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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**FAMILY LAW AND CITIZENSHIP:  
THE CASE STUDY OF EGYPTIAN BAHÁ'IS**

**A Thesis Submitted to the**

**Department of Law**

**In partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Vargha Dana**

**June 2014**

The American University in Cairo  
School of Global Affairs and Public Policy

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## DEDICATION

I dedicate this work to my loving wife for everything she has done for me.  
This would have not been possible without her sacrifices and generosity.  
Lori joon, thank you for believing in me.

## ACKNOWLEDGMENTS

I would like to thank my advisor, Dr. Jason Beckett, for his guidance and support in this past semester and for everything he has taught me in the last two years.

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I must especially thank Mr. Kamal al Ekhnawi for sharing his time and wisdom.

Thank you to all my friends and family for all your encouragement.

## ABSTRACT

After a four-year legal battle in 2009, Egypt's Supreme Administrative Court granted Egyptian Baha'is the right to obtain national identification cards. However, members of this minority group have continued to struggle to access basic rights of citizenship. Non-recognition of Baha'i marriage is the chief source of disenfranchisement of Baha'is in Egypt. This study argues that marriage as the legal instrument of creating a family, can act as the precursor to citizenship. By sanctioning certain types of marriages and prohibiting others, the state translates its specific ideology into creation of politicized legal entities known as citizens. The state's aspiration is to create an ideal nation by embracing "normal" families that can produce ideal citizens. As a vehicle for public policy, marriage has the capacity to act as a powerful hegemonic tool that shapes the society on the bases of class, gender, race, and religion. The family is fundamentally a legal entity shaped and sanctioned by the state and it is the site of production and reproduction of citizenship.

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## **I. Introduction**

This research study argues that the family is fundamentally a legal entity shaped and sanctioned by the state and that the family is the site of production and reproduction of citizenship as an exclusive and privileged institution. Family as a space in which citizenry is produced and reproduced can only exist through constant intervention and authentication by the state. Moreover, I will argue that modern marriage, as a public institution, has been closely interconnected with national citizenship and crucial for the creation of the national identity. I will argue that both family and citizenship are institutions of normalization and appropriation through which state-sanctioned normal citizens are distinguished from deviant non-citizens.

Marriage, being the cornerstone of public policy, is used by the state as an instrument that legitimizes relationships that reflect state interests and ideals. Family law, which represents the “national character,” plays a pivotal role in creation of the nation and citizenry. The case study of Egyptian Baha’is demonstrates that the Egyptian State, by not recognizing marriages between Baha’is, denies them access to basic rights and privileges associated with citizenship. Moreover, strategies employed by individual Baha’is to circumvent the Egyptian legal system resemble the behaviors of undocumented immigrants, thus offering, further proof of their less-than-citizen statuses.

Chapter II presents a historical background to the context and the subject of the study. In this chapter, I will provide a historical overview of the laws of personal status and citizenship in Egypt. This is followed by a brief history of the Baha’i faith in Egypt, the legal status of Baha’is, and marriage in the Baha’i faith. I will conclude this chapter by introducing the concept of religious dissimulation and its significance for Baha’is. Chapter III provides a case study of the Egyptian Baha’is and their legal status. This



chapter details the methodology I employed to conduct the fieldwork and an extensive description of the outcome of the interviews. Chapter IV, is the theoretical framework on which the arguments of this thesis are founded. I will analyze the findings of the study and discuss the implications of the normative assertions and the empirical findings of the research in chapter V. The study will conclude with chapter VI in which I will summarize the theoretical claims of the study.

## II. Background

### A. Personal Status Law in Egypt

Islamic law historically does not contain a category of family law. Traditionally, in books of *fiqh* (Islamic jurisprudence) laws concerning marriage, divorce and inheritance are often scattered under different legal categories such as contracts, offences and endowments.<sup>1</sup> Hence, the term ‘personal status law’ has no origin in Islamic law and is a modern legal creation.<sup>2</sup> The Egyptian Court of Cassation in 1934 shortly after its establishment defined personal status as “what differentiates one person from another in terms of natural and family characteristics and which is taken into consideration by the law to entail legal effects governing his/her social life.”<sup>3</sup> In the process of modernization and secularization of the Egyptian legal system in the late nineteenth and early twentieth century, family law represented “the last bastion of a dismantled Islamic legal system.”<sup>4</sup>

The laws of personal status in Egypt, as in most other Muslim majority countries, are governed by the principles of plurality and personality of laws and regulated in accordance to membership in particular religious communities. While the personal status law of Egyptian Muslims is governed by Islamic law, officially recognized non-Muslim communities have relative autonomy to administer their own religious laws in regards to personal status and family laws. The important implications of this legal system are that “the personal status of Egypt’s legal subjects is based on their belonging to [an officially

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<sup>1</sup> Hallaq, Wael B., *SHARĪ‘A: THEORY, PRACTICE, TRANSFORMATIONS*, 271 (2009). Agrama, Hussian Ali, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?* 52 *COMP. STUD. IN SOC. & HIST.* 495, 517 (2010).

<sup>2</sup> Qassem, Y., *Law of the Family (Personal Status Law)*, in *EGYPT AND ITS LAWS*, 19 (Nathalie Bernard-Maugiron & Baudouin Dupret (2002).

<sup>3</sup> Court of Cassation, (21 June 1934). Cited in *Id.*,

<sup>4</sup> Abu-Odeh, Lama, *Modernizing Muslim Family law: The case of Egypt*, 37 *VAND. J. TRANSNAT’L L.*, 1043, 1046 (2004).

recognized] religious community” and “a person without a religion is a legal non-entity.”<sup>5</sup> Fourteen non-Muslim (twelve Christian and two Jewish) communities are recognized under Egyptian law and the unrecognized non-Muslim communities are in theory governed under Islamic law.<sup>6</sup> Subsequently, one could see Islamic law of personal status as state law and the larger framework of the Egyptian personal status law and laws governing other religious minorities as acknowledged customary laws sanctioned under “plurality of religious laws (*ta’addud al-shara’i*)”<sup>7</sup> as it is generally referred to in the Egyptian legal literature.

The historical roots of the legal formulation of the Egyptian personal status laws can be traced back to the classical Islamic legal doctrine of *dhimmi*: protected non-Muslim communities residing within the Muslim territories. Under classical Islamic law *dhimmi*s were entitled to judicial and legislative autonomy in regards to their religious and personal status laws, and in all other areas of law they were bound by Islamic law.<sup>8</sup> It is argued that the Islamic position on the legal status of non-Muslims living under sovereignty of Islam should be understood as “tolerance of religious pluralism based on inequality.”<sup>9</sup> During the Ottoman era, and the succeeding *Khedivi* Egypt, a non-Muslim community was called a *milla* (millet) literally meaning “nation” and a *milli* court administered the religious and family law of each community.

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<sup>5</sup> Berger, Maurits. *Public Policy and Islamic Law: The Modern Dhimmi in Contemporary Egyptian Family Law*, 8 ISLAMIC L. & SOC. 88 (2001).

<sup>6</sup> Officially recognized non-Muslim religious communities under Egyptian law are four Orthodox Christian communities (Coptic, Greek, Armenian, and Syrian), seven Catholic communities (Coptic, Greek, Armenian, Syrian, Maronite, Chaldean, Latin), all Protestant denominations under one community, and two dwindling Jewish communities (Karaitic and Rabbinic). Baha’is and Jehovah’s Witnesses constitute the most notable unrecognized religious minorities. See Berger (2001) at 96 and Bernard-Maugiron, Nathalie. *Personal Status Law In Egypt*, DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT 25-26 (2010).

<sup>7</sup> Berger, (2001) at 88-91.

<sup>8</sup> *Id.* at 92.

<sup>9</sup> *Id.* at 91.

The same system was adopted in many nation-states emerging from the former Ottoman Empire. Though the Sharia and *Milli* courts were abolished and replaced by national (*wataniyya*) courts in 1956, pluralism of personal status laws in independent Egypt was enshrined in the law 462/1956 which limited the application of non-Muslim family laws to parties “sharing the same rite” and “non-violation of public policy.”<sup>10</sup> In addition, the term religion conventionally and legally has ever since been only applied to Islam, Christianity and Judaism where the latter two are made up of various rites and sects but all adherents of Islam are seen as members of one single community regardless of sectarian identification.<sup>11</sup>

Egyptian personal status laws have been altered and reformed a number of times since 1956, notably under laws 100/1985 and 1/2000 enhancing the rights of women and children in matters regarding marriage age, divorce and inheritance.<sup>12</sup> However, there has not been much development in the Egyptian legal system with regards to the pluralistic structure of personal status laws in recent years. In fact, this framework was preserved and more than further entrenched in the 2012 constitution<sup>13</sup> and the 2014 constitution.<sup>14</sup>

## **B. Egyptian Citizenship**

Like the majority of postcolonial states of Africa and Asia, Egypt follows the continental European tradition of *jus sanguinis*.<sup>15</sup> Although *jus soli* used to be applied to those had

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<sup>10</sup> *Id. at 96.*

<sup>11</sup> *Supra* note 2.

<sup>12</sup> Bernard-Maugiron, at 6-7.

<sup>13</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT. 26 Dec. 2012. *See The 2012 Constitution of Egypt, Translated by Nivien Saleh, with Index.* (Dec.17.2013).

<http://niviensaleh.info/constitution-egypt-2012-translation/>.

<sup>14</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT. 2014 (May.20.2014).

<http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>

<sup>15</sup> Bertocchi, Graziella and Chiara Strozzi. *The Evolution of Citizenship: Economic and Institutional Determinants.* 53 J. L. & ECON. 1, 9 (2010).

settled in Egypt prior to 1914,<sup>16</sup> Egyptian citizenship is mainly transferred through (male) blood.<sup>17</sup> According to Egyptian law, Egyptian citizenship is passed on to those who are born to Egyptian fathers, and possibly Egyptian mothers only if the father is stateless or unknown.<sup>18</sup> This applies both to those who are born in Egypt and abroad. Egyptian women who marry foreign nationals and take their husbands' nationality forfeit their Egyptian citizenship unless they apply for dual citizenship within a year of marriage.<sup>19</sup> Foreign women who marry Egyptian men are qualified for Egyptian citizenship.

### **C. The Baha'i Faith in Egypt**

The Baha'i faith was first introduced in Egypt by Iranian merchants in the second half of the nineteenth century. An independent religion,<sup>20</sup> which originally grew out of a Shi'i messianic movement<sup>21</sup> in the Qajar Iran, the Baha'i faith attracted many adherents in the Arab lands of the Ottoman Empire after its founder Bahauallah was exiled from Iran and imprisoned in the Palestinian coastal town of Akka (Acre). Egyptian Baha'is attracted widespread attention for the first time in 1910 when Abdulbaha<sup>22</sup> the leader of the faith first visited Alexandria amid much objection and outcry from a number of Azharite

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<sup>16</sup> Law No. 26 of 1975 (Law Concerning Egyptian Nationality. Official Journal No. 22, 29 May 1975, 29 May 1975), (Mar.24.2014) <http://www.refworld.org/docid/3ae6b4e218.html>.

<sup>17</sup> Law No. 391 of 1956.

<sup>18</sup> Law No. 26 of 1975, Art.2.

