



Emre Öktem

(full professor of International law at Galatasaray University of Istanbul,
Faculty of Law)

**Turkish secularism's ordeal with lucifer at Strasbourg:
reflexions inspired by the *Işık v. Turkey case* ***

“(A)ny conflict between an ecclesial/spiritual power and a political/temporal power becomes a political conflict at the moment it becomes the stake of a question of concrete self-affirmation, i. e. a conflict which cannot be settled by distinctions, however subtle they be, between the spiritual, the temporal, or mixt (*res mixtae*) but only in a formal way, i. e. by the answer to the formal question: *Quis judicabit?*”

(Carl Schmitt)¹

SUMMARY: 1. Preliminary remark - 2. The *Işık v. Turkey case* before the European Court of Human Rights and its background - 3. The previous case-law of the ECtHR in connection with the *Işık case* - 4. A new protagonist on the Strasbourg stage: The Religious Affairs Directorate - 5. Follow-up cases and subsequent developments – 5.1. ECtHR's case law – 5.2. Domestic law - 6. Instead of a conclusion: trying to analyse an identity crisis.

1 - Preliminary remark

In religious symbolism, light may have a dual meaning. It is most often related to divine attributes and powers: In Mazdeism, light, like fire, is directly associated with Ormuzd, the “good” deity. In Christianity, light is identified with the Verb² and may evoke the Holy Spirit, which explains the luminous, golden background of Orthodox icons. In Islam, a *Surah* (*Chapter*, no. 24) of the Koran is devoted to light and the concept of light

* Article peer evaluated.

¹ C. SCHMITT, *Der Leviathan in the Staatslehre des Thomas Hobbes. Sinn und Fehlschlag eines politischen Symbols*, Klett-Cotta, 2003, p. 166 (referring to H. BARION, *Besprechung des Sammelbandes*, in *Saggi storici intorno al Papato: dei Professori della Facoltà di Storia Ecclesiastica*, Pontificia Università Gregoriana, Roma, 1959).

² JOHN, I:9.



plays a crucial role in Sufi tradition³. However, the act of providing light has also an ominous significance: in the Old Testament, the Devil is called “morning star, son of the dawn”⁴. Interestingly reminiscent of Prometheus, the fire-robber, Satan is the light-bearer: *Lucifer*, in Latin.

In Turkish, *Işık* means light. Many Turks, either Sunni or Alevi, are called *Işık*. As an irony of destiny, it happened to an Alevi named *Işık* to seize the ECtHR, because he was frustrated that the domestic jurisdictions rejected his request that his identity card feature the word “Alevi” rather than the word “Islam”⁵. In its submissions, the Government of the secular republic tried to counter *Işık*’s claims with a myriad of interestingly religious arguments, coached in an ostensibly (but awkwardly) neutral, legalistic style. The legal debate seemed to be transposed into a religious battlefield, where the excessive aspirations of a presumptuous heretic met the opposition of public institutions, backed by religious authorities who draw the line between orthodoxy and heresy. The evil was fought with much zeal that appears hardly compatible with the republican principle of secularism. To exorcise this contradiction, the Government’s submissions were studded with frequent invocations of secularism, like repetitive aphorisms.

The *Işık* judgment turned out to be a turning point in a series of cases which share the same characteristics: All were lodged by Alevis, involved issues related to the neutrality of the State vis-à-vis different religious groups and debates about secularism, revealed the conspicuous role of the Religious Affairs Directorate in the domestic legal system, and all ended up with the same conclusion: The ECtHR found a violation of the ECHR or its 1st Additional Protocol.

This article proposes some reflections based on the analysis of the *Işık* judgment, its background, and the related case-law of the ECtHR before and after.

2 - The *Işık v. Turkey* case before the European Court of Human Rights and its background

³ See, in general: J. CHEVALIER & A. GHEERBRANT, *Dictionnaire des symboles, Mythes, rêves, coutumes, gestes, formes, figures, couleurs, nombres*, Edition revue et augmentée, Robert Laffont/Jupiter, Paris, 1996, pp. 584-589.

⁴ ISAIAH, XIV:12.

⁵ See, *Işık v. Turkey*, no 21924/05, 2 February 2010.



In 2004, Sinan Işık applied to a court requesting that his identity card feature the word “Alevi” rather than the word “Islam”. Until 2006 it was obligatory for the holder’s religion to be indicated on the identity card, but since 2006 the entry could be left blank upon request.

On 7 September 2004 the İzmir District Court dismissed the applicant’s request, endorsing an opinion it had sought from the legal adviser to the Religious Affairs Directorate, according to which the term “Alevi” referred to a sub-group of Islam and that the indication “Islam” on the identity card was thus correct. The applicant complained before the Court of Cassation, that he was under an obligation to disclose his beliefs as a result of this obligatory indication on his identity card, arguing that this obligation contravened both the ECHR (art. 9) and the Turkish Constitution (see below). The Court of Cassation upheld the judgment of the court of first instance without any other reasoning.

The application was lodged with the ECtHR on June 2005. In its judgment of 2 February 2010, the Court reiterated that the freedom to manifest one’s religion or beliefs had a negative aspect, namely an individual’s right not to be obliged to disclose his or her religion or to act in a manner that may enable conclusions to be drawn as to whether or not he or she held such beliefs. The Court did not find persuasive the Government’s argument that the indication of religion on identity cards (obligatory until 2006) did not constitute a measure that compelled Turkish citizens to disclose their religious convictions and beliefs. As regards the procedure whereby the applicant, in 2004, had unsuccessfully attempted to obtain the rectification of his identity card, the Court took the view that, since it had led the State to make an assessment of the applicant’s faith, it had been in breach of the State’s duty of neutrality and impartiality in such matters.

The Government had contended that after the law of 2006 the applicant could no longer claim that he was a victim of a violation of Art. 9, because since then all Turkish citizens had been entitled to request that the information about religion on their identity cards be changed or that the appropriate entry be left blank. The Court found that the law had not affected its assessment of the situation, because the fact of having to apply to the authorities in writing for the deletion of the religion in civil registers and on identity cards, and having an identity card with the “religion” box left blank, obliged the individual to disclose, against his or her will, information concerning an aspect of his or her religion or most personal convictions, in violation of the principle of freedom not to manifest one’s religion or belief. The Court pointed out that the breach in question had arisen not from the refusal to indicate the applicant’s faith (Alevi) on his



identity card but from the very fact that his identity card contained an indication of religion, regardless of whether it was obligatory or optional. The Court found, by six votes to one, that there had been a violation of Article 9 decided that it did not need to examine separately whether there had been a violation of Articles 6 and 14.

No surprise that The Court did not find persuasive the Government's arguments. For instance, referring to the Turkish Constitutional Court's judgment of 21 June 1995 that will be examined below, the Government contends that

"the mention of religion on identity cards does not affect the substance of the freedom of religion and belief; such a mention is based on necessities related to public order, general interests and social needs. There is by no means a compulsion exerted in order to obtain the divulgence of each person's beliefs or to blame or inculpate a person because of his beliefs. Turkish Republic is a secular State where freedom of religion is expressly stipulated by the Constitution. [...]" (§ 34).

