LEGAL MODERNIZATION IN THE EARLY MEIJI PERIOD AND THE JAPANESE RESEARCH ON THE MIXED COURTS OF EGYPT

Emir Karakaya

BOĞAZİÇİ UNIVERSITY

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Emir Karakaya

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The thesis of Emir Karakaya

has been approved by:

Prof. Edhem Eldem
(Thesis Advisor) _____

Prof. Ayşe Selçuk Esenbel
(Thesis Co-Advisor) _____

Assist. Prof. Yaşar Tolga Cora _____

Prof. Akif Emre Öktem
(External Member) _____

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DECLARATION OF ORIGINALITY

I, Emir Karakaya, certify that

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ABSTRACT

Legal Modernization in the Early Meiji Period

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With the development of the concept of international law into domination tool in the hands of the European powers, non-European states such as Japan and the Ottoman Empire signed commercial treaties that granted extraterritorial privileges to the Great Powers. The Meiji government determined the revision of the unequal treaties as its primary objective and in 1871 dispatched the Iwakura Mission to negotiate this issue with the treaty powers. During the negotiations, the mission was advised to analyze legal formations in countries such as Greece, the Ottoman Empire, and Egypt, which were “more suitable examples” for Japan. A member of the Iwakura Mission, Fukuchi Genichirō, carried out this important research and wrote a significant report on the Mixed Courts of Egypt. This was followed by two subsequent reports. The Research on the Mixed Courts of Egypt conducted within this historical context was an important episode of the Japanese experience of legal modernization that saw the Ottoman and Egyptian experiences at the crossroads. Placing this important episode at its center, this work aims to offer an alternative narrative of the nineteenth-century global order by questioning the Eurocentric perception of the extraterritorial regimes or nation-state victimization narratives of the histories of legal modernization by taking the agencies of Japan, the Ottoman Empire, and Egypt into account. Rather than defining these unique experiences of modernization as success stories or failures, this work regards these experiences within the historical context, considering the political and economic realities of these states comparatively.

ÖZET

Erken Meiji Döneminde Hukuki Modernleşme ve Arayışlar: Mısır Karma Mahkemeleri Örneği

Uluslararası hukuk kavramının Avrupalı güçlerin elinde bir tahakküm aracı haline gelmesi neticesinde Japonya gibi Avrupalı olmayan devletler Batılı güçlere diplomatik dokunulmazlık hakları veren ticari anlaşmalar imzalamak durumunda kaldılar. Meiji hükümeti başından beri bu "haksız anlaşmaların" yenilenmesini en temel hedefi olarak belirledi ve 1871 yılında anlaşma devletleriyle müzakereler yürütmek üzere kurulan Iwakura Heyeti'ni bu ülkelere gönderdi. Müzakereler esnasında heyete "daha münasip örnekler" olduğu belirtilen Yunanistan, Osmanlı ve Mısır'daki hukuki kurumları ve kanunları incelemeleri tavsiye edildi. Bu araştırmayı yapmak için görevlendirilen Fukuchi Genichirō, özellikle Mısır Karma Mahkemeleri üzerine oldukça önemli bir rapor hazırladı. Bu raporu iki önemli rapor daha takip etti. Yapılan bu araştırma Osmanlı ve Mısır hukuki modernleşmesi tecrübeleriyle Japon hukuki modernleşmesi tecrübesini adeta bir kavşak noktasında buluşturmaktaydı ve Japon hukuki modernleşmesinin geleceği açısından çok önemli bir dönüm noktasıydı. Bu çalışma diplomatik dokunulmazlık rejimleri meselesinde hâkim Avrupa-merkezci bakış açısını, ulus-devlet mağduriyet anlatılarını sorgulayarak Japonya, Osmanlı İmparatorluğu ve Mısır'ın tarihi rollerini ortaya koymakta ve on dokuzuncu yüzyıl dünya düzenine alternatif bir bakış açısı getirmeyi amaçlamaktadır. Bu çalışma, modernleşme tecrübelerini başarı veya başarısızlık olarak nitelendirmektense her bir hukuki modernleşme tecrübesini kendi tarihi bağlamı içerisinde değerlendirmekte ve bu bağlamlardaki siyasi ve ekonomik gerçeklikleri mukayeseli olarak ele almaktadır.

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CHAPTER 1

INTRODUCTION

From the beginning of the nineteenth century, the Western ships seeking the opening of the country had continuously visited Japan to establish trade. None of them were successful until Commodore Matthew Perry (1794-1858) arrived at the bay of Uraga in 1853. When Perry arrived, Japan not only had to deal with the dilemma that whether they should open the country to the Western trade or not, but also a sovereignty problem. Tokugawa Bakufu[1] had long perceived the *sakoku*[2] policy as a sovereignty issue and abolishing that was an important decision, a problem that threatened its sovereignty. The letter of the president of U. S which was brought to Japan by Perry gives important insights to this issue. The gunboat diplomacy manifests itself as the president reminded in the letter as "…I have sent Commodore Perry with a powerful squadron…" and demanded to get provisions and protection of the shipwrecked people and opening a port at the southern edge of the country. [3] Later, starting with the Harris Treaty[4] in 1858, Japan had given extraterritorial rights to US and following it to many other powers of the time. Thus, starting from the

[1] 幕府 Bakufu(tent government) is the military government that ruled over Japan for centuries. The last Bakufu was the Tokugawa Bakufu. Shogun was the head of Bakufu.

[2] 鎖国 Literally means closed country. The sakoku policy was the basis of foreign policy of Japan during the Tokugawa period. It was not a complete isolation but this policy limited Japan's contact with the outside World, especially with Europe. Jansen, Marius B. *The Making of Modern Japan*. Cambridge Mass.: Belknap Press of Harvard University Press, 2000.

[3] For the full version of this letter refer to: Matthew Calbraith Perry, *Narrative of the Expedition of an American Squadron to the China Seas and Japan: Performed in the Years 1852, 1853 and 1854, Under the Command of Commodore MC Perry, United States Navy, by Order of the Government of the United States* (AOP Nicholson, printer, 1856), 256–57.

[4] Originally known as The Treaty of Amity and Commerce Between the United States and the Empire of Japan, it is the first of the series of commercial treaties signed between Japan and a Great Power, known as Ansei or Unequal Treaties. Please see, The Treaty of Amity and Commerce Between the United States and the Empire of Japan, 1858, https://www.loc.gov/law/help/us-treaties/bevans/b-jp-ust000009-0362.pdf

mid-nineteenth century, these treaties became a major problem in Japan. In dealing with this sovereignty problem, mainly after the Meiji Restoration, Japanese governments looked for the ways to be part of the international order and revision of these unequal treaties and legal reforms were necessary. One of the most important stage for the revision of treaties with regard to this issue of sovereignty was the Iwakura Mission which dispatched in 1871 to negotiate the revision of treaties with Great Powers as well as to observe and analyze the legal, economic, and social systems in these countries. Regarding the legal observations to be made, the mission was advised to analyze legal formations in countries such as Greece, the Ottoman Empire and Egypt, which were "more suitable examples" for Japan to follow. This created a set of multi-dimensional relations on the one hand between Japan and the Great Powers and particularly between Japan and the Ottoman Empire. The Japanese authorities once again faced with an important problem, which was to change their attitude regarding the legal reforms that they needed to make to come on equal levels with the Great Powers.

This work analyzes the quest of Japan for sovereignty through four main issues. The second chapter will deal with origins of the concept of international law and nineteenth century global order. Because, to understand these developments, one needs to understand the basis of the issues of international law and its function in the nineteenth century. These multi-dimensional relationships were being conducted in the framework of nineteenth century imperialism, as the Great Powers had a developmentalist attitude throughout the negotiations. The second chapter aims to show that the development of the concept of international law as well as the global order of the nineteenth century was deeply connected with the colonial encounters of the European powers throughout the world, expansion of their trade networks,

development of the understanding of European civilization and European values as superior, and the changing political and economic dynamics up until the nineteenth century.

The third chapter deals with Japan's encounter with the nineteenth century global order and the comparison of the Japanese experience of extraterritorial regimes with those of other non-European states: the Qing Empire and the Ottoman Empire. One of the most important mechanism international law was used by the Great Powers in the nineteenth century was treaties signed between non-European states which granted them extraterritorial privileges. Japan signed extraterritorial treaties with the Great Powers following the Harris Treaty of 1858 that was signed with the United States of America. The opening of the country to the outside markets and extraterritorial privileges granted to the European subjects led to upheavals in Japan against the Tokugawa Bakufu. Discontented samurai from the "defeated clans", especially from the domains of Satsuma and Choshu, quickly organized an anti-foreign and Imperialist revolutionary army. This anti-Bakufu alliance finally defeated the Tokugawa armies and established the Meiji government. Realizing that the anti-foreign ideas could not be continued, the Meiji political elite determined the abolishment of the extraterritorial treaties and coming on equal terms with the Western powers as its most important foreign policy goal. Iwakura Mission was organized in 1871 to negotiate the revision of the treaties with the Great Powers and to analyze the Western industry and their social, economic, legal, and political institutions in their place. The Iwakura Mission led a junior officer, Fukuchi Genichirō[5], to Greece, the Ottoman Empire and Egypt as he was ordered to analyze the laws and legal institutions of these countries.

[5] 1841-1906 Junior officer in the Iwakura Mission served as a translator. Later he became a prominent journalist in Nichi nichi Shimbun of Japan. Andrew Cobbing, "A Japanese Protégé in Pera: Fukuchi

One consequence of the mission was the Japanese legal research in Egypt that will be dealt in the fourth chapter, which also helped Japan to establish relations with the Ottoman Empire. The fourth chapter made a comparison between the emergence of capitulations and extraterritoriality in the Ottoman Empire and Egypt with the Japanese experience. The origins of the Mixed Courts of Egypt is discussed and the Japanese Research on the Mixed Courts of Egypt is analyzed as one of the most important turning points in Japan's legal modernization in the second half of the nineteenth century.

The fifth and the last chapter analyzed the Ottoman–Japanese relations within the framework of nineteenth century global order. Japan's attempt to establish formal relations with the Ottoman Empire and the nature of the bilateral relations is discussed in the light of proceedings between the two countries. All these efforts made by Japan was to gain full sovereignty in their soils, which was restricted by the extraterritorial treaties. Moreover, after Japan managed to abolish extraterritoriality, it did not want to enter into relations with the Ottoman Empire on equal footing. This episode of the Ottoman–Japanese relations sheds light to the characteristic of the relationship between two non-European states. It is an important contribution to the scholarship as today the narratives of the nineteenth century global order are dominated by the European – non-European encounters. At the end of this thesis, it will be established it was through these efforts that Japan established a multi-dimensional set of relations between Western nations, and non-Western nations, such Egypt and the Ottoman Empire.

Gen'ichirō's Reports on the Mixed Courts of Turkey and Egypt," in *Diplomacy and Intelligence in the Nineteenth-Century Mediterranean World*, ed. Mika Suonpää and Owain Wright (London: Bloomsbury Publishing PLC, 2019), 207.

There are important works in the scholarship that discussed various aspects of this work. Nakaoka Saneki's work on the Japanese Research on the Mixed Courts of Egypt, Par Cassel's work on the extraterritorial regimes in China and Japan, Turan Kayaoğlu's work on the legal imperialism in China, Japan, and the Ottoman Empire, Douglas Howland and Michael Auslin's works on the Japanese struggle for sovereignty in the nineteenth century, and Reşat Kasaba's work on extraterritoriality and unequal treaties in the Ottoman Empire and China are important works in the scholarship. However, this work differs from these works as it incorporates the Ottoman, Japanese, Egyptian and briefly Chinese experiences of extraterritoriality under a theoretical framework. Moreover, it discusses the issue by taking the Japanese Research on the Mixed Courts of Egypt at the center. This enables to see the peculiarities and similarities of each context and the theoretical framework established in the second chapter makes it possible to discuss this issue in a more systematic way.[6]

This work looks at the nineteenth century global order and the concept of international law in the nineteenth century through the non-European experiences of legal modernization. Its main focus is not Europe, on the contrary, it aims to bring the discussion of extraterritoriality in the nineteenth century into the non-European context. It analyzes the issue from the Japanese, the Ottoman, and Egyptian

[6] Saneki Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," *上智アジア学*, no. 6 (1988); Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and İmperial Power in Nineteenth-Century China and Japan,* Oxford studies in international history (Oxford, New York: Oxford University Press, 2012); Turan Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge, New York: Cambridge University Press, 2013); Douglas Howland, *International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century* (Houndmills Basingstoke Hampshire: Palgrave Macmillan, 2016); Michael R. Auslin, *Negotiating with İmperialism: The Unequal Treaties and the Culture of Japanese Diplomacy* (Cambridge Mass.: Harvard University Press, 2004); Reşat Kasaba, "Treaties and Friendships: British Imperialism, the Ottoman Empire, and China in the Nineteenth Century," *Journal of World History* 4, no. 2 (1993), http://www.jstor.org/stable/20078561.

perspective. It concentrates on the non-European strategies of struggle with the European domination in the nineteenth century. The capabilities of Japan, the Ottoman Empire, and Egypt shaped these experiences, which were determined by the economic conditions, geopolitical circumstances, and internal dynamics of each context, and their main preferences determined their relative successes. Overall, this work argues that the nineteenth-century legal modernization of Japan is not an isolated narrative. It should not be overlooked that the Japanese legal modernization in the second half of the nineteenth century is a part of a shared experience. It had its unique features, and it had its parallels with other experiences of non-European struggle with the nineteenth century imperialism such as those of the Ottoman Empire and Egypt. Therefore, this work sees it crucial to bring the discussion of Japanese legal modernization outside of the narratives of "success" as well as the narratives of national victimization and connect this important history with its contemporary world.

CHAPTER 2

AN INSIGHT INTO THE NINETEENTH CENTURY GLOBAL ORDER

Before getting into the analysis of the Japanese Research on the Egyptian Mixed Courts, an understanding of the context is necessary. The nineteenth century global order was built upon a set of rules called “International Law”. Although at first it sounds as if this is a set of rules regulating the relationship between individual states and assuring justice in the world, the historical experience and the debates on the meaning and the origin of the international law varies. The first section of the chapter discusses different definitions of “International Law” and what it meant in the nineteenth century. The second section explores the origins of this concept, and discusses why it was placed at the center of the nineteenth century global order. The third section focuses on the geographical and cultural origins of International Law. Having established an understanding of the concept of International Law, the next section will deal with the way the international order operated and what role(s) International Law played. Starting from the fifth section, by analyzing the history and the function of the terms “extraterritoriality” and “unequal/capitulatory treaties” and the grounds for the main discussion of this work will be laid. In the last section, the focus will shift to the two specific experiences: the Japanese and the Ottoman/Egyptian experiences. Through these examples the struggle and solution against these problems on a global scale will be demonstrated. This last section will briefly touch upon the issue of the establishment of the Egyptian Mixed Courts, but the detailed discussion of the Egyptian Mixed Courts will be in the following chapters.

2.1 What is international law?

Inter-state relations are as old as the political history of the world and usually the diplomatic relations between different states were regulated by treaties. They regulated the relationships between states, alliances were formed with treaties, privileges were granted both militarily and commercially. There were general rules of conduct in inter-state relations but there was no "international law" as it was formed through ages thanks to the intellectuals, legalists and scholars who put effort and created a literature which both tried to understand how inter-state relations operated legally and tried to give it a systematic character by penning their doctrinal writings. It was from the sixteenth century on that doctrines had started to be written on the international relations. However, these writings were not detailed and only established a foundation for the discussions on the legal aspects of international relations.[7] When one looks at to the course of the history of international relations, it is seen that the form of inter-state relations usually determined by their relative strength. In many aspects, one cannot argue that prior to the establishment of the "modern international world order" the inter-state relations were based on equality. As the European Empires expanded throughout the world a new literature comprised of the doctrinal writings on the international law was created. The question here would be "When did then this systematic discussions on international law started?" There were two main historical events that played a role in the origins of the international law. "While Hugo Grotius is generally regarded as the principal forerunner of modern international law, historians of the discipline trace its primitive origins to the works of Francisco de Vitoria(1486?–1546), a sixteenth-century

[7] The first three will be discussed in this section are Francisco de Vitoria, Francisco Suarez and Hugo Grotius. Fassbender et al., *The Oxford handbook of the History of International Law*, 79.

Spanish theologian and jurist.[8]" The first of these events was the European "discoveries" of the Native Americans. As Anthony Anghie argues, Vitoria's discussions which is identified as the "primitive origins" of the international law was on the relations between the Spanish(the colonizer) and the Native Americans(the colonized). Anghie claims that Vitoria was trying to "resolve the unique legal problems arising from the discovery of the Indians."[9] Anghie in general believes that "Vitoria's jurisprudence relies in many respects on existing doctrines, he re-conceptualizes these doctrines, or else invents new ones, in order to deal with the novel problem of Indians." He continues and states that what is important is that the discussions and the use of international law did not exist during and before Vitoria's days and therefore "international law was created out of the unique issues generated by the encounter between the Spanish and the Indians."[10] The primitive origins of the discussions can be traced back to the sixteenth century, to Vitoria. Another important contribution to the development of the concept of international law was made by Francisco Suarez (1548-1617), who was a Jesuit theologian and philosopher whose detailed analysis of law, especially his conception and thorough discussion of international law, or in his terminology *ius gentium* was marking a turning point in the development of the concept of international law. Suarez argued that international law is applied to all mankind and that its both positive and human.[11] Hugo Grotius

[8] Antony Anghie, *Imperialism, Sovereignty, and the Making of İnternational Law,* Cambridge studies in international and comparative law 37 (Cambridge: Cambridge University Press, 2005), 13.
[9] Anghie, *Imperialism, sovereignty, and the making of international law*, 14.
[10] Anghie, *Imperialism, sovereignty, and the making of international law*, 15
Vitoria discusses this encounter within the framework of law and creates an important doctrine in the process of the development of the concept of international law. Francisco de Vitoria, A. R. Pagden and Jeremy Lawrance, *Political Writings*, Cambridge texts in the history of political thought (Cambridge: Cambridge University Press, 1991), 231–327.
[11] This in turn created an understanding that international law can be applied to the entire humankind, which provided the basis of its use up until nineteenth century, but especially in the nineteenth century. Francisco Suárez, Selections from three works of Francisco Suárez, *S.J: De legibus, ac deo legislatore, 1612 Defensio fidei catholicae, et apostolicae adversus anglicanae sectae errores, 1613 De triplici virtute theologica, fide, spe, et charitate, 1621* (Buffalo N.Y.: W.S. Hein, 1944), 325–44.

(1583-1645), who was a late sixteenth and seventeenth-century scholar wrote down one of the first systematic doctrinal discussions on international law after Vitoria and Suarez criticizing the argument that all parties in a war might be fighting for a just cause. "He saw the results of it in the brutal Thirty Years War that pitted Protestant rulers against Catholics for dominance in Europe. Everyone was fighting in a subjectively just cause." Therefore, the authors go on and say that he "helped to preserve a Just War Doctrine with credible constraints and made the Doctrine the focus his of seminal work, *On the Law and War and Peace* (1625)."[12] Just as Vitoria, Grotius also contributed to this literature based on the colonial experiences, this time not between the colonizer and the colonized, but between two colonial powers. This brings us to the second event, which was the Dutch seizure of the Portuguese vessel. Grotius commented on the Dutch seizure of the Portuguese vessel deeming the Dutch East Indies company as lawful in fact was the basis of an understanding that judges the parties, in this case the states, from their "political or moral characteristics."[13]

Gerry Simpson argues that this Grotian understanding of international law was not prevalent until nineteenth century "when it again became an explicit part of the international legal structure with the introduction of a distinction between civilized and uncivilized states."[14] He goes on and says that this in turn created a system where European powers formed a "Family of Nations" within the global world order.

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[12] Fassbender et al., *The Oxford handbook of the History of International Law*, 276.
[13] "In 1602, Spain and The Netherlands were embroiled in a long running war in Europe and this conflict carried over into hostilities between Dutch trading companies and Portuguese and Spanish maritime interests in East Asia. During one of many engagements on the high seas, an affiliate of the Dutch East Indies Company had captured a Portuguese vessel named 'The Catherine'. On 9 September 1604, a Prize Court in Amsterdam declared the capture lawful and held that the vessel belonged to the Dutch company." Gerry J. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order,* Cambridge studies in international and comparative law (Cambridge: Cambridge University Press, 2004), 3–4 ; To have a detailed look into Grotius' doctrinal work please see Hugo Grotius and Martine Julia van Ittersum, *Commentary on the Law of Prize and Booty*, Natural law and enlightenment classics (Indianapolis: Liberty Fund, 2006), http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=558147.
[14] Simpson, *Great Powers and Outlaw States*, 4.

"Indeed, it was another Grotian principle, that of sovereign equality (or at least that element of it I call existential equality), that informed the practice of states *until* the nineteenth century"[15] where states were in theory regarded as "equals".[16] However, it will be seen in the discussion on the history of international law that the formation of international law from the beginning was not out of the intention to assure equality between the states. To situate the discussion on a firmer basis, the focus will be on the two positions in our discussion of international law, and the discussion will move on in the second section for the discussion on the origins of international law. This principal Simpson mentions, sovereign equality, is based on the two positions dealing with the international law after the Peace of Westphalia.[17] The first one is naturalism, which is the position initially taken by Grotius and the second one is positivism, which became the dominant position in the nineteenth century.[18]

Hence, it might be argued that Grotius established a doctrine that would be applicable for both the believers and non-believers alike. After the Peace of Westphalia his doctrines became quite influential as Fassbender et al. puts it:

> On the one hand it has been argued, 'Grotius adapted the (old) Law of Nature to fill the vacuum created by the extinction of the supreme authority of Emperor and Pope'. On the other hand it has been affirmed that Grotius developed a system of international law which would equally appeal to, and be approved by,

[15] Simpson, *Great Powers and Outlaw States*, 4.
[16] "The orthodoxy on sovereign equality assumes that the international system contains a plurality of states and that these states are both similar and different i.e., capable of enjoying equality in some domains but distinct in others. States enjoying sovereign equality are often said to possess internal sovereignty (e.g., a monopoly of legitimate legal authority within a certain territory and jurisdictional primacy in that area) and external sovereignty (e.g., a right to territorial integrity, immunity from suits in the courts of another state). The core idea (of both sovereignty and equality) is that no state is legally superior to another -- *par in parem non habet imperium.* […] States recognize only one legal superior and that is international law itself." Simpson, *Great Powers and Outlaw States*, 27–28.
[17] Peace of Westphalia (1648) With the Peace of Westphalia the equality of states started to be an important element of inter-state relations. Simpson, *Great Powers and Outlaw States*, 9.
18 Simpson, *Great Powers and Outlaw States*, 31.

> the believers and the atheists[19], and which would apply to all states irrespective of the character and dignity of their rulers. [20]

The authors imply that this new order was marking the secularization of the legal institutions and "the equal, sovereign States undermined conceptions of community and community law.[21]" The practical side of the "natural law" doctrine was in its self-explanation. The eighteenth-century international lawyer Emer De Vattel(1714–1764), for instance, tried to explain that equality between states was a natural right. For him, Simpson argues, the states are regarded as legitimate entities since their existence before international law is known. Therefore, the international law accepts in the beginning that the existence of these entities is given, therefore naturally may claim that they have the right to be equals since they are made of people who also "have natural rights to equality."[22] However, a century before Vattel, Thomas Hobbes(1588–1679) argued that there needed to be a superior power. "Hobbes's answer is neither a legal order composed of equals nor a continuing state of anarchy. For him, only subordination to some superior power can ensure peace."[23] But in general there was a belief that the states were equal "sovereigns". As Howland and White argue, "sovereignty is a set of practices that are historically contingent" that is, they continue "a mix of both international and intra-national processes, including self-determination, international law, and ideas about natural right."[24] Therefore,

[19] Here applying the Word "atheist" into this context is anachronistic. Henri Lefebvre's argument on the accusations on Rabelais as an atheist is another example of this anachronistic approach.
Please see Stuart Elden's discussion on Lefebvre's work on Rabelais: Stuart Elden, "Through the Eyes of the Fantastic: Lefebvre, Rabelais and Intellectual History," *Historical Materialism* 10, no. 4 (2002): 97, doi:10.1163/15692060260474387.
[20] Fassbender et al., *The Oxford handbook of the History of International Law*, 277.
[21] Fassbender et al., *The Oxford handbook of the History of International Law*, 277.
[22] Simpson, *Great Powers and Outlaw States*, 32.
[23] Simpson, *Great Powers and Outlaw States*, 33.
[24] Douglas Howland and Luise White, *The State of Sovereignty: Territories, Laws, Populations,* 21st century studies 3 (Bloomington: Indiana University Press, 2009), 1.

from the perspective of the natural law the assumption was as Fasbender et al. described in the following quote:

> …rules associated with moral principle, such as when resort to force could be justified, bound states even if their governments had not agreed to any such rule in a treaty or through acquiescence in a general practice."[25]

However, for some scholars of the nineteenth century, such as Lassa Oppenheim(1858 - 1919), the explanation of international law based on moral principles caused the governments' disinterest in international law.[26] Therefore, it can be argued from the writings on international law in the nineteenth century that there was a shift in the paradigm from the naturalist position to the positivist arguments. As Howland and White also argue:

> In the nineteenth century, largely under the influence of John Austin's positive theory of law, legal scholars began to favor the idea that law can be produced only by a sovereign power. Whether that sovereign power were a king, a parliament, or a council, it alone guaranteed that law would be meaningful and enforceable. Unfortunately for international law, Austin believed that there could be no international law until it was produced by a sovereign power; otherwise, international law remained a type of morality. In so thinking, Austin was attacking the empirical school of international law, new in the nineteenth century and exemplified most by Jeremy Bentham and Henry Wheaton, who argued that the codification of extant practices constituted international law—from longstanding habits to treaties and conventions..[27]

Hence, the positivist position was leaning more towards the idea of "sovereign equality" which established its position by "positive laws and treaty principles."[28] Rather than basing legal principles on moral actions of the states like naturalism, "the primacy of the sovereign state and the requirement that states consent to any

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[25] Fassbender et al., *The Oxford handbook of the History of International Law*, 278.
[26] Fassbender et al., *The Oxford handbook of the History of International Law*, 283.
[27] Howland and White, *The State of Sovereignty*, 7 ; See John Austin and Wilfrid E. Rumble, eds., *The Province of Jurisprudence Determined*, Reprinted., Cambridge texts in the history of political thought (Cambridge: Cambridge Univ. Press, 2001) and Austin, John. *Lectures on Jurisprudence: Or, the Philosophy of Positive Law*. J. Murray, 1875. to gain a more detailed insight to Austin's Positive theory of law, especially see his discussion on the notions of Positive Law and Sovereignty John Austin, *Lectures on Jurisprudence: Or, the Philosophy of Positive Law* (J. Murray, 1875), 82–147
[28] Simpson, *Great Powers and Outlaw States*, 33.

international laws applied to their behavior are each derived from a core notion of sovereign equality."[29] Thus, the positivist position valued the definitive and unambiguous character of its principles. Hence, the author continues, "For positivists, these qualities are found in a system where the principal law-generating actors are readily identifiable and where these actors (states) are undifferentiated in their capacity to create law (legislative equality)."[30] Hence, from the start of the European expansion towards the nineteenth century there have been changes in the interpretation of the international law. This was a result of the historical trajectory the states' themselves followed. The sovereign equality was a requirement for the positivist interpretation of the international law. This, however, had certain limits. In the next section of this chapter, how these limits and criteria were determined throughout history will be discussed.

2.2 The history of international law

In the first section, it is established that the "primitive origins" of international law were going back to Vitoria's writings, which were based on the encounter between the Spanish and the Native Americans. Therefore, it is safe to argue that these writings were initially based on the colonial encounters of the European powers. In fact, some scholars even argue that the doctrines were written as a result of this colonial experience, rather than having them before colonial rule and applying them from the beginning in the colonies. Anghie, for instance, criticizes the mainstream narrative that assumes sovereignty was produced in Europe and brought to the other parts of the world through colonial activities. As this narrative suggests, "the European model of sovereignty, established by the defining event of the Peace of

[29] Simpson, *Great Powers and Outlaw States*, 33.
[30] Simpson, *Great Powers and Outlaw States*, 33.

Westphalia, was gradually extended to the non-European peripheries."[31] On the contrary, the discourse on sovereignty was shaped by different aspects of the relationship between the colonizer and the colonized. Moreover, it gained a different meaning and interpretation through this process.[32] In fact, the existing doctrines were modified and interpreted to fit the needs of the colonizer.[33] Even though international law was developed in the seventeenth and eighteenth centuries through the political changes that occurred in Europe, it is clear that its initial formulation was based on the European expansion in the sixteenth and seventeenth centuries. The conflicts arose between different colonial states and the legal jurisprudence of those conflicts gave way to the development of different solutions. Realizing this is critical for understanding the nineteenth century interpretation of international law. Because there is a historical continuity when it comes to the use of international law as a means of colonial rule. Howland and White also affirm Anghie's position that international law developed within the context of colonialism.[34] In fact, international law became the legitimization tool for the colonial exploitation and therefore "international law and the legal structures of colonialism are twin forms of articulating Europe's relationship with the rest of the world."[35] Therefore, setting the context of the Japanese encounter with the nineteenth century global order, it can be argued here that these developments were already creating the necessary conditions in which certain states would have the say who had the capacity to be fully independent and who had to obey certain rules and follow certain paths under their guidance to reach a level where they could be accepted as a "sovereign" state. Before

[31] Anghie, *Imperialism, sovereignty, and the making of international law*, 6.
[32] Anghie, *Imperialism, sovereignty, and the making of international law*, 6.
[33] Anghie, *Imperialism, sovereignty, and the making of international law*, 15.
[34] Howland and White, *The State of Sovereignty*, 8.
[35] Howland and White, *The State of Sovereignty*, 8.

getting to the nineteenth century interpretation of international law and the nineteenth century global order, which is the immediate context of this work, the phases international law went through in Europe will be discussed in order to understand certain concepts that will be used in the following chapters of this work.

2.2.1 International law before and after Westphalia

The Peace of Westphalia(1648) occupies a central place in the development of the concept of "sovereign states" in Europe. "Mutual recognition of sovereigns was a key element of the Westphalian settlement. Sovereigns were equal in voting power and in the level of protection to be accorded to their internal political practices."[36] A new international order was forming out of the Westphalian settlement and the terminology created together with it. So, Simpson is right when he states that "it is at Westphalia that equality, anarchy, sovereignty and independence were fused in the European system."[37] So in the light of this argument it can be argued that the international order and the idea to impose this international family of nations is a way to impose the consequences of European history on the entire non-European world. This has to do with the historical process that both the former and the latter had gone through and as a result of their relative power, the former became able to impose its rules on the latter. Westphalia is a critical turning point which would eventually lead us to an idea of international law based on the European values and doctrines of the European thought. Through Westphalia, Europe was experiencing an important transformation in its political order. The decreasing authority of the Church as well as the Holy Roman Empire was pointing out to the two important

[36] Simpson, *Great Powers and Outlaw States*, 31.
[37] Simpson, *Great Powers and Outlaw States*, 31.

processes of change in Europe: secularization and decentralization.[38] This is actually the "anarchical" side of the Westphalian settlements. The political and spiritual authority no longer exists, certainly in practice, after Westphalia. This meant, at least in a theoretical sense, that there existed some form of equality between different polities of Europe. This understanding of equality was also going to change after another war that shook the Westphalian order. After the Napoleonic Wars (1801–1815), a system based on hierarchies was in the making. With the signing of the Treaty of Chaumont (1814) between the idea of "Great Powers" was for the first time expressed legally.[39] This process starting with Westphalia and establishing itself with the Congress of Vienna(1814-15) has created an environment where now there could be a group of privileged states, who would be the "sovereign" in the Hobbesian sense and impose its will on the others.[40] Of course, this again would work behind the curtains of "sovereign equality." In theory all states were equals, however the definition of sovereignty pointed by Howland and White was an important determinant in inter-state relations:

> The peace treaties of Augsburg (1555), Westphalia (1648), and Vienna (1815) would establish consensual rules of mutual recognition and the principle of cooperation for the attainment of collective historical ends—cultural, ideological, economic, or otherwise. The resulting compacts created ethical realities: codes of rules, norms, and principles that created a juridical equality between states actually unequal in size, capacity, and legitimacy. The related fiction was the basis of privileges and immunities that allowed European states

[38] "The idea that states are legally equal has both a political origin and several philosophical sources. The organization of community on the basis of sovereignty and equality is both cause and effect of two associated processes in international affairs - secularization and decentralization. The culmination of these mediaeval processes occurred at Westphalia where there was the rejection of the spiritual dominion of the Catholic Church and the political rule of the Holy Roman Empire as well as an agreement on the secular equality of Catholic and Protestant states (in Germany). So, Westphalia symbolizes, for international law, a transition from strict hierarchy to equality or from a vertical ordering, with the Pope and Emperor at the pinnacle, to a horizontal order composed of independent, freely negotiating states." Simpson, *Great Powers and Outlaw States*, 30.

[39] "The significance of the European Coalition during the eight years that followed the signature of the Treaty of Chaumont is, that it represented . . . an experiment in international government, an attempt to solve the problem of reconciling central and general control by a European Confederation with the maintenance of the liberties of its constituent states, and thus to establish a juridical system." See: Simpson, *Great Powers and Outlaw States*, 96.

[40] Howland and White, *The State of Sovereignty*, 264.

> to coalesce into the Concert of Europe, the Holy Alliance, and later the North Atlantic Treaty Organization.[41]

Of course, the intention here is not to go into the details of these alliances and their formations. The point here is that this process led to the emergence of the nineteenth century global order where there is a certain group of nations, pointing their fingers at the other states and based on an established legal system classifying them as civilized, semi-civilized or primitive states. This was also proving that the idea of "equality" was going through some changes after the Congress of Vienna.