<sup>19</sup> Egyptian Ministry of Interior, *Egyptian Females Acquiring their Foreign Husbands' Nationality*. (May.03.2014)

<http://www.moiegypt.gov.eg/English/Departments+Sites/Immegration/Nationality/EgyptianFemalesAcquiring/>

<sup>20</sup> See Schaefer, Udo. *An Introduction to Baha'i Law: Doctrinal Foundations, Principles and Structures*, 18 J. L. & RELIGION 307, 308-309 (2003). Baha'i faith claims to be the latest of the Abrahamic religions fulfilling the eschatology of Shia Islam in the same way that Christianity relates to Judaism. The Baha'i belief is founded upon principles of oneness of God, unity of mankind and universal peace.

<sup>21</sup> Mirza Ali Mohammad Shirazi (1819-1850), also known as *the Bab*, is viewed by the Baha'is as a forerunner of the Baha'i faith who prepared for the promised one, Baha'u'llah the prophet of the Baha'i faith. The Bab's claim as the promised Mahdi, the twelfth Imam in Shia Islam, which gathered large number of supports known as *Babis*, infuriated the Shia clergies and Qajar authorizes, and as a result he was arrested and executed. See Schaefer at 309.

<sup>22</sup> Abbas Efendi (1844-1921), the eldest son of Bahauallah. He was the spiritual leader of Baha'is after the death of his father.

scholars, notably Rashid Rida. During the 1890s, Rida's mentor Muhammad Abduh had established an unlikely friendship with Abdulbaha with whom he corresponded regularly and exchanged ideas. Abduh became very fond of the innovative and modern ideas of the new religion and this worried Muslim scholars such as Rida.<sup>23</sup> The Baha'i faith flourished during 1910s and 1920s and the National Spiritual Assembly<sup>24</sup> (NSA) of Egypt, one of the first ones of its kind in the world was established in 1924. The NSA created a publishing house and community centers in Cairo and Alexandria, codified Baha'i personal status laws, issued marriage certificates and, although unsuccessful, petitioned the parliament for a *milla* status.<sup>25</sup> By the eve of the Egyptian Revolution in the 1950s, the population of Egyptian Baha'is was estimated to be around 5,000 individuals in 24 towns.<sup>26</sup> In 1960, there were 13 Local Spiritual Assemblies in Egypt and 11 other communities without an institutional status.<sup>27</sup>

#### **D. Legal Status of Egyptian Baha'is**

The NSA of Egypt never succeeded in obtaining formal recognition from the state for the Egyptian Baha'is. However, because marriage certificates were issued by the NSA and through indication of the word *Baha'iyya* on formal government documents by state employees the Baha'i faith managed to gain quasi-formal recognition in Egypt in the

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<sup>23</sup> Cole, Juan. *Rashid Rida on the Baha'i Faith: A Utilitarian Theory of the Spread of Religions*, 5 ARAB STUD. Q. 281-282 (1983).

<sup>24</sup> Baha'i communities are organized annually through elections. Each community elects a Local Spiritual Assembly (LSA) made up of nine members and LSAs annually elect 9 members of National Spiritual Assembly (NSA). Every five years, the members of NSAs from all countries vote for 9 members serving in the Universal House of Justice (UHJ) which is the guiding body of the international Baha'i community. UHJ was an innovation to solve the the problem of succession of leadership in the Baha'i faith. *See* Schaefer at 350-351.

<sup>25</sup> *See Supra* note 8. *See also* Pink, Johanna. *A Post-Quranic Religion between Apostasy and Public Order: Egyptian Muftis and Courts on the Legal Status of the Bahai faith*.10 ISLAMIC L. & SOC. 409 (2003).

<sup>26</sup> *Id.* at 412.

<sup>27</sup> Pink, Johanna. *The Concept of Freedom of Belief and its Boundaries in Egypt: The Jehovah's Witnesses and the Baha'i faith between Established Religions and an Authoritarian State*, 6 CULTURE AND RELIGION 135 (2005).

years between the 1923 and 1956 Constitutions. The main setback for the status of Baha'is in Egypt in this era stemmed from a number of fatwas issued by Islamic scholars of al-Azhar and dar al-ifta such as Rashid Rida, Abd al-Salim al-Bishri, and Grand Mufti Muhammad Hasanayn Makhluf. The frequency and number of fatwas concerning Baha'is was at the highest during the years between 1946 and 1960 which corresponded with increase in the number of court cases involving Baha'is.<sup>28</sup> The majority of these fatwas dealt with issues such as the legal validity of the Baha'i marriage, inheritance of Baha'is from deceased Muslims, and whether *Baha'iyya* constituted a religion separate from Islam. The latter point played a very significant role in the determination of many court decisions for the mass of scholars concluded that the Baha'i faith was in fact an independent religion with distinct laws and rituals. Due to "the belief in a post-Qur'anic revelation, Baha'is unlike Christians and Jews cannot be classified as 'people of the book' because from the Muslim perspective, the Qur'an is God's final revelation."<sup>29</sup> Therefore, Egyptian fatwas unanimously stated that the Baha'i faith constituted "unbelief" or *kufir* and converts to the faith were apostate; the only notable exception was Yusuf al-Qaradawi who decided that Baha'is are polytheists or *mushrikun* for believing in a prophet not mentioned in the Qur'an.<sup>30</sup>

There is no consensus among scholars with regards to descendants of the first generation Baha'is, for they were born into the Baha'i religion and did not convert to the Baha'i faith. The first major hindrance to enhancement of the legal status of Egyptian Baha'is came after the independence under Law No. 263/1960 issued by President Gamal Abdel-Nasser. Under this law the Baha'i communities and their administrations were

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<sup>28</sup> *Id.* at 416.

<sup>29</sup> *Id.* at 412.

<sup>30</sup> *Id.* at 418.

dissolved, their properties seized, and their place of worship -the *Hazirat al-Quds*- demolished and replaced by a mosque.<sup>31</sup> Under Law No. 263 any further Baha'i activities were criminalized and made punishable with up to three years in prison. In accordance with this law, Baha'is have refrained from any form of organized activity to this day.<sup>32</sup>

In 2004, Egyptian Baha'is experienced further disenfranchisement when the government started to require all Egyptians to obtain electronically issued national identification cards. An administrative decision by Egypt's Civil Status Department (CSD) *maslahat al-ahwal al-madaniyya* of Egypt's Ministry of Interior only allowed for three religions of Islam, Judaism and Christianity to be listed in the section for religion on all official documents.<sup>33</sup> Previously in 1994, Law No. 143 had required every citizen to indicate their religion on all documents of civil status. However, as these identification documents were still hand-written, many Egyptian Baha'is managed to obtain them at the discretion of the state clerks who either wrote "other", placed a dash "\_" or even wrote "Baha'i". However, the new policy of issuing electronic IDs, did not allow for such flexibility.

Moreover, the new law also affected other documentations of personal status such as birth, death, and marriage certificates. Consequently, many Baha'i children born in the last decade do not have proper identification, and those Baha'is who had old documents have not been able to renew them. Although in March 2009 Baha'is won a court case that allowed them to obtain IDs with (--) placed in the religion slot,<sup>34</sup> few individuals have

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<sup>31</sup> *Id.* at 138.

<sup>32</sup> Pink. (2003), at 412.

<sup>33</sup> Cantini, Daniele. *Being Baha'i in Contemporary Egypt: An Ethnographic Analysis of Everyday Challenges*, 4 ANTHROPOLOGY OF THE MIDDLE EAST 34 (2009).

<sup>34</sup> Husni Naguib 'Abd-al-Masih vs. the Minister of Interior, 12780-61, (2009).



been able to have access to their official documentation.<sup>35</sup> The above provides a glimpse of the legal problems with which Egyptian Baha'is have to deal in their everyday lives, and does not include other social issues such as work place discrimination, harassment of children in public schools, and instances of sectarian violence like the house burnings in Sohag in 2009.<sup>36</sup>

### **E. Baha'i Family and Marriage**

Equality of men and women is one the main tenets of the Baha'i faith.<sup>37</sup> Men and women are seen as "two wings of a bird" that can only fly when both wings are equally developed.<sup>38</sup> Baha'i marriage is based on the principle that men and women have equal role in the family and in the community. Age of maturity both for men and women is completion of sixteen years of age. However, the civil laws of the country in which they reside must be obeyed. The decision to marry is made between the spouses and no one, not even the parents, have the right to interfere in anyway. Baha'is have complete freedom in selecting their life partners but families are not excluded from the process. The Baha'i contract, usually prepared by a National Spiritual Assembly (NSA), consists of six signatures the bride, the groom and two witnesses from each side usually parents or family elders. Since there are no clergy in the Baha'i faith, any adult Baha'i can perform the ceremony. Baha'is acknowledge and recognize virtually all world religions, and not only are Baha'is not restricted from intermarriage with followers of other beliefs, but they are in fact encouraged to do so. As a result, Baha'is often do not object to partaking in other religious marriages.

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<sup>35</sup> Faris, David. *Amplified Voices for the Voiceless*. 11 ARAB MEDIA & SOC'Y (2010).

<sup>36</sup> see Faris (2010) and Bashir, Dwight. *A Baha'i Litmus Test for Egypt*. THE CAIRO REV. OF GLOBAL AFFAIRS. (2012).

<sup>37</sup> *Supra* note 34.

<sup>38</sup> ' Abd'ul'baha, THE PROMULGATION OF UNIVERSAL PEACE, 375 (1912).

## **F. *Taqiyyah*: Religious Dissimulation in the Baha'i Faith**

The Baha'i faith is seen by its believers to be a modern religion for the modern world founded on principles of peace and unity.<sup>39</sup> Baha'is believe that one is not born in a religion and should not simply inherit religion of the parents. Every person reaching adulthood (16 years of age) according to the Baha'i teachings should have the right to choose their path through "independent investigation of the truth" and parents' responsibility should only be to objectively educate their children about world religions and philosophies.<sup>40</sup>

However, once a person chooses to be a Baha'i, they are expected to publically proclaim their faith. One of the distinctive principles of the Baha'i religion is the rejection of the practice of *taqiyyah*, verbal renunciation of one's belief under persecution, a common practice among other Abrahamic religions and notably among Shiite Muslims of Iran.<sup>41</sup> Dissimulation is highly frowned upon in Baha'i communities and is often perceived as grounds for being excommunicated. During the early years of the religion in its birth place Iran some 20,000 Baha'i were killed because they refused to call themselves Muslims. Moreover, around 200 Baha'is have been executed in Iran since the 1979 revolution for the same reason and hundreds of others are currently in prisons.<sup>42</sup>

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<sup>39</sup> The main principles of the Baha'i belief include 1) unity of mankind, 2) universal peace, 3) independent investigation of the truth, 4) common foundation of all religions, 5) harmony of religion and science, 6) equality of men and women, 7) elimination of prejudices of all kind, 8) compulsory education, 9) equality and equity: elimination of extremes of wealth and poverty, and 10) a universal auxiliary language. See Abdulbaha, *The Promulgation of Universal Peace*, (1912).

<sup>40</sup> *Id.*

<sup>41</sup> Manuchehri, Sepehr, *The Practice of Taqiyyah (Dissimulation) in the Babi and Bahai Religions*, 3:3 HUMANITIES AND SOCIAL SCIENCES ONLINE, (1999). The practice of dissimulation by Muslims is founded upon this verse from the Quran 16:106 "Anyone who, after accepting faith in Allah, utters Unbelief, - except under compulsion, his heart remaining firm in Faith - but such as open their breast to Unbelief, on them is Wrath from Allah, and theirs will be a dreadful Penalty."

