according to their own laws. And for several centuries preceding the downfall of the Byzantine Empire in 1453, visiting Turkish and Arab traders lived in enclaves known in Italian as *fondacos* and in Arabic as *funduqs*. Although information pertaining to daily life in these enclaves is scant, their residents almost certainly could settle commercial disputes internally.<sup>12</sup>

The early capitulations are aimed essentially at reducing tariff discrimination against foreign traders and allowing them to settle internal disputes through legal procedures of their own choice. In stimulating competition, the first provision enhanced economic efficiency. As for the second, it amounts to allowing foreigners to settle disputes through arbitration, without involvement of the

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<sup>10</sup> Fleet, *European and Islamic Trade*, especially pp. 71, 76, 94; Martin, "Venetian-Seljuk Treaty," pp. 326-30; Depping, *Histoire du Commerce*, vol. 2, chap. 9; Constable, *Housing the Stranger*, chap. 4, especially pp. 113-26; Sousa, *Capitulatory Régime of Turkey*, pp. 47-48; Liebesny, "Western Judicial Privileges," pp. 312-15; Ashtor, *Social and Economic History of Near East*, p. 326.

<sup>11</sup> Zachariadou, *Trade and Crusade*, pp. 155-56 and doc. 1337A, clause 13, p. 191-92.

<sup>12</sup> Reinert, "Muslim Presence in Constantinople," especially pp. 144-48; Sousa, *Capitulatory Régime of Turkey*,

ruler's own courts. Arbitration requires the consent of all parties, so at initiation it is efficient: each party must expect to do at least as well as in a formal court. A ruler who allows foreign traders legal autonomy can expect, then, to benefit from lower transaction costs. For one thing, insofar as adjudication is left to individuals familiar with the histories, practices, and expectations of the litigants, judicial costs will fall and judgments will improve. For another, communal enforcement mechanisms can be brought into play, providing a deterrent to dishonesty without interference from functionaries lacking local knowledge.<sup>13</sup> Internal dispute resolution mechanisms thus raise the profits of foreign merchants, which stimulates trade and increases potential tariff revenue.

Initially, the capitulations skirted certain themes that figure prominently in later commercial treaties, such as inheritance practices, collective punishment, and documentation of contracts. They entered treaties that in the fifteenth century Mamluk sultans made with Venice and Florence, and those that the Ottomans negotiated with a growing set of European nations over a half-millennium, down to World War I. The fifteenth through twentieth centuries thus mark a period of expanding foreign trade privileges. We shall see that these reflect institutional changes under way across the Mediterranean.

### **Mounting foreign privileges**

The Ottoman capitulations showered with attention are those negotiated in 1536 between Süleyman the Magnificent and King François I of France.<sup>14</sup> They enabled traders operating under the French flag, not all of them French, to displace Venetians as the dominant “nation” in Mediterranean

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pp. 46, 156-57; Le Tourneau, “Funduk”; Constable, *Housing the Stranger*, pp. 147-50.

<sup>13</sup> On the operation of informal contract enforcement mechanisms, see Greif, *Institutions*, especially chaps. 3, 4, 9; and Platteau, *Institutions, Social Norms*, chap. 6.

<sup>14</sup> For the Turkish text, see Kurdakul, *Ticaret Antla\_malar\_ve Kapitülasyonlar* [hereafter *TAK*], pp. 41-48; and for an English translation, Hurewitz, *Middle East and North Africa* [hereafter *MENA*], doc. 1. Boogert, *Capitulations*, p. 10, notes that these texts are controversial; what have come down to us may differ from the original Turkish text. But it is clear that French traders began to enjoy the key privileges enumerated in versions available now.



commerce.<sup>15</sup> According to Ottoman political lore, Süleyman granted the 1536 capitulations as a gesture of goodwill, and he could revoke them at any time. In fact, the specifics were negotiated. And, whatever the extent of enforcement, both the French and the Ottomans obtained rights of value to them.

Thereafter, the Ottoman Empire found itself on a slippery slope entailing increasingly generous and generally unreciprocated privileges to more and more nations. In 1580 the English secured essentially the same trading rights as the French. Other powers, beginning with Holland and, in a period of rapprochement, Venice, then obtained comparable privileges of their own.<sup>16</sup> In principle, no privilege extended beyond the reign of the grantor. It became routine, however, for sultans to reinstate lapsed capitulations.

In the course of this development, the Ottoman Empire began a long process of territorial contraction. New capitulations were issued and old ones renewed from positions of diminishing military strength. Consequently, and in line with bargaining theory, foreigners obtained progressively greater concessions. Also, given the Ottoman stake in maintaining trade flows, it became increasingly unrealistic to continue viewing foreign privileges as revokable unilaterally. By the early nineteenth century, the capitulations had metamorphosed into an instrument for providing foreign nationals and their local protégés broad privileges denied to most Ottoman subjects. They were also giving western powers a say over key economic policies. Eventually the capitulations forced the Ottoman Empire to abolish various domestic monopolies. With the Anglo-Ottoman Commercial Convention of 1838, the Ottoman state also agreed to enforce substantially higher duties on exports than on imports. This compounded the already crushing disadvantages of domestic producers intent on competing globally.<sup>17</sup>

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<sup>15</sup> Masson, *Commerce Français dans le Levant au XVII<sup>e</sup> Siècle*, especially pp. xv-xvj.

<sup>16</sup> *TAK*, pp. 99-403; *MENA*, especially docs. 2-7, 9, 10, 14.

The foregoing transformation is evident in changes in the meaning of the term “capitulations.” The term derives from the Latin “*capitula*,” which refers to the chapters into which treaties were divided. Thus, at the signing of the earliest commercial treaties between Muslims and Christians, “capitulations” meant “chapters.” That was a time of Arab and Turkish territorial expansion, and the treaties were not perceived as inimical to Muslim sovereignty. Eventually the acquired the connotation of “surrender,” reflecting the unfolding loss of sovereignty. That the capitulations came to be associated with subjugation is evident also in the refusal of the Ottoman Empire’s successor states to recognize them, unless forced by colonial masters.<sup>18</sup> The Ottomans themselves abrogated the capitulations at their first opportunity, at the start of World War I. The occasion sparked joyous celebrations, and its anniversary became a national holiday—further proof that much of the local population had come to consider the capitulations a horrific burden.<sup>19</sup>

Key economic provisions of the initial capitulations to France are found also in commercial privileges granted in 1442 and 1497 by Mamluk Egypt to Venice and Florence, respectively.<sup>20</sup> In fact, the Mamluks provided privileges that the Ottomans withheld from foreigners until the seventeenth century. The Mamluks may have been ahead because they negotiated from a position of conspicuous weakness: their rule in Egypt faltering, they were desperate for certain imports.<sup>21</sup> In 1536 the Ottomans appeared militarily invincible, which is why Süleyman could achieve his objectives through relatively few concessions.<sup>22</sup> His bargaining strength fostered a perception of

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<sup>17</sup> For the text of the convention, see Great Britain, *Parliamentary Papers*, 50 (1839), pp. 291-95.

<sup>18</sup> Greece refused to recognize the capitulations in 1832, and Romania in 1878. Great Britain, which occupied Cyprus in 1878, opted not to enforce them. Italy, when annexing Libya in 1912, declared the capitulations abrogated. Hussein Ibn Ali, leader of the Arab Revolt against the Ottomans in World War I, never recognized them. An exception was Bulgaria, where the capitulations remained in force until 1914, because it remained under Turkish suzerainty. Iran followed the Ottoman example by ending its own capitulations in 1928. See Bullard, *Large and Loving Privileges*, especially pp. 31-32, 37.

<sup>19</sup> Ahmad, “Ottoman Perceptions of the Capitulations,” especially pp. 18-19.

<sup>20</sup> For the texts, see Wansbrough, “Venice and Florence” [hereafter *VF*], pp. 509-23.

<sup>21</sup> Ashtor, *Levant Trade*, chap. 2. The Mamluks depended on southern Europe for arms, timber, and iron, all articles critical to self-survival. Egypt would continue to weaken economically and militarily, then fall to the Ottomans in 1517.

<sup>22</sup> Over the previous two decades, Ottoman armies had conquered Syria, Palestine, and Egypt in the south, and

unilateralism, which endured at least another century, as successive sultans continued to treat the capitulations as acts of grace deniable to enemies.<sup>23</sup>

Of the 16 articles that comprise the initial French capitulations, five impose reciprocal obligations on France and the Ottoman Empire; these concern freedom of mobility, security, cooperation against piracy, and state protocol. Each of these has precedents in capitulations of earlier centuries, including ones granted by the Byzantines. Two other articles, though explicitly reciprocal, address special concerns of one side or the other: the return of runaway slaves (of greater importance to Ottomans) and consular authority over handling shipwrecks in waters of the other side (of significance only for France, the party that deployed consuls). As for the remaining nine articles, they provide French privileges without reciprocity. French merchants were entitled to consular representation, trials in French courts, wills enforceable by French authorities, and immunity from collective punishment for the offenses of individual Frenchmen.<sup>24</sup>

By the seventeenth century the Ottomans were granting capitulations focused even more strikingly on the needs of foreigners. The English capitulations of 1675 consist of 55 articles appended to those of earlier Ottoman-English agreements. Every one addresses the concerns of English merchants. True, it was customary to include a clause imposing reciprocal obligations across the board.<sup>25</sup> However, as the economic institutions of the two sides diverged, reciprocity became

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parts of Serbia and Hungary in the north, reaching the gates of Vienna.

<sup>23</sup> Lewis, *Political Language of Islam*, p. 84; Pakal\_n, *Osmanlı Tarih Deyimleri*, vol. 2, pp. 171-72. This perception had been validated by resistance to foreign demands. In 1368, for instance, Murat I turned down a Venetian request for land to establish a commercial colony similar to the Genoese colony in Byzantium [Thiriet, *Délibérations du Senat de Venise*, vol. 1, p. 118, no. 461].

<sup>24</sup> *TAK*, pp. 41-48. The articles comprising the last category are 3-9, 12, and 16. The Mamluk concessions of the previous century harbor an even more extreme asymmetry. The Mamluk-Florentine treaty consists of 35 articles, all addressing concerns of Florentine merchants, without any mention of reciprocity. Nine of these address the predictability of customs duties and other fees. Seven aim to improve the enforcement of contracts with Mamluk subjects, and sometimes more specifically with Muslims. One article requires the notarization of contracts between Florentine and Muslim merchants. Finally, two articles enable Florentine merchants to keep Muslims from suing them in regular Islamic courts, by having Muslim-Florentine disputes resolved through special tribunals [*VF*, art. 1, 7-8, 14, 17, 22, 26-28 (duties), 3-4, 6, 18, 33 (contracts), 5, 32 (courts), 2 (notarization).]