The Congress of Vienna was a turning point for the understanding of legal institutions, especially for international law. Although at first the Congress seemed to be about the settlement of borders and territories, through these settlements, legal principles and practices were gaining importance. International law and legality became the ultimate winner of the Congress.[42] The Vienna Congress served to a practical purpose. It allowed and "legitimized" the colonial expansion of the Great Powers. As Martti Koskenniemi suggests in reference to Pasquale Fiore, it was a tool of legitimization for the colonialists:

> In Fiore's 1890s treatise, many aspects of the professional ethic of a new international law were brought together: it responded to the needs of European economic and imperial expansion while remaining sensitive to the problems that accompanied it. It embraced a commercial spirit and had no doubt about the peaceful and enlightened quality of (European) public opinion. As legal theory, it was neither naturalist nor positivist but sought a pragmatic reconciliation of history with reason: development was "progress," associated with the spread of liberal political institutions, protection of individual rights, freedom of trade, interdependence and the civilizing mission.[43]

Progress was achieved by these civilized "great" states. Therefore, if any other political actor wanted to be regarded as their equal, it had to achieve that progress as

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[41] Howland and White, *The State of* Sovereignty, 264.
[42] Simpson, *Great Powers and Outlaw States*, 104–5.
[43] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960,* Hersch Lauterpacht memorial lectures (New York: Cambridge University Press, 2001), 57.

well. This was a simple equation. One can argue that there was nothing wrong with this since all these ideas were indeed making the non-Europeans more "civilized". Simpson supports this argument by stating that the new order Vienna created was functioning "through a combination of political will, legal usurpation and subsequent democratic ratification."[44] All these processes were presented with a complex legality. With the Congress of Vienna, the nineteenth century global order was shaped by a certain group of states which established their hegemony over the rest of the world and their objective was obvious. They wanted to spread the light of "civilization" to the other parts of the world. The dominance of the Great Powers was also based on the acceptance that the Europeans were culturally superior. It did not matter whether non-European states had sophisticated legal and political institutions. The treatment the Ottoman Empire and Egypt, Japan, and the Qing Empire received were important indicators that prove this claim.[45] The details of the treatment of the Ottoman Empire and Japan will be discussed at the end of this chapter briefly, and in the following chapters in detail, and will also be compared to the Qing experience. However, the point here is that the nineteenth century world order was shaped by political, legal, and economic developments that took place in Europe from seventeenth to early nineteenth century. Therefore, the concept of "sovereign equality" was giving its way to a new one in the nineteenth century: legalized hegemony. Simpson defines legalized hegemony with the following words:

> Legalized hegemony, then, is the term I use to describe the following phenomenon: *the existence within an international society of a powerful elite of states whose superior status is recognized by minor powers as a political fact giving rise to the existence of certain constitutional privileges, rights and duties and whose relations with each other are defined by adherence to a rough principle of sovereign equality.*[46]

[44] Simpson, *Great Powers and Outlaw States*, 106.
[45] Simpson, *Great Powers and Outlaw States*, 75.
[46] Simpson, *Great Powers and Outlaw States*, 68.

Simpson's definition will be taken as a reference in this work since by this definition it can be argued that legalized hegemony characterized the nineteenth century and is a helpful concept which explains the position of the Great Powers in the century. Thanks to the establishment of the Concert of Europe, the hegemony of the Great Powers acquired a legal character. As this legal status was approved within this new world order by other parties, the hegemony of the Great Powers, which Simpson defines as "legislative inequality" was in a sense legal.[47] This inequality was helping the Great Powers to establish their influence in the other parts of the world more easily.

Therefore, international law born as a result of the encounter between the colonizer and the colonized and went through a series of transformations in the historical experiences of Europe and finally again becoming a useful tool in the nineteenth century for the colonizer to assert its power in the other parts of the world. As Anghie puts it, the concept of sovereignty was already defined within the European concert and therefore excluded the non-European entities from this definition. This clearly was a colonial project. Diagnosing the problem of the non-European world as lack of sovereignty, Great Powers could provide the cure as sovereigns through the introduction and imposition of international law over the non-European world.[48]

This encounter between the "sovereign" European powers and the "primitive" entities in the other parts of the world was described by the European scholars by placing them on a scale of civilization. This does not mean that they did not have "civilization". But the rank of that with respect to the European civilization characterized the encounter of the European Great Powers with the rest of the world.

[47] Simpson, *Great Powers and Outlaw States*, 73.
[48] Anghie, *Imperialism, sovereignty, and the making of international law*, 64.

Moreover, as Orakhelashvili puts it, this encounter which undoubtedly legal in its nature started a process where that "inferior" civilization would eventually be uplifted to a higher degree. This would be their way to become a part of this civilized world.[49] In the next section, the position, and the status of the European civilization in the nineteenth century world order there will also be a language developed, a standard for the admittance of the non-European states into this Family of Nations will be discussed in detail.

2.3 Why Europe is at the center?

In the previous sections of this chapter, it was mentioned that the development of international law had to do with the European expansion in the Americas, Asia, and Africa. Then the phase where it(or its interpretation) went through important transformations as a result of the developments taking place in Europe was discussed. Consequently, in the nineteenth century an assumption was already established in people's minds: international law, in fact any legal institution that one can think of in the nineteenth century, was the product of the progress of Great Powers and therefore only they could properly apply those rules. Therefore, those who have not achieved this progress should not be considered as "civilized" and as "legal" as these European powers. However, the timing is critical. In the nineteenth century, these powers were expanding their commercial activities and had to have access to important ports and markets. In order to legitimize the unequal relationship that they wanted to establish in these places, international law was a "useful" device.

[49] Alexander Orakhelashvili, *Research Handbook on the Theory and History of International Law,* Research handbooks in international law (Cheltenham England: Edward Elgar Pub, 2011), http://site.ebrary.com/lib/alltitles/docDetail.action?docID=10490672, 131.

It was both bringing "civilization" to the non-European people and also opening up their ports and markets to the Great Powers:

> The ideology of 'European international law' emerged and became dominant in the nineteenth century to provide the ideological legitimacy to the agenda of colonization. This ideology chose not to focus on international legal relations that have over the centuries been conducted between European and non-European States on the basis of the international legal system that all of them shared, and instead propagated the cultural and racial superiority of Europeans over non- Europeans that ideologically justified the colonization and annexation of the latter by the former.[50]

This unequal relationship between the Europeans and the non-Europeans was going to create a doctrine which would divide the development of humanity into stages that placed the European civilization at the top. The normative equality mentioned above thus challenged by the need to justify the colonial expansion. Therefore, the idea of equality was taking a hit from the very parties that advocated and put it forth since Westphalia. As Simpson also supports, the "more equal" states were establishing their dominance in the nineteenth century global order.[51] This did not, however, mean that this hierarchy was established in an unjustifiable manner. The Great Powers were establishing their dominance in a systematic way. This system later, as Simpson states, would even admit the "second-class states" such as Japan into its inner circle, however that would also mean that the Great Powers' superiority is legally accepted and approved by these "late comers". This, which one might consider as a self-defeating exercise on the part of the non-Europeans, was an interpretation and application of the international law that was suitable for the nineteenth century ambitions of the Great or the Colonial Powers. The idea of sovereignty, as a part of this order, would help to define the outer circles in a "neutral" language. Anghie offers his readers a change of perspective and focuses on

[50] Orakhelashvili, *Research Handbook on the Theory and History of International Law*, 19.
[51] Simpson, *Great Powers and Outlaw States*, 233.

the legal result of this practice and invites them to see sovereignty as one of the mechanisms through which the non-European states were marked as incomplete/insufficient and therefore gave the Great Powers once again the honor to bestow and uplift the rest of the world.[52]

Through treaties, as the legally binding affirmation of the fact that these non-European societies are not fully sovereign, European superiority was once again spelled out within the system of international law. What Anghie criticizes about the scholarship is that the idea of sovereignty and international law was developed and "brought" to the non-European world is actually preventing to see the practical side of these doctrines. The idea of sovereignty was becoming a reference point where the Great Powers had the right to assert their rule over the others since they lack sovereignty and civilization. The historical trajectory of Europe rewarded European civilization with the gift of sovereignty. Nineteenth-century world order was turning into a game which those fell outside of the European civilization were left behind. The development of the argument of civilization will be discussed in the following pages, but for now it can be said that it is one of the most important components of this idea of European superiority. Orakhelashvili believes that this idea of superiority also structurally protected the European hegemony and, more importantly legalized it within the framework of international law. This superiority of European civilization also gives the Great powers the responsibility to spread their "light" to the rest of the world.[53] As this "responsibility" became more apparent with the expansion of the Great Powers and their increasing commercial activities, the more it became necessary to strengthen the claim that this was a "win-win" process for both sides.

[52] Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," *Third World Quarterly* 27, no. 5 (2006): 741, http://www.jstor.org/stable/4017775.
[53] Orakhelashvili, *Research Handbook on the Theory and History of International Law*, 133.

Therefore, the colonialist arguments were centering around how the world of the native societies have changed. This was regardless of the history and the civilization of that society. For them, the pinnacle of civilization was Europe, and any other civilization and legal order would be inferior against it. Paul Keal argues that the nature of those values "brought" by the Great Powers also mattered:

> International law reflects the normative order of the European states that made it and, by expecting non-Europeans to conform to it, it was a form of cultural imperialism. But this is not to say that some values inherent in this imperialism are not worth defending as universal values. In the end it has to be asked whether or not there are some core values that deserve to be universalized; regardless of whether they are culturally specific to Europe and the international society it created or to some other civilization.[54]

However, this again might lead us to ignore whether within that society a much morally higher value existed. This is beyond any "cultural exchange." This, as the author paradoxically states, falls within the boundaries of cultural imperialism. The civic values that are "inherent in this imperialism" that could be universalized were the most useful tool for the Great Powers to establish their "legalized hegemony". The idea of bringing or uplifting the civilization of certain societies was no different from what Keal has suggested. This idea of civilization had also gone through historical processes and was adjusted to the necessities of the colonial expansion in the interest of the commercial activities of the Great Powers in the nineteenth century world order. This was also uniting the Great Powers around a similar cause: with international law they now had an important and systematic institution through which they could protect their colonial interests. As Orakhelashvili also claims, international law established a secure place as "one of the principal tools whereby

[54] Paul Keal, "'Just Backward Children': International Law and the Conquest of Non-European Peoples," *Australian Journal of International Affairs* 49, no. 2 (1995): 192, doi:10.1080/10357719508445156.

states could secure their political interest and define the acceptable limits on that political interest in a mutually shared and acknowledged manner."[55]

One of the most important tools the Great Powers had integrated was the idea that the European civilization has acquired the necessary understandings through time to create a legal conscience which did not exist in the other political entities around the world. They had some sort of legal institutions; they had a certain degree of civilization, but they were not as developed as the European civilization and its understanding of legal practices.[56]

2.3.1 From Christianity to "civilization"

This leads the discussion to the concept of civilization in the European legal arguments behind international law. Of course, the use of any "civilization" as a discourse to establish hegemony over its "other" was something characteristic about the nineteenth-century international legal order. As Prasenjit Duara suggests, "civilization" was of course a reference point to create an identity and to point out the virtues of the self while emphasizing the shortcomings of the other, until nineteenth century it had not been used as a tool to conquer and change its other.[57] All in all, the specific historical context of Europe was presented as the cause of this high degree of civilization.[58]

Therefore, the term civilization was picked later by the Great Powers to conform into the conditions of the nineteenth century global order. It had to be stripped off from its religious character, therefore its Christian origins were known but was not

[55] Orakhelashvili, *Research Handbook on the Theory and History of International Law*, 455.
[56] Anghie, *Imperialism, sovereignty, and the making of international law*, 78.
[57] Prasenjit Duara, "The Discourse of Civilization and Decolonization," *Journal of World History* 15, no. 1 (2004): 3, http://www.jstor.org/stable/20079258.
[58] Simpson, *Great Powers and Outlaw States*, 237.

spelled out as often as before since it had to look universal. “The division of the world into civilized and uncivilized states was prefigured by Christian principles distinguishing heathen and godly cultures.” [59] The terminology was later secularized, and the criteria to measure the competence of any society became ‘civilization’.

What was different in the nineteenth century encounter between the Europeans and the non-Europeans than the sixteenth and seventeenth century encounter was that it had gone through some changes and it had gained a systematic characteristic what Simpson calls as “legalized hegemony.” There was the need to universalize the European norms and institutions and the way to do that was to create the discourse of civilization without the religious connotations.[60]

International law was the product of the European colonial expansion. Moreover, it legitimized “the imposition of European ideas of political society and community on others.”[61] However, from an alternative standpoint, it can be argued that it also served as an important tool for the local elites to implement their reforms.[62] This process, I prefer to call, overall, is institutional modernization. Any history of a society that is not among those Great Powers had to go through this process in one way or another. This process is institutional because of the place the legal and political institutions of Europe occupied in this process. The purpose here is not to dismiss the consequences and label them as negative. However, historians should not overlook the fact that this was a form of systematic, legal, and institutional imperialism.

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[59] Simpson, *Great Powers and Outlaw States*, 34.
[60] “In the early nineteenth century, European self-perception of superiority exhibited an openness and universalism that it did not have after the rise of Social Darwinism and racism at the end of the century.” Cemil Aydin, *The Politics of Anti-Westernism in Asia: Visions of World Order in Pan-Islamic and Pan-Asian Thought / Cemil Aydin,* Columbia studies in international and global history (New York, Chichester: Columbia University Press, 2007), 18.
[61] Keal, “'Just backward children',” 194.
[62] To see this in through the example of Egypt please refer to Timothy Mitchell, *Colonising Egypt*, Repr (Berkeley, Calif.: Univ. of California Press, 2003).

As European civilization, its political structures, laws, and institutions spread across the world there would eventually be certain states that would successfully transform themselves and would be worthy of getting admitted into the "family of nations". There needed to be certain criteria to decide who could be admitted into this "family of nations." As a result, there needed to be a standardization of the norms. The scholars of Europe were mostly concerned about this standardization in dealing with the encounters with the non-European societies and states. Therefore "standard of civilization" was presented like a roadmap for the "late comers" so that they could also be a part of this international order. [63]

Hence, non-European states simply had two options in the nineteenth century global order. One option would be to accept and agree to follow this roadmap presented by the Great Powers, therefore both accept their legal superiority and also accept their cultural "inferiority" and carry out the necessary reforms and become a part of the family of nations. The second option was rejecting these claims and preferring to remain outside of this global order. Although it seems the first option was ostensibly easy, as we will see in the Japanese case, it was a matter of choice and commitment. If one decides to go down the path of reform, they needed to have a serious commitment as this process would contain many values and institutions that would be completely odd for their understanding of the world[64] or dysfunctional for

[63] "The term 'standard of "civilization"' was framed with reference to relations between European states and non-European peoples. Gong explains that '[i]n general, the standard of "civilization" demanded that foreigners receive treatment consistent "with the rule of law as understood in Western countries"'. The late nineteenth and early twentieth century was, according to him, a transitional period between the expansion of the international system and the establishment of a 'civilized' international society. International law incorporating the 'standard of "civilization"' had a crucial role in that process. At the same time as 'international law was by definition expanding to include all "civilized" nations, the countries qualified to come within its scope remained limited in practice'. To enter the international society of 'civilized' states non-European countries had to meet the requirements of the standard. With the perspective of time we can recognize this as a form of cultural imperialism; and in reaction to it there has been a tendency, by those subjected to it and by its critics, to reject the values it represents." Keal, "'Just backward children'," 194.

[64] Selçuk Esenbel provides a striking example to this "incompatibility" through the examples of Japanese and Ottoman everyday lives impacted by this and transformed through time. For the detailed

their political agendas both for structural and social reasons[65]. Because it did not only contain reforms about the foreign relations. These states had to undergo serious reforms that had an important impact on their internal affairs. “For such states” (i.e.. Japan) Anghie argues, the only way to be admitted into the nineteenth-century international order was “only if they met the ‘standard of civilization’ which amounted, essentially, to idealized European standards in both their external and, more significantly, internal relations.”[66] It not only creates an unequal relationship between the European power and their own state but also has the potential to create disturbances that would even cause internal conflicts. This was realized with the Japanese experience. The Tokugawa government had to compromise its sovereignty and also it had to risk its authority in the country too. Not only the Japanese example but also the Ottoman and Egyptian examples support this argument. In particular, the Ottoman experience and partially the Egyptian experience indicates that there existed a third option: negotiation. Since the first two options, either completely agreeing to go down the path of Westernization or rejecting to go down that path and remain outside of the global order, created a dilemma for these entities it characterized the process of “institutional modernization” in these states and led them to find a compromise between these two.

When the decision was made to adopt European political and legal institutions, and therefore become fully sovereign, Anghie suggests, the non-European states were still taking this decision under the conditions created by this cultural and legal

analysis please see: Selçuk Esenbel, *Japon Modernleşmesi ve Osmanlı: Japonya'nın Türk dünyası ve İslam Politikaları* (Istanbul: İletişim, 2012), 243–70.

[65] For social reasons Halil İnalcık’s article on the social reactions to the Tanzimat Reforms provides an important example: Halil İnalcık, “Tanzimat'ın Uygulanması ve Sosyal Tepkileri,” in İnalcık; Seyitdanlıoğlu, *Tanzimat* For the structural problems the Ottoman Empire faced during the implementation of Tanzimat Reforms please see Musa Çadırcı’s article: Musa Çadırcı, “Tanzimat'ın Uygulanması ve Karşılaşılan Güçlükler,” in İnalcık; Seyitdanlıoğlu, *Tanzimat*.

[66] Anghie, *Imperialism, sovereignty, and the making of international law*, 84.

imperialism. They had two choices: either they would prefer to stay out of this international order which would mean that they legally do not exist, and potentially mean bringing the devastation of war upon them or to commit themselves to become a part of this international order which in turn mean that they had only one way to go.[67]

Sovereignty, therefore, is acquired only if the non-European states would comply to the standard of civilization. This required transforming the political and institutional structures, which was a great challenge for these states:

> Both external and internal reform had to be carried out by a state seeking entry into the family of nations. In the external sphere, the state had to be capable of meeting international obligations and maintaining the diplomatic missions and channels necessary to enable and preserve relations with European states. In the internal sphere, the state was required to reform radically its legal and political systems to the extent that they reflected European standards as a whole. Put another way, this test in effect suggested that the project of meeting the standard of civilization consisted of generalizing the standards embodied in the capitulation system, which was specific to aliens, to the entire country. In the domestic sphere, then, the non-European state was required to guarantee basic rights - relating to dignity, property, freedom of travel, commerce and religion, and it had to possess a court system which comprised codes, published laws and legal guarantees. All these rules compelling domestic reform essentially required profound transformations of non-European societies in ways that negated the principle of territorial sovereignty.[68]

Therefore, it might be said that the internal dynamics were quite determining in this process of meeting the "standards of civilization". Moreover, the "unequal treaties" the author mentions as capitulation system put enormous pressure on these states and was a major threat to their authority internally. The next section will lay the ground for these specific examples as we will try to understand the development of "unequal treaties" within the nineteenth century global order. In the last section of this chapter, the examples of Japan and the Ottoman Empire and Egypt will be discussed briefly.

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[67] Anghie, *Imperialism, sovereignty, and the making of international law*, 86–87.
[68] Anghie, *Imperialism, sovereignty, and the making of international law*, 86.

2.4 How did the nineteenth-century global order operate?

2.4.1 The role of commerce and international law

The nineteenth century global order was characterized by the growing commercial activities.[69] The Great Powers were increasing their overseas activities and therefore the encounter between their subjects and the local people of Asia and Africa was also increasing. This was not always a peaceful encounter and there often were legal disputes between the European individuals and the local people. The status of the people living in the ports and the commercial towns also raised, among the colonial powers, the questions of securing their colonial interests. In such an environment, the development of the international law had gone through some important changes:

> Doctrines were developed to give trading companies some measure of legal personality by characterizing them as extensions of the Crown by virtue of royal charter. Trading companies were thus capable of asserting sovereign rights over non-European peoples who were deprived of any sort of sovereignty by this same law. Company charters allowed them not merely to trade in particular areas, but to make peace and war with natives, and the power to coin money. The control of territories by companies established for the explicit purpose of making money meant, inevitably, that the territories were administered simply for profit.[70]

In fact, this was like a chess game strategy. The international law was creating a secured legal zone where the European subjects could be considered as if they were

[69] Kasaba argues that the British Imperialist agenda was not necessarily meant a destruction of already existing institutions wherever it established its dominance. Kasaba, "Treaties and Friendships: British Imperialism, the Ottoman Empire, and China in the Nineteenth Century," 216 It can be argued that the international law and the concept of civilization went hand in hand with the global liberal economic vision as can be seen in the case of British Imperialism. Of course, this is only one side of the coin and it is not possible to ignore the gunboat diplomacy, the unequal treaties and use of excessive force by Britain in nineteenth century(such as Opium Wars). Osterhammel and Camiller provide another perspective on the relationship between the "civilizing mission" and "global trade" in the nineteenth century. They argue that while it was inclusive it was also imperialistic. Most importantly it it served as an important means to satisfy the growing need for new markets. Jürgen Osterhammel and Patrick Camiller, *The Transformation of the World: A Global History of the Nineteenth Century,* America in the world (Princeton: Princeton University Press, 2014), 827–28.

[70] Anghie, *Imperialism, sovereignty, and the making of international law*, 68.

in their homeland. Most importantly, an important question was that how come these people could obtain such legal privileges.

The legalized hegemony of the European powers was expanding into the non-European territories through treaties that would secure the economic and legal rights of the European subjects against the local authorities and institutions.[71] This perception has transformed the relationship between the Great Powers and non-European states. The diplomatic relations, once legally did not contain this sense of superiority, now started to acquire an unequal characteristic. Although states such as China and the Ottoman Empire had complex institutions, legal structures, and rich histories, they were not considered as the same as Europe and therefore they were not as civilized as the Great Powers of Europe. They lacked sovereignty since they did not have the "civilized" legal and political institutions of Europe. They concluded unequal treaties with the Great Powers and granted extraterritorial rights to their subjects. This was, in legal terms, an acceptance of these states such as Japan, the Ottoman Empire and China that Europe was more superior. Moreover, it would also strengthen the legal position of the Great Powers as the hegemons. In the coming years, the non-European states had to follow the path of civilization and transform their institutions so that they could at least demand to be regarded as equals with the West.

This process, as many cases suggest, would start with treaties which would grant unusual commercial and legal privileges to the European Powers. The safeguarding of the rights and interests of the European states functioned through these "unequal treaties"[72] These commercial and legal privileges granted to the European subjects

[71] Anghie, *Imperialism, sovereignty, and the making of international law*, 30.
[72] Of course, the term unequal treaties is a concept that is applied in hindsight. In the case of the Ottoman Empire, the treaties of "unequal nature" are referred in the literature as "capitulatory treaties". The treaties had their own names such as the "unequal treaty" between Japan and United

had given them the right to be judged, in the case of a legal dispute, as if they were in their own countries. This, as one can imagine, caused serious damage to the authority of the governments of those states internally. Externally, they have already lost their sovereignty with the unequal treaties. [73]

The defense of the legal scholars of the nineteenth century was that the level of civilization was not enough to safeguard the fundamental rights of the European subjects. Therefore, in case of a legal dispute the local authorities must hand the European subjects to the European consuls so that their fundamental rights would not be infringed by the local judicial system, since, for instance, the use of torture was considered normal in the Tokugawa traditional law and was an important problem to be solved in the Ottoman legal and judicial practice.[74] This issue will be discussed in a more detailed manner in the following chapters. The discourse of civilization was the basis of the extraterritorial privileges granted to the European states on the discursive level since through this discourse the arguments on the nature of local

States(The Treaty of Amity and Commerce) or the entire series of unequal treaties Japan had signed were referred as "Ansei Treaties" named after the political era. However, since these treaties were granting one side extraterritorial and commercial privileges they are referred by the historians as "unequal treaties".

[73] "Many nineteenth- century authorities on international law agreed that the rights, privileges, and powers of consuls in the nineteenth century—and specifically the powers of consular jurisdiction—were based primarily upon international and bilateral treaties. If Grotius, for example, argued in the seventeenth century that natural law (from which he derived the law of nations) included a sovereign's right to legation as well as the inviolability of a sovereign's ambassador (and his entourage and property), such rights regarding ambassadors were still acknowledged as principles of the law of nations in the nineteenth century. But a consul is not an ambassador. His primary purpose as a commercial agent was to facilitate international trade and to protect and police his nation's community of merchants in foreign places, and he derived his powers solely from treaties that granted him privileges under conditions of extraterritoriality."
Howland and White, *The State of Sovereignty*, 41.

[74] For the Japanese torture methods please see Esenbel's work on 1871 Nakano Uprising: Selçuk Esenbel, *Even the Gods Rebel: The Peasants of Takaino and the 1871 Nakano Uprising in Japan,* Monograph and occasional paper series / Association for Asian Studies 57 (Ann Arbor, Mich.: Assoc. for Asian Studies, 1998), 239 ; For the methods of torture used in the Ottoman Empire please see: Gültekin Yıldız, *Mapusâne: Osmanlı Hapishanelerinin Kuruluş Serüveni, 1839-1908*, 1. baskı (İstanbul: Kitabevi, 2012), 51–53; Torture was finally made illegal in the Ottoman Empire in the year 1844. Yıldız, *Mapusâne*, 75.

political and legal institutions could be made justifiable and hence the hegemony of the Great Powers in the nineteenth century "legal".

2.4.2 Inventing the degrees of civilization: "the semi-civilized" and "the savage"

According to the nineteenth century European opinion, not all societies had the same degree of civilization. A language was developed to categorize different societies according to the degree of their civilization. These, in fact, resembled a pyramid of civilization. The tip of this pyramid was indeed the European civilization, and on the bottom were the "primitive" barbaric societies. In between these two were the semi-civilized states which would rise into the ranks of the civilized nations of the world by going through necessary reforms and resembling their institutions to those of the "civilized" European states.[75] Of course, not all the non-European societies were regarded as the same. There were societies that were primitive, and in a way hopeless. There were some societies that had civilization, but they were not a part of the European civilization. This idea of stages of civilization has become so widespread that it even led the non-European intellectuals to build theories of civilizations upon this diagram.[76] A great example to this would be Fukuzawa Yukichi(1835-1901), the Japanese intellectual, who advocated the three stages of development and placed Japan among the semi-civilized states:

> When we are talking about civilization in the world today, the nations of Europe and the United States of America are the most highly civilized, while the Asian countries, such as Turkey, China, and Japan, may be called semi developed countries, and Africa and Australia are to be counted as still primitive lands.[77]

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[75] Orakhelashvili, *Research Handbook on the Theory and History of International Law*, 131–32.
[76] Among the prominent theorists were Anthropologists such as Lewis Henry Morgan and Edward B. Taylor. Lewis Henry Morgan, *Ancient Society,* Classics of anthropology (Tucson: University of Arizona Press, 1985) ; Edward Burnett Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art and Custom* 2 (J. Murray, 1871).
[77] Wm Theodore de Bary, Arthur Tiedemann and Carol Gluck, *Sources of Japanese Tradition: 1600 to 2000* (Columbia University Press, 2005), 1748

As the word “civilization” came to be known as the synonym of European civilization, the non-European civilizations such as Japan, the Ottoman Empire and China were left out of the civilized world. The complex institutions they had, the law that had been functioning for hundreds of years and developing through time did not mean that they could be defined as a “civilized” society. The only standard was that of the European civilization and the decision to include a society into the international order was up to the decision of the Great Powers.[78] What actually mattered for the Great Powers was not a functioning government or a developed functioning legal system. States such as China, Japan, and the Ottoman Empire were not colonies but sovereign, functioning states. They were just not a part of the European civilization.[79] Therefore, if they wanted to be admitted into the family of nations, they had to reform their political, legal, and civil institutions and Europeanize them. When the Great Powers were “convinced”, then they could be admitted into the international order. However, as in the cases of Japan and the Ottoman Empire, they will require them to go through necessary stages. Some would become successful, while some would fail to convince the Great Powers.

This juridical exclusion was creating a family of nations within the realm of international law united in their “civilized” character. In the nineteenth century world order, there was no longer any room for the other legal and political systems. This, in theory, was one of the most important conditions of sovereignty. The positivist

[78] “The development of international law in the late nineteenth century was such that it defined and restricted community to the society of 'civilized' states. It encapsulated what was right or good action for these states in their mutual relations. It excluded what was right or good action in relation to 'uncivilized' peoples and left the determination of this to the conscience of individual European states. By restricting community to the society of 'civilized' states international law mirrored the conception of non-European peoples as being 'just backward children' that did not need to be considered in the same way as Europeans. International law thus simultaneously defined the boundaries of a moral community and excluded moral argument concerning entities that may lay outside of it.” Keal, “'Just backward children',” 204.

[79] Simpson, *Great Powers and Outlaw States*, 238.

understanding of international law was now rejecting any other legal institution in the nineteenth century global order:

> The naturalist international law which had applied in the sixteenth and seventeenth centuries asserted that a universal international law deriving from human reason applied to all peoples, whether European or non-European. By contrast, positivist international law distinguished between civilized states and noncivilized states and asserted further that international law applied only to the sovereign states which comprised the civilized "family of nations".[80]

Thus, one of the indicators of high civilization was the absence of plural legal order. Chinese[81], Japanese[82] and the Ottoman legal orders were also failing this criterion as legal pluralism was one way or another a part of their institutions. Therefore, the European subjects were expected to be tried not by the local judges but by in their own consuls. However, for this to function properly, they still needed the help of the local jurisdiction.[83] Therefore, this led them to realize, which was also true, that for them to be admitted and acquire full sovereignty over their territories they needed to transform their legal and political institutions and had to go through necessary stages so that they become "civilized". However, there was a great paradox in this process:

> These standards pre-supposed and legitimized colonial intrusion, in that a non-European state was deemed to be civilized if it could provide an individual, a European foreigner, with the same treatment that the individual would expect to receive in Europe. The development of this framework appears to correspond with the changing nature of European penetration of the non-European world and the legal regimes which had been devised to accommodate this. As discussed earlier, the first phase of contact took place through trading companies which confined their activities principally to trade; as they gradually adopted a

[80] Anghie, *Imperialism, sovereignty, and the making of international law*, 35.
[81] "Undoubtedly, Qing China was a legally pluralistic society in the sense that the state was not the only source of law or the sole locus of jurisdiction. Below the level of the district, a number of different social entities, such as common descent groups, native place associations, and guilds, carried out important legal functions, sometimes with the explicit sanction of the state." Cassel, *Grounds of judgment*, 17.
[82] "[…] Although no single body of law governed Japan as a whole, Tokugawa laws exercised a normative influence over the laws in the territorial domains, and the evolution of Tokugawa law culminated in the promulgation of the "Written Decisions for Lawsuits" (*Kujikata osadamegaki*) in 1742. Attempts were made to further codify the laws along Chinese lines, but none of these efforts materialized during the Bakufu itself. Consequently, at its peak the Tokugawa legal order was highly pluralistic, characterized by a multitude of jurisdictions that sometimes overlapped or competed." Cassel, *Grounds of judgment*, 30–31.
[83] Simpson, *Great Powers and Outlaw States*, 242.

> more intrusive role in the governance of the non-European state in order to further their trading interests, more demands were made on non-European states, which were compelled under threat of military action to make increasing concessions to the interests of the traders. Apart from demonstrating some of the characteristics of an unequal treaty, the Treaty of Nanking (1842) suggests how different European practices and policies were gradually introduced into non-European societies and then expanded. Once it had been established by way of treaty that Europeans had a right to reside and trade in a particular state, it was not altogether surprising that international jurists would use this as a measure of whether a country was civilized or not.[84]

Although Anghie gives the example of the Treaty of Nanjing, the struggle was there for any other state that had to sign unequal treaties with the Great Powers. However, the experiences of these different states had differed from each other. Some of them were able to transform their institutions and were accepted into the family of nations, while some were not able to do so. "Japan, China, the Ottomans and other states were denied full membership either because they were uncivilized or because they were not fully sovereign. These two categories" Simpson argues, "were mutually reinforcing in that the lack of civilization was deemed a reason for derogating from sovereignty."[85] This was a functional way for the Great Powers to protect their colonial interests in these countries. They had easy access to the ports, low or no tariff rates for certain goods, extraterritorial jurisdictional rights for their subjects. With their military might, there was no serious objection but only demands and negotiations to revise these treaties as in the example of the Meiji Japan, which is also at the heart of this work. The nineteenth century has presented different examples and strategies of different states in dealing with this problem. In the last two sections of this chapter, the treaties, the issue of extraterritoriality, the legal and jurisdictional consequences of this regime will be discussed and the examples of

[84] Anghie, *Imperialism, sovereignty, and the making of international law*, 84–85.
[85] Simpson, *Great Powers and Outlaw States*, 85–86.

