

OTTOMAN DIPLOMACY AND THE CONTROVERSY OVER THE INTERPRETATION OF ARTICLE 4 OF THE TURCO-AMERICAN TREATY OF 1830

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ABSTRACT

A lengthy dispute which for almost fifty years opposed the Ottoman Empire to the United States is a patent instance of the failure of Ottoman diplomacy to assert its legitimate rights in the face of a cynical manifestation of Great Power *Realpolitik*. Though the dispute was largely of an "academic" nature, it acquires a different stature when placed in the context of the post-*Tanzimat* Ottoman statesmen's aspirations to free the Empire from the shackles of the Capitulations.

The dispute had its origin in the working of Article 4 of the Turco-American Treaty signed in the Ottoman capital on May 7, 1830. Article 4 of the treaty, concerning penal matters related to American subjects residing and working in the Empire, was poorly drafted in its Turkish original and it could be construed that mixed cases were also to be heard by American consuls to the exclusion of Turkish courts, that is, it was giving American subjects the right of extraterritoriality in all but name.

KEYWORDS

Ottoman-American Diplomatic Relations; Capitulations; Foreigners in the Ottoman Empire.

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Ottoman diplomats were relatively late comers in the game of international politics as practiced in the nineteenth century but they were quick to master the tools of their trade and were often more than a match for their foreign colleagues who could draw from age-old traditions and experiences. If, however, the results attained were rarely commensurate to the skill they deployed in negotiations, this is not due to their own failings: In the age of imperialism the state whose interests they were defending was too weak and powerless to have any weight in the international scene.

A lengthy dispute, which for almost fifty years pitched the Empire to the United States, is a patent instance of the failure of Ottoman diplomacy to assert its legitimate rights in the face of a cynical manifestation of Great Power *Realpolitik*. Though the dispute was largely, as an American diplomat involved has said, of an "academic" nature, it acquires a different stature when placed in the context of the post-Tanzimat Ottoman statesmen's aspirations to free the Empire from the shackles of the capitulations. A thorough study of this controversy which occupied a succession of Ottoman diplomats both at the Washington legation (which was raised to embassy level in 1910) and in the Ministry of Foreign Affairs in Istanbul also sheds light on the inner workings of the ministry.¹ Indeed, not only does one see the mechanism of the ministry at work, but one can also detect personal rivalries and office feuds in between the lines of the dispatches that went to and fro the legation and the ministry.

The dispute had its origin in the wording of Article 4 of the Turco-American Treaty signed in the Ottoman capital on May 7, 1830, which is the starting point of regular diplomatic relations between the two countries. The story of the negotiations that led to the conclusion of this treaty is well known and will not be dwelt upon here. We have to know that till the 1856 Paris Conference where the Empire was admitted into the European Concert, whenever the Ottoman Empire concluded treaties with foreign

¹This article is based on files HR/H232-233-234 from the *Başbakanlık Osmanlı Arşivleri* containing the correspondence exchanged between the Ottoman mission in Washington and the Ministry of Foreign Affairs over this issue. I hope to return to this subject in more detail in a forthcoming study of Ottoman diplomatic history.

powers, it accepted only the Turkish version of the text as binding and valid. It would appear that article 4 of the American treaty, concerning penal matters related to American subjects residing and working in the Empire, was poorly drafted in its Turkish original and was therefore open to misinterpretations. Capitulatory rights provided that in causes where both parties were foreigners, these causes were to be heard by the consuls of the countries whose subjects the parties involved were. However mixed cases, that is when one party was an Ottoman subject and the other a foreigner, would fall under Ottoman jurisdiction, with the consul or the dragoman of the foreign party being admitted as an observer. Article 4 of the Turco-American treaty was drafted in the Turkish version in such a careless way that it could be construed that mixed cases were also to be heard by American consuls to the exclusion of Turkish courts, that is it was giving American subjects the right of extraterritoriality in all but in name.