<sup>42</sup> *The Baha'i Question: Cultural Cleansing in Iran*. BAHAI INTERNATIONAL COMMUNITY. 4 (2008). <http://news.bahai.org/documentlibrary/TheBahaiQuestion.pdf>

In addition to viewing that untruthfulness is morally wrong, Baha'is feel strongly about the erroneousness of religious dissimulation. As a result, Egyptian Baha'is have refused to denounce their religious affiliations on official documents in order to bypass their illegal status. The majority of the legal problems of Egyptian Baha'is would disappear if they simply decided to apply for official documents as Muslims and Christians. However, this is fundamentally against their notion of faith.

### III. Legal Status of the Egyptian Baha'is: A Case Study

During the last decade, certain amount of attention has been directed to the Egyptian Baha'i community both in the Egyptian and international media regarding their legal status as Egyptian citizens in what was popularly captioned as the Egyptian "ID crisis".<sup>43</sup> The crisis began with a number court cases in which Egyptian Baha'is challenged the Egyptian law that denied them obtaining identification documents for not belonging to one of the three heavenly religions.<sup>44</sup> In two instances in 2004 and 2006 Egyptian courts decided in favor of Baha'i claimants ruling that Baha'is must be allowed to indicate their religion on official documents and that the government cannot deny them identification documents. However, pressured from Al Azhar and the Muslim Brotherhood, the Interior Ministry appealed these decisions and subsequently the ruling was overturned.<sup>45</sup> During the following years in a number of occasions Baha'is with the assistance of NGOs tried their chance with different levels of Egyptian legal system and finally in 2009 the Supreme Administrative Court granted the Baha'is the right to obtain national documents with two dashes (--) inserted in the religion section.<sup>46</sup>

Although a number of Baha'is have managed to acquire identification cards, the crisis has not been resolved. When in Winter of 2014 I began to formulate my initial research ideas, the ID controversy, religious freedom and identity were the main concepts

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<sup>43</sup> See EIPR and Human Rights Watch. PROHIBITED IDENTITIES: STATE INTERFERENCE WITH RELIGIOUS FREEDOM, (2007), and *Another Year Passes With No Solution for Egypt's ID Crisis*. Baha'i Faith in Egypt. (May.02.2014)

<http://bahai-egypt.blogspot.com/2007/12/another-year-passes-with-no-solution.html>

<sup>44</sup> *Infra* note 25.

<sup>45</sup> 'Abdu'l-Majid Al'Anani v. Husam 'Izzat Muhammad Musa, 16834 &18971 of 52 J. H. (2006). The decision was also heavily criticized and condemn by several members of the government. For instance, the Religious Endowments Minister of the time Mahmoud Zakzouk in an interview with Daily News Egypt, stated that Baha'ism is "not a revealed religion" for Muslims and therefore not subject to special protection in Egypt. Following the ruling in a debate in the Egyptian parliament, at least one member argued that "Baha'is should be killed as apostates." See Faris at 5.

<sup>46</sup> Kourosch, Naseem. *A Cold Winter in North Africa: The Case of Baha'is in Egypt*,41:3 INTERNATIONAL LAW NEWS 31-32 (2012).

that occupied my mind. However, after I discussed my research interest with a number of Egyptian Baha'is, I discovered that marital status played a central role in the controversy and that non-recognition of Baha'i marriage was the chief source of the difficulties that plagued the lives of Baha'is in Egypt. Since the 2009 court decision, only Egyptian Baha'is who are single have succeeded in receiving national ID cards. Married, divorced and widowed Baha'is are still unable to receive any form of official documents, and Baha'i couples still face immense amount of trouble when they try to register the birth of their children or find schools that accept their children.

Several members of the Baha'i community in Cairo who took part in the study stated that representing the issue as an "ID card crisis" in the media diverted the attention from the real problem, which is non-recognition of Baha'i marriage and family. Although they recognize the 2009 decision as a milestone and a victory, Egyptian Baha'is see the ID issue as a small piece of a more complex problem. Participants in the study pointed out that the ID crisis is a relatively new phenomenon, which began with the digitization of official documents. However, the greater problem, which they identified as non-recognition of marriage between Baha'is, began over 50 years ago.

Since the 2009 court decision very few works have been published regarding the situation of Egyptian Baha'is and their legal status, and they have mostly been in form of reports commenting on the legal battle and the grim future of religious freedom in Egypt.<sup>47</sup> In absence of real accounts of experiences of Baha'is in Egypt and their perceptions of the problem, during the month of February 2014 I conducted a number of interviews with ten Baha'is in Cairo to learn about their experiences in everyday life in absence of proper official documents. I was also interested in their perceptions of the

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<sup>47</sup> See e.g. Faris (2010), Bashir (2012) and Kourosch (2012).

situation and their opinions regarding possible solutions. During the interviews I tried to see if and how Egyptian Baha'is see themselves as disenfranchised. Furthermore, I aimed to discover reoccurring themes in the personal strategies they use to circumvent difficult and essentially impossible situations. I was interested in seeing how they would they want the situation to be resolved and finally if they believe their legal status has influenced their success and goals in life.

### **A. Methodology**

This thesis is based on fieldwork conducted by the author in Cairo, Egypt during the month of February 2014. I conducted interviews with ten Egyptian Baha'is between the ages of 32 and 65 made up of 6 men and 4 women (Table 1). These interviews are the source of primary data for this study. The fieldwork involved semi-structured interviews with subjects who were chosen through the author's personal connections with the Baha'i community and through referrals by earlier participants. The interviews included minimal number of open-ended questions, which were used in order to initiate and direct the conversations, and secondary questions were mainly asked to clarify points.

The selection of the participants was centered on somewhat flexible criteria and mostly depended on availability and willingness of the individuals. However, besides being self-proclaimed Baha'is, the ideal requirements were for the participants to be adults, married, with school aged children. However, the latter criterion was later modified due to constraints of time and distance. Therefore, the participants included individuals with younger and older children which in fact proved to be useful to the project.

For the purpose of the Institutional Review Board (IRB) requirement of the university, written consent of all participants, which also guaranteed confidentiality of the

interviews, either in Arabic or in English, was obtained prior to the interviews. Participation was made sure to be voluntary. The participants were not rewarded or compensated for partaking in the project in order to avoid biases and conflict of interest. The interviews were mostly conducted in English however the participants were given the option to switch to Arabic whenever they felt they could express themselves more clearly. The interviews were digitally recorded, translated (when needed) and transcribed by the researcher. To protect the anonymity of the participants, pseudonyms are used throughout this thesis and the researcher avoids using any other identifying information when referring to the participants.<sup>48</sup>

The aim of this research methodology was to investigate the way Egyptian Baha'is interact with law, particularly but not exclusively with laws of personal status, in their everyday lives as a result of being denied access to full citizenship status. In addition, the narratives of the participants were directed to reveal individual strategic behaviors of Egyptian Baha'is through which they navigate their ways through the society trying to overcome legal complications. This research methodology also examines the possible link between the social class of the participants and the strategies employed to cope with legal and bureaucratic problems with which they struggle.

## **B. Interviews**

The participants include six men and four women between the ages of 32 and 65. All of the participants are married and have children. Except Zeynab, a university professor in her 60s who is married to a Muslim man, all of the interviewees are married to other

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<sup>48</sup> Although most participating members stated that they do not feel apprehensive regarding revealing their identities and in fact many of them have previously been interviewed by other researchers and journalists or publish online blogs regarding the being Baha'i in Egypt under their real names, the researcher believes it is in the best interest of the participants to safeguard their privacy in the current turbulent political situation in Egypt.

Baha'is. Zeynab is also the only participating member who has converted to the Baha'i faith as an adult and all the others have been born into Baha'i families. Only two out of ten, Atta, a 38-year-old airline employee and Nancy a private school teacher in her 40s, have obtained new national ID cards that have a national identification number<sup>49</sup>, (--) for religion and *single* marital status. All the others who do not have national IDs primarily use their passports as their main identification document. In addition, all those without IDs who mainly rely on their passports emphasized that they are some of the last Egyptians who have passports with no national numbers all of which will expire before the end of this year (2014). Three of the participants, Zeynab, Atta and Nancy have new birth certificates. Zeynab's birth certificate says Muslim (her old one said Muslim so she could not legally change it) and Atta's and Nancy's have dashes (--) for religion. Two of the interviewees, Karim an educator in his 40s and Mahmoud a 33 year old small business owner, are respectively married to Jordanian and Sudanese nationals. Shawky and Hoda, a brother and sister in their 30s who participated in the interviews, were born in Egypt to a Sudanese father and an Egyptian mother, and are married to Egyptians, but although they believe they should qualify for Egyptian citizenship their naturalization applications have been repeatedly rejected. Except Zeynab whose husband is Muslim, none of the participants have official registered marriage certificates and instead they have unofficial Baha'i marriage contracts, which legally are not recognized.

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<sup>49</sup> Since 2004, Egypt's Civil Status Department *maslahat al-ahwal al-madaniyya* of Egypt's Ministry of Interior began assigning national identification numbers, a unique fourteen digit number, for every Egyptian over 16 that appears on official documents such as national IDs, passports, etc.



Table 1. List of Participants

Participants	Age	Sex	Occupation	National ID	Marriage Certificate
Atta	30s	M	Airline Employee	(--)/single	Baha'i contract/ US Civil marriage
Hamid	60s	M	Retired Academic	No	Baha'i contract
Hoda	30s	F	Housewife	No	Baha'i contract
Karim	40s	M	Academic	No	Baha'i contract/ Civil Marriage Jordan
Maryam	30s	F	Housewife	No	Baha'i contract
Mahmoud	30s	M	Small Business Owner	No	Baha'i contract
Nancy	40s	F	School Teacher	(--)/Single	Baha'i contract
Shawky	30s	M	Pharmacist	No	Baha'i contract
Yousef	50s	M	Factory Worker	No	Baha'i contract
Zeynab	60s	F	Retired Academic	No	Registered/Muslim

After the participants explained their legal and personal status (the official documents they hold) and talked in length about their long and exhausting days at the *Mogamma*<sup>50</sup> dealing with the Egyptian bureaucracy in their attempts to renew their birth certificates, register their marriages, obtain ID cards, passports, and drivers' licenses, they were asked to talk about their everyday experiences in which they have to use an official document. In addition they were asked to explain how they find their way out of difficult situations. Their stories included many recurring situations<sup>51</sup> such as opening a bank

<sup>50</sup> The *Mogamma*, a fourteen story building on Tahrir Square, is Cairo's main administrative governmental building where a great variety paper work is done by government agencies. For instance, in *Mogamma* one could apply for a passport, get a driver's license, or extend a tourist visa.

<sup>51</sup> They all emphasized that life is difficult for everyone in Egypt and they do not think that their lives are exceptionally difficult. Almost everyone also mentioned that they tend not to think of these instances as

account, buying a car or a house, registering their children's births and finding school that would accept their children. There were also similar themes in the way these problems were solved. Most participants to some extent rely on family members (spouses, siblings, or cousins) who have proper documents. Almost every participant thought of luck or divine intervention as a factor. They also talked about good people who understand their situation and help them either bend the rules or find alternative solutions.

