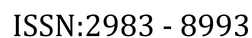
Special Issue

For a minimal Vocabulary of Interculturality: a legal comparative perspective



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“NON-WESTERN” SECULARISM:
THE CASE OF “RELIGIOUS” CITIZENSHIP IN ISRAEL AND TURKEY*

Anna Parrilli

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The essay examines the connection between citizenship and religious affiliation. To this end, it focuses on two case studies, namely Israel and Turkey. In Israel, the Law of Return acknowledges to all Jews a “fundamental right” to Israeli citizenship. In Turkey, while the constitution explicitly affirms the principle of State secularism, ethnicity and religion are closely interrelated, and they both contribute to defining Turkish national identity. This interrelation produces flaws between the black-letter constitution, and the operational rules governing citizenship. The essay argues also that Israel’s and Turkey’s legal systems are both characterized by the persistent influence of the Ottoman legal tradition, as well as that of the communitarian paradigm underling Jewish and Islamic traditions. In both countries, citizenship and State approach towards religious communities follow the logic of the millet*, which operates in an institutionalised form, in Israel, as a cryptotype in Turkey.*

I. INTRODUCTION

The essay examines the connection between citizenship and religious affiliation. To this end, it focuses on two case studies Israel and Turkey.

Since its foundation in 1948, the “Jewish and Democratic” nature of Israel has been deeply embedded in the constitutional and legislative structure of the State. The dichotomy between the (universal) principle of democracy and Israel’s Jewish character extends over to encompass immigration and citizenship law. As I shall discuss in the first section, Nationality Law (1952)[1] regulates the acquisition, loss, and attribution of Israeli citizenship by adopting

* The paper has been selected and reviewed by the Scientific Committee of the Conference "Costruendo un vocabolario minimo dell’interculturalità con approccio interdisciplinare”, held on May 19, 2021 via Zoom platform, within the research activities of the PRIN 2017 “From Legal Pluralism to theIntercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the EuropeanLegalSpace” (PI– prof. Lucio Pegoraro–CUP J34I19004200001).

universal and neutral criteria. The Law of Return of 1950,[2] by contrast, takes a different attitude. The status of "Jew" qualifies as a prioritizing factor for citizenship. Moreover, the foundation of the State as the "national home" of the Jewish people creates a strong link between Jewish ethno-religious belonging and the State.[3]

The connection between religious affiliation and citizenship also stands at the base of Israel's system of personal laws. In this respect, when Israel was founded in 1948, State authorities decided to preserve the *millet* system of personal laws inherited from the Ottoman Empire.[4] The Israeli *millet* thus grants fourteen religious communities a large degree of administrative and jurisdictional autonomy.[5] Religious courts are granted exclusive jurisdiction over matters of marriage and divorce. In other issues, such as succession, maintenance, and alimony, religious courts have concurrent jurisdiction with civil courts. [6]

As a consequence of the "Jewishness" of the State and the implementation of the *millet* system, we shall see the extent to which religious affiliation is legally relevant when determining the rights and obligations of Israeli citizens with respect to personal status and public-law issues, such as immigration law, citizenship rights and duties, access to public services and facilities, and participation in State religious institutions.

As regards the Republic of Turkey, the essay argues that religion-citizenship connection is arranged in a different way. After the demise of the Ottoman Empire, the *millet* system was abolished, and Mustafa Kemal Atatürk fully secularized the legal system. Accordingly, the 1928 constitutional amendments abolished Art. 2 of the 1924 Constitution, according to which Islam was the official religion of the State. It also repealed Art. 16 concerning the duty

[1] Nationality Law 5712-1952, Palestine Gazette No. 1210 of the 16th of July 1942, Suppl. II, p. 1193 (English Edition).

[2] Law of Return, 5710-1950, passed by the Knesset on the 5th of July 1950 and published in Sefer Ha-Chukkim No. 51 of 5th July, 1950, p. 159; the Bill and an Explanatory Note are published in Hatza'ot Chok No. 48 of the 27th June, 1950, p. 189.

[3] Y. Sezgin, *The Israeli Millet System: Examining Legal Pluralism through Lenses of Nation-Building and Human Rights*, in Israel Law Review, 631-654 (2010).

[4] The *millet* system of personal laws was established in 1452 by the Ottoman ruler Mehmet II. The system was primarily based on the Islamic legal tradition of *dhimma* (sanctioned by the *qur'an* (9: 1-3), and the *hadith* tradition), which regulated the personal and public affairs of those religious minorities living under Islamic rulers. Until its abolitions in the nineteenth century, the millet granted space for self-government and a certain degree of legal autonomy to Greeks (*rum milleti*), Jews (*yahudi milleti*) and the Armenians (*ermeni milleti*), while Muslims were considered as part of a single tradition and nation (*umma islamiyya*). The millet structure in Palestine was preserved under the British mandatory regime (Law and Administration Ordinance 5708-1948, May 19, 1948) and it was then adopted by the State of Israel, with some modifications as Jews became the majoritarian religious community. See S. Navot, *The Constitution of Israel a contextual analysis*, 195 ff. (1st ed. 2014). On the Islamic *dhimma*, K. Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States*, 133 ff. (2008); E. Don-Yehiya, *The resolution of religious conflicts in Israel,* in: Stuart A. Cohen, E. Don-Yehiya (eds.), *Conflict and Consensus in Jewish Political Life*, 203 - 218 (1986); I. Englard, *Religious Law in the Israel Legal System*, 13 (1975); A. Rubinstein, *Law and Religion in Israel*, in Israel Law Review, 384-399 (1967).

[5] F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, 57 ff. (3nd ed. 2021).