Japan, and the Ottoman Empire and Egypt will be presented briefly as an introduction to the next chapter. [86]

2.5 Treaties and extraterritoriality

2.5.1 Treaties and their role in nineteenth-century global order

Defining some states with the status of semi-civilized created an opportunity, legally, for the Great Powers to sign "unequal treaties" with them as discussed above. Although the history of the extraterritorial agreements goes beyond the nineteenth century, it started to become a tool of colonial ambitions in this time. Thanks to these treaties the European subjects were protected from the "uncivilized" jurisdiction in that country.[87] This, of course, caused many problems for the non-European states with regard to their internal affairs. Their subjects were no longer equally treated with foreigners.[88] Moreover, any dispute between a local person and a foreign subject would create more problems as there are many cases in which local side of a dispute would be treated more severely than the European subjects. From the European perspective, this inequality was legitimized through the ambiguous character of the non-European jurisdiction. "So, this inequality of jurisdictional power was based on an individual equality. In order for Western citizens to be treated equally, they must come under the protection of Western law."[89] This created a question, since they were signing treaties with the Great Powers did this mean that

[86] Simpson, *Great Powers and Outlaw States*, 85-86.
[87] Simpson, *Great Powers and Outlaw States*, 241–42.
[88] Not only European subjects but also Ottoman subjects travelling to another non-European country such as China would demand to be under the protection of the French consulate.Extreterritoriality existed but it acquired a nuanced character in the nineteenth century global order. Please see, Selda Altan, "Yirminci Yüzyıl Başında Çin'de Fransız Sömürgeciliği, Yunnan Müslümanları ve Osmanlılar," *Toplumsal Tarih* 323 (2020).
[89] Simpson, *Great Powers and Outlaw States*, 242.

they became a part of the international law? The answer was coming from the positivist scholars:

> Westlake and other positivists attempted to resolve the problem of whether or not the native states were part of international law by arguing that such states, although not proper, sovereign members of international society, were nevertheless partial members: hence, Westlake proposed that 'Our international society exercises the right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it'. The non-European states thus existed in a sort of twilight world; lacking personality, they were nevertheless capable of entering into certain treaties and were to that extent members of international law.[90]

However, in order to become a full member, they needed to follow the path to civilization, just as the European powers did through the course of history. This, however, was once again creating another problem for the non-European entities. While they were on the path of civilization, reforming and adopting Western political and legal institutions, they were admitting that the Western institutions are more superior and as a result they are leaving their former institutions behind. This was the "checkmate" moment for the Great Powers. "The resulting 'unequal treaties' - unequal not only because they were the product of unequal power, but because they embodied unequal obligations - were humiliating to the non-European states, which sought to terminate such treaties at the earliest opportunity."[91] In order to get rid of this humiliation, the non-European states were making series of reforms. This was also creating internal upheavals and in some cases resulted in the total annihilation of hundreds of years old regimes. This process of reforms was not an easy task; it had different phases and the Great Powers were not easily convinced. The first condition for the Great Powers along this process was granting extraterritorial rights to their

[90] Anghie, *Imperialism, sovereignty, and the making of international law*, 75–76.
[91] Anghie, *Imperialism, sovereignty, and the making of international law*, 72.

subjects so that they can continue to be "protected" under the Western Law. This required the practice of consular jurisdiction in the non-Western territories.[92]

The Great Powers were expanding their commercial activities around the world but even more so in East Asia. The establishment of companies and commercial outreaches in the countries of East Asia soon raised all the questions regarding the protection of their subjects, the "uncivilized" treatment of the local jurisdiction. In order to protect their own interests and as a result of military victories in some cases, and gunboat diplomacy in some others, they were able to sign extraterritorial treaties with the East Asian states:

> The great powers of the West created the regime of extraterritoriality for East Asia in the nineteenth century as a solution to two problems. First, the great powers intended to secure equality and fairness for their own respective citizens when they sojourned in the non- Christian lands of China and Japan. Second, the great powers wanted to secure permanent residence for their diplomats in those countries in order to protect the equality and fair treatment of their citizens abroad. Extraterritoriality underscores the fact that as national citizenship became portable, foreign jurisdictions—and the sovereignty that enforced them—became porous.[93]

In each case, after the first treaty with a Great Power was signed with the "most-favored-nation clause" the privileges given to the next signatory state had to be given to the former. This resulted in a system of cumulative inequality on the part of the non-European entities. It also proved that the Great Powers were, as stated above, protecting each other's interest in the expense of the non-European states. International law had created an unequal global order. This was a context "in which states increasingly realized the role of international law, notably of treaties, as an inherent part of their *Realpolitik* and an essential if not indispensable precondition for their ability to conduct their foreign policies."[94] As the theoretical and historical

[92] Anghie, *Imperialism, sovereignty, and the making of international law*, 85.
[93] Howland and White, *The State of Sovereignty*, 35.
[94] Orakhelashvili, *Research Handbook on the Theory and History of International Law*, 442.

background for the discussion of this work has been set, briefly the Japanese and the Ottoman and Egyptian experiences of extraterritorial treaties will be touched upon. Just note that, the next two chapters will deal with these experiences in detail. The next and also the last section of this chapter is only to provide an outline of these particular experiences.

2.6 Consular courts and mixed tribunals: a global struggle

2.6.1 The Japanese experience

The nineteenth century world order was a departure from the doctrines developed through the Congress of Vienna. The supposed legal equality between states was not regarded as useful and the great powers and legal scholars chose to resort to more pragmatic methods. [95] They would argue that the hegemony of the Great Powers was obviously a legally binding truth. "The reality of international law was that states were unequal and had unequal rights. Sovereign equality was an ideal but one that could never be realized." [96]

The Japanese experience suggests that the "successful" modernization of the Japanese legal and political institutions was stemming from the high motivation of the Meiji political elite as well as their realization of the fact that Simpson has just mentioned above. Therefore, while looking into the Japanese efforts to abolish "unequal treaties" one needs to bear in mind that this realization, the realist, and pragmatist approach Japan has taken. It was a pragmatist approach in the sense that in the end Japan realized that it had to follow the prescription given by the Great Powers, otherwise it might never succeed in abolishing the unequal treaties which

[95] Simpson, *Great Powers and Outlaw States*, 121–22.
[96] Simpson, *Great Powers and Outlaw States*, 121–22.

had become a huge burden on the shoulders of the Tokugawa Bakufu and the Meiji elite did not want to share the same fate with the Ancién regime it toppled:

> Coincident with the second Opium War in China, the United States secured the first similarly unequal treaty with Japan, and the other great powers followed suit. Because of the "most favored nation" clause included in these treaties, any foreign power could claim the same privilege vis-à- vis China or Japan that had been already granted to any other foreign power. It was this generalization of privileges that afforded the fact of extraterritoriality its appearance as a system. Hence we find in the secondary literature such expressions as "the treaty port system" and "the system of extraterritoriality."[97]

This system was becoming a serious threat to the stability of the states as it was hurting the economy of the country, creating upheavals against the government hence decreasing its control over the territories. On the other hand, it was also bringing economic growth, trade surplus, and better functioning institutions and production.[98] Nevertheless, this system excluded, as stated above, states such as Japan not because it lacked civilization but because it was necessary to keep them outside the family of nations for the interests of the Great Powers. Marti Koskenniemi explains this strategy:

> It turned out impossible to define which were such States – and the matter was again left for treatment on a case-by-case basis – with lawyers trying to infer some criterion from the de facto treatment of Turkey, Japan, China, Siam, and Persia. But European behavior never followed a criterion; however, much Japan insisted that by any reasonable measure it was at least as civilized as any European State, the way it was treated was a function of what European diplomacy saw as useful. Of course, international lawyers were not ignorant of

[97] Howland and White, *The State of Sovereignty*, 36.

[98] Treaty port system on the economic development and production in Japan had also a positive side. Silk production was increasing, institutional modernization also had a positive impact on the economic development. Daniel M. Bernhofen and Toshihiro Atsumi, "The Effects of the Unequal Treaties on Normative, Economic and Institutional Changes in 19th Century Japan," *SSRN Electronic Journal*, 2011, 10, doi:10.2139/ssrn.1966051
There are important studies that point out the long term positive impact of the unequal treaty regime on the Japanese economy thanks to the introduction of new institutions, demographic and technological developments please see: Toshihiro Atsumi, "Silk, Regional Rivalry, and the İmpact of the Port Openings in Nineteenth Century Japan," *Journal of the Japanese and International Economies* 24, no. 4 (2010), doi:10.1016/j.jjie.2010.10.001; Erich Pauer, "The Years Economic Historians Lost: Japan, 1850-1890," *Japan Forum* 3, no. 1 (1991), doi:10.1080/09555809108721403.

> the existence of civilization outside Europe. But the concept never worked, and was never intended to work, as an all-or-nothing litmus test.[99]

Although the extraterritorial treaties had given the European subjects the right to be tried by their own consuls, the cases between the European subjects and even the cases between the local subjects and the Europeans created problems both for the local government and also for the Great Powers as there were occasional conflicts and confusions about which consular court the litigants had to go. There were two solutions that they came up for the non-European states. First solution was the "Europeanization" of the institutions and then the Great Powers could be convinced that the consular jurisdiction could be abolished without hurting the fundamental rights of their subjects. The Great powers were not easily convinced but the Japanese experience shows us that the abolishment of extraterritorial treaties was not a utopian dream. The Great Powers prescribed what would be the necessary judicial and institutional reforms that needed to be carried out and following this roadmap Japan was finally admitted into the family of nations at the end of the nineteenth century.[100] Japan was the first non-European state that was able to abolish the unequal treaties.[101] What the reason for this success was, if at all it can be regarded as such, will be one of the main questions in this discussion. This experience and its place within the global history of the struggle of non-European societies against legal imperialism in the nineteenth century and the solutions they came up in this process will be identified.

[99] Koskenniemi, *The Gentle Civilizer of Nations*, 134.
[100] Koskenniemi, *The Gentle Civilizer of Nations*, 133–34.
[101] July 16, 1894 Treaty of Commerce and Navigation Between Great Britain and Japan brought the end of the unequal treaties in Japan.

2.6.2 The Ottoman and the Egyptian experience

The Ottoman Empire's experience of institutional modernization was quite distinctive and unique as well. Unlike Japan, the Ottoman leaders were not easily convinced that they should give up all its judicial, legal, and institutional structures so that they could be regarded as equals with the Great Powers. The political developments it went through were also quite confusing. They would often end up negotiating between two extremes and follow an unharmful and safe way to proceed. For instance, the Ottoman Empire was once admitted into the family of nations.[102] However, even this was showing that they were, in fact, not as civilized as the Europeans. This was also changing the character of the treaties already existing between the Ottomans and the European powers. In fact, the Ottomans with the Treaty of Baltalimanı[103] had already given extraterritorial privileges to a European power with one of the earliest examples of an "unequal treaty" of the nineteenth century. It was signed between the Ottoman Empire and the Britain and similar treaties were followed by the other Great Powers.[104] This became more obvious and this regime which in the literature is referred as "capitulations"[105] has become an important problem to solve for the Ottoman Empire and Egypt. It meant that the Ottomans were no longer considered on the same level as the European Powers:

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[102] "The Sublime Porte (Turkey) is a curious case. On the one hand, Turkey was admitted to the Family of Nations in 1856 under the terms of the Treaty of Paris. However, on the other, it was this treaty that converted the capitulations from unilateral privileges given by the Ottoman rulers to Western citizens into international obligations" Simpson, *Great Powers and Outlaw States*, 243 The admittance of the Ottomans into the European family of nations is a debated issue. Please refer to the following article for the analysis of the Ottoman claim based on the Treaty of Paris: Ünyılmaz, Habip. "Avrupa Uygarlık Eşiğinde Bâbıâli: 1856 Paris Andlaşması Temelinde Uluslararası Hukuk ve Osmanlı İmparatorluğu İlişkisine Avrupalıların Gözüyle bir Bakış." *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 2019, 418–37. doi:10.21492/inuhfd.571998.

[103] August 16, 1838

[104] Şevket Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi: Büyüme, Kurumlar ve Bölüşüm*, Sixth Edition 2910 (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2016), 97

[105] Although extraterritoriality existed in the Ottoman Empire well before the conclusion of these treaties, the author of this work argues that the nineteenth century global order marked its stamp on Ottoman extraterritoriality with these series of treaties signed from 1838 onwards. .

> This relationship of equality was transformed in the nineteenth century and replaced by one in which the Ottomans were excluded from the new European society of states and, increasingly, treated as a second-class social group. One of the starkest manifestations of this was the apparent admission of Turkey into the society of states in 1856 at the Congress of Berlin, an act that implicitly acknowledged its exclusion up to that point and, anyway, conferred no substantive rights on the Ottomans who were still excluded from decision-making in the late nineteenth century as they had been in 1815 from the Congress of Vienna.[106]

Through the course of history, the capitulations became a problem that could not be easily resolved. The Ottomans were dealing with this problem quite differently than the Japanese. They, as Pamuk states, did not want to sign the treaties but had to, and they were aware of what they were getting into.[107] And it was not that they did not want to get out of it, but they handled the process in a manner of negotiation. This was one of the main differences of approach between the Ottoman Empire and the Meiji Japan. "From then on the debilitating effect of the capitulations, the Balkanization of the Empire by the 1878 Congress and the general attenuation of the Ottoman territorial integrity and existential equality meant that Turkey was slowly becoming an unequal sovereign par excellence."[108] Egypt had been a part of the Ottoman Empire until towards the end of the nineteenth century, and it had similar experiences with the Ottoman Empire with the extraterritorial rights given to the European powers consular jurisdiction, in some cases even worse than the Ottoman experience. The Egyptian experience will be discussed in detail in the fourth chapter. The Egyptian example meant different things to the Ottomans and to the Japanese, and in a way reflected the perception and the strategy of these parties in the struggle against the Western institutional Imperialism in the nineteenth century.

[106] Simpson, *Great Powers and Outlaw States*, 244–45.
[107] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 98–99.
[108] Simpson, *Great Powers and Outlaw States*, 244–45.

The political consequences were directing the legal and discursive language of the Great Powers in the nineteenth century. The standards were mentioned, but the definition was vague. Having European institutions became one of the most important criteria for the acceptance of any non-European state into the family of nations:

> Despite their doubts about the possibility or the need to define "civilization," international lawyers were still deeply embedded in the language of the standard. Without such language, it would have been impossible to rationally explain, let alone to justify, why non-European communities could be subjected to massive colonization. Because the European States and their modes of communication were by definition civilized, the whole issue was reduced in practice to the question as to when outside communities would have started to resemble the Europeans to the extent that they could be smoothly integrated into the European system. [109]

Therefore, this process has become a test for the non-Europeans as how much did they want to give away their political tradition, political and legal institutions and rules and regulations. This was also creating more questions in the eyes of the Europeans as Koskenniemi states, the non-Europeans were proving that they are submissive, and they have a civilization that they can give up so easily and quickly. However, the political circumstances as well as their military power were giving them no chance but to accept as the Meiji Japan did, or to negotiate and buy some time as the Tokugawa Bakufu and the Ottoman Empire tried to do. It was very hard and challenging for the non-European entities to convince the Great powers.[110]

Thus far, a picture of the nineteenth-century global order has been painted. How international law has gone through different phases and how the nineteenth century global order was established its legitimacy through it has been the question

[109] Koskenniemi, *The Gentle Civilizer of Nations*, 135–36.
[110] Koskenniemi, *The Gentle Civilizer of Nations*, 135-36d

throughout this chapter. In this century, its character as an important tool of colonial expansion and administration became more apparent.[111]

This work is concentrating on a particular experience, the Japanese Research on the Egyptian Mixed Courts. This case is going to provide a perfect picture of the nineteenth century international order from the perspective of the non-Europeans through the discussion of two different ways of dealing with the problem of extraterritoriality and exclusion from the international order.

[111] A quite detailed picture of the century and the function of international law is provided in Koskenniemi's quote from Enrico Catellani: "Surveying the state of international law at the turn of the century, Enrico Catellani (1856–1945), Professor at the University of Padua and member of the *Institut de droit international* gave a gloomy view of the situation. If there was one tendency, he wrote, that was evident from the first moments of the new century, it was the increasing use of force in the determination of the fate of peoples. The law was moving away from the mid-nineteenth-century ideals of justice and equality. No doubt, there had been many developments in a positive direction: the increase and technical improvement of treaty law and private international law, progress in arbitration and the emergence of functional international cooperation. These developments were, however, overweighed by negative ones. No real international society had come to existence beyond Europe and the fundamental rights of peoples or States were no better protected than a century before. Europeans still acted from a position of superiority towards others: capitulation regimes, consular jurisdiction, and brutal colonial wars had become banal aspects of the international every day. Advancing civilization oppressed and impoverished indigenous populations to the point of extinction – a fact accepted by imperial powers as an inevitable consequence of modernity. Even in Europe, powerful States had set up a permanent reign of control over the continent so that smaller powers enjoyed less autonomy than ever. All in all, Catellani exclaimed, the nineteenth century had closed with imperial domination, methodological enslavement of populations, and war." Koskenniemi, *The Gentle Civilizer of Nations*, 98.

CHAPTER 3

JAPAN'S "ENCOUNTER" WITH THE NINETEENTH CENTURY GLOBAL ORDER

3.1. The decisive event: the arrival of Commodore Perry

Japan had been resisting the pressures to open up the country to the Great Powers ever since the turn of the nineteenth century. The Tokugawa Bakufu realized that the demands from the Western Powers to open their ports for trade were only increasing. Russia, Britain, Netherlands, and the United States were among these Western Powers. However, especially the United States was more concerned because of the treatment its shipwrecked whalers received from the Japanese authorities. [112] While the Great Powers were expanding their commercial activities throughout the world, it became obvious that eventually Japan had to open its ports to the outside world. As stated in the second chapter, there were only two options for Japan: either to reject the demands, which might bring the devastation of war upon the country or to agree to be a part of nineteenth-century global order. When the moment of truth came for the Tokugawa Bakufu, they were not sure which way they were supposed to go. However, the decision-making process was not only affected by the internal dynamics of Japan but also by the current events. The most important and devastating news was coming from the "middle kingdom" and this news from the continent caused worries in Edo. As the Qing Empire was being defeated and humiliated by Britain and the Japanese authorities evaluated this "catastrophic" news

[112] Mikiso Hane and Louis G. Perez, *Modern Japan: A Historical Survey*, 5th ed. (Boulder CO: Westview Press, 2013), 63–64.

as an important warning. [113] The Opium War and its consequences were going to be an important lesson for the Japanese authorities.

3.1.1. Gunboat diplomacy against the Tokugawa shogun and the anti-foreign wave

In 1853, the inevitable was happening: Commodore Perry was given the task to deliver the letter from the US President to the Japanese Emperor and demand to open up ports for the provisioning of the US ships. [114] Indeed, he criticized the Tokugawa Bakufu's *sakoku* or closed country policy and asserted that Japan had no right to continue this policy and it should be opened up to the outside world by force. [115] After long discussions and negotiations, Commodore Perry finally delivered the letter of President Millard Fillmore (1800-1874) demanding Japan to open its ports up to the United States, Perry assured he will come back again with "more vessels" to receive the answer of the Japanese authorities. [116]

Commodore Perry used "gunboat diplomacy" effectively during his first encounter with the Japanese authorities. The shocking news of the Qing Empire's defeat against Britain and the fear it created was still alive in the minds of the Japanese authorities. Perry's arrival was marking the beginning of an era historians of modern Japan termed *bakumatsu*[117]. The Tokugawa Bakufu, in the actual meaning of the words, had no idea how to respond to Perry's demands. It seemed obvious, however, that if they decide to reject signing a treaty and continue the *sakoku* policy, the consequences would be severe. In the meantime, giving up a policy that has been

[113] Marius B. Jansen, *The Making of Modern Japan* (Cambridge Mass.: Belknap Press of Harvard University Press, 2000), 270.
[114] Hane and Perez, *Modern Japan*, 64–65.
[115] Perry, *Narrative of the Expedition of an American Squadron to the China Seas and Japan*, 76.
[116] Perry, *Narrative of the Expedition of an American Squadron to the China Seas and Japan*, 246–247, 261.
[117] 幕末: Literally means the end of Bakufu

followed for more than two centuries was not a decision to take lightly. Thus, Tokugawa Bakufu wanted to ask the opinions of other actors in Japan about what to do next. "The Bakufu's officials turned for advice to the imperial court and all the *daimyō*, including the *tozama* (outside) lords, as well as to the shōgun's liege vassals."[118] This was an act that jeopardized Bakufu's authority in the eyes of the daimyo and the Imperial Court.[119] Among responses, some advocated, such as the lord of Mori clan, that a war would unite the country spiritually and victory would be inevitable.[120] Perry did come before the spring of the following year, as he promised, with a bigger squadron. Although agreed to open up the country, the Bakufu was reluctant to give away any right the American authorities demand. Therefore, the negotiations were long and while Perry tried hard to conclude the most advantageous treaty with Japan, the Japanese authorities were unwilling and resorted to stalling tactics in response to any demand that sounded suspicious.[121] Even though in the end Bakufu decided to listen to many respondents who advised to stall Perry to some extent, in the end, the Treaty of Kanagawa was concluded, and two ports of Japan were opened to the United States' vessels.[122] Japan avoided signing a commercial treaty, but the Americans made sure that they would receive the most-favored-nation(MFN) treatment in case of a conclusion of a commercial treaty with any other Western Power.[123] Thus, Japan's experience and struggle against Western legal

[118] Hane and Perez, *Modern Japan*, 65.
[119] For a more thorough analysis of this decision by the Bakufu officials please see: Jansen, *The Making of Modern Japan*, 280.
120 Hane and Perez, *Modern Japan*, 65.
[121] " Com. Perry: I think it would be better for the two nations that a treaty similar to the one between my country and the Chinese should be made between us. I have prepared the draft of one almost identical with our treaty with China. I have been sent here by my government to make a treaty with yours ships here ; if I do not succeed now, my government will probably send more but I hope we will soon settle matters amicably.
Japanese: We wish for time to have the document translated into the Japanese language." Perry, *Narrative of the Expedition of an American Squadron to the China Seas and Japan*, 383.
[122] Hane and Perez, *Modern Japan*, 65–66.
[123] "Article IX. This is a most important article, as there can be little doubt that, on hearing of the success of this mission, the English, French, and Russians will follow our example; and it may be

imperialism and nineteenth-century legal imperialism started with the Treaty of Kanagawa. "The legal significance of this provision is that the grant of MFN treatment here is unilateral in obligation, unlimited in scope, and unconditional in operation."[124] However, the Tokugawa authorities believed bearing the circumstances in mind, they could be considered rather successful in their negotiation with Perry. "Both sides had reason to be pleased; Perry that he had achieved his minimum objectives, and the Japanese that they had so far managed to avoid the fate that China had encountered in its subjection to the unequal treaty system."[125]

Bakufu had already started facing political, structural, and diplomatic crises after the conclusion of the Treaty of Kanagawa. They were aware that the conclusion of a commercial treaty was inevitable. The Second Opium War between Britain and the Qing Empire was also increasing the fear of defeat in case of a war with the Great Powers. Although consuls were arriving and new treaties with other Western Powers were signed subsequently, no commercial treaty was concluded until 1858. [126] This was not only a chaotic period in the political realm; the Bakufu also faced economic challenges after the conclusions of unequal treaties[127] with the Great Powers. The

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reasonable to suppose that each will gain some additional advantage, until a commercial treaty is accomplished. Article IX will give to Americans, without further consultation, all these advantages." Perry, *Narrative of the Expedition of an American Squadron to the China Seas and Japan*, 387.

[124] Shinya Murase, "The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854-1905," *The American Journal of International Law* 70, no. 2 (1976): p. 276, doi:10.2307/2200073, http://www.jstor.org/stable/2200073.

[125] Jansen, *The Making of Modern Japan*, 278–79

Although the Treaty Kanagawa marked the end of *sakoku* policy of the Bakufu it was definitely not an unequal treaty in its nature. Perry's 1854 treaty resulted in what was primarily a tentative pact between the two countries. Although it was the first formal treaty signed between Japan and a Western power, it was predicated on chance and impermanence: the chance that U.S. ships would have a need for Japanese ports and supplies, and the transitory nature of such contact. In addition, it merely provided for the possibility of appointing "consuls or agents" to reside on Japanese soil (Article 9); nothing in the treaty mandated long-term contact. It did not in itself create permanent trade or diplomatic relations. Auslin, *Negotiating with imperialism*, 18.

[126] Jansen, *The Making of Modern Japan*, 279–86.

[127] Unequal treaties is the historiographical term used for the commercial treaties signed by Asian states in the nineteenth century that gave extraterritorial judicial rights and tariff autonomy to the

inflation started to rise due to increasing demand and limited production.[128] The low-ranking samurai from the outer domains, *tozama*[129], were rising against the Bakufu. They were blaming the Bakufu officials for betraying the emperor for signing unequal treaties with the "barbarians" without getting the approval of the emperor, and they were advocating that the emperor should become the only political authority in the country. Their slogan was *Sonnō jōi*, which meant revere the emperor, expel the barbarians. They were staging attacks against foreigners residing in Japan and they were attacking Western vessels. They practically ended the Bakufu authority in the outer domains and pawed the way to the start of the Meiji Restoration. They were discontented because the Bakufu authorities opened the country to the barbarians and placed it under harsh conditions. The support to the anti-Bakufu forces grew and the Imperial Court in Kyoto overtly supported the revolutionaries.[130] The more detailed discussion about the Meiji Restoration in the next section as the connection between Sonnō jōi movement and the process leading up to the Meiji Restoration with the analysis of the unequal treaties will be established.

Western Powers. These treaties often included "the most favored nation" clause which would give the right to the Western Powers to have the same privileges the non-European country has given to the other Western Powers. Howland and White, *The State of Sovereignty*, 36.

[128] Hane and Perez, *Modern Japan*, 67.

[129] Tokugawa Japan was comprised of allied(Fudai) and defeated (Tozama) domains in addition to the lands under direct Bakufu control. This distinction was based on the camps each domain belonged when the Tokugawa shogunate united the country under its rule in the year 1600. Jansen, *The Making of Modern Japan*, 38.

[130] For a more detailed account of the anti-Bakufu or Sonnō jōi movement please see: Hane and Perez, *Modern Japan*, 69–78.

3.2. The Ansei/unequal treaties and the Meiji Restoration

Although the treaty of Kanagawa was not a commercial treaty, it was marking an important turning point in the history of Japan. It meant the end of the *sakoku* policy, the policy that characterized the foreign relations of Tokugawa Japan and, in fact, an important means for the Bakufu to control the internal power balances. The conclusion of the first commercial treaty with the United States, in turn, initiated a new era in modern Japanese history. It was the start of the extraterritorial regime in Japan. In less than five years, as a "semi-civilized" state, Japan was incorporated into the nineteenth-century international order. This also quickened the collapse of the Bakufu.

Soon after the conclusion of the Harris Treaty with the United States, in July 1858, Japan signed several treaties with the Great Powers of the West which gave, just as the Harris Treaty, extraterritorial rights in Japan.[131] The Bakufu was under pressure both internally and externally. The Shogun's sovereignty had taken a hit already when the extraterritorial treaties concluded with the Western Powers. Also, the outer domains were reacting against Bakufu's decisions to sign treaties and revolting against it. However, the external pressure seemed to the Bakufu as the more urgent problem that required a solution. The Bakufu was even threatened by Townsend Harris(1804-1878) that Britain would approach and force them to sign a treaty in "unequal terms". This was an effective threat as the memories of the First Opium War and the news of the Second Opium War were enough for the Bakufu authorities to lose their sleep.[132] As Michael Auslin also states, on the one hand, there was the threat of war with the Western Powers, and on the other hand, there was the

[131] Auslin, *Negotiating with imperialism*, 11; For the details of the treaty please see: https://www.loc.gov/law/help/us-treaties/bevans/b-jp-ust000009-0362.pdf
[132] Auslin, *Negotiating with imperialism*, 35.

threat of losing authority domestically.[133] Japan had already concluded the first treaty which had conceded consular jurisdiction of foreigners with Russia in 1855, and in three years it concluded a series of other unequal treaties which made Japan a part of the nineteenth-century global order.[134] Auslin rightly points out that the Bakufu was facing a dead-end. The unequal treaties were not only threatening the political authority of Bakufu against the outer daimyos. With low tariff rates and exemptions and with the most-favored-nation clauses the local economy was also seriously damaged.[135] The political turmoil within the country was fueled by the news of the unequal treaties. In the meantime, the anti-Bakufu forces under the leadership of Satsuma and Choshu domains were getting more powerful day by day. In 1867, the anti-Bakufu alliance asked the last shogun to officially resign from his power, which he did by petitioning the emperor. However, the Tokugawa clan was not willing to lose its influence in politics. The anti-Bakufu forces, in return, were not willing to give important positions in the new government to the former Bakufu officials. The Boshin War started between the imperialists and the pro-Bakufu forces and it was finally over when the pro-Bakufu forces surrendered in 1869 in Edo. [136]

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[133] Auslin, *Negotiating with imperialism*, 32.
[134] Cassel, *Grounds of judgment*, 89.
[135] "[…]But the first Treaty of Amity and Commerce with the United States, concluded through the crafty negotiations of Townsend Harris in 1858, indeed dragged Japan into the international arena of conflicting commercial interests. Article 3, the most important article, provided for the opening for trade of five ports, where the rights to lease land and erect buildings were granted. It also gave Americans the right to reside in Yedo (Tokyo) and Osaka and to engage in open private trade without the intervention of Japanese officialdom, with the exception of certain commodities such as munitions of war, rice, and wheat. Article 4 provided for customs duties according to the appended tariff, in respect of which MFN treatment and national treatment (if imported by Japanese vessels) were granted unilaterally to imports by American citizens. The tariff on imports, which was provided in the accompanying Trade Regulation, divided goods into four classes: Class 1, which was free of duty, consisted of gold and silver, furniture, and books not intended for sale. Class 2, consisting of foodstuffs, coal, timber, steam machinery, raw silk, and certain metals, paid five per cent. Class 3, including all intoxicating liquors, paid thirty-five per cent and Class 4, including all other articles, paid twenty per cent." Murase, "The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854-1905," 279–80.
[136] Hane and Perez, *Modern Japan*, 78–80.

When it comes to the reasons and explanations for the success of the Sat-Cho alliance against the Bakufu forces an irony, which will later become a norm, looks striking. Mikiso Hane states that the anti-Bakufu forces were "militarily better prepared because they were financially capable of purchasing modern weapons from the West."[137] The anti-Bakufu forces which were using "expel the barbarians" as their slogan were able to topple the ancién regime of Japan and come into power thanks to the weapons they have purchased from the Western powers. In fact, the Meiji political elite, which was composed of these "revolutionaries" would realize that in order to gain full sovereignty they had to understand, learn, and borrow from the West. The mentality of the political elite during the experience of institutional modernization was remarkably different from the initial attitude of these former samurai towards the Western powers. Even during the course of the revolution[138], they came to realize that simply rejecting the current conditions would not help Japan at all. This change of mentality would reach its peak with the Iwakura Mission and its aftermath. The research on the Egyptian Mixed Courts and the decision-making process after that was also an important factor in the development of this realistic approach. One needs to see this realistic approach in comparison to the experiences of other non-European states in the nineteenth-century global order. Therefore, the next section of this chapter will try to see the Japanese experience of consular jurisdiction both before and after the Meiji Restoration within the larger global historical trajectory. Having analyzed the Japanese experience, the next section will include the analysis of the Qing and the Ottoman experience in perspective.

[137] Hane and Perez, *Modern Japan*, 80.
[138] What was revolutionary about the Meiji Restoration?: It was a radical breaking point in the history of Japan as the country's hundreds of years of internal balance of power, the economic understanding, the political formation and more importantly legal formation had changed during the course of the Meiji Restoration. Although the author of this work is aware of the strength of the word "Revolution" it is necessary to point out the radical changes it brought in the nineteenth century.

3.3. Treaty port system

Historians use the term "treaty port system" for the positions states such as China, Japan, and the Ottoman Empire found themselves in after signing unequal/capitulatory treaties that grant extraterritorial rights to the Western Powers.[139] This system, as briefly discussed in the Japanese example above, entails low tariff rates, extraterritorial judiciary rights, and sometimes monopoly over certain goods. Although the Ottoman history shows us that the origins of extraterritorial rights could go even before the nineteenth century, the treaty port system is particularly linked with the nineteenth-century global order and the legalized hegemony of the Great Powers over the rest of the world, including China, Japan, and the Ottoman Empire. In this section, each of these examples will be discussed and connections between them will be drawn so as to see how this legalized hegemony established itself in these contexts and how it operated.

3.3.1. Consular courts and extraterritoriality in Japan

The initial part of this chapter shed light on how Japan was included in the nineteenth-century global order, first by the United States with the Treaty of Kanagawa and later with unequal treaties signed with the United States and other states. With the treaties signed between Japan and the Great Powers, Japan lost its tariff autonomy, granted the subjects of the treaty powers consular jurisdiction, and allowed them to establish autonomous foreign settlements.[140] Of course, the meaning of the treaties, the role they played, and the similarity of its Japanese version and the other versions is an important detail in order to understand how the treaty port system operated in Japan. As Pär Cassel states, the Bakufu officials believed that

[139] Howland and White, *The State of Sovereignty*, 36.
[140] Howland, *International law and Japanese Sovereignty*, 50.

with the treaties "they had only granted the right to be punished by their own countrymen and nothing else". Moreover, they successfully convinced the subjects of the treaty powers to "obey Japanese laws."[141] Unlike what most of the historical accounts that portray states such as Japan, the Qing Empire, or the Ottoman Empire as passive entities that were defeated and subjugated, before and during the first years of the Meiji era Japan was an active actor. So, Auslin is right when he says that negotiation was the key element in Japan's struggle with this legalized hegemony of the Great Powers.[142] Therefore, throughout this work, the struggle of mainly Japan, but also of the Qing Empire and the Ottoman Empire, and Egypt will be discussed. This will make it possible to see the history of international law in the nineteenth century from a different perspective. Moreover, these relations are not as simple as it is generally seen. Treaty relations pose an interesting problem for those trying to place them in their historical context. "Treaties are not simple instruments unrelated to the world they try to order. They are inherently political in nature and are based in speech, as negotiations."[143] The internal dynamics played an important role and guided and affected the development of the system. In fact, it "was not implanted into East Asia as a ready-made product but developed in a dialogue with local precedents, local understandings of power, and local institutions, which are best understood within the complex triangular relationship between China, Japan, and the West."[144] Thus, the treaty port system in Japan was not also a fixed system. Over time it went through transformations and to repeat again, and more importantly neither Tokugawa Bakufu nor the Meiji government were passive entities in this system.

[141] Cassel, *Grounds of judgment*, 92.
[142] Auslin, *Negotiating with imperialism*, 4.
[143] Auslin, *Negotiating with imperialism*, 6.
[144] Cassel, *Grounds of judgment*, 180.