One of the most noteworthy strategies used by Egyptian Baha'is interviewed in this research was to rely on the family members who are non-Baha'is, who have succeeded in obtaining new national ID cards, or who hold foreign passports. Yousef a 50-year-old father of two who works in a factory explained that he is greatly dependent on his brother because "he is single so he could get an ID." Yousef explained:

For example, I don't have a bank account. When my brother got his new ID he opened a saving account for me under his own name. So now every time I want to deposit or withdraw I have to ask him to help me... also I don't own my car; it's registered in my brother's name. He has [an] ID so he can buy and sell. [Laughing] whatever we want to do we should research and find someone with ID.<sup>52</sup>

Maryam, a housewife who also makes handicrafts at home, once had a very stressful situation when she tried to open a savings account at the post office:

I opened a saving account at the post office [using] my old passport; when I tried to take out some money they told me "you can't; you must have ID." I explained that I opened the account with my passport so I should be able to use it with my passport but they refused. Then I brought my younger sister; she is Christian so she has ID... We talked to

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problems and that do not like complain. Several of them explained that because of their faith they believe that "God does not leave anyone stranded".

<sup>52</sup> These excerpts are transcribed as accurately as possible by the researcher; the language is slightly edited and the Arabic phrases and sections are translated. The researcher has also omitted or modified identifying information such as names of employers, banks, and schools.

the manager and proved that we are sisters; then we took all the money and closed the account.

Zeynab's car is registered under her son's name. He lives abroad and so she has to wait for him to travel to Egypt in order to sell and change the car. Karim, on the other hand is married to a Jordanian Baha'i and he explained that foreigners can do everything using their passports. So he relies on his wife's passport for buying and selling:

The Car officially is not mine. At checkpoints, I have to carry documents to prove that the car belongs to my wife, and she is actually my wife, I have to show them my Baha'i marriage contract and they don't know what they are looking at. It's really strange for them. How can you expect a police officer to recognize this at the checkpoint? ... So far I have been lucky...once I told them "do you want to come home with me to see for yourself?" and he was like no, no, no that's fine... I guess they could tell I was telling the truth. He could have arrested me...I was lucky.

Mahmoud's wife is also a foreign passport holder and they bought their both cars in her name. However, in order to get a business license for the company that he has started he needed an Egyptian citizen with a national ID, so he has to use his cousin who is single as his "partner" in order to get a business license. The participants also emphasized on other types of personal connections that are very useful for dealing with lack of proper documentation. Several of the participants like Atta and Mahmoud mentioned that for instance Egyptians have to produce proof of marriage in order to check into hotels in Egypt, so they have to count on people they know, usually other Baha'is who work in hotels. Others, like Hamid and Karim explained that they can only use one branch for their banking, because the employees know them and allow them to use their passports (with no national number) as their identification document.

Almost every participant believed that luck has played an important role in resolving bureaucratic situations caused by their lack of proper documentations. The interviews overall had a very optimistic tone and the general attitude was that one should not worry too much about such problems because they are often resolved on their own. For instance, Zeynab who has recently retired from her job at an Egyptian university had trouble receiving her pension:

When I retired in order to change my status at [name of employer] I had to produce an ID so for a while I could not access my pension. I had to pick up my pension checks every month from the post office and I could not do so without a national ID... but one day they called me and said ‘come and pick up your cash card we have digitalized and you can get your money at any ATM’ ... I was also very lucky when I opened my bank account. I had basically given up after trying every bank. But one day I was walking in the city and I saw this new bank and it turned out to be a small branch of a foreign bank they were very eager to sign me up. I guess they were just looking for customers. So they gave me an account just using my passport and that was it.

However, the factor of luck was often linked with finding the right person. The participants very often talked about “people who were willing” or “took it upon themselves” to solve the problems either by overlooking the rules or finding and suggesting alternative ways to perform the tasks. A number of the interviewees emphasized on the fact that “there are many good people out there who sympathize with us and understand our situation”. Yousef, for example, talked about his difficult time finding employment before he was hired at his current job:

I couldn’t get a job for long time because employers only want people from their own religion. My current employer is a convert; he used to be a Christian and now is a Muslim so he understands that religion is private. It’s not a problem for him that I am a Baha’i. He

is well known in the industry and because I have been trained by him now I can work in other places.

In several of the interviews, the participants also talked about their interactions with public employees at the government agencies. They mentioned that sometimes there are people who as Karim phrased it “understand the difference between what is fair and what is legal.” Zeynab described such an interaction in which the government employee decided to “look the other way”:

Before [the university] switched to direct deposit, once I tried to pick up my pension at the post office with my passport but [the clerk] somehow seemed to know, because there was a buzz about Baha’is at the time in the media... it was as if there was some kind of human understanding, He said ‘ok I’ll give you your pension’ but it was his own personal responsibility and it was just that one time...

There were several similar stories from participants who tried to obtain birth certificates for their children or register them at schools. Karim’s children, for example, were turned down by thirteen private schools when he and his family relocated to a suburb of Cairo until a school director decided to accept them on the conditions that they study Islam for their mandatory religious education<sup>53</sup> and promise not talk about their faith with other children. Hoda, on the other hand, has not been so lucky in finding a school for her son:

My son is six now but isn’t going to school. Last summer, we received an email that he was accepted in a private school but after a few hours they called us and told us he is rejected without any explanations. But when I met with the admin they told me that it is

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<sup>53</sup> Egyptian children both in public and private schools receive religious education based on the religious community to which they belong. This is determined by the religion indicated in the children’s birth certificate and Baha’i children with no birth certificate or one with (--) have a very difficult time being admitted to schools.

because of his religion. We could not find another school that took him in time and now [February] is too late and he is one year behind.

Reflecting on these types of interactions, Karim explained that:

You can never tell if it is something personal or they just can't do it. Some people just don't want the trouble. They are afraid ...

Karim has three children and he explained that it has increasingly become more difficult to receive birth certificate for children born to Baha'i parents. When he and his wife had their last over a year ago, they found it nearly impossible to acquire a birth certificate for their child:

The lady there just refused to issue the birth certificate even though I told her we had done this before for my other two children; she kept asking "where is the religion? You must prove you are Baha'i" she just didn't want to do it... she was actually scared to take the risk and issue the birth certificate. When you want to get a birth certificate for a Baha'i child you have to get the approval of the criminal department at the police and then the approval of the national security department for a 3-day-old child. It had taken me six months to do all this and she still refused. After weeks of running around and negotiating, someone else said ok let's do it. We got lucky.

Egyptian Baha'is are very much familiar with such problems at state agencies and they try to avoid public institutions as much as possible. They are often self employed or work in the private sector and they send their children to private schools when they can afford it; only one of the families I met during the interviews send their children to a public school because they simply could not afford private school fees for two children. Maryam explained that in order to register their children at a governmental school, with the intervention of a human rights NGO, they obtained a letter from the Ministry of Education that forced the school to accept her children.

Other participants also mentioned seeking help from human rights NGOs in their dealings with state agencies. Probably the most notable of these organizations is Egyptian Initiative for Personal Rights (EIPR), which represented Baha'is in several cases in front of Egyptian courts.<sup>54</sup> Karim for instance told me about the last time that he and a number of other Baha'is from Cairo succeeded to renew their passports:

My passport was about to expire and I couldn't renew it in *Mogamma*. My last passport was issued from there but *Moggama* is now computerized. So we were advised by an NGO to go to [name of town] because they could issue hand written passports. They arranged with some high ranking police officer and when we got there the officer called and instructed them to renew our passports. I heard other Baha'is also petitioned through that same NGO to renew their passports but that "deal" was no longer available.

Among the participants Atta and his wife and Nancy and her husband stood out in the ways they approached their legal status problem. Atta works for an airline and he managed to receive a national ID and a passport with the national identification number before he married his wife who is a convert from Islam. Knowing that they would not be able officially get married in Egypt, they travelled to the United States on tourist visas and got married there. They also did same before their child was born. Their child was born in the USA, has an American birth certificate and is automatically an American citizen. He explained that although it is helpful to have an American civil marriage and birth certificate for their child, those documents are not *really* accepted in Egypt; their civil marriage from abroad is not recognized because they hold Egyptian passports and without an Egyptian birth certificate his child cannot get health insurance. He explained:

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<sup>54</sup> *Supra* note 43.

My wife has a Muslim birth certificate and ID card so we decided it was safer to get married in the US. Her family was really worried when we decided to get married so they suggested that we get married outside the country. Also for the birth of my son we decided to go to the US. All of this cost a lot of money. I was very lucky to be able to do this. Very, very few Baha'is can afford to do this. You know what it is like over there without insurance. But we spent all this money and it's been useless so far. I translated the birth certificate in the Egyptian embassy in the US and they still haven't issued him an Egyptian birth certificate; without it I can't get him health insurance or his vaccinations and I am sure it is going to be a problem for his school. So my family wants me to move to the US or Canada. It is very difficult.

Nancy and her husband, on the other hand, after difficult years of living without ID cards decided to apply for IDs as singles. Unlike most other Baha'is I interviewed, Nancy and her husband do not find holding ID cards as singles morally problematic. Others like Yousef, Maryam, and Karim stressed the point that they are not willing to lie about their marital status and believe that their marriage should be recognized by the state. However, Nancy explained that she does not see the word *single* on their IDs necessarily as lying. She explained:

We are not saying we are single; the government is. We know we are married and we have children together but the government doesn't recognize this. Life was very difficult without IDs and we have children and we have responsibility, so if they want to give us IDs as single we have no problem with it.

However, Nancy explained that living with these IDs is not easy:

Only my boss knows I am a Baha'i and she doesn't want anyone else to know. It's very difficult. They know I am married and they have met my kids. As for my ID, I try to hide it. Once a year I have to give them a photocopy. I scan it but I make a very light copy so



they can't read it. I never show my ID to anyone at work ... when we go on vacation and have to stay in a hotel it's really strange. We show them our IDs that show we are single then he has to show them his insurance card that has my name and our children's names on it; our insurance card is the proof our marriage.

When I asked how they managed to receive insurance cards without a valid marriage certificate Nancy explained:

It's kind of a funny story. When my daughter was young, she had to get a surgery. Only my husband had health insurance and the hospital wouldn't accept it. So my husband went to the insurance company and made a big scene. He screamed at them. They put our children's names on his insurance AND they also put my name on it as his wife. We didn't even ask for it. Now we can use the card to prove we are married.

Most other participants do not think that obtaining identification cards that say they are single when they are not is even an option to consider. Some of the interviewees are in fact actively involved in raising awareness regarding non-recognition of their marriage and its consequences. Hamid believes that the Baha'i issue has been misrepresented as an "ID card controversy" by human rights activists, the media and even some Baha'is themselves. He believes that the ID issue is just the surface and a very minute issue and the bigger issue is the recognition of Baha'is right to marriage and family. Therefore, Hamid a retired university professor, argues that:

Accepting ID cards that say single is not good for [Egyptian Baha'is]; then they (the government) can claim that they have solved the problem. The problem should be posed as one concerning recognition of Baha'i family and it's not a new one; it goes back to the

time of Nasser. Before that we used to have an NSA<sup>55</sup> and they were able to issue marriage certificates and the government recognized it, but all that changed with Nasser.<sup>56</sup>

Regarding the question of how they would want their situation to be solved, all participants answered that they would want the field of religion to be removed from all official documents. Nancy smilingly answered:

Sometimes I would like to have Baha'i on my ID card. I think maybe it would make feel proud. But then I think no, that wouldn't be good. There's a lot of prejudice in our society and people discriminate. Writing your religion on your ID is just allowing them to discriminate. It is like this for Christians right now.