Besides, in the eyes of the Government,

"the content of the identity card could not be determined according to the desires of each person. Given the multiplicity of denominations within Islam, (such as (« Hanefi », « Shafii », etc.) or of mystical orders (such as « Mevlevi », « Quadiri », « Naqshibandi » etc.), it is necessary not to mention various denominations or ramifications of the same religion in order to preserve the public order and the neutrality of the State [...]" (§ 35)

The Government associates the mention of religion with the necessities of public order, general interests and social needs, but does not specify why and how the information about religion is useful for such purposes. Its repetitive invocations to the principle of secularism in order to justify the disclosure of the religion sound irrelevant. If there is any relevance, it should be in the opposite sense: A secular State is supposed not to discriminate among different religions or denominations, and does not need to know about its citizens beliefs. On the other hand, the mention of mystical orders on the identity cards is impossible not only for technical reasons, but also because these orders were closed down and banned by virtue of a revolutionary law (No. 677/1925) enjoying special constitutional protection (art. 174)⁶.

The applicant had claimed before domestic jurisdictions that art. 43 of the Law n° 1587 on public registration, which required the identity

⁶ For the volte-face in the Government's defence strategy with regard to the Law no. 677, see below "5 - Follow-up cases and subsequent developments".



cards' holder's religion to be indicated was incompatible with art. 24 § 3 of the Constitution which provides: "No one shall be compelled to worship, or to participate in religious ceremonies or rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions"⁷. In its judgment of 21 June 1995⁸ (related to a contention of unconstitutionality in a case lodged by a Bahai), referred to by the Government in the Işık case, the Turkish Constitutional Court had declared, by a majority of 6-11, that article 43 Law n° 1587 was in conformity with articles 2 (secularism) and 24 (freedom of religion) of the Constitution. According to the majority's reasoning:

"The State must know its citizens' characteristics. This need is based on public order and public interest, as well as on economic, political and social necessities. [...] The information concerning the individual's religion is among these characteristics and has no special meaning contradicting the secular structure of the State. [...] The concept of secular State requires the neutrality of the State vis-à-vis different religions and that the State regards all religious beliefs on equal footing. In this context, no law provides different treatment and discrimination by reference to the "religion" indicated on the identity card. [...] In the legislation, there is no distinction between "recognized and non-recognized religions by the State". Within the conception of secular State, all religions are valid and respectable. No one can intervene into the belief or non-belief of others by invoking this conception. [...] The information concerning the religion which figures on the identity cards [...] cannot, by no means, be misused or misinterpreted in a way incompatible with the principle of secularism.[...] It cannot be inferred, from the constitutional rule "No one shall be compelled [...] to reveal religious beliefs and convictions [...]" that the religion of individuals cannot be registered in official records. What is prohibited by the Constitution is duress. The duress concerns the revelation of the religious beliefs and convictions. [...] The concept of religious "beliefs and convictions" cannot be confined to the mention of religion to be written into the family registration as a personal or demographic information. This concept is broader and comprises numerous elements relating to religion and beliefs. [...] What is prohibited by art. 24 of the Constitution is not to know

⁷ Ironically, the Constitution (art. 15) protects the *forum internum* to an extent that the right "not to be compelled to reveal his religion, conscience thought or belief" figures among the non-derogable rights in time of state of emergency. This provision is echoed by article 115 of the Criminal Code which provides that "(1) Any person who forces another person by using violence or treat to disclose or change his religious, political, philosophical beliefs, conceptions and convictions, or prevents disclosure and publication of the same, is punished with imprisonment from one year to three years [...]".

⁸ Official Gazette No. 22433 of 14 October 1995, pp. 7 and ff.



an individual's religion, but to force him to reveal his religious beliefs and convictions by duress. The constitutional rule that "No one shall be blamed or accused because of his religious beliefs and convictions" is of complementary and confirmative nature. [...] In sum, the art. 43 in question comprises no provisions of compelling nature"⁹.

Would it be farfetched to interpret the introductory statement (a State must know its citizens' characteristics for reasons of public order and interest) as a *lapsus calami* revealing totalitarian tendencies? One can hardly follow the Constitutional Court's reasoning. For the argument's sake, let us admit that this necessity concerns only statistics, that every modern State can legitimately collect and keep. More imagination is, nevertheless, needed to understand why a staunchly secular State must gather data about its citizens' religions. Furthermore, the Constitutional Court affirms that a secular State must be neutral vis-à-vis different religions and treat them on equal footing. Therefore, why does it need to know the citizens' religions, since it will treat them all equally?

The Constitutional Court reminds that no law provides different treatment and discrimination by reference to the "religion" indicated on the identity card. True, religious non-discrimination is one of the *sine qua non* conditions of secularism¹⁰. But the Constitutional Court seems to be satisfied with merely legal formalism, without taking the pain to check whether *de jure* equality is completed by *de facto* equality in daily life. In other words, how to explain the mystery that Alevis are underrepresented in public service and Non-Muslims, not represented at all?

The Constitutional Court observes that the legislation makes no distinction between "*recognized and non-recognized religions by the State*". If so, why may some religions figure in identity cards and why others have to raise a legal challenge in order to obtain such a right? These questions are maybe nonsensical, since "*no procedure exists in Turkey for the recognition of religious denominations*" as the ECtHR will observe in the İzzettin Doğan Case¹¹.

Distinction is made, by the Constitutional Court, between the State's right to "*know an individual's religion*" and to "*force him to reveal his religious beliefs and convictions by duress*". What if a public official wants to "*know*" an individual's religion and this latter refuses to reveal it, or gives an unwelcome response?

⁹ Official Journal No. 22433 of 14 October 1995, pp. 13-14.

¹⁰ See H. PENA-RUIZ, *Qu'est-ce que la laïcité?*, Gallimard, Paris, 2003, p. 242.

¹¹ *İzzettin Doğan and Others v. Turkey*, App. no. 62649/10, 26 April 2016, § 92.



Actually, in his dissenting opinion, Judge Özden, President of the Court, pointed out that

“each legal act, especially regarding education and military service, requires the presentation of the identity cards by the citizens, who are therefore undeniably exposed to a compulsion in order to reveal their religious beliefs and convictions, which is precisely prohibited by art. 24 of the Constitution. In the same vein, citizens cannot register their new born child in the public register unless they specify his or her religion. Furthermore, art. 61 of the Penal Procedure Code requires the court to ask the witness’s religion, which may give rise to discrimination or even to tendencies not to appear before the courts”¹².

In their joint dissenting opinion, Judges Tüzün and Bumin emphasized

“a secular State’s duty to prevent pressures and interventions originating from different sections of the society that could harm the freedom of religion and belief. The pressure exerted upon individuals in order to compel them to reveal their religion or the fact that they have no religion, may generate reactions or negative prejudices towards those persons. Such prejudices may even give rise to conflicts and disturbances in the society”¹³.

These few judges’ realistic objection to the Court’s fallacious reasoning was certainly praiseworthy, but absolutely inconsequential for the settlement of the problem in domestic law.

A year later, the Constitutional Court did not hesitate to blatantly contradict itself by founding that art. 61 of the Criminal Procedure Court, which required that a witness was asked to declare, *inter alia*, his/her religion before his/her first deposition before a criminal court, was contrary to the Constitution¹⁴. The Constitutional Court observed that:

“[...] asking an individual’s religion will entail that he/she will declare his/her religion against his/her will, obviously violating article 24 par. 3 of the Constitution. The lack of any sanction for the refusal to answer such a question is irrelevant in that regard, since, since complying with the legal injunctions is a natural consequence of the rule of law principle. Accordingly, it is obvious that the provision in question breaches the

¹² Official Gazette No. 22433 of 14 October 1995, pp.16-17. Judge Sezer (Ahmet Necdet Sezer, later president of the Republic) and Judge Acargün share, *mutatis mutandis*, Judge Özden’s opinion that art. 43 of the Law on Public Registration breaches art. 24 of the Constitution. (pp. 18, 20)

¹³ Official Gazette No. 22433 of 14 October 1995, p. 18.