[6] S. Navot, *The Constitution of Israel a contextual analysis* ,76 (2014)

of the Parliament "to apply shari'a law".[7] By 1930, *shari'a* courts were abolished and legal dualism came to an end.[8] In 1937, the principle of *laiklik* eventually received constitutional status (art. 2 Const.). The principle has been interpreted by the Constitutional court (*Anayasa Mahkemesi*) as an essential condition for democracy.[9]

The mainstream narrative on Turkish constitutionalism revolves around the rupture with the Ottoman Empire and the adoption of a French-inspired "assertive model" of secularism.[10] Yet, this is not the whole story. In Turkey, State and religion are not fully separated. Take, for example, the Presidency of Religious affairs (*Diyanet Işleri Başkanlığı*, hereinafter: *Diyanet*) which is part of the public administration with the aim of regulating Islamic religious activities in accordance with the principle of *laiklik*.[11]

Not only does the constitutional and legal framework institutionalize Sunni Islam, but religion also plays a pivotal role in nation building and identity creation.[12] As I shall argue in section two, in Turkey, the connection between the ethno-religious element and citizenship is apparent from the disclosure of citizens' religious affiliation in the State population registry and the identity cards. In addition, the concept of "religious minority" (as understood by Turkish authorities) reveals the persistence of the *millet* logic, which constitutes a legacy of the Ottoman legal *substratum* and, therefore, a cryptotype of Turkish constitutionalism.[13]

As for Israel, the essay argues that the constitutional and legal framework disclose the prevalence of an ethno-religious concept of nationality over the civic concept of citizenship.[14] As for Turkey, a «tension between the black-letter law and rules 'in action'» emerges[15] with regard to citizenship and minority rights. In this respect, by reading beyond the black-letter constitution and law, Turkish citizenship emerges as membership to a nation State defined

[7] M. Kocak, *Islam and national law in Turkey*, in: J.M. Otto (ed.), *Sharia incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, 243, (2010).
[8] M. Koçak, *Islam and national law in Turkey*, 436 – 487, (2010)
[9] *Turkish Constitutional Court Decision, E.1989/1, K.1989/12*, March 7, 1989, Anayasa Mahkemesi Kararlar Dergisi[Constitutional Court Reports], n. 25, 133 -165.
[10] R. Hirschl, *Constitutional Theocracy*, 26 ff (2010).
[11] The *Diyanet* was established under Act n. 429 of 3 March 1924 on the "Abolishment of the Ministry for Religious Affairs" (*Şeriye Vekaleti*). According to Art. 136 of the Constitution (1982) «The Presidency of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity».
[12] F. Piazza, V.R. Scotti, *La Repubblica di Turchia un processo costituzionale continuo*, in: C.D. Bonella (ed.), *Itinerari costituzionali a confronto. Turchia, Libia, Afghanistan*, 27-131 (2013).
[13] R. Bottoni, *Secolarizzazione e modernizzazione nell'Impero Ottomano e nella Repubblica di Turchia: alle origini del principio di laicità*, in Rivista di Studi Politici Internazionali, 242-260 (2007).
[14] S. Baldin, *Lo Stato Nazione del popolo ebraico. Considerazioni sulla forma dello Stato israeliano alla luce della Legge fondamentale del 2018*, in Revista General de Derecho Publico Comparado, 1 ff. (2018).
[15] J-L. Halpérin, *Law in book and Law in Action: The Problem of Legal Change*, in Maine Law Review, 47 (2011).

on the basis of the majority religion (Sunni Islam). In both countries, citizenship displays a "collective-religious dimension".[16]

Furthermore, the essay highlights that both approaches towards citizenship and minority rights are grounded in a communitarian paradigm shared by the Islamic and Jewish traditions. This paradigm influences the legal formants – explicitly formulated or cryptotypes - of both systems of law.[17]

II. THE RELIGIOUS DIMENSION OF CITIZENSHIP IN ISRAEL

2.1 The *Law of Return*

The Law of Return of 1950 (hereinafter, LR) constitutes «one of the clearest reflections of the State of Israel as a Jewish State».[18] Together with the Nationality Law (1952), it grants Jewish immigrants in the country a nearly absolute right to Israeli citizenship.[19]

Indeed, Art. 1 of the LR states: «[E]very Jew has the right to come to this country as an *oleh»*. The *oleh* (pl. *olim*) is the Jewish immigrant who undertakes *aliyah* (Jewish immigration) and expresses the wish to settle in Israel and to acquire Israeli citizenship. He/she has the right to obtain the visa and the *oleh* certificate, without any reservation or other formalities required to non-Jews (sects. 2-3).[20]

The ties between the LR and the Jewish tradition is apparent from the very letter of the law. The terms *oleh* and *aliyah* retain their original religious meaning inasmuch as they describe the "ascension" of Jews to their homeland, i.e., Israel. According to some commentators, the

[16] F. Alicino, *Cittadinanza e religione in Turchia*, in: F. Alicino (ed.) *Cittadinanza e religione nel Mediterraneo*, 174 (2017).

[17] R. Sacco, *Legal formants. A Dynamic approach to comparative Law (Installment I of II)*, in The American Journal of Comparative Law*,* 1 ff. (1991).

[18] S. Navot, *The Constitution of Israel*, 76 (2014).

[19] In *HCJ 3648/97 Stamka v. Minister of Interior, PD 53(2)728* on the right of a non-Jewish who married an Israeli Jewish citizen to immediate citizenship upon request, Justice Cheshin stated: «[the] primary characteristic of the right of return is that is almost an absolute right. Every Jew, wherever he may be, can and is entitled – at his volition alone – to realize the right of return».

[20] Odd as it may seem, the requirement of a *real desire* to settle in Israel gave the way to controversy before the Supreme Court. In 1959 Mr. Rotenberg, a Jew of Polish origin, entered Israel and obtained the *oleh* visa and certification. In order to avoid compulsory military service in Israel, the applicant argued before the court that he had never intended to permanently settle in Israel, nor to acquire Israeli citizenship. Mr Rotenberg wanted to leave Poland and to settle in the Soviet Union. However, the Soviet authorities in Poland denied him the visa. Therefore, he moved to Israel under the *Law of Return*; then, he asked the Soviet consulate in Israel the permission to enter the Soviet Union. Ruling against Mr. Rotenberg, the Israeli Supreme Court, however, affirmed that it was not possible to evade the obligation to perform military service on the ground that, at the time of obtaining the *oleh* visa, he lacked the real desire to acquire Israel's citizenship. HCJ, *Rotenberg v. Deputy Head of Manpower Division*, 1959 in M.D. Goldman, *Israel Nationality Law*, 20 ff. (1970).