Karim and Atta believe that it is essentially impossible to have true religious rules that reflect people's beliefs. Karim explained:

It's not about what I believe; it's about what the government wants to say I believe. It's about statistics. They give us two choices, Muslim or Christian, and we have to pick one. They say just say you are Muslim because you're name sounds Muslim, but you know I am lying and I know I am lying, so how is this my 'belief'? They want to force us to lie, and it's not just about Baha'is; it's for all Egyptians.

Atta similarly said:

I wonder why they want us to be liars. I think this kind of law, or dealing with the law promotes lying. Anywhere else in the world law wants to show the truth but here they want us to lie. I think they just want us to get sick and tired of the situation and then say 'fine, I am a Muslim'. They just want us to lie and they don't accept anything else.

I am not asking the government to recognize the Baha'i faith if it really contradicts with their belief; Baha'i faith is recognized all over the world. I just want my IDs and my

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<sup>55</sup> *Infra.*, note 15.

<sup>56</sup> Karim is referring to the presidential decree No. 263 issued by Nasser in 1960 which dissolved the Baha'i community and criminalized all Baha'i activity. *See, supra* note 23.

papers and my daily life to go on. We are all Egyptians; we love Egypt, we eat 'foul', we eat 'basbousa' [laughing] if they don't want to recognize my faith then fine, but they have to find a solution.

Hoda answered this question according to what she called "the most important principle of the Baha'i faith":

We Baha'is believe in peace and unity; the unity of mankind. Such laws are the cause of disunity and fragmentation of the society. As a Baha'i I don't think my religion is my identity to be shown on a card; show my name, my age and any other information that represents me. But the religion box on the ID is not the real problem. The problem comes from the culture of our society. First you have to unite the society to believe we are all the same. We should not highlight the differences but the similarities.

Hamid on the other hand believes that civil marriage would be a very good solution both for Baha'is and for those Egyptians who are interested in interfaith marriages; however, he is not optimistic about the possibility that the government would introduce civil marriage in Egypt:

I don't even think they are worried about Baha'is getting married. We are just a few thousand people, they are mainly worried about Muslim women marrying men from other religions. They are afraid of this ever happening. If they decided to introduce civil marriage, then great, but as for now we are just asking them to allow us to register our marriages in the special civil section; this is for Egyptians who marry foreigners. But they don't even allow Baha'is who marry foreigners to register their marriages.

What we are asking is very simple; there is boy whose ID says his religion is 'dash' and a girl who also is 'dash', ok why shouldn't they be able to marry?

Regarding the last research question, all participants thought of themselves as successful and optimistic about the future. Almost all participants also agreed that they do

not think that their legal standing in the Egyptian society has impacted their success. Atta for example believes that:

A successful person is someone who keeps improving... I don't think these problems with ID and so on has effected who I am. I think I am successful regardless. But sometime I feel these discriminations mean that I don't belong to this country; they don't want you to be in this country; they don't want you to belong to their world. But this not true. I don't accept it. I live my dreams not theirs. This is my home; this is my street and this is my country.

Shawky mentioned that the Universal House of Justice<sup>57</sup> in a letter to the Egyptian Baha'i community suggested that they should not "dwell on a litany of the vexations" and instead they should move forward with "ever-larger sense of meaning and purpose."<sup>58</sup> Therefore, Shawky and many others explained that they do not like to complain or even think of having problems. Zeynab sees success to be "an overall state of satisfaction," and "a combination of different types of happiness," as a result; she does not believe that one's legal status alone could have a great impact on their lives. However, Yousef expressed concerns about the future of his children because he believes that they are not given the same opportunities as their classmates because they have Baha'i parents. He believes that if he "enjoyed equal rights" and he could "buy and sell and travel", and he could provide better lives for his children.

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<sup>57</sup> The supreme governing body of the international Baha'i community, *see supra* note 20.

<sup>58</sup> The Universal House of Justice, *Baha'i Community of Egypt and Religious Identity*, BAHAI LIBRARY ONLINE (Mar.30.2014). [http://bahailibrary.com/uhj\\_egypt\\_identification\\_cards](http://bahailibrary.com/uhj_egypt_identification_cards)

#### **IV. Theory: Family Law and Citizenship**

In this chapter I will discuss the theoretical framework in which the research of this thesis is formulated. My thesis is that the family is fundamentally a legal entity shaped and sanctioned by the state and that the family is the site of production and reproduction of citizenship as an exclusive and privileged institution. Moreover, I will argue that modern marriage, as a public institution, has been closely interconnected with national citizenship and crucial for the creation of the national identity.

##### **A. State, Marriage and Citizenship**

This study is concerned with the function of the family and marriage as institutions purposefully designed for production and reproduction of [ideal] citizens. More importantly, this study aims to reverse the conventional understanding of family and citizenship and the relationship between them; in that, instead of seeing the family as a conjunction of individual citizens, family (or more precisely marriage) should be seen as a machinery and citizenship as its product. One significant result of this viewpoint is that rather than viewing citizenship only as a political construct linking individuals to the state, citizenship signifies the relationship and the hierarchy between individuals. In this chapter, I will argue that citizenship is “exclusive, privileged and normative”<sup>59</sup> and that both family and citizenship are institutions of normalization and appropriation through which deviations are discerned and sometimes corrected. In order to establish these theses, in this chapter I will discuss theories of citizenship and marriage with the aim to illustrate the historical link between these two institutions.

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<sup>59</sup> Brandzel, Amy L., *Queering Citizenship: Same-Sex Marriage and the State*, 11 FEMINIST REV. 171, 173 (2005).

The French Revolution is often argued to be the inventor of the modern nation-state and the institution and ideology of national citizenship.<sup>60</sup> The modern nation-state is argued to have redefined and influenced nearly every aspect of human life as “the appropriator and possessor of the law;” it authorized itself with the exclusive right to create and enforce law as the ‘big father’ of all its citizens.<sup>61</sup> Because the pre-modern fluid household, comprised of extended family and perhaps slaves,<sup>62</sup> was not adequate for producing subjects fitting for the modern state, the nuclear family, an ideal prototype of the nation was invented.<sup>63</sup> Thus, the institution of marriage became “the building block of public policy” and a carefully fashioned legal apparatus for the production of ideal citizens.<sup>64</sup>

The birth of “family” and “citizenship” as institutions coincided with the birth of nation-states following the American and French revolutions at the end of the eighteenth and beginning of the nineteenth centuries.<sup>65</sup> Thus, family and citizenship were not the outcome of the nation-state as a modern political entity but the essential instruments that created and perpetuated “the nation” in the first place. Since this period, family has become the target of state intervention and reform in order to create a *modern social body* that concurs with the modern national identity of the state. On one hand, family law, which embodied the *volksgeist*, the spirit of the nation, and played an instrumental role in

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<sup>60</sup> Brubaker, Roger, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY*, 35 (1992).

<sup>61</sup> Hallaq, at 450.

<sup>62</sup> See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 *AMERICAN JOURNAL OF COMPARATIVE LAW* 756 (2010).

<sup>63</sup> *Id.*

<sup>64</sup> Cott, Nancy F., *Giving Character to our Whole Civil Polity: Marriage and The Public Order in the Nineteenth Century*, in *U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS*, 107 (Kerber, *et al.*, 1995).

<sup>65</sup> This time period is viewed as an era in which ‘subjecthood of a kingdom’ was transformed into ‘citizenship of a nation.’ See Brubaker, at 35., and *supra* not 62.

the nation-building projects of nineteenth century Europe and arguably in the post-colonial states of the twentieth century.<sup>66</sup> On the other hand, through the institution of family, state included, excluded, and hierarchized members of the society on the bases of class, race, ethnicity and gender. In fact, it is argued that marriage has been instrumental in creating these categories, which also have become rationalizations for citizenship.<sup>67</sup>

Citizenship is commonly understood to be “the legal institution that designates full membership in a state and the associated rights and duties.”<sup>68</sup> These rights and duties are often identified most notably as the right to vote, access to legal protection, the ability to travel, and be drafted in the military service. However, this definition of citizenship is arguably more inclusive than what citizenship may actually offer to individuals. Moreover, citizenship has not always had the same connotation throughout its relatively short history. At times it has been synonymous with nationality and national belonging and at other times it has meant to represent political participation.<sup>69</sup>

I see citizenship as a political institution which defines social belonging by which I do not mean one’s feeling of belonging in the society but the state’s acknowledgment of one’s membership in the nation. Citizenship is simultaneously internally inclusive and externally exclusive. It is, as Rogers Brubaker notes, a “powerful instrument of social closure;” it is a “legally consequential and ideologically charged distinction” between citizens and noncitizens.<sup>70</sup> Citizenship demarcates insiders and outsiders and creates additional categories of insider-outsiders: those who do not quite qualify for full membership in the social and political life. In addition, citizenry is the reflection of the

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<sup>66</sup> *Tsoukala, Philomila, Marring Family Law to the Nation*, 58 AM. J. COMP. L. 4, 873 (2010).

<sup>67</sup> Cott, (1998) at 1443.

<sup>68</sup> Bertocchi, at 98.

<sup>69</sup> *Infra* notes 71 and 72.

<sup>70</sup> Brubaker, at 21.

“state identity” and its politics are involved with a specific *ideal*. Modern states frequently construct and celebrate *model citizens*; from the Chinese “model comrade” Lei Feng<sup>71</sup> to “Joe the Plumber” the average American of the 2008 presidential election, ideal citizens always represent a certain set of *values*, and ideological principles enshrined by the state.

Since its inception, citizenship has been closely associated with marriage. Drawing from their British heritage, the Founding Fathers of the United States saw *independence* to be a “necessary public virtue” and the chief prerequisite for political participation and full citizenship. Independence to them, however, did not merely mean abstract autonomy of a person and rather, it referred to the “clear hierarchy as the privilege of men occupying the status of household head.”<sup>72</sup> In other words, marriage completed a propertied man’s independence<sup>73</sup>; it made a man into an independent head of the household and made a woman into a wife, a dependent by removing her property and income, and transferring to the husband. In 1776 in a letter to a friend discussing his views on the right of suffrage, Thomas Jefferson defined a citizen as one who had the intention to reside permanently, which he interpreted as certain duration of residence,

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<sup>71</sup> Leys, Simon. *Model Comrade*, TIME (May.01.2014)  
<http://content.time.com/time/world/article/0,8599,2054445,00.html>

“In 1962, the unheralded soldier was killed in northeast China's Fushun when a telephone pole fell on his head. Officials later uncovered his diary, allegedly filled with selfless devotion to the Communist Party. Parents are dear to their children, read one entry, but they can't compare with Chairman Mao. In subsequent political campaigns, the Lei Feng model has been dusted off and presented as an ideal for proper socialist behavior.”

<sup>72</sup> Ditz, Toby. *Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750-1820*, WILLIAM & MARY Q., 3: 47 (1990), in Cott (1998).