The nineteenth-century global order was divided into three stages of civilization. China, Japan, and the Ottoman Empire were seen as semi-civilized states. Therefore, from the European perspective, they were seen as "sovereigns", but they were regarded as entities that are not entirely capable of providing basic rights to the European subjects. The unequal treaties were signed with Japan on this basis. Japan certainly had a legal structure, political institutions, and a rich history but it did not have the European law, legal institutions of Europe, or the political institutions. Moreover, it certainly did not have the comprehensive legal structure that the nineteenth century European legal institutions required. Closed itself to the outside world for more than 250 years, now Japan was "opened up" to the outside world, allowed foreigners to reside in its territories, and granted the foreign subjects extraterritorial legal rights. This is the narrative of how Japan entered into the treaty port system. Although this narrative is not false, it can be misleading. Therefore, there is a need to stress that the extraterritoriality or treaty port system in Japan, or in any other country in the nineteenth century, was this simple. It involved complex relations, rules, and regulations that were constantly changing and transforming. This narrative may provide an overview of this process, but it certainly does not tell anything about how this system operated. It involved negotiation, interpretation, and political maneuvering. It involved multiple actors and not certainly always hierarchical. Moreover, Western treatment was not the same in every non-European country. Most importantly, Japan was not meant to be colonized by the Western powers so the Western attitude towards Japan was more "equal". [145] Moreover, treaty relations developed through time and were affecting the internal dynamics and in turn affected by the events taking place in the country. This also changed the nature

[145] Auslin, *Negotiating with imperialism*, 7.

of treaty relations, as the stability of the Tokugawa regime decreased the treaty powers became more eager to solve the problems of dialogue.[146] These circumstances helped the Japanese politicians to develop strategies, and they tried to solve problems by adjusting themselves to new conditions through these strategies.[147] The strategies even varied at different times, as seen with the change of attitude of the Bakufu in the 1850s, and later in the 1860s, not to mention the change of approach of the Japanese authorities with the establishment of the Meiji government. This change of approach was not of course a sudden change, it was a gradual one and it certainly had to do with the capacities and capabilities of the authorities. As Cassel puts it, "the Japanese greeted the advent of the treaty port era first as alarmed spectators and then as reluctant participants."[148] Through dialogue and often bearing the negotiation clause in the unequal treaties in their minds, the authorities wanted to go through this process with the least damage. For some historians, this process was even a learning process for the Japanese authorities. Douglas Howland sees the treaty port system in Japan from a different perspective. He believes that the unequal treaties helped Japan to increase the knowledge of treaty law:

> Accordingly, the unfair treaties that Japan signed between 1858 and 1869 offered Japan the opportunity to develop an expertise in treaty law—especially in order to maintain its territorial integrity and to assert sovereignty over its territory. As the Japanese government successfully argued in the 1870s, Japan may have granted judicial jurisdiction to foreign consuls, but it retained legislative jurisdiction, and foreigners in Japanese territory were bound to obey the laws of Japan.[149]

In fact, in the light of an interesting case, one can actually see the dynamics of the relationship between the treaty powers and Japanese authorities, the attitude of the

[146] Auslin, *Negotiating with imperialism*, 8.
[147] Howland, *International law and Japanese Sovereignty*, 49.
[148] Cassel, *Grounds of judgment*, 85.
[149] Howland, *International law and Japanese Sovereignty*, 23.

Japanese authorities as well as the reflection of the legalized hegemony of the Western powers in the nineteenth century. Although there was room for negotiation, the learning process of how treaty port system and especially extraterritorial jurisdiction operated under international law determined the agenda of the Japanese policy makers' attitude towards the unequal treaties was going to be proven more important:

> In November 1860, a Briton called Michael Moss went on a duck hunting expedition outside Edo. Under Bakufu law, it was a capital crime to discharge firearms within a distance of ten ri(about forth kilometers) from the shogun's castle, and when Moss was on his way back to Yokohama, the governor of Kanagawa sent some officers to apprehend him. As the officers tried to perform their duty, Moss fired his gun and wounded one of them seriously. Moss was finally arrested after a scuffle with the officers and was subsequently extradited to the British consul. Against the objections of two assessors, who were sympathetic to Moss, the British consul declared Moss guilty of 'maliciously wounding' the Bakufu officer and sentenced him to deportation from Japan and a fine of $1,000. On reviewing the verdict, Alcock, the British minister, decided to increase the sentence to three months' imprisonment and also gave instructions that the fine be paid as compensation to the injured Bakufu officer. However, when Moss arrived in the British Crown Colony of Hong Kong to serve his sentence, he was promptly released by the colonial authorities because Alcock had supposedly exceeded his authority by imposing both a fine and a prison sentence. Not only that, the Hong Kong Supreme Court awarded $2,000 as compensation to Moss for his wrongful imprisonment.[150]

This case was indicating how much harm the extraterritorial jurisdiction could bring upon the authority of a sovereign state. Of course, this case does not suggest that the Bakufu was simply accepting the outcome. The punishment Moss got, of course, was not acceptable, but it was better than no punishment. The final outcome of this case was unacceptable not only to Bakufu but also to the British minister Rutherford Alcock(1809–1897). Cassel points out a slight change of approach on the part of the British after the Moss Incident stating that a new set of regulations were passed that

[150] Cassel, *Grounds of judgment*, 92–93; To read a detailed and thorough analysis of this case please see Douglas Howland, "An Englishman's Right to Hunt: Territorial Sovereignty and Extraterritorial Privilege in Japan," *Monde (s)*, no. 1 (2012).

gave the Bakufu the authority to arrest British subjects if they break certain "local laws, including hunting, the discharge of firearms, and riding horses in 'a furious and careless manner'."[151] Although eventually this was never implemented, it illustrated a different picture than the conventional narrative of the nineteenth-century encounter of the Great Powers and the non-European states. It shows that Bakufu did play a role, and it certainly convinced the authorities of Great Powers on certain occasions, as they convinced Alcock, that full implementation of the extraterritorial judiciary would not be possible in Japan. Partly because of the Meiji era and later generation of historians' interpretation of the Bakumatsu period and partly because the regime collapsed in a short amount of time, it is believed that Bakufu's policies towards extraterritoriality were ineffective and the later Meiji policies and attitudes constituted a sharp contrast. This is true to a certain extent. Nevertheless, with a change of perspective, it can also be argued that the Bakufu was trying to improve its position and was not a passive entity. One example of this was the monetary policies the Bakufu followed. The devaluation of the silver coin was intended to improve the position of the Bakufu in the international market, but it had a negative impact on the domestic economy and could not stop hyperinflation.[152] Moreover, Cassel argues that the Bakufu made sure that from the unequal treaties and consular jurisdiction it should not be inferred that the subjects of the treaty powers gained total exemption from the local laws. Additionally, "the early Meiji state continued where the Bakufu had left off and drew clear limits beyond which it did not wish foreign privilege to extend itself."[153] Therefore, it would be safe to say that even though there are major

[151] Cassel, *Grounds of judgment*, 92–93.
[152] Michael Smitka, ed., *Japanese Economic History 1600-1960: The Japanese Economy in the Tokugawa Era, 1600-1868,* Japanese economic history, 1600-1960 6 (New York: Routledge, 2012), 252–62.
[153] Cassel, *Grounds of judgment*, 180.

differences both in terms of their capacity and strategies, there was a certain degree of continuity between the policies followed by Bakufu and the policies followed by the Meiji government with regard to the treaty port system. Bakufu already approached the unequal treaties with doubt. The negotiation clauses in the Ansei treaties were demonstrating that the desire of the Bakufu was not to remain within the treaty port system or at least not in the conditions determined by the treaties of 1858. Article 13 of the Harris Treaty and similar articles in the treaties signed with other parties had given the Bakufu the hopes of negotiating the unequal treaties and hopefully replacing them with an "equal one".[154] Nevertheless, the Bakufu did not live long enough to have a chance to deal with this matter.

During the course of the last days of the Bakufu, the course of history took another turn. The Meiji elite, the Tozama samurai who were attacking foreign envoys with the slogan *Sonnō jōi* realized after coming into power that the abolishment or negotiation of the treaties was not an easy task.[155] In a short amount of time, the Meiji government's most important task would become the revision of the Ansei treaties.

3.3.2. Comparison with the Qing Empire

As stressed above, China, Japan, and the Ottoman Empire were not to be colonized by the Great Powers as they were seen among the "semi-civilized" nations. Therefore, these states were to some extent sovereign. It was just that they were not

[154] Article XIII of the Harris Treaty is as follows: "After the 4th of July, 1872, upon the desire of either the American or Japanese Governments, and one year's notice given by either party, this Treaty, and such portions of the Treaty of Kanagawa as remain unrevoked by this Treaty, together with the regulations of trade hereunto annexed, or those that may be hereafter introduced, shall be subject to revision by Commissioners appointed on both sides for this purpose, who will be empowered to decide on, and insert therein, such amendments as experience shall prove to be desirable." Auslin, *Negotiating with imperialism*, 220–21.
[155] Cassel, *Grounds of judgment*, 93.

equal to the Great Powers in this respect and their local laws and institutions were not applicable to the Western subjects.[156] Of course, aside from the similarities, after taking a detailed look at China's experience of the treaty port system, one can see that it differed from Japan in terms of the strategies followed by the authorities as well as the attitude of the treaty powers. One of the most important differences was that China has signed these extraterritorial treaties and entered into the treaty port system as a result of its defeat in the Opium War. Japan, however, signed the Ansei treaties in a "peaceful" condition. Of course, as stated in the second chapter there was definitely the threat of war and the threat of opium, as discussed above during the negotiations with Townsend Harris, but the Bakufu officials were at least able to negotiate more than their Chinese counterparts. The psychology of defeat and the psychology of threat also affected the decision-making process of both in different ways. The Ansei treaties, as Cassel suggests, were less destructive than the Qing treaties. He claims that, if one puts the internal conflicts aside, the Bakufu officials were even able to put a clause in the Harris treaty that banned opium.[157] As Alexander Orakhelashvili states, China has given many special rights and privileges to the Western Powers throughout the treaty port system. It included low tariffs, mixed courts in Shanghai, territories given to the foreign states, payment of indemnities, privileges given to the missionaries, and independent educational institutions.[158] After reading all of these rights and privileges the Great Powers secured from China, it becomes clear that there are more parallels with the Ottoman "capitulations" than the Japanese "Ansei Treaties". As mentioned above, Japan has given rights and privileges through unequal treaties to the treaty powers, but they

[156] Cassel, *Grounds of judgment*, 15.
[157] Cassel, *Grounds of judgment*, 91.
[158] Orakhelashvili, *Research Handbook on the Theory and History of International Law*, 451–52.

were not as heavy as the ones given by China. The Bakufu officials set certain limits, and they tried to stay within those limits during their negotiation with the Great Powers:

> Local Japanese authorities did reserve their right to take unilateral action, especially when it came to opium. Ever since the war between the Qing and British empires, they had kept a watchful eye on the spread of the drug in Japan. To the Japanese, opium symbolized bot the incursions of imperialism into East Asia and the perceived backwardness of the Chinese, who were unable to shake this habit. Consequently, when the Ansei Treaties were negotiated in the late 1850s the Bakufu was more than happy to accept Western offers to include an explicit ban on opium.[159]

The logic of extraterritorial judiciary rights given to the European subjects was simple. It was to provide an assurance to the European states that they would be under the protection of their own law, not the "semi-civilized" and "ambiguous" local law. The paradoxical side of this matter was that, once a state has signed a treaty of this sort, they were no longer considered a civilized state.[160] So, on the part of China, an empire that had to sign these treaties as a defeated party entered into the treaty port system in the heaviest conditions compared to its counterparts such as Japan and the Ottoman Empire. The signing of the Ansei treaties created the problem of defining the legal status of the Qing subjects in Japan. The Chinese were coming to Japan as interpreters and mediators between the Europeans and the Japanese. As their numbers increased, this legal problem was manifesting itself more often with occasional disputes. This problem was addressed when the Meiji government took over. A treaty was finally signed in 1871.[161] The Qing officials were trying to distinguish this treaty from the unequal treaties they had signed with the West. Moreover, it seemed that the Qing officials were more concerned with their subjects

[159] Cassel, *Grounds of judgment*, 120.
[160] Anghie, *Imperialism, sovereignty, and the making of international law*, 84–85.
[161] Cassel, *Grounds of judgment*, 85–103.

residing in Japan than the Japanese authorities. The following paragraph indicates that the Qing authorities saw the overseas population as a potential threat, as they considered the possibility of acquiring Japanese nationality. This would not only be a threat to the Qing Empire but also to Japan:

> Moreover, both Qing officials and Japanese observers considered the Chinese community in the Japanese treaty ports unruly. Qing officials feared that granting unilateral extraterritorial privileges to Japanese nationals might provide overseas Chinese with an opportunity to use Japanese nationality as a protective shield in China. To allow the existence of a Chinese enclave beyond the reach of Qing rule yet so close to the Chinese mainland could be dangerous.[162]

The Treaty of Tianjin signed between Japan and China in 1871 was not a satisfying diplomatic success on the part of Japan. The efforts of the Meiji government to revise the unequal treaties with the Western powers would be seriously harmed by this treaty. They came to understand that if they could not get a successful revision of this treaty, the renegotiation of the treaties with the Great Powers was destined to fail.[163] Japan's ambitions to abolish the unequal treaties with the West and to come on equal terms with the Great Powers were now under serious risk. "Nothing less than an 'unequal treaty' would do in Japan's relations with the Qing Empire, which many Western-educated reformists like Tsuda Mamichi regarded as beyond the pale of modern civilization."[164] However, the Treaty of Tianjin was partly a failure for the Meiji government. It would sign a treaty with the Qing Empire on "unequal terms" only after the victory of the First Sino-Japanese War, in 1895. Shortly after the signing of this treaty Japan was able to abolish the unequal treaties it signed with the West.[165]

[162] Cassel, *Grounds of judgment*, 101.
[163] Cassel, *Grounds of judgment*, 13.
[164] Cassel, *Grounds of judgment*, 103–4.
[165] Cassel, *Grounds of judgment*, 149.

Whether Japan's victory over China or the institutional and legal reforms it undertook, or other factors were more determining in Japan's "success" is a question to be answered to at the end of this work. Leaving the discussion of this important and critical question to the next chapters, one could say that the Qing experience and the Japanese experience were quite different. Although they did have shared legal and political institutions, after the establishment of the Meiji government, even the bilateral relations were not equal between Japan and the Qing Empire. The Meiji political elite, as they would try to do it in their efforts to establish formal relations with the Ottoman Empire, wanted to sign a treaty with the Qing Empire to assure the Western or Great Powers that they are "civilized enough" to acquire an unequal treaty from a "semi-civilized" state. Besides, they were already in the belief that the Chinese law was not assuring the Japanese subjects' security from arbitrary trial and mistreatment and therefore did not want them to be subjected to the local law and jurisdiction. Moreover, the treaty port system meant different things to the Japanese and to the Qing authorities. The Chinese officials were aware of the problems the treaty port system brought. However, instead of struggling with these problems, they opted to tone down these threats. "The flexibility of the Qing legal order, and the propensity of the Qing statesmen to manage consular jurisdiction as part of the Qing legal order, effectively preempted any efforts to introduce 'modern' legal norms into China."[166] Thus, while the Meiji government prioritized the unequal treaties and the problem of sovereignty, the Qing officials chose to prolong its solution and only dealt with its present complexities, rather than developing a long-term strategy. Hence, it can be argued that there were two distinctive approaches from two different states, as the Qing Empire and Japan.

[166] Cassel, *Grounds of judgment*, 83.

3.3.3. Comparison with the Ottoman Empire

Analyzing the nineteenth-century treaty port system in the Ottoman Empire usually leads historians to neglect the legal aspects of the "capitulations" and focus solely on its commercial aspects. As discussed in the second chapter and in this chapter, the Ottoman Empire had gone through a transformation in terms of the nature of the privileges granted to the Western powers. Here, my aim is to underline this transformation and see how the Ottoman Empire was relegated by the Great Powers to the status of a semi-civilized state. According to Halil İnalcık, the most favored nation clause appeared for the first time in a treaty signed between Britain and the Ottoman Empire in 1601.[167] However, the process was gradually evolving throughout the seventeenth and eighteenth centuries as capitulations were renewed with European states and each capitulation was including another privilege granted to the Europeans. Edhem Eldem argues that one needs to understand the nature of the capitulations in their initial phase as these were not commercial in essence and it was an attempt to bring these foreign merchants under a manageable legal framework.[168] It was done in the Ottoman context, according to Eldem, for simply defining the status of these merchants since it was vague, since they were subjects of other states, thus he argues that these *ahidnames* (imperial pledges) were used as a tool to situate these foreigners in the legal structure.[169] However, at the turn of the nineteenth-

[167] Halil İnalcık, *Devlet-i 'Aliyye: Osmanlı İmparatorluğu Üzerine Araştırmalar,* Tarih X (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2016), 237

[168] Edhem Eldem, "Capitulations and Western Trade," in *The Cambridge History of Turkey: The Later Ottoman Empire, 1603-1839*, ed. Suraiya Faroqhi, The Cambridge history of Turkey v. 3 (Cambridge, UK, New York: Cambridge University Press, 2006), 293.

[169] Eldem, "Capitulations and Western Trade," 293–94 ; "In spite of the outward form of 'gracious concession' in which many of these Capitulations were clothed, it is reasonably clear that the earliest concessions represented nothing more or less than good business transactions in the mutual interest of the parties involved. They were simply a means of securing to Turkey the trade and other benefits resulting from the presence in the country of large bodies of industrious and intelligent people, in exchange for a protection and a right of self-government which had the advantage of relieving the Turkish state from complicated administrative burdens. Certainly, the Capitulations were very far from being privileges wrung from unwilling Eastern religious rulers. Founded on mutual interest, they were above everything else the expression of a practical working agreement dominated by a factor of

century these pledges gradually started to acquire a hegemonic character. While the Ottoman Empire was gradually losing its sovereignty over the foreign subjects, the capitulations, perhaps a striking difference from the Qing and Japanese experiences, was that it was weakening the position of the state against different religious groups within the empire.[170] Thus, the Ottoman Empire was excluded from the European family of nations and started to be considered as a semi-civilized, state just as the Qing Empire and Japan.[171] Capitulations already well before the nineteenth century had given the European merchants residing in the port cities of the Ottoman Empire rights such as trading and traveling inside the country, transportation of their goods, and throughout the time they acquired the right to be tried in their consular courts and fixed low tariff rates.[172]

The Ottoman state in the late eighteenth century and in the nineteenth century was struggling to preserve its authority within the empire. Therefore, as Şevket Pamuk states, it started to resort to the help of the Western powers. However, in exchange, the great powers of Europe were demanding from the Ottoman Empire to open its economy more.[173] With the advent of the century, as Eliana Augusti suggests, the Ottoman Empire had conceded consular jurisdiction while the reform and adaptation process into the international law and nineteenth-century global order continued.[174] Unequal treaties/capitulations, as discussed in the second chapter and

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controlling importance, namely, the essentially religious conception of sovereignty as distinguished from the later Western conception of sovereignty as coexistent with territorial control. The law of the Koran was a law for the Faithful alone. It was but natural to accord those of alien religious faiths, whether subjects of the Sultan or foreigners, the privilege-conceived also as the obligation- of being judged by their own laws and customs." J. Y. Brinton, *The Mixed Courts of Egypt* (Yale University Press, 1968), https://books.google.com.tr/books?id=r1MqAQAAMAAJ, 4.

[170] İnalcık, *Devlet-i 'Aliyye*, 242.

[171] Simpson, *Great Powers and Outlaw States*, 244–45.

[172] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 57.

[173] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 95.

[174] Eliana Augusti, "From Capitulizations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire," *J. Civ. L. Stud.* 4 (2011): 289–90.

as also Augusti supports in the context of the Ottoman Empire, were useful tools for the Great Powers to maintain and control their legalized hegemony. Hence, for the Great Powers "capitulations protected their merchants, trade, contracts, and cases; they established in the strategic specific places of Mediterranean Western presence and controlled, from a privileged inner position, their Muslim interlocutor."[175] The turning point was, of course, the Baltalimanı Treaty signed between Britain and the Ottoman Empire. Pamuk argues that the signing of a treaty of extraterritorial nature between Britain and the Ottoman Empire was only a matter of time and Britain seized the opportunity when the Ottoman Empire asked their help against the revolt of the Khedive and powerful figure of nineteenth-century Egypt, Mehmed Ali Pasha.[176] Just as the examples of China and Japan, after signing this treaty the Ottoman Empire signed several other treaties of extraterritorial character with other great powers of Europe. These treaties were commercial treaties that were ripping the Ottoman government's tariff autonomy off and reinforcing the extraterritorial consular jurisdictional rights of the Western subjects.

The Ottoman Empire's experience of the treaty port system differs from that of Japan and China as it is a result of the states' struggle to boost stability within the empire and eliminate political rivals over a much longer time. Of course, this rebellion of Mehmed Ali and Istanbul's resort to outside help from Britain was only a contributing factor. It was argued in the second chapter that these treaties are not a product of one factor. They are the consequences of many factors coming together and one final moment that leads to the conclusion of the treaties. In the case of the Qing Empire, the treaty was signed as a result of defeat. The Ottoman Empire

[175] Augusti, "From Capitulizations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire," 292.
[176] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 97–99.

suffered consecutive defeats against European armies, but the initial motivation of the empire in signing these treaties was to cultivate advantages against the internal uprisings in exchange for privileges given to the great powers. Certainly, the defeats against the European powers extended the impact of capitulations. The extraterritorial rights that were granted to the foreign merchants before the conclusion of the Baltalimanı treaty gained a universal character.[177] In fact, there are documents in the Ottoman Imperial archives including proceedings between the consuls of the European Powers such as Russia with the Ottoman officials and interfering the trials of their subjects and demanding to carry out the jurisdiction in the presence of the consuls.[178] The Ottoman practice differed from the Chinese and Japanese practices in terms of the consular courts and eventually, the Egyptian consular jurisdiction evolved into a different form in the coming decades after the early nineteenth century. The treaty port system in Egypt will be discussed in the next chapter and therefore will not be extensively mentioned here.

In the end, the Ottoman strategy was different from the Chinese strategy. It will become clearer in the following chapter that the jurisdiction and the degree of intervention of the consuls also differed. In the case of Japan, the Ansei treaties were signed by the Bakufu, primarily to eliminate possible threats of war and prevent the spread of opium within the country. Moreover, the Ansei treaties, unlike the unequal treaties of China or the capitulations of the Ottoman Empire, included clauses that stated a possibility of the revision of these treaties. This reflects that the Japanese

[177] The first of which legally granted to the French subjects in 1740 which was followed by "Denmark, Prussia, Great Britain, the Netherlands, Austria Hungary, Sweden, Italy, Russia, Spain, Persia, Belgium, Portugal, Greece, and a few decades later, the United States, Brazil, and Mexico." Mariya Tait Slys, *Exporting Legality: The Rise and Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China* (Genève: Graduate Institute Publications, 2014), 7–11.
[178] BOA HR.MRKT.258/93. (September 30, 1858), "As the Russian consul prevented the trial of Russian Haralambi, the murderer of Hüseyin's brother Emin, one of the artillery soldiers of the Trabzon castle, the court is going to be held with the participation of the Russian consul and his translator"

authorities had more space for negotiation, unlike their Ottoman and Qing counterparts. This affects the future policies of legal and institutional reform of these three states. It was argued above that the Qing strategy was to underestimate the problem of extraterritoriality and to restore authority, and its internal dynamics and the hierarchical arrangement of the society was a serious backdrop for the Qing dynasty to apply any possible reforms. The Ottoman state, however, did not ignore the problem but acted reluctantly in the process of reformation. The Ottoman Empire was reforming its institutions certainly, and this included legal reforms or the introduction of a parliamentary system, or the inauguration of the first constitution. However, these reformed institutions many times co-existed with the former institutions. The reforms were in line with the state's desire to establish a strong centralized government. However, this also meant more commercial and extraterritorial treaties with the Western Powers.[179] Therefore, it would be safe to argue that the Ottoman authorities were acting reluctantly since they wanted to preserve their position, and they carried out reforms, again, to preserve and strengthen their position. This was the dilemma of the Ottoman institutional modernization. The Tanzimat Reforms and their implementation were a reflection of this dilemma. [180] Japan, on the other hand, wanted to learn from the West, as a part of its practical/realistic approach towards this entire process of institutional modernization and showed no sign of reluctancy.

Even though Japan, the Qing Empire, and the Ottoman Empire are presented in the scholarship and in the contemporary writings within the same category, they followed different strategies, their internal and institutional dynamics, as well as their

[179] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 95.
[180] The Ottoman state was encountering difficulties both because of its limited capacity and also because of the resistance coming from different social groups. For a detailed analysis see,. İnalcık, "Tanzimat'ın Uygulanması ve Sosyal Tepkileri"

historical relationship with the West, differentiated the trajectory they followed. It is not to suggest that these three experiences, or four adding Egypt in the nineteenth century, did not have common characteristics. In fact, these characteristic similarities were discussed in the previous chapter. What distinguished the Japanese experience was Japan's realistic approach and its timing in its quest for sovereignty.

3.4. The Iwakura Mission and Japan's quest for sovereignty

Japan's quest for sovereignty was not entirely a "miracle" of the newly established the Meiji government. The Bakufu also took serious steps for the internal and external reformation the Great Powers saw necessary for a non-European country to join the international family of nations. However, one might argue that the Meiji government had defined the treaty revision as its number one foreign policy. Following the collapse of the Bakufu and the establishment of the Meiji government, the revision of the treaties became one of the most important issues for the political elite. In this regard, this prioritization of treaty revision was not a continuity between the Bakufu and the Meiji government. As Selçuk Esenbel says, especially the first generation of the Meiji era focused on radical reformation processes in order to become a part of the international order. Therefore, its primary aim was to follow all the necessary steps mentioned above and convince the Western powers that they meet the requirements to abolish these unequal treaties.[181] To this end, they obtained and tried to obtain extraterritorial rights from non-European states, as the Qing example suggests. However, overall, Japanese authorities were serious in their effort to modernize their institutions and seemed to believe that that was the only option to revise the treaties. Moreover, it was the first and the most important project of the

[181] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 237.

Meiji government. The Meiji political elite set its priorities and "the primary object of the reform program which is known with the four-motto military strength, economic prosperity, civilization, and enlightenment could be realized only and only with the revision of the treaties."[182] Regarding the Meiji governments' plans to revise the treaties through serious reforms, great powers such as the United Kingdom had their own plans regarding this important issue, specifically on the legal institutions of Japan. This particular plan was especially vowed during the Iwakura Mission and will be discussed in detail in the following pages. Iwakura Mission, therefore, occupies an important episode in the attempt of Japan to negotiate the revision of the Ansei Treaties. While trying to reform all the institutions at home, the Meiji government naively thought that it was the time to discuss the revision of the unequal treaties with countries concerned and also see their economic and social machinery working at its place and learn from them for the future reforms in Japan. They were supposed to study with particular care those legal and political institutions and practices that might be necessary to adopt if the Western nations were to be persuaded to revise the unequal treaties.[183] To this end, the Meiji government dispatched the Iwakura Mission to America and Europe and negotiated with great powers, while also observing the infrastructure, the industry, the educational system, the legal system of these countries. The realization of the Meiji political elite that they indeed had to undergo serious political, legal, and institutional changes was the most important driving force of the mission. The Mission was named after the prominent political figure of the Meiji era, Iwakura Tomomi (1825-1883).[184] The

[182] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 238.
[183] Hane and Perez, *Modern Japan*, 89.
[184] By giving reference to the letter written by Iwakura Tomomi to Sanjō Sanetomi Cassel stresses Iwakura was among the first Meiji politicians who realized the necessity of full authority over jurisdiction:

mission sailed into the Pacific Ocean and visited first the USA and then passed to Britain. The embassy spent most of its time in these two countries, which was crucial for the negotiations. After Britain, the embassy visited European countries such as France, Belgium, Holland, Prussia, Russia, Denmark, Sweden, Italy, Austria, Switzerland, Spain, and Portugal.[185] With confidence, the members of the Iwakura Mission thought that they could convince the European Powers that they are eager to meet the "standard of civilization" and therefore the revision of the unequal treaties was possible. The negotiations, however, were going to take them to another direction.

3.4.1. Negotiation and rejection

The Iwakura Embassy's primary goal was to negotiate the revision of the unequal treaties. The Japanese envoys wanted to show and persuade the treaty powers that the Meiji government was on track for institutional and legal reformations, and that Japan was ready to sign new treaties that put them in equal conditions with the Western Powers. The Japanese authorities wanted to accomplish the abolishment of low tariff rates, consular jurisdiction and hence become a totally sovereign state. Before understanding the negotiations held between the Iwakura Embassy and the treaty powers, one should keep in mind that the standard of civilization and international law were useful tools for the nineteenth-century ambitions of the Great

"The leading court noble Iwakura Tomomi was one of the first to single out consular jurisdiction as a disgrace to Japan as a nation (waga Kōkoku no chijoku) in a letter to another prominent court noble, Sanjō Sanetomi in April 1869. Clearly envisioning Japan as a nation among nations, Iwakura held that only by assuming full territorial jurisdiction within its borders could Japan assert its rightful position in the world, a statement indicating that Iwakura was approaching an understanding of national sovereignty informed by international law." Cassel, *Grounds of judgment*, 93.

[185] The embassy was comprised of important members of the Meiji government. Iwakura Tomomi, Kido Koin, Okubo Toshimichi, Ito Hirobumi, Yamaguchi Naoyoshi, and an additional 45 members including Fukuchi Genichiro. Kunitake Kume, *Japan rising: The Iwakura embassy to the USA and Europe 1871-1873* (Cambridge, New York: Cambridge University Press, 2009), XIV-XV.

Powers. The legal and political institutions, although it was rather vague and arbitrary, had to be Europeanized for any non-European state's admission into the international family of nations. These were believed to be the civilized laws and institutions that Great Powers could allow their subjects to be subjected to. The Meiji government had taken important steps until 1871 in terms of institutional and legal reforms, but it was only at the beginning of this long process. Therefore, one should bear in mind that not only admitting Japan into the family of nations was not fitting the political and commercial interests of the Great Powers at that time but also the Meiji government had a long way ahead in its journey of institutional modernization. Around the time the Iwakura embassy dispatched for the negotiations, the Meiji government was continuing some of the Bakufu policies for the maintenance of its authority in Japan. "Japanese statesmen started to draw clear limits beyond which they did not want consular jurisdiction to assert itself. The government also called off experiments with mixed courts, which had been carried out intermittently in Yokohama since 1865."[186] Later, there were different reactions to different plans suggested by the authorities in Japan, one of which was a total rejection of the establishment of the Mixed Courts system in Japan. Negotiation, however, was the most powerful tool in the hands of the Japanese authorities. The Iwakura Embassy was the most important symbol of this powerful tool.[187]

The Iwakura Embassy's daily affairs are known thanks to the account of the historian, and a member of the embassy, Kume Kunitake(1839-1931). The first country they arrived in was the United States, the country that signed the first "unequal treaty" with Japan. They arrived in San Francisco on January 15, 1872.[188]

[186] Cassel, *Grounds of judgment*, 94.
[187] Auslin, *Negotiating with imperialism*, 5.
[188] Kume, *Japan rising*, 14.

The only mission of the embassy was not to negotiate for treaty revisions, but also to survey and observe the Western industrial, political, social, economic, and institutional conditions. Therefore, throughout the journey of the embassy from San Francisco to Washington they have visited factories, they traveled via railways, they observed the operation of the postal services. Kume provides a detailed analysis of anything that they came across throughout his account.[189] They finally arrived at the capital towards the end of February. They visited the Congress, they attended banquets, they traveled to the northern states during their stay in Washington. During their travels to the Northern States, they stayed in Washington until July 27, when they decided to leave the capital by train. In terms of the treaty negotiations, nothing particularly developed in the favor of the Meiji government. It was unfortunate for the Iwakura embassy that at the time they were in Washington, the presidential election campaign was at its peak. "While we were in Washington, the United States was in the throes of a presidential election. Therefore, we were able to observe political candidates gathering in conventions and holding primary elections."[190] Throughout his account of the United States, Kume mentions the meetings of the senior members Iwakura Tomomi and others with the authorities, but no improvement is noted. Throughout the account, Kume expresses his admiration of the United States, its industry, economy, people, and political system. However, one also senses a tone of disappointment as the negotiations for treaty revision did not work out as they hoped.[191]

[189] For a detailed account of the journey please see: Kume, *Japan rising*, 14–54.
[190] Kume, *Japan rising*, 91.
[191] Kume, *Japan rising*, 88–104.

3.4.2. Discussion with Lord Granville

The Iwakura embassy arrived in Britain on August 16. One thing remarkable for the account of Kume in London is how he mentions that Britain established its Empire in a short amount of time.[192] This gives a sense of envy and ambition to the reader. It, perhaps, indicates his views on the long-term strategy the Meiji government should follow. However, the first duty of the government, and in this case for the Iwakura Embassy, was to convince the Great Powers to revise the unequal treaties, which they failed to do so in the United States. Similar to their treatment in the United States, the embassy was stalled by Britain as well. "At one o'clock in the afternoon, we visited the residence of Lord Granville (1815-1891), the foreign secretary, to report him the nature of our mission and to request an audience with the Queen. At that time," Kume continues, with words that give the reader an impression of resentment, "the queen was on holiday at her castle [Balmoral] in Scotland. Since there was no precedent in the history of the country for her to return to Buckingham Palace from holiday for the express purpose of seeing foreign ambassadors, it was agreed that we would await Her Majesty's return."[193] They were finally received by the Queen on December 5, almost three months after their arrival in Britain.[194] The most important aspect of the Iwakura mission's visit to Britain was the dialogue between British Foreign Secretary Lord Granville and Iwakura Tomomi. This dialogue shows that Japan was not considered by Britain and the other treaty powers, according to the narrative of the treatment they received in other countries, as an equal state. Japan had not yet met the standard of civilization to revise the unequal treaties and try Western subjects according to their own law. During the course of

[192] Kume, *Japan rising*, 119–20.
[193] Kume, *Japan rising*, 119.
[194] Kume, *Japan rising*, 208.

negotiations, Prince Iwakura asked Granville that if there would be legal improvement within Japan since they wish to regard equally both Japanese and the British before the law, in this case, would the British be obeying these laws. Granville responded that an immediate transfer of the rights would not be preferred by Britain and if the effectiveness of the civil law is assured, it could also be applied to criminal law after some time when it will be the most suitable. He also advised Iwakura to follow the Egyptian example.[195] This was showing the members of the embassy that the negotiations with the treaty powers would possibly get stuck at this point. Japan was not in the place they thought it was.

