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## **Taking the State to Court: A Study of the Baha'i Case**

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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**TAKING THE STATE TO COURT:  
A STUDY OF THE BAHA'I CASE**

**A Thesis Submitted to the  
Department of Law**

**In partial fulfilment of the requirements for the LL.M. Degree in  
International and Comparative Law**

**By**

***Reem Awny Abuzaid***

**June 2020**

**The American University in Cairo  
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## ABSTRACT

This research engages with a question about how public law litigation operates in a restricted context like Egypt, and how does this context influence the litigation process and its outcome. The research examines the Baha'i case to exhibit ways by which public interest lawyers interact with the context surrounding their case and the impact of that on their tactical choices, and, ultimately, on the success of their case. The Baha'i case tried before the Supreme Administrative Court between 2008 and 2009 is celebrated, within the local and international human rights community, as a successful practice of public law litigation to give the claimants the right to issue official documents with a dash (a short straight line) in the mandatory religion category in three national identification cards; the research looks beyond the immediate outcome to evaluate the case's contribution towards the fulfillment of its strategic goals to expand the legal gain to the rest of the Baha'i community, to influence the state discriminatory policies against them, as well as to influence public perception of Baha'i citizens so that when such policy change happens it's socially accepted.

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## I. Introduction

The litigation case no. 18354/58, famously known as the Baha'i case, tried before the Supreme Administrative Court between 2007 and 2009 is celebrated, within the local and international human rights community, as a successful practice of public law litigation to give the claimants the right to issue official documents with a dash (a short straight line) in the mandatory religion category in their national identification cards. The case was filed to strike down an administrative decision by the Ministry of Interior ("MOI") instructing the state administrative authority ("Civic Status Division") to refrain from issuing official documents for members of the Baha'i minority unless they choose to register one of the recognized Abrahamic (in Arabic *samaweya*, which literally translates to *heavenly*) religions in the mandatory religion category.<sup>1</sup> That decision forced the minority members to conduct their lives in an informal setting because they were unable to issue any required official documents.

Public interest lawyers working on the case engaged with a highly problematic and contentious legal and political framework to fulfil the strategic goal motivated the case from the beginning. To reach these goals, public interest lawyers had to come up with a plan on how to deploy tactics to advance their case starting with their choice of the suitable courthouse to adjudicate their case, the suitable legal arguments and references in their submission, and the launch of a public campaign to mobilize support and to create a suitable context for the court to decide in their clients' favour.

The case was motivated by an immediate goal to protect Halem's family from state discriminatory practices which they are subjected to because of their religious affiliation. Public law litigation is not exclusively about adjudicating social demands in court, but it's about conducting legal action as a political movement. In that, the Baha'i case was a great success. Lawyers of the Baha'i case capitalised on the available legal opportunity when they filed their case in front of the Supreme Administrative Court which is popular among public interest lawyers for its legacy in supporting public law litigation cases; they wanted to establish a precedent on the equal rights of Baha'i citizens to acquire official

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<sup>1</sup> *MOI directive no. 5/1/24* (issued on Sept. 25, 2000). Accessed through EIPR's institutional database.

documents that prove their religion. Also, like any other successful political movement, the Baha'i case created resources for future mobilization. The Baha'i case became a blueprint, a manual, for other public interest lawyers working on cases that involve members of other unrecognized religious minorities.

The Baha'i case, similar to any other public law litigation case, wasn't adjudicated for the sole purpose of fulfilling Halem's demand, rather than to contribute to the bigger strategic goal of protecting a vulnerable group of the society, the Baha'i minority, from the state's systematic violation of their rights as equal citizens. Lawyers of the Baha'i case aimed to maximize the opportunity for the minority members to use their case as a precedent as they file other cases for their rights. The case, undoubtedly, established a precedent in front of the Supreme Administrative Court; however, this victory was very limited as the precedent only affected those Baha'is who already have official documents to prove their religious affiliation to the minority, which is the case with a very minimal number of the minority members. At the end, the court decision in the Baha'i case didn't cause a significant change in the legal condition of the minority member.

In the long run, public interest lawyers wanted to influence the state discriminatory policy from citizens of unrecognised religious minorities, which wasn't nearly achieved. The Baha'i case mainly focused on a minor aspect of the minority suffering which is the administrative discrimination against its members manifested in the MOI's decision to refrain from issuing official documents for Baha'i citizens. Public interest lawyer's decision to narrow down the scope of their case was successful in fulfilling their clients' demand, but certainly didn't influence the state policy from either the minority or other unrecognized religious minorities. The court heard the case decided to grant Halem's children the right to issue official documents with a dash to replace their religion. Such a decision was justified to serve the society's interest to mark those individuals instead of giving them the chance to conduct their lives as Muslims, which practically institutionalised state discrimination against Baha'is. The court decision further instated the inequality practiced against Baha'is in the Egyptian society.

The final strategic goal that motivated the Baha'i case was to influence the public perception of those citizens. In order to fulfil this last strategic goal, public interest

lawyers launched a mass-media campaign to correct some of the popular misconceptions about the Baha'i minority; they even reached out to opposing columnists and known public figures to persuade them with their cause. It was very difficult to reach a conclusive conclusion on the outcome of this campaign or its impact on the court decision within the framework of this research.

Despite the outcome, the Baha'i case is worth examining. The case is known to be one of the few public law litigation cases to use Shari'a as the main legal argument. Typically, public interest lawyers conduct their work, and draft submissions, with legal reasoning to justify their demand to protect individuals' rights. Their legal work is rather a statement of position through which they express their understanding of law and rights, and, purposefully, through which they try to advance their rights-based narrative against the state position. In the process of developing their submissions, public interest lawyers engage with the law governing their case. As a result, they chose to change some of their arguments that are not necessarily reflective of the lawyers' original position; they are reflective of what they perceive as the most pragmatic path to state their position and to fulfil the strategic goals, under the prevailing conditions. Public interest lawyers working on the Baha'i case identified an opportunity to argue their case using the same platform, Shari'a, on which the state established its position, which had an impact on the case outcome.

This research poses a question on how public law litigation operates in restrictive conditions, such as that prevailing in Egypt. This question entails an understanding of how public interest lawyers conduct their work and of the tactical choices of legal arguments and normative references used in their submissions to the court. Methodologically, this research bases its analysis on legal documents (plaintiff submissions, defence submissions, court decisions, affidavits, ... etc.) collected from the Egyptian Initiative for Personal Rights ("EIPR") institutional database. The research also relied on semi-structured interviews of different actors involved in the case to fill in the knowledge gap uncovered by the collected documents.

The research benefits from a vast pool of literature on public law litigation in Egypt. The first trend in the literature is interested in the connection between law and politics.



Two scholars, Tamir Moustafa<sup>2</sup> and Nathan Brown<sup>3</sup> focused on the concept of judicial activism, resistance, as they attempted to theorize that law was present as an agent for the executive authority's interest in authoritarian countries.<sup>4</sup> The second trend focuses on the engagement of the human rights movement with the authoritarian context through the practice of law. The analysis in this trend emphasizes the perspective of human rights organizations that employ it. The present research will constantly borrow from both trends of literature while giving more emphasis to the perspective of public interest lawyers who were involved in the Baha'i case. This research contributes with an in-depth analysis of the legal argument, moral references, tactics, and tools used in public law litigation, using the Baha'i public law litigation case.

The research is divided into four main chapters. Chapter one is dedicated to the conceptualization of public law litigation and public interest lawyers in the context of Egypt. In this chapter, the research creates a historical foundation to understand the evolution of public law litigation in Egypt, its institutional set-up, and its relationship with practicing lawyers. Chapter two focuses on the challenges facing Baha'is as a result of the legal system and the systematic discrimination against them for their religious belief. In the following section, chapter three, the research focuses on ways public interest lawyers designed and strategized for their engagement with that context including the different tactics and political decisions made to reach the desired outcome. The research examines, in the last chapter, the case outcome. This way, an overview of the public law litigation process is presented.

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<sup>2</sup> Moustafa explores the concept of judicial activism expansively in his studies; See Tamir, Moustafa. *The Law and Courts in Authoritarian Regimes*, 10 Annual Review of Law and Social Science 281-99 (2014).

<sup>3</sup> See Brown, Nathan. *The Rule of Law in the Arab World, Courts of Egypt and the Gulf* (Cambridge University Press, 1997) for more information on how judges engaged in politics as they serve in Egyptian courts.

<sup>4</sup> Abu-Odeh, Lama. *The Supreme Constitutional Court of Egypt: the Limits of Liberal Political Science and CLS analysis of Law Elsewhere*. 59 American journal for Comparative Law 995 (2011).

## II. Public Law Litigation in Egypt

The term ‘public law litigation’ was originally coined in 1976 by the Harvard Professor Abram Chayes to describe the practice by US lawyers to bring about social change and to reform legal rules through court decisions typically conducted through the class action mechanism.<sup>5</sup> The definition is generic and doesn’t capture the legal practice in detail, which left room for scholars to approach it in multiple ways. The first trend understands litigation from its impact on public policy and legislation or its orientation towards public interest; here, public law litigation is perceived as a form of political participation, or more clearly, political activism.<sup>6</sup> Other scholars understand litigation from its legal utility as a strategy used by public interest lawyers to provide an alternative account of history;<sup>7</sup> It's also a tool for human rights advocacy.<sup>8</sup> On that track, litigation is perceived as an intellectual process through which litigants contribute to the creation of their doctrine; their collective rights-based doctrine which originates from the human rights discourse and evolves to carry various elements of the context and history around it; in that sense, public interest lawyers defend plaintiff’s cases in a court of law as they inject human rights values in the legal debate.<sup>9</sup> Both interpretations only capture some elements of that particular type of litigation in the context of Egypt.

Chayes developed a model to examine the traditional conception of adjudication that I am using to highlight the distinctive character of public law litigation. Chayes’ model comprises five areas:<sup>10</sup>

1. *Parties to a lawsuit.* Traditional adjudication is the process of filing lawsuits to settle disputes between private parties about private rights. That’s to say, lawsuits are bipolar in the sense that involves two individuals, or at least two unitary interests, of equal and opposed powers, and the winner-takes-it-all.<sup>11</sup> Public law

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<sup>5</sup> Chayes, Abraham, *The Role of the Judge in Public Law Litigation*. 7 Harvard Law Review 1281 (1976).

