

**JEWES IN THE OTTOMAN *MILLET* SYSTEM AND
THEIR JUDICIAL STATUS
A Family Law Review**

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Abstract

In Ottoman society, which was formed on the basis of the “*millet system*” with the conquest of Istanbul, freedom of faith and opinion among the communities composing this society, which included the members of various religions and parties of society, was guaranteed. With regard to certain rights of self-determination, judicial acts and cases that concerned private law were resolved according to the laws and customs of each community. Along with the Rūms and Armenians, Jews composed a significant part in the Ottoman *millet* system. Due to its multinational and multi-confessional social structure, the Ottoman Empire respected the religions and cultures of individuals in relation to private law. One of the fields in which this respect can be observed is the field of family law. *Qāḍīs* valued the consideration of the parties and made decisions by taking those considerations into account. This sensitivity was exhibited in the preparation of the last example of Ottoman legislation, the *Ḥuqūq-i ʿĀila Qarār-nāmasi* (*Hukûk-ı Âile Kararnâmesi* [*Decree of the Family Law*]), and the provisions “involving Jews and Christians” were established separately. This study will examine the place of Jews in the Ottoman social order and their judicial status. The study will conclude with some evaluations comparing Jewish customs and the rules of family law that were applied to the Ottoman Jews within the framework of *Ḥuqūq-i ʿĀila Qarār-nāmasi*, dated 1917.

Key Words: Jews, Ottoman Legislation of 1917, family law, non-Muslims, *dhimma*, *dhimmī*

Introduction

The *Huquq-i ʿĀila Qarār-nāmasi* (*Hukûk-ı Âile Kararnâmesi* [Decree of the Family Law], henceforth *HAQ*), which went into effect by the imperial decree of Sultan Meḥmed V Rashād (d. 1918) dated Muḥarram 8, 1336 / October 25, 1917, constitutes the last circle of the legislation efforts in the modern sense of the Ottoman Empire, which dates back to the *Majalla*. As described in the document of motivation (*asbāb-i mūjiba lāyihasi*), this codification, which, due to certain concerns, is of the nature of a “decree law” rather than a “law,” is the first code to take effect in the Muslim world.¹

The aforementioned *HAQ*, which introduced many innovations to Islamic law as well as to the history of Ottoman law, was prepared in a way that could be applied to all citizens of the Ottoman Empire, which retained the identity of an empire at the time the *HAQ* took effect. In other words, the *HAQ* was effective not only for Muslim citizens but also for non-Muslims. This is why the *HAQ* established provisions “involving Jews” and provisions “involving Christians.”

By doing so, acts of marriage and divorce (*ṭalāq*) that non-Muslim communities had been carrying out among themselves and cases concerning these acts were taken under the control of the Empire. In a manner of speaking, unity in the judiciary was meant to be assured. This implementation was the result of the policy to legislate for all Ottoman citizens in accordance with the principle of *liberty*, recognized by the *Khaṭṭ-i sharīf of Gulkhāna* (*Gülhâne Hatt-ı Şerīfi* [Rescript of the Rose Chamber of 1839]) and followed by *Qānūn-i Asāsī* (*Kānūn-i Esāsī* [the Ottoman Constitution of 1876]) after the end of the *millet* system, which had been applied since Meḥmed II. The implementation was actually a result of the reform process introduced by the *Tanzīmāt* movement.

Within the framework of the *HAQ*, this study will present a two-step examination of the family law applied to the Ottoman Jews. First, Jews’ place in the Ottoman *millet* system and their judicial status will

¹ Prior to the *Huquq-i ʿĀila Qarār-nāmasi*, a project consisting of 647 articles titled *al-Aḥkām al-sharʿiyya fī l-aḥwāl al-shakhsīyya* (Cairo: Maṭbaʿa-i Hindīyya, 1900), which was probably prepared in 1292/1875 by Muḥammad Qadrī Pasha, the Minister of Justice in Egypt, could not take effect. See Mehmet Akif Aydın, “el-Ahkāmü’ş-Şer’iyye fi’l-Ahvāl-i Şahsiyye,” *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (*DİA*), I, 557.

be reviewed, and then the regulation will be evaluated within the framework of the *HAQ*.

I. Jews in the Ottoman Millet System and Their Judicial Status

With the conquest of Istanbul, Ottoman society was formed on the basis of the *millet* system and with respect to certain rights of autonomy recognized to the *millets*, the members of various religions. Thus, judicial acts or cases pertaining to the field of private law were resolved by application of the specific laws and customs of each *millet* (which was not a racial but a religion-based concept).² Although complete self-determination was not the case (and was out of question because it would have contradicted the sovereignty of the state), non-Muslims enjoyed complete freedom to fulfill the requirements of their own religions under the leadership of their spiritual leaders to such an extent that they could even perform certain acts that were strictly prohibited by Islamic law,³ which was the basic law and the source of reference of the Ottoman Empire.

Those who doubt the greatness of this autonomy,⁴ which was summarized by the firman, “Shall they manage all acts and cases of any kind through the means of the related patriarch,” do not hesitate to acknowledge that with regard to family law, non-Muslims had an almost unlimited judicial autonomy. Marriage, divorce, and other acts and cases related to these issues were left exclusively to the spiritual leaders.⁵

² Joseph R. Hacker, “Ottoman Policy toward the Jews and Jewish Attitudes toward the Ottomans during the Fifteenth Century,” in Benjamin Braude and Bernard Lewis (eds.), *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society* (New York, NY: Holmes & Meier Publishers, 1982), I (*The Central Lands*), 117, 122; İlber Ortaylı, “Millet: Osmanlılar’da Millet Sistemi,” *Türkiye Diyanet Vakfı İslâm Ansiklopedisi (DİA)*, XXX, 66-67; M. Macit Kenanoğlu, *Osmanlı Millet Sistemi: Mit ve Gerçek* (Istanbul: Klasik Yayınları, 2004), 34, 44, 245.

³ For instance, producing alcoholic drinks, raising and eating pigs, and marrying one’s *mağrams* could be noted here.

⁴ For certain doubts of Benjamin Braude, Kevork Bardakçıyan, Joseph R. Hacker, and Macit M. Kenanoğlu, see Kenanoğlu, *Osmanlı Millet Sistemi*, 38-56, 245.

⁵ See Stanford J. Shaw, *The Jews of the Ottoman Empire and the Turkish Republic* (Hong Kong: Macmillan, 1991), 60-61; Yavuz Ercan, *Osmanlı Yönetiminde Gayri Müslimler: Kuruluştan Tanzimat’a Kadar Sosyal, Ekonomik ve Hukukî Durumları* (Ankara: Turhan Kitabevi, 2001), 203; Kenanoğlu, *Osmanlı Millet Sistemi*,

From its foundation by way of a marriage to its end, the central administration of the Ottoman Empire left the field of family law to the spiritual leaders and prevented interference from the outside, even from the side of Muslims. Orders required *qāḍīs* and *imāms* not to interfere with the procedures of marriage of non-Muslims but to be sensitive in their circumscription and to control local *imāms* who exceeded their competence by performing marriages for non-Muslims.⁶ It was not verified whether non-Muslims carried out their procedures of marriage and divorce in accordance with their religion (“in accordance with their own rituals,” as expressed in the documents). The *abl-i ʿurf* [Officer of Custom] who conducted this inspection was equipped with the power to nullify any act that would be considered illicit according to the law and custom of the religious group involved. Additionally, there were attempts to prevent *abl-i ʿurfs* from bribing the spiritual leaders validate illicit marriages.⁷ The Ottoman sensitivity in regulating the field of family law by taking specific religions into consideration was so advanced that it went even further, exiling or imprisoning religious men who allowed illicit marriages that were not supported by their religion.⁸

It is unlikely that a state that was so sensitive about guaranteeing the free application of religious law for members of other religions in addition to Christians and Jews would pressure non-Muslim citizens⁹

245; Colin Imber, *Osmanlı İmparatorluğu 1300-1650: İktidarın Yapısı* [= *The Ottoman Empire 1300-1650: The Structure of Power*] (translated into Turkish by Şiar Yalçın; İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2006), 283-284; Hacker, “Ottoman Policy ...,” 117; id., “Jewish Autonomy in the Ottoman Empire, Its Scope and Limits: Jewish Courts from the Sixteenth to the Eighteenth Centuries,” in Avigdor Levy (ed.), *The Jews of the Ottoman Empire* (Princeton, NJ: Darwin Press, 1994), 153 ff.