This goes a long way to show how inept had the pre-Tanzimat Ottoman Chancery grown that it could overlook such a gross error, which gave away the last remnants of national sovereignty, that is the right to try and punish foreign nationals. American diplomats realized the importance of this clause early on, which they had secured without even asking for it. The American negotiators had been instructed to obtain the treatment of the most-favoured nation, and here they had unwittingly obtained from the Porte a concession that even countries long-established in the Levant like France, England and Austria had not been able to gain for their own nationals. That the Ottoman statesmen, on the other hand, failed to apprehend the dangers that this faulty composition could lead to is clear as the same clause appears verbatim in two other treaties the Porte negotiated with foreign states in subsequent years, that is in the Belgian treaty of 1838 and the Portuguese treaty of 1843.²

²Ottoman diplomats in later years were always worried that these two countries would also try to claim similar rights. Owing to the small number of Portuguese nationals residing in the Empire, Portugal was never involved in the dispute but when a Belgian subject was arrested by the Ottoman police following an attempt against the life of Sultan Abdülhamid in 1905, the Belgian government put pressure on the Porte to have him released. For the Ottoman view see, Gabriel Effendi Noradoughian, "Le Traité turco-belge de 1838 et la compétence en matière pénale des autorités

For forty years, the matter lay dormant, like a time-bomb waiting to explode in a sleepy chancery room. The fact that no case arose for such a long time that involved an American subject is indicative of either the orderly conduct of the citizens of the Union living and working in the Ottoman Empire or of their small number.

In 1868 two Americans were recruited along with a number of Austrians and Englishmen in a bizarre expedition funded by Mustafa Fazıl Paşa, who wanted to overthrow his half-brother the Khedive of Egypt İsmail Paşa. The plot aborted and the foreign mercenaries ended up in custody in Damascus. One of the Americans, was the former US consul at Piraeus, H.M. Canfield, also known as Lamar, and the other was a freshly naturalised Hungarian named Romer, probably a left-over from the wave of Hungarian refugees who sought shelter in the Empire after the 1848 uprisings. While the Secretary of State William Seward confessed to Blacque Bey, the Ottoman Minister in Washington, that Canfield had violated the laws of the Empire and that he would therefore refuse to intervene in his favour, Morris, the US Minister in Constantinople disagreeably surprised the Porte by demanding that the two Americans be handed over to him basing his claim on what was to become the standing American interpretation of Article 4 of the 1830 treaty; that is that American citizens were to be tried by their own consuls even in cases to which the Ottoman state or Ottoman subjects were party.

Whether Morris was acting on his own, or upon instructions received from Washington is not known, but in the latter case, it would not be the last time that American diplomats would mislead their Ottoman counterparts by disclaiming knowledge of what was being done or said either in Washington or by the American Minister in the Ottoman capital. The Ottoman Minister of Foreign Affairs was Âli Paşa, known both for his fastidiousness as a writer of diplomatic notes and his negotiating skills. He at once dismissed Morris's claim as being unfounded and contrary to all known precedents and usages in force in the Empire's relations with foreign states. For obvious reasons, the Porte preferred not to give

ottomanes envers les étrangers", *Revue de Droit international et de Législation comparée*, Bruxelles, 2e série, 1906, tome VIII, pp. 3-19.

too much publicity to the whole affair and decided to expel all the foreigners who had been involved in this botched up attempt to overthrow the Khedive. But this did not prevent a lengthy exchange of notes between the Ottoman Ministry of Foreign Affairs and the American legation on the subject of Article 4. I have not been able so far to trace either these notes or any document related to the Mustafa Fazıl Paşa expedition in the Ottoman archives. But it would appear that Âli Paşa's last note to the legation on the matter of Article 4 dated 18 September 1869 having remained unanswered, the Porte interpreted this as an acceptance on the part of the US Government of its views on the issue, and the matter was allowed to fall into oblivion.

Ten years later, an event was to occur that would bring it back to the fore of Turco-American relations and open a file which remained active for almost 40 years. Indeed, in February 1877, a drunken sailor called Patrick Kelly from the crew of USS *Vandala*, a ship from the American Mediterranean station which was anchored at the port of İzmir, killed Tahir Ağa, a customs watchman. The sailor was taken into custody by the Ottoman police but later was handed over to the American consul in İzmir, on the condition that the consul would arrange for him to appear at court when the case was to be heard. It was the understanding of the Governor of the Aydın Province, Sabri Paşa, with whom Consul Smithers was in touch over this affair, that when Kelly was to be summoned to the court, the consul or his dragoman would be present only as a witness to the proceedings, as was the case in law suits in which a foreigner was one of the parties. However, Smithers demanded the right for himself to sit among the judges who would hear the case with a deliberative vote. He was basing his claim on article 42 of the English capitulations of 1645 and cited precedents in which the British consul in İzmir had in recent years been allowed to take part in the deliberations of the court in mixed cases involving British subjects. The governor having dismissed Smithers' demand on the ground that this article had become obsolete and disclaiming any knowledge of such a permission having recently been granted to the British consul, the US consul acting on instructions received from the Consul General in İstanbul, Schuyler, released the sailor and allowed him to leave İzmir with USS *Vandala*.