¹⁴ Official Gazette No. 22769 of 26.09.1996, Judgment of 2 February 1996, E. S. 1995/25, K. S. 1996/5.



freedom of religion and conscience, by asking the witnesses to reveal their religion."

The contradiction with the previous case is striking, since the refusal of a witness to reveal his/her religion before the court does not entail any legal consequence, whereas in case of the parents' refusal to provide any information about their child's religion, the public register officer can reject the whole demand for registration, with all imaginable dramatic consequences: The new-born child shall, legally speaking, not exist.

Other cases of public records requiring the mention of religious data have been mentioned: In October 2005, the Ministry of Public Health asked the personnel of some hospitals that it had newly acquired, to fill an information sheet, with an entry on the "*denomination*"¹⁵. In 2013, an occult administrative practice going back to 1924 was coincidentally discovered: "*Race codes*" were given to Non-Muslims in public records (Greeks: 1, Armenians: 2, Jews: 3, Syrians: 4) allegedly in order to make sure that pupils of each community frequent only their respective schools¹⁶. Such practice was *de facto* abrogated in 2016¹⁷ leaving behind a myriad of question marks.

3 - The previous case-law of the ECtHR in connection with the *Işık case*

The positions taken by the Court in its previous case-law had already provided hints, so that the *Işık case* was by no means a surprise.

In *Sofianopoulos and others v. Greece case*, the ECtHR had considered that "*an identity card cannot be regarded as a means intended to ensure that the adherents of any religion or faith whatsoever should have the right to exercise or manifest their religion*"¹⁸. In sharp opposition to the story of the *Işık case*, in the *Sofianopoulos case* the applicants had complained that, pursuant to the joint decision of the Ministers of Economic Affairs and Public Order of 17

¹⁵ *Radikal newspaper*, 9 October 2005, cited by R. ENDER, "*Açıklamama Hakkı*", in *Güncel Hukuk*, August 2011, p. 60.

¹⁶ *Radikal newspaper*, 1 August 2013 (<http://www.radikal.com.tr/turkiye/iste-soy-kodlari-rumlar-1-ermeniler-2-yahudiler-3-1144444/>).

¹⁷ *Agos newspaper*, 25 February 2016 (<http://www.agos.com.tr/tr/yazi/14473/soy-kodu-sifahen-kalkti>).

¹⁸ *Sofianopoulos, Spaidiotis, Metallinos and Kontogiannis v. Greece*, no. 1977/02, 1988/02 and 1997/02.



July 2000, identity cards to be issued thenceforth to Greek citizens were no longer to record the bearer's religion. They had seen in that aspect of the new identity cards an infringement of their right to manifest their religion. The Court considered that there had been no interference with the applicants' right to manifest their religion and rejected the complaint as manifestly ill-founded.

The *Sofianopoulos case* has to be read within the context of a particular and overheated political period of Greece, the last EU member State to maintain the mention of religious beliefs on official documents. When the Government, under the growing pressure from Brussels, decided to update the identity cards, the Greek Orthodox Church staged huge demonstrations in the streets, led by the crosier of Mgr. Christodoulos, Archbishop of Athens¹⁹. At the end of the day, the European standardization overcame the Byzantine particularity. Turkey and Greece share the same spirit of defiance, and attachment to their religious identity. A major difference is of legal nature: the Greek Constitution recognizes Eastern Orthodoxy as the dominant religion whilst Turkey is a secular state which, legally speaking, privileges no particular religion.

In the *Alexandridis v. Greece case* (no 19516/06, 21 May 2008), the ECtHR observed that, the obligation imposed upon a lawyer to reveal before the competent court that he was not Christian Orthodox and that he desired to pronounce a solemn declaration instead of taking a religious oath, breached his right not to be compelled to manifest his religious convictions²⁰. The Court considered that the freedom to manifest one's religious beliefs comprises also a negative aspect, *i.e.* the right, for the individual, not to be obliged to reveal his denomination or his religious beliefs and not to be coerced to adopt a behaviour from which one could deduce that he has, or not, such beliefs. Public authorities must not interfere with the freedom of conscience of a person by inquiring his religious beliefs or by compelling him to manifest these beliefs. This principle is especially valid at the occasion of taking an oath in order to perform certain functions (§ 38).

¹⁹ See "Greek Church at war over plans to change ID cards" in *The Guardian*, 22 May 2000; "Religious row blazes over Greek identity" in *BBC News*, 15 March 2001. It is interesting to notice that Mgr. Christodoulos declared his suspicions about a Jewish conspiracy instigating moves by the government to no longer mention religious affiliations on the cards.

²⁰ *Alexandridis v. Greece*, 19516/06, 21 May 2008, § 41.



The *Folgerø and Others v. Norway case* (no. 15472/02, 9.6.2007) is closely connected to the following *Hasan and Eylem Zengin v. Turkey case* since it involved the refusal to grant full exemption from instruction in Christianity, religion and philosophy in State primary schools, upon request of the parents²¹. This case is also meaningful in connection with the *Işık case*, since the Court found that the system of partial exemption was capable of subjecting the parents to a heavy burden with a risk of undue exposure of their private life and that the potential for conflict was likely to deter them from making such requests. According to the ECtHR:

"[...] information about personal religious and philosophical conviction concerns some of the most intimate aspects of private life. [...] imposing an obligation on parents to disclose detailed information to the school authorities about their religious and philosophical convictions may constitute a violation of Article 8 of the Convention and possibly also of Article 9 (ibid.). In the present instance, it is important to note that there was no obligation as such for parents to disclose their own convictions. Moreover, Circular F-03-98 drew the school authorities' attention to the need to take duly into account the parents' right to respect for their private life (ibid.). The Court finds, nonetheless, that inherent in the condition to give reasonable grounds was a risk that the parents might feel compelled to disclose to the school authorities intimate aspects of their own religious and philosophical convictions. The risk of such compulsion was all the more present in view of the difficulties highlighted above for parents in identifying the parts of the teaching that they considered as amounting to the practice of another religion or adherence to another philosophy of life. In addition, the question whether a request for exemption was reasonable was apparently a potential breeding ground for conflict, a situation that parents might prefer simply to avoid by not expressing a wish for exemption" (§ 98).

With its emphasis on the absolute respect for the *forum internum*, the *Folgerø* judgment undoubtedly contributed to pave the way to the *Işık* judgment.

The *Hasan and Eylem Zengin v. Turkey* (no. 1448/04, 9 January 2008) case does not concern identity cards, but the religious identity and the right to education of the Alevi community. The problems observed by the ECtHR are symptomatic of the "*identity crisis*" that will lead to the violation of art. 9 in the *Işık* case.

The violation found by the Court originated in the syllabus of religious instruction, and the absence of appropriate methods

²¹ *Folgerø and Others v. Norway* of 2007, 15472/02, 9.6.2007. The Court found a violation of Article 2 of Protocol No. 1.



to ensure respect for parents' convictions. The Court held that bringing the Turkish educational system and domestic legislation into conformity with Article 2 of Protocol No. 1 would represent an appropriate form of compensation. Mr. Zengin submitted requests to the Directorate of National Education and before the administrative courts for his daughter, Eylem Zengin, to be exempted from lessons in religious culture and ethics, pointing out that his family were followers of Alevism. He alleged that the course in question was incompatible with the principle of secularism and was not neutral as it was essentially based on the teaching of Sunni Islam. All his requests were dismissed on the ground that the course in religious culture and ethics was in accordance with the Constitution and Turkish legislation.