⁶ *Kulliyāt-i Qawānīn*, vol. II, no: 3991; vol. III, no: 3992, cited in Kenanoğlu, *Osmanlı Millet Sistemi*, 246.

⁷ *Kulliyāt-i Qawānīn*, vol. III, no: 3993; vol. IV, no: 3994, cited in Kenanoğlu, *ibid.*, 246.

⁸ Kenanoğlu, *ibid.*, 247.

⁹ Here, it should be noted that the words *minority* or *aqalliyya* (small group) are deliberately not used. In Islamic societies, there is no minority; instead, it is “citizens” who are bound to the state by contract. In these societies, strangers are either tourists or enemy warriors, and they are treated according to these statuses. For the idea that the concept of *minority* did not exist in Ottoman society and that the word *aqalliyya* (small group) was used only in the last decade of the

in other cases. In fact, tens of studies¹⁰ based on searches of thousands of archival documents and court registers prove that non-Muslims lived freely within the Ottoman territory. Two examples leave no need for any further comment on this issue:

* To prevent the acceptance of Islam by force, the procedure required that non-Muslims must state in front of the court and witnesses (or, in later periods, before the interpreter of the consulate) that they became Muslim by their own consent and without pressure.¹¹

* According to a survey conducted on the *sharī'a* court registers of Cyprus, between 1786 and 1834 (over a period of fifty years), only seven cases occurred between Muslims and non-Muslims. Because one of the parties was Muslim, at the end of six cases of the seven cases in *sharī'a* courts, the non-Muslim party was considered rightful.¹²

Islam constitutes the main framework of reference for itself, so the pre-Tanzīmāt Ottoman practice summarized herein essentially depends upon the Islamic concept of *dbimma*. The Qur'ān, which emphasizes that the pluralism of religion in society is Allah's own wish,¹³ has established provisions to guarantee the freedom of religion and opinion.¹⁴ Through his personal attitude along with the commands he

Empire, see Ortaylı, "Gayri Müslimlerin Hukuki ve Günlük Yaşamdaki Durumları – Osmanlı İmparatorluğundan Türkiye Cumhuriyetine [Die rechtliche und alltagskulturelle Situation der Nichtmuslime – vom Osmanischen Reich zur Türkischen Republik]," *Türkiye ve Avrupa'da Çok Dinli Yaşam – Geçmişte ve Günümüzde [Multireligiöses Zusammenleben in Der Türkei und in Europa – Gestern und Heute]* (Ankara: Konrad-Adenauer-Stiftung Yayınları, 2006), 19; id., "Millet: Osmanlılar'da Millet Sistemi," XXX, 67.

¹⁰ Although inadequate, for a list of surveys on the subject, see Erhan Afyoncu, *Tanzimat Öncesi Osmanlı Araştırma Rehberi* (Istanbul: Yeditepe Yayınevi, 2007), 489-493.

¹¹ Gülnihâl Bozkurt, *Alman-İngiliz Belgelerinin ve Siyasi Gelişmelerin Işığında Gayrimüslim Osmanlı Vatandaşlarının Hukukî Durumu (1839-1914)* (Ankara: Türk Tarih Kurumu Yayınları, 1996), 134.

¹² Ahmet B. Ercilasun, "Hristiyan Teb'aya Karşı Türk Toleransı," *Türk Kültürü* 24/264 (1985), 39-40; see Kenanoğlu, *Osmanlı Millet Sistemi*, 283.

¹³ Q 5:48; Q 10:99.

¹⁴ Q 2:26; Q 10:99; Q 18:29; Q 88:21-22.

gave, the Prophet embodied the institution of *dbimma*,¹⁵ which means guaranteeing in the territory ruled by Muslims that non-Muslims live as citizens and that they benefit from a substantial judicial autonomy.

Furthermore, the following are stipulations of the Constitution of Medina, the first written constitution of the history of law:

Amongst Jews, those who have submitted to us are to be treated well and helped without injustice, nor is it allowed to support those who are against them.

The Jews of ‘Awf, compose an *umma* together with the Muslims. The religion of the Jews is to themselves, and that of the Muslims is to themselves. This applies to themselves as well as their associates, as long as they don’t do injustice or commit crime. One, who commits a crime or does an injustice, hurts only his family and himself.¹⁶

The Prophet endeavored to protect the rights of non-Muslims based on his authority. For example, in a message he sent to the King of Ḥimyar in South Arabia, he established as a condition that Jews and Christians desiring to preserve their religion should not be permitted. In the *amān-nāma* (permission paper) he gave to the Christians of Najrān, he declared that he himself was the guarantee of their properties, their lives, their religions and rituals, their families, and their temples.¹⁷

Based on the divine instructions in the rule, “They have rights and obligations just like the Muslims,” Muslim jurists have emphasized that non-Muslims “should be let free with their religion.”¹⁸

¹⁵ For the details, see Abū ‘Abd Allāh Shams al-Dīn Muḥammad Ibn Qayyim al-Jawziyya, *Aḥkām abl al-dbimma* (3rd edn., Beirut: Dār al-‘Ilm li-l-Malāyīn, 1983); ‘Abd al-Karīm Zaydān, *Aḥkām al-dbimmiyyīn wa-l-musta’manīn fī dār al-Islām* (Beirut: Mu’assasat al-Risāla, 1982); Ahmet Yaman, *İslam Hukukunda Uluslararası İlişkiler* (Ankara: Fecr Yayınevi, 1998).

¹⁶ For the entire Constitution along with Articles 16 and 25 cited above, see Muḥammad Ḥamidullāh, *Majmū‘at al-watbā’iq al-siyāsiyya li-l-‘abd al-nabawī wa-l-kbilāfa al-rāshida* (Beirut: Dār al-Nafā’is, 1987), 59-62.

¹⁷ For the documents and their sources, see Ḥamidullāh, *ibid.*, 175, 220.

¹⁸ Abū Bakr Shams al-a’imma Muḥammad ibn Aḥmad ibn Sahl al-Sarakhsī, *al-Mabsūṭ* (Istanbul: Çağrı Yayınları, 1983), XIII, 137; Abū Bakr ‘Alā’ al-Dīn Abū Bakr ibn Mas’ūd ibn Aḥmad al-Ḥanafī al-Kāsānī, *Badā’i’ al-ṣanā’i’ fī tartīb al-sbarā’i’* (2nd edn., Beirut: Dār al-Kutub al-‘Ilmiyya, 1982), VI, 280.

Dbimmīs in the Muslim world had judicial autonomy in the fields of family law and the law of succession. According to the general consideration of Muslim scholars, these two fields were originally considered to be religious; in a better expression, they were considered to have the characteristics of worship. This is why the command “Let them free with their religions” that the Prophet gave to Muslim scholars has opened the door of recognition to the acts that Islam strictly prohibits in these fields. As an indicator of this, al-Ḥasan al-Başrī (d. 110/728) stated, “They pay us *jizya* to be able to live in respect to their own religions” to ‘Umar ibn ‘Abd al-‘Azīz, the Umayyad Caliph (d. 101/720), who had asked him if the state should interfere in the marriages of the *dbimmīs*, which should be nullified according to Islamic law.¹⁹

In this regard, the engagements concerning the rights of non-Muslim citizens undertaken by the Ottoman Empire within the framework of the *İşlāḫāt Farmāni* (*Islahat Fermanı* [Ottoman Reform Edict of 1856]) before the international community are nothing more than a confirmation of an old tradition that dates back centuries.