<sup>6</sup> Sheldrick, Byron. *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression*. Waterloo: Wilfrid Laurier University Press 144 (2014).

<sup>7</sup> Abu-Odeh, (2011) at 993.

<sup>8</sup> Fallah, D.G. *Assessing Strategic Litigation Impact on Human Rights*, 10 Rev. Direito Prax 762 (2019).

<sup>9</sup> Abu-Odeh, (2011) at 991.

<sup>10</sup> Chayes, (1976) at 1282.

<sup>11</sup> *Supra* note 10.

litigation is concerned with state policy, therefore, it involved two parties of obviously unequal powers: a citizen and state institution.<sup>12</sup>

2. *Litigation*. A traditional lawsuit is retrospective and concerns an identified and completed set of events.<sup>13</sup> The events of a public law litigation case are usually ongoing. Previous events and impact of regulatory policies on the lives of citizens are necessary for litigants to establish the premise of their cases, however, the potential impact of these policies on citizens' lives in future instances is the main driving force behind public law litigation cases.<sup>14</sup>
3. *Rights and remedy*. The plaintiff in traditional adjudication gets a compensation measured relatively to the substantive violation he was subject to.<sup>15</sup> On the other side, redress in public law litigation is associated with changing state policies rather than personal relief<sup>16</sup>
4. *Lawsuit impact*. Traditionally, the impact of court judgment is only meant to affect the parties involved in the case.<sup>17</sup> On the contrary, the impact of public law litigation extends from the parties of the case to a wider pool of individuals who are similarly affected by the state policy.<sup>18</sup>
5. *The litigation process*. The plaintiff, a party to a lawsuit, has a very wide margin of control over the process of litigation in a traditional setting.<sup>19</sup> This liberty, in the case of public law litigation, is relatively limited by various elements amongst which are other class members' interests, the personal ideology and political interest of the litigants handling the case, and, most importantly, the legal and political context in which the case will be adjudicated.<sup>20</sup>

Chayes' model establishes two foundational assumptions that are unnecessarily reflective of the Egyptian case. The model, first, assumes the neutrality of the democratic

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<sup>12</sup> Ezzat, Ahmed. *Challenging the Legal Ideology of the State: Cause Lawyering and Social Movement in Egypt*. 1 Arab Reform Initiative 6 (2019).

<sup>13</sup> Chayes, (1976) at 1283.

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Ezzat*, (2019) at 7.

<sup>17</sup> *Supra* note 13.

<sup>18</sup> *Supra* note 16..

<sup>19</sup> *Supra* note 13.

<sup>20</sup> *Supra* note 16. .

ruling regime, which, essentially, entails an absolute separation of power between the state's three authorities. Such an assumption doesn't grasp the authoritarian practices of the executives to control and direct the judicial apparatus in Egypt. Chayes' model also assumes the neutrality of judges seeing cases in the American federal courts.<sup>21</sup> This assumption doesn't capture Egyptian judges' biases due to political inclinations and ideological interests. Judicial activism is one side of that bias; other judges, on the other side, decide cases to benefit the ruling regime.<sup>22</sup>

A lot of scholarly work addressed the topic of public law litigation in Egypt. Ali and Ali's study is an exemplary attempt to generate a comprehensive approach to understand that legal practice in Egypt which perceives public law litigation as a planned collective action taken to advance new legal norms based on human rights discourse.<sup>23</sup> They are more interested in the emergence of that type of litigation as a movement, and of its collective nature, and the development of its tools and mechanisms to fight unjust laws, and state practices that hinder human rights.<sup>24</sup> This research understands public law litigation as a political movement guided by Sidney Tarrow's conceptualisation as a collective action taken by a group of lawyers against the state and its policies to achieve specific political, economic, or social goals in a context that allows for such actions.<sup>25</sup> In that sense, public law litigation in Egypt is essentially a collective legal work, a social movement, empowered by a wider, political and human rights movement around it to engage with state politics and law to bring about actual change, as well as to present an intellectual narrative depicting the litigants' position from rights at a certain time in history which serves as a tool for following advocacy work.

Research on public law litigation in Egypt often refers to that legal practice as "public law litigation" or "human rights litigation" as a reference to lawyers' education and professional training in international human rights law. There is no agreement on a

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<sup>21</sup> Chayes, Abram, *How Does the Constitution Establish Justice?*, 11 Harvard Law Review, Vol. 1026 (1988).

<sup>22</sup> Moustafa, (2014) at 285.

<sup>23</sup> Moustafa, Tamir. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* 190 (Cambridge University Press, 2017) and Ali, K. And Ali, A. *In the Name of the People*. 1 The Egyptian Center for Social and Economic Rights Publication 9 (2014).

<sup>24</sup> *Supra* note 22.

<sup>25</sup> Tarrow, Sidney, *Power in the Movement: social movements and contentious politics* 10 (Cambridge University press, 1998).

single term, as much as there isn't an agreement on naming the lawyers engaged in that type of litigation. "Human rights lawyers" is an inaccurate term to describe the whole community of Egyptian lawyers who work on that type of cases.<sup>26</sup> Historically, public law litigation was practiced by leftist lawyers who were focused on the interests of the working class like Ahmed Nabil al-Helali.<sup>27</sup> Lawyers ventured into human rights law when they affiliated with human rights organisation, which justified the name, however, it doesn't grasp the reluctance of some of these lawyers to work on cases of certain nature, like LGBTQ or providing legal assistance to members of the Muslim Brotherhood in post-2013 Egypt.<sup>28</sup> For this research, I use the term of "public law litigation" to name the activity of bringing cases in front of the court to challenge oppressive and unjust regulatory policies and laws, and I will use the term "public interest lawyers" to describe the group of law professionals who engages with that type of litigation, who serve the direct interest of the client and extend their work to influence the interests of certain groups in society, purposefully to serve a cause they believe in. This chapter investigates how public law litigation emerged and developed in the context of Egypt, and, also, examines the interconnected relationship between that legal practice and the surrounding context, over time, and how did that impact strategy and tactics that litigants applied in their work.

### **A. Public law Litigation in Egypt**

The public law litigation has always been institutionally associated with the work of human rights organizations. Throughout the past four decades, which is the lifetime of this legal practice, litigants were educated, trained, and employed by these organizations;

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<sup>26</sup> *Ezzat*, (2019) at 31.

<sup>27</sup> *Ezzat*, (2019) at 10.

<sup>28</sup> By the time president Sisi cracked down on the Muslim Brotherhood and imprison thousands of its membership, the organisation had severed its ties with all different ideological opposition in the country including the civil society and human rights organisation. Many of the lawyers working in human rights organisations blamed the MB for the political deadlock that Egypt reached which paved the way for the military coup, led by Sisi, to succeed. That's why a number of the lawyers opposed the idea of providing the MB detainees legal assistance which was criticised for not serving the human rights of those detainees. This is one of many incidents that *Ezzat*, (2019) at 31 mentions when lawyers leaned toward their political opinion on the expense of their commitment to the universality of human rights.

such a close association shaped the nature, identity, and strategies of that legal practice and nurtured it.<sup>29</sup> A result of such a close association with human rights organisations, public law litigation was resisted by the state as part of its general opposition to the expansion of civil society; it was also met by the social stigma of being funded by the West.<sup>30</sup> This part of the chapter creates a timeline for the evolution of public law litigation in Egypt and its institutional relationship with human rights organizations.

### 1. Pre-public Law Litigation Phase (1985 - 1993)

Public interest lawyers benefited immensely from Egypt's human rights movement; one of the oldest rights movements in the whole Arab region.<sup>31</sup> In 1985, Egyptian Organization for Human Rights ("EOHR") was established as the Egyptian branch of the Arab Organization for Human Rights ("AOHR") founded by a majority of leftists and Marxist activists,<sup>32</sup> nationalists,<sup>33</sup> and a limited number of liberal activists.<sup>34</sup> Public law litigation was established on EOHR legacy of human rights work that rests on a cross-border connection with international organizations such as the UN council on Social and Economic Rights.<sup>35</sup> By 1993, the internal conflict hindered a lot of the organization's capacity to grow. Several nationalist leaders withdrew from the organization as early as in 1991 when a decision was made to seek funding from foreign entities to cover for the financial needs to expand the organization's work.<sup>36</sup> The internal structure, whether an

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<sup>29</sup> Interview with Gasser Abdel Razek, Executive Director, the Egyptian Initiative for Personal Rights, in Cairo (July 25, 2017).

<sup>30</sup> Interview with Islam Khalifa, Public interest lawyers, the Egyptian Initiative for Personal Rights, in London (June 23, 2017).

<sup>31</sup> The only two exceptions are "The Tunisian League for Human Rights" established in 1976 and the Palestinian "Right" organizations in 1978. The two experiences originated as a reaction to atrocities committed by colonial powers and aimed at using the available human rights tools for redress.

<sup>32</sup> *The list includes Hani Shukrallah, Bahei el-Dien Hassan, M. el-Sayyid Saied, Saad el-Dien Ibrahim, Hisham Mubarak, Aida Seif El-Dawla.*

<sup>33</sup> Like Negad El-Borai and Hafez Abou Sieda who was still heading the organisation at the time this research was written.

<sup>34</sup> Shash, Yasmine, *The Formal Birth of the Human Rights Movement in Egypt*, 1 The Arab Reform Initiative 2 (2017) and *Supra* note 30.

<sup>35</sup> Stork, Joe, *Three Decades of Human Rights Activism in the Middle East and North Africa: An Ambitious Balance Sheet* In Beinin j. (ed) *Social Movements, Mobilization, and the Contestation in the Middle East and North Africa* 107 (Stanford University Press, 2013).

<sup>36</sup> *Shash*, (2017) at 8.

open membership political platform or a closed membership organization, was another point of contention between the organization's leadership which pushed the Marxists away.<sup>37</sup> There were other reasons for conflict within the leadership amongst which were the nature of the organization's solidarity with the Islamists, the relationship with the ruling regime, and the organization's position from the legal framework governing the work of the civil society.<sup>38</sup> The organization continued to lose membership and leading figures whenever any of these topics were discussed.