The Turkish government were rightly incensed. Not only had a culprit escaped scot-free from the pursuit of Ottoman law, but once more foreign consuls were taking the law into their own hands and were exceeding their rights. Consul Schuyler had already been a cause of irritation for the Porte when his reports on Bulgaria had been given wide publicity in the press both in Europe and in the States. As the US Minister in İstanbul, Maynard endorsed the action of his consuls and declared categorically that Article 4 of the 1830 treaty granted US consular officers the right to judge American citizens in all kinds of cases, the Ottoman Government decided to settle this matter once for all and invited the American Government to negotiations on this issue. If one bears in mind the events that were taking place in the summer of 1877, one can easily realize the importance the Porte was giving this matter. After an inconclusive exchange of notes between the legation and the Ministry of Foreign Affairs, the State Department suggested that the venue for the negotiations be moved to Washington. This was to be the first instance of the dilatory tactics used by the American government in this long-drawn case. Whenever they appeared at loss for new arguments, they would switch the centre of the talks from one capital to the other. The American side proved itself an adept of old-style great-power-diplomacy: stick it out until your opponent gets bored and loses interest.

But in this precise case, their opponents did not lose interest. Too much was at stake for the Ottomans. They had started a fight to abolish the capitulations or at least to revise those that were contrary to national sovereignty and were striving to place the Empire's relations with foreign states within the frame of international law and reciprocity, this last concept becoming the key word for Ottoman diplomats. They could therefore ill-afford to grant a power, that had not much weight in the region, new privileges which they would be forced to likewise extend to all other states as the treaties they had contracted were based on the "most favoured nation" principle. And this accounts for the attention the Ottoman Ministry of Foreign Affairs devoted to the matter at a time when the Empire was fighting first a vital war against Russia and then was involved in crucial post-war negotiations.

The main actors on the Ottoman end were on the one hand the successive envoys in Washington and on the other the Legal Advisors of the Ministry of Foreign Affairs in İstanbul or the *Chambre des Conseillers Légistes de la Porte* as was their title in French, which had, after the Crimean War become the official working language of the Ottoman Foreign Ministry. Over the 35 years that the dispute lasted (1877-1912), some nine envoys succeeded one another at the head of the Washington mission which was raised to Embassy level in 1912, but two played an important role in the course of the negotiations; Gregory Aristarchi Bey and Alexandre Mavroyeni Bey. That these two both belonged to the Greek Orthodox *millet* is a sheer coincidence. Aristarchi was *en poste* in Washington when the whole matter started and Mavroyeni served in Washington for almost ten years. So out of the 35 years that the dispute lasted these two men were on the spot for an aggregate of almost 16 years. And for the remaining twenty years, this question, though unsolved, was allowed to remain dormant, with occasional outbursts of activity when the Ottoman Ministry of Foreign Affairs would ask its envoy in Washington to sound the State Department in this respect and it would either receive an umpteenth repetition of the US standpoint or the request would simply remain unanswered. A sign of the importance the Sublime Porte attached to finding a solution to this issue is indicated by the decision to cancel in 1880 a Council of State motion to close the Washington legation for budgetary reasons. It was felt that keeping a direct open line to the Department of State would greatly justify the expense involved.