Jews, who constitute the main subject of this article, composed a significant part of the Ottoman *millet* system. Jews, who are referred to with terms such as *millet-i Yebûd*, *Yebûd tâifesi*, and *Mûsevî milleti*,²⁰ constituted the third *millet* along with the Rûms and Armenians.²¹

Meḫmed II designated Rabbi Moses Capsali, who was attempting to fulfill his duty under harsh circumstances in Byzantine, as the

¹⁹ Antoine Fattal, *Le Statut Legal des Non-Musulmans en Pays d'Islam* (Beirut: al-Maḥba‘a al-Kāthūlikiyya, 1958), 128; Aydın, “Osmanlıda Hukuk,” in Ekmeleddin İhsanoğlu (ed.), *Osmanlı Devleti Tarihi* (Istanbul: Feza Gazetecilik, 1999), II, 420.

²⁰ The Ottoman historians register, as an interesting matter of fact, that the expression *kafara* [unbelievers] is not used regarding Jews. As the recordings from the classic period show, the distinction “*kafara* and the Jewish community” existed in the documents. See Ortaylı, “Millet: Osmanlılar’da Millet Sistemi” XXX, 69.

²¹ Aryeh Shmuelevitz, *The Jews of the Ottoman Empire in the Late Fifteenth and Sixteenth Centuries: Administrative, Economic, Legal and Social Relations as reflected in the Responsa* (Leiden: E. J. Brill, 1984), 20-21; Avram Galanti, *Fatih Sultan Mehmet Zamanında İstanbul Yabudileri* (Istanbul: Fakülteler Matbaası, 1953); Ahmet Hikmet Eroğlu, *Osmanlı Devletinde Yabudiler (XIX. Yüzyılın Sonuna Kadar)* (Ankara: Alperen Yayınları, 2000), 165 ff.; Kenanoğlu, *Osmanlı Millet Sistemi*, 44; Hacker, “Ottoman Policy ...,” 122.

commissioned rabbi of the Jewish community. It is controversial whether this rabbi and the following rabbis delegated by the Empire represented the entire Jewish *millet* or only the Jewish community inhabiting Istanbul and nearby cities.²² However, historical sources register the personalities who led the Jewish community in both religious and judicial aspects beginning from this period.²³

In fact, the Jewish presence and the application of the *dhimma* law to Jews date back in the Ottoman Empire almost to the time of its foundation. When he received the keys of Bursa in 1326, Orkhân Beg came upon a Jewish society that had always been subject to the humiliations of the *takfurs* there. Following the conquest, Orkhân Beg allowed the construction of the temple still known today as *Etz ha-Hayyim* (Tree of Life), and he provided an environment of toleration where they could manage their affairs and resolve their cases through the administration of their chief rabbis.²⁴

With the tolerance that they were shown after the conquest of Bursa, Jews, who had always been subject to exile and genocide under Roman and Byzantine rule, had for the first time a legitimate social identity that did not exist in that period in other European countries.²⁵ Moreover, the *Yeshiva* (Talmud school) of Edirne under the

²² Shmuelevitz, *The Jews of the Ottoman Empire*, 20-21; Naim Gülerüz, *Türk Yahudileri Tarihi I (20. Yüzyılın Başına Kadar)* (Istanbul: Gözlem Gazetecilik Basın ve Yayın, 1993), 51-52; Kenanoğlu, *Osmanlı Millet Sistemi*, 130 ff.; Eroğlu, *Osmanlı Devletinde Yahudiler*, 165 ff.; Hacker, "Ottoman Policy ...," 122.

²³ For example, see Shmuelevitz, *The Jews of the Ottoman Empire*, 20-21; Gülerüz, *İstanbul Sinagogları* (Istanbul: Rekor Ofset, 1992); Galanti, *Türkler ve Yahudiler: Tarihi, Siyasi Tetkik* (expanded 2nd edn., Istanbul: Tan Matbaası, 1947); Moshe Sevilla-Sharon, *Türkiye Yahudileri* (Istanbul: İletişim Yayınları, 1992); Harry Ojalvo, *Osmanlı Padişabları ve Musevi Tebaalarına İlişkin Kısa Taribçe* (Istanbul: A Basım ve Reklam Hizmetleri Ltd. Şti., 2001).

²⁴ Ojalvo, *ibid.*, 22; Shmuelevitz, *The Jews of the Ottoman Empire*, 17-18, 85; Sevilla-Sharon, *Türkiye Yahudileri*, 31; Kenanoğlu, *Osmanlı Millet Sistemi*, 131; Bozkurt, *Alman-İngiliz Belgelerinin ve Siyasi Gelişmelerin Işığı Altında ...*, 12-13; Gülerüz, *Türk Yahudileri Tarihi*, 43; Eva Groepler, *İslâm ve Osmanlı Dünyasında Yahudiler* (translated into Turkish by Süheyla Kaya; Istanbul: Belge Yayınları, 1999), 29-30; "History of the Jews in Turkey," http://en.wikipedia.org/wiki/History_of_the_Jews_in_Turkey (accessed February 10, 2009).

²⁵ Leften S. Stavrianos, *The Balkans since 1453* (New York: Rinehart, 1958), 89-90; Hacker, "Ottoman Policy ...," 117; Mary W. Montgomery, "Turkey," *Jewish Encyclopedia*, 279, cited in Ercan, *Osmanlı Yönetiminde Gayri Müslimler*, 65. On the

rule of the Romaniot Community became a center of theology to educate the rabbis of nearby countries in the period of Murād I (1362-1389).²⁶

In the following years, although some Jews immigrated to the Ottoman territory from countries such as France and Hungary and those who lived in the conquered Balkan territory gained the status of *dbimmī*,²⁷ Jews who immigrated at the end of the 15th century from Spain, Portugal, and Italy and who spoke Spanish (which is why they were called *Safārad*) became more apparent in Ottoman society. In Jerusalem, there were 70 Jewish families in 1488, whereas at the beginning of the 16th century, this number reached 1.500. The number of synagogues in Istanbul soon reached 44, and the number of Jewish inhabitants was as high as 30.000.²⁸ Joseph R. Hacker, in his book dedicated to the Ottoman Jews, records that 1.647 Jewish families were living in Istanbul in 1477.²⁹ Some Jewish scholars say that this made Istanbul the largest Jewish center in Europe.³⁰

Jews, who had a non-negligible population at the time, increased their population in the following period.³¹ By examining the Jewish

subject, Yavuz Ercan refers to: Klaus Schwarz, *Osmanische Sultansurkunden des Sinai-Klosters in Türkischer Sprache* (Freiburg im Breisgau: Klaus Schwarz Verlag, 1970), 41, 42.

²⁶ Groepler, *İslâm ve Osmanlı Dünyasında Yabudiler*, 30.

²⁷ For further information, see Benjamin Braude and Bernard Lewis (eds.), *Christians and Jews in the Ottoman Empire* (vol I: *The Central Lands*; vol. II: *The Arabic-Speaking Lands*; New York, NY: Holmes & Meier Publishers, 1982); Halil İnalçık, Leon Picon, and Kerim C. Kevenk, *Turkish-Jewish Relations in the Ottoman Empire* (reprinted from United Turkish American, 1982); Güleriyüz, *Türk Yabudileri Tarihi I*; Bernard Lewis, *İslam Dünyasında Yabudiler* [= *The Jews of Islam*] (translated into Turkish by Bahadır Sina Şener; Ankara: İmge Kitabevi, 1996).