Despite its internal division, EOHR created a foundation for numerous human rights organizations to be established and trained a generation of activists on the human rights discourse who ventured into a new type of human rights work that is public law litigation.<sup>39</sup>

## **2. The First Generation of Public Interest Lawyers (1993 - 2002)**

In 1994, human rights and leftist activist, Hisham Mubarak, initiated the Center for Human Rights Legal Assistance ("CHRLA"). CHRLA was the first human right organization to rely primarily on litigation to advance human rights. CHRLA's mission was to provide free legal service to the widest number possible of victims of human rights violations as a mechanism to expose the deteriorating rights-condition in Egypt.<sup>40</sup> A number of specialized organizations followed the lead of CHRLA. The Women's Legal Aid Center was established in 1995 to provide legal assistance to victims of gender-based violations. The Land Centre for Human Rights was established in 1996 to legally empower peasants victims of land trapping in the second half of the 1990s. In 1997, the Human Rights Center for the Assistance of Prisoners was established to assist prisoners exposed to torturous treatment in detention. These organisations provided legal assistance to vulnerable groups, political opposition, and marginalised classes.

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<sup>37</sup> *Shash*, (2017) at 9.

<sup>38</sup> *Shash*, (2017) at 4.

<sup>39</sup> *Supra* note 35.

<sup>40</sup> Moustafa, Tamer, *Public Interest Litigation and the Egyptian Movement*. In Anthony Tirado Chase and Amr Hamzawy (eds.) *Human Rights in the Arab World: Independent Voices* 158 ( Pennsylvania Press, 2006).

Leftist and Nasserite lawyers who were active in the Freedom Committee of the Bar Association in the 1980s made a great contribution to organizations in this wave.<sup>41</sup> The new organizations operated as legal clinics and depended heavily on lawyers to conduct their work instead of politicians and human rights activists. Lawyers working in the new organizations were hired as legal consultants.<sup>42</sup>

The political context has always been a determining factor to the success and failure of public law litigation in Egypt. Throughout the 1990s, the new organizations benefited from the relative independence of the Egyptian judicial system. At that time “*the only possible way to advance reform was through judicial battles.*”<sup>43</sup> By 1997 public law litigation became the main strategy used to strike down state legislature violating human rights inviting new organizations to practice it.<sup>44</sup>

An independent supreme constitutional court was central for public law litigation to flourish. Chayes claims that the existence of an independent judicial system is imperative in order to achieve justice as the judiciary is established to serve as an institutional custodian of justice in a legal system.<sup>45</sup> The Egyptian judicial system, with the establishment of the Supreme Constitutional Court (“SCC”) in 1979 and the judicial reforms to the administrative and civil courts in 1984 offered public law litigation an opportunity for growth. The Egyptian judiciary offered a suitable venue for public interest lawyers to challenge the state’s oppressive policies. In its early phase, public interest lawyers preferred to take their cases all the way to SCC as it presented the most effective route to change the legal infrastructure by deeming contested laws unconstitutional.<sup>46</sup> Decisions by SCC justices enforce immediate, and permanent, change

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<sup>41</sup> Ezzat, (2019) at 22.

<sup>42</sup> Interview with Adel Ramadan, Senior cause lawyer, the Egyptian Initiative for Personal Rights, in Cairo (Dec. 15, 2016).

<sup>43</sup> *Supra* note 29.

<sup>44</sup> Moustafa, (2017) at 159.

<sup>45</sup> *Supra* note 21.

<sup>46</sup> Brown, N. And Hesham, N. *Egypt’s Judges Step Forward: The Judicial Election Boycott and Egyptian Reform*. Carnegie Endowment for International Peace. Available at: <https://carnegieendowment.org/files/PO17.borwn.FINAL.pdf> P.5. (2005). According to regulations, a case needs a referral from a lower court in order to reach the Supreme Court. During the 1990s judges of lower courts were very lenient with public interest lawyers and enabled them ways to reach SCC. An example of that is CHRLA’s case against Law 35/1976 governing the trade union elections. The organisation filled 50 cases in front of different Administrative and Civil courts, and managed to obtain 10 successful transfers to SCC. Despite being known for its slow process, SCC issued its first verdict with the unconstitutionality of



to the stricken laws, and do not only achieve justice in the case at hand.<sup>47</sup> In many instances, SCC judges decided in favor of democratic values, such as when they forced the Mubarak regime to legalize the Nasserite party in 1988 and when they decided on the unconstitutionality of the electoral laws, forcing the dissolution of the People's Assembly in 1987 and in 1990.<sup>48</sup> Under the liberal leadership of SCC Chief Justice Awad al-Mur (1991 -1998), public law litigation thrived.

A lot was achieved by public interest lawyers in the SCC halls in the 1990s. The most important victory was that Egypt's international commitments became legally enforceable once ratified by relevant authorities. During the leadership of al-Mur, Egypt's commitment to ICCPR and ICESCR became more than an academic debate but was used to support the court's interpretation of constitutional provisions. In 1997, SCC found that Law 32/1964 organizing civil association violated ICCPR, stating "*The human rights values summarised in Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights, which is consistently practiced in democratic countries, are parts of the shared human heritage which is the reason why the Egyptian constitution protects it*";<sup>49</sup> with that, SCC granted constitutional power to these international agreements including the non-binding UDHR.

In the early 2000s, the political context became very hostile to the practice of public law litigation. The expansion of the public law litigation in the SCC intimidated the ruling regime which was mostly annoyed by Awad al-Mur's human rights language in his formal rulings as well as his public statements.<sup>50</sup> Mubarak's regime was annoyed also by the exacerbated number of public law litigation cases challenging the constitutionality of the ruling party's legislation and of activist judges in regular judiciary who grant them referrals to SCC without delay.<sup>51</sup> As a reaction, Mubarak imposed his control over the SCC as he broke a two-decade norm of appointing the most senior

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the law only a few months after receiving the case. See Moustafa, p. 58 for more details on the proceedings of the case.

<sup>47</sup> *Supra* note 44.

<sup>48</sup> Moustafa, (2006) at 110.

<sup>49</sup> *Supreme Constitutional Court, decision no. 46/17, (4 January 1997). Extracted from EIPR's institutional database.*

<sup>50</sup> *Supra* note 44.

<sup>51</sup> Moustafa, (2017) at 156.

justice on the bench to be the chief justice position.<sup>52</sup> In 2001, after the retirement of Chief Justice Asfour, Mubarak appointed Justice Fathi Naguib from outside the court,<sup>53</sup> a justice who is known for his affiliation with the ruling regime and proved his loyalty over the years as he drafted the majority of the latter's illiberal legislation (including Law 153/1999 governing NGOs).<sup>54</sup> Also, Mubarak expanded the number of SCC justices by 50% to make sure that activist judges have less influence from now on.<sup>55</sup> The new order gave the Executives control over the court and impacted the litigation strategy of human rights organizations, which shifted to the Administrative Court, leaving the SCC to limited occasions. The switch to the Administrative Court resulted in public interest lawyers' focus on smaller-scale litigation.<sup>56</sup>

The hostile political context impacted the unity of the working organizations. CHRLA, for example, broke into two groups: a soft-liner group which took into establishing the Association for Human Rights Legal Aid to continue to work through the state's official channels, and, another, hard-liner group which established a law firm named Hisham Mubarak Center for Legal Aid to continue its struggle against the regime's authoritarianism.<sup>57</sup>

### **3. The Second Generation of Public Interest Lawyers (2002 - 2013)**

In 2002, the Egyptian Initiative for Personal Rights ("EIPR") was founded to address issues of the interpersonal sphere of rights including freedoms such as religion, sexuality, and thought which for long was stigmatized as controversial rights in Egypt. Until the establishment of EIPR in 2002, the vast majority of human rights organizations were concerned primarily with civil and political rights.

EIPR set a tone for many other organizations to follow its lead. In 2004, human rights activist Gamal Eid established the Arab Network for Human Rights Information

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<sup>52</sup> *Supra* note 29. .

<sup>53</sup> *Supra* note 29.

<sup>54</sup> Moustafa, (2017) at 166. Law 153 for the Year 1999, (Official Gazette, Issue 21 (cont) (a), 27 May 1999).

<sup>55</sup> Four of the new justices were appointed from the court of cassation and one from a Cairo court of appeals. All of them were known for their loyalty to the Mubarak regime. *See supra* note 55.

<sup>56</sup> Moustafa, (2017) at 155.

<sup>57</sup> *Supra* note 29.

(“ANHRI”) which works primarily on freedom of expression and thought in Egypt and the Arab World. Also, the Association for Freedom of Thought and Expression (“AFTE”) was founded in 2006 to defend students’ and academic rights as well as digital freedoms. In 2009, Khalid Ali, prominent public interest lawyer, established the Egyptian Center for Social and Economic Rights (“ECSER”) which led numerous legal confrontations with the Mubarak regime. A very celebrated ECSER legal victory was the extraction of the right to a minimum wage for state employees. The case was a huge win at a time when neoliberal businessmen from the Mubarak regime controlled politics in Egypt. All of these organizations adopted public law litigation as a strategic tool for their work alongside other tools.

These organizations hosted, and nurtured, the second generation of public interest lawyers, whose work was coordinated and conducted collectively. Previously, organizations were challenged by the ideological and normative divide that weakened any potential of coordinating the work of different organisations; something that was avoided by these organizations as human rights values assumed equal normative authority to that of politics over litigation.<sup>58</sup> Public law litigation was practiced in a collective setting; the vast majority of cases filed depended on cross-organization cooperation in which litigants worked in groups.<sup>59</sup> “*Coordinating collective legal work isn’t always an easy task,*” said Ramadan referring to instances when controversies emerged to obstruct their group work. Litigants might carry different opinions about the suitable tactic to adopt and the legal argument to use in the case which contributes to these controversies; however, in the end, finding consensus among these conflicting debates advanced the performance of public law litigation. These organizations used new instruments in their work, including international advocacy and regional litigation; many cases they filed adopted a robust rights-based legal reasoning and carried a clear stance in pushing Egypt to commit to its international obligations.<sup>60</sup>

In addition to the classical interest of public law litigation to influence the legal infrastructure in favor of wider protection to individuals’ rights, one strategic aim of

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<sup>58</sup> Albrecht, Holger, *Raging Against the Machine: Political Opposition Under Authoritarianism in Egypt*. 63 (Syracuse University Press, 2013).

<sup>59</sup> *Supra* note 42.