Aristarchi Bey who opened the negotiations in Washington is also known as the compiler of the 7-volume collection of Ottoman laws and regulations translated into French. He left Washington in March 1883 having served there over ten years. His recall seems to have been caused by a Palace cabale related to the purchase by the Ottoman Army of US-made rifles. He then lived in self-imposed exile in Paris, where he was in the employment of Alfred Nobel for whom he acted as a kind of international affairs advisor. After the fall of Abdülhamid II, he was reinstated as Ottoman Minister to the Netherlands where he died in 1915, the last serving senior Ottoman

diplomat from the Greek *millet*. He is to a large part the originator of the main arguments used by the Ottoman side in this dispute.³

Mavroyeni Bey who ended his diplomatic career as the Ottoman Ambassador to Vienna on the eve of the Balkan Wars appears to have been an independent spirit, delighted in initiating schemes for which he would later try to obtain official endorsement. In the question that is of interest to us many have been the times when he did devise proposals to submit to the Department of State and for which he literally begged approval from İstanbul. While in Vienna in 1911, he came up with an audacious proposal for an Ottoman-Austrian alliance against the Slaves in south-east Europe.

At the homefront, that is at the Ministry of Foreign Affairs in İstanbul, policies were formulated by the Office of the Legal Advisors, which was headed at the beginning by the German Genscher assisted by Gabriel Noradonghian, the future Minister of Foreign Affairs and the author of the celebrated collection of treaties of the Ottoman Empire. The role of the Legal Advisors appears to have been to try to dampen the more sanguine ardour of the men at the frontline and, so to speak, to bring them to a more realistic reading of the situation. But they were nevertheless careful not to keep them too strictly under control, ready to share in the credit if they were successful but equally ready to disavow them if they failed.

From the start Ottoman diplomats were careful to set apart two different issues; the case of Patrick Kelly accused of homicide and the question of the interpretation given by the Americans to Article 4. Aristarchi set himself upon these two tasks with great relish. The Kelly question was relatively easy to solve. He was a fugitive from Turkish justice and his offence had been clearly established. The Americans refused to release him back to an Ottoman court to be tried on the ground that that court was not habilitated to judge him; but on the other hand they were not willing to hand him over to an American court, and what is more he had been reported to have come back to İzmir several times

³When in semi disgrace in Paris, Aristarchi published a short pamphlet, *Protégés et naturalisés en Turquie*, Macon 1899, based on his Washington experience.

after the event whenever his ship the *Vandala* called at the port. Aristarchi arranged for all the notes exchanged between Consul Smithers and Governor Sabri Paşa to be sent to him in Washington and he was able to clearly establish that Smithers had violated the existing usages by refusing to release Kelly back to Ottoman police and that Minister Morris at İstanbul had several times misled the Ottoman Foreign Ministry either deliberately or because he himself had been misinformed by his subordinates, Smithers in İzmir and Schuyler in İstanbul.

The Ottoman envoy realised that the likelihood of the Americans ever giving up Kelly to the Ottoman authorities was very remote and that the Ottoman state could not initiate an extradition case against Kelly on the grounds that a) there was no extradition treaty between the USA and the Empire since the 1874 Naturalisation Treaty between the two countries had been allowed to lapse and b) because, in any case, such treaties provided only for criminals convicted of premeditated murder to be extradited and not authors of homicides. Furthermore, extradition cases fought in American courts were both costly and lengthy affairs. Aristarchi, thus based all his argumentation on the fact that a crime, albeit unpremeditated and accidental, was allowed to remain unpunished and that the family of the murdered man had fallen into distress by the action of an American subject. He managed to obtain a monetary compensation in favour of the family in spite of much foot dragging on the part of the Department of State which tried to make the payment of an indemnity conditional to the acceptance by the Porte of the American interpretation of Article 4. He was finally given a draft of USD 1200 drawn on an American bank in Paris which he at once triumphantly forwarded to İstanbul. Whether this sum ever reached Tahir's widow and children is a moot point that will probably never be solved. As an additional reparation, the two consuls who had been involved in this affair, Smithers in İzmir and Schuyler in the capital, were shortly after recalled.

The matter of Article 4 was approached at different levels by Ottoman diplomacy. It was first claimed that the translation was at fault. The matter was complicated by the fact that the Turkish original had been translated first into French and from that into English. The first line of attack of Ottoman diplomacy was to get the Americans to only accept the validity of the Turkish original.