²⁸ Montgomery, "Turkey," 280, cited in Ercan, *Osmanlı Yönetiminde Gayri Müslimler*, 65-66; Groepler, *İslâm ve Osmanlı Dünyasında Yabudiler*, 31; "History of the Jews in Turkey."

²⁹ Hacker, "Ottoman Policy ...," 123.

³⁰ Groepler, *İslâm ve Osmanlı Dünyasında Yabudiler*, 31. There is evidence that at that time, the Jewish population in Istanbul was 11%. See Groepler, *ibid.*, 33.

³¹ For a brief summary based on a large body of literature on the history, the organization, the operation, and the situation of the Jewish presence in the Ottoman Empire, see Kenanoğlu, *Osmanlı Millet Sistemi*, 130-145; for further information,

population living at the time the *HAQ* containing the rules for Jewish family law took effect (which will be discussed below), the increase in the population can be observed. According to the evaluation of *Alliance Israélite Universelle*, in 1908, there were 65.000 Jews in Istanbul, 17.000 in Edirne, 90.000 in Thessaloniki, 35.000 in Izmir, 12.000 in Aleppo and Damascus each, 40.000 in Jerusalem, and 45.000 in Baghdad.³² According to the *Judische Statistik* and *The News of Today*, between 1902 and 1913, the total Jewish population of Ottoman society reached as high as 650.000.³³ These numbers give us an idea about the size of the Jewish community addressed by the *HAQ*.

Thus, the *HAQ*, dated 1917, covered Jews, who had always had a certain autonomy in matters of family law. Although it limited their judicial competence in family matters by other *ru'asā'-i rūḥāniyya* (spiritual leaders),³⁴ it continued tolerance toward them through provisions regulated based on their own religion and considerations.

To demonstrate their gratefulness for this general attitude of tolerance by the Ottoman Empire, all of the Jewish organizations in different territories of the world organized the *Conference of Istanbul* in 1877. They unanimously recorded the fact that Jews had been treated well in the Ottoman Empire and that they had lived a peaceful life. In contrast, Jews who inhabited the territories that lost Ottoman authority were subject to great atrocities.³⁵

see Güleriyüz, *Türk Yabudileri Tarihi I*, 43 ff.; Groepler, *İslâm ve Osmanlı Dünyasında Yabudiler*, 28 ff.

³² Paul Dumont, "Jewish Communities in Turkey during the Last Decades of the Nineteenth Century in the light of the Archives of the Alliance Israélite Universelle," in Braude and Lewis (eds.), *Christians and Jews in the Ottoman Empire*, I, 231. M. A. Ubcini registers that as of 1844, 170.000 Jews lived in the Ottoman Empire and constituted 0.48% of the population. According to the same census, the population consisted of Muslims by a margin of 58.13%, 38.84% Rûms-Orthodox, and 2.55% Catholics. See Bilal Eryılmaz, *Osmanlı Devletinde Gayrimüslim Teb'anın Yönetimi* (Istanbul: Risale Yayınları, 1990), 76.

³³ Justin McCarthy, "Jewish Population in the Late Ottoman Period," in Avigdor Levy (ed.) *The Jews of the Ottoman Empire* (Princeton, NJ: Darwin Press, 1994), 376. For confirmation, see Enver Ziya Karal, *Osmanlı İmparatorluğu'nda İlk Nüfus Sayımı 1831* (Ankara: T.C. Başvekâlet İstatistik Umum Müdürlüğü, 1943).

³⁴ *Huquq-i 'Â'ila Qarâr-nâması* (Istanbul: Maṭba'a-i Orkhāniyya, 1336 H.), art. 156.

³⁵ *Avrupa ve Amerika'da Bulunan Bütün Musevî Cemiyetlerin 1877'de İstanbul Konferansı'na Verdikleri Müşterek Muhtıra: Musevilerin İspanya'dan Türkiye'ye*

II. Rules of Family Law Applied to the Ottoman Jews

The *HAQ*, which was a regulation concerning not only Muslims but also all Ottoman citizens, was the result of the reform period that had a significant impact on the last century of the Empire. Thanks to the reforms that occurred beginning with the *Tanzîmât*, differences in the judicial statuses between various *millets* of non-Muslim citizens disappeared and the status of “Ottoman citizen” was adopted in place of the status of *dhimmî*.³⁶

Because the field of law and culture related to the family had always been in line with the theory and application suggested by Islam, deprivation could not be the case. New secular laws adopted by means of translations and reception³⁷ did not distinguish between citizens. Indeed, the *Majalla* was of the same nature and was effective for all Ottoman citizens. Furthermore, within the laws and decrees provided in accordance with *shar‘-i sharîf* (Islamic law), the provisions with respect to the religion of non-Muslims (with respect to “their own rituals,” as the mention in the Ottoman documents goes) were established separately. This method did not imply the existence of a multi-jurisdictional legislative structure. By virtue of the principle of territoriality, the legislation was to be applied to all citizens. Provisions involving religious differences were inserted separately in the same legislation. Thus, in the words of Aḥmad Jawdat Pasha (d. 1895), a general regulation was put into place that was “to

Göçlerinin 500'üncü Yılı Kutlanırken (ed. İlhan Akant; İstanbul: İstanbul Üniversitesi Siyasal Bilgiler Fakültesi, 1992); The memoirs of a lady named Gracia Mendes, who fled from the Spanish-Portuguese inquisition, describe with gratitude how they were given an opportunity by the Ottoman Empire to preserve and almost rebuild their identity. See Marianna D. Birnbaum, *Gracia Mendes: Bir Sefaradın Uzun Yolculuğu* [= *The Long Journey of Gracia Mendes*] (translated into Turkish by Mercan Uluengin; İstanbul: Kitap Yayınevi, 2007). See also Esther Benbassa, *Son Osmanlı Hababasısının Mektupları – Alyans'tan Lozan'a –* [= *Haim Nabum: A Sephardic Chief Rabbi in Politics, 1892-1923*] (translated into Turkish by İrfan Yalçın; İstanbul: Milliyet Yayınları, 1998).

³⁶ Bozkurt, *Alman-İngiliz Belgelerinin ve Siyasi Gelişmelerin Işığı Altında ...*, 2; Eryılmaz, *Osmanlı Devletinde Gayrimüslim Teb'anın Yönetimi*, 95 ff.

³⁷ See Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi* (Ankara: Türk Tarih Kurumu Basımevi, 1996), 39 ff.; Cengiz Otacı, *Hukukun Laikleşme Serüveni* (İstanbul: Birey Yayınları, 2004), 146 ff.; Mustafa Şentop, “Tanzimat Dönemi Kanunlaşırma Faaliyetleri Literatürü,” *Türkiye Araştırmaları Literatür Dergisi* [TALİD] 3/5 (2005), 647-672.

be applied as the religious law to the members of Islam, and to the non-Muslim people too, in the sense of a law.”³⁸

Thanks to the *HAQ*, the institution of the family obtained the protection of the law, which was previously based upon imperial decrees and orders and the books of *fiqh* and *fatwā* for Muslims. For non-Muslims, it was left to the authority of the community that depended upon the requirements of their own religion.

Although it was subject to objections by the Jewish and Christian community³⁹ because it removed the jurisdictional competence of the community courts in the field of family law,⁴⁰ the *HAQ* maintained the same approach to protecting their rights and regulating the field of family law with respect to their own religion. In this regard, the “provisions involving Jews and Christians” were listed under separate titles and they were consulted in the determination of these rules. This fact is mentioned in the motivation of the *HAQ*, as follows:

Because of the fact it is possible to eliminate all the inconveniences related to their religious rules, by individually indicating and explaining all the rules to be imperatively applied, within this law herein, this principal was followed and non-Muslim people were consulted in the preparation and the regulation of the rules concerning non-Muslims and they were benefited from their knowledge on the subject.⁴¹

Due the fact that the Rabbinate and the Patriarch agreed on the effectivity and the validity of the rules concerning non-Muslims, no further motivation was needed to mention.⁴²

Despite believing in different religions, sharing the same cultural geography for centuries meant that the Jewish family was an Ottoman family as well. They had more commonalities than differences in their culture. İlber Ortaylı, indicating that the Ottoman family was a typology in the world, says that what designates the border of the composition of the Ottoman family is not the religion of the people or their

³⁸ Aḥmad Jawdat Pasha, *Ma‘rūḍāt* (ed. Yusuf Halaçoğlu; Istanbul: Çağrı Yayınları, 1980), 200.