most correct translation of the provisions contained in Art. 1 would in fact be: «Every Jew has the right to 'ascend' to the Land of Israel as an 'ascender' (or, a returning Jew) ».
Being part of the Israeli State building project, the LR was designed to encourage Jewish immigration by establishing a strong link between the nascent State and the Jewish Diaspora. This connection has recently acquired constitutional status in the Basic Law: 'Israel as the Nation State of the Jewish People' (2018), according to which «the State shall be open for Jewish immigration, and for the Ingathering of the Exiles» (sec. 5). Furthermore, the 2018 Basic Law recognises the right to self-determination *uniquely* to the Jewish people (sec. 1.c), raising the development of Jewish settlement to a "national value" promoted by the State (sec. 7).[21] In 1948, the Declaration of the Establishment of the State of Israel (hereinafter; the Declaration) had already done so by inviting Jewish Diaspora «to rally round the Jews of Eretz-Israel in the tasks of immigration and upbuilding» of the State.
As the constitutional and legal framework uphold, Israel has been primarily conceived as a country of Jewish immigration and settlement. Consequently, the State has the responsibility to ascertain religious belonging of people wishing to join the Jewish *millet*. While "Jewishness" clearly qualifies as a prioritizing factor for the acquisition of Israeli citizenship, the definition of "Jew" within the Israeli legal system remains controversial.
Israeli law uses the term "Jew" in relation to religious tribunals jurisdictions, matters of civil registration and the LR. As regards the LR, the *Knesset* and the Supreme Court provided a secular interpretation of the term "Jew". Under the LR, a Jew is «a person who was born of a Jewish mother or has become converted to Judaism, and who is not a member of another religion». As further illustrated below, the definition was then broadened to include family members of Jewish immigrants which are not considered "Jews" under *halachah* (Jewish law). As far as religious law is concerned, it provides a clear definition of Jewish belonging: a Jew is a person who was born to a Jewish mother or who converted to Judaism (*ghiur*).
Thus, the secular definition of "Jew" adopted by LR only partially squares the religious one. The latter is applied by the Chief Rabbinate of Israel and the Rabbinical courts to determine Jewish status for the purposes of personal status law, as well as for granting access to public religious services. [22]

[21] While granting constitutional dignity to the Jewish identity of Israel, the Basic Law: The Nation State deliberately omit any reference to the democratic character of the State. On the consequences of this omission see, A. Harel, *Basic Law, Israel as the Nation State of the Jewish People*, Nationalities Papers, 262 ff. (2021).
[22] The Chief rabbinate of Israel is a statutory State body controlled by the Orthodox establishment. The Chief Rabbinate of Israel Law, 35, L.S.I, 97, 1980 established the functions, composition and the election process of the main organs of the Rabbinate: The Rabbinical council and the two Chief Rabbis. The Law

2.2 Jews as Citizens: a controversial relationship

The definition of "Jew" adopted by the State to regulate Jewish immigration and citizenship has been subject to harsh political and legal debate. Originally, the LR did not provide for a definition of "Jew" for the purposes of *aliyah.* In 1958, the Ministry of Interior adopted a residual subjective criterium prescribing that it is considered "Jew" a person who declares himself to belong to the Jewish people "in good faith", provided that he/she does not belong to another religion

The government's decision was harshly contested by the Jewish Orthodox establishment, which has been always trying to maintain the monopoly over the definition of Jewish status and conversion, calling for the strict application of *halachah* in determining religious affiliation.

These attempts have been partially balanced by the Supreme Court, acting as a "standard-bearer of secularism".[23] In the seminal cases *Rufeisen* (1962) and *Shalit* (1970), it addressed the legal connection between Israel and Jewish tradition. In 1962, in *Rufeisen (Brother Daniel)*, the court hold that, for the purpose of *aliyah*, the meaning of "Jew" had to be interpreted by applying the ordinary rules of interpretation instead of the religious criteria adopted by Jewish law. This was due to the fact that the LR is a secular law.[24] The background is well-known. Mr. Rufeisen was a Polish Jew who converted to Christianity, becoming a Carmelitan monk by the name Brother Daniel. In 1953, he moved to Israel and sought to be recognized as Jew under the LR. Israeli authorities refused his request since, according to the said law, the term "Jew" does not apply to a person who converted to another religion. The judges reasoned that «in the absence of a definition either in the statute itself or in the decided cases», the term "Jew" had to be interpreted according to its «ordinary meaning», i.e., taking into consideration the perception of the community on who is a Jew. Since a Jew who converted to Christianity is no longer deemed as part of the community by ordinary Jewish people, Mr.

on Religious Public Service (consolidated version) (5731- 1971) rules the terms of work of city rabbis under the supervision of the Rabbinate. Under Israeli law, the Rabbinate has a say over the authorization of *dayanim* (Jewish religious judges) and it acts as an appellate court. Moreover, it enjoys the monopoly over the supply of public religious services, such as the issuing of *kashrut* and conversion certificates, and licensing marriages and divorces among Jews.

[23] S. Baldin, *Lo Stato nazione del popolo ebraico*, *Considerazioni sulla forma dello Stato israeliano alla luce della Legge fondamentale del 2018*, in Revista General de Derecho Publico Comparado, 10, (2018).

[24] See *HCJ 72/62 Rufeisen v Minister of the Interior, P.D.16, 2428 (1962)*

Rufeisen/Brother Daniel was not regarded as Jew for the purpose of the LR [25] (although he could still have been considered Jew under Jewish law).[26]

In *Shalit*, the Supreme Court applied the test of "communal understanding" developed in *Rufeisen* and ordered the registration of a child born to a Jewish father and a non-Jewish mother as Jew in the Population Registry.[27] A child who was not Jew under religious law, was considered Jew in Israeli case law.[28]

Following *Rufeisen* and *Shalit*, the *Knesset* repeatedly amended the LR. As already mentioned, under its current formulation, the law states that a "Jew" is «a person who was born of a Jewish mother or has become converted to Judaism, and who is not a member of another religion». The *Knesset* does not entirely depart from Jewish tradition, as the LR accepts the matriarchal rule of religious origin. However, contrary to Jewish law - according to which a Jew converted to another religion is still a Jew – in application of the *Rufeisen* case, a Jew converted to another religion is not considered part of the Jewish community by Israeli civil law.[29] Perhaps most important of all is that Section 4a of the LR further departs from religious criteria, thus broadening the scope of the law to include other family members of a Jew, i.e. the spouse, children (and their spouses), and even grandchildren (and their spouses). In sum, even family members who are not considered Jews under Jewish law qualify as Jews under the current formulation of the LR.