The State Department challenged the Porte to produce its own version of the original which the Porte proved to be reluctant to do for a long time. This reluctance was all the more difficult to understand that by that time two published editions of the Ottoman version had already appeared and were available to scrutiny, the first one dating back to 1842.⁴ When finally a manuscript version of the original text was found, it became clear to the dismay of Ottoman diplomats that the said text was at best ambiguous and at worse could possibly lend itself to an interpretation close to the one put forward by the Americans. At once a new line of defense was devised, which, while admitting that the text was unclear, was based on the part of the article that said that the procedure in case involving Americans would "follow in this respect the usage observed towards other Franks". The usage in this respect was quite clear: none of the European powers that had many more subjects settled in the Ottoman Empire had tried to avail itself of such a privilege. When the State Department answered that such a right had been granted to the US by the treaty, Aristarchi and his successors meticulously studied the published American diplomatic documents relative to the negotiations and conclusively proved that what the American negotiators had as brief was to obtain the treatment of the most favoured nation, and had they secured a privilege likely to radically change the whole status of foreigners in the Empire, a trace of such a spectacular achievement would have been found in their dispatches to Washington. The Department of State under a number of administrations both Republican and Democrat stuck to its position claiming that as the Treaty in this form had been ratified by Congress and had been published in congressional records, it had acquired the character of a US statutory law and could only be modified by a decision of the Congress itself.

In the face of US obduracy, Ottoman diplomats kept looking for a variety of ways to influence the State Department, some of them quite innovative. During the Patrick Kelly affair, and while the first Ottoman Parliament was still in session, Aristarchi proposed that a deputy for the İzmir province ask a parliamentary

⁴*Devlet-i aliyeye ile düvel-i mütehallem beyinlerinde teyellünen mün'akid olan muahedat-ı atika ve cedideden memurin-i saltanat-ı seniyyece müracaatı lâzım gelen fikirât-ı ahdiyyeyi mutazammun risaledir, Dar-üt tubaat ül amire, 1258 (1842); and Resail-i ahdiye mecmuası, Matbaa-i amire, 1284 (1867).*

question to the Ottoman Minister of Foreign Affairs which would result in the publication of all the documents related to this case in the hope that this publication would wake American public opinion to the inequity of their representatives in Turkey. This is indicative of the realisation by Ottoman diplomats of a) the working of a parliamentary state and b) the importance of public opinion. The question never came to the agenda of the Ottoman parliament for obvious reasons, but attempts to influence American policy makers through public opinion continued. The Legal Advisors' Office published a 40-page pamphlet in French stating the position of the Porte in this issue. Hüseyin Tevfik Paşa, then Ottoman minister in Washington arranged it to be translated into English and distributed 150 copies among leading Congressmen and journalists. He also tried to have articles favourable to the Turkish view published in American papers but had to give up when journalists demanded to be paid. Not only had he no budget for that but he had been most imperatively instructed not to disburse a penny for this.

Still there were some attempts to influence the Congress notably through the Democrat senator for New York Samuel Cox, who briefly served as the US Minister to the Ottoman Empire and went on record for declaring at a Congressional session that the capitulations regime was outmoded and iniquitous. Another Ottoman minister, Ali Ferruh Bey, was heard for a whole afternoon by the Foreign Affairs Commission of the Senate. Ottoman diplomats were on the lookout for cases of a similar nature where the US had yielded to a foreign power and were delighted to find out that the US had admitted to a translation error in a treaty with Spain. In another case which had opposed the US to Britain, the US position was closer to the Ottoman one in the Turco-American dispute. When the US President publicly acknowledged that the United States had behave unjustly towards the Republic of Hawaii and presented his apologies, this led to optimistic assessments on the part of the Ottoman Minister.

Among the various avenues explored by Ottoman diplomats the following are the most imaginative: recourse to arbitration though this was judged as potentially dangerous since the possibility of an unfavourable judgement being passed was not ruled out owing to the hostility generally exhibited towards the Empire. One of the arbiters suggested was the Papal nuncio in

İstanbul. The unilateral denunciation of the whole treaty or of Article 4 only was also suggested. Even the forceful arrest of Americans accused of crimes was contemplated by the more audacious of Ottoman diplomats oblivious of the possible outcry such an action might evoke. It is rather ironical that Ottoman diplomacy was even concerned at one time with trying to save the face of the State Department and suggested that the matter be solved by an exchange of notes between the American mission in İstanbul and the Ministry of Foreign Affairs or alternatively between the Ottoman Legation and the Department of State, notes that would clarify the spirit of Article 4 hopefully in accordance with the Ottoman interpretation. This would have had the advantage of not requiring the assent of the Congress. The State Department again rejected this proposal insisting on its own interpretation of both the letter and the spirit of the Article 4.