³⁹ See Mehmet Akif Aydın, *İslâm-Osmanlı Aile Hukuku* (Istanbul: Marmara Üniversitesi İlahiyat Fakültesi Vakfı Yayınları, 1985), 208-212, 222.

⁴⁰ *HAQ*, art. 156.

⁴¹ *Munākahāt wa-Mufāraqāt Qānūn-nāmasi Asbāb-i Mūjiba Lāyiḩasi*, in *HAQ*, 2-3.

⁴² *Ibid.*, 7.

families but the common culture. According to Ortaylı, “The difference between a Dutch family and an Ottoman Armenian family is greater than the one between an Armenian and an Ottoman Turk.”⁴³

Because of the common sense mentioned above, although no religious or legal obstacle existed in practice, the marriage of a Jewish lady of the Ottoman society and a Jewish man outside of the society was not considered appropriate. Non-Muslims did not approve of marriages between the women of their communities and non-Muslim men from other countries, and they carried out strict control on this issue.⁴⁴ As an indicator of this situation, upon the marriage of Jewish women to men from Tuscany inhabited Thessaloniki at that time, a firman prohibiting these acts was promulgated, dated Shawwāl 17, 1266/1850. Aḥmad Rāsım Beg, the *taba‘a tafriq ma’mūru* (officer of nationality), ordered the investigation and prevention of these situations.⁴⁵

As in Islamic culture, the family was considered a religious institution beyond its social character in Judaism. The Torah, which indicates that it was not right for the first human created to remain alone,⁴⁶ continues by stating that Allah created the woman, and that the two made a whole together.⁴⁷ The phrases below from the Torah* clearly show that the family is a praised institution and indicate the importance of the family in Judaism:

Take wives and become the fathers of sons and daughters, and take wives for your sons and give your daughters to husbands, that they may bear sons and daughters; and multiply there and do not decrease.⁴⁸

⁴³ Ortaylı, *Osmanlı Toplumunda Aile* (Istanbul: Pan Yayınları, 2001), 2, 7, 70-71.

⁴⁴ *Ibid.*, 30, 74, 94-95.

⁴⁵ Başbakanlık Osmanlı Arşivi (BOA) [The Ottoman Archives of the Prime Minister's Office], İr-Har, no: 5109, cited in Ortaylı, *ibid.*, 96,

⁴⁶ Gen. 2:18.

⁴⁷ Gen. 2:24; 3:16.

* All the citations herein are based on the version *New American Standard Bible*, 1995.

⁴⁸ Jer. 29:6.

God created man in His own image, in the image of God He created him; male and female He created them. God blessed them; and God said to them, "Be fruitful and multiply, and fill the earth!"⁴⁹

The family, which was considered so important in Judaism, obtained a judicial and moral character with the aid of regulations in the holy texts. The laws related to the family, particularly the questions of whom not to marry, the cancellation of marriage, polygamy, law regarding widows, the *mabr*, divorce, and the consequences related to these issues were enumerated both in the Torah and in the Mishnah along with the Talmud.⁵⁰

The field of the family is the area of civil relations in which religious considerations are most important. With the exception of legislations of a laic nature, legislative activity in this field has long adopted the principle of being respectful toward religious sensitivity. Based on this sensitivity, the *HAQ* separately determined the rules to which Jews submitted themselves, as mentioned above.

Were these provisions really in coherence with the religion and customs of the Jews? Was any rule presented of which no trace is found in the Old Testament? This paper seeks answers to these questions with the Old Testament (i.e., the Torah) at the center of the study.

First, one should keep in mind that the Commission that was to prepare the *HAQ* determined the provisions related to Jews by con-

⁴⁹ Gen. 1:27-28. On the place of the family in Judaism, see also Hakkı Şah Yasdıman, *Yabudi Kutsal Metinleri Işığında Kadının Evlilikteki Yeri* (PhD dissertation; Izmir: Dokuz Eylül University, 2000); id., "Yahudi Dininde Ailenin Yeri," *Dokuz Eylül Üniversitesi İlahiyat Fakültesi Dergisi*, 13-14 (2001), 241-266; Nuh Arslantaş, *İslâm Toplumunda Yabudüler: Abbâsî ve Fâtımî Dönemi Yabudilerinde Hukukî, Dinî ve Sosyal Hayat* (Istanbul: İz Yayıncılık, 2008), 347-348; see Yusuf Besalel, "Aile," *Yabudilik Ansiklopedisi* (Istanbul: Gözlem Gazetecilik Basım ve Yayın, 2001-2002), I, 42 ff.; Louis M. Epstein, *The Jewish Marriage Contract: A Study in the Status of the Woman in Jewish Law* (New York: Jewish Theological Seminary of America, 1927).

⁵⁰ On the Jewish sacred texts, see Ömer Faruk Harman, *Metin, Muhteva ve Kaynak Açısından Yabudi Kutsal Metinleri* (unpublished habilitation thesis; Istanbul: 1988); Baki Adam, *Yabudi Kaynaklarına Göre Tevrat (Mabiyeti, Tabrifî ve Yabudi Hayatındaki Yeri)* (Ankara: Seba Yayınları, 1997); Zafar al-Islâm Khan, *al-Talmüd târîkhubû wa-ta'âlimubû* (Beirut: Dâr al-Nafâ'is, 1985).

sulting their own authorities. The Commission of the *Huqūq-i ʿĀʿila* (Family Law), which was constituted by five delegates, was first separated into three subcommissions to determine the rules of family law of the three religions. It stipulated provisions primarily concerning Muslims along with rules determined in the subcommissions. The rules of Christian or Jewish family law, which were not compatible with Islam and featured a different character, were indicated separately. This is how the *HAQ* was formed.⁵¹

As stated above, because the Commission consulted the religious authorities of related communities along with the Rabbinate and the Patriarch and because the provisions regarding non-Muslims were considered “valid and effective” by them as well, the Commission did not draw up a separate *asbāb-i mūjiba* (leading motives) concerning these rules. This leads to the conclusion that the rules of the *HAQ*, apart from those legislated separately with respect to different religions and those that were not to be applied to the non-Muslims, were to be applied to all Ottoman citizens. The *HAQ* acknowledges this situation by stating, “The rules in the Chapter herein, are also effective regarding Jews”⁵² and “The rules within the Chapter herein, are not to be applied to the non-Muslims.”⁵³ In addition, it embodies the aforementioned situation by stating, “The articles in the Decree herein, which are not contradictory with the provisions exceptionally stipulated regarding the non-Muslims, are to be applied to them as well, unless clearly stated otherwise.”⁵⁴

In the next section, the origin of the articles that are stipulated regarding Jews will be sought in the Torah or in Jewish custom rather than focusing on the provisions to be applied to Muslims. In the first chapter specific to the Jews, the *HAQ* enumerates the persons with whom one cannot marry. This chapter, titled, “On the persons with whom one is prohibited to get married; concerning Jews,” consists of articles numbered 20 to 26, including the articles below:

Article 20: “One cannot marry the sister of his divorcee who is alive”.

The article quoted above, which derives from the 18th sentence of the 18th chapter of the third book of the Torah, the Book of Leviticus,

⁵¹ Aydın, *İslâm-Osmanlı Aile Hukuku*, 163-164.

⁵² *HAQ*, art. 39.

⁵³ *HAQ*, art. 51, 91.