<sup>25</sup> For example, the Austrian capitulations of 1718, art. 6 [Liebesny, “Judicial Privileges,” pp. 322-23] and the Spanish capitulations of 1773, art. 7 [*TAK*, p. 162].

increasingly symbolic.<sup>26</sup>

The fiscal provisions of the capitulations, including customs duties, underwent their own evolution. Both the French capitulations of 1673 and the English capitulations of 1675 stipulate a 3 percent ad valorem duty on merchandise exported or imported by their merchants, slightly more than the 2.5 percent due from Muslims.<sup>27</sup> And from the end of the seventeenth century to the abolition of the capitulations in 1914, all capitulatory powers enjoyed essentially “most favored nation” status in regard to tariffs.

Definitely critical were provisions concerning the predictability of taxation. As we shall see, foreigners gained a progressively broader set of exemptions from other charges that Ottoman subjects continued to endure. If the Ottomans traveled down a “slippery slope” in relation to taxation, it is these non-tariff privileges that made a difference. The expansion of foreign privileges is evident also, however, in the judicial sphere. The early French and English capitulations had stipulated that kadis would adjudicate lawsuits between subjects and foreigners, albeit under special rules.<sup>28</sup> Over time western traders gained ever greater immunities to Islamic prosecution. This happened as the jurisdiction of western and, after the mid-nineteenth century, secular local courts expanded at the expense of traditional Islamic courts.<sup>29</sup>

To the end, kadi courts retained jurisdiction over cases involving Muslims. The Ottomans never ceded the right to try cases involving even a single individual they construed as a subject. As a

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<sup>26</sup> The capitulations of the eighteenth century gave Ottoman representatives in western Europe authority over judicial matters involving their own subjects. But the Ottomans had not yet appointed permanent representatives, let alone ones with judicial expertise. In any case, it is doubtful that the Ottomans could have operated Islamic courts in London or Paris, for other capitular provisions allowed Ottoman representatives to exercise only those rights accorded to the diplomatic corps in general. By this time, these excluded extraterritorial jurisdiction. See Liebesny, “Judicial Privileges,” pp. 322-24; Frey and Frey, *History of Diplomatic Immunity*, chap. 6. In 1703, when an Arab merchant appeared in London with a document showing that he sold goods worth 5,262 dollars to the “Turkey Company,” and demanded payment, he was disappointed that English courts did not give him rights that Ottoman kadi courts gave to visiting English merchants. His quest for justice was hampered, of course, by the lack of an Ottoman consul in London. See Levant Company files, “The Humble Petition of Hadgi Mahomet Ebu Ismael” [Public Records Office, S. P. 3418].

<sup>27</sup> On 1773, *TAK*, p. 82. On 1675, *MENA*, doc. 14, art. 30-32, 54-75; *TAK*, pp. 112-20. The latter capitulations set a per unit duty for certain commodities, probably because of frequent disputes over valuation.

<sup>28</sup> *MENA*, doc. 1, art. 3-5, and doc. 4, art. 7.

matter of practice, however, foreigners were increasingly able to defy the Islamic courts even in cases involving subjects, often with the connivance of local elites. Western ambassadors, consuls, and other officials could issue effectively unchallengeable rulings, implying that subjects could no longer count on the protection of Islamic courts.

### **Limits of received explanations**

No satisfactory explanation exists either for the granting of the Middle Eastern capitulations or for their metamorphosis into binding one-sided privileges inimical to political sovereignty and, ultimately, into instruments of discrimination against the religious majority. The factors invoked, alone or in combination, include two political and three economic objectives.

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<sup>29</sup> On some matters, westerners were able to avoid prosecution in all local courts, religious and secular.

The most common explanation is that the capitulations served to split western Europe, fount of the horrific Crusades, by forming alliances with friendly Christians. In this view, the Ottoman capitulations of the sixteenth and seventeenth centuries were shrewd acts to weaken Christendom politically and militarily. The initial capitulations to the French were expanded in 1569, just as the Ottomans were preparing to conquer Cyprus, then held by Venice, a commercial rival of France. Likewise, the English capitulations benefitted a rival of two Turkish enemies—the Habsburgs and the Pope.<sup>30</sup> It is clear that Ottoman rulers, like the Mamluk and Safavid counterparts, used trade policy to build and strengthen alliances. Indeed, they made the continuation of privileges contingent on peaceful relations.<sup>31</sup> In some cases, alliance formation might even have been the dominant motive. But geopolitical objectives do not explain the substance of the capitulations. They do not explain why, say, a documentation requirement was imposed for lawsuits involving foreigners. Nor do they account for the trajectory of the capitulations. Alliance formation alone does not elucidate why foreign extraterritorial legal rights expanded over time.<sup>32</sup> Even if alliance formation was a first-order objective initially, other objectives gained greater importance over time.

The other frequently invoked political factor is the desire to weaken domestic merchants, lest they sow instability. According to Mehmet Genç, who emphasizes the survival instincts of the ruling dynasty, the Ottomans, like other pre-modern Muslim rulers, restricted private capital accumulation. Accordingly, they confiscated the estates of high officials and capped commercial profits through price controls. From this perspective, welcoming foreign merchants was less a response to military

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<sup>30</sup> For several variants of the geopolitical explanation, see \_nalc\_k, “Ottoman Economic Mind,” pp. 214-15; \_nalc\_k, “Ottoman State,” especially pp. 189, 366-67, 373; Shaw, *History of the Ottoman Empire*, vol. 1, pp. 97-98; De Groot, “Organization of Western European Trade,” especially pp. 232, 236; Karpat, “Ottoman Views,” pp. 138-39. A complementary explanation invokes the geopolitical motivations of beneficiaries. For example, Horniker, “William Harborne,” especially pp. 299, 304-6, stresses that England sought to secure Ottoman capitulations as its relations with Spain worsened.

<sup>31</sup> Brummett, *Ottoman Seapower*, offers much evidence from the fifteenth and sixteenth centuries.

<sup>32</sup> Alliance building does explain why the Mamluks provided broader privileges than the Ottomans did a century later. As mentioned earlier, the former negotiated from a weaker position, which would have made them more accommodating.

threats than a handmaiden of domestic power politics.<sup>33</sup> Yet, to discriminate against domestic merchants one need not grant foreigners judicial privileges. In any case, it is unclear why local merchants stood by as foreign merchants accumulated rights. What explains their political impotence? One factor, already developed, is the stagnation of the contractual forms used by domestic traders. Their political power was limited because the available legal system inhibited the pooling of resources within large and long-lasting enterprises. If this is granted, the growing handicaps of domestic merchants appear as an independent cause of the capitulations, as opposed to their objective. A ruler might have agreed to capitulations at least partly because his own subjects were becoming commercially uncompetitive and he considered reversing this trend costlier than turning trade with western Europe over to foreigners. In other words, his goal might have been to overcome the economic limitations of domestic merchants rather than to weaken them politically.

The most common economic explanation is that revenue could be raised more easily from foreign merchants than from domestic ones. Under Islamic law foreigners pay higher duties in comparison to subjects, so foreign traders were welcomed, it is said, in order to stimulate customs receipts. Further, the cultural particularities of foreign merchants and their concentration in major ports made them particularly visible and, hence, relatively easy to tax.<sup>34</sup> But if fiscal considerations were paramount, why did the state not raise the tariffs paid by domestic merchants, who used the same ports? All domestic merchants, irrespective of religion, paid taxes without a basis in Islamic law. There were abundant precedents for rate adjustments as well as new forms of taxation.<sup>35</sup>

Another economic explanation invokes a geocommercial objective: maintaining the viability

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<sup>33</sup> Genç, *Devlet ve Ekonomi*, especially pp. 84-85. See also Gilbar, "Muslim Big Merchant-Entrepreneurs," p. 16.

<sup>34</sup> Fleet, *European and Islamic Trade*, especially p. 94; \_nalc\_k, "Ottoman State," pp. 189-90. In theory, the elasticity of labor supply might have been greater for domestic traders than for foreigners. But there is no evidence to that effect.

<sup>35</sup> On early Islam, Abu-Yusuf, *Kit\_b al-Khar\_j*, especially pp. 100-01; Løkkegaard, *Islamic Taxation*; Björkman, "Maks,"; Kuran, "Islamic Redistribution," pp. 276-80. On the Ottoman Empire, Co\_gel and Miceli, "Risk, Transaction Costs"; Ça\_atay, "Vergi ve Resimler"; Darling, *Revenue-Raising*, especially pp. 26-27, 87-89.

of the Middle East as a transit stop. Mamluk Egypt and the Ottoman Empire are said to have granted commercial privileges to maintain the attractiveness of Mediterranean trade routes between Europe and Asia after the circumnavigation of Africa.<sup>36</sup> Rival trade routes did influence the strategic thinking of Middle Eastern rulers. But they cannot have been central to the capitulations, for they existed well before 1498, when Vasco Da Gama reached the Indian Ocean. More critically, the objective of supporting old trade routes did not require pro-foreign discrimination. Transit trade could have been stimulated through commercial incentives blind to faith and nationality.

Finally, there is a provisionist explanation centered on imports. Merchants from Christian Europe were particularly welcome, it has been argued, because they supplied strategic goods such as tin, silver, and gunpowder.<sup>37</sup> Stimulating the supply of selected goods was certainly an objective of the Ottomans and, especially, of the Mamluks. However, there is no necessary connection between stimulating trade and singling out foreigners for special treatment. The desired inflow of strategic commodities could have been induced through non-discriminatory subsidies to all merchants, including locals. By itself, then, the demand for certain commodities sheds no light on the capitulations.

The existing literature thus identifies five distinct motives for the capitulations: coalition

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<sup>36</sup> Genç, *Devlet ve Ekonomi*, pp.199-200; De Groot, “Organization of Western European Trade,” p. 237; Bulut, “Commercial Integration between the Levant and the Atlantic,” especially pp. 213-16; Özbaran, “Osmanl\_ mparatorlu\_u ve Hindistan Yolu,” especially pts. 1, 7; \_nalc\_k, “Ottoman Economic Mind,” pp. 214-15.

<sup>37</sup> Pamuk, *Monetary History of the Ottoman Empire*, p. 11; De Groot, “Organization of Western European Trade,” p. 237.



formation, limiting the political capabilities of potential domestic rivals, revenue generation, protection of trade routes, and securing strategic goods. Although some of them are integral to the story, even collectively they yield few insights into the institutions that the capitulations allowed foreigners to carry into the Middle East.

### **Institutional substitution**

During the centuries when the capitulations became increasingly one-sided, the major trading nations of the West were developing the organizational means to pool increasing amounts of capital for progressively larger and effectively permanent commercial enterprises. They were also developing various services that lower the transaction costs of exchange among strangers, including banking, formal insurance, and double-entry bookkeeping. Over time, such advances enabled the exploitation of the economies of scale and scope afforded by evolving technologies. They also extended the terms over which traders could plan and make credible commitments.