As regards conversion, section 4b of the LR establishes that immediate citizenship rights are vested in people who converts to Judaism. Since «conversion in the context of this Law is a public-civil act»,[30] it requires supervision by the State. The validity of conversion is an essential factor for the purposes of Jewish immigration under the LR - as the law applies to Jews only - and then, for the determination of the personal status law applying to the

[25] In delivering the dissenting opinion, Justice Cohn diverged from the "communal understanding" test in favor of a subjective approach which took into consideration Mr. Rufeisen's statement of being Jew because of his subjective feeling. See, J. Cohn dissenting opinion, *HCJ 72/62 Rufeisen v Minister of the Interior, P.D.16, 2428 (1962).*

[26]According to Jewish law a person who is born Jew is part of the Jewish people, even though they decide to convert to another faith or does not fulfill their religious obligations.

[27] *HCJ 58/68 Shalit v. Minister of the Interior P.D. 23(2).*

[28] The child was registered as a Jew under the Registration of Inhabitants Ordinance 1949, which preceded *the Population Registry Law of 1965*, by filling the entry *le'um*, a term generally referred to the (very different) concepts of "peoplehood", "ethnicity", "nationality" but whose translation is almost impossible, and not under the entry "*dat*", which indicates religious affiliation for the purpose of personal laws. On the *Shalit* case, see further A.R. Petty, *The Concept of "Religion" in the Supreme Court of Israel,* in Yale Journal of Law and the Humanities, 211-268 (2014).

[29] The communal test was further applied in *Beresford* (1987). Justice Barak held that the applicant (a couple who declared to be Messianic Jews) did not qualify under the Law or Return because the ordinary Jew - in Barak's words «the Jew from the marketplace» - would not have recognized them as part of the Jewish people.[29] *HCJ 265/87 Beresford v. Minister of the Interior 43(4) PD 793, 1987*

[30] HCJ 7625/06 *Rogachova v. Minister of Interior,* March 31, 2016 (President Naor).

newcomers on matters of marriage and divorce (and ancillary issues). Despite the importance of this matter, a conversion law is still lacking,[31] and regulation of this issue has been mainly left to government and courts.[32] According to the Supreme Court's precedents, the term "converted" refers to a person who joins a «recognized Jewish community»,[33] that is, «an established, active community with a common, known Jewish identity, which has fixed frameworks of communal administration and which belongs to one of the streams recognized by the international Jewish community».[34] Under this inclusive criteria set by the Supreme Court, not only Orthodox conversion, but also Reformed and Conservative conversions performed both in Israel and abroad are recognized by the State for the purposes of the LR.[35]

As part of an effort to build the Jewish State, the current formulation of the LR allows a great number of people to come to Israel as Jews and obtain immediate citizenship. However, those immigrants who acquire citizenship under the secular LR, but whose Jewishness is contested by the Rabbinate under Orthodox religious law, are left in a "limping legal status" with regards to personal status law. This occurs because, as aforementioned, in Israel religious affiliation is legally relevant on matters of *status personae*, which is partially regulated by religious laws. Uncertainties about the religious status of a person may jeopardize her/his constitutionally protected rights, in particular the rights to freedom of religion and *from* religion, to marry and family life, to be equal before the law, to non-discrimination in the access to public religious services, as well as children and women's rights.

Idiosyncrasies between the (partially) secular criteria adopted by the LR and the religious ones applied by the Israeli religious authorities reflects the inherent tension between the democratic (secular) character of the State and the relevance of religious affiliation on matters of citizenship and personal status.

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[31] At the time of writing, a Conversion Bill proposed by the Interior Minister and leader of the Shas party, Aryeh Deri, is under discussion. The scope of the bill is limited to conversion performed within Israel and it would recognize legal validity to Orthodox conversion only.

[32] Government decisions n. 3613 (4 July 1998) and n. 3155 (14 February 2008).

[33] Section 4b of the Law of Return (1950). See HCJ 264/87 Se*pharadi Torah Guardians, Shas Movement v. Population Registrar*, IstrAr, 43(2) P.D. 723 (11989; *Rodriguez-Tushbeim v. Minister of Interior*, IsrSC 59(6), 721; HCJ 1031/93 *Pessaro (Goldstein) v. Minister of the Interior*, 1995, IsrSC 49(4), *HCJ 5070/95 Naamat v. Minister of the Interior [2002] IsrSC 56(2) 721*, HCJ 7625/06 *Rogachova v. Minister of Interior,* March 31, 2016. Lower courts further contributed to the cause of non-Orthodox converts. For instance, in 1998, the Chief judge of the District Court in Jerusalem ruled the Ministry of the Interior to register as Jews 23 immigrants who converted under non-Orthodox procedures in Israel. *Gigi v. Minister of the Interior, 5757(3) P.M. 454 (1998*).

[34] CJ 7625/06 *Rogachova v. Minister of Interior,* March 31, 2016 (President Naor).

[35] *Rodriguez-Tushbeim v. Minister of Interior*, IsrSC 59(6), 721; HCJ 1031/93 *Pessaro (Goldstein) v. Minister of the Interior*, 1995, IsrSC 49(4), HCJ 7625/06 *Rogachova v. Minister of Interior,* March 31, 2016.