The Iwakura Embassy went on its journey and continued its diplomatic contacts throughout Europe. The negotiations were, however, fruitless. The primary aim of the mission could not be realized. The Japanese envoys found out that they were not considered as equals by the Western powers and they had to continue the institutional reforms to reach their ultimate aim. The most important difference of opinion between Japan and the treaty powers was the abolishment of consular jurisdiction, among other issues such as tariff rates. The Western powers did not think the Japanese laws and legal institutions were "civilized enough" to assure the protection of the fundamental rights of their subjects. In other words, they wanted their subjects to be immune from Japanese law. "It was this claim to be immune from the Japanese law that so outraged the Japanese government in the 1870s and committed it to eliminating extraterritoriality and consular jurisdiction."[196] However, the first serious attempt was not successful in realizing its objective. As also Hane discusses, the mission failed its primary goal, which was the revision of the unequal treaties.

[195] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 22.
[196] Howland, *International law and Japanese Sovereignty*, 51.

Nonetheless, the members of the mission went back to Japan learning many things from what they had seen so far in the West, especially in Bismarck's Germany.[197] This was a remarkable contact between Japan and the "civilized world."

The Japanese envoys were impressed by the Western societies, cultures, industries, and institutions. However, they were also getting a lot of attention. Throughout their stay, the Iwakura embassy was subject to public debates wherever they went.[198] Moreover, not only did they get the attention of the media of the countries they have visited, but also countries such as the Ottoman Empire were keeping a close eye on them as they appeared in certain proceedings. The first example was a proceeding giving the news that the Japanese envoy has arrived in Berlin and conducting negotiations with the German authorities.[199]Another document was from Ali Kabuli Pasha(1812-1875), the Ambassador of the Ottoman Empire to St. Petersburg, who writes to the Ottoman Ambassador at Vienna to welcome Hiromoto Watanabe(1848-1901), chargé d'affaires of Japan to Vienna, who will be arriving there soon. It is important to stress here that Hiromoto Watanabe was a member of the Iwakura Mission. Moreover, Ali Kabuli Pasha probably met Watanabe during his service in Vienna as the Ambassador of the Ottoman Empire while the Iwakura Mission was visiting Austria in 1873.[200] Therefore, the Ottoman authorities were also carefully watching the steps of the Iwakura Mission and embassies at the visited countries were notifying Istanbul about the arrival of the Japanese missions. From Rashid Pasha's (1824-1876) proceedings, it is clear that the

[197] Hane and Perez, *Modern Japan*, 89.
[198] To see an example: *The New York Times, "*The Japanese Embassy; Gossip About the Young Ladies Accompanying Them Impressions Made by the Men," February 20, 1872, accessed October 7, 2020, https://www.nytimes.com/1872/02/20/archives/the-japanese-embassy-gossip-about-the-young-ladies-accompanying-the.html.
[199] BOA, HR.TO.. 30/64 (March 17, 1873). "About the Japanese envoy in Berlin"
[200] BOA, HR.SFR.1.. 39/69 (April 3, 1873) "Political remarks on Japan sending a former ambassador who visited many European capitals before, to Europe"; BOA, HR.SFR.1.. 40/3 (April 17, 1873) "On receiving the report on the Japanese mission arriving at Petersburg",

Ottoman authorities were aware of the activities of the Iwakura mission and that they were visiting all these countries to negotiate the revision of extraterritorial treaties.[201] Later, there would also be formal initiatives of the Japanese chargé d'affaires to conclude a treaty with the Ottoman Empire to establish formal relations. This, however, is an issue that will be discussed in detail in the last chapter of this work.

The negotiations with Earl Granville, however, led two members of the embassy in a different direction. The mission did not visit the Ottoman Empire, but it was during this mission that they were advised to visit and analyze the legal structure of the Ottoman Empire and Egypt. As the most important issue to be discussed in this work regarding the Iwakura Mission, the issue of legal reform was a topic mentioned in many countries visited in Europe. It was the most important condition for the negotiations for the revision of the unequal treaties to start. To meet the standard of civilization in Japan, the advice had to be taken seriously. In these negotiations, Fukuchi Genichirō was present and served as an interpreter. Later, he was assigned for the spot-on research in Egypt and the Ottoman Empire with the Buddhist monk Shimaji Mokurai.[202] In the reports of the Japanese foreign affairs indeed the Japanese delegation including Iwakura and Terashima Munenori(1832-1893) fiercely defended the need to revise the treaties as the extraterritorial jurisdiction was causing troubles, from beginning to the end Lord Granville argued that it was not the time and that the revision of the treaties could only be discussed after they return to Japan.[203] Before moving into the Japanese Research on the Mixed Courts of Egypt in

[201] BOA, HR.SYS. 819/0026.1-2-3-4 (May 31, 1879)
[202] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 22.
[203] Ministry of Foreign Affairs 外務本省, 日本外交文書デジタルアーカイブ 条約改正関係第 1 巻, Nihon gaikō bunsho dejitaruākaibu jōyaku kaisei kankei dai 1-kan (Digital Archive of the Japanese Diplomatic Documents Treaty Revision Volume 1), 英国外務に於ける岩倉大使ト同国外相トノ對話書, Igirisu gaimu ni okeru Iwakura taishi to dōkoku gaishō tono taiwa-sho, (The Report

the next chapter, it would be appropriate to finish this chapter by analyzing the reasons behind Lord Granville's advice to the Iwakura Embassy to analyze the structure of the Mixed Courts of Egypt. Was it a suitable institution for a country such as Japan? Was the reason Granville saw Mixed Courts appropriate for Japan was its rank among the nations?

3.4.3. Mixed Courts of Egypt as a suitable model

From the fall of the Bakufu onwards, the Meiji government was taking initiatives to reform its legal and political institutions. Therefore, one needs to see the Iwakura mission as a part of this series of efforts. In fact, the issue of treaty revision and legal modernization was at the center of this endeavor. Already familiar with the turmoil of the *bakumatsu* era, the Meiji government's primary concern was the establishment of a strong centralized state.[204] A strong and centralized state necessitated the control of jurisdiction within the country, and this was in contradiction with the unequal treaties that granted the Western subjects the right to be tried in their consuls and exempted them from the Japanese law. As Cassel suggests, the Meiji political elite was against any competing form of jurisdiction as it was an undermining factor in the Bakufu's struggle against the unequal treaties:

> The early Meiji oligarchs were deeply concerned about the fractured character of the Japanese state and defined themselves in opposition to the Tokugawa plural legal order. Over time, this intolerance toward competing jurisdiction manifested itself in a strong opposition to any form of consular jurisdiction on Japanese territory.[205]

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of the Dialogue Between Ambassador Iwakura present in Britain and the Foreign Secretary of the same country), October 27, 1872, 225–29.

[204] Wilhelm Röhl, ed., *History of Law in Japan Since 1868,* Handbook of oriental studies. Section five Japan 12 (Leiden, Boston: Brill, 2005), 2.

[205] Cassel, *Grounds of judgment*, 36.

Hence, the Meiji government, while carrying out reforms, was looking for a way to reinforce this centralization in terms of the application of law and legal institutions. The Meiji leaders would become aware that the modernization of the military, economy, and education was very important for its admission into the family of nations.[206] The legal modernization process was going to be greatly influenced by the Japanese Research on the Mixed Courts of Egypt. Because Japan could realize in the end that it had to make a choice, and also could see what being a reluctant actor would bring through its encounter with the Ottoman and Egyptian experience of institutional modernization. Japan kept itself relatively isolated for more the two centuries and finally opened its economy in the mid-nineteenth century. This was a quick and shocking experience comparing to the Ottoman, Chinese, or Egyptian examples. The investigation of the Ottoman and Egyptian legal institutions would teach Japan how to handle this process. The Meiji government certainly wanted to abolish consular jurisdiction since it brought many problems and was a threat to Japan's sovereignty.

In the second chapter, the development of the international law, its history, and the role it played in the nineteenth-century international order was discussed. It was a useful tool for the Great Powers to assert their superiority together with the term "civilization". One reason Lord Granville suggested the Japanese authorities investigate the Ottoman and, especially the Egyptian legal institutions, was because of his belief that Japan was in the same rank as the Ottoman Empire and Egypt. Although Egypt was an autonomous entity, it symbolized the institutional modernization of a non-European state. It was also planning to experiment Mixed Courts system which was suitable in "semi-civilized" states such as Japan as well.

[206] Susumu Yamauchi, "Civilization and International Law in Japan During the Meiji Era (1868-1912)," *Hitotsubashi journal of law and politics* 24 (1996): 2.

Therefore, the first stage to achieve a development of status on the way to abolishing extraterritoriality was to follow the example of Egypt. Moreover, it was also bringing solutions to the common problem of the treaty port system: multiple consular courts. At least, this was how Granville thought and advised the members of the Iwakura Embassy.

Thus far, the impact of the treaty ports system in Japan and the parallels and differences with the Qing and the Ottoman Empires has been discussed. The Iwakura Embassy was an important part of the discussion throughout this chapter and in the second chapter. Japan's quest for sovereignty would take a different course. The decisive process in the institutional modernization of Japan: the research on the Mixed Courts of Egypt. In the next chapter, this episode and how Japan went on a different path than the Ottoman Empire, the Qing Empire, or Egypt will be discussed extensively.

CHAPTER 4

HOW FAR IS THE FAR EAST TO THE NEAR EAST?: NON-WESTERN STRATEGIES AND LEGALIZED HEGEMONY IN THE NINETEENTH CENTURY

4.1. Capitulations and privileges: the Ottoman history of extraterritoriality

Compared to the sudden beginning of extraterritoriality in China or Japan, the history of extraterritoriality and capitulations in the Ottoman Empire is a complex matter. Historians should interpret the reasoning behind the first capitulations. Also, it is necessary to take the complexities behind its development into account before making any comparison with the history of extraterritoriality in East Asia. It is already established in the previous chapter that the Ottoman Sultans granted privileges to the foreign merchants, primarily to define them in a legal framework. The initial purpose of the capitulations should not be mistaken with its later function, which often leads to the misinterpretation of the meaning of the word "capitulations" as well. Halil İnalcık rightly states that "the most commonly used concepts in the Islamic world for capitulation privileges such as şurût, 'uhûd, amân identifies the characteristics of these documents. Documents including such articles are called 'ahdname or in the Arab lands kitab amân or marsûm." Underlining the source of this misconception, İnalcık continues; "Şurût (articles, conditions) are translated into Latin as capitula (conditions, parts, articles). From this origin comes the French word capitulation, and it is wrong to give this concept the meaning of 'to capitulate'"[207]. Only when the capitulations start to resemble the characteristics of "unequal treaties"

[207]İnalcık, *Devlet-i 'Aliyye*, 226.

they are referred as “capitulatory treaties” in the literature stressing their unequal characteristics.

Mehmet Genç summarizes the Ottoman economic policies before the nineteenth century with three important principles. The first principle, provisionism, provides an important perspective to understand what the motivation of the Ottoman Sultans was in granting such legal and economic privileges to the foreign merchants. As Genç states, under the principle of provisionism, the economic activities were seen from the perspective of the consumers[208] and therefore the state was making sure that there are enough goods within the market with various qualities and prices. To ensure this, the imports were set free and in certain cases, the export of certain goods was either banned or regulated by high tariffs. [209] Moreover, Genç also argues that the Baltalimanı Treaty of 1838 should not be considered as an imposition of Britain, as the Ottoman authorities negotiated not for the limitation of the imports but exports during the negotiations. [210] Also, Reşat Kasaba states that the treaty of Baltalimanı is not the first unequal treaty the Ottoman Empire signed as they granted extraterritorial privileges to Russian merchants in 1829 with the Treaty of Adrianople and to the American merchants in 1830. However, the treaty of Baltalimanı marked a significant point in the history of unequal treaties. [211] Otherwise, extraterritoriality was not a novelty for the Ottoman state. Even before these treaties mentioned by Kasaba, there were treaties signed by the Ottoman state that included the most favored nation clause and granted extraterritorial privileges to the European powers

[208] Mehmet Genç, *Osmanlı İmparatorluğunda Devlet ve Ekonomi*, 11. basım, Kültür serisi 186 (Beyoğlu, İstanbul: Ötüken, 2014), 41.
[209] Genç, *Osmanlı İmparatorluğunda Devlet ve Ekonomi*, 50.
[210] Genç, *Osmanlı İmparatorluğunda Devlet ve Ekonomi*, 50–51.
[211] Kasaba, “Treaties and Friendships: British Imperialism, the Ottoman Empire, and China in the Nineteenth Century,” 221.

and even to Qajar Iran.[212] The arguments of Genç might appear to be the exact opposite of Şevket Pamuk's arguments, who states that the treaty of Baltalimanı was a turning point in the process of the opening of the Ottoman economy in the nineteenth century.[213] However, one needs to be careful in the assessment of these two theories. First, Pamuk emphasized Genç's argument on the control over the exports and imports too. In fact, Pamuk sees the treaty of Baltalimanı from the perspective of sovereignty. He also argues that in times of need the Ottoman state was resorting to extraordinary taxes, *avarız akçesi*[214], and with the treaty of Baltalimanı the state was also giving up this most precious source of income in times of need.[215] Hence, Pamuk approaches the issue from the perspective of sovereignty and state capacity while Genç looks at the larger process and sees the treaty as a part of a consistent understanding and "worldview" of economic policies of the Ottoman Empire. Kasaba, on the other hand, underlines that Baltalimanı became a model for the unequal treaties in the nineteenth century by arguing that it was more comprehensive and universally applied than the unequal treaties signed in East Asia.[216] Later in the nineteenth century, treaties of extraterritorial nature were signed

[212] Please refer for the detailed analysis of the Treaty of Erzurum, the treaty signed between the Ottoman Empire and Iran in1823 that granted privileges to the Iranian merchants within the Ottoman Empire. Soofizadeh, Abdolvahid. "I. ve II. Erzurum Antlaşmalarının siyasi açıdan değerlendirilmesi." *Tarih Araştırmaları Dergisi* 32, no. 54 (2013): 183–94.
[213] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 95–97.
[214] In fact, the word " *'avāriż*" means accidents, misfortunes, betidings. James W. Redhouse, *An English and Turkish Dictionary, in Two Parts: English and Turkish, and Turkish and English* 2 (Bern. Quaritch, 1856), 668.
[215] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 98
[216] " Compared with the Nanjing Treaty, the Ottoman agreement was more comprehensive and was intended to be universal in its implementation. The Balta Limani Treaty declared the foreign merchants and their agents equal to their Ottoman counterparts in all respects. It prohibited all government monopolies, outlawed locally imposed surcharges, and specified the rate and manner of collection of import, export, transit, and local duties. All these provisions were to be valid in all the possessions of the empire and were to cover all its subjects. British diplomatic and consular representation had already existed for more than two hundred years in the Near East." Kasaba, "Treaties and Friendships: British Imperialism, the Ottoman Empire, and China in the Nineteenth Century," 219.

in East Asia, starting with the Treaty of Nanjing in 1842.[217] These historians, despite their varying views on the nature of the Treaty of Baltalimanı discussed above, do agree that the nineteenth century was the period where the characteristics of these treaties were going to change. Through this change, the nature of the capitulations would transform and acquire the characteristics of unequal treaties in the sense it is interpreted throughout this work in the context of the nineteenth-century global order.

Before discussing the transformation of the capitulations into "capitulatory treaties" for the Ottomans, it is necessary to point out a striking difference between the Japanese economic policies and the Ottoman economic policies. As it is discussed in the previous chapter, the Tokugawa Bakufu was ruling over a rather fragmented country. It was unable for completely controlling the internal dynamics of the domains. However, it was able to follow a closed country policy and enforce it over the entire daimyo. The *sakoku* policy is often misinterpreted as the policy of complete isolationism in the Tokugawa period but in reality it meant the limitation and control of the trade and diplomatic relations with the outside world.[218] Although it was not completely an isolated economy, the Tokugawa economy throughout most of the seventeenth and eighteenth centuries remained a self-sufficient economy. For

[217] "In 1843 Foreign Secretary Aberdeen wrote to Pottinger, who was representing the British government in the ongoing cease-fire negotiations with China, asking him to obtain from the Chinese government a "renunciation of jurisdiction similar to that made in former times by the Sultans of Turkey, and recorded to the Capitulations." After the end of the Opium War, through a supplementary treaty that was signed on 8 October 1843, the British obtained some extraterritorial rights and jurisdiction in China for the first time." Kasaba, "Treaties and Friendships: British Imperialism, the Ottoman Empire, and China in the Nineteenth Century," 228.

[218] Many studies on the sakoku as well as the economic history of the Tokugawa era suggest that the Bakufu did not isolate the country from the outside world; it just controlled the country's relations with the outside world. It promoted trade interests to some daimyo. As Ronald Toby argues, "Bakufu authorized Satsuma to trade with Ryukyu and China, and Tsushima to trade with Korea in the early seventeenth century, and it kept these privileges in their hands. Also, recent studies support that the Korea trade monopolized by Tozama Tsushima actually was greater than the Nagasaki trade." Ronald P. Toby, "Reopening the Question of Sakoku: Diplomacy in the Legitimation of the Tokugawa Bakufu," *Journal of Japanese Studies* 3, no. 2 (1977): 325, doi:10.2307/132115.

the sake of comparison, it can be argued that resemblances of the "traditionalism" principle Genç argues for the Ottoman economic understanding[219] can be found within the Tokugawa economy.[220] This self-sufficiency, however, had certain limits. David Howell asserts the need to see this development of commercialization as a process. Moreover, he also claims that there were different aspects and limits to the self-sufficiency by giving the example of the farmers of Hokkaido. His analysis of the commercialization of a fishery village in Hokkaido reveals various layers of this self-sufficient economy.[221]

The nineteenth-century economic and institutional history of the Ottoman Empire, on the other hand, is characterized by reforms and changes. Especially the legal institutions had gone through important changes and as stated in the third chapter, these reforms were initiated to increase the authority of the Ottoman state in the distant corners of the empire. However, Halil İnalcık argues that even though the reforms aimed to strengthen the loyalty of the non-Muslim population to the state, it only contributed to the further disintegration of the empire. This was especially because of the principle of equality that was inspired by the West and became an important motto of the legal and institutional reforms of the Tanzimat era. The difference between the promises of Tanzimat and its implementation was the main source of dissatisfaction throughout the empire.[222] Among the reforms that concern

[219] Genç, *Osmanlı İmparatorluğunda Devlet ve Ekonomi*, 44-46; 58-60; Smitka's arguments supports this resemblance: "The phrase "self-sufficient farming," used here in contrast with 'commercialized farming,' should not be taken to mean that individual farmers, or even entire villages, relied completely on the goods and crops they produced themselves. Rather, villagers who engaged in these self-sufficient practices had a traditional peasant mentality." Smitka, *Japanese Economic History 1600-1960*, 60.
[220] In the seventeenth and most of the eighteenth century the Japanese economy continued to rely on "self-sufficient" agricultural economy. This was going to change through late eighteenth century with the commercialization of the economy. Smitka, *Japanese Economic History 1600-1960*, 60–72
[221] David Howell, *Capitalism from Within: Economy, Society and the State in a Japanese Fishery*, [ACLS Humanities E-Book edition] (Berkeley: University of California Press, 1995), http://hdl.handle.net/2027/heb.01806.0001.001, 2–9.
[222] İnalcık, *Devlet-i 'Aliyye*, 195–97.

the discussion of this work, the most important one is the establishment of the mixed tribunals and commercial tribunals in the Ottoman Empire in the year 1847.[223] Although the establishment of the mixed tribunals is an important turning point, just as the necessity to be aware of the origins of economic privileges given to the European subjects, it is crucial to take the origins of extraterritorial legal privileges into account. As Nevin Özkorkut states, the capitulations stated that the disputes between two subjects of the same country should be settled in their consular courts.[224] Therefore, the extraterritorial legal arrangements were a solution the Ottoman state came up with to place the foreign subjects within a legal framework. In case of a dispute between an Ottoman subject and a subject of another country, the matter would be settled in the Ottoman courts. In the commercial tribunals[225] as well as the mixed tribunals[226] that deal with the criminal cases, the consul and the translator of the consulate were able to attend and intervene in the proceedings.[227] In no more than ten years the commercial tribunals extended to the cities of commercial importance. They comprised from the "representatives of the Ottoman and European mercantile communities, assisted by translators, and they settled disputes between Ottoman and foreign merchants, and disputes among Ottoman merchants. In the latter case, the attendance of the European representatives was not required."[228] Another important legal reform in this period and especially right after the Reform

[223] Eduard Philippe Engelhardt, *Türkiye ve Tanzimat: Devlet-i Osmaniye'nin Tarih-i Islahatı 1826'dan 1882'ye* (Ötüken Neşriyat AŞ, 2017), 89.
[224] Nevin Ü. Özkorkut, "Kapitülasyonların Osmanlı Devleti'nin Yargı Yetkisine Getirdiği Kısıtlamalar," *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 53, no. 2 (2004): 85.
[225] "Commercial tribunals that were established under the umbrella of the Ministry of Trade in 1840, were responsible for solving commercial disputes between the Ottoman subjects and foreigners." Özkorkut, "Kapitülasyonların Osmanlı Devleti'nin Yargı Yetkisine Getirdiği Kısıtlamalar," 90.
[226] "The commercial tribunals became mixed commercial tribunals in 1847 after foreign judges joined in 1847." Özkorkut, "Kapitülasyonların Osmanlı Devleti'nin Yargı Yetkisine Getirdiği Kısıtlamalar," 90.
[227] Özkorkut, "Kapitülasyonların Osmanlı Devleti'nin Yargı Yetkisine Getirdiği Kısıtlamalar," 90.
[228] Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity*, 1st ed. (New York: Palgrave Macmillan, 2011), http://site.ebrary.com/lib/alltitles/docDetail.action?docID=10476130, 26.

Edict of 1856 was regarding the land reform. In the Reform Edict, it was explicitly stated that since the principle of equality regards the subjects Muslim and non-Muslim alike, the foreign subjects would be able to purchase land on the condition to pay the same amount of tax as the Ottoman subjects.[229] With the advent of the Tanzimat reforms, and with the expansion of the Western legal hegemony of the nineteenth century; the consular courts within the Ottoman Empire were transformed into tools of legal imperialism as argued by Anthony Anghie[230]. Moreover, it is an established historical fact that these reforms were not successfully applied in the provinces. In other words, it was mostly limited to Istanbul, and the problems addressed in the Tanzimat edict were not resolved as a result.[231] Interestingly, while the Ottoman government was introducing these reforms to increase its revenue and boost its authority in the provinces, the reforms led to expectations of reform among the populations in especially the Balkan provinces which would ease off their tax burden. In response, the Ottoman state continued its efforts to increase its tax revenues in the provinces.[232] This is another proof to the claim that the Ottoman Empire was introducing reforms to increase its authority in the provinces, however, these reforms were only weakening the influence of the center in the provinces as there were harsh reactions triggered by the implementation of Tanzimat Reforms and the expectations created by the edict itself.[233]

The Meiji reforms at the initial phases, especially the reforms regarding land, caused huge uprisings in the rural areas as well. However, different from the

[229] Engelhardt, *Türkiye ve Tanzimat: Devlet-i Osmaniye'nin Tarih-i Islahatı 1826'dan 1882'ye*, 185.
[230] Anghie, *Imperialism, sovereignty, and the making of international law*.
[231] To see a short but detailed analysis of the probable reasons please see: İnalcık, *Devlet-i 'Aliyye*, 199–201.
[232] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 90–91.
[233] Nish Rebellion in 1841 and Vidin Rebellion in 1850 are the examples discussed by Halil İnalcık in this context. İnalcık, "Tanzimat'ın Uygulanması ve Sosyal Tepkileri," 187–95.

Ottomans, the Meiji government tried to reach a compromise between its needs and their demands, and its reaction was often either carefully increasing the agricultural taxes[234] or easing off the tax burden on the local populations[235] though mildly after 1881.[236] The Meiji government would finally be able to consolidate its power on the local populations towards the end of the century. In this regard, the Meiji government's reforms, although the reactions were harsh, were strengthening the central government's position legally and institutionally.[237] This is unlike the Ottoman government, which was not able to collect taxes on a great portion of the agricultural production because of the compromises made in that regard with local power holders.[238]

Another important factor and a point of comparison between the Ottoman Empire, Egypt, and Japan is the foreign loans. The Japanese government assumed the debts from the toppled Tokugawa Bakufu as well as the former daimyo after the restoration of power to the emperor and the establishment of the new government.[239] Even though the Meiji government assumed these debts, it was able to pay most of its foreign debt by the mid-1870s, except for the borrowings from the London banks which were obtained for the construction of railways in 1869 and employing former

[234] Kōzō Yamamura, *The Economic Emergence of Modern Japan* (Cambridge: Cambridge University Press, 1997), 39.
[235] James Nakamura argues that the land reform in the early Meiji era eased off the tax burden compared to the Tokugawa figures by 14 to 43 percent. James I. Nakamura, "Meiji Land Reform, Redistribution of Income, and Saving from Agriculture," *Economic Development and Cultural Change* 14, no. 4 (1966): 434–35, http://www.jstor.org/stable/1152149.
[236] Hane and Perez, *Modern Japan*, 117–20.
[237] Esenbel concludes that there was also a change of attitude by the Meiji government with respect to the Tokugawa Bakufu. While the Bakufu would opt to reach a compromise with the locals. "The Meiji government", however, "would no longer simply go along with the interests and demands of the local population of the periphery" and as a result was capable of establishing its authority despite the harsh reactions its reforms attracted. Esenbel, *Even the Gods Rebel*, 246.
[238] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 58–59.
[239] Yasuzo Horie estimates the amount assumed by the Meiji government was 500.000 Mexican dollars. In addition to this it also assumed 4 million dollars of debt from the former lords. Yasuzō Horie, "Japan's Balance of International Payments in the Early Meiji Period," *Kyoto University Economic Review* 24, 1 (56) (1954): 16–17, http://www.jstor.org/stable/43217340

samurai in 1872. These were redeemed in 1881 and 1899 accordingly.[240] Masanori Fukushima argues that the main reason was the Meiji government's intention not to give away control of the railroads by allowing the entrance of the foreign capital directly.[241] Thanks to the "modern" strategies adopted by the Meiji government, by the Sino-Japanese war, Japan was mostly not an indebted empire.[242] This was an important and clear advantage that can be seen from hindsight if one would compare the Ottoman and Japanese foreign debt management and the political ramifications indebtedness to Great Powers would cause in case of a demand to abolish extraterritoriality.[243]Although Nathan Sussman and Yishay Yafeh are overstating as they argue that the legal and institutional changes did not have an immediate or significant impact on the change of Britain's and other Great Powers' perception of Japan[244], they rightly point out to the highly risky venture of the Japanese government to cope with its foreign debt, by trading bonds in the London market and later by the adoption of the gold standard in 1897.[245] It is not the purpose of this

[240] Horie, "Japan's Balance of International Payments in the Early Meiji Period," 16-17.
[241] Masanori 昌則 Fukushima 福島, "わが国外資政策の実証的考察-累積債務問題によせて (Wagakuni Gaishi Seisaku No Jisshō-Teki Kōsatsu - Ruiseki Saimumondai Ni Yosete)," *經營と經濟 (Keiei to keizai)* 63, no. 4 (1984): 2.
[242] "To summarize, our country, which had been one-sidedly a debtor nation in the first years of the Meiji era, afterwards divested herself of this situation step by step the time of the Sino-Japanese war, came to hold a position where she time was she was neither a debtor nation, nor, and at the same time was she a creditor nation, to any appreciable extent." Horie, "Japan's Balance of International Payments in the Early Meiji Period," 18.
[243] In comparison to the amount of debt the Meiji government assumed from the Bakufu and the domains(see footnote 239), the Ottoman foreign debt right after the establishment of the Ottoman Public Debt Administration(1881) was estimated to be 141.505.919 Ottoman gold lira or 128.641.744 Sterlin. Biltekin Özdemir, *Osmanlı Devleti Dış Borçları: 1854-1954 Döneminde Yüzyıl Süren Boyunduruk, 1854-1914 Borçlanmaları Galata Bankerleri ve Osmanlı Bankası Düyun-u Umumiye İdaresi Türkiye Cumhuriyeti'nin Kabul ettiği Osmanlı Devlet Borçları*, 2. baskı, T.C. Maliye Bakanlığı Strateji Geliştirme Başkanlığı no. 2010/403 (Ankara: T.C. Maliye Bakanlığı Strateji Geliştirme Başkanlığı, 2010), 78.
[244] Their analysis disregards the fact that in analyzing the Japanese Modernization and Economic development in the Meiji era, economic development, legal reforms, institutional reforms and growing power of the Japanese military and its increasing technology are all contributing factors.
[245] Nathan Sussman and Yishay Yafeh, "Institutions, Reforms, and Country Risk: Lessons from Japanese Government Debt in the Meiji Era," *The Journal of Economic History* 60, no. 2 (2000): 442–443; 457, http://www.jstor.org/stable/2566379.

work to deal with the economic development of Japan during the Meiji period in detail. However, it constitutes an interesting and important contrast with the Ottoman and Egyptian experiences of modernization. Even though Japan was able to pay off its foreign debts by the end of the century, the Ottoman Empire and Egypt's foreign debts were an important pressure on their respective governments in their quest for sovereignty, and these debts always affected their efforts to abolish extraterritoriality negatively. The Crimean war was marking the beginning of the foreign loans[246] for the Ottoman Empire.[247] From 1854 onwards the Ottoman Empire was going to struggle with its foreign debt. The major difference between the Ottoman foreign debt and the Meiji debt was while the Meiji government was able to pay out the debt since was borrowing to create jobs or for projects such as the railroad constructions and it was on the receiving end of the war reparations such as the First Sino-Japanese War, the Ottoman government, was trading its bonds to close the budget deficit and this, naturally, was increasing the amount of the debt. This was a vicious cycle for the Ottomans and as Pamuk states, it was quite a profitable job for the European entrepreneurs as well.[248] The Ottoman foreign debt was getting out of control. Perhaps, Edhem Eldem's words summarizes the establishment of European control over the Ottoman economy: "The word had started to spread that simple monitoring of the Ottoman finances would no longer suffice to guarantee the survival of the Empire and that what was really needed was to place it under direct European

[246] This first foreign debt was obtained because of the negative impact of the Baltalimani Treaty of 1838 on the trade deficit, the insufficiency of the internal borrowings, the fact that it was impossible to afford war expenditures and also due to the existence of excessive capital in France and Britain. Özdemir, *Osmanlı Devleti Dış Borçları*, 48 The total amount of this loan was 3.300.000 Ottoman gold lira or 3.000.000 Sterlin. Özdemir, *Osmanlı Devleti Dış Borçları*, 63.
[247] Edhem Eldem, "Ottoman Financial Integration with Europe: Foreign Loans, the Ottoman Bank and the Ottoman Public Debt," *European Review* 13, no. 3 (2005): 434, doi:10.1017/S1062798705000554.
[248] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 117–19.

control."[249] Hence, the Great Powers established the Ottoman Public Debt Administration in 1881, which meant for the Ottoman government the loss of its control over the economy.

In 1805 Muhammad Ali Pasha[250] (1769-1849) was appointed as the governor of the province of Egypt right after the French occupation came to an end.[251] Muhammad Ali was an ambitious man, and he wanted to guarantee his post and "undertook various radical measures that changed Egypt's position within the Ottoman empire, strengthened its economic ties with Europe at the expense of older links with other provinces of the empire, and radically changed its social and cultural map."[252] Officially being an autonomous province of the Ottoman Empire since 1841[253], and a part of the Ottoman Empire since 1517, these reforms, extraterritorial privileges, and their consequences also had a great impact on Egypt.[254] Although Egypt became an autonomous province, the impact of the problems inherited from the Ottomans and reforms as well as capitulations and extraterritorial rights, became an integral part of the problems for nineteenth-century Egypt as well. "Thus, to compare Egypt and the Ottoman Empire in the 19th century means also to compare the ways in which they were exposed to European imperialism."[255] In the 1860s, Egypt was holding negotiations with the Great Powers for public loans to cope with

[249] Eldem, "Ottoman Financial Integration with Europe: Foreign Loans, the Ottoman Bank and the Ottoman Public Debt," 436.
[250] Or Mehmed Ali
[251] Khaled Fahmy, "The Era of Muhammad Ali Pasha: 1805-1848," in Daly, *The Cambridge History of Egypt. Vol 2, Modern Egypt, from 1517 to the End of the Twentieth Century*, 140.
[252] Fahmy, "The era of Muhammad Ali Pasha," 139.
[253] "On June 1, 1841 the sultan issued a *fîrman* naming Muhammad 'Ali governor of Egypt for life and granting his male descendants hereditary rights to office." Fahmy, "The era of Muhammad Ali Pasha," 175.
[254] Ragıp Raif, "Mısır Meselesi," in *Osmanlı Arap Coğrafyası ve Avrupa Emperyalizmi: Filistin-Basra Körfezi-Kızıldeniz-Kuzey Afrika diplomatik belgeler*, ed. Ali Akyıldız and Zekeriya Kurşun, Birinci basım, Tarih (Beyoğlu, İstanbul: Türkiye İş Bankası Kültür Yayınları, 2015), 355.
[255] Maurus Reinkowski, "Uncommunicative Communication: Competing Egyptian, Ottoman and British Imperial Ventures in 19th-Century Egypt," *Die Welt des Islams* 54, 3/4 (2014): p. 407, http://www.jstor.org/stable/24268895.

its financial problems to cover the expenses of loans and grand projects such as the Suez Canal. Nubar Pasha was an important actor in these negotiations.[256] Nubar Pasha, an interesting character who was appointed as the director of the foreign affairs, continued his contacts with the European authorities and also negotiated for the abolishment of the consular courts in Egypt.[257] As an able statesman, his comments in the report on the transformation of capitulations into "capitulatory treaties" he presented to Khedive Ismail(1830-1895) in 1867 is quite striking. While he speaks for Egypt, and even though consular jurisdiction in Egypt was a lot harsher than the rest of the Ottoman Empire, his commentary can well be applied to the context of the Ottoman Empire as well.:

> The jurisdiction which determines the relations between Europeans and the Government of Egypt, and the inhabitants of the country is no longer based on the Capitulations. The Capitulations exist only in name. They have been replaced by an arbitrary law of custom, varying with the character of each new diplomatic chief- a law based upon precedents frequently abusive, which has been permitted to take root in Egypt through force of circumstances and constant pressure and a desire to make easy the lot of the foreigner. It leaves the Government powerless in its relation to such foreigners and the people without any security that even-handed justice will be done. Such a state of affairs violates the Capitulations in both letter and spirit; it impedes the country in the development of its resources; it prevents it from putting its true riches at the service of European enterprise and capital; it destroys its progress and brings moral and material ruin in its train.[258]

[256] "Nubar Nubarian (1825-99), better known as Nubar Pasha, one of the most important personalities of his time and one of the few men with statesman-like qualities that nineteenth-century Egypt produced. Ambassador extra- ordinary to the Porte, emissary to the courts and governments of Europe and England, Nubar held important positions under six Viceroys, served as foreign minister in name or in fact for over two decades, and was three times President of the Council of Ministers. Nubar served during a period of flux and rapid change when Egypt was acquiring the trappings of a European state but also passing through a profound economic and political crisis that would shake its institutions and seal its fate for years to come. Because of this, Nubar was able to develop his considerable personal gifts and have a real impact on events." F. Robert Hunter, "Self-Image and Historical Truth: Nubar Pasha and the Making of Modern Egypt," *Middle Eastern Studies* 23, no. 3 (1987): 363, http://www.jstor.org/stable/4283190.
[257] F. Robert Hunter, *Egypt Under the Khedives, 1805-1879: From Household Government to Modern Bureaucracy* (American Univ in Cairo Press, 1999), 173–74.
[258] Brinton, *The Mixed Courts of Egypt*, 8–9.