For these reasons alone, Mamluk, Ottoman, and other rulers stood to gain from keeping western merchants interested in trading. The West's institutional evolution increased the surplus achievable from inter-regional exchanges. Some of this surplus could be transferred to the state treasury through tariffs, fees, and tolls. Western complaints about arbitrary taxation, discussed ahead, suggest that rulers did indeed try to appropriate a slice of the enlarged trade surplus. The domestic trading partners of foreign merchants would have sought to do the same. Insofar as they were successful, rulers could have benefitted from the rising profitability of cross-Mediterranean trade also by taxing domestic merchants.

To benefit from external productivity gains, rulers did not have to undertake domestic legal reforms. Capitulary privileges could have served as a substitute. The substitution would have entailed giving foreign merchants opportunities to do business under institutions different from those prevalent in the Middle East, including inheritance laws conducive to maintaining successful

enterprises across generations and courts accustomed to advanced organizational forms. In fact, the capitulations gave foreigners the right to settle their own estates as well as expanding immunities against Islamic lawsuits. Extraterritorial judicial rights had been used to reduce the transaction costs of interregional trade. This advantage grew as commercial institutions of the two regions became increasingly dissimilar. In an expanding set of contexts, it became ever costlier to use Islamic courts as a forum for dispute resolution.

In the correspondence of foreign merchants doing business in the Middle East under the capitulations, a frequent theme is that Islamic courts, which litigated many of their disputes with natives, were biased against foreigners.<sup>38</sup> There is nothing surprising here. For one thing, Islam's traditional rules of evidence, reviewed further on, favored Muslims. For another, all over the world courts of the time favored local interests, and foreign litigants suffered also from linguistic handicaps, inadequate local knowledge, and limited connections.<sup>39</sup> But whatever the nature of local favoritism in the Middle East, there is no evidence that it grew over time. Although the issue of anti-foreign bias has received much scholarly attention, two other issues were more important, and increasingly so: the predictability of adjudication and its quality.

As western legal systems developed, foreigners found it increasingly difficult to comprehend the logic behind kadi verdicts. Arbitrariness is the key characteristic of what, centuries later, Max Weber would characterize, condescendingly, as “kadi-justice.”<sup>40</sup> Like the uneasiness of the Western mercantile community, Weber's relevant scholarship rested on superficial knowledge about Islamic justice; in principle, kadi decisions were based on intricate legal doctrines, and studies of Islamic court records reveal much consistency in practice. Nevertheless, the key doctrines guiding kadi

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<sup>38</sup> Masters, *Origins of Western Economic Dominance*, pp. 65-68. [Add: chronicles of John Finch, Sanderson]

<sup>39</sup> See chap. 11.

<sup>40</sup> Weber, *Economy and Society*, vol. 2, pp. 976-78. “Kadi-justice knows no rational ‘rules of decision’,” he writes (p. 976).

decisions dated from the early Islamic centuries.<sup>41</sup> The ensuing doctrinal stagnation ensured that foreigners from institutionally dynamic societies would find them increasingly alien to their daily experiences.<sup>42</sup> In addition to a decline in legal predictability, they were bound to perceive a reduction in the quality of kadi verdicts. This is because legal training in the traditional Islamic mode would become increasingly inadequate for understanding business relations involving new business techniques and organizational forms.

The relative advantage of adjudicating disputes in alternative courts could have grown, then, even as anti-foreign biases remained constant. Thus, as the economic institutions of the two regions diverged, foreign calls for immunity from Islamic justice grew louder. Successive capitulations responded to the growing demand by broadening the range of cases exempt from the jurisdiction of Islamic courts. The bargaining power of western negotiators increased, of course, with the rising military and economic might of the West. But their favored institutional transplants were not necessarily inimical to local interests. Some of them benefited a wide class of local players, including rulers.

It is relevant again that in Muslim-governed territories anyone, including foreigners, could ask to be tried under Islamic law. Thus, even a share of the disputes strictly among foreigners came before a kadi.<sup>43</sup> As with minorities, this right undermined another right: legal autonomy in intra-communal affairs. The problem, discussed earlier in interpreting the economic performance of indigenous minorities, was twofold. First, losers of consul-adjudicated lawsuits could reopen the case before a kadi, whose rulings trumped those of other courts. Second, the right to Islamic

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<sup>41</sup> Vogel, *Islamic Law*, chaps. 1-2, especially pp. 15-23.

<sup>42</sup> Weber correctly identifies procedural unchangeability as harmful to the quality of kadi judgments: “The more strongly the religious nature of the *Kadi*’s (or similar judge’s) position is emphasized, the more arbitrary—that is, less rule-bound—will the judgment of the individual case be within the sphere where it is not fettered by sacred tradition.” (p. 978). However, there is no necessary connection between attachment to tradition and lack of rationality.

<sup>43</sup> Our data set includes 4 such cases, three of which involve notarization: Galata, vol. 138, case 31/3; vol. 151, case 9/2; and vol. 151, case 9/3. The last case was a trial: Istanbul, vol. 15, case 72/4. See also Goffman, *Izmir*, p. 125; Ekinci, *Osmanlı Mahkemeleri*, pp. 97-98, 328. The fees charged by Islamic and consular courts influenced choices of forum. See Steensgaard, “Consuls and Nations,” pp. 23-24.

adjudication remained even in respect to contracts based on another legal system, which rendered legally unenforceable whatever kadis might fail to understand or find objectionable. All commercial contracts of foreigners were subject, therefore, to opportunistic behavior. In stages, the capitulations sought to enhance the credibility of these contracts. They did so by subjecting Islamic courts to rules that enabled foreign merchants to do business under alien institutions.

### **The pursuit of contractual credibility**

The first significant measure was a ban on kadis adjudicating lawsuits among co-nationals.

The French Capitulations of 1536 state:

The kadi or other officers of the Grand Signior [Süleyman the Magnificent] may not try any difference between the merchants and subjects of the King [of France], even if the said merchants should request it, and if perchance the said kadis should hear a case their judgment shall be null and void.<sup>44</sup>

This was not the first provision of its kind. Mamluk Egypt had given French consuls the right to settle all cases among Frenchmen.<sup>45</sup> Yet the 1536 variant was particularly explicit; and from then on judicial autonomy for foreign “nations” became a fixture of the capitulatory system.<sup>46</sup> The restriction would have benefited the French consuls, who charged for their judicial services. As for merchants trading under the French flag, the main advantage was that local judges could no longer undermine contracts drawn according to French legal norms among French-protected parties.

The challenge to the supremacy of Islamic law is self-evident. Although the restriction did not concern lawsuits involving Muslims, it curtailed the jurisdiction of Islamic courts within the abode of Islam. In the previous century the Mamluks had not gone that far. According to their capitulations, any case could be tried by a kadi, except that privileged foreigners could request a

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<sup>44</sup> *MENA*, doc. 1, article 3; *TAK*, p. 42.

<sup>45</sup> *TAK*, pp. 34-35.

<sup>46</sup> See, for instance, *MENA*, doc. 4, art. 17; and *TAK*, p. 162, art. 5.

transfer to the ruler's own court.<sup>47</sup> Under Islamic law, the duty to deliver justice fell, in any case, on the ruler, who merely delegated responsibilities to kadis. There was nothing necessarily un-Islamic, therefore, to having a high-level Muslim tribunal adjudicate a lawsuit involving Venetians.

Blocking kadis from hearing cases among foreign co-nationals would have deprived them of the speedy trials for which kadis were widely praised. On the positive side, it enhanced the credibility of contracts among foreigners operating under the same flag. As such, it would have encouraged expatriate merchants to pool their resources in larger amounts and for longer periods. Yet foreign merchants went to Ottoman lands to trade with Ottoman subjects, not among themselves. So they remained widely exposed to Islamic lawsuits. Any Ottoman subject, irrespective of faith, could still take a foreigner to a kadi. The Islamic courts continued to claim sole jurisdiction over cases involving Muslims.

Foreign negotiators in Istanbul sought to address the matter through a variant of the Mamluk forum transfer rule. By the early seventeenth century, the Ottoman-granted capitulations were stipulating that cases “exceeding the value of four thousand aspers (*akçe*)” be tried in the capital, before an imperial council (*divan- hümayun*) consisting of high administrators and possibly headed by the sultan himself, with a foreign representative present.<sup>48</sup> In 1675, when the English won this right, the threshold amounted to 152 times the average daily wage of a skilled construction worker. Due to inflation, the range of cases that met this threshold requirement expanded steadily. By 1838, the year of the Anglo-Ottoman Convention, it amounted to just 4 times that wage (Table 10.1). Certain late capitulations required cases in commercial centers situated far away from Istanbul to be tried by the highest regional authority—in Tunis, for example, “the Council of the Bey, the Dey, and the Divan,” as opposed to “ordinary judges.”<sup>49</sup> Local merchants, Muslim or not, had always been

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<sup>47</sup> *VF*, art. 5, 32.

<sup>48</sup> For the text of a 1601 stipulations, and an account of the members and procedures of this council, see Boogert, *Capitulations*, pp. 47-52. A 1675 variant of the same stipulation is in *MENA*, doc. 14, art. 24.

<sup>49</sup> *MENA*, doc. 25, art. 16.

free to petition for a hearing before a tribunal of dignitaries.<sup>50</sup> However, rulers were selective in hearing appeals, and most subjects had neither the resources to pursue a case in the capital nor the clout to prevail. They also lacked an organization to defend them in trials where their foreign adversaries would enjoy the help of consular staff. The forum transfer option thus turned foreigners into a legally privileged class.

One benefit to foreigners was that their major lawsuits became sensitive to international pressures. Another is that adjudication before a relatively slow-changing administration, whose members could be reminded of their own precedents, made contract enforcement more predictable. The tenure of a kadi lasted at most two years, and appointees differed in style, temperament, skills, and biases.<sup>51</sup> The resulting judicial uncertainty would have hindered contract enforcement. At least on financially important disputes foreign merchants could escape that uncertainty through the forum transfer rule.

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<sup>50</sup> On ruler's courts (*mazlim*) in Mamluk Egypt, see Nielsen, *Secular Justice in an Islamic State*; and on Ottoman imperial courts, Üçok and Mumcu, *Türk Hukuk Tarihi*, pp. 206-13; and Uzunçar\_1\_, *İmiye Te\_kilât\_*, pp. 153-57.

<sup>51</sup> In the Ottoman Empire a kadi's term of appointment in any one place lasted between 3 and 20 months. See Ortayl\_, *Osmanl\_ Devletinde Kad\_*, pp. 16-17; Uzunçar\_1\_, *İmiye Te\_kilât\_*, p. 94.