The applicants maintained, before the ECtHR, that the way in which religious culture and ethics were taught in Turkey infringed Ms. Zengin's right to freedom of religion, and her parents' right to ensure her education in conformity with their religious convictions as guaranteed under Art. 2 of Protocol No. 1 and Art. 9. They alleged that the course's syllabus lacked objectivity because no detailed information about other religions was included, and was taught from a religious perspective which praised the Sunni interpretation of the Islamic faith and tradition.

The Court found that the syllabus for teaching in primary and secondary schools and the relevant textbooks gave greater priority to the knowledge of Islam than to that of other religions and philosophies. The textbooks did not just provide a general overview of religions but also foresaw specific instruction in the major principles, tenet, practices and rituals of the Muslim faith. Pupils received no teaching on the confessional or ritual specificities of the Alevi faith, even though its followers represented a large proportion of the Turkish population. Information about the Alevis was taught in the 9th grade but the Court, like the applicants, considered that such information was insufficient to compensate for the shortcomings of the primary and secondary school teaching. The Court found that religious culture and ethics lessons in Turkey could not be considered to meet the criteria of objectivity and pluralism necessary for education in a democratic society and for pupils to develop a critical mind towards religion, and did not respect the religious and philosophical convictions of Ms. Zengin's father.

The Court examined also whether appropriate means existed in the Turkish educational system to ensure respect for parents' convictions. Following a decision by the Supreme Council for Education of July 1990, it was possible for children "*of Turkish nationality who belong to the Christian or Jewish religion*" to be exempted from religious culture and ethics lessons.



That decision necessarily suggested that the lessons were likely to create conflict for Christian or Jewish children between the religious instruction given by the school and their parents' religious or philosophical convictions. The Court considered that that situation was open to criticism: if the course intended to be about different religious cultures, there was no reason to make it compulsory for Muslim children alone. The fact that parents were obliged to inform the school authorities of their religious or philosophical convictions was an inappropriate way to ensure respect for freedom of conviction. The Court considered that the exemption procedure did not use appropriate methods and did not provide sufficient protection to those parents who could legitimately consider that the subject taught was likely to raise a conflict of values for their children. That was especially so where no choice had been provided for the children of parents who had a religious or philosophical conviction other than that of Sunni Islam, and where the exemption procedure involved the heavy burden of disclosing their religious or philosophical convictions. The Court concluded that there had been a violation of Article 2 of Protocol No. 1.

Two elements of the *Zengin case* seem particularly relevant for the *Işık case*. Regarding the procedure for the children to be exempted from religious culture and ethics lessons, the Court noted that

"[...] whatever the scope of this exemption, the fact that parents are obliged to inform the school authorities of their religious or philosophical convictions makes this an inappropriate means of ensuring respect for their freedom of conviction" (§ 75).

Secondly, the Government submitted that the syllabus of the subject religious culture and ethics course did not take into consideration the teachings of members of a branch [mezhep] of Islam or a religious order [tarikât] represented in the country and, consequently, these topics were not covered. It argued that knowledge of the Alevi faith, which seemed to belong more to the area of philosophy, required more in-depth teaching (§ 43). To this argument, the Court responded implicitly by reference to its previous case-law regarding religious autonomy:

"The Court reiterates that it has always stressed that, in a pluralist democratic society, the State's duty of impartiality and neutrality towards various religions, faiths and beliefs is incompatible with any assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed²². Further, the State does not need to take measures to

²² See *Manoussakis and Others v. Greece*, 26 September 1996, § 47, and *Hasan and Chaush*



ensure that religious communities remain or are brought under a unified leadership.²³ The State's duty to avoid "any assessment of the legitimacy of religious beliefs or the ways in which those beliefs are expressed"

has been determinant in the *Işık case*.

3 - A new protagonist on the Strasbourg stage: The Religious Affairs Directorate

The *Işık case* introduced into Strasbourg's stage a new protagonist, who already was present, as we have seen in *Zengin case*, but just behind the curtains: The Religious Affairs Directorate, which, in the terms of the 1982 Constitution, "*exercises its duties prescribed by its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity*" (art. 136)

The Directorate had been created by the Law n° 633 of 22 June 1965²⁴. The Directorate is attached to the Office of the Prime Minister and is charged with carrying out the affairs related to the tenets, to the worshipping and moral principles of Islamic Religion, of enlightening the society in religious matters, and of managing worship places. The highest organ of decision and consultation within the Directorate is the "*High Council of Religious Affairs*" whose functions are described by art. 5 of the Law no. 633. The original version of the art. 5 § *e* cited among the Council's functions: "*to follow the publications, in Turkey or abroad, related to religion, to take the necessary steps and to prepare the principles of scientific struggle against adversary publications*". Since the scope of the Directorate's functions is confined to Islamic religion, "*adversary publications*" could be interpreted as contrary to Islam, and the "*scientific struggle*", as based on Islamic precepts²⁵. This provision was abrogated, but the new art. 5 § *g* reads: "*to follow the religious or scientific activities, publications or religious propaganda in Turkey or abroad, to evaluate them, to report the result to the Directorate*".

Although Law no. 633 charges the Directorate with functions related to "*Islamic*" Religion, in practice, these functions are limited to a

v. Bulgaria no. 30985/96, § 78.

²³ See, *Serif v. Greece*, no. 38178/97, §§ 51, 54.

²⁴ *Official Journal* No. 12038 of 2 July 1965.

²⁵ See, **B. (VURAL) DINÇKOL**, 1982 *Anayasası Çerçevesinde ve Anayasa Mahkemesi Kararlarında Laiklik*, Kazancı Kitap Ticaret A. Ş., İstanbul, 1992, p. 164.



particular denomination of Islam, the Sunna. Alevism is *de facto* excluded from the scope of activities of the Directorate, and no Alevi works at the Directorate as administrator, theologian, secretary or sweeper.

In the *Işık case*, the İzmir District Court dismissed the applicant's request, on the basis of an opinion it had sought from the legal adviser to the Religious Affairs Directorate, which states that the mention of religious interpretations or sub-cultures at the entry devoted to religion in identity card cannot be reconciled with national unity, republican principles and the principle of secularism. The "*Alevi*" term designates a sub-group within Islam and cannot be considered as an independent religion or a denomination (*mezheb*) of Islam. Alevism is an interpretation of Islam, influenced by Sufism, with specific cultural characteristics (§ 8). The Government gave a sibylline definition of the Directorate's functions:

"[The Directorate] is charged with giving opinions about questions related to the Islamic Religion. It functions in the respect of the principle of secularism, and is charged with taking into consideration the fundamental bases of the Islamic Religion, which are valid for all Muslims."

Besides, the Government referred to art. 10 of the Constitution (principle of equality and non-discrimination) in order to emphasize that the State has to ensure the equality of treatment for different cults and interpretations within the same religion (§ 35). First of all, why not to use the appropriate technical Islamic term "*fatwa*"²⁶, instead of the wire-drawn "*opinions about questions related to the Islamic Religion*". Secondly, what distinguishes "*the fundamental bases of the Islamic Religion*" from the "*sharia, another well-defined Islamic concept*"? And, what if a clash occurs between "*the fundamental bases of the Islamic Religion*" and the "*principles of secularism*"? Who decides in a case of divergent opinions upon "*the fundamental bases of the Islamic Religion which are valid for all Muslims*"? The most probable answer is the Sunni theologians working within the Directorate, a State entity enjoying public power.