⁵⁴ *HAQ*, art. 155.

prohibits marrying a living divorcee's sister. Although it is not clearly stated in the article, it is *a priori* understood that marrying two sisters at the same time is also prohibited. The passage of the Torah mentioned below explicitly notes this situation:

You shall not marry a woman in addition to her sister as a rival while she is alive, to uncover her nakedness.⁵⁵

Article 21: A woman, who is conclusively divorced from her spouse, cannot marry him again; after having married to another man, and having divorced from him.

The above article, which prohibits the remarriage of divorced spouses no matter what the reason, derives from verses 1-4 of the 24th chapter of the fifth book of the Torah, the Book of Deuteronomy. Although this marriage obstacle, which is regulated in the verses mentioned above, seems to be exclusive to cases in which the divorce is on the part of the woman, Jewish custom extends the scope of this obstacle to all divorces of any sort or any grounds. This issue is mentioned in the Torah as follows:

When a man takes a wife and marries her, and it happens that she finds no favor in his eyes because he has found some indecency⁵⁶ in her, and he writes her a certificate of divorce and puts it in her hand

⁵⁵ Lev. 18:18. "To uncover her nakedness" refers to marriage and the bridal chamber, not "adultery." Until Moses, Jews were authorized to marry two sisters at the same time. After Moses, this practice was prohibited. It is considered illicit to be married to two sisters at the same time. On this subject, see Arslantaş, *İslâm Toplumunda Yabudiler*, 348 ff.

⁵⁶ In Jewish literature, this situation is called "ervat davar." "The things to be ashamed of" that exist in women are detailed in the Talmudic literature on the basis of verse 22:13 of the Deuteronomy. The Talmud states that a man can divorce his wife if he finds that she has physical flaws or a chronic disease. Flaws that provide reasons to divorce a woman include having permanent traces (e.g., a dog bite) on her body, smelling bad, having bad breath or body odor, old age, contagious and chronic diseases such as epilepsy and leprosy, a bad voice, or asymmetrical breasts. In the same way, if a man marries a girl thinking that she is healthy and finds that she has a disease after marriage, it is acceptable for the husband to divorce his wife without being obliged to pay her *ketubah* (*mahr*). See Arslantaş, *İslâm Toplumunda Yabudiler*, 418-419. Some authors suggest that "things to be ashamed of" implies situations such as not being a virgin, being disloyal, or overcooking food. See Besalel, "Boşanma," *Yabudilik Ansiklopedisi*, II, 127.

and sends her out from his house, and she leaves his house and goes and becomes another man's wife, and if the latter husband turns against her and writes her a certificate of divorce and puts it in her hand and sends her out of his house, or if the latter husband dies who took her to be his wife, then her former husband who sent her away is not allowed to take her again to be his wife because she has been defiled; for that is an abomination before the Lord ...⁵⁷

Article 22: One is not prohibited to marry his brother's/his sister's female descendants and his/her posterity.

The origin of this article, which allows marriage with nieces and the children of these, could not be found in the Torah we consulted. However, the passages of the Torah on marriage obstacles⁵⁸ (that is, the persons whom one is prohibited from marrying) do not contain any obstacles regarding this issue. Although it seems to be one of the provisions likely to be corrupted because it is not explicitly prohibited in the Old Testament and there are examples of this practice in Jewish history, this seems compatible with Jewish law. Consequently, the provision stating the legitimacy of a marriage of an uncle (the brother of a man, not the brother of a woman) who marries his nieces is confirmed by the practice of this type of marriage dating back to the time of the Prophet.⁵⁹ Some contemporary Jewish researchers indicate that it is acceptable to marry one's nieces in Rabbinic (Orthodox) Judaism. However, it is prohibited in certain marginal Jewish sects, namely Karaite Judaism and the Covenanters of Damascus.⁶⁰

⁵⁷ Deut. 24:1-4.

⁵⁸ See Lev. 18:6-18; Deut. 22:13-21, 30.

⁵⁹ See Arslantaş, "Hz. Peygamber'in Çağdaşı Yahudilerin İnanç-İbâdet ve Dinî Hayatları ile İlgili Bazı Tespitler," *Marmara Üniversitesi İlahiyat Fakültesi Dergisi* 34/1 (2008), 91.

⁶⁰ S. D. Goitein, *Yahudiler ve Araplar: Çağlar Boyu İlişkileri* (translated into Turkish by Nuh Arslantaş and Emine Buket Sağlam; İstanbul: İz Yayıncılık, 2004), 77. The fact that Karaite Jews, who only accept the *written* Torah and reject the Talmud (which is considered the *oral* Torah), appeared a century after the Prophet and the fact that the Covenanters of Damascus, about whom there is no sufficient information, appeared three centuries later (see George F. Moore, "The Covenanters of Damascus; A Hitherto Unknown Jewish Sect," *Harvard Theological Review* 4/3 [1911], 330-377) lead to the idea that these sects prohibited the situation in question, inspired by Islam.

Article 23: Within the framework of the prohibitions regulated under the Article 19 in four categories, the prohibition of *muşābara* (affinity) will be admitted in case of an abstract act as well as in case of an absolutely invalid marriage, no matter if an intercourse took place or not.

Article 19 to which the above article refers regulates the issue of a marriage obstacle called *ḥurmat-i muşābara* or *mamnū‘iyyat-i muşābara* (prohibition of the affinity) in the words of the *HAQ*. Within this framework, Article 19 enumerates the relatives-in-law whom one cannot marry. Affinity is considered a continuous obstacle because it does not cease by divorce or death. The prohibition of marriage to daughters-in-law, mothers-in-law, stepmothers, stepsisters, and step-grandchildren, regulated in Article 19, exists in the same form in Judaism. Marriage obstacles caused by birth or marriage are listed in the Torah, as follows:

None of you shall approach any blood relative of his to uncover nakedness; I am the Lord. You shall not uncover the nakedness of your father, that is, the nakedness of your mother. She is your mother; you are not to uncover her nakedness. You shall not uncover the nakedness of your father's wife; it is your father's nakedness. The nakedness of your sister, either your father's daughter or your mother's daughter, whether born at home or born outside, their nakedness you shall not uncover. The nakedness of your son's daughter or your daughter's daughter, their nakedness you shall not uncover; for their nakedness is yours. The nakedness of your father's wife's daughter, born to your father, she is your sister, you shall not uncover her nakedness. You shall not uncover the nakedness of your father's sister; she is your father's blood relative. You shall not uncover the nakedness of your mother's sister, for she is your mother's blood relative. You shall not uncover the nakedness of your father's brother; you shall not approach his wife, she is your aunt. You shall not uncover the nakedness of your daughter-in-law; she is your son's wife, you shall not uncover her nakedness. You shall not uncover the nakedness of your brother's wife; it is your brother's nakedness. You shall not uncover the nakedness of a woman and of her daughter, nor shall you take her son's daughter or her daughter's daughter, to uncover her nakedness; they are blood relatives. It is lewdness. You shall not marry a

woman in addition to her sister as a rival while she is alive, to uncover her nakedness.⁶¹

Here, Article 23 of the *HAQ* indicates that the affinity that leads to an eternal marriage obstacle with stepsisters and step-grandchildren is caused exclusively by the contract of marriage according to Judaism, adding that it does not matter whether actual intercourse took place or the marriage is invalidly established.⁶²

Article 24: Remarrying the woman divorced due to adultery is prohibited.

A woman who is accused before the *kohen* on grounds of adultery is divorced by the decision of the *kohen* after an oath and a cursing procedure, which is explained in detail in the Book of Numbers of the Torah.⁶³ Spouses in such cases who are divorced due to adultery can never marry each other again, and the woman cannot marry the man with whom she committed adultery.⁶⁴

⁶¹ Lev. 18:6-18. See also Deut. 22:30 and 27:20-23. As can be seen, in Judaism, unlike Islam, it is strictly prohibited to marry the wives of one's uncles (that is, one's sisters-in-law).