<b>Table 10.1 Threshold for the forum transfer rights of foreigners: 1675-1838</b>	
Year	Multiples of average skilled wage
1675	152
1775	56
1838	4
Based on data from Istanbul in Özmucur and Pamuk, “Ottoman Living Standards,” Table 1.	

The availability of a legal right does not mean, of course, that it will be exercised indiscriminately. Foreign-local cases above the monetary threshold did not always land before high-level tribunals. For one thing, it was not costless to exercise the transfer right. Apart from incurring possible transportation costs, a foreign merchant initiating a transfer could damage his reputation in the eyes of local clients and suppliers favoring speedy kadi justice to lengthy trials conducted by intimidating high officials. For another, foreigners would have preferred the Islamic courts when they felt confident of winning. The latter factor would explain why the alleged anti-foreign bias fails to show up in court records from the seventeenth and later centuries.<sup>52</sup> Indeed, though few in number, most of the foreigner-subject cases in my sample of court cases supports the scholarly consensus of an absence of foreign disadvantage in this period (Table 10.2). What is clear is that foreigners used the forum transfer option frequently enough to make it an issue in their local interactions.

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<sup>52</sup> Ekinci, *Osmanlı Mahkemeleri*, especially p. 43.

<b>Table 10.2 Outcomes of civil trials that pitted a foreigner against a subject: 1579-1698</b>				
Sample	Date	Number of cases that satisfied the threshold rule	Won by foreigner	
			Number	%
Pilot sample	1579-98	7	7	100
Istanbul 9	1662	3	2	67
Istanbul 22	1695	3	3	100

Note. 21 *defters* in pilot sample: Galata 124, 130, 131, 137, 138, 145, 151; Istanbul 1, 2, 8, 15, 16, 23; Rumeli 21, 22, 26, 27, 33, 34, 40, 41. These contain a single civil case between two foreigners.

It is not self-evident, however, that foreigners would have benefited from the forum transfer option. Yes, it gave them further legal protections against opportunistic behavior by local buyers, suppliers, debtors, and creditors.<sup>53</sup> On the downside, they now had incentives to cheat Ottoman subjects, who would have had to exercise caution in dealings with foreigners and to add a risk premium to their prices. Foreigners would have sought ways to limit the drawbacks of their privilege. But the benefits of the forum transfer option must have outweighed the costs. This interpretation accords with the eagerness with which foreigners, and increasingly also their local protégés, demanded the transfer of lawsuits involving Muslims. It accords also with bitter complaints from Muslims who felt victimized by restrictions on suing foreigners in local courts.<sup>54</sup>

<sup>53</sup> Goffman, *Izmir*, p. 127; Hanna, *Making Big Money*, chap. 8, especially pp. 172-73.

<sup>54</sup> Masters, *Christians and Jews*, pp. 125-26, relates one such complaint from a Muslim merchant in Aleppo in 1764. For other such cases, see Goffman, *Izmir*, pp. 128-30.



Nevertheless, foreigners would have sought to limit the drawbacks. The differences in legal status between Muslim and non-Muslim subjects are relevant once again. Recall that in the eighteenth century, and even more easily in the following century, the latter could purchase foreign legal protection. By becoming, say, a French protégé, a Greek-Ottoman merchant could more or less level the legal playing field in his dealings with the French. In the event of conflict, his protégé status would limit the pro-French bias of the French officials who would step in to adjudicate. The protection system made the forum transfer rule irrelevant, then, with respect to protected minorities, which would have induced foreigners to favor them in their dealings with local parties. Recall that minorities played a vastly disproportionate role in economic dealings with foreigners, and that their rapid economic ascent coincided with the explosion in interregional trade (chaps. 8 and 9). Minorities advanced partly by intermediating between foreigners and Muslims under a dual legal status—operating under Islamic law in interacting with Muslims and under a foreign legal system in dealing with foreigners.<sup>55</sup> Critical here is that the legal protection system allowed foreigners to limit drawbacks of the forum transfer rule. By doing business selectively with domestic subjects to whom they could extend their own judicial rights, they could operate under their own institutions *without* blocking exchange opportunities.

In the sixteenth century, we saw in chap. 8, foreigners and, to a lesser extent, indigenous non-Muslims exercised caution in dealing with Muslims, to avoid entanglement in lawsuits against Muslims, which had to be adjudicated in an Islamic court. Driven by real or imagined handicaps endured in kadi trials, non-Muslims of all nationalities limited contacts with Muslims.<sup>56</sup> For the same reason, European consuls picked their dragomans almost exclusively from among religious

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<sup>55</sup> Having a dual legal status was not a frictionless process. Complex disputes involving many bilateral or multilateral contracts could generate protracted struggles over jurisdiction. For two instructive case studies, see Boogert, *Capitulations*, pp. 179-99, 226-59.

<sup>56</sup> This is a common theme in economic histories of the region. For a sampling of the pertinent evidence, see Frangakis-Syrett, *Commerce of Smyrna*, pp. 91-92; Masters, *Origins of Western Economic Dominance*, especially pp. 65-68, 78-79; Faroqhi, “Venetian Presence in the Ottoman Empire,” p. 335.

minorities. As the judicial rights of foreigners expanded, we now see, the tables turned. At least in the leading commercial centers, it is Muslims who had reasons to avoid cross-communal ventures. “No wise Egyptian will ever enter into a partnership with a foreigner, or accept his surety,” wrote *The Times* of London in 1870.<sup>57</sup> For their part, foreign merchants and their protégés had progressively less need to avoid interactions with Muslims, because their consuls could keep them out of Islamic court and, beginning in the nineteenth century, even out of secular local courts. Besides, in the event a local court found them guilty, their consuls could appeal directly to government officials beholden to western governments. The emerging Muslim legal handicaps played a role in restricting Muslim economic interactions with foreigners. They would have become increasingly serious with the expansion of foreign participation in the Middle Eastern economy. No longer could they be dismissed on the ground that economic relations with India and the Far East were relatively more significant.

### **The perils of personal exchange**

From the rise of Islam, Islamic adjudication relied primarily on oral testimony. Though documents could be presented as evidence, they were viewed with suspicion, partly because of the possibility of forgery, but also because written texts could be misread to illiterate and innumerate litigants. Low levels of education doubtless fed this mistrust, and it became the norm to consider a document valid only if attested by morally upright witnesses.<sup>58</sup> A document could be invalidated by casting doubt on the authenticity of a seal or signature, or by impugning the character of a witness to its creation. To ensure the availability of credible corroborating oral testimony in case of litigation, written contracts always furnished the names and attestations of multiple witnesses. Consequently, a huge demand existed for witnesses whose integrity and reliability had already been certified. Found

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<sup>57</sup> *The Times*, 12 February 1870, p. 4.

<sup>58</sup> Wakin, *Documents in Islamic Law*, p. 6; Cook, “Opponents of Writing”; Messick, *Calligraphic State*, pp. 25-

at every court, such certified witnesses (*sh\_hid 'adl*, but usually simply *sh\_hid* or *'adl*) exercised the function of a modern notary.<sup>59</sup> They assisted and observed the registration of private contracts and also the recording of kadi judgments. No written instrument, not even the archives of a kadi court, carried legal value without the corroboration of multiple witnesses of good character.<sup>60</sup> In principle, the testimony of a Muslim of good character, as determined by the court, carried double the weight of testimony from a non-Muslim of equally fine reputation.

Although documents lacked independent value under Islamic law, they were used in the pre-Islamic Middle East, and the pattern continued uninterrupted after the emergence of Islam. The Qur'an itself contains evidence to this effect:

Believers, when you contract a debt for a fixed period, put it in writing. Let a scribe write it down for you with fairness. ... Do not fail to put your debts in writing, be they small or big, together with the date of payment. (2:282)

In requiring the documentation of debt contracts, the same verse also says, however, that two men must witness the recording, so that “if either of them commits an error, the other will remember.”

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<sup>59</sup> Certified witnesses are present in every single case in the database from which this chapter's tables are drawn. On early Islam, Tyan, *Organisation Judiciaire*, pp. 236-52; Wakin, *Documents in Islamic Law*, pp. 7-10; on the thirteenth century, Ibn Khaldun, *Muqaddimah*, vol. 1, p. 462; on the high-Ottoman period, Ortayl, *Osmanl\_ Devletinde Kad\_*, pp. 51-61; El-Nahal, *Judicial Administration of Ottoman Egypt*, pp. 18-19.

<sup>60</sup> Tyan, *Organisation Judiciaire*, pp. 236-52; Wakin, *Documents in Islamic Law*, pp. 6-8. In general, only Muslim witnesses could validate the records of an Islamic court.

Further, it says that when “a bargain [is] concluded on the spot, it is no offence ... not [to] commit it to writing.” Taken in its entirety, this verse on documentation may reasonably be interpreted as (1) requiring documentation when the *quid* and the *quo* are separated in time, (2) making documentation optional in other transactions, and (3) tying the validity of documents to their authentication by credible witnesses to their preparation.

In certain places and times kadis took to treating written records as valid even without supportive oral testimony. In parts of eleventh-century Spain and North Africa, for instance, authentication through a kadi’s handwriting was sometimes considered sufficient validation.<sup>61</sup> This practice was rationalized on the basis of the necessity principle (*dar\_ ra*), which legitimizes a normally illegitimate practice to prevent hardship.<sup>62</sup> Writing around 1200, the jurist Ibn al-Munasif explained that a merchant might have trouble finding two witnesses able to travel to the trial site, delaying resolution of a conflict.<sup>63</sup> Where tolerated, then, the practice of accepting documents lacking oral authentication was treated as abnormal. Ibn al-Munasif did not object to a witnessing requirement per se; where feasible, he supported it.

The norm, then, was that written contracts lacked validity without live witnesses to testify to their authenticity.<sup>64</sup> Moreover, oral contracts remained enforceable everywhere, even in localities

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<sup>61</sup> Hallaq, *Authority, Continuity and Change*, p. 211.

<sup>62</sup> The principle finds justification in Qur’an 2:185: “God wants things to be easy for you.”

<sup>63</sup> Hallaq, *Authority, Continuity and Change*, pp. 211-13. Expedious adjudication was considered a supreme virtue of Islamic litigation.

<sup>64</sup> Masters, “Aleppo,” pp. 43-44, offers examples from seventeenth-century Syria.

where written documents carried validity on their own. In the seventeenth century, when the capitulations were being expanded through new judicial provisions, only a minority of all kadi trials turned on documentation (Table 10.3) [... Analysis].