The discussion remained largely on academic level as said earlier. I have not been able to establish the number of Americans who had been involved in such cases and who were able to escape judgment and punishment in Ottoman courts through the action of US consulates. The Ministry of Foreign Affairs appears to have handed such a list to the American Embassy in 1910 but it was obviously not a very large one. Yet there was always the possibility that the number would increase if former Ottoman subjects returned to the Empire having acquired American nationality and became embroiled in such cases. The Porte did not acknowledge this change of nationality since the 1869 Law of Nationality provided that Ottomans who wanted to change their nationality had beforehand to secure the Porte's consent and pledge not to return to Ottoman lands under their new nationality. The US were the only power not to recognize this pre-condition which resulted in the absence of a naturalisation treaty between the two countries, and as a matter of fact most of the American subjects involved in court cases were freshly naturalized former Ottoman subjects.

Ottoman diplomats involved in this matter, including those who belonged to the Greek Orthodox *Millet* were painfully aware of the negative impact that the missionary lobby had on the politics of Washington. Aristarchi, referring to the author of an official report on the Capitulations, a junior official of the American consulate at Cairo, Van Dyke, was quick to note that he was the son of a missionary family and that this gave him a biased view. Ali

Ferruh Bey, answering a request from the ministry to bring the matter once more to the attention of the Department of State stated that the time was not opportune referring to the anti-Turkish campaign orchestrated in the wake of the events in eastern Anatolia by the President of the University of Michigan, Angell who, while he served briefly as American Minister, had proposed that the US Navy "should rattle the Sultan's windows". Ali Ferruh called him disparagingly in his dispatch "*ce curé* Angell". Ottoman diplomats were also worried about the wayward actions of American consuls trying to preserve American subjects from Ottoman justice. The memory of Consul Vidal who had threaten to bombard Tripoli if his demands were not met still rankled.

After the restoration of the Constitution in 1908, the Ministry of Foreign Affairs once again approached the US with the view of settling finally this affair. The Americans this time answered sanctimoniously that though they acknowledged that now the Constitution provided protection against arbitrary power, they were concerned about the state of Ottoman prisons and until there was a notable improvement they would not let Turkish justice imprison any American (Ottoman diplomats *en poste* in Washington regularly referred to the expeditious way in which justice was meted out in the US and gleefully reported cases of lynching and public hanging). Sometime later Rıfat Paşa, the Foreign Minister drew the attention of the American government to the fact the new regime was about to embark on wide infrastructural investments and that American bidders would most likely be turned down since these investments required also the presence of a large foreign workforce and that owing to the lack of understanding between the two countries over the penal condition of Americans, it was not to be desired that Americans should reside in large numbers in the Empire. And indeed, as soon as the prospect of a railway concession to be granted to an American consortium headed by Admiral Chester came to the agenda and that the Ottoman government made it clear that the granting of the concession would be made conditional to the US accepting the Ottoman interpretation of Article 4, all the qualms of the State Department miraculously disappeared. The principle of the primacy of Congress was shelved, concerns about the state of Ottoman jails forgotten. An Assistant Secretary of State, Fr. M. H. Wilson travelled all the way to İstanbul, the Department of State prepared a draft treaty embodying the objections of the Ottoman side but now

the Ottomans demanded that the matter be settled by an exchange of notes according to their terms to which the Americans agreed. As an amusing aside, the Ottomans were represented by two Armenians, Ohannes Kuyumciyan, the under-secretary of the Foreign Ministry and Hrand Abro, a legal advisor while America was also represented by an Armenian, Schmavonian the legal counselor of the Embassy.

A short time after the agreement was reached, a series of external factors intervened to render it inconsequential. But the study of how it was reached will remain as a instructive case-study of ethics and morality in the conduct of foreign policy.

One can but conjecture on the reasons why successive US administrations chose to stick to a position whereby they may have been right in the letter but in which they were definitely in their wrong according to the spirit, and as confirmed by the leading contemporary authority on the capitulations the Frenchman Pélissié du Rausas, specially when they were to beat such an ignominious retreat from that position as soon as the higher interest of the country were at stake.