With regard to the LR, the Supreme Court repeatedly stated that the peculiarity of Israeli immigration and citizenship legislation finds its justification in the "Jewish and Democratic" nature the State, which is entrenched in the 1948 Declaration, the Basic laws 'Human Dignity and Liberty' (1992) and 'Freedom of Occupation' (1994), and 'the Knesset' (1992).[36]

Over the years, the Supreme Court has pursued a secularizing agenda on matters of recognition of Jewish belonging and conversion, while preserving the Jewish character of the State. Several rulings ordered the registration of non-Orthodox Jews as citizens under the LR for in the Population Registry.[37] However, when it comes to personal status issues, the Rabbinical institutions and tribunals still rely on the Orthodox interpretation of Judaism. The Supreme Court case law and the parliamentary debate When addressing the fundamental question "Who is a Jew?", the Supreme Court and the *Knesset* struggle to find a common ground with the religious institutions. The controversy surrounding the the definition of who is a Jew is revealing of the inherent contradictions of the Israeli forms of State as "Jewish and democratic".

In sum, the "religious" dimension of citizenship in Israel is further strengthened by the adoption of the *millet* system.[38] Since the inception of Israel as an independent State, Israeli authorities have preferred to avoid confrontations over religious matters.[39] Hence, religious courts retained jurisdiction over the *status personae*, and they were therefore incorporated into the State institutional structure. In so doing, potentially conflicting legal systems were kept in force but accommodated under State control. But, the implementation of the *millet* structure was also aimed of preserving and homogenizing Israeli-Jewish identity; as well as

[36] Art. 1, Basic Law: Human Dignity and Liberty, passed by the Knesset on 17th March 1992; Art. 2, Basic Law: Freedom of Occupation (1994) passed by the Knesset on the 9th March 1994, which repeals and replaces the Basic Law: Freedom of Occupation enacted in 1992; Art. 7, Basic Law: The Knesset passed by the Knesset on 12th February 1958;

[37] *HCJ 5070/95 Naamat v. Minister of the Interior [2002] IsrSC 56(2) 721; HCJ 2597/99 Rodriguez-Tushbeim v. Minister of the Interior [2005] IsrSC 58(5) 412 (May 31,.2004)*

[38] The Palestine Order in Council 1922-1947 recognized Jewish and Sunni Muslim communities, as well as the following Christian religious groups: the Latin Catholic Community, the Eastern Orthodox Community, the Gregorian Armenian Community, the Catholic Armenian Community, the Catholic Syrian Community, the Chaldean Community, the Maronite Community, the Orthodox Syrian Community and the Greek Catholic Mellcite Community. Moreover, the Druze (1957) and the Bahai (1971) communities are recognized.

[39] The reasons behind the government's decision to retain the millet system have been broadly discussed by the literature. See, among others, R. Harris, *Historical opportunities and absent-minded Omissions: on the incorporation of Jewish Law, in Nascent Israeli Law,* in M. Bar-On, Z. Zameret (eds.), *Both sides of the Bridge: Church and State in Early Israel* (in Hebrew) cited in Y. Sezgin, *The Israeli Millet System: Examining Legal Pluralism through Lenses of Nation- Building and Human Rights*, in Israel Law Review, 638 (2010); D.M. Sassoon, *The Israel Legal System*, in The American Journal of Comparative Law, 405 ff. (1968).

keeping the differentiation between Jews and non-Jews.[40] In other words, the *millet* manages diversity in society by drawing the communities along ethno-religious lines; at the same time, it favours the creation of a common national identity among Israeli Jews. Consequently, the ethno-religious concept of nationality prevails over the civic concept of citizenship, raising questions in terms of freedom of religion (and *from* religion), citizens' equality before the law, and identity rights with regard to both non-Jewish minorities and non-Orthodox Jewish groups *within* the Jewish majority of the population.[41]

III. THE RELIGIOUS DIMENSION OF CITIZENSHIP IN TURKEY

3.1 The "hidden" millet

Whereas the concepts of religion and ethnicity, in Israeli legal system frequently overlap,[42] Islam clearly separates ethnicity from religion.

The link between religion, ethnicity, and nationality is an entirely modern construction which was introduce by the secular governments in States like Turkey and Egypt; both have experienced nationalism, and religion was functional for nation and identity building.

Before dealing with the "religious dimension" of Turkish citizenship, a premise is necessary. During the period of the *tanzimat* (reforms) (1839 – 1878), Ottoman rulers re-interpreted and re-used concepts, categories, principles, and institutions of the Islamic tradition by mixing them with borrowings of the Western legal traditions. One of the most interesting metamorphoses is the reinterpretation of the religious concept of *umma* which is associated and combined with terms by no means coincident, such as of *watan* (homeland) and *qawmiyya*

[40] Y. Sezgin, *How to integrate Universal Human Rights into Customary and Religious Legal Systems*, in Journal of Legal Pluralism, 5 (2010).

[41] In CA 630/70, *Georges Raphael Tamarin v. the State of Israel*, known as "The Tamarin Decision", Justice Agranat held that in order to grant a declaratory order about one's membership of a certain nationality, there must be objective evidence about the existence of that nationality. A subjective belief is insufficient for determining the existence of a certain nationality for purposes of registering in the Population Registry. In addition, J. Agranat affirmed that there was no evidence that an "Israeli" nationality was formed in the State of Israel that is separate and distinct from the Jewish nationality. The *Tamarin* decision was confirmed in the subsequent ruling CA 8573/08 *Ornan v. Ministry of the Interior*. S. Baldin, *Lo Stato nazione del popolo ebraico*, 10 (2018) .

[42] Art. 1 of the Foundation of Law Act states that when the court «finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage (*moreshet israel*)». Foundations of Law, 5740, 1980, p. 163, in Laws of the State of Israel: Authorized translation from the Hebrew, vol. 34, Government Printer, Jerusalem, Israel (1948-1989), p. 181.