Ordinarily, cases were decided on the basis of oral testimony alone. An outcome could even turn on an oath. Faced with a dispute unresolvable on the basis of verbal testimony, the kadi would ask the defendant to clear his name, or the defendant to establish the veracity of his claim, by swearing on his “book” (Qur’an, Bible, or Torah). In the late seventeenth century, about 20 percent of civil lawsuits were decided in this manner (Table 10.4). Cases that modern courts would dismiss for lack of written evidence were thus resolved through a procedure that presumed repeated interactions among litigants, and between them and the rest of society.<sup>65</sup>

In closed and small societies, litigants will have repeated interactions, and judges are likely to understand the circumstances of a dispute, the characters of the litigants, and the consequences of alternative judgments.<sup>66</sup> These factors contributed to the efficiency of oral litigation procedures. But these procedures are subject to serious abuse on matters involving interactions with outsiders. Just as paid experts testify in today’s secular courts, so in premodern Islamic courts litigants could hire witnesses prepared to testify on their behalf. Kadis were supposed to inquire intimately into the character of any witness presented in court, and to dismiss unreliable testimony. However, they were not always motivated to find the truth, because their own tenure was very short. If for no other reason, the conditions under which oral procedures work ideally were lacking in the major

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<sup>65</sup> A thoroughly selfish and asocial defendant accused of default would choose, if the outcome of the trial hinged on it, to swear that he had paid. Hence, in a society whose members fit that characterization, an oath will carry little informational value. However, in a society consisting of religious people who interact with one another repeatedly, the informational value of an oath is not negligible. In the pre-modern Islamic world litigants included genuinely God-fearing individuals, who did not take an oath lightly. Even today, many Muslims believe that a false oath will bring divine retribution [Rosen, *Anthropology of Justice*, pp. 34-35]. Moreover, in conflicts rooted in contractual ambiguity defendants eager to maintain a good reputation might have been reluctant to win on the basis of an oath, rather than the judgment of a kadi. Indeed, in court records one encounters refusals to take an oath even when compliance would almost certainly have resulted in exoneration [Galata court records, vol. 131, case 12/5 (11 August, 1683); Istanbul court records, vol. 23, case 30/1 (26 January 1697)].

<sup>66</sup> Rosen, *Anthropology of Justice*, especially chaps. 1, 3, provides further details, claiming that the conditions

commercial centers that attracted foreigners. Judicial corruption is a major theme in Middle Eastern history.<sup>67</sup> Also, character reading, never an infallible process, was particularly unreliable where visitors or foreigners were involved. Even where the kadi was honest and unbiased, then, the possibility of false oral testimony threatened the enforcement of contracts involving foreigners.

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are present in parts of modern Morocco.

<sup>67</sup> In the period under focus, renowned Ottoman chroniclers, including Koçi Bey (d. 1650) and Kâtib Çelebi (1609-57), complained of rampant corruption in the courts. For extensive quotes and additional evidence, see Uzunçar\_1\_, *İmiye Te\_kilât\_*, chap. 18. See also Mumcu, *Osmanl\_Devletinde Rü\_vet*, especially pp. 134-41, 182-202.

<b>Table 10.3 Use of documents in civil trials among subjects: 1579-1698</b>						
Source of actual or potential dispute	Register	Registration	Trial performed			
			Document(s) used		Only oral testimony used	Total
			#	%		
<b>Debt</b>	Istanbul 9	421	21	5.85	337	358
	Istanbul 22	78	51	50.0	51	102
<b>Sale</b>	Istanbul 9	459	16	15.8	85	101
	Istanbul 22	87	21	46.7	24	45
<b>Commercial partnership</b>	Istanbul 9	37	2	9.5	19	21
	Istanbul 22	2	0	0.0	1	1
	Pilot sample*	34	5	13.8	31	36
<b>Joint ownership of real estate</b>	Istanbul 9	84	9	39.1	14	23
	Istanbul 22	31	7	22.6	24	31
<b>Inheritance</b>	Istanbul 9	319	21	10.8	173	194
	Istanbul 22	39	12	75.0	4	16
<b>Waqf</b>	Istanbul 9	195	23	31.9	49	72
	Istanbul 22	97	18	54.5	15	33
<b>Taxation</b>	Istanbul 9	10	6	40.0	9	15
	Istanbul 22	26	8	88.8	1	9
<b>All</b>	Istanbul 9	1245	53	9.7	494	547
	Istanbul 22	315	82	46.8	93	175

\**Defters* reviewed: 21 *defters* listed in Table 10.2.

<b>Table 10.4 Use of oaths in civil trials</b>				
<b>Register</b>	<b>Date</b>	<b>Total trials</b>	<b>Kadi requests an oath</b>	
			<b>Number</b>	<b>%</b>
Istanbul 9	1662	547	116	21.2
Istanbul 22	1695	175	40	22.8

Foreigners complained about this danger tirelessly, as they believed that the burden of abuses fell disproportionately on them.<sup>68</sup> In a letter written in 1567, a Venetian official in Istanbul complains that the local legal system is unused to written evidence. “All cases,” he suggests contemptuously, “even the most important, are ... summarily dispatched by verbal evidence.”<sup>69</sup> An added problem was that only locally drawn documents were even considered. Yet another concern stemmed from the devaluation of foreign testimony. Not all kadis applied Islam’s traditional rules of evidence consistently, if at all.<sup>70</sup> For centuries, however, the formal rules remained an irritant in relations between foreign merchants and Muslims. They even complicated relations with local Jews and Christians, who were usually considered more trustworthy than foreigners, might have Muslim

<sup>68</sup> Cevdet Pa\_a, *Tezâkir*, vol. 1, pp. 62-63; Ubcini, *Letters on Turkey*, vol. 1, p. 184; Masters, “Aleppo,” pp. 43-44; Ekinci, *Osmanl\_ Mahkemeleri*, pp. 28-41.

<sup>69</sup> As recorded by Arbel, *Trading Nations*, p. 122.

<sup>70</sup> For examples, see the following cases: Istanbul vol. 15, no. 37/5 (1 May 1665), no. 39/2 (4 May 1665); no. 58/2 (16 May 1665); Istanbul, vol. 22, no. 1/3 (17 January 1696); Galata, vol. 138, no. 83/3 (21 March 1687); Rumeli, vol. 33, no. 21/1 (November 1611). Variations in the evaluation of testimony are found also in the Syrian court data compiled by Al-Qattan, “*Dhimmi*s in the Muslim Court,” pp. 437-38.



partners or protectors, and were accustomed to the Islamic judicial system. The mere presence of the rules threatened enforcement of commercial agreements. The frequent rotation of kadis posed another problem: if one kadi ignored the rules, his successor might apply them rigidly.

For foreign merchants active in the Middle East the local court system was problematic, then, for two distinct reasons. In the first place, they considered the rules stacked against them in lawsuits against local subjects. Second, the weight given to oral testimony diminished the quality of kadi judgments, all the more so as the use of written contracts gained prevalence and documents drawn abroad became common. Absent the quality issue, foreign merchants would have been satisfied with measures to eliminate discrimination. They might have lobbied for, say, special Islamic courts with “mixed” tribunals on which foreigners had representation. This option had been used elsewhere. In medieval northern Europe, for instance, alien merchants often enjoyed a right to a “half-tongue” (*de medietate linguae*) trial, in which the jurors would include speakers of the defendant’s language.<sup>71</sup> However, foreign merchants in the Middle East pursued a different strategy.<sup>72</sup> As we shall now see, they sought to have kadi courts use special procedures in their own trials. The consequent privileges helped, in essence, to adapt the kadi courts to Europe’s ongoing transition from personal to impersonal exchange.

### **The road to impersonal exchange**

At the time of the early Ottoman capitulations, commercial trials based solely on oral testimony were the norm also in parts of western Europe.<sup>73</sup> Oral evidence created problems analogous

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<sup>71</sup> Oldham, “Origins of the Special Jury,” pp. 167-71; Greif, *Institutions*, pp. \_\_.

<sup>72</sup> There is an exception to the general pattern. A 1348 treaty between the Seljuk Ayd\_ın and the Sancta Unio coalition of Latin powers, which included Venice and the pope, allows for mixed courts to adjudicate disputes involving Turks and Latins. See Fleet, “Turkish-Latin Diplomatic Relations,” p. 611.

<sup>73</sup> Klerman, “Jurisdictional Competition,” especially pp. 8-9; Baker, *English Legal History*, especially pp. 67-68, 324-25. According to De Roover, *Medici Bank*, p. 18, Medieval European finance showed a preference for oral transfer orders over written assignment, which was later called a check. In Barcelona, checks were forbidden up to the sixteenth century, and in Venice prior to the eighteenth century bookkeepers were not allowed to enter a transfer unless the order was dictated by the depositor or his attorney.

to those in kadi courts. The hiring of false witnesses and judicial corruption are prominent themes of European legal history as well.

However, the use of oral testimony and the discounting of written evidence became increasingly controversial as commerce expanded and a growing portion of exchanges became “impersonal,” in the sense of being conducted between individuals lacking reliable knowledge about each other’s character.<sup>74</sup> During the transition to mostly impersonal exchange there was resistance to imposing a documentation requirement, partly because the literate would benefit disproportionately. Moreover, documents were treated with suspicion, and trials often centered on whether a document was authentic. A litigant who appeared to have endorsed a document might claim that his seal was stolen or that, being illiterate, he was tricked into accepting a clause quite obviously detrimental to his interests. For their part, the expected beneficiaries of documentation sought to improve the enforcement of their written contracts by having them notarized.

Over many centuries, in some places faster and more broadly than elsewhere, reliance on documents grew. Also, financial claims based solely on oral testimony became increasingly suspect and eventually legally invalid. These transformations drew strength from the growth in literacy and numeracy.<sup>75</sup> Given this background, one would expect foreigners to try to transplant to the eastern Mediterranean the institutions of impersonal exchange with which they were becoming increasingly familiar. That the Islamic rules of evidence discriminated against foreigners constituted an added motive for making documentation mandatory. If it is the substance of a written contract that decides a case, the religion or nationality of the litigants ceases to matter.

As early as the fifteenth century kadis had been required to use special procedures in regard to commercial dealings between local merchants and certain foreigners. In 1486, for instance, the Ottomans imposed a documentation requirement for cases involving merchants from Dubrovnik.

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<sup>74</sup> When a company share is traded through the stock market, the buyer and seller need not be aware of each other’s identity, to say nothing about information concerning character.