<sup>60</sup> *Supra* note 42.

public law litigation became to inject the human rights discourse into legal reality.<sup>61</sup> Starting the second generation onwards, public interest lawyers, purposefully, used litigation as an advocacy tool to create a narrative that documents abuses and holds abusers accountable; at the same time, lawyers used this narrative to argue their cases in the court of law aiming at bringing change on the human rights reality of Egyptians. That's why cases were argued on the ground of the incompatibility of national law with the international regime of human rights. In a way, public law litigation becomes a mechanism of enforcement of international human rights law.<sup>62</sup>

#### 4. Post-revolution Public Law Litigation (2013 - 2020)

Politically, the post-2013 years were very controversial in Egypt. The state cracked down on the Muslim Brotherhood after the arrest of the former president Mohamed Morsi, and the mass arrests of its membership. In many instances, the ruling regime used courts and laws to punish and side-line its opponents. The working organizations faced a challenge because the scale of human rights violations exceeded their capacity to offer legal assistance due to the large number of victims and the diverse and nuanced type of violations like enforced disappearance of political activists and extrajudicial executions.<sup>63</sup>

In that context, human rights organizations came under immense pressure because the outcome of its litigation work wasn't the least rewarding. The decision to establish a new organization became an act of resistance on its own.<sup>64</sup> That's why a new generation of organizations emerged to address these shortcomings; these organizations relied mainly on a decentralized structure of management. These organizations aren't registered as NGOs but some operate as legal offices and some others work informally. These organizations emerged from a local need in various governorates, that's why each branch has a different program, financing plan, membership model, and model of operation.<sup>65</sup> The first organisation of that sort established as early as 2011 named "No for Military Trials" to defend protestors and political activists undergoing military trials. At that time,

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<sup>61</sup> *Supra* note 29.

<sup>62</sup> *Supra* note 29.

<sup>63</sup> Ezzat, (2019) at 37.

<sup>64</sup> Mirshak, Nadim, *Rethinking Resistance under Authoritarianism: civil society and non-contentious forms of contestation in post-uprisings Egypt*, 18 Social Movement Studies 712 (2019).

<sup>65</sup> Shash, (2017) at 19.

civilians' referral to military trials was a commonly used practice by the regime. A similar organisation was formed post-2013 named "Freedom for the Brave" to do similar work to that of any other human rights organization; it documents cases of torture and abuse among prisoners, conduct advocacy campaign to increase public awareness of their conditions, and provide legal aid to them.<sup>66</sup> Other lawyers, who believed in the cause of defending prisoners affiliated with political Islam, started to organise their effort post-2013. Islamist lawyers were influenced by the legacy of human rights organizations which inspired them to establish umbrella organizations to incubate their lawyerly work.<sup>67</sup> Lawyers involved in these organizations as volunteers; majority of them are employees in other human rights organizations or private law firms.<sup>68</sup> Because of its informal set-up, these organizations managed to do work at times when human rights organizations suffered from the regime's close surveillance. The documentation work of the new organizations was satisfying to an extent; however, the political context made it impossible for their litigation work to have an impact.

### **B. Public Interest Lawyers in Egypt**

Public interest lawyers are law professionals who willingly engage with public law litigation motivated by their political, ideological, or humanitarian affiliations. They are the agents of the political movements established around litigation.<sup>69</sup> A number of factors shaped the normative character of public interest lawyers such as their political background, their education and training in international human rights law, and their professional capacity as legal consultants in human rights organizations.<sup>70</sup> This section discusses two important factors shaping the character of public interest lawyers; these are the creation of their normative affiliation through education and professional training in international human rights law, and the ethical code they follow in dealing with their clients.

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<sup>66</sup> Shash, (2017) at 20.

<sup>67</sup> Ezzat, (2019) at 38.

<sup>68</sup> *Supra* note 66.

<sup>69</sup> Ezzat, (2019) at 46.

<sup>70</sup> *Supra* note 69.

## 1. Normative and Professional Affiliation

The first generation of public interest lawyers shared a common affiliation to the leftist ideology. Most of the lawyers involved in public law litigation were associated with leftist political parties like al-Tagammu' or the Nasserite party.<sup>71</sup> The introduction of public interest lawyers to the international regime of human rights was only possible through human rights organizations. At that time, International human rights law was barely part of lawyers' education in Egypt.<sup>72</sup> Even after graduation, a typical lawyer wouldn't have the opportunity for professional training in that body of law. Human rights organizations offered an opportunity for public interest lawyers to develop their professional skills in that area of the law, its standards, and the jurisprudence of international and regional mechanisms of human rights protections such as the Inter-American and European Human Rights Courts.<sup>73</sup> Human rights organizations hosted numerous opportunities to train their staff and other interested lawyers on fair trial standards and the judicialization of human rights in order to prepare them to fulfil their function.<sup>74</sup> Over time, public interest lawyers turned into a professional group politically motivated to engage in public affairs and trained to adjudicate to protect individuals' rights.

As employees in human rights organizations, public interest lawyers were exposed to a plethora of social movements and campaigns that influence their way of thinking.<sup>75</sup> The collective nature of work within these organizations made the connection between human rights activists and lawyers a daily event; something that shaped public interest lawyer's understanding of the law and its practice.<sup>76</sup> In return, human rights activists relied on public interest lawyers' technical expertise to advance their demands and to obtain state recognition for them.<sup>77</sup> For years, public interest lawyers worked on

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<sup>71</sup> Ezzat, (2019) at 35.

<sup>72</sup> Ezzat, (2019) at 13.

<sup>73</sup> Ezzat, (2019) at 14.

<sup>74</sup> *Supra* note 73.

<sup>75</sup> Ezzat, (2019) at 27.

<sup>76</sup> *Supra* note 29.

<sup>77</sup> *Supra* note 76.

transforming economic, social, and political demands of social movements into recognized rights in courts.<sup>78</sup>

The 2011 revolution was formative in the history of the public interest lawyers' community as a large number of lawyers became interested in practicing public law litigation. That sudden expansion of the community of public interest lawyers had its limitations, obviously, because human rights organisations didn't have the capacity to invest in their training the same way that had happened previously.<sup>79</sup> The political volatile context resulted in bringing clashes forward between members of the community. Some were not willing to defend members of the LGBTQ community because they didn't empathize with their sexual rights.<sup>80</sup> Others refused to defend Islamist prisoners in the post-2013 era.

## **2. Public Interest Lawyer - Client Relationship**

There is no one unanimous definition of public interest lawyers that fits all different contexts.<sup>81</sup> In the US, there is a great resemblance between the work of public interest lawyers and traditional lawyers working on a pro-bono class action.<sup>82</sup> Both types of lawyers provide their clients with legal empowerment and facilitate their access to the legal system to redress their grievances.<sup>83</sup> The fact that public interest lawyers engage with clients whose human rights are violated doesn't make their professional practice any different from any other type of lawyers. There are general rules that apply to all practicing lawyers to not act deceptively and introduce false evidence, and not mislead a third person.<sup>84</sup> These rules ensure that legal representation is honest. Despite the resemblance, there is room for a distinction that separates public interest lawyers from others.

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<sup>78</sup> Ezzat, (2019) at 28.

<sup>79</sup> *Supra* note 70.

<sup>80</sup> *Supra* note 29.

<sup>81</sup> Henning, Peter J., *lawyers, truth, and honesty in representing client*, 20 Notre Dame Journal of Law, ethics & Public Policy 213 (2014).

<sup>82</sup> *Supra* note 81.

<sup>83</sup> Ezzat, (2019) at 6.

<sup>84</sup> *Supra* Note 81.

A known rule is that Lawyers defend their clients and their interests despite their values or motivation.<sup>85</sup> This rule doesn't necessarily apply to public interest lawyers who are engaged with cases that involve victims of human rights violations because they believe in their cause and right. Public interest lawyers challenge state policies and laws in different judicial platforms in order to pave the way for their political movement's gain.<sup>86</sup> In that context, lawyers are activists, agents, who engage with the law in order to advance the demands of their political movement.

Public interest lawyers' focus on public issues doesn't necessarily separate them from other types of lawyers. Pro-bono lawyers, also, work towards changing state policy; the motivation behind their actions is what separates them from public interest lawyers. A pro-bono lawyer would engage with state policies motivated by self-interest to win the case for his clients, while public interest lawyers would be motivated by the aspiration of social change. Public interest lawyers are typically motivated by the common cause of enabling a platform for marginalized groups and classes to speak against state ideology and practices.<sup>87</sup>

Public interest lawyers practice two types of legal practices; they provide legal assistance to victims of human rights so they, like conventional lawyers, usually wait for clients to seek their legal services.<sup>88</sup> Public interest lawyers, also, practice public law litigation, which is a planned type of legal practice established around exploiting legal loopholes to file cases in front of different judicial platforms to bring about legal change; lawyers, sometimes, resort to taking the initiative and seek identified clients in order to engage with certain topics.<sup>89</sup> In many cases, lawyers file lawsuits under their name or using the name of one of their colleagues if they are eligible and affected by the policy they want to challenge.<sup>90</sup> For instance, EIPR wanted to challenge state discrimination against the Baha'i minority for a long time, which wasn't possible because they lacked a connection to members of the minority; something that changed when a Baha'i employee

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<sup>85</sup> Ezzat, (2019) at 7.

<sup>86</sup> *Supra* note 85.

<sup>87</sup> *Supra* note 85.

<sup>88</sup> Ezzat, (2019) at 15.

<sup>89</sup> Interview with Osama Diab, Senior Economic Researcher, the Egyptian Initiative for Personal Rights, in London (July 4, 2017).

<sup>90</sup> *Supra* note 89.



extended the connection between EIPR and the Halem family.<sup>91</sup> The relationship between EIPR public interest lawyers and their clients is very particular as it was established on personal rather than a professional foundation. This relationship ensured a close involvement of Halem and his family in the proceeding of the case; they didn't have much contributions to the making of the legal argument used by the public interest lawyers, but they were consistently consulted, also, they were asked in many instances to participate in other non-legal work associated with the case such as appearing in TV interviews.<sup>92</sup>

### **C. The Baha'i Public Law Litigation Case**

Public interest lawyers, throughout their work on the case, made a number of tactical decisions towards the fulfilment of the overall strategy. As mentioned before, EIPR had always a strategic interest in minorities' rights; for years, EIPR lawyers followed up on the development of the Baha'is predicament due to the lack of state recognition of their minority and the legal struggle of their everyday life. By the time EIPR started working on the case, in 2007, lawyers had accumulated sufficient knowledge to engage.