In the eyes of the ECtHR, this approach is precisely what a democratic State, ultimate warrant of pluralism in a democratic society, has to avoid (§ 45). The Court refers to the *Serif v. Greece case*, where it had stated that: "*Although the Court recognizes that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers*

²⁶ See, *Encyclopédie de l'Islam*, tome II, C-G, Leyden-Paris, 1965, p. 886. Fatwa: "Consultation sur un point de droit (fiqh) ce terme s'appliquant, en Islam, à toutes matières civiles ou religieuses [...]".



that this is one of the unavoidable consequences of pluralism”²⁷. The *Manoussakis* judgment reads: “The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”²⁸. In the case of *Metropolitan Church of Bessarabia and others v. Moldova* the Court goes even further in saying:

*“In any event, the Court observes that the State’s duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group”*²⁹.

The reactions of the Religious Affairs Directorate, as well as of the Ministry of National Education against the aforementioned *Zengin* case reveal the underlying tensions on the Alevi issue. The Ministry declared that it would not change its curriculum of religious education, the *Zengin* judgment does not provide a binding guideline and Alevi pupils would not be exempted from the courses. The Ministry stated that European Union (*sic*) could not impose its conception of religious education to any country, including member States³⁰.

The Danıştay, (High Administrative Court) known for its revolutionary jurisprudence, conformed itself to the *Zengin* judgment in order to allow Alevi pupils to be exempted from lessons of religious education. The reaction of the President of the Religious Affairs Directorate, Ali Bardakoğlu, a Professor of theology by origin, was harsher than the Ministry of National Education:

“You do not close down a hospital because there have been a few cases of malpractice. The High Administrative Court’s judgment does only multiply and amplify the errors of the ECtHR. [...]. The European Court substitutes itself for theologians. However, the magistrates should pronounce their judgments according to their knowledge and to a certain methodology, and not according to their personal opinion”.

Bardakoğlu criticized the Council of State for having neglected to consult the Directorate and the 23 faculties of theology existing in Turkey in order to solve all these problems:

²⁷ *Serif c. Greece*, n° 38178/97, 14 March 2000, § 53.

²⁸ *Manoussakis and other v. Greece*, 59/1995/565/651, 26 septembre 1996, § 47.

²⁹ Emphasis added. *Metropolitan Church of Bessarabia and others v. Moldova*, no. 45701/9, 927/03/2002 § 123.

³⁰ “MEB AİHM kararını önemsemedi” in *Radikal*, 11 October 2007.



“I have serious doubts about what kind of scientific data and expertise brought about the Council of State’s judgment that decides in religious matters? The most competent institution to respond to the following questions is, beyond doubt, the Directorate of the Religious Affairs: How religion is taught in Turkey? What knowledge corresponds to the common nucleus of all Muslim denominations? And what knowledge is peculiar to such or such particular denomination?”.

Bardakoğlu subsequently affirmed that his Directorate did not perform its functions according to a particular denomination or rite, and Alevism should naturally be a part of the Imam-Hatip High-Schools’ curriculum³¹.

The personal opinion of its President seems to be endorsed by the Directorate, since the Annual Report of activities of the Directorate cites, among the “Threats” (under the Chapter: “Evaluation of the Institutional Ability and Capacity”): “Certain circles’ claims for the suppression of the compulsory lessons of religious education”. Another pertinent threat is: “Efforts and activities in order to present various Islamic opinions and interpretations as a different religion”³². One does not need to be a cryptologist to decipher “certain circles” as including, in the first place, the ECtHR and the Turkish Council of State. To borrow from international humanitarian law’s language, the Directorate is involved in a conflict with both internal and international aspects³³. In other words, it has to defend the purity of the faith against the assaults coming from outside, but also against internal deviations - these two evils becoming particularly perilous when in collaboration.

5 - Follow-up cases and subsequent developments

The follow-up judgments of the ECtHR affined to the *Işık case* are worth analysing in order to understand the place and the impact of this judgment in the case-law of the Court. As for the developments that emerged in Turkish domestic law in connection with the main issues of the *Işık case*, they seem to be regrettably missed opportunities.

³¹ “*Danıştay’ın din dersi kararına kızdı*”, in *Radikal*, 7 March 2008. The Imam-Hatips are special high-schools for the education of the Muslim clergy.

³² *Diyaret İşleri Başkanlığı Faaliyet Raporu*, 2008, (Strateji Geliştirme Daire Başkanlığı) p. 83 par. 1.15.

³³ International Criminal Tribunal for Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a “Dule”* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1, 2/10/1995, § 72.



5.1 - ECtHR's case law

A few months after the *Işık judgment*, the ECtHR reaffirmed its position on the privacy of religious convictions in the *Dimitras and Others v. Greece case*³⁴, where it found that the obligation, in Greece, to disclose religious convictions to avoid having to take religious oath in criminal proceedings violated art. 9 of the ECHR. The Court considered that the provisions concerned were difficult to reconcile with freedom of religion in so far as the Code of Criminal Procedure created the presumption that a witness was an Orthodox Christian and would take a religious oath. The very wording of the Code meant that people had to give details of their religious convictions in order to rectify that presumption and avoid having to take a religious oath. The law as applied in this case had obliged the applicants to reveal their religious beliefs in order to make a solemn declaration, thereby interfering with their freedom of religion (§§ 79-89).

The *Wasmuth v. Germany Judgment*³⁵ could have been interpreted as a deviation from the line of reasoning initiated by the *Işık case*, since the ECtHR found that the requirement to indicate on wage-tax card possible membership of a Church or religious society did not violate the art. 9 of the ECHR. However, the ECtHR justified its judgment with solid arguments and took care to distinguish the present case from the similar ones, including the *Işık case*: The obligation imposed on the applicant to provide the impugned information on his wage-tax card had constituted an interference with his right not to indicate his religious beliefs. However, that obligation had a legal basis in German law and pursued the legitimate aim of protecting the right of churches and religious societies to levy church tax. As to the proportionality of the interference, the reference on the tax card at issue was only of limited informative value and did not allow the authorities to draw any conclusions as to his religious or philosophical practice. The tax card was not in principle used in public, outside the relations between the taxpayer and his employer or the tax authorities. The Court did not rule out that there might be situations in which interference with an applicant's right not to manifest his religious beliefs could appear more significant and in which the balancing of interests might lead it to a different conclusion (§§ 57-64). Although highly

³⁴ *Dimitras and Others v. Greece* - 42837/06, 3237/07, 3269/07, 3.6.2010.

³⁵ *Wasmuth v. Germany* - 12884/03, 17.2.2011.



criticisable, the *Wasmuth judgment* constitutes “a classical solution in favour of the untouchable State sovereignty”³⁶.

There is little to say about the *Mansur Yalçın and Others v. Turkey judgment*³⁷ in which the ECtHR held, unanimously, that there had been a violation of Article 2 of Protocol No. 1 to the ECHR because in the field of religious instruction, the Turkish education system was still inadequately equipped to ensure respect for parents’ convictions. Although significant changes that had been made to the curriculum in the wake of the *Hasan and Eylem Zengin judgment*, the structural problem already identified in that case remained unsolved. Turkey had to remedy the situation by introducing a system whereby pupils could be exempted from religion and ethics classes without their parents having to disclose their own religious or philosophical convictions. The Court interestingly found that the applicants could legitimately have considered that the approach adopted in the classes was likely to cause their children to face a conflict of allegiance between the school and their own values (§ 71).