These cases were to be heard only if the transactions had been recorded in a court register (*sicil*) and a kadi had issued a document stating the facts of the case (*hüccet*).<sup>76</sup> In the same vein, the Mamluk-Florentine treaty of 1497 required Florentine contracts with Mamluk subjects to be recorded in writing in the presence of certified witnesses.<sup>77</sup> A documentation clause is found also in the first French capitulations:

In a civil case against Turks, tributaries, or other subjects of the Grand Signior, the merchants and subjects of the King can not be summoned, molested, or tried unless the said Turks, tributaries, and subjects of the Grand Signior produce a writing from the hand of the opponent, or a “heudjet” from the cadi.<sup>78</sup>

This clause harbors a striking asymmetry: French subjects may sue locals on the basis of oral testimony, but cannot be sued without documentation. Its purpose was to lessen the kadi’s reliance on Muslim witnesses whenever the defendant was a Frenchman, focusing attention in such cases more on the written agreement than on matters of probity, religious observance, faith, and national origin. With documentation, witnesses could still be heard if its validity was questioned.<sup>79</sup> But the burden of proof would fall on the challenger of the document, so the possibility of escaping a contractual obligation, or of fabricating a liability, would diminish. In our database (under construction), there are 33 cases with at least one foreign litigant. 18 resulted in the drawing or recording of a written contract, 12 involved the use of a document in a trial, and only three involved trials decided solely on the basis of oral testimony (Table 10.5). Partly to protect French merchants against the invalidation of documents by paid witnesses, the capitulations of 1536 stipulated also that a kadi “may not hear or try ... subjects of the King without the presence of their dragoman.”<sup>80</sup> As an Ottoman subject in command of local vernaculars, a dragoman was better equipped than the typical French merchant to

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<sup>75</sup> Stone, “Literacy and Education in England.”

<sup>76</sup> Biegman, *Turco-Ragusan Relationship*, pp. 70-71 and docs. 22-24. The guarantee was renewed in 1575.

<sup>77</sup> *VF*, art. 2. The treaty is unclear about whether a lawsuit could proceed without presentation of a notarized contract.

<sup>78</sup> *MENA*, doc. 1, art. 4; *TAK*, p. 42.

<sup>79</sup> Faroqhi, “Venetian Presence,” pp. 340-41.

<sup>80</sup> *MENA*, doc. 1, art. 4; *TAK*, pp. 42-43.

discredit fraudulent testimony. The requirement concerning his presence, like the documentation provision, became a standard feature of subsequent capitulations.<sup>81</sup>

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

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<sup>81</sup> For example, *MENA*, doc. 4, art. 10, 16.

In any case, foreign communities interacted much less with each other than with the local population, which limited the number of “mixed” foreign cases. With growth in the volume and complexity of interregional trade, interactions among foreigners would have increased. Predictably, rival foreign communities eventually negotiated ground rules for trying mixed cases without reliance on the kadi courts.<sup>82</sup> Sometimes a mixed tribunal was formed; at other times the case was heard by a mutually agreed foreign judge or consul.<sup>83</sup>

<b>Table 10.5 Use of documents in civil trials involving a foreigner: 1579-1698</b>				
<b>Sample</b>	<b>Date</b>	<b>Registration</b>	<b>Trial performed</b>	
			<b>Document(s) used</b>	<b>Only oral testimony used</b>
Pilot*	1579-1698	14	6	3
Istanbul 9	1662	1	3	0
Istanbul 22	1695	3	3	0

\**DefTERS* reviewed: 21 *defTERS* listed in Table 10.2.

### **The quest for predictable returns from trade**

We have seen that capitulations of the seventeenth century lowered the tariff on foreigners to a rate slightly above the 2.5 percent collected from Muslim merchants. Even in the nineteenth

<sup>82</sup> Cevdet Pa\_a, *Tezâkir*, vol. 1, pp. 62-63; Ekinci, *Osmanl\_ Mahkemeleri*, pp. 49-50, 97-100; Steensgaard, “Consuls and Nations,” pp. 22-23; Anderson, *English Consul*, p. 207.

<sup>83</sup> Aky\_ld\_z, *Osmanl\_ Merkez Te\_kilât\_*, p. 130. Up to the eighteenth century, Ottoman rulers, and later semi-autonomous Egyptian governors as well, refused to recognize this extension of the judicial rights specified in the capitulations. [Brown, *Foreigners in Turkey*, pp. 67-68; Watson, *American Mission in Egypt*, pp. 463-64]. But some of the late capitulations, for example, those given by the Ottomans to the Russians in 1782 and by the Moroccans to the British in 1856, formalized the consular right to try cases among different nationalities [*TAK*, p. 182; *MENA*, doc. 107,

century, by which time the capitulations had turned into a source of discrimination against merchants required to operate under Islamic law, foreigners enjoyed no privileges on this count. The Anglo-Ottoman Commercial Convention of 1838 stipulates that British merchants will pay the same duties as “the most favored class of Turkish subjects”; that commercial regulations shall be “general throughout the Empire” and “applicable to all subjects, whatever their description,” implying the inclusion of local Jews and Christians; further, that equal duties will be extended to “other foreign Powers.”<sup>84</sup>

If foreigners came to enjoy tax privileges, these stemmed not from tariff differences but from immunities against other taxes. From the early Arab empires onward, subjects of Muslim-governed states paid diverse personal taxes, including unanticipated levies imposed to transfer perceived rents to the state. In the Ottoman Empire, opportunistic taxation was common especially during fiscal emergencies associated with military campaigns. Whether collected by state officials or tax farmers, these non-customary taxes were known as *avâr\_z*, literally “accidental” or “irregular” but widely understood to mean “whatever can be extorted.”<sup>85</sup> In western sources, impositions on foreigners, if considered extortionate, are denoted by a similar sounding word: *avanas*. The term encompassed diverse charges levied over and above what custom, the law, or a treaty dictated.<sup>86</sup> Foreigners felt that extraordinary taxes fell disproportionately on them. Whatever the validity of their perception, it motivated them to insist on protections against ad hoc taxes. Thus, the capitulations of 1673 stipulate repeatedly that the French are exempt from all obligations other than charges explicitly listed. Likewise, those of 1675 state ad nauseam, presumably to allay ambiguity, that the English shall pay

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art. 9]. On judicial applications of the latter capitulations, see Ryan, *Last of the Dragomans*, pp. 240-44.

<sup>84</sup> *MENA*, doc. 80, art. 3, 6.

<sup>85</sup> The etymology of the term remains controversial. See *\_nalc\_k*, “Ottoman State,” p. 191; Darling, *Revenue-Raising*, especially chaps. 1 and 3; Bowen, “*Aw\_rid*.”

<sup>86</sup> Masson, *Commerce Français dans le Levant au XVIII<sup>e</sup> Siècle*, chap. 1; Bent, “English in the Levant,” pp. 660-61.

no other fees.<sup>87</sup>

Resistance to taxation is as old as human civilization. There is nothing unusual, then, about incessant foreign complaints about various charges. However, over and beyond resisting taxation per se, foreigners objected to the unpredictability of their obligations to various authorities. They objected, for instance, to arbitrary exactions at ports, such as duties demanded whimsically for goods kept on board.<sup>88</sup> Arbitrary taxation raises the cost of capital and discourages trade by making investors demand a risk premium. Capitulary restrictions on the fiscal powers of the Ottoman government would have enhanced efficiency, then, by making the returns from interregional commerce more predictable.

That a fundamental function of the capitulations was to enhance the predictability of their commercial investments is evident also in clauses that bar collective punishment for the default, bankruptcy, or other misdemeanors of an individual foreigner. The French capitulations of 1536 state:

When one or more subjects of the King, having made a contract with a subject of the Grand Signior, taken merchandise, or incurred debts, afterwards depart from the State of the Grand Signior without giving satisfaction, [neither] the bailiff, consul, relatives, factor, nor any other subject of the King shall for this reason be in any way coerced or molested, nor shall the King be held responsible.<sup>89</sup>

The text then commits the French king to prosecuting and punishing fugitive merchants. By preventing unscrupulous Frenchmen from heaping liabilities on their honest co-nationals, this

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<sup>87</sup> For 1673, see *TAK*, pp. 77-83. For 1675, see *MENA*, doc. 14, art. 30-32, 54-75; and *TAK*, pp. 112-20.

<sup>88</sup> Kütüko\_lu, *Osmanl\_ - ngiliz\_ ktisâdi Münâsebetleri*, p. 27.

<sup>89</sup> *MENA*, doc. 1, art. 7. The Mamluks had also provided protections against collective punishment. See *VF*, art. 25, and the related discussion of Wansbrough, “Safe-Conduct,” pp. 33-35.

arrangement most certainly diminished the risks of traders operating under French protection. Provided they stayed within the law, fulfilled their contractual obligations, and got along with local officials, their profits would be safe.

There were other capitulatory privileges that reduced the commercial risks of foreigners. One involved inheritance. Each treaty of the fifteenth or sixteenth century includes an article giving consuls sole jurisdiction over the disposition of estates belonging to their countrymen.<sup>90</sup> By virtue of this right, foreigners living abroad could inherit from ones who died in the Middle East. It also ensured the enforceability of foreign wills at odds with the Islamic inheritance system. If a foreigner died intestate, his consul would follow the inheritance customs of his home town or region.<sup>91</sup> Confiscation could still occur under the pretext that the estate contains illegally acquired property or that the decedent has unpaid debts.<sup>92</sup> Also, inheritance cases involving both foreigners and subjects led to complications.<sup>93</sup> Nevertheless, consular authority over foreign estates diminished interference by local officials.

Remember that the Islamic inheritance system created incentives to keep commercial enterprises small and caused the fragmentation of successful businesses. By enabling foreigners to avoid these problems, the inheritance articles of the capitulations gave them a palpable advantage in building and preserving mercantile enterprises. Equally important, they facilitated partnerships between expatriate merchants and investors at home. Absent the disincentives rooted in local

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<sup>90</sup> See *VF*, art. 9; *TAK*, p. 35; *MENA*, doc. 1, art. 9; *MENA*, doc. 4, art. 9.

<sup>91</sup> West European countries had a wide variety of inheritance systems, which complicated the consul's task.

<sup>92</sup> Where such dangers existed, a consul might take measures to keep assets of the deceased out of the hands of officials. The goal could be accomplished by distributing the property among other expatriates. Goffman, *Britons in the Ottoman Empire*, pp. 134-35, offers an example from Izmir in 1649.

<sup>93</sup> Boogert, *Capitulations*, chap. 4.



inheritance practices, threats to the continuity of foreign partnerships were substantially reduced. Western merchants also benefited, of course, from the evolving financial institutions of Europe. Eventually the emergence of banks enabled them to raise funds more cheaply and for longer terms than their local rivals could in the atomistic financial markets of the Middle East.