(ethnicity).[43] This interpretative choice served the purpose of attenuating the universal character of the "community of believers" (*ummat al-mu'minin*), which increasingly took on the contours of an "*umma* - nation". In other words, an original operation of transposition and tuning was carried out by the Ottoman rulers.[44] Concepts indebted to Western legal tradition were transported into the Ottoman legal system and adapted to the local legal-cultural context. The same occurred with the Arabic term *millah.* Originally, indicating religious communities recognized under the *millet* system, it took on increasingly national and less religious contours.[45] Consequently, the entire *millet* structure changed its meaning, becoming less religious and more ethnic (and national) in nature.[46]

Following the demise of the Ottoman Empire and the foundation of the Republic of Turkey, the *millet* structure was abolished. However, the model is still present in the Turkish legal system as its cryptotype, which slyly shapes the definition of "who is a Turk" and, consequently, State's approach towards religious minorities.

As regards the acquisition, loss, and granting of Turkish citizenship, Art. 66 of the 1982 Constitution and the Citizenship law n. 5901 (2009) (as amended in 2018)[47] identify two basic principles: the acquisition of citizenship by birth and by naturalization. In the first scenario, a child born in Turkey or abroad from a Turkish father or mother is a Turkish citizen pursuant to Art. 7.1 of the Citizenship Law. However, if the child is born outside the marriage bond, the law differentiates according to whether the citizenship is passed on from the mother or from the father (art. 7.2 and 7.3). In the hypothesis of matrilineal transmission, Art. 7.2 of the Law provides for its immediate acquisition at birth. In case of acquisition *iure sanguinis* from a Turkish father and a foreign mother, the child acquires citizenship on condition that the criteria and procedures for ascertaining paternity pursuant to Art. 7.3 and 8 of the Citizenship Law are met. Finally, citizenship by naturalization requires the assent and discretionary decision of the Ministry of the Interior, which is competent in verifying the presence of the condition required by the law.

At a first reading, the legal framework seems to fully adhere to a civic, Western conception of citizenship, which separates the *status civitatis* from the *status religionis*. Likewise, the ethnic

[43]E. Rossi, *Dall'Impero Ottomano alla Repubblica di Turchia. Origini e sviluppi del nazionalismo turco sotto l'aspetto politico-culturale*, 364 – 365(1943).
[44] E. Örücü, *Law as Transposition*, in The International and Comparative Law Quarterly, 205-223 (2002).
[45] F. Castro, *Il sistema sciaraitico Siy'asa Sariyya e modelli normativi europei nel processo di formazione degli ordinamenti giuridici dei Paesi del Vicino Oriente*, 167 (1981).
[46] G.M. Quer, *Pluralismo e diritti delle minoranze. Il sistema del "millet*", in Stato, Chiese e pluralismo confessionale, 257 ff. (2010).
[47] Citizenship Law (as amended in 2018) [Turkey], Law No. 5901, April 2018.

element is formally irrelevant. However, when reading the law in the light of the «institutionalized political formulas»-[48] namely the «aims and values» that the Parliament intended to foster when drafting the constitutional and legislative provisions regulating citizenship – the "ethno-religious" dimension of citizenship emerges. In other terms, it is necessary to broaden our gaze on Kemalist policies for the construction of Turkish identity – pursued through the instruments of law – to understand the interrelations between Turkish citizenship and the ethno-religious element.

For instance, until 2010, under the transitional provision no. 1 of the Citizenship law, applicants classifiable as "ethnically Turks" had to prove long-term residence in Turkey for two years only, compared to the five years required for other applicants pursuant to Art. 11, paragraph 1 (b) of the law. The key to reading this provision is to be found in the Kemalist project aimed at building a homogeneous national identity that differentiate between "Turks" and other citizens belonging to different groups, as emerges from the General Assembly preliminary drafts reports.

3.2 Disclosing religious information on identity cards

Since the establishment of the Republic, the connection between Turkish identity and Islam has been strengthened. Although, in fact, the Kemalist *elite* promoted the image of a 'civilized' and 'patriotic' Turkish citizen[49], whose loyalty goes the nation, instead of the *umma.* At the same time, Kemalism made use of (Sunni Hanafi) Islam as a fundamental tool of nation-building, along with Turkish language.[50] The association between national identity and Islamic religious belonging, which originated from extra-legal factors, consolidated over time as a cryptotype influencing the attitude of the State towards ethnic-religious minorities.

The disclosure of religion in the identity cards and in the civil registry is of particular interest in relation to freedom of religion (and *from* religion), the non-discrimination principle, and, ultimately, the principle of *laiklik* as enshrined in the Constitution.

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[48] G. Lombardi, *Premesse al corso di diritto pubblico comparato. Problemi di metodo*, 69-70 (1986).

[49] The imagine of a 'modern', 'civilized' Turkish citizen, who is devoted to the Republic, rather than to the religious community, can be found in numerous speeches given by Mustafa Kemal, as reported in the literature. Atatürk's project of 'civilization' became one was infused by the Kemalist elite into popular culture and, from there, it passed on Turkish legal culture. For instance, the Preamble of the 1982 Constitution reads as follow: «this Constitution […] embodies […] the determination […] to attain the standards of *contemporary civilization* as an honorable member with equal rights of the family of world nations». The official English translation of the 1982 Constitution is published on the Grand National Assembly official website www.global.tbmm.gov.tr (last visited, November 1, 2021)

[50] R. BOTTONI, *Secolarizzazione e modernizzazione nell'Impero ottomano e nella Repubblica di Turchia,* in Rivista di Studi Politici Internazionali, 242 (2007).

Pursuant to Art. 35 of the Law on civil registration services,[51] Turkish identity cards contemplate the following religious identities: Muslim, Greek-Orthodox, non-Orthodox Christian, Jewish, Hindu, Zoroastrian, Confucian, Taoist, Buddhist, no religion, or other. The administrative practices and procedures reveal a presumed equivalence between national and religious identity. In other words, children are generally identified as Muslims in the civil registry, unless their parents (or their legal representatives) declare and *prove* the children belong to a different religious group recognized by the State.[52]

Members of religious communities not recognized by the Turkish state have raised this issue several times before Turkish administrative and constitutional courts, as well as before the European Court of Human Rights, mainly at the request of. In *X v. Turkey Supreme Court of Administration* (1994), for instance, the applicant was a follower of Jehovah Witnesses, which had been identified as a Muslim on his identity card. He complained about the administration refusal to change the information on the “religion” box. In line with other rulings on this issue, the administrative court ordered the removal of the wording ‘Islam’ from the applicant's document. However, the court refused to order the replacement with ‘Jehovahs Witness’, since the State does not recognise this religious group as separated from Christianity.[53]

The question of disclosure of religion on identity documents was also addressed by the Constitutional Court in 1979 and 1995. On both occasions, the Court ruled the requirement to fill in the information box on religion set forth in the 1972 Art. 43 Population Law (*Nüfus Kanunu)* in compliance with the rights of freedom of religion and conscience (art. 24 of the Constitution, *ex* art. 19 of the 1961 Charter).