The case of *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*³⁸ concerned the possibility under Turkish law for places of worship to be granted an exemption from paying electricity bills and the refusal to grant this privilege to the applicant foundation which runs, throughout Turkey, many *cemevis*, which are premises dedicated to the practice of Alevism. The Yenibosna Cultural Centre, houses the foundation’s headquarters and a *cemevi*. In 2006, submitting that the Yenibosna Centre was a place of worship for the Alevi community, its director requested exemption from paying electricity bills. The District Court of Beyoğlu dismissed the foundation’s claims, basing its decision on the Directorate’s opinion that Alevism was not a religion and that the *cemevis* were not places of worship. That judgment was upheld by the Court of Cassation. The foundation lodged an application with the ECtHR on 7 May 2010, complaining that, although electricity bills of places of worship were usually paid by the Directorate of Religious Affairs, it had been deprived of this privilege on account of the failure in Turkey to recognise *cemevis* as places of worship.

³⁶ A. FORNEROD, “Liberté négative de religion et fiscalité culturelle. Cour européenne des droits de l’homme, *Wasmuth c. Allemagne*, 17 février 2011” in *Revue trimestrielle des droits de l’homme*, 91/2012, p.600

³⁷ App. 21163/11, 16 September 2014.

³⁸ App. 32093/10, 2 December 2014.



The ECtHR pointed out that the Alevis' free exercise of the right to freedom of religion was protected under Art. 9 of the ECHR and the Yenibosna Centre included a room for the practice of *cem* (series of liturgical, ceremonial and ritual practices), which was a basic part of the exercise of the Alevi religion. The *cemevis* were, like the other places of worship, premises used for religious worship and that the situation of the applicant foundation was similar to that of other religious communities. Turkish law reserved the exemption from payment of electricity bills to recognised places of worship and that, by excluding *cemevis* from the benefit of that status, it introduced a difference in treatment on the ground of religion. The Court reiterated that States enjoyed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. Nevertheless, if a State introduced a privileged status for places of worship, all religious groups which so wished had to be offered a fair possibility of seeking the benefit of such status and the established criteria had to be applied in a non-discriminatory manner. The Court observed that the refusal of the applicant foundation's request for exemption from payment of electricity bills had been based on an assessment by the Turkish courts on the basis of an opinion issued by the authority for religious affairs to the effect that Alevism was not a religion. However, that such an assessment could not be used to justify the exclusion of the *cemevis* from the benefit in question, as they were, like other recognised places of worship, places intended for the practice of religious rituals. The Court concluded that the difference in treatment sustained by the applicant foundation had no objective or reasonable justification and observed that the system for granting exemptions from payment of electricity bills for places of worship under Turkish law thus entailed discrimination on the ground of religion. The ECtHR held, unanimously, that there had been a violation of Art. 14 taken together with Art. 9. of the ECHR.

The case of *İzzettin Doğan and Others v. Turkey*³⁹ concerned the domestic authorities' refusal to provide the applicants of Alevi faith with the public religious service is provided exclusively to citizens adhering to the Sunni understanding of Islam. The applicants had requested that the Alevi community be provided with religious services in the form of a public service; that Alevi religious leaders be recognised as such and recruited as civil servants; that the *cemevis* be granted the status of places of worship; and that State subsidies be made available to their community.

³⁹ App. no. 62649/10, 26 April 2016.



Their requests were refused on the grounds that the Alevi faith is regarded by the authorities as a religious movement within Islam, more akin to the “*Sufi orders*”. The Court held in particular that the authorities’ refusal amounted to a lack of recognition of the religious nature of the Alevi faith and its religious practice (*cem*), depriving the Alevi community’s places of worship (*cemevis*) and its religious leaders (*dedes*) of legal protection and entailing numerous consequences with regard to the organisation, continuation and funding of the community’s religious activities. In the Court’s view, the Alevi faith had significant characteristics that distinguished it from the understanding of the Muslim religion adopted by the Religious Affairs Department/Directorate. The Court therefore found that there had been interference with the applicants’ right to freedom of religion and that the arguments relied on by the State to justify that interference were neither relevant nor sufficient in a democratic society. The Court further observed a glaring imbalance between the status conferred on the understanding of the Muslim religion adopted by the Religious Affairs Department/Directorate and benefiting from the religious public service, and that conferred on the applicants, as the Alevi community was almost wholly excluded from the public service. The Court therefore held that the applicants, as Alevis, were subjected to a difference in treatment for which there was no objective and reasonable justification. The Court held that there had been a violation of Art. 9 of the ECHR and a violation of Article 14 taken in conjunction with Art. 9 of the ECHR.

By no means a surprise in the light of the ECtHR’s previous case-law, the *İzzettin Doğan judgment* involved a number of conspicuous elements which promise dramatic consequences in the future. The Court observes that Religious Affairs Directorate has a sort of monopoly over matters pertaining to the Muslim religion in Turkey (§ 26) and the Joint Partly Dissenting and Partly Concurring Opinion of Judges Villiger, Keller and Kjølbro go so far as to assert that

“the Sunni interpretation of Islam - which is supported by the RAD - acts as a de facto “State religion” in Turkey” (§ 23). The Court *“doubts whether the Turkish system clearly defines the legal status of religious denominations, and especially that of the Alevi faith”* and observes that *“the legal regime governing religious denominations in Turkey appears to lack neutral criteria and to be virtually inaccessible to the Alevi faith, as it offers no safeguards apt to ensure that it does not become a source of de jure and de facto discrimination towards the adherents of other religions or beliefs”* (§ 182).



The Government's reasoning is based on a peculiar conception of secularism which endorses the views the RAD which

"performs its tasks [in accordance with the principle of secularism and] not by reference to the preferences or religious traditions of a particular faith or a particular religious group or order, but on the basis, [...] of sources of the Muslim religion accepted by all Muslims [...] these traditions and sources are common to all Muslims and are spiritual rather than temporal. Likewise, the services it provides are general and supra-denominational and are made available to everyone on an equal footing" (§ 27).

The same interpretation of secularism appears in the judgment of 4 July 2007 of the Administrative Court which dismissed the applicants' claim:

"As justification for that difference in treatment it observed, in particular, that if the State were to respond to all the expectations and demands of religious groups by providing a public service, this might engender a debate on the manner in which the religious public service was delivered by the RAD. There would also be a risk of breaching the principle of secularism by upsetting the balance between religious and legislative rule-making, and of restricting the exercise of the right to freedom of religion" (§ 174)⁴⁰.

In sum, in the public authorities' conception, the State's religious neutrality, as a prerequisite of secularism, is identified with a neutral interpretation, by the RAD, of Islamic traditions and sources common to all Muslims. Such an astonishing confusion between legal and theological concepts is nevertheless a constant element in the official discourse related to secularism. The ECtHR's hostility to the confusion of theological and legal domains seems to be a determinant factor in this judgment:

"The Court observes that the main argument relied on by the Government as justification for this difference in treatment is based on a theological debate concerning the place of the Alevi faith within the Muslim religion [...] such an approach is inconsistent with the State's duty of neutrality and impartiality towards religions" (§ 179).

The most drastic change in the *İzzettin Doğan case* is certainly the volte-face of the Government's defence in connection with the Law no. 677 of 30 November 1925 (1341) on the Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and

⁴⁰ The administrative court refers to international conventions to which the Republic of Turkey is a Party (§ 14), including Article 18 of the United Nations Universal Declaration of Human Rights, which is a United Nations General Assembly Resolution and not an international convention. See E. ÖKTEM, *Uluslararası Teamiül Hukuku*, Istanbul, Beta, 2013, pp. 162-196.