Frivolous lawsuits constituted yet another obstacle to predictable returns. In the Islamic system it was usually the winner who paid the expenses of litigation. This encouraged lawsuits, benefiting not only victorious plaintiffs but also the kadis who collected fees, usually from acquitted defendants. The French capitulations of 1740 addressed this problem through an article stipulating that when lawsuits are brought “contrary to justice,” the kadi must collect the court fees from them, instead of the innocent defendants.<sup>94</sup>

### **The onset of reverse discrimination**

By no means were Western negotiators interested only in the predictability of their returns from trade. As their bargaining power rose, they also pursued outright privileges. In time the capitulations provided foreign merchants immunity from new taxes. It became the norm, in fact, to forbid charges on foreigners unless allowed specifically by an international treaty. Of the 75 articles that comprise the English capitulations of 1675 no fewer than 28 limit a charge.<sup>95</sup>

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<sup>94</sup> *TAK*, p. 94; Boogert, *Capitulations*, p. 127.

<sup>95</sup> *MENA*, doc. 14. Several articles stipulate a specific, rather than ad valorem, duty for certain commodities, probably because the English objected to giving customs officials discretion.

In subsequent years western negotiators sought exemptions from paying for services made possible by emerging technologies. Ultimately they were so successful that capitulatory tax restrictions were interpreted as giving foreigners and their protégés free access to services for which most natives had to pay. In the late nineteenth century, for example, Western governments invoked the capitulations to exempt their nationals from a fee to finance the maintenance of flammable liquids in municipal depots.<sup>96</sup> Foreigners thereby escaped a charge that European municipalities imposed freely on their own constituents. Western fiscal privileges reached the point, in fact, where an Ottoman subject could avoid a tax, fee, or fine simply by transferring an asset's ownership to a foreigner. Another method of evasion rested on the capitulatory principle that foreign-occupied premises could not be searched unless a consular representative was present. If a consulate was slow to act, the resulting delay enabled the transfer of goods or evidence of liability to another foreigner of different nationality, which then required the involvement of another consulate, complicating and delaying matters further.<sup>97</sup> In contexts where foreign communities accepted to pay for services, they did not always pay equally. The Ottoman commercial courts established in the 1850s to serve all communities, irrespective of religion or nationality, adopted two fee schedules, one for natives and another for foreigners. When decrees involving fines were issued, foreigners paid half as much as natives guilty of the same offense.<sup>98</sup>

These extreme examples come from the nineteenth century, which is when the capitulations turned into instruments of outright pro-foreign discrimination. Even earlier, however, Western representatives sought privileges, though cloaked in demands for fair and predictable taxation. Upon close consideration, certain charges that contemporaneous negotiators or observers characterized as *avanas* hardly appear arbitrary. Consider the seventeenth-century claim that merchants who married

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<sup>96</sup> Bullard, "Large and Loving Privileges," p. 18. Bullard offers many additional examples, mostly from Egypt. See also Shaw, "Ottoman Tax Reforms," especially pp. 428-38.

<sup>97</sup> Bullard, "Large and Loving Privileges," pp. 22-23.

<sup>98</sup> Shaw, "Ottoman Tax Reforms," p. 439.

an Ottoman subject became victims of unjust taxation. According to traditional Islamic law, such merchants became liable for the taxes due from local Christians and Jews. Likewise, they lost eligibility for the privileges of foreign visitors.<sup>99</sup> Such reclassification was, and remains, common all across the globe. It is obvious, however, why western expatriates were increasingly averse to reclassification. As the capitulations became ever more generous, the benefits of remaining a foreigner rose accordingly. In addition, as visiting European merchants turned effectively into permanent residents, their likelihood of marrying a local woman increased, raising the demand for annulling the status reclassification rule.

In contrast to contemporaneous western observers who complained about real or imagined inequities borne by their co-nationals, Middle Eastern commentators of the capitulatory era often, and with mounting frustration up to 1914, lamented those imposed on indigenous populations.<sup>100</sup> Each side overlooked important dimensions of the unfolding processes. Local commentators failed to see that the very growth of commerce with the West depended on limiting opportunism and arbitrariness in the taxation of foreign merchants and financiers. In the absence of essentially predictable commercial returns, which required binding state officials, they would have had to charge more for their services. For their part, western commentators generally failed to acknowledge that the pursuits of commercial predictability and equal taxation had spawned various forms of reverse discrimination.

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<sup>99</sup> Olon, “Towards Classifying Avantias,” analyses two famous cases of allegedly extortionate taxation by Ottoman officials, showing that the charges in question fell within a reasonable interpretation of the prevailing law. Boogert, *Capitulations*, pp. 133-55, offers several other such cases.

<sup>100</sup> Toprak, *Türkiye’de “Milli \_ktisat”*, chaps. 1-2.

The need to impose the rule of law on sectors served by foreigners was being abused in order to give them and their protégés entitlements unavailable anywhere else.

No systematic research exists on the magnitude of the average tax advantage enjoyed by foreign merchants. We do not even know for the early twentieth century whether foreigners generally carried a lower tax burden. They paid taxes also to their own states, so their total tax burdens could have been heavier. Two things are certain. First, the sweeping fiscal immunities of foreigners raised the attractiveness of working in the Middle East. This is evident from the huge influx of foreigners into the region. Egypt had no more than a few hundred foreign residents in the eighteenth century; by 1878 there were about 70,000, and by 1907 around 150,000.<sup>101</sup> The pattern was similar in Turkey. Istanbul alone had about 130,000 foreigners on the eve of World War I.<sup>102</sup> Second, the fiscal immunities of foreigners raised the attractiveness of acquiring western legal protection. This is evident in the rising prices that local non-Muslims were willing to pay for protégé status.<sup>103</sup> The fiscal advantages of foreign and foreign-protected merchants came on top of the administrative support they received from ambassadors, consuls, dragomans, and clerks prepared to interfere on their behalf at the slightest dispute with authorities.

Not only did Muslim merchants and unprotected non-Muslims lack such support, as a consequence they became the target of choice whenever fiscally strapped authorities sought to raise tax revenue. In the century preceding World War I, the burden of various new taxes imposed, in one place or another, but often widely—stamp duties, profit taxes, trade licenses, house taxes, and road labor dues, to name a few—fell largely on unprotected natives.<sup>104</sup> No less significant was the unpredictability of taxation. With authorities introducing new taxes and revising rates in a steady drive to extract revenue, unprotected natives lived with uncertainty as to their tax obligations.

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<sup>101</sup> Baer, “Social Change in Egypt,” p. 158.

<sup>102</sup> Toprak, “Nüfus,” p. 110.

<sup>103</sup> See chap. 9.

<sup>104</sup> Ubicini, *Letters on Turkey*, vol. 1, pp. 266-83; Shaw, “Ottoman Tax Reforms,” p. 428 ; Marlowe, *Anglo-*

Especially in sectors where profitability was hard to conceal, this uncertainty must have discouraged investment and entrepreneurship.

### Variations in enforcement

Disagreements over the effects of the capitulations stem partly from geographic variations in their enforcement. Although a treaty typically enumerated a single set of rights and obligations, these were meant to apply without modification only in the main commercial center—in the Ottoman Empire, Istanbul. Side-agreements proclaimed through sultanic decrees fine-tuned the main treaty. For example, they adjusted certain fees according to the port visited.<sup>105</sup> The consequent variations reflected differences in the cost of servicing foreign ships, but also, in the strengths of local players, including customs officials, kadis, and governors.

A much more significant source of variation lay in imperfect control over political agents. Away from the capital, capitulatory provisions could get interpreted in self-serving ways, even defiantly rejected. In the early 1600s officials in Izmir charged Venetians export dues on the local market value of cotton, rather than on the purchase price inland, as was customary. In addition, they required export duties almost double those specified in prevailing capitulations.<sup>106</sup> Around the same time, the tax farmers entitled to collect tariffs in Cyprus refused to accept the reduction—5 to 3 percent—that the Dutch obtained in 1612. Only after lengthy negotiations, which may have involved unrecorded side-payments, did Cypriot customs officials agree to implement the reduction.<sup>107</sup> It even happened, on occasion, that duties above capitulatory limits were imposed retroactively. Several months after two English merchants paid the requested tariff on a particular shipment, a tax farmer

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*Egyptian Relations*, p. 185.

<sup>105</sup> Kütükoğlu, *Osmanlı - İngiliz Kıtisâdî Münâsebetleri*, pp. 30-32.

<sup>106</sup> Goffman, *Izmir*, p. 107. For additional cases, see Nalcak, “Ottoman State,” pp. 195-204; and Hanna, *Making Big Money*, p. 112.

<sup>107</sup> Steensgaard, “Consuls and Nations,” pp. 18-19. For the text of the Dutch Capitulations of 1612, see De Groot, *Ottoman Empire and Dutch Republic*, app. 1; the rate reduction appears in art. 17, 46, and 64.

demanded a surcharge. The consul protested that the surcharge violated the capitulations. In the end, however, rather than filing a lawsuit, he opted for a negotiated settlement.<sup>108</sup>

An Ottoman decree of 1618 prohibited customs officials in Aleppo from overestimating the value of goods belonging to foreigners. Another decree legalized contracts that shifted the tariff burden from Venetian sellers to their local clients.<sup>109</sup> Such decrees were issued at the request of Venice, evidently because of inconsistent implementation. A century and a half later an Aleppine dragoman for the British, exercising a capitulary privilege, asked that a dispute between him and a local dignitary be transferred to Istanbul. The local kadi objected, holding that under Islamic law the matter fell within his own jurisdiction, rather than a distant administrative body. Notwithstanding the capitulations, the kadi's understanding of his authority was faulty; a kadi functions as an agent of his sultan, who is free to reclaim or redirect any particular judicial responsibility. Nevertheless, when the British consul complained to the governor, the latter sustained the decision and fined the dragoman for evasion of justice.<sup>110</sup>

Even in the mid-nineteenth century, by which time foreigners had enormous leverage over officials in Istanbul, certain provisions of the capitulations went unrecognized in places where the Ottoman government lacked authority. In Mosul, Iraq, the ferry tax was 20 paras for local merchants but 80 paras for foreigners—the opposite of the fee patterns prevalent in Istanbul. Taxes and tolls imposed on foreigners in violation of the prevailing capitulations tripled the five percent import duty stipulated by the Anglo-Ottoman Commercial Convention. Meanwhile, any merchant taking designated commodities out of the city paid a duty of 20 percent—well above the rate established by treaty.<sup>111</sup>

Foreign officials understood that power was in practice decentralized and that the regulatory

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<sup>108</sup> Steensgaard, "Consuls and Nations," p. 44.

<sup>109</sup> Faroqhi, "Venetian Presence," p. 339.

<sup>110</sup> Masters, *Christians and Jews*, p. 126.