⁶² In Islamic law, it requires more than a contract of marriage to be prohibited to marry one's wife's posterity, or stepsisters and step-grandchildren. For this, one needs to have had sexual intercourse in addition to the contract of marriage. More clearly, in case of a divorce without sexual intercourse, it is possible to marry the girl of that woman who was fathered by a different man. However, if one had sexual intercourse with his wife, he can no longer marry his stepsisters. See Q 4:23; also Yaman, *İslam Aile Hukuku* (Istanbul: Marmara Üniversitesi İlahiyat Fakültesi Vakfı Yayınları, 2008), 41.

⁶³ See Num. 5:11-31. This procedure of cursing, which involves irrational practices that contradict physical principles such as an appeal to a divine voice and the bitter water test, eventually evolved to a more reasonable form. See Ze'ev W. Falk, "Yahudi Hukuku [= Jewish Law]," (translated into Turkish by Bilal Aybakan), *İLAM Araştırma Dergisi* 3/1 (1998), 174.

⁶⁴ In Judaism, this rule is called *asur le-baal ve le-bo'el*, which means "to be prohibited to both her husband and the man with whom she committed the adultery." For some of the court decisions on the subject dating to the pre-Ottoman era, see Arslantaş, *İslâm Toplumunda Yahudiler*, 386-387. On the same subject, see also Haim Cohn, "Eherecht," *Jüdischen Lexikon*, 78, cited in Fatmatüzzehra Ekinci, *İslam Hukuku ile Tevrat Hükümlerinin Karşılaştırmalı Olarak İncelenmesi* (MA thesis; Konya: Selçuk University, 2003), 90; Besalel, "Evlilik," *Yahudilik Ansiklopedisi*, I, 161-167. The procedure called *mulā'ana* or *li'an*, which consists of

Article 25: Marrying the wife of a brother, who died while having children, is prohibited.

The following sentence from the 18th chapter of the Book of Leviticus, which is quoted in detail under Article 23, is the origin of the above article:

You shall not uncover the nakedness of your brother's wife; it is your brother's nakedness.⁶⁵

It is deducible from both the statement and the sense of Article 25 that it is possible to marry the childless wives of one's brothers after the death of their husbands. Although it seems as if the above verse of the Torah indicates a general prohibition without taking such details into consideration, a study of the other verses shows that the prohibition in question, like the Article clearly states, concerns only the wives of brothers who have children. Moreover, in such a case, it is almost an obligation for the widow who does not have children to marry the brother of her husband who died. This marriage,⁶⁶ called *yibbum* in Judaism⁶⁷ (a sort of *levirate*; marrying the brother-in-law), takes place as follows:

When brothers live together and one of them dies and has no son, the wife of the deceased shall not be married outside the family to a strange man. Her husband's brother shall go in to her and take her to himself as wife and perform the duty of a husband's brother to her. It shall be that the firstborn whom she bears shall assume the name of his dead brother, so that his name will not be blotted out from Israel. However, if the man does not desire to take his brother's wife, then

cursing each other in front of the judge, although practiced differently in Islam (Q 24:6-9), is considered an eternal obstacle to marriage (similar to Judaism), according to the majority of *faqīhs* (with the exception of al-Imām Abū Ḥanīfa and Muḥammad al-Shaybānī). See Yaman, *İslam Aile Hukuku*, 91-92.

⁶⁵ Lev. 18:16. As can be seen, in Judaism, unlike Islam, it is strictly prohibited to marry the wives of one's brothers who have children – in other words, the brides of the family who have children.

⁶⁶ See Cohn, "Leviratehe," *Jüdischen Lexikon*, 114, and Johnson, *Yabudi Taribi*, 547, cited in Ekinci, *İslam Hukuku ile Tevrat Hükümlerinin Karşılaştırmalı Olarak İncelenmesi*, 84.

⁶⁷ *Yibbum* is the practice in which a man dies leaving his children behind, and his brother marries his dead brother's wife. The purpose of this marriage is to retain the name of the dead brother and to prevent the family property from being dispersed or distributed to others.

his brother's wife shall go up to the gate to the elders and say, "My husband's brother refuses to establish a name for his brother in Israel; he is not willing to perform the duty of a husband's brother to me." Then, the elders of his city shall summon him and speak to him. And if he persists and says, "I do not desire to take her," then his brother's wife shall come to him in the sight of the elders, and pull his sandal off his foot and spit in his face; and she shall declare, "Thus it is done to the man who does not build up his brother's house." In Israel his name shall be called, "The house of him whose sandal is removed."⁶⁸

Thus, the aforementioned article shows coherence with Jewish law and the Torah, which serves as its basis.

Article 26: Foster kinship is not an obstacle to marriage.

The above article, stating that the foster kinship does not constitute an obstacle to marriage, overlaps both the Torah and Jewish custom. Although wet nursing was known in the era of Moses,⁶⁹ the Torah did not refer to foster kinship when enumerating the persons whom one cannot marry.⁷⁰ On the grounds of these historical data, the *HAQ* indicates that foster kinship does not concern the Jews.⁷¹

The second specific chapter of the *HAQ* about Jews, dated 1917, regulates the issue of the invalidity and nullity of a marriage. The chapter titled "On the Validity and the Nullity of the Marriage Involving Jews," which consists of articles numbered from 59 to 62, includes the following articles:

Article 59: It is invalid to marry a woman, with whom one is prohibited to get married, by virtue of the Articles 13, 14, 16, 17, 19, 20, 21, 22, 23, 24, and 25.

⁶⁸ Deut. 25:5-10; see Gen. 38:8-10.

⁶⁹ Exod. 2:1-10; Q 28:7, 12.

⁷⁰ Lev. 18:6-8; Deut. 22:30; 27:20-23. However, under the impression of Islam, certain Judaic sects, such as Karaite Judaism, which appeared after the emergence of Islam, began to accept that foster kinship is an obstacle to the marriage. See Arslantaş, *İslâm Toplumunda Yabudiler*, 351.

⁷¹ See also Yaman, "İslam Hukukuna Özgü Bir Kurum: Süt Akrabalığı," *Selçuk Üniversitesi İlahiyat Fakültesi Dergisi* 13 (2002), 58-59. According to Islam (Q 4:23; al-Bukhārī, "Nikāḥ," 20; Muslim, "Raḍā," 1), a proper foster kinship that meets the conditions is considered a continuous obstacle to marriage.

Except for Article 14, all of these articles, of which the last six are mentioned above, originate from the verses of the Torah. The articles in question, listed under the title “On the persons with whom one is prohibited to get married,” enumerate the marriage obstacles concerning the Muslim community. According to these, it is prohibited to marry a woman who is already married to someone else or who is in the period of *‘idda*; to marry two women who would be *mahram* to each other (in other words, if one of them was to be imagined as a man to marry the other one, who would not be able to realize such a marriage due to the close kinship); to marry a relative of the first degree of affinity or consanguinity; and to marry a person who became a relative due to marriage.

Because these prohibitions are also valid for Jews according to the 18th chapter of the Book of Leviticus as well as 22:30 and 27:20-23 of the Book of Deuteronomy, quoted in detail under Article 23, the *HAQ* regulated the issue in this direction. Article 14 states that it is also effective concerning Jews. The Article, which allows polygamy limited to four women by stating “It is prohibited to marry another woman for one, who has four wives, either who are married to him or who are in the period of *‘idda*,” gives the impression that the limit of four women is also effective regarding the Jews because the Article itself is effective concerning them. However, according to the sentence “If he marries another woman, he is not to reduce the *nafaqa*, the dressing and the right of wifeness of the previous,”⁷² although polygamy is legal in Judaism,⁷³ no observable quantitative limitation or mention

⁷² Exod. 21:10; for the verses confirming polygamy, see Gen. 4:19; 16:1-4; 29:16-30; Deut. 21:15-17; cf. Deut. 17:17.