Lead lawyer, Adel Ramadan, described the process through which EIPR developed its strategy working on the Baha'i case. The immediate goal of the case was to relieve their clients, Raouf Hindi Halem and his children, from state arbitrariness denying them the equal right to other Egyptian citizens to issue official documentation proving their identity.<sup>93</sup> Similar to any other public law litigation case, Ramadan had other strategic goals in mind. Lawyers knew that adjudicating and winning Halem's case in front of the Administrative Court<sup>94</sup> will establish a precedent, a legal foundation, for other members of the Baha'i minority to follow its lead.<sup>95</sup> That's to say, a victory in Halem's case should maximize the opportunity of other Baha'is to be treated as equal citizens. In addition to

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<sup>91</sup> *Supra* note 42.

<sup>92</sup> *Supra* note 42.

<sup>93</sup> *Supra* note 42.

<sup>94</sup> In a civil law system, like that applied in Egypt, the court doesn't give much attention to precedents. The administrative court, as well as the supreme constitutional court, is known to give weight to precedents before making decisions.

<sup>95</sup> *Supra* note 42.

that, lawyers working on the case wanted to change the state policy towards citizens of unrecognized minorities and to alter societal opposition and hostile opinion against them through exposing state hostility towards these vulnerable groups of the society.<sup>96</sup>

Institutionally, EIPR was interested in Halem's case because it fits within its overall strategic framework on abolishing the mandatory religion category in official documents for all Egyptian citizens.<sup>97</sup> For a long time the organization campaigned against the state decision demanding that citizens disclose their religion in that category as it tightens the control of state security over citizens' personal rights i.e. religious freedoms.<sup>98</sup> The strategy was quite reflective of the Baha'i case, and the grievances of members of the Baha'i minority in a broad sense. Public interest lawyers of EIPR, and later ECSCER, were motivated to engage with that case in order to offer the Baha'i minority a legal platform to challenge the state narrative determining what is a recognized religious minority and what is not; they believed achieving this strategy would enhance the overall condition of freedom of belief in Egypt.<sup>99</sup>

Understanding the impact of the Baha'i case entails a detachment from the binary of victory x defeat in order to grasp the impact of public law litigation from an alternative lens.<sup>100</sup> There is a need to shift from the conventional modern ways of perceiving the work of litigation of human rights cases mainly because its evaluation using the same scale as other cases of different nature (business, torts, ... etc) is certainly deceiving since it doesn't capture the multiple-layered nature of these cases. As demonstrated earlier, litigating human rights cases, unlike any other case, is not a purely legal practice but rather an act of political activism against oppressive laws and harmful policies; it's also a tool for advocacy which enables victims of human rights violation to reframe the abuses they are exposed to. That's why it invites a more accommodating model of evaluation; one that's multi-layered and wide enough to understand the context surrounding the cases, grasp the multiple perspectives of actors involved in the litigation process (victims,

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<sup>96</sup> *Supra* note 42.

<sup>97</sup> Egyptians are legally obliged to register their religion in the mandatory religion category in official documents. Members of unrecognized religious minorities suffer a lot because they cannot register their religion in official documents.

<sup>98</sup> *Supra* note 42.

<sup>99</sup> *Supra* note 42.

<sup>100</sup> Fallah, D.G. Assessing Strategic Litigation Impact on Human Rights, 10 Rev. Direito Prax 762 (2019).

NGOs, lawyers, ...etc), and trace the impact of the cases over the years.<sup>101</sup> A more accommodating model of evaluation approaches public law litigation from the lenses of a political movement; hence, it evaluates its process according to the same parameter.

The evaluation model used in this research focuses on two pillars equally important to that legal process. The first pillar focuses on the institutional angle of the litigation process: the organizational effort behind the case. The focus on that aspect of the litigation necessarily entails an examination of the role played by multiple actors involved in the litigation work including the plaintiffs themselves as much as concerned human rights organizations; it also examines ways by which public interest lawyers organize their legal action which is typically conducted in a collective setup.<sup>102</sup> Similar to a political movement, public law litigation involves a lot of organization between different actors involved in its collective action. The work on the Baha'i case involved close cooperation between litigants from EIPR and others from the ECSEER. Coordinating work between members of the litigation teams wasn't an easy task and they were frequently faced with intellectual and professional clashes. Organizing such work was another learning lesson that the case presents.

The second pillar of the evaluation model focuses on the legal impact of the cases not only its instant effect in the court (victory x defeat lens) but also its long-term legal impact on other potential litigation actions in similar cases. In a way, this pillar doesn't stop at the outcome of the litigation action that was concluded in 2009 and goes beyond that to examine its long-term effect which might still be ongoing. The focus on the strategic goal behind the case instead of its instant outcome makes the litigation case a continuous, and dynamic, process. This is the outcome of the litigation movement: how the case fulfilled its strategic purpose in a wider realm of mobilization and action.<sup>103</sup> From those lenses, the Baha'i case is a single action within the wider framework of a movement aiming at gaining citizen rights of unrecognized religious minorities; that's why this case is examined from a wide perspective, which enables the research to

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<sup>101</sup> *Supra* note 100.

<sup>102</sup> Vanhala, Lisa. *Legal Opportunity Structure and the Paradox of Legal Mobilization by the Environmental Movement in the UK*, 3 *Law & Society Review* 525 (2012).

<sup>103</sup> *Supra* note 102.

understand a number of tactical decisions that were made during the legal action that would appear ambiguous otherwise.

### III. The Precarious Life of Baha'is in Egypt

The Bahai'yya, founded by Bahauallah, is an independent religion that originally grew out of the Shi'i Islamic faction in Iran.<sup>104</sup> The religion attracted many adherents in the Arab part of the Ottoman Empire when Bahauallah was exiled from Iran to Akka (Acre) on the coast of Palestine and made its way to Egypt in the nineteenth century.<sup>105</sup> In the 1860s, the Egyptian Baha'i minority was formed by Iranian Baha'i merchants who settled in Cairo and Alexandria.<sup>106</sup> The Bahai'yya attracted widespread attention when Abdulbaha - then the spiritual leader of the religion following the death of his father Bahauallah - visited Alexandria in 1910. At that point, the Egyptian Baha'i minority flourished and benefited from the atmosphere of religious diversity that existed in the 1910s and 1920s. The first National Spiritual Assembly (NSA) of Egypt was established in 1924; it was the first one of its kind in the world.<sup>107</sup> As part of NSA, the Baha'i minority established a publishing house in Cairo that printed sacred writings and religious literature for the whole Arab world, created community centers in Cairo and Alexandria, issued marriage certificates as part of its effort to collect and codify Baha'i laws of marriage, divorce, inheritance and personal status for the first time.<sup>108</sup> NSA organized the affairs of members of the Baha'i minority and took care of family matters and funerals, and represented their interests in an unsuccessful attempt to obtain a *Milla* status through petitioning the parliament.<sup>109</sup>

Al-Azhar and the Grand Mufti opposed the increased activity of the Baha'i minority and the expansion of its membership.<sup>110</sup> The Bahai'yya was long opposed by religious *Sunni* scholars even before its expansion in the 1920s. As adherents of a post-

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<sup>104</sup> Dana, Vargha. *Family Law and citizenship: the case study of Egyptian Baha'is Vii (2014)* (Dissertation submitted to the Law Department, the American University in Cairo).

<sup>105</sup> *Supra* note 104.

<sup>106</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* 136 (2005).

<sup>107</sup> Dana, (2014) at viii.

<sup>108</sup> Pink, Johanna. *A Post-Quranic Religion between Apostasy and Public Order: Egyptian Muftis and Courts on the Legal Status of the Baha'i Faith*. 10 *Islamic Law and Society* 412 (2003).

<sup>109</sup> Pink, (2005) at 138.

<sup>110</sup> Pink, (2005) at 139.

Quranic religion, Baha'is believe that god's revelation doesn't end with Prophet Mohamed; something that contradicts with the foundation of Islam, and, hence, fuelled al-Azhar opposition.<sup>111</sup> As early as the 1890s, Muslim scholar, Rashid Rida, publicly condemned the Bahai'yya to counter his mentor, Mohamed Abduh, expression of fondness of the innovation and modern ideas of the new religion.<sup>112</sup> The highest frequency and number of religious opinions (“*fatwas*”) concerning Baha'is was during the years (1945 - 1960).<sup>113</sup> Another peak of opposition to the Bahai'yya was in 1985 and 1986 when a declaration by the direction of al-Azhar denouncing Baha'is as infidels was published in most of the country's newspapers.<sup>114</sup> This campaign followed the arrest of about 50 Egyptian Baha'is in February 1985.<sup>115</sup>

The opposition of Al-Azhar and the Grand Mufti to the Bahai'yya had influenced the public opinion as well as state institutions. In 1960, President Nasser issued a Decree no. 263/1960 to dissolve the Baha'i communities. At that time, there were 13 Local Spiritual Assemblies in Egypt and 11 further communities without an institutional status.<sup>116</sup> The property of the community was seized immediately as a reaction to the new law. Nasser's decision followed a wide public campaign by Al-Azhar scholars condemning the Bahai'yya. At that time, Nasser's regime adopted a strategy of subordinating religious institutions to state control or to dissolve them; al-Azhar's campaign pressured him to choose the second option.<sup>117</sup> Nasser's decree deviated from the state's earlier accommodating approach towards the Bahai'yya expressed by the state council's opinion no. 583 issued on 19 November 1952 which includes Baha'is in its

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<sup>111</sup> *Pink*, (2005) at 140.

<sup>112</sup> *Supra* note 107.

<sup>113</sup> *Dana*, (2014) at 15.

<sup>114</sup> *Supra* note 111.

<sup>115</sup> In the events of this opposition wave, Grand Mufti 'Abd al-Latif Hamza told Uktubar and al-Nur magazines that he approved the criminal prosecution of Baha'is, and the former minister for Pious Endowments and Azhar affairs 'Abd al-Mun'im al-Nimr agreed. *See Pink* (2005) for a more detailed account on al-azhar opposition to the Baha'iyya.

<sup>116</sup> *Supra* note 109.