Any statesmen of Japan, the Ottoman Empire, the Qing Empire, or Egypt would approve Nubar Pasha's comments on the capitulatory regimes. The question of agency appears once again at this point. In contrast to the narrative that portrays the non-European powers as pacified entities, statesmen such as Nubar Pasha were trying to find solutions to the problems created by the extraterritorial regimes and unequal treaties. One such solution for Nubar Pasha was also known as his grand project: The Mixed Courts of Egypt.

One important assessment of the impact of the capitulations on the legal autonomy of Egypt is Mark Hoyle's interpretation of the capitulations from the point of view of Islamic Law. As stated above, the capitulations were initially granted to the foreign subjects to place them within a legal framework. Hoyle argues that since from the Islamic point of view "law was applied by virtue of origin, nationality, religious or tribal affiliation of a person" this constituted a contrast with the Western legal tradition which applied law based on territoriality. Therefore, he explains, initially "there was nothing strange or objectionable to a Muslim in allowing foreigners to have recourse to their own laws in a Muslim country."[259] In Egypt, different from the Ottoman consular jurisdiction, "any case of criminal or civil was judged by the defendant's consul according to the defendant's law."[260] Egypt was also affected by the Tanzimat ideals and carried out reforms in its institutions, particularly legal institutions. However, the legal transplantations that had been carried out in the Ottoman Empire from the 1840s on were not adopted by the Egyptian government.[261] As Hoyle also points out, in the nineteenth century after the decree of 1841, Egypt was overwhelmed with consular courts of different European powers, and "the

[259] Mark S. W. Hoyle, "The Origins of the Mixed Courts of Egypt," *Arab Law Quarterly* 1, no. 2 (1986): 221, doi:10.2307/3381481.
[260] Hoyle, "The Origins of the Mixed Courts of Egypt," 222.
[261] Hoyle, "The Origins of the Mixed Courts of Egypt," 222–23.

chaotic nature of dispute settlement" in the country was signaling the necessity of reform.[262] The answer to these problems was the Mixed Courts project of Nubar Pasha.

4.2. The birth of the Mixed Courts of Egypt

The establishment of the mixed courts was a result of the growing concerns in Egypt in the chaotic circumstances caused by the consular courts. It is the privileges given to the European powers that paved the way for the legal autonomy gained by the European powers from the mid-sixteenth century up until the nineteenth century.[263] For Hoyle, this was only natural from a legal point of view. There was also a commercial aspect of this issue, as conducting commerce with the foreign merchants was something desired. However, there was a contrast between the rights given to foreign merchants in Egypt and the other parts of the empire. When the merchants were immune from arbitrary taxation in the other parts of the empire, they were immune from all direct taxation in Egypt. Moreover, while the foreign merchants were tried in the Ottoman criminal courts in the case of a criminal offense, in Egypt they too were subjected to consular jurisdiction. Lastly, in Egypt they were free from domiciliary search unless the consul general was present, while the authorities were only advising the council before searching in the other parts of the empire.[264] This excessive freedom enjoyed by the foreign merchants in Egypt caused huge economic problems for the Egyptian government and it was necessary to find a solution to the issue of the consular courts.[265]

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[262] Hoyle, "The Origins of the Mixed Courts of Egypt," 224.
[263] Hoyle, "The Origins of the Mixed Courts of Egypt," 220.
[264] Hoyle, "The Origins of the Mixed Courts of Egypt," 221.
[265] "The chief vehicles of this penetration were the consular offices of the European powers and foreign banking capital. The European consuls had formal political power and also wielded informal influence through contacts inside the administration. After 1854 their influence was broadened and

One should be careful in portraying the non-European entities as passive actors in this process of imposition of European legal institutions upon the non-European states. The effort of establishing mixed courts in Egypt disproves this misinterpretation. This was an opportunity for the local actors to reform the existing institutions and strengthen their authority. Therefore, Khedive Ismail, who was determined to create an empire, was aware that he needed to furnish Egypt with a "stable and just legal system as protection for the foreigners and natives involved."[266]

Ismail was an ambitious man, and a determined modernizer, so he used every possible way to realize his modernization project. He was able to get full autonomy from Constantinople in negotiations with foreign powers concerning the economic development of the country.[267] Thanks to his ability to negotiate, this was the beginning of his efforts in the legal reformation in Egypt.[268] The chaotic condition of the consular jurisdiction in the country was an important source of motivation for Ismail's project of establishing the Mixed Courts in Egypt. There was bias, prejudice, and it was taking longer to get a decision out of the courts since the consuls were reluctant to upset their own nationals with their judgments.[269] Therefore, this chaotic legal structure needed to be replaced if Ismail were to realize his dream: building an empire out of Egypt. Together with the firmans obtained in the years 1867, 1873, and 1879, the government of Egypt was granted permission to introduce legal reforms.

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deepened, partly because their governments intervened more in Egyptian affairs, but also because of the rapid growth of a large foreign colony, to whose interests the consuls and their governments had to be sensitive." F. Robert Hunter, "Egypt Under the Successors of Muhammad Ali," in Daly, *The Cambridge History of Egypt. Vol 2, Modern Egypt, from 1517 to the End of the Twentieth Century*, 187.

[266] Hoyle, "The Origins of the Mixed Courts of Egypt," 224.

[267] BOA, İ.MTZ.(05)-20/839 (June 8, 1867) "That the governor of Egypt shall be called Khedive and shall no longer be called governor, and that he shall keep the titles of 'vizier' and 'pasha'", BOA, A.{DVN.MNH – 17/11 (June 8, 1867). "That the title of Khedive was conferred to Ismail Pasha, the governor of Egypt and that he was given authority and permission in some matters"

[268] Afaf L. a.-S. Marsot, "The Porte and Ismail Pasha's Quest for Autonomy," *Journal of the American Research Center in Egypt* 12 (1975): 95, doi:10.2307/40000011.

[269] Hoyle, "The Origins of the Mixed Courts of Egypt," 226.

However, on the issues that are concerning the Ottoman Empire and its relations with the foreign powers, the approval of the Sublime Porte was necessary. As a result of this permission, the legal structure of Egypt developed differently than the Ottoman legal structure. After these developments, Khedive Ismail sent Nubar Pasha to Europe, and he started negotiations for the establishment of the Mixed Courts to replace with the seventeen consular courts in Egypt.[270] As Hoyle suggests, Nubar Pasha and Khedive Ismail wanted to ensure: "justice in claims against the Egyptian government, justice between litigants of a different nationality, protection for the foreigners from the risk of arbitrary government actions."[271]

The most important emphasis of Nubar Pasha in his proposal on the establishment of the Mixed Courts was the independence of judiciary from the government but also from the consulates: "The principle is complete separation of justice from the administration. Justice must emanate from the Government. It must not depend upon it. It should no more depend upon the Government than upon the consulates."[272] When, however, Nubar Pasha proposed his plan to the Great Powers, there were oppositions, particularly from France, which held great extraterritorial privileges. The negotiations on the establishment of the Mixed Courts in Egypt lasted for years and the contemporary events in Egypt and Europe affected its process.[273] Jasper Brinton relates the "diplomatic battle" which shows that the agency of Egypt becomes much more crucial. There were different opinions on the part of the Great powers regarding the Mixed Courts, however, Nubar Pasha and his fellow statesmen

[270] Sevda Özkaya, "Modernleşme Sürecinde Mısır'da Karma Mahkemeler Kurulması Meselesi," *Electronic Turkish Studies* 9, no. 4 (2014): 935; BOA, İ..MTZ.(05) 21 / 873. (April 19, 1870)
[271] Hoyle, "The Origins of the Mixed Courts of Egypt," 228.
[272] Brinton, *The Mixed Courts of Egypt*, 9.
[273]"It was a period of engrossing diplomatic interest, replete with historic sidelights and human touches, enlivened by the opening of the Suez Canal, and interrupted by the Franco-Prussian War. In turn the stage moves from Cairo to Constantinople, from Constantinople to Paris, from Paris to London, and so through the capitals of Europe." Brinton, *The Mixed Courts of Egypt*, 13.

were benefiting from these differences of opinion and trying to get a deal through the use of media and negotiations in person to reach an acceptable outcome for Egypt.[274] In fact, what is striking about Nubar Pasha's tour is that it is a rather geographically narrower and intensified "Iwakura Mission" of Egypt.[275] Perhaps, in the case of *The Nubar Mission*, Egypt eventually did get the result it wanted. [276]

In the Ottoman Imperial Archives, two documents reveal the lengthy discussions between Egypt, the Great Powers, and the Sublime Porte. The first document specifies the reasons for the establishment of Mixed Courts in Egypt and its regulations[277] and the second document stresses that while the Mixed Courts are not exactly the solution the government would find satisfactory, it nevertheless was a necessary measure[278].

The document dated 1870 discusses why the establishment of the Mixed Courts in Egypt was necessary by giving an account of how in Egypt the consular jurisdiction was creating problems between the foreign subjects and the local population that is defined as "abuse"[279] of the rights of the people. The document repeatedly emphasizes the necessity to save the trial of the cases between foreign subjects and the local people from the hands of the consular courts and points out the establishment of the Mixed Courts as a reasonable solution. The following pages of

[274] Brinton, *The Mixed Courts of Egypt*, 14.
[275] "For the next eight years, Nubar fought hard to gain big-power approval of his proposals. Nubar visited Bismarck in Berlin, Menabrea (the Italian premier) in Florence, and conducted a press campaign in England where he singlehandedly put together a lobby in favor of his program. He convened an international commission and showed himself willing to modify important parts of his original proposal in order to save the project (thus Nubar agreed that a majority of judges would be European)". Hunter, *Egypt Under the Khedives, 1805-1879*, 175.
[276] "[…]It was a period of engrossing diplomatic interest, replete with historic sidelights and human touches, enlivened by the opening of the Suez Canal, and interrupted by the Franco-Prussian War. In turn the stage moves from Cairo to Constantinople, from Constantinople to Paris, from Paris to London, and so through the capitals of Europe." Brinton, *The Mixed Courts of Egypt*, 13.
[277] BOA, İ.MTZ(05).21/873. (April 19, 1870)
[278] BOA, İ.MTZ(05).21/895. (July 18, 1872)
[279] The word "*sū-i isti'māl"* is used in this document.

this document define the place where the first courts would be established[280] and the limits of the jurisdictional authority of the Mixed Courts.[281] It also indicates, moreover, that the establishment of a council of appeals in Alexandria whose members will be composed of four European and three Egyptian judges. In the mixed courts as well as in the council of appeals, the chief judges will be one of the four European judges.[282]

In the first document from the year 1870, it is stated that the proposal was not approved by the Sublime Porte because it did not want to accept the application of foreign law in the cases involving the locals. While the Porte acknowledged the necessity of legal reforms in all parts of the empire, it stated that they cannot accept an attempt to give the foreigners the right to enforce their own laws over the Muslim populations of the Empire.[283] In the response coming from the Sublime Porte, discontent towards Nubar Pasha and Khedive is explicitly stated as it is asserted that they exceeded their authority and that carrying out negotiations with other states does not fall within their authority:

> Since accepting that a province of our empire to make some arrangements with treaty states for reform only for itself would mean overturning all of the main principles of our empire based on the policy of unity of government, it is obvious that the Sublime Porte would not allow such a thing.[284]

However, Ismail Pasha later obtained the right to negotiate with the foreign powers on behalf of Egypt from the Sublime Porte. Thus, the negotiations with the Great Powers were carried out, the Sublime Porte's dissatisfaction ceased to be an obstacle,

[280] "Article 1: Three courts of first instance shall be established in Alexandria, Cairo and Zagazig or Ismailia."
[281] Most importantly it clearly states that cases between Europeans and locals or between European parties falls under the authority of these courts. It also specifies the number of judges as 3 Europeans and 2 Egyptians.
[282] BOA, İ.MTZ(05).21/873. (April 19, 1870)
[283] "It is obvious that we cannot remain indifferent to an attempt in our country that will empower foreigners to enforce their laws." BOA, İ.MTZ(05).21-873. (April 19, 1870)
[284] BOA, İ.MTZ(05).21/873. (April 19, 1870)

and in 1872 the Mixed Courts of Egypt was finally inaugurated.[285] It was going to begin operating in 1875.

The Egyptian Mixed Courts is a significant turning point as it stresses the independence of the judiciary from the government as well as from the consulates and as it marks a new era for the legal institutions in Egypt. Perhaps because of Nubar Pasha's negotiations and interviews with the European authorities, especially with the British authorities such as Lord Granville, the Egyptian Mixed Courts was seen as a potentially successful model for all the non-European states wishing to abolish extraterritoriality and adopt European law. The proper functioning of European law and the power of this new institution to solve the problems caused by consular jurisdiction would promise a successful model for countries such as Japan. Bearing these in mind, Fukuchi Genichirō who was the first secretary at the Ministry of foreign affairs together with Shimaji Mokurai, a Buddhist monk of pure land Buddhist sect who was eager to study "Eastern religions", set off to study and observe the legal institutions and laws of Greece, the Ottoman Empire, and Egypt. This was marking the beginning of what is called in Japanese historiography as "Egypt Studies" (*Ejiputo kenkyū*). This episode of Japanese legal modernization provides an opportunity to see three different experiences of struggle against the legalized hegemony which was at the center of the nineteenth-century global order.

4.3. Fukuchi Genichirō's arrival in Istanbul

4.3.1. An analysis of the political and legal institutions

After the discussions with Lord Granville, Fukuchi and Shimaji were ordered to conduct on-spot research in the Ottoman Empire and Egypt, as well as Greece, to

[285] BOA, İ.MTZ(05).21/895. (July 18, 1872)

study their judicial systems. On February 6, 1873(or Meiji 6) Iwakura Tomomi officially announced that Fukuchi was appointed to study the legal institutions and realities of Egypt and the Ottoman Empire and that the mission is also departing from Paris.[286] This is marking the official start of Fukuchi and Shimaji's journey to the "East", parting their ways with the rest of the embassy. The first stop of the duo was Greece. "Fukuchi met Greek Foreign Minister, who promised to assist them in their inquiries at the Greek Ministry of Justice."[287] The news of their arrival was also getting attention in the Ottoman media. A brief note about the arrival of Fukuchi Genichirō in the state-owned newspaper Takvîm-i Vekâyi was published.[288] However, as Nakaoka Saneki also states, the Greek authorities were not so eager to help him, and as a result, Fukuchi decided to continue to the second stop: Constantinople. However, his timing could not be worse as he was unable to meet Foreign Minister Server Pasha since at that moment the Ottoman government was conducting negotiations with Russia.[289]

Another issue about Fukuchi's arrival in Istanbul is rather curious. As I have been looking for any mention of him or any Japanese official requesting to get an appointment with the Foreign Minister, or any news about his arrival in the newspapers, I was able to find no single document that is mentioning his name or any Japanese official or a monk in Constantinople. Looking into the Ottoman

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[286] Ministry of Foreign Affairs 外務本省, 日本外交文書デジタルアーカイブ 条約改正関係第 1 巻, Nihon gaikō bunsho dejitaru ākaibu jōyaku kaisei kankei dai 1-kan (Digital Archive of the Japanese Diplomatic Documents Treaty Revision Volume 1), 岩倉大使等ヨリ三条太政大臣等宛 Iwakura Taishi-tō Yori Sanjō Dajōdaijin-tō ate, (From Ambassador Iwakura Addressing to Prime Minister of the Imperial Government Sanjo), 明治六年二月六日(February 2, 1873).

[287] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 13.

[288] *Takvim-i Vekâyi, "*Mevâdd-ı Hâriciye (Foreign News)," April 7, 1873 February 8, 1290(AH), accessed October 20, 2020 His name is not mentioned, he is referred as "the secretary of the Japanese ambassadors."

[289] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 13.

Archives, it was as if he never came to Constantinople. Fukuchi wanted to continue his research even though he could not have an audience with the Foreign Minister but then the authorities of the Ottoman Empire warned him that it was forbidden by the state to have a look at the "laws and regulations" of the Commercial Mixed Tribunals of the Ottoman Empire.[290] Consequently, Fukuchi's stay in Constantinople was not going to produce the outcome he desired. After the way he was treated in Athens, now he was not even taken into account by the Ottoman authorities. However, to his luck, he was able to meet General Nikolay Ignatiev(1832-1908), the Russian Ambassador to Constantinople whom he met before in Japan.[291] When Fukuchi asked his opinion on the Commercial Mixed Tribunals in the Ottoman Empire, Ignatiev told that it would not be worth to examine at all. Just as Lord Granville, Ignatiev also advised him to study the soon to be established Mixed Courts of Egypt.

Fukuchi is explicit about his negative ideas about the Ottoman Empire. He describes the legal institutions of the Ottoman Empire as despotic, arbitrary, and he judges that thanks to the extraterritorial treaties the foreigners could protect themselves from them.[292] He even requested to be under the protection of France upon his arrival, and this request was accepted.[293] This reveals the complexity of the nineteenth century inter-state relations. A Japanese official studying the extraterritorial regime in the Ottoman Empire received extraterritorial rights during his country's mission to abolish extraterritoriality. Fukuchi preferred to be under the

[290] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 14.
[291] "Fukuchi had known Ignatiev, since the two had met on occasions of negotiation between Japan and Russia, during the last days of the Shogunate era." Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 13.
[292] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 14.
[293] Andrew Cobbing, "A Japanese protégé in Pera," 198.

protection of the French embassy rather than falling into the hands of a "despotic" and "arbitrary" legal system, in his words.

4.3.2. Tackling a problem of documentation

Before going into the analysis of Fukuchi's report, why there is no mention of him in the local newspapers or the archives is an important question to ask. Because, as discussed above, his arrival in Athens did get the attention of Takvîm-i Vekâyi. One explanation would be the Ottoman government's occupation with the negotiations with Russia, as Nakaoka also argues. However, from the perspective of the Ottoman Empire, his arrival and a possible audience with Server Pasha would mark the start of the official relations between Japan and the Ottoman Empire. Considering the fact that he was not an official of high rank, the Ottoman government would have opted to ignore him simply because of this reason. These and many other possible explanations on why Fukuchi's stay at Constantinople was not mentioned by the Ottoman officials or the newspapers are not verifiable. However, one thing is certain: his visit to the Ottoman capital was not of significant value to the Ottomans. This problem of documentation also reflects the Ottoman-Japanese relations in the coming years. There will be no official treaty signed between the two states until the end of the Great War.[294] The bilateral relations between the Ottoman Empire and Japan, though unofficial, will be covered in the following chapter in detail.

4.3.3. Fukuchi and Nubar Pasha's encounter

General Ignatiev and Fukuchi's encounter was leading Fukuchi to his research in Egypt. Unable to find any fruitful solution in Athens and Constantinople, the Russian

[294] The official relations between two countries started with the signing of the Treaty of Lausanne on July 24, 1923.

ambassador introduced Fukuchi was to Nubar Pasha. Thus, it was at this time that Fukuchi had the chance to meet Nubar Pasha in Constantinople, who was negotiating with the Sublime Porte on the issue of the Mixed Courts at that time.[295] Japan was aiming to modernize the legal institutions to be able to abolish extraterritorial treaties which were putting heavy pressure on the Meiji government, just as capitulations were putting heavy pressure on the Khedive of Egypt. It is obvious that this episode, the Japanese research on the Mixed Courts of Egypt, of the long efforts made by Japan that took almost half a century to come on equal terms with the Western powers until when they could abolish extraterritoriality in 1894[296] had a particular significance. However, one should know that the issue of Mixed Courts for Japan was no novelty when Fukuchi was sent to Egypt to observe the newly established institution. Japan was regarded among "the uncivilized Orient" and for them to modernize their legal institutions and therefore to revise the unequal treaties there needed to be stages which they should follow, as mentioned in the previous chapters, and this would bring them to the point where they actually can abolish those unequal treaties. This is explicitly stated by the Foreign Secretary Earl Granville in his conversation with Iwakura and other delegates of the Mission.[297] According to Nakaoka, the establishment of mixed courts in Japan was already planned by Britain and thought of as a step forward for Japan. Therefore, after a stay of thirteen days in

[295] BOA, İ.MTZ.(05) 21/895. (July 18, 1872)
[296] Treaty of Commerce and Navigation between Great Britain and Japan was signed on July 16, 1894. Harrison & Sons, St. Martin's Lane, Treaty of Commerce and Navigation between Great Britain and Japan, 1894, Foreign, Commonwealth & Development Office.
[297] Ministry of Foreign Affairs 外務本省, 日本外交文書デジタルアーカイブ 条約改正関係第 1 巻, Nihon gaikō bunsho dejitaru ākaibu jōyaku kaisei kankei dai 1-kan (Digital Archive of the Japanese Diplomatic Documents Treaty Revision Volume 1), 英国外務に於ける岩倉大使ト同国外相トノ對話書, Igirisu gaimu ni okeru Iwakura taishi to dōkoku gaishō tono taiwa-sho, (The Report of the Dialogue Between Ambassador Iwakura present in Britain and the Foreign Secretary of the same country).

Constantinople, Fukuchi, and Shimaji left for Egypt.[298] Moreover, as Fukushima Sayako stated, there was more British subject than others in Japan and therefore Britain's objective was to establish a similar system with Egypt, without putting its subjects under the judiciary of the local law.[299] Fukuchi observed the legal structure in Egypt and prepared an explicit report on the Mixed Courts and in the end, presented his judgment on whether Japan should adopt this system.

4.4. The Fukuchi Report

4.4.1. The analysis of the mixed courts

The importance of the research of Fukuchi Genichirō lies in two aspects which constitute one of the main discussions of this work. First, it was one of the first serious attempts of the Japanese government to make on-spot research for the legal reforms necessary for the abolishment of the unequal treaties. Therefore, this research was an important turning point, and it followed a series of other research and created literature that is called today Egypt studies (*Ejiputo Kenkyū エジプト研究* in Japanese). Second, thanks to this mission of Fukuchi, for the first time in history the Ottoman Empire and Japan made contact. It was also thanks to these researches that marked Japan's encounter with Islamic Law as the Egyptian laws started to be translated into Japanese.[300] Although there was no official relationship

[298] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 16.

[299] Sayako 小夜子 Fukushima 福島, "領事裁判と明治初年の日本 Ryōjisaiban to Meijishonen No Nihon," *オリエント Orient* 23, no. 2 (1980): 101, doi:10.5356/jorient.23.2_99.

[300] Sayako 小夜子 Fukushima 福島, "明治初年の日本におけるイスラム法との出会い Meijishonen No Nihon Ni Okeru Isuramu-Hō to No Deai (Japanese First Contact with Islamic Law in Early Meiji Era): 条約改正期のボアソナードとイスラム法をめぐって Jōyaku Kaisei-Ki No Boasonādo to Isuramu-Hō O Megutte (Concerning Dr. Boissonade and Islamic Law at the Time of Treaty Revision)," *宗教法 (Religious Law)* 1985.3 (1985): 8–11.

between the two countries and that it was only when two sides signed the Treaty of Lausanne in 1923, this was the beginning of a long but unofficial relationship between the two nations, what is termed by Selçuk Esenbel as "twilight diplomacy".[301] In the last chapter of this work, this second aspect of Fukuchi's research will be discussed in detail.

Fukuchi begins his report on the Egyptian Mixed Courts with an assessment of the contemporary history of Egypt and the Ottoman Empire. He mentions the legal situation and the extraterritorial agreements between the Ottoman Empire and Western Powers, which were signed because of the problems the despotic rule of the Sultan caused to European powers.[302] Therefore, we can say that Fukuchi has missed the point that the initial grants to the foreign merchants were transformed into capitulatory treaties only towards the mid-nineteenth century and that it was not the despotic rule that caused the problem, it was the legal understanding of the Empire that necessitated to place foreign merchants in a legal framework in the first place and as the trade balance changed significantly it was extended by new agreements and got to a point where it started to cause great problems for the Ottomans especially in the legal system.[303] With hindsight, it is possible to say that this was a result of a larger process that also created the legalized hegemony of the Great Powers over not only their colonies but also states such as the Ottoman Empire, the Qing Empire, and Japan. However, understanding some other nuances, Fukuchi states that Egypt was nothing but a "nominal tribute" state under the Ottoman Empire, and "its diplomatic engagement is quite similar or even more advanced than those of an independent country, a fact which the Turkish government finds

[301] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 271-307; 444
[302] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 14.
[303] Eldem, "Capitulations and Western Trade," 297.

unpleasant."[304] This, as he continues, causes the problem of not being able to implement these legal reforms without the approval of the government in Istanbul. However, as Nakaoka quotes he says that:

> As for our country, it has been an independent country as far as we can remember and does not fear restriction by any other country. Moreover, since the terms of our Treaties with Foreign Powers have already expired, our negotiations of the Treaties revision, even if they resulted in the introduction of the Mixed Courts system, would produce more favorable results than in the Egyptian case, depending of course on our efforts at negotiation.[305]

It is clear that according to his assessments and as a result of his research, the Mixed Courts system is not so much a favorable system for Japan to adopt. However, as it can be inferred from his comparison, for him, adopting this system would be a good first step to abolish the unequal treaties with the foreign powers, and later being an independent country, Japan can negotiate and even come on equal terms. It seems that the developmentalist attitude of the West towards the issue of the legal reforms made him look at the situation more realistic rather than idealistic. This is evident in his words at the beginning of the report, as he says that "the Government seems to be resolved to make it clear that the right of jurisdiction over foreigners in our country should wholly belong to our state." He continues, probably exhausted because of the long negotiations the mission made so far in Europe, "however, judging by the difficulty experienced by our Mission in its negotiations with the states concerned, the prospects for the revision to the treaties do not seem very bright."[306] Although it is not certain whether Fukuchi had this realistic approach from the beginning, but it would not be surprising that any member of the Iwakura Mission to change their

[304] Eldem, "Capitulations and Western Trade," 297.
[305] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 15.
[306] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 12.

perception towards a more realistic tune after the long and exhausting negotiations they carried out without any significant achievement. Fukuchi's approach to the position of Japan and what should be done next, even though it has a realistic tone, does not completely disregard the power, Japan has compared to the Egyptian government. He stresses many times that Japan does not need to guarantee anything to the foreign powers and the treaties have expired a long time ago. This, for him, is one of the advantages Japan has for the next steps to be taken after adopting a more favorable version of the Mixed Courts.[307] As a result, he concludes the first part of his report suggesting that the Mixed Courts should be adopted by the Japanese government: "I may conclude that if the Japanese government has an intention of expanding foreign trade in the years to come, it should decisively accept the policy of introducing the Mixed Courts system as soon as possible."[308] Fukuchi was well aware that Britain desired to introduce Mixed Courts in Japan and there seemed no other way to continue trade. Although he advocated the adoption of the Mixed Courts system, Fukuchi cautioned that there should be some changes with Japan's proposal, especially the points the Egyptian government was having trouble with. The first point he stresses is the number of judges. He suggested that they should not readily accept if foreign powers demand that their judges should outnumber the Japanese judges. Even if the foreign judges outnumber the Japanese at first, he adds, Japan should train young judges and set a schedule and in time their number should exceed those of the foreign judges. The Russian Ambassador and Nubar Pasha advised that the Japanese judges should outnumber the foreign ones, limiting their number to one-third of the total number.

[307] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 24.
[308] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 15.

Nubar Pasha's intervention and eagerness to help is interesting and needs attention. Nubar Pasha was transferring his experience to Fukuchi so that he could be able to stress to the points that need caution when proposing the Mixed Courts system to his government. Communicating in French as most of the educated statesmen and diplomats of the time, these two men understood each other's concerns and Nubar Pasha's help proved to be crucial for Fukuchi. In other words, this episode is another way to see the struggle of the non-European statesmen against the Western legalized hegemony in the nineteenth century, especially the global superpower of Britain. Moreover, In the light of these suggestions, it is evident that Fukuchi's realistic approach does not mean for him to give away anything too quickly. On the contrary, he suggests that Japan should be insisting on the terms favorable for them from the beginning since otherwise it would be too difficult to reverse. Another issue was to place criminal cases under Mixed Courts, which Egypt failed to do. Nakaoka claims that, even though it would be under the Mixed Courts, that might not be effective to prevent the abuse, since "the principle of absolute majority and the consular intervention still existed in the criminal cases at the Mixed courts."[309] Thus, if the criminal cases should be placed under the Mixed Courts to stop the abuse of the consular courts, the issue of absolute majority and intervention of the consuls had to be rejected in the first place. It is important to remember at this point that foreign powers had no intention to give such extended rights to Japan at that time and the two years of efforts by the Iwakura mission achieving nothing for the revision of the treaties proves this argument.

[309] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 24–25.

4.4.2. Fukuchi's suggestion to the Meiji Government

Fukuchi conducted his research on the legal institutions of Egypt, especially on the Mixed Courts, which would be opened in the year 1875. He prepared a report which he would later present to the Japanese Foreign Ministry.[310] In his own words, he was lucky during his research for many reasons. First, the Russian Ambassador to Constantinople happened to be an old acquaintance, and Nubar Pasha was in the city as well, as he was negotiating with the Porte for the structures and implementation of the soon to be established Mixed Courts of Egypt. It seems as if Fukuchi were directed from London, Paris, and Constantinople to Cairo where he would end up examining the Mixed Courts of Egypt. However, it seemed to him that he did not have many options either. The fact that he wanted to be under the protection of the French Embassy throughout his stay in the Ottoman Empire and Egypt shows that he did not trust the legal structure and laws. Moreover, the fact that he was not very well received in Greece and that he was not getting enough attention and "mention" in Constantinople probably affected his decision making. Moreover, when he heard that the British Ambassador to Japan asked the British Embassy in Constantinople for the investigation of the laws and regulations of the Mixed Tribunals in the country, Fukuchi was quite convinced that there was no other way to find a better solution to the question of consular jurisdiction.[311]

Before he gave his advice to the government whether the Mixed Courts system should be adopted or not, he, first of all, underlined that Egypt is a protectorate, it is placed under the authority of the Ottoman Empire, and that Japan has been and will be an independent country. He then builds up his argument on this comparison and

[310] Genichirō 源一郎 Fukuchi 福地, 外国人立合裁判報告書 Gaikokujin tachiai saiban hōkoku-sho (Report on the Mixed Courts), July 17, 1873 明治 6 年 7 月十七日, Cabinet Library.

[311] Fukushima 福島, "領事裁判と明治初年の日本 Ryōjisaiban to meijishonen no Nihon," 109.

states that the Mixed Courts system would prove to be much more effective in Japan than in Egypt as an independent country. He states that some rules need to be changed while adopting this system, as he was told by Nubar Pasha.[312] One strong stress of Fukuchi is on the failure of the Iwakura Embassy to fulfill its objective. As seen in the embassy's discussion with Lord Granville, what the Great Powers, such as Britain, have in their minds for Japan is a development of the legal structures of Japan in stages. Mixed Courts would be adopted, first, the civil cases would be tried under them and if it proves to be successful, then the criminal cases would start to be tried there and finally, if this all works out well the revision of treaties on equal terms would be possible.[313] He cautions that in adopting this system no privileges and exceptions should be granted to the treaty powers as the treaties Japan had signed with them should have been expired a decade ago. He argues that there can be more foreign judges than the Japanese judges on the condition that their duty in the courts would be fixed to a certain time limit and that in time the foreign judges would be replaced by the Japanese judges who are going to be trained accordingly.[314] All in all, Fukuchi advised the Meiji government to adopt the Mixed Courts system as a first step towards acquiring full sovereignty in the nineteenth-century international order.

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[312] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 15–16.