<sup>111</sup> Shields, *Mosul Before Iraq*, pp. 106, 110-11. For similar examples of violations, see British Foreign Office,

landscape differed across localities and sectors. They also grasped the advantages of dealing directly with local notables. Indeed, foreign representatives posted in commercial centers as important as Aleppo, Alexandria, and Izmir made a point of dealing independently with local governors, pashas, kadis, tax farmers, even thugs.<sup>112</sup> In view of the unreliability of centralized enforcement, they effectively chose to negotiate “local capitulations” in contexts where interstate capitulations lacked credibility.<sup>113</sup> To ensure favorable terms they also played competing notables against each other. To this end they would threaten to relocate their operations if their demands were rejected.<sup>114</sup>

Where capitulatory provisions were violated, the perpetrators were not necessarily Muslim officials. The customs officials and other tax farmers accused of transgressions included many

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“Tariff of 1839,” p. 3.

<sup>112</sup> Goffman, *Britons in the Ottoman Empire*, especially pp. 17, 30-31, 38.

<sup>113</sup> Like disputes between foreigners and tax collectors, certain disputes between foreign nations were settled by local authorities able to defy capitulatory provisions and government directives. In 1619, reports Goffman, *Izmir*, pp. 100-01, the Venetian consul appealed to Istanbul when the English consul sought to collect consulage from Venetian merchants shipping goods from Venice to Izmir on English vessels. Customs officials in Izmir disregarded the government’s order and kept awarding the right to the English consul, probably as a result of a deal that has left no historical traces.

<sup>114</sup> Frangakis-Syrett, *Commerce of Smyrna*, especially p. 117; Fleet, *European and Islamic Trade*, especially chap. 10.

Christians and Jews. As discussed in chap. 9, by the nineteenth century hundreds of thousands of their co-religionists enjoyed some form of foreign protection; and, consequently, they were able to compete with foreign companies much more effectively than could their Muslim counterparts. The observed infractions stem partly, therefore, from struggles over market share. The same logic applies to enforcement violations perpetrated by Turkish, Arab, or other Muslim officials. Although the available historical records rarely reveal the full scope of official motivations, pro-local commercial protectionism must have been a common factor.

Variability in the enforcement of the capitulations helps to explain why, even as capitulatory rights turned into instruments of pro-foreign discrimination, foreigners continued to complain about business conditions and to press for institutional reforms. By documenting, publicizing, and even exaggerating treaty violations, they sought to tighten and broaden enforcement. A by-product of their campaigns is an abundance of historical evidence on treaty violations. None of this evidence implies, of course, that the capitulations lacked practical significance. On the contrary, in all commercial centers where foreigners established a major presence, they managed to obtain tax reductions and exemptions denied to local subjects and to establish institutions of their own.

### **Islamic rationales**

The foregoing interpretation of the capitulations has highlighted their role in limiting the reach of Islamic law. It is time to address how they were reconciled with broad Islamic principles and whether clerics affected the historical evolution.

Remarkably, the capitulations received the blessing of religious authorities, whose understandings of Islam adapted to evolving social realities. The early capitulations, including the initial Ottoman ones, were easily justified on religious grounds. Under classical Islamic law non-Muslims can be treated differently depending on whether they live in the “abode of Islam” (*d\_r al-*



*Isl\_m*) or “abode of war” (*d\_r al-harb*).<sup>115</sup> Specifically, protections afforded to the residents of Muslim-governed territories may be denied to non-Muslim foreigners. By the same token, Islamic law allows the extension of security guarantees (*am\_n*) to useful foreigners who pledge “friendship and sincere good will.”<sup>116</sup> It was legitimate, therefore, to grant privileges to selected Christian nations capable of serving Muslim goals. Thus, as early as 651 the Muslim administrators of Egypt were incorporating into treaties with Christian rulers “safe conduct guarantees” for foreign individuals and groups.<sup>117</sup> Guarantees extended to groups must have economized on administrative costs. They would have avoided the costs of considering applications from individual members of the groups.

As for allowing foreign merchants to live by their own laws and traditions, it was a short step for a Muslim ruler, having granted certain foreigners security, to endow them with legal options similar to those of native Jews and Christians. Allowing a Venetian merchant to exercise choice of law could be defended by viewing him as a potential subject. Under Islamic law, a non-Muslim foreigner who resided in an Islamic territory for more than a lunar year became a dhimmi, a protected non-Muslim.<sup>118</sup> Revealingly, the term used to designate a “pact” with local minorities (“*ahd*”) also designated the initial trade treaties with foreigners.<sup>119</sup> For Islam’s early interpreters, it seems, these treaties did not involve a radical break with the past.

Eventually the capitulations granted foreigners rights well beyond those found in early Islamic treaties. Those of 1536, like the Mamluk treaties of the previous century, explicitly overruled the principle that a foreign non-Muslim became a dhimmi after one year of residence:

No subject of the King who shall not have resided for ten full continuous years in the dominions of the Grand Signior shall or can be forced to pay tribute, Kharadj, Avari, Khassabiye [various taxes].<sup>120</sup>

<sup>115</sup> This distinction is customarily based on Qur’an 47:4.

<sup>116</sup> Typically the justification is Qur’an 9:6. See Khadduri, *War and Peace*, chap. 15.

<sup>117</sup> Schacht, “Am\_n,” pp. 429-30.

<sup>118</sup> Khadduri, *War and Peace*, pp. 163-64.

<sup>119</sup> Goffman, *Ottoman Empire and Early Modern Europe*, pp. 187, 196.

<sup>120</sup> *TAK*, p. 47; *MENA*, doc. 1, article 15.; Wansbrough, “Safe Conduct,” examines the rationales Egyptian jurists developed in support of Mamluk treaties.

Over the following century other nations, too, obtained the right to retain foreigner status beyond the one-year limit.<sup>121</sup> By the nineteenth century even the ten-year rule was unenforceable.

Yet high Islamic authorities backed each successive extension, often tacitly, though sometimes explicitly. In certain seventeenth-century lawsuits that pitted an Ottoman subject against a foreigner, the latter invoked not just sultanic decrees but also the authority of clerics.<sup>122</sup> Religious leaders also permitted the lowering of tariffs for westerners essentially to the levels of Muslims. Ultimately they even allowed local minorities to move into foreign legal jurisdictions. There is no reason to believe that clerics were of one mind on such privileges. However, there was never an organized or sustained religious opposition to the capitulations. As a group, then, clerics accommodated the introduction of western institutions to the Islamic world. As such, they facilitated the initial steps toward economic modernization, while also contributing to the process that gradually placed the Middle East in a tutelary relationship to western powers.

Neither religious leaders nor statesmen could have failed to grasp the economic significance of the capitulations. Scores of decrees and opinions aimed at protecting urban craft guilds betray a keen appreciation of how commercial privileges can make or break fortunes.<sup>123</sup> Authorities could observe that European merchants dominated certain commercial emporia. Broadening their privileges would surely compound the handicaps domestic merchants faced in those markets. It would also sow incentives for shrinking the jurisdiction of Islamic courts. If capitulations were granted in spite of these observable costs, and then expanded repeatedly, the ruling classes of the Middle East must have expected to benefit from the activities of foreign merchants, to whom domestic merchants offered no credible alternative. Although the longstanding practice of security guarantees does not imply capitulations, Islamic history furnished ample religious ammunition to their supporters. Through

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<sup>121</sup> In 1621 the Venetians formally won the right to live in Ottoman territories for many years without losing the advantages accorded to foreigners [Faroqhi “Venetian Presence,” p. 329].

<sup>122</sup> Istanbul court records, vol. 9, case 19a/1 (13 December 1662); vol. 23, case 7/3 (29 December 1696).

creative extensions and reinterpretations of hallowed traditions, they were able to reconcile foreign privileges with Islamic principles.

### **Appraising the capitulations**

Islam did undergird, then, the long process through which the capitulations helped to marginalize large segments of the local business community. In the nineteenth century one manifestation of this process was that Muslims could not participate in any significant capacity in the most dynamic and newest economic sectors—banking, mass transportation, mass production, and large-scale trade.

Earlier we saw that Islam’s distinct form of legal pluralism accounted for the decline in the economic standing of Muslims vis-à-vis the local protégés of foreign powers. The capitulations were essential, we now see, to the dynamic generated by the choice of law accorded to minorities. In enabling foreigners to transplant their evolving institutions to the Middle East, the capitulations motivated minorities to exercise their choice of law differently. Thus, they took to using foreign, or foreign-inspired, commercial techniques, forms of organization, and means of conflict resolution. Gradually dropping economic practices identified with Islam—Islamic partnerships, informal credit practices, adjudication in kadi courts, personal exchange—they became progressively estranged from the region’s dominant economic culture, which they had long helped to sustain. Meanwhile, almost all Muslims remained in relatively static and old economic sectors, which still operated mainly under Islamic law.

These long-term consequences were unintended. The sultans who agreed to the early capitulations for immediate political or economic gain may not have wanted to promote Muslim

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<sup>123</sup> Genç, *Devlet ve Ekonomi*, pp. 54-59; Kuran, “Ottoman Guilds,” pp. 46-48.

merchants, but neither did they seek to marginalize them vis-à-vis non-Muslims. The observed outcomes depended on the subsequent institutional evolution of the West. Had the economic institutions of England, France, and the Netherlands stagnated after the sixteenth century, foreign privileges would not have posed a major problem for local mercantile communities. Western-inspired institutional transplants would have been much less significant; and, if only because there would have been no explosion in foreign trade with the West, Muslim merchants and producers would not have lost market share to minorities and foreigners.

Another unintended consequence, of lasting significance, has been the de-Islamization of economic life in the Middle East. The capitulations triggered a dynamic through which Islam's role in the region's economic life diminished far beyond anything once imaginable. In encouraging western merchants to establish lasting commercial enterprises, the capitulations familiarized the region's peoples with business practices, organizational forms, and legal procedures without a basis in Islam. Judicial defeats such as the one that Mehmet bin Mahmut suffered against Heneage Finch taught the local population the advantages of documenting contracts in a world of expanding commerce and increasingly impersonal exchange. The growing powers of foreign representatives enabled their protégés to reduce their dependence on Islamic courts, at least on matters of business. Most significant for the present, foreign economic successes made Muslims recognize the benefits of institutions developed outside the realm of Islamic law. They demonstrated, for example, the advantages of binding the tax-collecting hand of the state.

The capitulations set the stage, therefore, for momentous economic reforms of the nineteenth and twentieth centuries—momentous because they essentially severed the connection between daily economic life and Islamic law. Specialized commercial courts, corporate law, and stock markets—all of which presume largely impersonal exchange—were adopted and disseminated, for the most part, without even lip service to Islamic principles. They thus became part of the institutional fabric even in countries, like Saudi Arabia, whose economy is nominally under a divine and time-invariant law.

Institutions and practices of foreign provenance became a visible part of the domestic economic system, partly through emulation of prototypes already present in the region's most dynamic sectors, through the capitulations.

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

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