<sup>117</sup> *Supra* note 109.

definition of “non-muslims” citizens as presented in article 3 of the Law no. 68 for the year of 1947.<sup>118</sup>

Nasser’s decree was a huge setback to Baha’is as it trapped them in a hostile legal infrastructure which violated their rights as citizens on many grounds. Both the law and courts contributed to making these violations a structural order. For years, the Egyptian state didn’t recognize Bahai’yya as a religion, hence, its members were denied the right to register their marriage or to issue official documents that mention their religion. This chapter focuses on how the legal system in Egypt works consistently to impose difficult conditions on a group of people for the reason of their membership to the Baha’i minority.

### **A. The Legal Framework Governing Baha’is in Egypt**

Two legal events shaped the legal framework governing Baha’is in Egypt: these are Law no. 263 for 1960 on the dissolution of the Baha’i spiritual assemblies and the constitutional court decision of 1975 endorsing its constitutionality. These two actions were concerned with a specific area of Baha’is lives which is their practice of religion.

Law no. 263 for 1960 titled “*The Presidential Decision on the Matter of the Dissolution of the Baha’i Spiritual Assemblies*” was issued on 17 July 1960 by a presidential decree during a state of emergency and under the 1958 interim constitution of the United Arab Republic.<sup>119</sup> The legislation was the first to organize the affairs of Baha’is in Egypt and was limited to dissolving their meeting centers and assemblies where they meet to practice their religious rites, pray and conduct other religious rituals, to socialize the teachings of their religion, and to preach for their belief to newcomers. On many occasions, courts interpreted the law to restrict the existence of the Baha’i minority; the loose language used to draft it helped in the process, particularly in the first

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<sup>118</sup> EIPR policy paper, *The Absent Basic Rights of members of unrecognized minorities in Egypt*, the Egyptian Initiative for Personal Rights. <https://eipr.org/publications/الغانية-الاساسية-الحقوق-سياسات-ورقة> مصر-في-بها-المعتز-ف-غير-الديانات-لأصحاب (published on 21 May 2019).

<sup>119</sup> The 1958 interim constitution of the United Arab Republic was the only constitution in Egypt that did not include any provisions for the protection of freedom of religion which indicates a rather restrictive position from unrecognised religious minorities. See Human Rights Watch. *Prohibited Identities: State Interference with Religious Freedom* (2007) at 31.

article instructing authorities “*To dissolve the spiritual assemblies and to take necessary measures to prohibit any individual or institution engaged in any activity previously conducted by these assemblies.*” From that perspective, any member of the Baha’i minority could be arbitrarily targeted for practicing their religion even in the privacy of their homes and could be subject to criminal sanctions up to three years in prison.

Following the enactment of the 1960 Law, members of the Baha’i minority were subject to arrests for conducting activity similar to the work of the Baha’is spiritual assemblies and to organize preaching groups for the Baha’i belief; they were also accused of organizing communal gatherings in their houses for the same purpose. Egyptian security services exploited the 1960 Law to justify six major crackdowns on the Baha’i community, in 1965, 1967, 1970, 1972, 1985, and 2001.<sup>120</sup> There is little information available on the first two arrests;<sup>121</sup> the extent of our knowledge is based on information provided in the preamble of the supreme court decision issued in 1975 that the first case no. 11278/1967 targeted 18 Baha’is and was filed on 20 July 1967; all victims, except one who died before the decision, were sentenced to six months in prison. The second case took place in the same year, filed on 27 April 1967, and involved 25 Baha’i victims; one of which was sentenced to a year in prison and the rest were fined 20 to 50 pounds.<sup>122</sup>

Soon after the establishment of the supreme constitutional court, a number of the 1967 case victims filed a case to strike down the 1960 Law for its violation of the Baha’is freedom of belief. Plaintiffs of the case aimed at extracting state recognition of this religious minority and, therefore, strike down the law on the ground of violating the rights of their minority members to practice their religious rites freely. The court decision didn’t come in their favor. Most importantly, the decision established some dangerous legal principles which appear, later, in every case that involved the Baha’i minority. The first legal principle is the separation of freedom of belief from that of practicing religious rites. The court found that the Baha’is freedom of belief is granted, while their right to practice is limited by the given public order which only accepts the existence of the three

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<sup>120</sup> *Human Rights Watch report. Prohibited Identities: state interference with religious freedom at: <https://www.hrw.org/sites/default/files/reports/egypt1107webwcover.pdf> 31 (2007).*

<sup>121</sup> *Pink*, (2005) at 148.

<sup>122</sup> This case’s lawyers filed for an appeal (appeal no. 1063/69) and a decision was reached in 22 September 1971 a month later victims filed for unconstitutionality of the 1960 law on which the case is based. As a result, the case was suspended until the supreme court reached its decision.



recognized Abrahamic religions.<sup>123</sup> The second legal principle is the relativity of equality between citizens. The court found that the legal principle of equality does not refer to the equal treatment of all individuals rather than only between individuals who are comparable with each other concerning their legal status.<sup>124</sup> The court said, “*The principle of equality before the law isn’t established on mathematically calculated equality applied to all people regardless of their different circumstances and legal status.*”<sup>125</sup> The decision made freedom of belief exclusive to religions that are perceived equal in Islamic Shari’a, which Bahaiyya is not.

As the supreme court heard the case, in 1972, a third case accused 80 Baha’is from Tanta, a town in Egypt’s delta, of violating the 1960 Law. This time, the accused Baha’is remained in prison for months as the trial extended before their release on procedural grounds.<sup>126</sup> Despite their acquittal, Baha’is were targeted by a fierce smear campaign claiming the existence of a connection between the minority members and Zionism, which motivated hostility against them. The timing, at the hype of the Egyptian-Israeli conflict, gave these narratives enough momentum and attracted widespread attention.<sup>127</sup>

Both criminal and administrative courts, heard cases involving Baha’i citizens, reverted to the 1975 constitutional court decision’s judgment to reject any attempt to enhance the Baha’is legal conditions. In 1987, a case didn’t fail on a procedural ground, on the contrary, the 45 persons arrested received the highest possible sentences: three years in prison and a fine. The court decision, which was revoked in the appeal stage in 1988, established its argument on the religious adherence of the accused and not any concrete action on their part.<sup>128</sup>

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<sup>123</sup> *Egyptian Baha’is v. Egypt*, Supreme Constitutional Court Decision no. 7/2, at para. 1&4 (March 1, 1975). Accessed through EIPR’s institutional database.

<sup>124</sup> *Egyptian Baha’is v. Egypt*, Supreme Constitutional Court decision 7/2, at para. 5 and 6 (March 1, 1975).

<sup>125</sup> *Egyptian Baha’is v Egypt*, Supreme Constitutional Court decision 7/2. at para. 6 (March 1, 1975).

<sup>126</sup> *Moustafa*, (2017) at 149.

<sup>127</sup> The original claim of the affiliation of the Baha’i religion and Israel goes back to a widespread media campaign that took place in the 1950s and the 1960s. The Baha’is who have a world centre in Haifa were accused of serving foreign interests, more particularly the interest of the state enemy, in several newspapers. The traces of this accusation continues until now. See Pink (2005) for expansive details about the original connection between the Baha’i minority and Haifa, and how this connection was later used as a claim to attack the minority members.

<sup>128</sup> *Supra* note 126.

In 2001, the last criminal case targeting Baha'is took place and involved 20 members of the Baha'i minority in Suhaj, an upper Egypt governorate. For the first time, the accusation wasn't based on the 1960 Law but on charges of "contempt of religion" existing in provision article 98 of the Penal Code, which is directed against those who do the immoral act of exploiting religion to weaken national unity. Despite the attempt to find a new legal foundation to prosecute Baha'is, all detainees were released after 10 months, four of them on bail, no chargers were raised.

### **B. How Did Courts Adjudicate Cases of Baha'i Subjects?**

Several cases involving Baha'i subjects highlight how problematic is the application of that legal framework. Over the years, different judges in different court levels issued contradictory decisions on the matter of the Baha'is legal status interpreting the same provisions of the law; some judges triumphed for the minority members, while others stood firmly against granting the same rights in other cases.<sup>129</sup> That lack of consistency is primarily because the framework governing Baha'is is very limited.<sup>130</sup> On many occasions, judges hearing cases on the topic of issuing a birth certificate, a passport, or an identification card find themselves engaging with the bigger question that is the lack of recognition of the Baha'i minority. Ideological and political beliefs play a pivotal role, through judicial discretion, in decisions on cases of Baha'i subjects. That's why many judges rejected Baha'is freedom because it contradicts with Shari'a and its principles. Some other judges denied Baha'is their citizens' rights because they didn't see them equal to other Egyptians, therefore, they aren't granted equal rights. In a few instances, judges decided in favor of Baha'is.

The following two cases are just examples of how cases with Baha'is subjects adjudicated in Egyptian courts. The events of the first case started, in 1983, with Samy Shawky El-Sayed Fahmy resorting to the Alexandria administrative court to revoke a decision by the civil status authority to deny him the right to issue an identification card

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<sup>129</sup> Al-Sayyid, Mostapha Kamel. *Rule of Law, Ideology, and Human Rights in Egyptian Courts*. Nathan, B. And Arjoman, Said A, (eds.) *Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*. 213 (State University of New York Press, 2013).

<sup>130</sup> *AL-sayyid*, (2013) at 214.

mentioning Baha'iyya as his religion; something that resulted in his expulsion from the faculty of education where he was studying.<sup>131</sup> In the end, the court decided in favor of Fahmy and demanded the civil status authority to issue his identification card mentioning his religion.<sup>132</sup> The court reasoned its decision on the foundation that the state should know the true religion of its citizens. At the same time, the court affirmed the decision made by the faculty of education to expel Fahmy saying that a Baha'i, who lost his path of true faith, could use his occupation to spread his false ideas to students of the next generation.<sup>133</sup>

A more recent case took place in 2001 when Nabil Habib Shehata filed for issuing a family identification card that includes all his family members whose documents carry different religions: Shehata's (1939) official religion is Baha'i, and whose siblings Azziza (1938) and Ansaf (1936) are registered as Christians; he previously married Nawal Aly El-Shoukery (1943) and had two children Karim (1981) and Fotna (1983) who are Baha'i. Shehata's first marriage was concluded by divorce and remarried Samia Abdel Aziz Mahmoud (1957), a Muslim, and had his third son Samih (1981) who is registered as a Muslim.<sup>134</sup>

Originally, Shehata filed for the document because it was requested from Samih, his youngest son to complete his file for mandatory military conscription. As he filed for the document, Shehata was subjected to interrogation by officials of the civil status authority to clarify his position from being a Baha'i who has a multi-religion family. Shehata was questioned about the possibility of his conversion from Christianity to another religion, and about the legality of his marriage from a Muslim female.<sup>135</sup> The interrogation preceded the court decision denying Shehata's request to issue such a document because it cannot be obtained for families whose members are registered with

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<sup>131</sup> *Shehata v. MOI*. Alexandria's Administrative Court Decision, at 407 (January 29, 1983).