In the 1979 ruling, the court affirmed that the Constitution prohibits any act of coercion aimed at forcing an individual to disclose his/her religious affiliation. However, in the court’s opinion, under the 1972 Population Law, citizens were not *forced* to reveal their faith. When

[51] Population Service Law L. No. 5490, adopted by the TGNA on Apr. 25, 2006; published in the Official Gazette on Apr. 29, 2006 (No. 26153).

[52] H. Gülalp, Country profile. *Turkey*, [Global Governance Programme], GREASE, Country Reports, 2019, [Cultural Pluralism], p. 4 on Cadmus, European University Institute Research Repository available at https://hdl.handle.net/1814/69933 (last visited, October 19, 2021).

[53] Similarly, in Egypt, religion is mentioned in the identity cards. Since the law only recognizes three religions (Islam, Judaism and Christianity), people belonging to non-recognized religious groups often cannot obtain identification document. The same applies to Muslims who converts to another religion. On Turkey, S. Esen, L. Gonenç, *Religious Information on Identity Cards: A Turkish Debate*, in Journal of Law and Religion, 579-603 (2008). On Egypt, M. Berger, N. Sonneveld, *Sharia and national law in Egypt*, in: J.M. Otto, *Sharia incorporated.A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, 80 ff. (2010).

asked by civil registrars, they could simply decide not to answer. In 1995, the Constitutional court confirmed the previous decision in favour of the constitutionality of Art. 43 of the *Population Law*. On that occasion, however, the court took the principle of *laiklik* (art. 2 Const.) as the main constitutional parameter. In this respect, the *Anayasa Mahkemesi* observed that *laiklik* requires the State be neutral towards all religious groups. The Population Law fulfilled this condition, since the provisions contained therein addressed all faiths.[54]

The issue of ethnic-religious affiliation on Turkish identity cards was later brought before the European Court of Human Rights in *Sinan Işık v. Turkey* (2010)[55]. In the present case, Mr. Işık complained about the refusal opposed by the public administration officer to change his religious affiliation on the identity card from "Muslim" to "Alevi". The ECtHR ruled that the indication of religion on the identity card violated Art. 9 (Freedom of religion and conscience) of the European Convention on Human Rights. Challenging the coercion test developed by the Turkish Constitutional Court in 1979 and 1995, the ECtHR highlighted that the mere presence of a "religion" box on the identity cards obliged the individual to disclose information regarding their attitude towards religious or their philosophical convictions. The same holds true for having to apply for religious indication to be deleted from the population registry.

In 2006 the Turkish General Assembly intervened by passing the Law on Civil Registration Services of 2006,[56] thus, allowing Turkish citizens to leave the religion box blank. Alternatively, they could submit, upon reaching majority, a request to change the wording on their identity documents pursuant to Art. 266 [cc].[57] The choice not to reveal one's religious affiliation, however, does not come without consequences.

Turkish constitution provides for mandatory religious and moral education in primary and secondary schools (art. 24). Students belonging to recognised religious communities are granted the right to be exempted from the "Religious Culture and Ethics" (*Din Kültürü ve Ahlak Bilgisi*) classes upon verification of confessional affiliation as indicated on the identity

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[54] Turkish Constitutional Court *E. 1979/9, K. 1979/44*; Turkish Constitutional Court *E. 1995/17, K. 1995/15*

[55] ECtHR, *Sinan Işık vs. Turkey*, Application No. 21924/05, 2, February 2010.

[56] Law on civil registration services n. 5480/2006.

[57] Five to eleven judges stated that Art. 43 Law on civil registration *services* was contrary the right to freedom of religion and conscience protected *ex* Art. 24 of the present Constitution as: « parents or legal representatives of children are obliged to declare the religion of their children, failing which no entry will be made. The inclusion of religion in the family record and on identity cards, before the child reaches the age of majority and without his or her consent, constitutes de facto mandatory disclosure of religion in daily life ... That disclosure obligation, stemming from the indication of religion on a document confirming civil status, and the presentation of that document when registering at a school or when carrying out military service formalities, does indeed amount, in my view, to 'compulsion'». S. Esen, L. Gonenç, *Religious Information on Identity Cards, a Turkish debate,* in Journal of Law and religion, 579-603 (2008).

documents and the civil status register.[58]

A clear example of how a formally neutral legislative framework may be repressive in its effects: the law operates within the context of important social factors, of which it is necessary to be aware in order not to lose sight of the concrete functioning of legal system.[59]

Turkish law regulating the disclosure of religious belonging on identity cards virtually applies to *all* citizens; thus, satisfying the requirements of State formal neutrality and *laiklik*. In a socio-legal context which implicitly links Turkish identity and Muslim identity, this disclosure is likely to produce incidentally a discriminatory effect against religious minorities, such as the Alevis. The latter do not qualify as minorities under the Treaty of Lausanne (1923),[60] nor they are conferred legal recognition as autonomous religious confessions under Turkish law. This approach towards the Alevi faith is twofold, it precludes Alevis' claims for legal protection and services provided by the *Diyanet*, such as the administration and founding of places of worship, and the employment of religious leaders as public servants; at the same time, it denies them the privileges granted to officially recognized religious minorities, such as the right to be exempted from compulsory religious classes.

It is precisely the protection of ethnic-religious groups other than Sunni Islam that reveals the blend between Kemalist ideology and religious tradition, as well as the influence of the Ottoman *millet*. The latter works in Turkish legal system as its cryptotype.