[313] Ministry of Foreign Affairs 外務本省, 日本外交文書デジタルアーカイブ 条約改正関係第 1 巻, Nihon gaikō bunsho dejitaru ākaibu jōyaku kaisei kankei dai 1-kan (Digital Archive of the Japanese Diplomatic Documents Treaty Revision Volume 1), 英国外務に於ける岩倉大使ト同国外相トノ對話書, Igirisu gaimu ni okeru Iwakura taishi to dōkoku gaishō tono taiwa-sho, (The Report of the Dialogue Between Ambassador Iwakura present in Britain and the Foreign Secretary of the same country), 227.

[314] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 24.

The Fukuchi report is an important beginning for the Japanese quest for sovereignty in the early Meiji period. Throughout the nineteenth century, Japan continued looking into ways and possibilities to abolish extraterritoriality and sign new treaties on equal terms with the Great Powers. This shows that Japan was not a passive agent. However, it is clear that Fukuchi was approaching this quest for abolishing extraterritoriality for the time being as a utopian ideal. He was under the influence of Ignatiev and Nubar Pasha. Moreover, he was confident that the establishment of Mixed Courts in Japan would only be a temporary solution as he argued that the unequal treaties have already expired and neither the Great Powers were in a position where they can demand more privileges in the courts nor Japan was as desperate and vulnerable as Egypt. However, one of the most important aspects of Fukuchi's research is the way he perceived the Ottoman legal system and the fact that he felt the need to receive the legal protection of the French Embassy. This detail reveals the complex nature of diplomatic relations in the nineteenth century. It is ironic enough that a junior official of a country that is under extraterritorial regime felt the need to obtain extraterritorial privileges in the country which he visits for the very purpose of studying its legal institutions to reach the ultimate aim of his government: abolishing extraterritoriality. It can be argued that he is under the influence of the negotiations he witnessed during the Iwakura Mission that revealed the hegemonic power of the major Western powers who did not want to give up the treaties. This influence can also be seen in his proposal to the Meiji government to establish Mixed Courts in Japan with some reservations as he sees that this is inevitable. Though not as explicitly stating as Fukuzawa Yukichi, he in a way argues that Japan needs to complete its development from a semi-civilized to a civilized state by following the necessary stages of civilization.

The Japanese research on the Egyptian Mixed Courts did not end with the Fukuchi report. At the request of the Iwakura Mission, the government immediately began translating the laws used in the Egyptian Mixed Courts. The translation was done by Mitsukuri Rinshō, who was the director of the translation bureau of Daijō-kan(太政官)[315] at that time, and they were completed in 1874.[316] Fukuchi's suggestion was rejected, as the Japanese government was not satisfied with the report. The investigation on the Egyptian Mixed Courts, however, continued.[317]

4.5. The Japanese research on the Mixed Courts of Egypt after the Fukuchi Report

4.5.1. The Davidson Report

Four years after Fukuchi's research, the new Meiji government ordered a British legal advisor, who was introduced to the Ottoman Ambassador to the British Empire by Terashima Munenori via a letter he sent to the Ambassador of Japan to Great Britain, Ueno Kagenori. In the letter Terashima stresses the need to establish relations with the Ottoman Empire and that he is sending a diplomat to study the legal institutions in Egypt.[318] This diplomat is John Richard Davidson who was hired by the Ministry of Technology and Industry as an advisor.[319] He also conducted research and presented two reports on the Mixed Courts of Egypt to the ministry, the first of which was stating some realities of the mixed courts, he conducted this

[315] The Grand Council of State (1868-1885)
[316] Fukushima 福島, "領事裁判と明治初年の日本 Ryōjisaiban to meijishonen no Nihon," 109.
[317] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 32.
[318] Ministry of Foreign Affairs 外務本省, 日本外交文書デジタルアーカイブ第 8 巻, 土耳其国トノ通交ニ関スル件 Nihon gaikō bunsho dejitaruākaibu dai 8-kan, Toruko kuni to no tsūkō ni kansuru ken (Digital Archives of the Japanese Diplomatic Documents Vol.8, Regarding the Matters Concerning Friendly Relations with Turkey), July 12, 1875 (明治 8 年七月十二日).
[319] Cassel, *Grounds of judgment*, 153.

research almost two years after its establishment. So, he was in a more advantaged position compared to Fukuchi Genichirō as he was able to observe what is functioning and what is not. Davidson raises three points in his second report in which he makes his analysis on the institution, and states that unless Japan would reconstruct its entire judicial system and laws and regulations, the Western powers would not give up their extraterritorial rights. This is an important realization on the part of the Meiji government. Second, the adoption of the Egyptian model would be "inconsistent with the dignity of Japan, with the advancement of the country, and with the intelligence, perseverance, spirit and patriotic enterprise of her people."[320] This is another statement after Fukuchi that attempts to distinguish Japan from Egypt and the Ottoman Empire. This is a common pattern that is in line with the developmental argument of the Great Powers. Davidson finally concludes that Japan could adopt a legal structure in which those rights would be provided only by Japan, not imposed by the Western powers. Therefore, a good solution might be to suggest that foreign judges should be appointed by Japan, not the foreign governments. Thus, he suggested a modified version of the Mixed Courts in Egypt, which would not damage "the dignity of Japan". However, although it has "dignity", Japan is eventually not considered as "equal" with the treaty powers. He even suggested that Japan could use the card going back to the consular court system, thus having multiple options against the Western powers.[321]

Davidson's report differs from the Fukuchi Report in its analysis of the advantages and disadvantages of the Mixed Courts system in Egypt, perhaps because of its timing. This is not to underestimate the fact that Davidson was more informed

[320] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 24–28.
[321] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 29.

from a legal point of view than Fukuchi. However, he also believed that it was not possible for Japan to have another option other than the consular courts or Mixed Courts even though he acknowledged that Japan should appoint foreign judges. The Davidson report was not going to be the final episode of the Japanese Research on the Mixed Courts of Egypt. However, it has significant importance as it marked the change of attitude on the part of the Meiji government regarding the legal modernization of the country. Before the Iwakura Mission, the Meiji government was under the naïve impression that the law of nations was ensuring the equality of sovereign states.[322] The initial aim was to be a part of the law of nations to guarantee its sovereignty and authority threatened by other powers. However, after the Iwakura Mission, this belief started to leave its place to a realization of the political realities of the nineteen-century international order. As a result, the main objective was gradually shifting towards a complete modernization of the legal institutions in order to abolish extraterritoriality. The Fukuchi Report was not approved, the Davidson Report was not found sufficient. So, to decide whether to establish Mixed Courts in Japan. Meanwhile, there were discussions on the establishment of the legal and political institutions of Japan. The Meiji political elite was discussing the creation of a modern constitutional monarchy based on a parliamentary system and under the principle of separation of powers [323]

[322] Takii Kazuhiro and David Noble, *The Meiji Constitution: The Japanese Experience of the West and the Shaping of the Modern State* (Tokyo: International House of Japan, 2007), 4.
[323] Röhl, *History of law in Japan since 1868*, 40.

4.5.2. The Hasegawa Report

The third research conducted in Egypt was carried out by Hasegawa Takeshi, who was the president of the Yokohama court of first instance[324] in 1882. Thus, he had a very close experience with the consular courts and the problems of the treaty port system. He prepared an important report after his on-spot research in Egypt with the help of Nubar Pasha and his suggestions in the report occupied an important place in the late nineteenth century diplomatic and legal history of Japan, since the main agenda was still to abolish extraterritoriality. Hasegawa began his report by stating that a mixed court system is more suitable for small countries. Furthermore, he also discussed by making the analogy of "Tower of Babel" that using different languages also causes problems in the courts. Moreover, the judges who were appointed by their own governments were actually acting for the benefit of those governments. For him, it was normal for people to be pleased with the Mixed Courts in a country like Egypt, in which "civilization has not yet spread widely."[325] Later on, Hasegawa concluded this part with his dialogue with Nubar Pasha. As a man of law, his ability to speak French, just like Fukuchi, helped him to communicate closely with Nubar Pasha. This dialogue is quite important, and Hasegawa brilliantly uses this dialogue to make his point at the end of the report. In the dialogue, Nubar Pasha pointed out two defects to deal with before the introduction of such system with the following two prerequisites for a more favorable Mixed courts system: "First, that the

[324] Yokohama Court of First Instance was the district court in city. Originally it was known as Kanagawa District court. It was renamed in the year 1876 as Yokohama District court and later "classified as the Yokohama Court of First Instance" with the introduction of the Meiji Code of Criminal Procedure. It had jurisdiction "over major misdemeanors and felonies." Röhl, *History of law in Japan since 1868*, 695–96 ;"At Yokohama where foreigners lived, he had to engage himself in complicated negotiations involving Japan and foreign countries, as well as deal with the problem of the revision treaties." Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 34.

[325] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 35–39.

insistence upon the right to select and appoint judges to be attributed to the government of Egypt." This was advised by Ignatiev to Fukuchi as well and this issue was stressed for the second time by Nubar Pasha to Hasegawa. "Second, that any revision of existing laws is made through an agreement between the Egyptian government and the Mixed Courts."[326] Therefore, the appointment of the foreign judges by the Japanese government from unaffiliated men is not stressed here but again it was suggested that the Japanese government should have the authority to make revisions. Although there were solutions such as making Arabic learning compulsory in three years, the Egyptian government was not successful to identify the good and bad judges and they left all the tasks into the hands of foreign powers. The second point is also caused, as Nubar Pasha suggests, by the unwillingness of the Western powers to discuss and listen to the suggestions of the Egyptian government in the revision of the laws. Nubar Pasha, although unhappy about these two defects of the Egyptian Mixed Courts, was not overall unhappy about the system. He even admitted that the local judges were abiding by only to the traditional moral code and not keeping up with the advancement of civilization and most of them were not well experienced. Therefore, it was necessary to get help from foreign judges. Nubar Pasha stressed the importance of imposing language learning to the judges. [327] This is probably the reason why Hasegawa was critical of the "oriental" countries as not being ready to modernize their legal structures at the beginning of his report. He was criticizing the mindset behind the statement of Nubar Pasha. Hasegawa was certainly differentiating Japan from Egypt and he was considering this factor as the basic difference between Japan and Egypt regarding the decision to

[326] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 41.
[327] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 41.

settle with the Mixed Courts' introduction. Therefore, his judgment was not to introduce the Mixed Courts system in Japan. [328] The answer was "No" for Hasegawa, but in the year 1886, the British and German ministers made an effort to introduce a jurisdiction treaty that would go into effect in April 1887. Therefore, the research made by Hasegawa also dismissed this effort by British and German ministers, who were assisted by Davidson on behalf of the British government, whose research and report[329] discussed above.

4.5.3. The end of the *Ejiputo Kenkyū*

Fukuchi was not at all mistaken about his assumption that Britain was determined to introduce the Mixed Courts in Japan as well. However, he probably underestimated the role Japan could play in the decision-making process. On the other hand, Hasegawa stressed that the Mixed Courts system was not a solution to the treaty port system. Hasegawa was very critical against the foreign judges outnumbering the local judges, as it was suggested by this draft. However, Nakaoka raises the question of how Hasegawa reacted to the introduction of the consular courts in Korea by the Japanese government.[330] This is an important question because the Japanese government was also going to try establishing formal relations with the Ottoman Empire based on an unequal treaty.[331] Perhaps, an answer could have been given by

[328] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 43.

[329] First Report: Realities of the Mixed Courts of Egypt(第一報告　埃及国共立裁判景況書); Second Report: Mixed Courts: Second Report by John R. Davidson Esq. Being an Examination of the Question of Japanese Judicial Reform and Codification varied in the Light of his Report on the Egyptian System of Mixed Courts dated June 1877 (第二報告　共立裁判設立意見書　埃及国共立裁判法二キキ日本国裁判法之改革並二法律編成ヲ論ス)

[330] Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," 44.

[331] Selçuk Esenbel, "A Fin De Siècle Japanese Romantic in Istanbul: The Life of Yamada Torajirō and His Toruko Gakan," in *Japan, Turkey and the World of Islam: The Writings of Selçuk Esenbel*, v. 3, ed. Selçuk Esenbel, http://www.jstor.org/stable/619710, v. 3:238–39.

looking into the larger process of the Japanese Legal Modernization as from the beginning it started as a movement with full belief in the international law and it evolved through time and experience into a realistic approach to the nineteenth-century global order. Of course, at the center of this order was the legalized hegemony of the Great Powers. From the mid-1870s onwards there was a great effort to translate the French civil code with the help of Boissonade[332], however, this was a long process, and finally, after a long period of study, adaptation, and discussions the Japanese Civil Code promulgated on July 16, 1898.[333]

The *Ejiputo Kenkyû* was only an episode within the history of the legal and institutional modernization of Japan. It started with the initial acknowledgment of the Meiji officials of the realities of the nineteenth-century international order. For the first report, the research conducted by Fukuchi was not well-planned. Fukuchi's low rank and the fact that he was not a legal expert created a great disadvantage for his visit to the Ottoman Empire and Egypt. However, he was lucky enough to be at the right place at the right time as he was introduced to Nubar Pasha, the mastermind of the Mixed Courts of Egypt. The second report is more informed and conducted by Davidson who also suggested the establishment of the Mixed Courts system in Japan with important revisions, just as the Fukuchi Report. In the meantime, the Japanese knowledge and expertise were continuously developing both in Egypt and in European law. According to Isam, the Japanese Research on the Mixed Courts of Egypt has also increased the interest of the legal studies in Japan. While the *Ejiputo Kenkyū* was in progress, the studies and translations of laws and regulations of

[332] Ronald Frank, "Chapter Three: Civil Code," in *History of Law in Japan Since 1868*, ed. Wilhelm Röhl, Handbook of oriental studies. Section five Japan 12 (Leiden, Boston: Brill, 2005), 175.
[333] Frank, "Chapter Three: Civil Code," 182–88 The " The Civil code modelled after the Code Napoleon was submitted in April 1890 but it did no go into effect because of the debates surrounding it and finally German model was adopted rather than the one modelled after the French Civil Code. Frank, "Chapter Three: Civil Code," 176

Europe were also flourishing. [334] The legal studies and translations of various codes of European origin as well as an effort of writing a constitution were an important part of this process.[335] Eventually, the research on the Egyptian Mixed Courts came to an end and it was decided that a full-fledged legal modernization was the measure the Meiji government had to take if it wanted to abolish extraterritoriality once and for all. In hindsight, this may appear as a success story for Japan and a failure for the Ottoman Empire and Egypt. This assumption will be questioned through the discussion of the parallels as well as differences between these experiences in the next and last chapter of this work.

[334] R. Hamza Isam, "明治時代における日本のエジプト研究 Meiji Jidai Ni Okeru Nihon No Ejiputo Kenkyū," *待兼山論叢 Machikaneyama Ronsō. . 日本学篇 Nihongakuhen* 16 (1982): 20 For a detailed analysis of the interest in the extensive study of Egypt motivated by this research please see Isam, "明治時代における日本のエジプト研究 Meiji jidai ni okeru Nihon no Ejiputo kenkyū," 20–22.
[335] Kazuhiro and Noble, *The Meiji Constitution*, 47–48.

CHAPTER 5

THE NARRATIVES OF SUCCESS AND FAILURE OR A DIFFERENT LOOK AT THE UNOFFICIAL MEIJI-OTTOMAN RELATIONS

5.1. Japan's efforts to establish formal relations with the Ottoman Empire

As discussed in the previous chapter, Fukuchi Genichirō contacted the Ottoman Empire for the first time as a Japanese official even though he could never get the chance to meet a state official. This chapter, however, will analyze the "attempts" of the Meiji government to establish formal relations with the Ottoman Empire. This analysis will be done with the help of documents obtained from the Ottoman Imperial Archives. The purpose of this chapter is to understand the complex nature of the nineteenth century global order and its impact on the non-European interstate relations.

Although the Ottoman–Japanese relations never gained official status, there was unofficial contact and several official attempts to establish relations in the second half of the nineteenth century. These years of unofficial correspondence and diplomacy have been termed by Selçuk Esenbel as "twilight diplomacy". [336] This conceptualization will be used in this chapter as it masterfully defines the diplomatic "struggle" between Japan and the Ottoman Empire over the establishment of formal relations and signing of a commercial treaty of "unequal" nature which will be seen through document analysis.

Esenbel argues that extraterritoriality and the most favored nation clause characterized the relations between states who were not considered as the "Great

[336] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 271–306.

Powers" in the nineteenth century. [337] This was indeed the case for the Ottoman Empire and Japan. The Ottoman state was reluctant to establish formal relations with Japan under the conditions of the nineteenth century because of these limitations dictated on the non-European states by the nineteenth-century global order.

5.1.1. Demands to start formal relations

Since Japan and the Ottoman Empire could not establish formal relations, but there were attempts by the Meiji government. From Fukuchi's arrival in 1873 until the early twentieth century, Japan had requested to sign a commercial treaty with the Ottoman Empire several times by pointing out that their subjects living in the Ottoman territories had no legal protection. Thanks to the discussion in the previous chapter, it is now clear that the Meiji government was looking at the Ottoman Empire and Egypt as examples to learn from as they were dealing with the nineteenth-century global order and struggling to abolish extraterritoriality in their own country. Also, one of the key actors in the contacts between these parties was Nubar Pasha, and the Japanese research on the Mixed Courts of Egypt had become one of the critical turning points in the Japanese legal modernization process. However, the Meiji government's only point of contact was not Nubar Pasha. The Meiji government, through consulates and embassies, asked the Sublime Porte and the Sultan to provide certain information, to grant protection to their subjects, and asked whether the Ottomans were willing to sign a commercial treaty with Japan to officialize their relations.

In a letter sent by the Japanese ambassador at Paris to the Ottoman embassy dated May 17, 1879, a detailed analysis of which rights were given to the foreign

[337] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 272–73.

subjects residing in the Ottoman Empire and which rights were not given to them was requested. The reason for this inquiry was stated as the Japanese government's negotiation for the revision of the unequal treaties.[338]

I could not find the answer of the Ottoman authorities to this inquiry (if an answer was given at all) at the Ottoman Imperial Archives. However, the questionnaire is very detailed, and the answers would be laying out the details of the extraterritorial regime in the Ottoman Empire. The eight questions were as follows:

> The first thing I would like to know is whether there are any limitations and regulations regarding the residency and traveling of the foreign subjects within the boundaries of the Ottoman Empire?
> Second, is it possible for foreigners to purchase or own land or a house?
> Third, are the foreigners paying taxes just as the Ottoman subjects do?
> Fourth, is the criminal and civil law enforcement related to foreign subjects is regulated by the Ottoman Empire or foreign governments and especially is the inspection of the foreign newspapers under the export of banknotes article and trade and harboring and quarantine regulations enforced by the city police is regulated by the local government or do the foreign governments have the authority to interfere in these matters?
> Fifth, as of today, foreigners are subjected to which laws and courts? How are these courts formed? Especially in the courts settling cases that occurred within the boundaries of the Ottoman Empire how do the courts are organized and what are the powers of these courts?
> Sixth, what are the functions and duties of the mixed courts? How are the mixed courts formed? Which law do they practice?
> Seventh, what are the privileges enjoyed by the consular courts?
> Eighth, which treaty is practiced today and in which treaty is related to the points discussed above?[339]

The letter ends with the statement that the answer of the Ottoman government will be of great help for the negotiations that will be carried out in Japan with the treaty powers.

The answer to the first question is hidden in the 1867 Passport Office Regulation. It is stated that if the person does not carry a passport, the local government would consult the consulate the person in question was subjected to on

[338] BOA. HR.SYS.1922/32.1 (May 17, 1879)
[339] BOA. HR.SYS.1922/32.1 (May 17, 1879)

the action they were supposed to take. Instead of extradition, the punishment in the case of an absence of a passport would be a judicial fine. For a foreign subject to travel within the Ottoman Empire, obtaining an official permit was necessary. Moreover, the foreigners had the right to reside in the Ottoman Empire and their rights were protected with the capitulations first and later with the regulation on the right of the foreigners to own property.[340] The second question's answer is already given in the fourth chapter of this work and with the final regulation in 1867 the right to own and purchase land and real estate was given to the foreigners and they were required to pay the same taxes over these estates as the Ottoman subjects.[341] The fourth, fifth, and sixth questions could be answered together. If there was a dispute between foreigners of the same nationality, it would be settled in the consular courts of their home country. The cases of commercial nature were tried in the consular courts where the company's headquarters were based. The law applied in these courts would vary according to the consulate, but generally, the home country's law would be the basis. However, Belkıs Yazar Konan states that the consular courts would time to time make use of the Ottoman customary(*örfî*) law and occasionally local laws promulgated for special purposes such as the use of interest rate of 9% decided for the French citizens by the French consular court.[342] Hence, the seventh question, although answered in the previous chapter as well, could be answered by stating that the consular courts had the right to try their own citizens according to their own laws but in criminal cases, the vice-consul had to notify the Ottoman authorities for crimes committed within their area of responsibility.[343] Of course, the

[340] Belkıs Y. Konan, "Osmanlı Devletinde Yabancıların Kapitülasyon Kapsamında Hukuki Durumu" (Ph.D., Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı, Ankara Üniversitesi), 32–33; 45.
[341] Engelhardt, *Türkiye ve Tanzimat: Devlet-i Osmaniye'nin Tarih-i Islahatı 1826'dan 1882'ye*, 186.
[342] Konan, "Osmanlı Devletinde Yabancıların Kapitülasyon Kapsamında Hukuki Durumu," 138–48.
[343] Konan, "Osmanlı Devletinde Yabancıların Kapitülasyon Kapsamında Hukuki Durumu," 153.

answer to the last question would vary for each European power, however, it would generally be possible to trace back their origins to the capitulations.

This questionnaire is illuminating for obvious reasons: First, it reveals the points that are important for the Meiji government in their negotiations for the revision of the unequal treaties. Second, it provides an outline of how extraterritorial regime in the Ottoman Empire operated. Regardless of the answer, Ottoman authorities would have given to the Japanese authorities, it also demonstrates the attitude of the Meiji government towards the Ottoman Empire, especially after the Fukuchi and Davidson reports. The Ottoman Empire, for the Meiji government, is a useful guideline through which Japan would identify the mistakes it should not do. This attitude has transformed through the next few years as can be seen in the correspondences between the officials of the two countries.

Another questionnaire was made by the Japanese envoy to the Russian Empire Sakimitsu Yanagihara(1850-1894) with regard to the legal institutions and their functioning in the Ottoman Empire. The questions were regarding the independence of the courts, use of torture, the penal and civil code, whether Europeans were subjected to the jurisdiction of Mixed courts, tariff rates, and on the most favored nation clause. Şâkir Pasha(1838-1899) answered Yanagihara's questions by stating that the "Turkish codex" is used by the courts, that the penal punishments resemble that of the European countries and "include indemnities, detention, exile, imprisonment, and capital punishment."[344] Şâkir Pasha especially underlined in his answer that "traditional norms" or "precedents" were not applied in the penal courts, "judges and courts are independent and autonomous", and that "there are no mixed courts of law in Turkey. If there is a litigation between two foreigners the consular

[344] Umut Arık, *A Century of Turkish-Japanese Relations: A Special Partnership* (Japan-Turkey Friendship Centenary Program Committee, 1991), 20–21.

courts resolve it." However, he continued and said that things get different if one of the parties applies to the local court "the said court will have authority for legal proceedings. All conflicts between a Turk and a foreigner are, naturally, considered by the local courts."[345] The proceedings between Yanagihara and Şâkir Pasha demonstrated that the Japanese authorities were still researching the Ottoman legal institutions and were still interested in the mixed courts. This attitude was soon going to change as the Meiji government went into the path of total Europeanization of its legal institutions and laws.

Another document reveals a Japanese attempt to establish formal relations with the Ottoman Empire with a commercial treaty as early as 1879[346]. However, this request made through Alexander Caratodhory Pasha(1833-1906) by Aoki Shūzō(1844-1914), the Japanese envoy to Paris was not accepted by the Sublime Porte. Japan's demand was to sign a treaty of commerce and navigation that would put Japanese subjects under the protection of European law and once the formal relations were established and Japan could open an embassy in Constantinople, it would be revised. It is not hard to see why the Ottoman Empire was not returning the favor. The Sublime Porte could only accept the signing of a treaty with Japan if the subjects of both countries would be guaranteed equal treatment.

One of the earliest and one of the most important delegations from Japan that visited the Ottoman Empire was that of Yoshida Masaharu(1852-1921) [347] who were

[345] Arık, *A Century of Turkish-Japanese Relations: A Special Partnership*, 21.
[346] BOA. HR.SYS.819/26 (May 31, 1879)
[347] "Compared to the focused intention of the Japanese who visited Ottoman Istanbul and Egypt earlier in 1873 to find out about the legal rights of Europeans under Consular courts, the Yoshida Mission, thus, had a more general agenda. This picturesque journey into the heartland of Persia was to be a *tanken,* an expedition to transmit the whole Muslim world's state of affairs to Japan. This was the first official contact of the Meiji Japan with the sovereign governments in the region. It was also the first time that the Meiji Japanese travelled directly from Japan to the Middle East by sailing into the Persian Gulf, bordering today's Iran and Iraq." Selçuk Esenbel, "Shoes and Modern Civilization Between Racism and Imperialism: The 1880 Yoshida Masaharu Mission of Meiji Japan to Qajar Iran

sent by the Japanese Foreign Ministry.[348] He requested to learn about the conditions of trade, production, and industry in the Ottoman Empire as well as to have an audience with the Sultan[349] and this request was accepted.[350] In another correspondence, this time in the year 1881, the request to sign a treaty between Japan and the Ottoman Empire was repeated. This document starts with the reference to the Yoshida delegation. It states that "the delegation that recently visited and had the great honor to have an audience with his Great highness and expressed their government's intention to sign a commercial treaty with our exalted state…"[351]. The continuing lines asked the Sultan his opinion in this matter as Yoshida did not have the authority to sign the treaty but was given the duty of initiating the process with the permission of the Sublime Porte. [352] In response, the Sultan ordered the Sublime Porte to see the conditions of the treaty proposed and act accordingly.[353] Therefore, it is clear that the Ottoman Empire did not reject to sign a commercial treaty with Japan nor it eliminated the possibility to establish formal relations between the two countries. However, one might argue that the Ottoman authorities approached this issue with caution. In the correspondences, the reference to the impossibility of signing a commercial treaty of "unequal" nature with Japan is one of the striking aspects of this relationship.

In another document dating 1892, the Sultan was notified that an official from Japan named Kiyora would like to have an audience with him and while making this request he stressed the necessity to have a treaty between the two states.[354] This

as Global History," *Global Perspectives on Japan* Japan's Interaction with the Turkish and the Muslim World, no. 2 (2020): 21.
[348] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 274.
[349] BOA. HR.TO.525/14.1 (February 20, 1881)
[350] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 274.
[351] BOA. İ.HR.283.17594/1 (March 28, 1881)
[352] BOA. İ.HR.283.17594/1 (March 28, 1881)
[353] BOA. İ.HR.283.17594/2 (March 28, 1881)
[354] BOA. Y.PRK.ASK.78/71.1 (January 14, 1892)

person must be Count Kiyoura Keigo(1850-1942), who was returning to Japan from his visit to Europe, who must have stopped in Constantinople to have an audience with the Sultan.[355]

Although in the archives not all of these correspondences were available to my eyes, it is certain that since the first contact, Japan repeatedly asked the Sublime Porte's opinion on signing a commercial treaty and therefore start official relations.

A series of documents in the Ottoman Archives mentions the visit of Prince Komatsu(1846-1903) in October 1887, who was the highest-ranked Japanese authority who ever visited Constantinople during the era of "twilight diplomacy".[356] This visit was not only important as it was Komatsu and his wife who visited Constantinople but what it led to and how the subsequent events had a determining impact on the Ottoman-Japanese relations in the late nineteenth century. It was indeed an important milestone, as Esenbel also argues, because this visit was promising a positive turn towards the establishment of the official relations between the two parties.[357]

Sultan Abdulhamid II wanted to pay a return visit and send gifts to the Japanese emperor. However, according to Erol Mütercimler and Kemal Öke, the Sultan did not choose to send one of his *sehzades* to Japan unlike the Japanese emperor but rather sent naval officers so that it would not acquire the meaning of an "official mission".[358] Considering the demands coming from the Japanese side for a commercial treaty and their "unacceptable conditions", this can be interpreted as a

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[355] Ono, Shūzō, "『伯爵清浦奎吾傳』 明治二四年から明治三九年まで ("Hakushaku Kiyora Keigo Den" Meiji Nijuyonen Kara Meiji Sanjūkyunen Made)," *慶應義塾大学日吉紀要. 社会科学 (Keiōgijuku daigaku Hiyoshi kiyō. Shakai kagaku)*, no. 24 (2013): 83–84, https://ci.nii.ac.jp/naid/120005618101/en/.
[356] BOA. HR. MTV. 491/44 (September 10, 1887)
[357] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 288.
[358] Erol Mütercimler and Kemal Öke, *Ertuğrul Fırkateyni Faciası ve Türk-Japon Münasebetlerinin Başlangıcı* (İstanbul: Türk Dünyası Araştırmaları Vakfı, 1991), 6.

cautious diplomatic move for the Ottomans. Another reason for this precaution was to not arouse suspicion in Russian Empire about this visit.[359] The official preparations were made, and the Ertuğrul frigate set sail to its catastrophic end on July 14, 1889.[360] The reasons why Ertuğrul was sent to such a dangerous and long journey, to begin with, is not an issue to discuss here.[361] The importance of the Ertuğrul disaster for the discussion of this chapter is that it led an important figure in the late nineteenth and early twentieth-century Ottoman–Japanese relations to Constantinople. One of the most important figures in this period of "twilight diplomacy" was Yamada Torajirō(1866 – 1957). Yamada remained one of the key actors of the unofficial relationship between the Ottoman Empire and Japan.[362] The first document in the Ottoman Imperial Archives mentioning his name is dated May 20, 1892.[363] He arrived at Constantinople in the year 1892 bringing the aid collected by the Japanese people for the families of the victims of the Ertuğrul disaster.[364] The Sultan was notified of his visit and his request to have an audience with Sultan Abdulhamid II as he brought presents from his home country as well:

> Monsieur Yamada, the Japanese merchant, who will bring a depiction of a famous battle that took place 300 years ago in Japan and armors and a sword preserved in its scabbard ornate with gold and would like to present these gifts to your majesty and who also brings the aid money of approximately 20 liras collected for the victims of the Ertuğrul Frigate disaster.[365]

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[359] F. Şayan Ulusan Şahin, *Türk-Japon İlişkileri: (1876-1908)*, 1. baskı, Yayımlar Dairesi Başkanlığı kültür eserleri dizisi 315 (Ankara: Kültür Bakanlığı, 2001), 29.
[360] Mütercimler and Öke, *Ertuğrul Fırkateyni Faciası ve Türk-Japon Münasebetlerinin Başlangıcı*, 37.
[361] For a lengthy discussion based on reports and eyewitness accounts by Mütercimler and Öke on why Ertuğrul was the wrong choice for this journey please see: Mütercimler and Öke, *Ertuğrul Fırkateyni Faciası ve Türk-Japon Münasebetlerinin Başlangıcı*, 26–37; 106-111 and by Şayan Ulusan Şahin based on reports and proceedings obtained from the Ottoman Imperial archives how the chain of events led to the disaster Ulusan Şahin, *Türk-Japon ilişkileri*, 34–46.
[362] Esenbel, "A Fin de Siècle Japanese Romantic in Istanbul: The Life of Yamada Torajirō and his Toruko Gakan," v. 3:237.
[363] BOA. HR. İD. 2044/80. (May 20, 1892) "That the Ertuğrul frigate sank in Japanese waters. The leader of the memorial society of the victims Prince Komatsu's rewarding with a medal and his assignment of a person named Yamada Torajirō who will be visiting Constantinople."
[364] Esenbel, "A Fin de Siècle Japanese Romantic in Istanbul: The Life of Yamada Torajirō and his Toruko Gakan," v. 3:241.
[365] BOA. Y.PRK.ASK.80/107.1 (April 6, 1892)

Another document in the archives mentioning his name is also dated 1892. Abdülhalim Nawado[366], a Japanese Muslim who was residing in the Ottoman Empire, asked in a petition to the Sultan to extend his help to Yamada who in his words "does not speak the language, knows no one but myself, and could not do his job because of all these difficulties".[367] The help was later extended to Yamada and he was placed under the protection of Sublime Porte throughout his stay in Constantinople.[368] Yamada was not only given the duty to take the aid money for the victims to Constantinople but also to help Japan establish formal relations with the Ottoman Empire.[369] He settled in Istanbul, established trade networks, and opened his own shop in the city.[370] Before obtaining the protection of the Sublime Porte, the Meiji government used this position of Yamada to obtain a commercial treaty of unequal nature with the Ottoman Empire.[371]

Before using Yamada's position, however, the Meiji government had already extended several other offers to the Ottoman government to establish formal relations by signing a commercial treaty. The Japanese ambassador at Berlin notified on March 5, 1896, that he had the authority to negotiate for a treaty between Japan and the Ottoman Empire, referring to the correspondence between the Japanese embassy at Berlin with the Ottoman Ministry of Foreign Affairs.[372] These correspondences were later used by the Ottoman Ministry of Foreign Affairs as a reference point. On

[366] Incorrect spelling in the original document. Abdülhalim Noda: Journalist Shōtarō Noda(1868-1904) brought the aid Money collected from the Japanese press for the victims of the Ertuğrul disaster stayed in Constantinople and adopted the Muslim name "Abdülhalim". Ulusan Şahin, *Türk-Japon ilişkileri*, 95.
[367] BOA. Y.PRK.AZJ.21/116.1 (June 12, 1892)
[368] Esenbel, "A Fin de Siècle Japanese Romantic in Istanbul: The Life of Yamada Torajirō and his Toruko Gakan," v. 3:245.
[369] Esenbel, "A Fin de Siècle Japanese Romantic in Istanbul: The Life of Yamada Torajirō and his Toruko Gakan," v. 3:241.
[370] Esenbel, "A Fin de Siècle Japanese Romantic in Istanbul: The Life of Yamada Torajirō and his Toruko Gakan," v. 3:241–42.
[371] Esenbel, "A Fin de Siècle Japanese Romantic in Istanbul: The Life of Yamada Torajirō and his Toruko Gakan," v. 3:244–45.
[372] BOA. HR.İD.2096/3.1 (February 26, 1896)

the part of the Ottomans, there was certainly an effort to understand the Japanese efforts to persuade the Ottoman Empire into signing a commercial treaty, but the legal status of the Ottoman Empire was also dictating them to be cautious and stick to certain principles.