<sup>132</sup> *Pink*, (2005) at 149.

<sup>133</sup> *Pink*, (2005) at 150.

<sup>134</sup> Shehata's family details were furnished in a letter by the Ministry of interior's legal and technical research division to the executive director of the civil status authority's office in west delta in Alexandria dated 15 October 2001.

<sup>135</sup> In an affidavit dated on May 14, 2001, Shehata stressed on the personal nature of the questions directed to him throughout the interrogation. He was asked about his religious practices. The affidavit was accessed through EIPR's institutional database.

conflicting religions. Moreover, the court added that his marriage is unrecognized by the state, void, on which anything established is also deemed null and void.<sup>136</sup>

Following that court decision, in May 2001, Shehata filed a plea to the legal resources department at the civil status administration in Abbasiyya, Cairo, to issue the same family registration document. This time, his request was rejected because it contradicts with public order and that the 1960 Law doesn't give him the right to issue any official documents mentioning the Baha'i religion.<sup>137</sup>

In the end, it's justifiable to say that judicial discretion played a fundamental role in shaping the law governing the lives of the Baha'i minority. The limited legal infrastructure, judicial discretion, and contradictory court decisions, gradually, made it difficult for Baha'is to seek redress in courts.

### **C. The Daily Life of Baha'is in Egypt**

The Egyptian state relied on the 1960 Law and the 1975 constitutional court's decision to justify discriminatory policies and practices against Baha'i citizens. The paramount policy here is the lack of state recognition to the Baha'i minority and the equal rights of its members to that of other citizens. It was due to the lack of state recognition that Baha'is operated in a completely informal setting, where all their official documents carry information different from that of their reality, this includes birth, death, marriage, and divorce certificates, as well as national identity documents.<sup>138</sup> The whole Baha'i population is a victim of structural conditions that violate their citizens' rights on a daily basis. Due to that they became a categorically vulnerable group exposed to potential violations by both the state and society.

#### **1. Matters of Civil Rights**

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<sup>136</sup> *Shehata v. MOI*. Alexandria Administrative Court no 1493, (9 December 2001).

<sup>137</sup> In his affidavit, Shahata explained the reasons that motivated him to approach the civil status department in Abbasiyya as a last resort: to go to the capital and approach central authority after the court failed him in Alexandria.

<sup>138</sup> *Al-Sayyid*, 2013, p.216.

The state refusal to renew Baha'is official documents made them a vulnerable group in the society. Historically, Baha'is relied on informal connection with state bureaucrats, and to a lesser degree on luck, to obtain their official documents. Baha'is official documents carry a variation of religions registered in the mandatory religion category; some of them carry documents mentioning Bahai'yya as their religion while others have '- ' or 'other' noted in their religion category. There was no system prohibiting the registration of other religions other than the three Abrahamic religions in official documents and the registration process happened manually which gave room for state clerks to make a decision on what to mention in citizen's documents. A situation that depended mainly on the arbitrary nature of the relationship between an individual and a government official and was conditioned by the absence of state control. It became a customary practice for Baha'is to issue their official documents in small neighborhoods where people knew each other and where they could rely on their personal connection to make that happen.<sup>139</sup> Despite the precarious situation, Baha'is managed to obtain official documents carrying their true religion.<sup>140</sup>

In 1995, Egypt modernized the official documents' registration system and introduced an automated system. The new system was placed under central control reducing the authority of clerks, which made it difficult for Baha'is to obtain official documents using their informal channels. In 2000, an internal directorate was issued by the Ministry of Interior's Civil Status Department (CSD) instructing state bureaucrats to allow only three religions - Islam, Judaism, and Christianity - to be listed in the mandatory category for religion on all official documents.<sup>141</sup> The directorate was preceded by Law no. 143/1994 which requires all citizens to register their religion in all official documents. Members of the Baha'i minority were cornered in a very critical position.

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<sup>139</sup> Cantini, Daniele. *Being Baha'i in Contemporary Egypt: An Ethnographic Analysis of Everyday Challenges*, 4 *Anthropology of the Middle East* 38 (2009).

<sup>140</sup> Baha'is adhere to their religion by the age of 16 and once they make their choice are expected to publicly proclaim their faith. One of the distinctive principles of the Baha'i religion is the rejection of the practice of Taqiyya, verbal renunciation of one's belief under persecution, a common practice among other Abrahamic religions. That's why Baha'is didn't have a choice but to fight for their recognition in Egypt. See Dana, (2014) at xiii.

<sup>141</sup> *Supra* note 139.

Since the Ministry of Interior limited registration to Abrahamic religions only, members of the Baha'i minority became forced to take one of two difficult decisions. The first choice is to register one of the recognizable religions by the state to mention in their official documents.<sup>142</sup> This choice makes its taker liable for fraud for violating article 72 of the 1994 Law; a punishable crime to 5 years in prison. The second choice is to refrain from issuing any of these mandatory documents, which essentially means to conduct one's life in the shadow away from any contact with the state. A decision that still violates the 1994 Law mandating Egyptians to issue official documents.

The lack of official documents made certain aspects of Baha'is life nearly impossible. Without parents' ID, children's birth certificates cannot be obtained and they cannot enroll in educational institutions. Baha'is cannot register for a bank account without an ID, and they cannot travel without a passport. Baha'is are denied a plethora of economic and social practices that are considered given rights to other Egyptian citizens.

## **2. Matters of Personal Status**

Personal status is another realm of discrimination against Baha'is. The personal status of minorities in Egypt, as in most other Muslim majority countries, are governed by the principles of their religions as instructed by their recognized religious authority.<sup>143</sup> This condition only applies to recognized religious minorities, which are the three factions of the Christian minority (Orthodox, Catholic, and Protestant) and the Jewish minority. The Baha'i minority as well as the Jehovah's Witnesses are unrecognized by the Egyptian state. In that condition, Baha'is' personal affairs (Marriage, divorce, and inheritance) are organized by Islamic Shari'a as the source of legislation in Egypt.<sup>144</sup>

That's why, the Baha'i marriages often take place within the community, concluded by religious authority from the minority, and officiated by a certified prepared by a National Spiritual Assembly (NSA). None of that is registered by the state. It's very common for Baha'i married couples to carry official documents as single, which

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<sup>142</sup> *Supra* note 139.

<sup>143</sup> *Dana*, (2014) at iv.

<sup>144</sup> *Supra* note 118.

contributes to a very serious predicament when the couple wants to register their offspring.

Most of the Baha'i couples avoid state registration of their marriage because the Egyptian law imposes a set of values that contradicts with their religion. Baha'iyya equates between men and women while the Egyptian law grants unequal privileges for men in marriage, divorce, and inheritance.<sup>145</sup> These values are also pertained in cases of litigation in personal status matters, leaving Baha'i women in a vulnerable position that contradicts with her religious principles.<sup>146</sup>

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<sup>145</sup> *Dana*, (2014) at Xlix.

<sup>146</sup> *Supra* note 118.

#### **IV. Taking the State to Court: Adjudicating the Baha'i Case**

In case no. 19354/58 heard by the Supreme Administrative Court (SAC), Mr. Raouf Hindi Halem, in his capacity as the guardian of Nancy and Emad Halem, filed a case against the Minister of Interior and the President of the Civil Status Division of the same ministry for refusing to issue official documents identifying the two children's religion as Baha'i in the mandatory religion category, especially since the Egyptian Consulate in Oman had previously issued these documents upon their birth, with Baha'i registered in the religion category.

Public interest lawyers working on the Baha'i case were motivated by several strategic goals. On the short-run, lawyers wanted to achieve the immediate relief of their clients' suffering through issuing official documents for their children required to enroll them in school.<sup>147</sup> Lawyers wanted to win the case in front of the administrative court to establish a precedent to be used by other Baha'is whose legal status is similar to Halem's family.<sup>148</sup> Public interest lawyers had another, long-term, strategic goal to change the state position from citizens of unrecognised minorities whom, for long, were discriminated against because of their religious belief. Lawyers had a third strategy in mind to change societal hostile positions from the Baha'i minority which they thought is achievable if the case exposed state hostility towards that vulnerable group of the society.<sup>149</sup> This chapter investigated how public interest lawyers put their strategic goals into actual actions, and the tactics used to make it a reality.

##### **A. Immediate Remedy for Halem's Family**

For years, EIPR followed the developments of the Baha'is legal battle demanding state recognition in Egyptian courts. The organization was interested in the Baha'is affairs as part of its wider strategic interest in the freedom of members of religious minorities in

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<sup>147</sup> *Supra* note 42.

<sup>148</sup> *Supra* note 42.

<sup>149</sup> *Supra* note 42.



Egypt.<sup>150</sup> The legal conditions of the Baha'is represented a case of grave human rights violation; something that added to the motivation of EIPR public interest lawyers to engage with it.

The Egyptian state doesn't recognize the Baha'i religion, and, therefore doesn't recognize the existence of its minority. Due to the lack of state recognition, members of the minority operate in a precarious setting, where all their official documents carry information different from that of their reality.<sup>151</sup> Egyptian law didn't protect the Baha'i who found themselves frequently subject to harassment by the state security apparatus; resorting to litigation, seeking legal protections of the state, the legal process in court failed them. Baha'is became a categorically vulnerable group as they are constantly exposed to violations by the state. Members of the Baha'i minority were subject to interrogation, and possibly harassment, by the state authorities on many occasions. The majority of the documented occasions took place when Baha'is approached state bureaucrats to obtain official documents: any of the multiple official documents that are necessary for Egyptians to conduct their daily lives.