The Ottoman interpretation of the concept of minority further influences the interpretation of the 1923 Lausanne Treaty by Turkish authorities. The Treaty only refers to "non-Moslem".[61] However, under Turkish law the status of recognized religious minorities has been recognised to Christian, Armenian and Jews only. With the sole exception of the *Law on civil registration services* of 2006, no reference to religious denominations other than the "People of the Book" was found in legal texts regulating citizenship, identity documents, public education, and religious services, nor did any non-Sunni Islamic groups seem to be mentioned.

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[58] Supreme Council for Education Decision n. 1, 9 July 1990 in S. Esen, L. Gonenç*, Religious Information on Identity Cards: a Tuskish debate,* in Journal of Law and religion, 528 (2008).

[59] F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, 47 (3ed 2021).

[60] The Lausanne Treaty is particularly interesting in that, unlike other international agreements on the protection of minorities, it does not distinguish between racial, linguistic or religious groups, but groups all possible minorities into a single category: 'non-Muslims' (*Müslüman olmayan azınlıklar*). The criterion used to identify groups is therefore purely religious and draws a line between Muslims and others (ethnic-religious groups). Among non-Muslim communities, by virtue of an established practice, the Turkish State officially recognises only Greek Orthodox communities, Armenians and Jews (in essence, Christians and Jews). Treaty of Peace with Turkey signed at Lausanne, Arts. 37-45, July 24, 1923, 28 L.N.T.S available at http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne (last visited, September 9, 2021).

[61] Treaty of Peace with Turkey, July 24, 1923, 28, L.N.T.S, arts. 37-45.

As regards non-Sunni groups, the refusal opposed by Turkish public authorities to recognize them as religious minorities constitutes a legacy of the Ottoman *millet* as well as the Islamic legal tradition, under which the community is regarded as a uniform entity united under the Islamic religion. According to Turkish authorities, as they are part of the Islamic community, the Alevis cannot be recognized as an autonomous religious group.[62]

IV. CONCLUSIONS

In dealing with the Jewish character of the State, in Israel, and the interrelation between citizenship and (ethno-)religious affiliation, in Turkey, this essay has highlighted how use by national authorities of the majority religion as a tool for nation building and identity creation. Indeed, both Israel and Turkey an ethno-religious conception of citizenship prevails over a civic one.

As regards Israel, the Law of Return and Nationality law recognize to all Jews a "fundamental right" to Israeli citizenship. We have seen that, the definition of "Jew" provided by the LR is secular; thus, it only partially squaring with religious criteria followed by the Rabbinate (matrilineal descent and conversion to Orthodox Judaism) for the purposes of personal laws, as well as for granting access to public religious services. Uncertainties about the religious status of a citizens may jeopardize her/his constitutionally protected rights, in particular the rights to religious freedom, to marry and family life, to be equal before the law, as well as children and women's rights.

In Turkey, the Constitution protects *laiklik* as a fundamental pillar of democracy; at the same time, Islamic religious identity was incorporated within Turkish national identity in an original "Turkish-Islamic synthesis" (*Tu̇rk-Islam sentezi*).[63] The foundation of the Republic in 1923 was not followed by the establishment of a genuinely a secular citizenship based on the separation between *cives* and *fideles*.[64] Instead a differentiation was drawn among the dominant *millet* (Sunni Muslim Turks), other *millets* (religious communities recognized under the Lausanne Treaty), and the remaining confessional groups.

[62] A. Parrilli, *Religious freedom, Minority rights and Turkish secularism: The Case of the Alevis,* in Revista General de Derecho Público Comparado, 12 (2018).

[63] F. Alicino, *Cittadinanza e religione in Turchia*, in: F. Alicino (ed.) *Cittadinanza e religione nel Mediterraneo*, 157-190 (2017).

[64] F. Alicino, *Cittadinanza e religione in Turchia*, 180 (2017).

The latter are mainly identified by Turkish authorities as "sects" instead of being recognised as autonomous religious communities.[65] This approach to minority rights and politics of recognition constitutes a legacy of the Ottoman legal culture, since it resembles the *millet* structure of the society.[66] The discovery of this cryptotype – the Turkish "hidden *millet*" - is facilitated as the idea which is implicit in Turkey's legal system, is explicit in the Israeli legal systems, as well as in other Middle-eastern countries which adopt a system of personal religious laws (i.e., Cyprus, Egypt, Jordan, Lebanon, Syria).

In conclusion, the *millet* model of religious diversity governance - institutionalized (in Israel) or emerging as a cytotype (in Turkey) – is mainly based on a communitarian paradigm which contributes to drawing the ethno-religious communities as monolithic blocks for the purposes of nation-building and religious minority governance. In so doing so, the system portrays the society as composed by homogeneous communities. However, this picture hardly mirrors the reality. Perhaps most important of all, is that it poses serious challenges to both religious minorities living in the two countries, as well as to minorities *within* the religious majority community, such as non-Orthodox Jewish citizens in Israel, and the Alevi community in Turkey.

[65] ECtHR, *Hasan e Eylem Zengin v. Turkey*, n. 1448/04, 9 January 2008, § 66. Apart from those religious denominations endowed with the status of recognized minorities by the abovementioned Treaty of Lausanne and few other international treaties, Turkish law does not provide for any procedure by which religious groups can be recognized and registered or they can acquire legal personality, either under public or private law. They can only operate indirectly as foundations (*evakaf*) or cultural associations. E. Öktem, *Statut juridique des fondations des communautés non-musulmanes en Turquie. La nouvelle loi sur les fondations*, in Quaderni di diritto e politica ecclesiastica, 477-500, (2009).

[66] The Ottoman *hatt-i humayum* of 1856 already distinguished religious belonging from citizenship (*ginsiyya*). Among the most significant measures, the 1856 rescript abolished *jizya* (in Turkish, *cizye*), i.e., the tax enforcement on non-Muslim protected under the Islamic rulers (*dhimmi*). Nevertheless, *dhimmi* continued to pay a fee (*bedel-i askeri*) in order to be exempted from military service. F. Öztürk, *Ottoman and Turkish Law,* 23 ff. (2014).