<sup>73</sup> This conception of *independence* is perhaps closely related to the concept of *obligation* which is seen as rooted in the social contract theory. Obligation was understood as “the cornerstone of bourgeois responsibility” to family, occupation, and morality “with respect to the public/private division.” See Turner, Bryan S., *Citizenship Studies: A general Theory*, 1 CITIZENSHIP STUD., 5 (1997).



having family, and having property.<sup>74</sup> This meant besides being white and male (based to the criterion of property) being married is what gave one the full capacity of citizenship. Although marital status never became an official legal requirement for male suffrage, in 1885 the U.S. Supreme Court in a case concerning a Utah law prohibiting polygamist Mormons from voting ruled that the state had the authority to “declare that no one but a married person shall be entitled to vote” and that a monogamous marriage was “wholesome and necessary” to a “free self-governing commonwealth.”<sup>75</sup>

As marriage came to be understood as a privilege originally reserved for free white men and gradually extended to others, so did citizenship.<sup>76</sup> Until the 1920s only American men could extend their citizenship to their foreign (white) wives<sup>77</sup>; and in fact following an 1883 Supreme Court ruling<sup>78</sup> not only would a foreign husband of an American woman not qualify for naturalization, women marrying foreigners were at the risk of losing their nationality as Americans.<sup>79</sup> Earlier, across the Atlantic in 1804 the Napoleon Code had declared that the citizenship of married women, including French women, echoed their husbands’, and in 1844 the British Parliament ruled that (only)

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<sup>74</sup> Cott (1998), at 1448.

<sup>75</sup> *Murphy v. Ramsy*, 114 U.S. 15 (1885).

<sup>76</sup> “State courts during the years that slavery was an American institution agreed that slaves could not be validly married because their status as someone else’s property prevented them from being able to consent freely—a crucial requisite for marriage.” See Cott (1995) at 111.

<sup>77</sup> The first naturalization law in the United States limited naturalization to “free white” persons in 1790. This law remained in place until 1952. See Brandzel (2005) at 174.

<sup>78</sup> *Pequignot v. Detroit*, 116 Fed. 211 (1883) in Cott (1998), note 56. Henry B. Brown (ascended to the Supreme Court in 1891 and served until 1906.) argued that “legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative, at least for the purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power.” He found it appropriate “to apply the same rule of decision to a case where a female American citizen marries an alien husband, that we should to a case where an alien woman marries an American citizen.”

<sup>79</sup> For example the Immigration Act of 1924 not only made Chinese and other Asian migrants “inadmissible” for citizenship, but also made intermarriage between whites and Asians illegal. See Cott (1998), at 1466.

women marrying British men automatically naturalized themselves.<sup>80</sup>

These early accounts of the birth of modern citizenship are evidence that citizenry has never reflected or meant to reflect the national population: the nation. Moreover they are significant in understanding the institution of citizenship as foundationally built on the principals of hierarchy and differentiation. The history of citizenship is also verification for the view of the state as a membership organization rather than a territorial organization.<sup>81</sup> The conception of the state as a territorial entity prevents us from recognizing the stratified nature of citizenship. Therefore, citizenship is also viewed as defining a space of legal equality, which T.H. Marshall referred to as the “basic human equality of membership.”<sup>82</sup> Thus citizenship, like most other types of membership, is only possible through creating or embodying existing inequalities. Membership connotes privilege and advantage and its rules are as much concerned with disqualification as they are with qualification.

However, while citizenship is founded on principles privilege and differentiation, its ultimate goal is eradication of deviances through normalization. In the case of *the inclusion of plague victims*, Foucault describes normalization as the “constant examination of a field of regularity within which each individual is constantly assessed in order to determine whether he conforms to the rule.”<sup>83</sup> He contrasts this model of control, “a fundamentally positive power that fashions, observes, knows, and multiplies itself on the basis of its own effects” from the medieval model of purification based on *the exclusion of lepers* “a technology of power that drives out, excludes, banishes,

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<sup>80</sup> Cott, (1998) at 1458.

<sup>81</sup> Brubaker, at 22.

<sup>82</sup> Marshall, T. H., CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS, 9 (1950).

<sup>83</sup> Foucault, Michel et al, ABNORMAL LECTURES AT THE COLLEGE DE FRANCE 1974-1975, 47 (2003).

marginalizes, and represses.”<sup>84</sup> The normalization process is concerned with control, supervision and correction, and “is linked to a positive technique of intervention and transformation.”<sup>85</sup> The state through normalization, therefore, defines and institutionalizes the norm, decides what is considered normal, and designates the general standards of normalcy against which individuals are examined. The norm is not “defined as a natural law” but it “is an element on the basis of which a certain exercise of power is founded and legitimized.”<sup>86</sup>

State apparatus and institutions therefore can be seen as instruments that shape and transform individuals in a given society that conform to the rule, and using the state ideology (the norm) as a pervasive standard they try to replicate the model citizen (the normal) as close as possible. Institutions such as marriage (as a public institution), school, and hospital measure the degree of deviancy in relation and proximity to the normal. What drives this normalizing process according to Foucault is a positive power that he calls “discipline-normalization”, a “technology of power” that is primarily concerned with “intervention and transformation” and its secondary effect is repression and coercion.<sup>87</sup>

Foucault, however, did not see family as a disciplinary institution but a domain of sovereign paternal power “grounded either in blood-right or blood-conquest.”<sup>88</sup> By this he did not mean that disciplinary practices are absent from the familial space but that the institution of family is not constituted by means of disciplinary power. He did not believe that family serves as a model for disciplinary apparatus or that there was any continuity

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<sup>84</sup> *Id.*, at 48.

<sup>85</sup> *Id.*, at 50.

<sup>86</sup> *Id.*,

<sup>87</sup> Foucault, (2003) at 51-52.

<sup>88</sup> Foucault, Michel, *Psychiatric power: Lectures at the College de France, 1973–1974* 43 (2006).

between that family and such institutions.<sup>89</sup> Foucault saw family as “a sort of cell” established upon the axes of parent-child (blood-right) and husband-wife (marriage as conquest) in which the power of the sovereign is exercised.<sup>90</sup> This notion of power is concerned with the “intra-familial relations” which, although “disciplined by external mechanisms”, remain sovereign.

However, Foucault’s view of the family as the source of sovereign power does not preclude the family from being a site for the operation of disciplinary power. The familial space not only is directly shaped and monitored by disciplinary normalization but also is an institution that is fundamental for interpretation of the norm and reproduction of the normal. More precisely, I view family as a certain modern construct that is an imperative of national citizenship and as a device that molds individuals conforming to the norm. Such a family as “the archetypal source of state legitimation” is a crucial foundation for the nation-building project.<sup>91</sup> The institution of marriage as “a site of citizen production” is critical in formation of a “properly” fashioned (gendered, racialized, hetero-sexualized, etc.) nation.<sup>92</sup> Any threat to the politically motivated *sanctity* of the proper family is a source of anxiety to the state for it is perceived as a threat to the national identity cherished by the state.

Moreover, it is argued that a *proper family* is a reproductive family. Richardson and Turner argue the idea of modern citizenship is fundamentally grounded on “the theory of productive citizenship” which is based on the premise that the state is interested in “with

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<sup>89</sup> Taylor, Chloe, *Foucault and familial Power* 27 HYPATIA 201, 203 (2012).

<sup>90</sup> *Id.*, at 202-204 and Foucault (2006) at 43-44 and 79-80.

<sup>91</sup> Alexander, M. Jaqui, *Not Just (Any) Body Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas*. 48 FEMINIST REVIEW 5, 20 (1994).

<sup>92</sup> Brandzel, at 174.

whom [one may] reproduce and under what social and legal conditions.”<sup>93</sup> They argue that the link between reproductive citizenship and nation building is a fundamental element of the rise of modern citizenship.<sup>94</sup> In addition, reproduction of the next generation of citizens through marriage and formation of traditional families (a working father and reproductive mother) is “a central means of acquiring effective parental entitlements of citizenship.” The state promotes reproductive citizenship to safeguard the growth of population through *normal* households; the modern regime of citizenship regards “parenthood in ‘normal’ families ... as the defining characteristic of the ‘average’ citizen.”<sup>95</sup>

## **B. Theorizing Family Law**

Family law is perhaps one of the least theoretically developed areas of law, which perhaps is due to its recent creation. Although in the recent decades there have been a number of attempts to “critically” approach theories of family law, this area of law remains peripheral. Perhaps one reason for this continuity is the preoccupation of scholars and policymakers with reforms. Rather than questioning and deconstructing the very structural doctrines of family law, legal, policy and feminist scholars and practitioners have often focused on specific “bad” laws, trying to reform family law through simply tweaking a few laws and legislations.<sup>96</sup> Once more, it needs to be emphasized that the goal here is not to disregard the intention and the accomplishments of such reforms but my aim is to call attention to the ever-static conception of family law. In order to do so, I

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<sup>93</sup> Richardson, Eileen H., and Bryan S. Turner, *Sexual, Intimate or Reproductive Citizenship?* 5 CITIZENSHIP STUD. 329, 330 (2001).

<sup>94</sup> *Id.*, at 336.

<sup>95</sup> *Id.*, at 337.

<sup>96</sup> See Olson, Frances, *The Family and the Market: A Study of Ideology and Legal Reform.* 96 HARV. L. REV. 1575-1576 (1983).

will discuss and critique a number of interlinked doctrinal ideas associated with our understanding family law, which are (supposed) functions of family law, the private/public dichotomy, and the family/state relationship.

Family law as the distinct area of law as we recognize today is a relatively recent creation historically tied to the emergence of the modern nation-state and division of society into public and private spheres.<sup>97</sup> The mere existence of an area of law governing family relations and its functions are often taken for granted and seldom scrutinized. Likewise, existence of *family* as the foundational unit of the society is often taken for granted and is seen as natural and trans-historical. As an extension, family law is treated as a necessary and in some contexts even a sacred entity that expresses the spirit and collective character of the nation.<sup>98</sup> Renowned Oxford lecturer and leading family law scholar John Eekelaar conventionally identifies three functions for family law, which he claims to be “uncontroversial” and “empirically true.” First function of the law according to Eekelaar is to offer a set of mechanisms and regulations to adjust relationships between members of the family *after* the breakdown of the family unit. Secondly, he sees family law as a way to protect individuals from harm inflicted on them within the family unit, and lastly, family law provides support for “maintenance of family relationships.”<sup>99</sup> These functions are usually understood and associated with restriction of traditional powers of men as the patriarch and in contrast empowerment and protection women and children.

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<sup>97</sup> Freeman M. D. A., *Towards a Critical Theory of Family Law*. Delivered as an Inaugural Lecture at University College London on February 26, 1985, 38 CURRENT LEGAL PROBLEMS 153, 166 (1985).

<sup>98</sup> Kennedy, Duncan, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 817 (2010).

<sup>99</sup> Eekelaar, John, *Family Law and Social Policy* OXFORD, 24-26 (1984) in Freeman, at 153.

Assigning these functions to family law is both structurally problematic and contradictory to the historical formation of family law. Family law (intervention of state in the family) is paradoxically founded upon the principles of privacy and state non-intervention. While within the last century feminist and family law reform movements have managed to introduce protection-oriented mechanisms and legislations worldwide, family law fundamentally has not gone far from its intended purpose which according to Freeman is institutionalization of the domination of men over women and children.<sup>100</sup> Viewing family law as protective is problematic because it obscures the reality of whom the law is set to protect. The private sphere since its creation has always resonated the idea of the home as a “man’s castle,” a fortified space where the husband is the king through whom the wife and children, his dependents, are linked to the public sphere.<sup>101</sup> Therefore, it is contradictory to assume that the law that marks this threshold of (men’s) privacy, the same law that draws the line of state intervention, is also the law that intervenes to support and to protect women against men.