⁷³ Cf. Besalel, “Monogami ve Poligami,” *Yabudi Ansiklopedisi*, II, 427-428; Yasdıman, “Yahudi Dininde Ailenin Yeri,” 254-255; Ekinci, *İslam Hukuku ile Tevrat Hükümlerinin Karşılaştırmalı Olarak İncelenmesi*, 84. When the State of Israel was founded, a group of immigrant Jews came from Yemen to Israel, bringing two or three wives with them, which put the immigration officers into a quite difficult situation. Although the State allowed the immigrants to keep their wives with them, most men divorced their wives after their arrival in Israel. Those who did not divorce their wives retained their rights. For the others who were divorced, the right of a remarriage was not recognized. However, with a law promulgated in 1959, polygamy was prohibited. See Goitein, *Yabudiler ve Araplar*, 227.

exists in the Torah.⁷⁴ However, in some Talmudic reviews, it is stated that one can marry a maximum of four women at the same time.⁷⁵

Thus, the Ottoman administration, to take control of marriage and to obtain a certain discipline in this field, accepted the above interpretation, discussed the situation with the Rabbinate, and enlarged the scope of the Article to be applied to Jews as well, as stated in the *asbāb-i müjiba* of the *HAQ*.

Article 60: By virtue of the articles written under the Second Chapter of the previous Book, in case one of two parties does not possess the conditions of capacity, the marriage becomes illicit.

Article 61: In case the conditions settled at the moment of contract in favor of one of the parties do not come true following the marriage, the marriage becomes illicit.

Article 62: In case the witnesses presenting themselves at the contract of marriage do not possess the required qualities, the marriage becomes illicit.

These three articles, which regulate some technical aspects of the contract of marriage, seem to guarantee that the contract of marriage

⁷⁴ The tradition that existed between Jews in the Era of the Judges of marrying two or three times gave way to an even more advanced polygamy. The Torah mentions that David married six or seven wives, and Solomon married even more wives. The Torah also records that not only the prophets but also prominent kings and administrators carried out polygamous marriages. It is known that Rehoboam married many times; he married 18 wives, like Gideon, and had 60 concubines. It is also known that in the era of the Prophet, some contemporary Jews carried out polygamous marriages. In the Islamic period, Jewish ecclesiastics such as Sherira Gaon (967-1006) indicated that polygamy limited to 18 wives and the right to own unlimited concubines/odalisques, concerned only the kings, adding that as long as one provided one's wives with alimentation, dressing, and sexual needs, there was no limit. On the subject, see Arslantaş, "Hz. Peygamber'in Çağdaş Yahudilerin Sosyo-Kültürel Hayatlarına Dair Bazı Tespitler," *İSTEM (İslam San'at, Tarih, Edebiyat ve Mûsikîsi Dergisi)* 11 (2008), 27.

⁷⁵ Abraham Cohen, *Everyman's Talmud* (New York: E. P. Dutton, 1949), 166; Ali Osman Ateş, *İslam'a Göre Cabiliye ve Ehl-i Kitab Örf ve Âdetleri* (Istanbul: Beyan Yayınları, 1996), 326.

(*ketubah*)⁷⁶ is correctly contracted, which is taken quite seriously by Jews who attempt to make these aspects written. Obviously, it is difficult to find word-for-word equivalences of these details in the Torah. However, Jewish sources indicate that marriages took place between persons of a certain age in a wedding tent or a synagogue. Although it was not imperative, beginning in the 15th century, they were carried out in the presence of a rabbi and two witnesses. Conditions in favor of only one party could be demanded, and these conditions could be added in the *ketubah*. Furthermore, the witnesses should possess certain qualities.⁷⁷ Thus, the provisions of the *HAQ* in question are in line with Judaism.

Article 148: Regarding Jews, an absolutely valid contract is required. In case of an invalid contract, a divorce should be carried out. In case of the cancellation of the marriage or the death of the husband, the *'idda* should take place. The period of *'idda* is ninety-one days. However, for a woman who is pregnant or who has a child, this period lasts until the child reaches two years of age. In case of the death of the child, *'idda* is ninety-one days beginning from the day of the death.

For the above article, which legislates that women should wait throughout the *'idda* in any case, a word-for-word origin could not

⁷⁶ *Ketubah*, which is the written record of the marriage signed before the rabbinite who performed the marriage and two witnesses and then delivered to the bride, is the letter of agreement. This paper, which is to ensure the economic security or the rights of succession of the woman in case of the death of her husband or a divorce, is literally a social contract that is completely in favor of the woman.

⁷⁷ These conditions were registered in the *additional ketubah* (*ketuba tosefet*). For Jews, *ketubabs* consist of two parts: the *original ketubah* (*Ikar*) and the *additional ketubah* (*Tosefet*). The *original ketubah* is the *ketubah* within the framework of which the minimum *mahr* that the groom should pay to the bride is registered. The *additional ketubah* is the *ketubah* that contains the conditions that were settled regarding the marriage other than the *mahr*. See Arslantaş, *İslam Toplumunda Yabudiler*, 364-365. Based on other Jewish sources as well as the documents of the Turkish Rabbinite, see also Besalel, "Evlilik," I, 161-167; I. Singer, J. F. McLaughlin, S. Schechter, J. H. Greenstone, and J. Jacobs, "Marriage," <http://www.jewishencyclopedia.com/articles/10432-marriage> (accessed August 18, 2009); Asife Ünal, *Yabudilik'te, Hristiyanlık'ta ve İslâm'da Evlilik* (Ankara: T.C. Kültür Bakanlığı, 1998), 22, 39; see also Epstein, *The Jewish Marriage Contract*.

be found in the Torah. However, in Jewish resources, the reason for the *‘idda* is indicated as “finding out whether the woman is pregnant or not” and “helping the woman to forget her past.” It is generally accepted for 90 days for women who do not have children. For women who have a baby, the period lasts until the baby stops suckling⁷⁸ or for a duration of twenty-four months,⁷⁹ which indicates that the Article overlaps Jewish custom. It should be noted that the information in the *fiqh* books stating that a woman who is a member of the People of the Book should not wait for the *‘idda* should be revised.

Conclusion

Although not as populous as the Christians, Jews composed a significant part of Ottoman society. Jews, who lived under the status of *dhimmī* until the *Tanzimāt* (when they became constitutionally equal citizens in the Ottoman territory), had extensive freedom of religion and opinion. Within the framework of this freedom, they formed relations of private law among them with respect to the religious rules, considerations, and customs to which they submitted. Thus, they regulated the family, which they considered a religious institution, from its foundation to the end and within its period of operation according to Jewish principles.

The religious and semi-judicial freedom that the Ottoman administration recognized for them finds its reflection in the *HAQ* dated 1917, which is the last comprehensive legislation of the Empire. Within the rules of this decree-law, the rules that the Jewish community adopted were also taken into consideration, and separate chapters concerning them were inserted in the *HAQ*.

This study showed that all the Articles related to Jews depended either directly on the Torah, which is their Holy Book, or the Talmud, which is the long-established interpretation of the Torah or Jewish custom.

⁷⁸ For related provisions in the medieval Jewish law literature and the application of these, see Arslantaş, *İslam Toplumunda Yabudiler*, 430-431.

⁷⁹ See Besalel, “Boşanma,” I, 128; id., “Evlilik,” I, 167; Ünal, *Yabudilik’te, Hıristiyanlık’ta ve İslâm’da Evlilik*, 62; Solomon Schechter and David W. Amram, “Divorce,” <http://www.jewishencyclopedia.com/articles/5238-divorce> (accessed August 18, 2009); see also Yasdıman, *Yabudi Kutsal Metinlerine Göre Kadının Evlilikteki Yeri*.

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