Prohibition of Certain Titles, which enjoys a constitutional protection by virtue of art. 174 of the 1982 Constitution. When various Alevi groups and institutions had previously claimed, in domestic law, the right to open *cemevis*, administrative/judicial authorities rejected such claims by identifying Alevism to a Sufi order, and their *cemevis*, to the *tekkes*, which were both banned by the Law 677. In the *İzzettin Doğan* case too, the ECtHR observes that:

“In many opinions the RAD has said that it regards the cemevi as a sort of monastery (tekke)” (§ 38). “The Government [...] asserted, [...] that this faith was simply a “Sufi order” which falls into the category of religious groups covered by Law no. 677” (§ 123). “[...] the refusal complained of has had the effect of denying the autonomous existence of the Alevi community and of maintaining it within the legal framework of the “banned Sufi orders (tarikats)” for the purposes of Law no. 677. That Law lays down a number of significant prohibitions with regard to these religious groups: the use of the title “dede”, denoting an Alevi spiritual leader, is banned, as is the designation of premises for Sufi practices, and both are punishable by a term of imprisonment and a fine” (§ 126).

The ECtHR discretely points out the inconsistency of the Government, which, at the hearing, had stated that *“Law no. 677, which had been enacted in the wake of the proclamation of the Republic, was no longer applied nowadays” (§ 84)* and concludes that:

“Even though, according to the Government, failure to abide by these prohibitions is tolerated, the fact remains that in its submissions to the Administrative Court the Prime Minister’s Legal Department specified clearly that “[t]o recognise cemevis as places of worship would be contrary to Law no. 677” [...] Furthermore, in its judgment of 4 July 2007 the Administrative Court referred explicitly to the prohibitions laid down by that Law” (§ 126).

The factual caducity of Law no. 677 has long been an obvious reality, as pointed out by the author of the present article in 2003⁴¹, but the avowal of its non-application by an official agent of the Government, in the *İzzettin Doğan* judgment, is unprecedented. This can pave the way to the legalization and (re)institutionalization of all sorts of religious orders, including the Sunni ones, since the judgment tolerates no legal discrimination between different religious groups, whatever their religious status be from a theological viewpoint. In other words, any freedom and right recognized to Alevis would be equally enjoyable by

⁴¹ See, E. ÖKTEM, *“La spécificité de la laïcité turque”*, in *Islamochristiana*, 29, 2003, p. 102.



other religious groups. True, Law no. 677 has not been technically abrogated under Turkish law and remains theoretically applicable by domestic courts. One can, however, argue that, should a case of criminal condemnation by virtue of the Law no. 677 come before the ECtHR, this later could find a violation of art. 7 (No punishment without law) of the ECHR, attributing a binding force to the declaration made at the occasion of the *İzzettin Doğan case*.

5.2 - Domestic law

Two legal developments seem to present missed opportunities to conform Turkish domestic legislation to the *Işık judgment*. Law no. 6698 of 24.03.2016 on the Protection of Personal Data⁴² cites, among the protected data, “*religion, denomination and other beliefs*” (art. 6/1). However, such data can be registered without the consent of the individual concerned, in the cases enumerated by special laws.

Another interesting legal initiative was the implementation of the “*Turkish Republic Identity Card Project*” based on a Circular Order of the Office of the Prime Minister issued in 2007⁴³. The new identity cards with electronic chips which were distributed in a number of chosen “*pilot zones*”, included an entry for “*religion*”. In 2016, the minister of interior declared that this entry would be maintained in the new cards, but the inscription of any religion would be facultative. The new regulation is far from complying with the requirements of the *Işık judgment*⁴⁴.

In connection with the *Zengin judgment*, an interesting judgment by the Administrative Court of Antalya of 30 December 2015, recognized the right of atheist parents to have their children exempted from lessons in religious culture and ethics, on the grounds that those lessons did not correspond to the lessons on “*religious culture and moral education*” which are compulsory by virtue of art. 24 § 3 of the Constitution following a reasoning that had appeared in the old case law of the Danıştay⁴⁵.

6 - Instead of a conclusion: trying to analyse an identity crisis

⁴² *Official Gazette* of 7 April 2016, no. 29677.

⁴³ *Official Gazette* of 4 July 2007, no. 26572.

⁴⁴ T. ŞİRİN, “*Nüfus Cüzdanındaki Din Hanesi-Eğitimde Din Dersi Zorlamaları*”, in *Güncel Hukuk*, May 2016, 5/149, p. 34.

⁴⁵ T. ŞİRİN, “*Nüfus Cüzdanındaki Din Hanesi-Eğitimde Din Dersi Zorlamaları*, cit., p. 35.



The custom to indicate the religion on republican identity cards is inherited from Ottoman practice⁴⁶, which had its reasons, since various religious communities of the Empire were organized according to the “*millet*” system. In civil matters, the members of each *millet* were submitted to their respective regulation, including marriage and inheritance laws, as well as to the jurisdiction of denominational tribunals whose judgments were supervised and implemented by the Government. The mention of religion could avoid frauds and falsifications. For instance, an Arab of Catholic faith, with a typically “neutral” Arab name such as Aziz, Malik or Khaled, could claim to be a Muslim in order to divorce, which is prohibited in Catholic canon law. A Greek Orthodox by the name of Sim(e)on could declare to be a Serbian, a Bulgarian Orthodox, or a Jew, according to the circumstances, in order to decline to pay the his Church tax. When caught drinking *raki* in daytime during the Ramadan, a Muslim named Yakub, could claim to be a Jew named Yaakov, in order to avoid penalties. Oddities of the Ottoman alphabet (relative absence of vowels, polyvalent consonants) as well as whimsical spellings of Non-Muslim proper names in public records could encourage such schemes. Therefore, the mention of religion was not only meaningful, but also necessary.

So was it at the beginning of the Republic, since by virtue of article 42 of the Lausanne Treaty of 24 July 1923, the birth-certificate of the Turkish Republic, the Turkish Government undertook, for the familiar or personal status of the non-Muslim minorities, to adopt all necessary measures in order to regulate these issues according to the customs of the minorities. The Lausanne minority system was, thus, supposed to be based partially on the Ottoman *millet* system⁴⁷. In 1925, on the eve of the reception of the Swiss civil code by Turkey, a Jewish delegation sent a letter renouncing its rights stipulated in art. 42, and was followed by the

⁴⁶ Interestingly, art. 3 of the last Ottoman Law on the Public Register mentions, among the entries to be introduced, “*the religion of the Muslims, the religion and the denomination of Non-Muslims, and the communities the latter belong to [...]*”. See Nüfus Kanunu, Law No.1929, 5 Şevval 1332 - 14 Ağustos 1330, Published in: *Takvim-i Vekayi (Official Gazette)* on 17 Şevval 332 - 26 Ağustos 1330, and in the *Düstur (Official Collection of Legislation)* 2. Tertib, vol. II, p. 1244. Such a formula presupposes that Muslims constitute a monolithic (i.e. Sunni) entity whereas Non-Muslim may belong to various denominations and communities- a conception that has survived.

⁴⁷ S. AKGÖNÜL, “Reciprocity and Minority Religious Institutions in Greece and in Turkey”, in *Reciprocity. Greek and Turkish Minorities. Law, Religion and Politics*, edited by Samim Akgönül, Bilgi University Press, İstanbul, 2008, p. 154. See also: A. YUMUL, “Azınlık mı, vatandaş mı?”, in A. KAYA & T. TARHANLI (ed.) *Türkiye’de Çoğunluk ve Azınlık Politikaları: AB Sürecinde Yurttaşlık Tartışmaları*, TESEV, 2005, p. 100.



Armenian and Greek communities.⁴⁸ Putting aside the question of the international validity of these declarations, we may say that from 1925 onwards, there is one, unique legislation that applies to all Turkish citizens, regardless of their religion or denomination.