By viewing men as the primary wage earners, women as dependents (or at best secondary wage earners), and children as property, all that family law is set to achieve is “the protection of the dominance of men against women, and adults against children.”<sup>102</sup> In addition, the idea that the state intervenes in the family only at times of crisis to adjust familial relationships fails to recognize that not only that state reproduces social order through law but in fact it is the law that constitutes and defines that order in the first

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<sup>100</sup> Freeman, at 166-174.

<sup>101</sup> *Id.* at 172.

<sup>102</sup> *Id.*, at 168.

place.<sup>103</sup> Thus, assigning corrective, supportive, and protective functions to family law is “a distortion of reality;” Freeman explains:

Family law ... produces and reproduces patriarchal relations. The legal form is one of the main modalities of social practice through which actual relationships embodying gender [and age] stratifications have been expressed.<sup>104</sup>

In order to clarify this inconsistency one must scrutinize the public/private dichotomy through which the state/family relationship is understood. The private/public distinction is often traced back to the classical Greek binary between the *polis* and the *oikos*. The *polis* “by nature” belonged to men who were fit to participate in the public life, and women, children, slaves and all those naturally unfit for the public life were constricted to the household, the *oikos*. While fairly similar, it is argued that the modern distinction should be located in the period of rise of industrialization. Freeman argues that the Industrial Revolution (and not capitalism) should be regarded as a historical watershed for the modern public/private paradigm since formal/legal separation of home and workplace, and of wage labor and childcare, are the characteristics of this era.<sup>105</sup> Nonetheless, Freeman asserts that while Aristotle drew “normative conclusions” from *polis/oikos* distinction, which included “justification[s] of dominance of women by men and ... of slavery,”<sup>106</sup> modern liberal theorists refuse to acknowledge such normative analyses and continue to treat the public/private dichotomy as a natural and/or historical reality.

Thus the critics of such theories argue that the boundaries of public and private are

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<sup>103</sup> *Id.*, at 158.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 166-167.

<sup>106</sup> *Id.* At 166.



not “fixed by nature” but “socially and historically constructed” by the state, which has the authority to constantly renegotiate and redraw these boundaries.<sup>107</sup> Nikolas Rose sees the private /public division not only “a construction within a particular set of values and beliefs” but also a false division with a number of deliberately designed functions.<sup>108</sup> He argues that the private/public dichotomy:

mystifies the fact that the state itself constructs both the boundaries and the limits of privacy. It legitimates the extent to which the state refuses to intervene into certain places or relations through its legal mechanisms. It masks the fact that privacy is all too often the right of men to dominate women and children. And it obscures the degree to which the state empowers welfare professionals to impose social norms on the family lives of certain sections of society, especially controlling women in their roles as wives and mothers.<sup>109</sup>

Freeman similarly argues that, considering the fact that “the private sphere is constituted and reconstituted by the public,” one could conclude that the state’s interest in mystifying a space as private is to gloss over and therefore to preserve the status quo, the hierarchy, and the power structure within the space labeled as private. He further claims that the family unity is so important to the state perhaps because “the power structures embodied in the family are functionally useful to the state;” in the family children learn conformity and obedience and therefore family (alongside the school) is the machinery of molding submissive citizens.<sup>110</sup> Consequently, the private sphere, private citizens and the private

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<sup>107</sup> *Id.*, at 170.

<sup>108</sup> Rose, Nicolas, *Beyond the Public/Private Division: Law, Power and the Family*, 14 JOURNAL OF LAW AND SOCIETY 66 (1987).

<sup>109</sup> *Id.*

<sup>110</sup> Freeman, at 171. He further argues that state idealizes family unity in order to construct national unity. States often borrow familial language and vocabulary when referring to the nation and its unity. Through

laws governing their relations are necessary illusions created by the modern state in order to institutionalize subordination and stratification and to protect the interests of the dominant forces in the society.

In addition to being functionally useful to the state, others have observed other ways by which family relates to the state. In what Duncan Kennedy calls “loopification of the public/private distinction”, he explains that while considering the way private and public institutions are conceived, one could visualize a circular continuum which begins with the state at the public end of the loop and with the family at the private end. Hence, if one continues to the extreme private (past the family) would arrive back at the state and vice versa.<sup>111</sup> The premise of his argument is that for a distinction to exist one need to be able to “feel intuitively sensible to divide something into poles” and moreover, a distinction that does not make a difference is not a distinction even if everyone agrees how to make the distinction.<sup>112</sup>

Therefore, state and family are two manifestations of the same entity. First, they both should be considered “units of government” and not markets. Halley and Rittich argue that in pre-modern era *the household* was comprised of both what we call family today and the market. It was the unit of (economic) production and (human) reproduction. Thus, modernization was “the breakup of these semi-public spaces” into two entities of the family and the market within a private space.<sup>113</sup> Second, ideas of the family and political discourse constantly refer to one another and are so interchangeable that one

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normalizing power differences within the family state perhaps hopes the nation to pass over class, religious, and ethnic differences.

<sup>111</sup> Kennedy, Duncan, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354-1355 (1982).

<sup>112</sup> *Id.* at 1349.

<sup>113</sup> *See supra* note 62.

might combine them into “a single familial/political rhetoric”. Third, “the blurring of institutional line between the state and the family is more obvious than blurring along the market/family or market state boundaries.”<sup>114</sup>.

The critics of public/private dichotomy, notably Robert Lee Hale, Morris Cohen and Frances Olson among others, since the first half of the twentieth century have condemned such classification arguing that private categories of law in reality represent “a delegation of public power, entailing policy decisions and enforced by state imposed sanctions.”<sup>115</sup> They mocked and disregarded the idea that private law operates in a “neutral and apolitical” space because all law is coercive with distributive consequences.<sup>116</sup> As a result, private law was seen by them as “a delegation of coercive public powers to individuals, and could only be justified by public policy.”<sup>117</sup> However, such distinction of spheres has shaped our conception of law, politics and society. When the frameworks of the private and the public, state intervention and non-intervention, and the state and the family are positioned in the legal discourse, “they can induce beliefs that existing social arrangements are just, natural, inevitable, [and] legitimate.”<sup>118</sup>

Frances Olson in a feminist critique of the family/market dichotomy notes that the purpose of any dualism is to separate “a strong and positive side” from “a weak and negative side” and that men associate themselves with strong side of dualisms (market, public, reason, power, etc.) and assign the weak side (family, private, passion, sensitivity,

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<sup>114</sup> Kennedy (1982) at 1355-1356.

<sup>115</sup> Rose, at 62.

<sup>116</sup> See Hale, Robert. *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

<sup>117</sup> Horwitz, *The history of the Public/Private distinction*. 130 U. OF PA. LAW. REV., 1423, 1426. (1982).

<sup>118</sup> Rose, at 63.

etc.) to women.<sup>119</sup> Family is conceptualized as a separate and private domain of “comfort and compassion” and of “community” that needs to be protected from the intervention of the public the domain of individualism. Thus, she argues that this is a conception of “a family that embraces a warped and impoverished notion of community and freedom. The community within a family is hierarchical [and] the freedom in the family is largely an illusion.”<sup>120</sup> Assumption of a private family is therefore the mythical assumption that family naturally exists rather than it is the creation of the state.<sup>121</sup>

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<sup>119</sup> Olson, at 1575-1576.

<sup>120</sup> *Id.* at 1566.

<sup>121</sup> *Id.* at 1503-1504.

## V. Analysis

Marriage under Egyptian law is an unequal privilege for men.<sup>122</sup> While a Muslim Egyptian man can independently enter a marriage contract, a Muslim woman does not have the autonomy to do the same without the approval of a male guardian.<sup>123</sup> Divorce is also a unilateral privilege for Muslim men. A man can terminate a marriage contract virtually without having a reason; however, a woman has to prove the existence of harm (for example, physical in case of abuse, or psychological in case of polygamy) in order to access divorce.<sup>124</sup> However, these laws simply signify male privilege. What I mean by marriage as an unequal privilege is the inequality of access to legally marriageable women among Egyptian men based on religious affiliation. Muslim men have the exclusive right to marry Muslim women and in addition they can legally marry women of other Abrahamic faiths (Christians and Jews). Muslim men are also legally allowed to have polygamous marriages with up to four wives. Christian men however, in addition to having access to Christian women, are allowed to marry Jewish women. And finally, Jewish Egyptian men, assuming they still exist, only have access to Jewish women. If a man wants to marry up the religious hierarchy, he has to convert. No one can convert down in the system (see Figure 1). This system also indicates that only these three types of (heterosexual) men have the privilege to access marriage legally. Another reading of the system could be that men can marry equal and down, and women can marry equal and up.

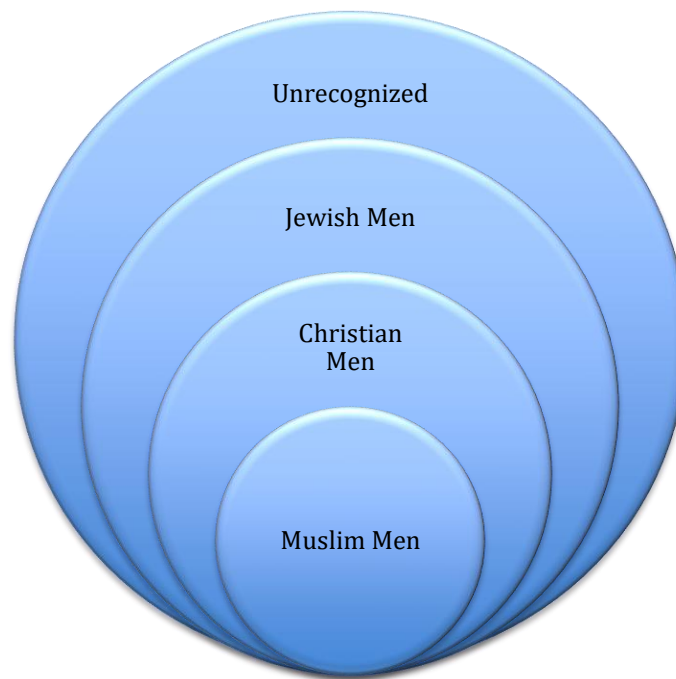
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<sup>122</sup> I would argue that everywhere marriage has been a privilege for men. Traditionally, men are the subject and women the object of marriage, and the proof of that is still found in many languages; a man takes a wife, and a woman is married off and given away by her father. However, for the purpose of this research I will demonstrate how this concept is materialized in the Egyptian personal status laws.

<sup>123</sup> Qassem, at 19.

<sup>124</sup> See Welchman, Lynn, *WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY* 107-126 (2007), and An-Na'im, Abdullahi, *ISLAMIC FAMILY LAW IN A CHANGING WORLD* 171-172 (2002).