Yamada, as stated above, arrived at Constantinople in the year 1892, and in a petition, he asked for the protection of the Sublime Porte seven years after his arrival, this time to convince the Sublime Porte to the advantage of signing an official treaty. The petition from the Japanese Ministry of Foreign Affairs is dated October 19, 1899, and can be translated as follows:

> The petition from the Japanese Foreign Ministry asking for the legal protection of the Japanese merchant Monsieur Yamada, pointing out to the fact that there are no formal relations between the two countries, and he does not have legal protection.
>
> *Translation*
> Japanese merchant Monsieur Yamada who has been residing in Constantinople for many years has no legal protection as there is, unfortunately, no treaty or formal relationship between the two countries and because of this we do not have an embassy or a consulate in the country and as a result, he cannot obtain this legal protection from our government. Therefore, the request to extend your exalted protection to Yamada is respectfully submitted for your consideration. [373]

The Ottoman government's response to this request as well as the response to the request to sign a commercial treaty that would give extraterritorial privileges to the Japanese subjects reflects the Ottoman attitude towards these Japanese diplomatic tactics. According to Esenbel, the Japanese Foreign Ministry saw establishing relations with the Ottoman Empire on equal footage as a step back in their quest to become a European power according to the international law of the nineteenth century global order.[374] As Esenbel argues, this "Great Game" the Meiji government

[373] BOA. HR.İD.2096/9.1 (October 7, 1899)
[374] Selçuk Esenbel, ed., *Japan on the Silk Road: Encounters and Perspectives of Politics and Culture in Eurasia,* Brill's Japanese studies library volume 60 (Leiden, Boston: Brill, 2018), 88.

was playing with the Ottoman government by using the legal status of Yamada Torajirō[375] was equally retaliated by the Ottoman Ministry of Foreign Affairs as they gave references to the 1856 Paris Treaty and stated that the Ottoman Empire is in no position to give extraterritorial privileges to a non-European power as Japan.[376] The full translation of the answer given by Said Halim Pasha(1865-1921) to Aoki Shūzō gives an important insight into the attitude of the Ottoman Empire in this "twilight diplomacy".

> *This is the copy of the proceedings that will be made between the Ministry of Foreign Affairs and Japanese Foreign Ministry*
>
> Monsieur Yamada, the merchant, and one of the Japanese residents in Constantinople, has submitted your proposal for the treaty with regard to the treatment of the subjects of both sides traveling and residing in the Ottoman Empire and Japan should get. It is of no doubt that we will give him the legal protection your highness has asked for as we know that he was improving the trade between two sides, that he was introducing Muslims to the people of Japan and therefore establishing lasting bonds between two peoples with his continuous praise.
>
> About the proposal for a treaty, I would like to state that the content of this draft implies the style of the old treaties (*uhûd-ı atika*) or the primeval treaties (*mu'âhedât-i kadîme*)[377] which in turn gives you the possibility of demanding similar treaties that are practiced, except for Serbia, Greece, and Montenegro, between the European countries and the Ottoman Empire. As your excellency might remember the point, the Sublime Port did not agree to your proposal in Berlin was clear, and as you were told by his highness the Sultan himself in his honorable presence, there will only be an agreement if the subjects of both sides would be treated equally. On the other hand, while Japan was able to get rewarded for its effort to abolish these treaties, it cannot demand or wish for their perpetuity within the Ottoman Empire. Especially, the Japanese government knows that our right to give these privileges to foreign governments has been revoked with the decision declared in the congress that took place in Paris, in the year 1856 except for a few countries and that it is not possible anymore according to the laws and regulations of the Ottoman Empire and that we certainly reject any foreign government's request in this regard. Therefore, when we notified your government about our decision it was accepted and acknowledged by the Japanese government and after a while, we were notified that you will no longer insist on this issue. Now that your excellency is in the Japanese Foreign Ministry, all the difficulties that

[375] Esenbel, "A Fin de Siècle Japanese Romantic in Istanbul: The Life of Yamada Torajirō and his Toruko Gakan," v. 3:243–44.
[376] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 284.
[377] Basically, the unequal or capitulatory treaties

would drive the negotiations to a dead end are out of our way and we have every right to hope that either the draft that was sent to your embassy in Berlin or the one that will be given to Monsieur Yamada will be accepted without difficulties. I will not hesitate to send these drafts to the consideration of your government after the necessary amendments that will erase the implications for signing a treaty in the style of the old treaties are made.

Hoping that you will understand my concerns, and agree with my feelings the first draft, Attachment A, and the amended version of your draft, Attachment B, will be sent to you. As I think that the signing of the treaty starting bilateral relations would benefit both countries and would lay the grounds successfully for a treaty of navigation and commerce, I also believe that the Sublime Porte would be willing to agree on the conditions of the amended version of your draft. I would like to assure you that I will be happy if the bilateral relations are established quickly, and I will do everything in my power to see this happening as soon as possible.[378]

This response is the key to understand the attitude of the Ottoman Empire in their relations with Japan. The Ottoman Empire closed its doors to signing another "capitulatory treaty". Its basis of legitimacy was the Paris Conference which was mentioned in the previous chapters as the conference that accepted the Ottoman Empire as a European power. The only way to start official relations with Japan was, as Said Halim Pasha also stated clearly, if the subjects of both countries were to be treated equally in each other's soils.[379] Japan, on the other hand, was finally able to abolish extraterritoriality in 1894 and would not consider signing an equal treaty with the Ottoman Empire. As Esenbel also argues, the nineteenth-century global order made it difficult for non-European countries to establish formal relations.[380]

[378] BOA. Y.MTV.198/122.5 (January 29, 1900)
[379] Draft A suggests that until a treaty of commerce and navigation is signed the subjects of both countries would be able to travel and reside freely in the other country, and they would be under the legal protection of the respective government and they would be subjected to the same laws as the local population and except the goods whose imports and exports are prohibited or controlled by the local governments there will be free trade and they will have the right to navigate freely in the two country's waters with the exception of certain inland waters and they will be subjected to the same laws and regulations in the ports. Also, both parties promise to open diplomatic missions in the other country. The treaty in this draft was determined to be renewed in three years. BOA. Y.MTV.198/122.4 (January 29, 1900);
Draft B was also promising equal treatment of the subjects of both countries and they would be subjected to European Law. The amended version of the Draft B underlines that there will be no extraterritorial privileges given to the other country. BOA. Y.MTV.198/122.3 (January 29, 1900)
[380] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 282.

However, even after the abolishment of extraterritoriality, Japan did not want to consider itself as equal with the Ottoman Empire. The only way to maintain commercial and diplomatic relations between the two governments, therefore, was the unofficial “twilight diplomacy”.

5.1.2. The Ottoman - Japanese attitudes

Based on the documents discussed above, it can be argued that Japan and the Ottoman Empire had similar agendas when Fukuchi arrived at Constantinople and made the first contact between Ottoman Empire and Japan. Both sides, as non-European and independent countries, aimed to abolish extraterritorial regimes and come on equal terms with the Western powers. To this end, Japan studied the legal, political, economic, and social institutions in the United States and Europe, thanks to the Iwakura Mission. The Iwakura Mission led Japan to research the Egyptian Mixed Courts. As it was established in the previous chapter, the Japanese research on the Egyptian Mixed Courts led the Meiji politicians to an important conclusion: without replacing the existing legal institutions and laws with the European ones, Japan’s aim to abolish extraterritoriality and to come on equal terms with the Great Powers could not be realized. Especially after the late 1870s, Japan’s policy was to Europeanize its institutions. During these years, the Meiji government wanted to establish official relations with the Ottoman Empire. However, Japan was not considering entering into a relationship with the Ottoman Empire on equal terms. As discussed in the third chapter, the Meiji government was also concerned that after the Treaty of Tianjin was signed between the Qing Empire and Japan as they saw it a major obstacle in Japan’s quest to abolish extraterritoriality. This shows that the Meiji government was considering the Qing Empire and Ottoman Empire within the same category, a

category which signing a treaty on equal terms would damage Japan's ambitions to become a European power. Japan wanted to sign a treaty according to the most favored nation clause with the Ottoman Empire[381], but this was not possible for the Ottomans since they were considered a "European Country" after the Paris Treaty[382] and they used this to reject the proposal made by the Japanese diplomats.[383] As Habip Ünyılmaz argues, the Ottoman state masterfully used the article 7 of the Paris Treaty of 1856 to claim its place among the European family of nations and prevent the imposition of new "capitulatory treaties".[384] It could be argued that both Japan and Ottoman Empire shared a common ground in addition to the kind gifts exchanged between both sides, and that was struggling against the nineteenth-century global order based on international law and eagerness to abolish extraterritorial treaties. Umut Arık argues that the Japanese - Ottoman approach was due to common interests against the Russian aggression.[385] Both sides could benefit from this friendship by uniting their forces against Russian Empire.

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[381] There was, however, a difference of opinion within the Meiji government. The military elite of the Meiji government such as Colonel Utsunomiya Taro(1861-1922) argued that Japan should establish official relations on equal terms with the Ottoman Empire as they were a natural ally against the major threat of Russia. For a detailed analysis of this nuanced approach among the Meiji elite see, Esenbel, Selçuk. "Fukushima Yasumasa and Utsunomiya Tarō on the Edge of the Silk Road: Pan-Asian Visions and the Network of Military Intelligence from the Ottoman and Qajar Realms into Central Asia." In *Japan on the Silk Road: Encounters and Perspectives of Politics and Culture in Eurasia*. Edited by Selçuk Esenbel, 87–117. Brill's Japanese studies library volume 60. Leiden, Boston: Brill, 2018.

[382] "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Austria, His Majesty the Emperor of the French, His Majesty the King of Prussia, His Majesty the Emperor of All the Russias, and His Majesty the King of Sardinia, declare the Sublime Porte admitted to participate in the advantages of the Public Law and System (Concert) of Europe. Their Majesties engage, each on his part, to respect the Independence and the Territorial Integrity of the Ottoman Empire; Guarantee in common the strict observance of that engagement; and will, in consequence, consider any act tending to its violation as a question of general interest." Treaty of Paris 1856, Article VII.

[383] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 284.

[384] Habip Ünyılmaz, "Avrupa Uygarlık Eşiğinde Bâbıâli: 1856 Paris Andlaşması Temelinde Uluslararası Hukuk ve Osmanlı İmparatorluğu İlişkisine Avrupalıların Gözüyle bir Bakış," *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 2019, doi:10.21492/inuhfd.571998.

[385] Arık, *A Century of Turkish-Japanese Relations: A Special Partnership*, 26.

As the Meiji government was not willing to come on equal terms with the Ottoman Empire, an empire once was powerful but still under the extraterritorial order since they saw it as an obstacle in Japan's journey towards becoming a great power. Therefore, the Meiji government's position was to give "most favored nation treatment" to the Ottoman subjects only in the matters of trade and therefore establishing extraterritorial jurisdiction in the Ottoman soils for their subjects.[386] This, as can be seen from the response of the Ottoman Foreign Minister, was not an acceptable offer for the Sublime Porte. Because of this difference of interests, Japan and Ottoman Empire could never establish formal relations. Yamada remained to be an integral part of the unofficial bilateral relations between the two powers.

5.2. What makes Japanese legal modernization a "success story"?

The discussion of "twilight diplomacy" between the Ottoman Empire and Japan brings two historical and historiographical questions into minds. The first question is: Is Japanese legal modernization a success story? Giving an answer to this question seems easy. However, it requires a thorough analysis of Japanese modernization. This work focused on the nineteenth-century global order and its impact on Japanese institutional modernization. In itself, this question can be answered. In fact, historians such as Douglas Howland, Marius Jansen, or Michael Auslin presented Japan's successful abolishment of unequal treaties in 1894 in addition to the legal reforms carried out along the way as a successful achievement.[387] It is almost uniformly accepted that the Meiji institutional modernization is a successful example of a non-European state adopting Western institutions and rising to the ranks of the

[386] Arık, *A Century of Turkish-Japanese Relations: A Special Partnership*, 46.
[387] Howland, *International law and Japanese Sovereignty*, 125; Jansen, *The Making of Modern Japan*, 429 ; Auslin, *Negotiating with imperialism*, 200.

civilized West. Japan was motivated to do what it takes to abolish extraterritoriality and gain full sovereignty. Prominent political figures such as Itō Hirobumi(1841-1909), Ōkubo Toshimichi (1830-1878) and Matsukata Masayoshi(1835-1924), especially after the Iwakura Mission, were convinced that a Europeanized constitutional state had to be built in order to abolish extraterritoriality and achieve full sovereignty.[388] As the history of Japanese legal and institutional modernization in the nineteenth century is also the history of the Meiji constitution and its successful inauguration, it inevitably presents itself as a success story. However, bringing the Ottoman institutional modernization into the equation provides some perspective and prevents the historian to think the Japanese institutional modernization in an isolated manner. The second follow-up question is if Japanese legal modernization is a success story, what were the factors that turned this into a success story? The following pages of this chapter will discuss this question. The following section will also discuss the Ottoman legal modernization as it is regarded in the historiography as a "failure".

When the extraterritorial treaties were signed in 1858, Japan entered into the treaty port system quite suddenly. There were important incidents from 1858 until the abolishment of extraterritoriality in Japan in 1894 that had an important impact on the determination of the Meiji government officials.[389] Moreover, Japan had gone through an important transformation in 1868 and the unequal treaties were naturally regarded as the burden that the new regime assumed from the ancién regime it toppled. This made it easier for the Meiji government to regard the Ansei treaties as an important inherited problem that they had to deal with. It was the most important

[388] Kazuhiro and Noble, *The Meiji Constitution*, 49.
[389] These are discussed in the third chapter of this work under the subtitle: "Consular courts and extraterritoriality in Japan".

obstacle in the way of Japan's full sovereignty. The Iwakura Mission was an important experience, the one in which the prominent Meiji politicians got familiar with the nineteenth-century global order. It was made clear to them that if Japan were to abolish extraterritorial treaties and become a part of the "family of nations" it had to abolish its former institutions and adopt European laws and legal institutions. The research on the Egyptian Mixed Courts was an important milestone for the Japanese legal modernization since it helped the Meiji government to realize that "half measures" such as the introduction of mixed courts in Japan would not be the way to realize their ultimate goal: abolishing extraterritoriality. Especially from the late 1870s onwards, Japan started to adopt European laws and legal institutions. From an institutional standpoint, the Japanese legal modernization could be considered as a success story thanks to the quick realization of the realities of the nineteenth-century global order and the necessity to transform laws and institutions as this was the only way to convince the treaty powers that there will not be a different treatment to their subjects in the Japanese courts and under the Japanese law which were after all adaptations of European laws and institutions. Rightfully, Esenbel argues that the Japanese modernization and the so-called Japanese eclecticism is actually a complete separation of the public sphere, which had gone through transformation and completely Europeanized, and the private realm of the Japanese society and ceremonial aspects of the public life which remained "Japanese".[390] According to this argument, one might say that laws and legal institutions were not a part of the "Japanese culture". This was not the case for the Ottoman laws and legal institutions.

One of the questions that could be asked is whether Japan's victory in the Sino-Japanese war had an impact on the abolishment of extraterritoriality. One rather

[390] Esenbel, "Shoes and Modern Civilization Between Racism and Imperialism: The 1880 Yoshida Masaharu Mission of Meiji Japan to Qajar Iran as Global History," 20.

interesting argument was presented by Yamauchi Susumu. He argues that Japan's actions during the First Sino-Japanese War as a "civilized state" were regarded as an important test.[391] The Anglo-Japanese treaty in 1894 that put an end to the extraterritorial treaty between Britain and Japan was an important source of legitimacy according to the author and the civilized conduct of the war by Japan would prove that Japan was indeed a civilized great power.[392] Thomas Erskine Holland's comments quoted by Yamauchi show that, in fact, Japan did successfully used the Sino–Japanese war to its advantage. Leaving the atrocities committed by the Japanese army in Port Arthur aside it "has conformed to the laws of war, both in her treatment of the enemy and in her relations to neutrals, in a manner worthy of the most civilized nations of Western Europe.".[393] The question, therefore, is not whether Japan's victory over the Qing Empire impacted on the abolishment of extraterritoriality in Japan. It was the application of international law during the war that counted.[394]

One other factor that contributed to the perception of Japanese legal modernization as a "success story" was Japan's geopolitical advantage. Japan, as also discussed in the previous chapters of this work, was not to be colonized or to be carved out into spheres of influence by the Great Powers. Japan's importance was stemming from its position between the Pacific Ocean and the Indian Ocean and Japan as a market attracted the great powers as it would be clearly beneficial to include Japan into the global trade. Moreover, towards the end of the century, Japan

[391] Yamauchi, "Civilization and International Law in Japan During the Meiji Era (1868-1912)," 9–10.
[392] Yamauchi, "Civilization and International Law in Japan During the Meiji Era (1868-1912)," 10.
[393] Yamauchi, "Civilization and International Law in Japan During the Meiji Era (1868-1912)," 11.
[394] Turan Kayaoğlu argues that Japan was only able to achieve its sovereignty when it transformed its legal institutions and laws into more "civilized", Western style and the victory in the First Sino – Japanese War was not an important contributing factor in Japan's abolishment of extraterritorial treaties. Kayaoglu, *Legal imperialism*, 69–70.

was one of the countries that was strong enough to help Britain to contain the Russian Empire. As Esenbel also suggests, Britain was starting to have conflicting interests with the other possible ally against Russia, the Ottoman Empire, and with the Japanese victory over the Qing Empire in 1895, Japan started to become a close ally "to protect common interests of Britain and Japan."[395] The Anglo-Japanese alliance became official at the beginning of the twentieth century in 1902 and Japan finally achieved the goal set by the Meiji political elite and became one of the great powers of the world.

The Japanese legal modernization played a crucial role in the transformation of Japan from a state under an extraterritorial regime to an imperial power just within fifty years. Especially from the late 1870s onwards, Japanese legal modernization changed the perception of Japan throughout Europe. The geopolitical factors, the Japanese treatment in the Sino-Japanese war and its victory in the end as well as Britain's need for a powerful ally against Russia were contributing factors in Japan's rise into the ranks of great powers.

5.3. What makes the Ottoman legal modernization a "failure"?

The start of capitulations goes back to the sixteenth century, as discussed in the previous chapters. The origins of capitulations were not a military defeat or a political concession. It was simply a legal solution. However, the capitulations were transformed thanks to the changing status quo over the centuries and acquired the characteristics of an "unequal treaty" or more correctly for the Ottoman context "capitulatory treaties". The great powers used the existing extraterritorial rights to their advantage. The transformation was not isolated, it was due to the changing

[395] Esenbel, *Japon Modernleşmesi ve Osmanlı*, 285–86.

power balances in Europe, and the Ottoman economic and legal understanding did not see the capitulations as a problem for a long time. With the Baltalimanı Treaty of 1838, the Ottoman Empire lost its tariff autonomy, as discussed in the previous chapters. This was a decisive moment for extraterritoriality in the Ottoman Empire. The existing extraterritoriality in the Ottoman Empire was in its entirety a resemblance of the nineteenth century global order.

Moreover, the Ottoman Empire, just as Japan and the Qing Empire, was not a passive entity. The laws and legal institutions were going through reforms. However, different from the Japanese legal modernization, it was not possible for the Ottomans to abolish the existing legal structures completely. The Ottoman understanding of legal reformation was to improve(*iṣlāḥ)* the existing legal institutions. The sophisticated legal tradition that was shaped throughout the ages of jurisprudence and improvement could not be abolished by the Ottoman Empire, unlike what happened in Japan after the second half of the nineteenth century.

Moreover, the Ottoman Empire was also under high geopolitical pressure in the second half of the nineteenth century. Britain sided with the Ottoman Empire during the Crimean war but the conflicting interests between Britain and the Ottoman Empire, as discussed above, changed the direction of the British Empire to form an alliance with Japan against Russia and therefore eliminating the Ottoman Empire. The Ottoman Empire was only able to abolish extraterritoriality unilaterally after the advent of the First World War in 1914.[396] The legal reformation, a total acceptance of European laws and institutions, only took place after the collapse of the Ottoman Empire.

[396] Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*, 164.

5.4. Two extremes or two similar experiences?

Throughout the chapters of this work, and finally, in this chapter, it was seen that the Japanese legal modernization was a process of a rapid change. It began with the internal conflict after the opening of the country and resulted in the toppling of the Tokugawa Bakufu. The Ottoman experience of extraterritoriality, on the other hand, had gone through a gradual transformation and the problems of the privileges given to the European powers were exposed as the Ottoman Empire lost power, as the status quo had changed and as the European laws and legal institutions through the means of international law were considered the "civilized" form. Ottoman Empire had introduced legal reforms throughout the nineteenth century, but it was never to Europeanize the legal institutions completely. The Ottomans, perhaps rightfully, did not feel the need to abandon completely its sophisticated legal tradition, which had been going through changes within itself.

It can be argued that the comparison of the Japanese and Ottoman experiences of legal modernization could be misleading in the sense that the geopolitical factors, the political changes both countries went through in the nineteenth century, were not similar. While the Japanese political elite saw the "unequal treaties" as the chains the Meiji government inherited from the Tokugawa Bakufu, even though in its initial years the Meiji government also signed unequal treaties it can be argued here that it should be regarded as a legacy of the Tokugawa policies, the Ottoman Empire did not have an "ancién regime" and therefore could not transform its laws and institutions in the full-fledged manner the Meiji government did in the last quarter of the nineteenth century. In hindsight it seems that the Japanese experience was certainly more successful in its own conditions. In the end, Japan was admitted into the family of nations, recognized as an imperial power, and regarded as a civilized

nation with a constitution, civil code, and European court system. On the other hand, the Ottoman Empire always remained between a complete adoption of European institutions and holding onto its existing institutions. However, historians such as Mehmet Genç, Şevket Pamuk, Niyazi Berkes and Halil İnalcık argued that the reformation and the modernization process did help establish the final "successful" Europeanization of the legal institutions and laws in the republican era.[397] As argued previously in this work, just as one cannot regard the history of the Meiji restoration as whitewashed from the Tokugawa Bakufu, one cannot also think of the history of modernization of the Republic of Turkey whitewashed from the Ottoman Empire. It only became possible to transform the existing laws and institutions by completely abandoning the long tradition of the old regime, in this case the Ottoman Empire.[398]

In this way, the Ottoman legal modernization was a story of hesitation, struggle, and compromise. Failure is a strong word, and it is certainly does not do justice to the practice of historians to compare Ottoman and Japanese experiences of legal modernization as if they were tested in the same environment in a laboratory.

[397] Prominent scholars of the Ottoman history argues that the failure or the "collapse" narratives are too simplistic and do not answer critical questions of context, capabilities and agency. For further discussion see the following Works: Genç, *Osmanlı İmparatorluğunda Devlet ve Ekonomi* ; Pamuk, *Türkiye'nin 200 Yıllık İktisadi Tarihi*; Niyazi Berkes and Ahmet Kuyaş, *Türkiye'de Çağdaşlaşma*, 16.bs, Yapı Kredi Yayınları Cogito 117 (İstanbul: Yapı Kredi Yayınları, 2011); İnalcık, "Tanzimat'ın Uygulanması ve Sosyal Tepkileri"

[398] However, Baron Hayashi Gonsuke (1860 – 1939) argued in the Lausanne Conference that Turkey needed to work on a solution to abolish extraterritoriality for a few decades just as Japan. He completely disregarded the Ottoman experience, and he completely underestimated the capacity of the new Turkish Republic to modernize its laws and legal institutions. George Nathaniel of Curzon, *Lausanne Conference on Near Eastern Affairs 1922 -1923: Records of Proceedings and Draft Terms of Peace* ([Milton Keynes]: Gale Making of modern law, 2013), 470; 493.

CHAPTER 6

CONCLUSION

International law in the nineteenth century was a product of the encounter between the colonizer and the colonized. It was not a ready package; it was shaped by this encounter through years. The transformation of international law is a crucial matter to understand the nineteenth century global order. This allows to see the continuity between its origins and its use as an important tool of nineteenth century imperialism. With the process started by the Peace of Westphalia in 1648 up to the Congress of Vienna, the idea of "Great Powers" took its roots thanks to the development of international law. This was an important development that would characterize the encounter between the Western Powers and non-European states in the nineteenth century. The development of the concept of international law provided a basis of legitimacy for the nineteenth century imperialism. The European powers believed they had the civilized institutions and laws. Their culture was in harmony with these principles. On the other hand, this legitimate basis was also giving them a responsibility. The responsibility to protect their own subjects from the "uncivilized" laws and institutions of the non-European states and the "arbitrary" decisions their courts would make. They also felt responsible to spread their civilization throughout the world. Great Powers were expanding their trade networks and needed to access important ports and markets throughout the world. This was crucial for their economic system and for the development and continuity of the nineteenth century global order to which their economic development depended upon. The legality of

European expansion made it possible for them to dominate the non-European world, both commercially and politically.

The legalized hegemony of the West in the nineteenth century was also an important reference point for the rulers of the non-European states to legitimize their attempts to reform their existing legal, political, and social institutions. Institutional modernization was necessary for them to remain sovereign within their territories. There were different paths and strategies for institutional modernization. This work analyzed these unique experiences and looked into different strategies followed by non-European states to cope with the nineteenth century global order. The focus was the Japanese experience but the Qing, Egyptian, and especially the Ottoman experiences were brought into the discussion in order to prevent an isolated analysis of extraterritoriality and institutional modernization in the nineteenth century.

Under the Tokugawa Bakufu, Japan limited its contact with the outside world. When Commodore Perry forced Japan to open its ports for the provisioning of the American ships, he also started the end of Japan's ancién regime. Starting with the Harris Treaty signed with the United States, Japan signed a series of commercial treaties with the "most-favored nation" clauses and granted extraterritorial privileges and low tariff rates to the treaty powers. These treaties, which are referred as unequal treaties in the scholarship, also started Japan's struggle with the nineteenth century global order and the legalized hegemony of the Great Powers. The severe economic conditions and humiliation, together with the anti-foreign sentiments, led to the Meiji Restoration and brought the end of the Tokugawa Bakufu.

The extraterritorial regime was an important threat to the sovereignty of the newly established the Meiji government. The Meiji government wanted to establish a

strong centralized state and in order to achieve this goal it was essential to abolish the "unequal treaties".

Compared to the Japanese experience, however, the Qing experience of extraterritoriality was a product of a military defeat. The Qing Empire did not have a clause in their treaties with the Great Powers that banned opium, and they granted extensive privileges to the treaty powers. China usually used as a bad example and the Japanese authorities were threatened by the Great Powers to become like China if they do not agree to sign the treaties in question.

The Ottoman experience of extraterritoriality was a far longer process than that of Japan. It was not a result of a military defeat or diplomatic pressure; it was merely a legal solution that the Ottoman state came up with to situate foreign merchants within the legal framework. However, as time passed with military and diplomatic defeats, the commercial expansion of European powers and the weakening position of the Ottoman state, these capitulations were transformed into a tool of domination, imperialism and legal exploitation for the European powers and their subjects within the borders of the Ottoman Empire. Unlike that of Japan, this transformation was slow in the Ottoman Empire and Egypt. There were reforms initiated by the Ottoman state, but it could not solve the problems extraterritoriality and low tariff rates created. After Egypt was granted autonomy, it became even more vulnerable to the outside pressures, and consular courts were creating a chaotic environment within the country. The Egyptian statesmen Nubar Pasha's solution to solve this chaotic situation was the introduction of the Mixed Courts of Egypt. This project was going to be crucial not only for Egypt's but also for Japan's experience of legal modernization.

The Meiji government's first project was the abolishment of the unequal treaties by convincing the Great Powers to sign new commercial treaties. Moreover, having defeated the Bakufu thanks to the Western weaponry, the Meiji leaders had already abandoned their anti-foreign views and started to believe that they should adopt Western economic institutions and models, import Western technology and know-how in order to exist as a powerful state in the nineteenth century global order. To achieve this and more importantly to achieve the dream of abolishing extraterritoriality, the Meiji government dispatched the Iwakura Embassy to Europe and the United States. Although the treaties were not renewed on equal terms, Fukuchi Genichirō and Shimaji Mokurai were sent to study the legal institutions and laws of Greece, the Ottoman Empire and Egypt. Especially, the research on the Mixed Courts of Egypt became crucial for the Japanese legal modernization process. Even though Japan did not adopt Mixed Courts system after conducting an almost fifteen years of research and producing three extensive reports, the Ottoman and Egyptian experiences taught the Meiji political elite an important lesson. Japan needed to abolish the old laws and institutions and adopt European ones in order to abolish extraterritoriality. The constitution, the civil code, the courts of justice; in short, all legal institutions should be adopted from Europe. With the help of political circumstances in East Asia, thanks to the Japanese victory in the First Sino-Japanese War and Japan's civilized behavior during this war, and Britain's need for a powerful ally against Russia, Japan could abolish extraterritoriality by 1894 and became an important great power in 1902 with the Anglo-Japanese alliance.

The Japanese quest for sovereignty also revealed another dimension of the nineteenth century global order. The legalized hegemony of the West and the role of international law in interstate relations created a set of multi-dimensional relationship

between the West, Japan, and the Ottoman Empire. 1873 onwards, Japan and the Ottoman Empire continued a rather interesting diplomatic relations of unofficial status. The "twilight diplomacy" revealed the Japanese perception of the Ottoman Empire and Japan's ambitions to strengthen its position as a great power. Ottoman–Japanese relations after 1873 is a good example of how relations between two non-European powers in the nineteenth century worked. When Fukuchi was visiting the Ottoman Empire, for instance, he did not want to be subjected to the local laws and jurisdiction. He acquired the legal protection of France to assure his "safety". After his visit, the Japanese diplomats made several offers to sign a commercial treaty that would give Japan extraterritorial privileges in the Ottoman Empire. The Sublime Porte rejected these offers, stating that they are a part of the European Family of Nations by giving reference to the Paris Treaty of 1856. Both before and after 1894, the Meiji government eagerly attempted to gain extraterritorial privileges from the Ottoman Empire. This showed that the Meiji government wanted to strengthen its position in the eyes of the Great Powers by becoming an Empire worthy of acquiring extraterritorial privileges from the Ottoman Empire, and as they modernized their institutions, they started to see the Ottoman legal institutions, just like the European powers, as uncivilized and arbitrary. This created an invisible wall between Japan and the Ottoman Empire. Japan was able to break the wall between them and the Great Powers thanks to the Meiji government's decision for a full-fledged Europeanization. The Meiji legal reforms were exclusively European. The Ottoman experience did not allow for the implementation of such a policy. The unequal treaties were the legacies of the old regime in Japan. Therefore, it was easier for them to completely abolish the existing institutions and adopt European ones. The Ottoman state, however, did not have an "ancién regime" that would make it easier

for them to abolish the existing institutions and laws and replace them with the European laws and institutions. Even though series of reforms were introduced, especially in the second half of the nineteenth century, there were many cases where old institutions coexisted with the new ones. The twilight diplomacy continued until the start of the First World War. Official relations were only established when the new Turkish Republic was established with European codes, constitution, and institutions.

This work is dedicated to understand the Japanese legal modernization within the global trajectory of the struggle of non-European states with the nineteenth century global order. It aimed to take the narrative of nineteenth century inter-state relations and experiences of legal modernization out of the Eurocentric narratives. It also set its goal to provide a different perspective of non-European experiences of the nineteenth century, which is dominated by the isolated national historical narratives of victimization. The Japanese legal modernization brought the abolishment of extraterritorial treaties and could be seen as a success story in an isolated narrative. It was regarded as a model for all non-European states. However, it is seen in this work that Japan had critical advantages compared to China, Egypt, or the Ottoman Empire. Thanks to this work, it is clear that the particular conditions of Japan provided the best possible outcome in Japan's quest for sovereignty and legal modernization. It became clear that rather than labeling different experiences of modernization as stories of success or failure as if they were tested within the same conditions, historians should see them within their capabilities and the choices that were made within these boundaries. This allows a nuanced analysis as well as enables historians to do justice to the historical actors. Having applied this approach, it was seen that one of the most significant difference between the Meiji Japan and Ottoman Empire

and Egypt was the amount of foreign debt the respective governments owed. Japan was able to pay its debts and the loans the Meiji government took usually used for employment of former samurai or construction of railways and the Japanese government was able to pay these debts throughout the nineteenth century. The Ottoman Empire, however, could not take control over its debts and towards the end of the nineteenth century, the Ottoman state was taking loans to pay loans. The foreign debt of the Ottoman Empire was taken under control when the Public Debt Administration was established. Egypt, assuming huge amounts of debt from the Ottoman Empire, could not act on its own as well. Another important difference was the importance of the existing institutions. The Ottoman legal institutions and laws were not easily replaceable because of possible social reactions and the fact that they were based on ages of state tradition. After acquiring its autonomy from the Sublime Porte, Egypt was able to act more freely on this matter however still the Khedive had limited power to introduce the reforms and new institutions as easily as the Meiji government. Legal institutions and laws that were in place in Japan in the nineteenth century, however, were neither deeply rooted nor their replacement with European institutions would cause social upheavals. The Meiji government did face social upheavals, but these were not because the existing institutions were replaced by European ones but because of the amount of taxes and land reforms. As a result of this comparative analysis, it was seen that the Japanese research on the Mixed Courts of Egypt is an important turning point in the long process of Japanese legal modernization. Moreover, it revealed the nineteenth century global order and interstate relations from non-European perspective as it was at the crossroads of the Egyptian, Ottoman, and Japanese legal modernization and revealed parallels as well

as differences of these experiences of non-European strategies of struggle, adaptation, and reformation.

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