Since religion has no legal impact, one can wonder why its mention was kept in identity cards. Such mention has unfortunately detrimental effects in practice, especially in professional life and in the relations with public authorities. In order to avoid unpleasant consequences, some Non-Muslims prefer to exhibit their driving licence before public authorities since it does not mention their religion. Non-Muslims are practically absent in the public service⁴⁹, especially in judicature, by virtue of an unwritten rule which predetermines their professional choice⁵⁰.

The problem is closely connected with the identification of "Turk" with "Muslim": Through a quite paradoxical process in a secular republic, religion has become a *sine qua non* element of the Turkish identity. Bernard Lewis points out that, in secular Turkey, the word "Turkish" is only applied to Muslims. The non-Turkish immigrant (Bosnian, Albanian, etc.) acquires rapidly a Turkish identity⁵¹ whereas the Non-Muslim Turkish citizen is socially and even legally⁵² considered a foreigner. The creation of Turkish Republic, and especially the exchange of populations⁵³ allowed a former Ottoman *millet*, i.e. the Muslim one, to overlap geographically with a Nation-State. The establishment of secularism went hand in hand with

⁴⁸ See **C. BILSEL**, "Medeni Kanun ve Lozan Muahedesi", in *Medeni Kanununun XV. Yıl dönümü için*, Kenan matbaası, İstanbul, 1944, p. 43; **R. BALI**, *Cumhuriyet Yıllarında Türkiye Yahudileri-Bir Türkleştirme Serüveni*, (1923-1945), 3rd edition, İletişim, İstanbul, 2000, pp. 64-65; **D. KAMOUZIS**, "Reciprocity or International Intervention? Greek and Turkish Minority Policy, 1923-1930", in *Reciprocity. Greek and Turkish Minorities. Law, Religion and Politics*, edited by SAMİM AKGÖNÜL, Bilgi University Press, İstanbul, 2008, p. 58.

⁴⁹ Two major exceptions would be medical professions and university career.

⁵⁰ **R. ENDER**, "Açıklamama Hakkı", in *Güncel Hukuk*, August 2011, p. 59.

⁵¹ Cf. **B. LEWIS**, *Le Retour de l'Islam*, Gallimard, Paris, 1985.

⁵² See: **A. ALEXANDRIS**, *The Greek Minority of Istanbul and Greek-Turkish Relations 1918-1974*, Centre for Asia Minor Studies, Athens, 1992, pp. 108-111, 185; **F. ÇETİN**, "Yerli Yabancılar" (Local Foreigners), in İBRAHİM KABOĞLU (ed.), *Ulusal, Ulusalüstü ve Uluslararası Hukukta Azınlık Hakları* İstanbul, İstanbul Barosu İnsan hakları Merkezi, p. 74-75; **A. ALEXANDRIS**, *The Greek Minority of Istanbul and Greek-Turkish Relations 1918-1974*, Centre for Asia Minor Studies, Athens, 1992, p. 220.

⁵³ The Exchange of Populations Treaty signed at Lausanne on 30 January 1923 adopted the religious criterion for the exchangeable persons, i.e. "Turkish nationals of the Greek-Orthodox religion established in Turkish territory and Greek nationals of the Muslim religion established in Greek territory" (art. 1).



the construction of the nation, referring to a particular religion.⁵⁴ This mutation seems to deviate from the original republican genetics, since, in the very words of Atatürk: “Some say that the unity of religion is efficient in the constitution of a nation. But we see, the opposite in the picture of the Turkish nation before our eyes”⁵⁵.

Thus, in blatant violation of the social engineering program set up by the founding fathers of the Republic, a religion, namely Sunnite Islam of Hanefite rite / school, has progressively become an integral part of the national identity. Non-Muslims, despite being Turkish nationals, have been considered as foreigners and the Alevis have been simply ignored as a distinct religious identity or invited to join the flock. Prior to the Alevi cases brought before the ECHR, when Alevis asked for an authorization to build their own prayer houses (*Cemevi*), they received the same Aristotelian reply from different state bodies (municipality, governorship, Religious Affairs Directorate etc.): “*Alevis are Muslim. Muslims go to the Mosque. Alevis shall go to the Mosque*”. In the same vein, when Sinan Işık applied to a court requesting that his identity card feature the word “Alevi” rather than the word “Islam”, the District Court dismissed his request, on the grounds that the term “Alevi” referred to a sub-group of Islam and that the indication “Islam” on the identity card was thus correct.

Initially designed as the republican establishment’s tool for controlling religion, the Religious Affairs Directorate has become the laboratory of an astonishing osmosis: In the early republican era, the establishment manipulated the Directorate in order to better control the religious feelings of the population and to avoid any deviation harmful to the public order and the regime. However, by adopting a reconciliatory discourse, the Directorate presented a curious parallelism with its predecessor, the office of the *Şeyhülislam* (the grand Mufti, highest religious authority issuing *fatwas*) and has become a zealous supporter of the regime⁵⁶, perhaps initially as a price to pay for survival, and later, for

⁵⁴ E. COPEAUX, “*La nation turque est musulmane: Histoire, islam et nationalisme*”, in GROC Gérard (dir.), *Formes nouvelles de l’islam en Turquie. Les Annales de l’autre islam*, n° 6, INALCO-ERISM, Paris, 1999, p. 327.

⁵⁵ A. AFETINAN, *Medeni Bilgiler ve M. Kemal Atatürk’ün El Yazıları*, 2. baskı, Türk Tarih Kurumu Basımevi, Ankara, 1988, s. 21

⁵⁶ See article “*Shaykh al-Islam*” in *Encyclopédie de l’Islam*, Nouvelle édition, tome IX, Brill, Leiden, 1998, p. 413: “*Considérer la charge du mufti comme la réponse au besoin qu’avait l’Etat de disposer d’une personnalité religieuse distincte du gouvernement séculier, capable d’exprimer l’autorité de la shari’a, voire apporter une sanction religieuse au régime, permet d’expliquer logiquement la création de la fonction [...]*”.



power maximization. As religion has become an element of the national identity, the Directorate assumed the charge of a National Church. In fact, in terms of relationship between religion and State, what is the difference between the Turkish Religious Affairs Directorate and any State Church model in the European space? In all these cases, the structure concerned is integrated into the State apparatus, the ministers of the cult are civil servants paid by the State. The highest organs of the religious structure define the limits of the creed and decide what is left outside. In parallel with legal and political integration, religious and national identities are overlapping.

In the Turkish case, one can observe the hilarious coexistence of a secular political and legal system with a State body fighting zealously to preserve the religious / national identity. As it appears in the jurisprudence of the ECtHR, Greece and Turkey are facing very similar, if not identical problems in terms of the relationship between State and Religion. Greece recognizes Eastern Orthodoxy as the dominant religion of the State, whereas Turkey is, legally speaking, a secular State. The heritage of the Byzantine *symphony* of powers seems to be perennial in the post-byzantine space.

The identity crisis triggered by Mr. Işık contributes to the diagnosis of a legal schizophrenia. In the Middle-Ages, mental diseases were considered of diabolic origin and mental patients were “cured” with fire as witches. The regions surrounding Strasbourg were particularly infamous for witchcraft cases brought before local courts⁵⁷. Today, the Strasbourg Court’s jurisprudence provides a helpful remedy to heal the disease: No State, not the least a secular one, can neither assess the legitimacy of religious beliefs nor collect religious data for legally unjustified reasons. Religious otherness is not an evil to be burnt, but a human choice to be protected by law and respected by the society.

⁵⁷ See, G. BECHTEL, *La Sorcière et l’Occident. La destruction de la sorcellerie in Europe, des origines aux grands bûchers*, Plon, Paris, 1997, pp. 672-673.