One argument for this hierarchical system is that children take the religion of their fathers.<sup>125</sup> However, the main basis for the system of sectarian laws personal status comes from the Islamic legal doctrine of *wilaya*, which is usually translated as authority or guardianship. According to traditional Islamic jurisprudence, there are three types of *wilaya*: authority of adults over minors (which also include insane and incapacitated individuals), authority of men over women, and finally authority of Muslims over non-Muslims.<sup>126</sup> Based on these principles of *Wilaya* many legal systems associated with Islam hold that Muslim women cannot marry non-Muslims because they would be under authority of non-Muslims.



**Figure 1 Hierarchy of Religious Affiliation**

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<sup>125</sup> Although in Judaism succession to religion is matrilineal, under Egyptian law, the fathers religion determines religion of the children in mixed marriages. See *supra* notes 17 & 18.

<sup>126</sup> See Bearman, P., *et al*, *Wilāya*, BRILL ONLINE: ENCYCLOPAEDIA OF ISLAM, (May.14.2014). [http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/wilaya-COM\\_1349](http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/wilaya-COM_1349)

Marriage laws in Egypt are notably instrumental in creation and maintenance of social hierarchy based on religious affiliation. In addition, marriage underscores “belonging to a religious community” upon which Egyptian citizenship is founded. In other words, one could not be suitable for Egyptian citizenship without being associated a legally recognized religious community and marriage is the chief signifier of this membership. What I am arguing is that in Egypt, one’s membership in a sanctioned community is determined by the parents’ marriage (at birth)<sup>127</sup> and it is further entrenched by one’s own marriage. Thus, the institution of marriage simultaneously defines community membership and citizenship, and therefore the two kinds of membership are closely interrelated.

Moreover, marriage is the building block of public policy and crucial to the maintenance of public order. In the case that ultimately granted Baha’is the right to obtain ID cards,<sup>128</sup> the Cairo Administrative Court argued that “anyone who adopts the Baha’i Faith is an apostate and that the religion cannot be recorded in any civil status or other official document, because that would conflict with public order.”<sup>129</sup> The court defined public order as “the official religion being Islam, that most of the population professes Islam, and that Islamic law is the primary source of legislation.”<sup>130</sup> The court concluded that it would, nonetheless, allow Baha’is to receive government documents cards with (--) in order to “protect members of the ‘revealed religions’-Judaism, Christianity, and Islam-

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<sup>127</sup> *Supra* note 16 and 17.

<sup>128</sup> *Supra* note 43.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

from Baha'i infiltration and avoid potential dangers from such persons' conduct and relations with them."<sup>131</sup>

While the court decision is viewed by some Baha'is and human rights activists as a triumph; others rightfully recognize it as a different version of the same exclusionary policy. Being Baha'i still legally and socially constitutes otherness, deviance and anomaly. The dashes on the birth certificates of Baha'i children tell the school principal that they do not belong to the school because they do not comply with the state's religious study requirement. The documents adorned with (--) let the public agent in charge of issuing marriage certificates know that their holders do not conform to any of the state prescribed versions of marriage. These documents denote that their holders are not normal citizens.

Examples of problems mentioned above may appear to have been caused by a number of bureaucratic malfunctions and contradictory policies that need to be adjusted. However, Hamid one of the interviews pointed out that:

It's not just that they don't recognize our marriage; they are actively preventing us from getting married. There are solutions such as civil marriage. In our laws we have civil marriage for example for those who marry foreigners, but they don't want us to use it. People also get civil marriage abroad in Cyprus or Turkey, but they don't recognize ours. There are Baha'is who have married foreigners or have civil marriage from abroad but they still have the same problems.

Hamid points out to the state's deliberate attempts preventing formation of Baha'i families. The result of 2008-2009 legal battles was that Baha'is could at least get birth

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<sup>131</sup> *Id.*



certificates for their children. However, this process as Karim mentioned earlier includes obtaining clearances from criminal and national security departments.<sup>132</sup>

The connection between marriage and Egyptian citizenship was repeatedly highlighted in the interviews conducted with the members of the Egyptian Baha'i community. The participants in the study narrating their everyday experiences with the Egyptian law, illustrated how their access to things commonly known to be inherent to citizenship, such as property ownership, employment and access to banking and schooling, is limited or nonexistent due to the states refusal to acknowledge their marriages. Their stories are very much like the experiences of undocumented migrants who have to depend on "luck" and the compassion and generosity of others in order to be able to simply get by in the society. Much like an illegal alien, an Egyptian Baha'i has to work hard to avoid the law, or by devising creative strategies, try to negotiate the system and get through everyday life. Like an illegal immigrant, Nancy has to hide the truth about her identity from her colleagues and make sure that they do not see her ID card because she has "made a deal" with her boss and otherwise she could lose her job. Like an undocumented non-citizen Karim had to go from school to school to find one that would allow his children to get an education and like illegal alien all Egyptian Baha'is have to rely on a "network of twenty-first century underground railroad of supporters"<sup>133</sup> people who sympathize and are willing to help.

In Egypt, membership in a community is seen as the threshold of citizenship, which is not an unfamiliar concept. T. H. Marshall defines citizenship as "the status

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<sup>132</sup> See Karim's quote at the bottom of page 23.

<sup>133</sup> Vargas, Jose Antonio, *My Life as an Undocumented immigrant*, THE NEW YORK TIMES (2011). (May.01.2014.)

<http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html>.

bestowed on those who are full members of a community”<sup>134</sup> and according to Linda Bosniak citizenship status means having rights and an identity in a community.<sup>135</sup> While, I do not deny the significance of social acceptance and the community, I argue that the state has the ultimate say in determining boundaries of citizenship, and for that matter even community. Critiques of citizenship as community membership correctly point out that community is a politicized term with emotional and ideological overtones.<sup>136</sup> The Egyptian law decides what does and does not constitute a community<sup>137</sup> and then masquerades state interests and policies by calling for celebration of the community.

Nevertheless, Baha’is see themselves as integrated members of the communities in which they live. The majority of Baha’is who participated in this study are educated professionals who described themselves as successful and content with their lives. They see themselves surrounded by Muslim and Christian Egyptians who understand their situation, sympathize with them and help them find solutions to their problems. Many of the participants are also members of larger kinship networks that include Muslims and/or Christians with whom they happily interact. I perceive these descriptions of the Baha’is’ lives as “full membership in the community,” but one that does not lead to full citizenship. Perhaps it is not implausible to argue that the definite and homogenous “communities” that Egyptian law recognizes to govern social life in Egypt is nothing but a politically fictitious narrative that serves a particular state agenda. This does not mean to deny the existence of distinct historical religious communities in Egypt, but to highlight the state’s role in formulating and drawing the borders of these communities.

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<sup>134</sup> Marshall, at 28.

<sup>135</sup> Bozniak, Linda, *Universal Citizenship and the Problem of Alienage*, 94 NW. U. L. REV. (963 (2000)), see also Kymlicka, Will, and Wayne Norman. *Return of the citizen: A survey of recent work on citizenship theory*. 104 *ETHICS* 352-81(1994).

<sup>136</sup> Brandzel, at 175-176.

<sup>137</sup> *Supra* note 6.

Thus, I argue that the family is the threshold of citizenship, and marriage is a privileged means by which citizenship crystallized. By denying the Baha'is access to state sanctioned marriage, I argue that Egyptian state denies them access to full citizenship. As Hamid, one of the interviewees, noted “[Egyptian Baha'is] are punished for being married, for wanting to have families...if you are single and want to stay single then it is no problem.” Marriage is a matter of public policy, meaning that the state by recognition of a legal relationship between two individuals extends rights and obligations onto them. According to the Egyptian policies of personal identification, many rights and obligations associated with citizenship, such as property ownership, freedom of movement and political participation (voting) are not possible without proper national identification cards.

Nasser's presidential decree not only criminalized “Baha'i activity” but in a way outlawed being Baha'i.<sup>138</sup> This move by Nasser, who is popularly known as the founder of the Arab Republic of Egypt, should be understood in the context of decolonization and the creation of Egyptian national identity. Nasser defined Egyptian identity based on the principles of Arab unity, anti-imperialism, and anti-Zionism, and within this framework Islam “served as a cultural reference point.”<sup>139</sup> As a result, Baha'is remained outside of the Egyptian citizenry because on one hand, through their connections to the city of Haifa, Baha'is were falsely accused of being British and Israeli agents, a popular opinion in the Egyptian media until the present time.<sup>140</sup> On the other hand, Islam as Egypt's cultural identity could not tolerate those who profess a religion not recognized by the

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<sup>138</sup> Law No. 263/1960. *See*, note 31.

<sup>139</sup> Del Sarto, Raffaella A., *CONTESTED STATE IDENTITIES AND THE REGIONAL SECURITY IN THE EURO-MEDITERRANEAN AREA*, 133 (2006).

<sup>140</sup> *See* Shahine, Gihan, *The Others*, AL-AHRAM WEEKLY ONLINE. (Mar.26.2014) <http://weekly.ahram.org.eg/2006/794/eg6.htm>.

Quran. In a way, Baha'is represented the antagonists of the new Egyptian identity. Therefore, the first step towards containment of Egyptian Baha'is as the ultimate others was to criminalize the Baha'i marriage and condemn the Baha'i family. Today the population of Egyptian Baha'is is less than half of the official number in 1960 while the Egyptian population has more than tripled during these years.<sup>141</sup> Although perhaps conversion and immigration could also be factors for the decline of the Baha'i population in Egypt in the last fifty years, it is safe to conclude that Nasser's policies of citizen making have been effective in containment of the Baha'i population.

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<sup>141</sup> *Supra* note 27.

## VI. Conclusion

Most people view marriage as a private matter for it is concerned with private decision-making in the domestic realm. Marriage is also seen as central to creating nurturing spaces for raising children, expanding kinship networks and transferring private property. It is seen as building one's identity in relation to others. Marriage, a holy matrimony, is often viewed as located in the realm of religion, a sight of legitimizing intimacy, and celebrating love and commitment. Marriage is undoubtedly all of that, but there is a less visible aspect to marriage. Marriage is above all a public institution. Marriage is *the* institution that "facilitates the government's grasp on the populace". For marriage to be *marriage*, it requires affirmation by the state.<sup>142</sup> It is the power *invested* in the clergy by the state that institutes marriage. Marriage needs a license and it has to be registered; it has to be legal; it has to be sanctioned by the law. The law sets the terms of marriage (and divorce) and the state enforces them. There are duties and privileges, benefits and obligations.

Moreover, marriage as the legal instrument of creating a family, can act as the precursor to citizenship. By sanctioning certain types of marriages and prohibiting others, the state translates its specific ideology into creation of politicized legal entities known as citizens. The state's aspiration is to create an ideal nation by embracing "normal" and "healthy" families that can produce ideal citizens. As a "vehicle for public policy" marriage has the capacity to act as a powerful hegemonic tool that shapes the society on the bases of class, gender, race, and religion.<sup>143</sup> Marriage laws are coercive and restrictive means of normalization that mold individuals who meet the requirements of normalcy.

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<sup>142</sup> Cott, Nancy F., *PUBLIC VOWS: A HISTORY OF MARRIAGE AND A NATION*, 1 (2000).

<sup>143</sup> Cott, (1995) at 171.

Moreover, the public characteristic of marriage is often masked by the conception of family law as dealing with the private sphere founded upon the principles of privacy and non-intervention. Family law mystifies the familial space as private in order to preserve the hierarchical and subordinating characteristics of the family that are useful for creation of compliant and law abiding citizens.