It wasn't until 2006 when EIPR got an opportunity to work with Baha'is. Before, despite the organization's interest, they found great difficulty to reach out to members of the minority.<sup>152</sup> EIPR's attempts to engage the minority members in filing a lawsuit against the Egyptian state was particularly difficult for many reasons amongst is that the Baha'i teaching refrain adherents from engaging with political affairs. Sawsan Hosni, in her autobiography that documents her life journey of converting from Islam to Baha'i religion, explains the rationale behind such a religious position when said, "*The Baha'i religion forbids adherents from engaging in political affairs; a fact that is known in every country where Baha'is live. They don't participate in politics or join political parties. The Baha'is are peaceful people, they preach for peace and prosperity and desert politics and conflict.*"<sup>153</sup> Such a religious position made it a challenging task to involve them as clients in public law litigation cases.

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<sup>150</sup> *Supra* note 29.

<sup>151</sup> *Al-Sayyid*, (2013) at 216.

<sup>152</sup> *Supra* note 42.

<sup>153</sup> Hosni, Sawsan. *My Journey from Belief to Reassurance*, 1 zahmet ketab for culture and publishing 8 (2018).

In 2006, one of EIPR employees, a member of the Baha'i minority and one of Halem's sons, extended a personal connection with other members of the minority including his father. The personal connection created a link of trust that extended to a wider group of the Baha'i community.<sup>154</sup> By the time EIPR public interest lawyers filed Halem's case, in 2007, the organization had been involved with the Baha'i community on many occasions through legal aid to obtain necessary official documents.<sup>155</sup> Through legal assistance, EIPR got closer to members of the minority and even much closer to understand the factors creating their legal status and ways to argue against it in a public law litigation case.

The first tactical decision made by public interest lawyers on that case concerned the choice of the court in front of which they adjudicate the Halem case. The case was filed in front of the Supreme Administrative Court ("SAC") for the obvious reason that it involves a dispute with the state's administrative apparatus. Typically, the administrative court offers a fast track for remedy. The court hears cases with a sense of urgency, compared to other courts in the Egyptian system, and its decisions have an immediate effect on the administrative apparatus.<sup>156</sup> Most importantly, SAC has developed a tradition over the years to consider precedents while making decisions. In a civil law system, legal codes are considered the manual through which judges reach their decisions. The three supreme courts (The Supreme Constitutional Court, The Court of Cassation, and the Supreme Administrative Court) divert from that legal norm in many cases.<sup>157</sup> Public interest lawyers wanted to benefit from this tradition to extend the legal gain they achieve with their case to the rest of the minority.

Previously, cases involving Baha'i subjects were argued on the foundation of freedom of belief; the court repeatedly decided against it. The previously discussed case of Nabil Habib Shehata is an example of cases argued on such bases. Public interest lawyers working on Halem's case preferred to take a different route and to focus on highlighting state abuses against Baha'is instead of seeking state recognition for their

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<sup>154</sup> *Supra* note 42.

<sup>155</sup> EIPR, *The victory of the Egyptian judiciary for the recognition of the Baha'is religious rights*, Press release, <https://eipr.org/press/2006/04/المصري-القباض-القضاء> (April 6, 2006).

<sup>156</sup> *Supra* note 42.

<sup>157</sup> *Al-Sayyed*, (2013) at 218.

minority. That was the lawyers' second tactical choice which concerned how they drafted the legal argument used in their case. That tactical choice was based on rigorous study of previous cases; lawyers believed that legal arguments presented in these cases provoked state opposition because every demand to protect Baha'is freedom of belief entailed state recognition of the Baha'iyya: an argument that repeatedly failed in court.<sup>158</sup> The lawyers wanted to avoid similar confrontation, that's why they framed Halem's suffering as an outcome of administrative discrimination against an equal citizen; an argument that they believed would seem more appealing to the court.<sup>159</sup>

### **B. Extending Legal Gain to the Rest of the Baha'i Community**

Adjudicating the Baha'i case was indeed an opportunity to influence the state position vis-a-vis unrecognized religious minorities. The case, aimed at the relief of a burden on a group of citizens forced to engage in social and financial interactions in an entirely informal manner, due to the lack of proper official documents.<sup>160</sup> Public interest lawyers working on the Baha'i case made a third tactical choice to frame their case around highlighting the suffering of Halem's family as a part of state discrimination against the whole Baha'i minority. The lawyers wanted to focus on the whole minority to show the wide range of discrimination practiced against every member of the Baha'i minority.<sup>161</sup> The lawyers wanted to prove that the state is practicing systematic abuse against a pool of citizens because of their religious affiliation. Talking about his organization's decision to get involved in this legal battle, Adel Ramadan, EIPR's lead litigants on this case, said *"Our involvement, in this case, was calculated and based on extensive research in the field. For years, the Bahai's were caught in the maze of Egyptian courts without any actual gain or change in state policy. This time we were determined to influence the state's position from religious minorities, as well as the public perception on the matter."*

Influencing the state's hostile position from Baha'is would ensure permanent salvation for the suffering of the Baha'i minority. Aside from winning for his client,

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<sup>158</sup> *Supra* note 42.

<sup>159</sup> *Supra* note 42.

<sup>160</sup> *Al-Sayyid*, (2013) at 217.

<sup>161</sup> *Supra* note 42.

Ramadan aimed at extending legal gain to other members of the Baha'i minority, and, possibly, members of other unrecognized minorities. The case was planned to open the door for other Baha'is to file lawsuits to attain similar gains to that of Halem's.

### **C. Shaping the Legal Argument**

EIPR's litigation team was joined by Khaled Ali, the leading public interest lawyer at ECESR known for his advanced oral pleading skills at an early stage. The litigation team maintained a clear division of work. EIPR was responsible for coming up with solid legal reasoning in consultation with other litigants, researchers, and advisors involved, and Ali was going to plead it to court.

The Halem case was special compared to other public law litigation cases because it relied heavily, in its legal argument, on Shari'a rather than international human rights law. Public interest lawyers working on the case made a fourth, tactical choice to negotiate with the state on the same platform. The religious foundation of that platform was presented in the MOI'S defense statement which resorted to reinterpreting Article 47 of the 1971 Constitution on practicing the freedom of belief as limited to the three Abrahamic religions: Islam, Christianity, and Judaism; these are the religions recognized, and allowed, by the opinion of the majority of Muslim scholars who follow the Hanafi school of interpreting Shari'a.<sup>162</sup> Any deviation from these three religions is a deviation from the traditions of Islam.<sup>163</sup> The court used this argument to reject Halem's demand to include a dash in the mandatory category of religion pleaded in previous cases. The court sought Halem's demands to serve an implicit maneuver to force the state to recognize the Baha'i religion against the stable judicial tradition based on Shari'a.

Ramadan tactically focused on the administrative aspect of state discrimination against members of the Baha'i minority through highlighting the effect of the lack of recognition of their religion, which, for decades, had forced them to register official documents under other religions, usually as Muslim. In his submissions, Ramadan argued

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<sup>162</sup> *Halem v. MOI*. Supreme Administrative Court, MOI defence statement 18354/58, 6 (2007). Accessed through EIPR's institutional database.

<sup>163</sup> *Halem v. MOI, defence statement (2007) at 10*.

that such a practice fundamentally contradicts with Shari'a, which does not force anyone to adhere to Islam against their conviction.<sup>164</sup> Overall, litigants were interested in highlighting state discrimination against the Baha'is under the guise of Shari'a.

In their attempt, public interest lawyers established their arguments on ways in the Sunna Nabaweya of dealing with religious minorities. Lawyers argued that "*Following the tradition of prophet Mohamed, in the first Islamic state in Madina, there was no differentiation between adherents of Abrahamic religions and those of other beliefs such as Maghoos and Al-Sabe'a. All of those non-muslims were welcomed to live peacefully in the Islamic state in return they pay Jezzya, which is equivalent to our modern understanding of citizenship.*"<sup>165</sup> Public interest lawyers tactically highlighted the equal treatment those religious minorities received in the Islamic State despite being Abrahamic or not since Jezzya was collected equally from all of them as a token of that equal status.<sup>166</sup> Lawyers also referred to a narrative told that the prophet was asked (narrated by Imam Malek on behalf of Ga'far bin-Mohamed on behalf of Omar Ibn al-Khattab) about ways to deal with Maghoos and that he instructed his followers to treat them equally to that of the other religious minorities.<sup>167</sup> That argument proved that even religious minorities, which denied Islam and were perceived as a threat to the unity of the Islamic community, were peacefully accepted and lived peacefully among Muslims. The tactical utility of these arguments is to draw the court's attention to examples in the prophetic history showing that religious minorities were always a part of the composition of the Muslim society.

Halem's Lawyers had a strategic goal of influencing state policy from unrecognized religious minorities, that's why they tactically referred to Quranic verse to exemplify how Islam allows religious plurality. In their submission to the court, public interest lawyers working on the Baha'i case referred to an interpretation by al-Qortobi to Soret al-Kaferon "*to each their own religion*" stating that the other types of faiths were named religions as long as its adherents believed in it and followed its order and teaching.

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<sup>164</sup> *Al-Sayyid*, (2013) at 217.

<sup>165</sup> *Halem v MOI*. Supreme Administrative Court, Plaintiff Submission by EIPR,10831/54, 15 (September 27, 2008). Accessed through EIPR's institutional database.

<sup>166</sup> Litigants cited the book of Ahkam Ahl al-zema by Ibn al-qayem al-gozeya "*Jezzya was collected from both adherents of Abrahamic and non-non-abrahamic religions according to the sunna nabaweya.*"

<sup>167</sup> *Halem v MOI*, Plaintiff Submission (2008) at 16.

That shows how the Qur'an didn't limit the definition of religion to Abrahamic religions and that, historically, included all religions even those of the enemies of the Islamic state.

<sup>168</sup> The tactic here was to refute the state argument that Baha'iyya isn't a recognized religion according to Islamic teachings.<sup>169</sup>

Tactically, litigants resorted to utilizing Shari'a in their submissions to argue that the Egyptian state has failed to fulfill one of its fundamental obligations towards its citizens which is to protect their right to peacefully coexist in their society. A right that was historically granted by Shari'a in Muslim communities.

The attention to Shari'a-based arguments reflected a general approach that sought to ease concerns by judges to decide in their favor. Ramadan highlights how EIPR's submissions were conscious that that inequality of members of unrecognized religious minorities is not unconstitutional, which makes every argument they present to court not strong enough to win the case; that's why they needed to present another solid foundation, established on the Islamic norms, to make judges see their demands as realistic. *"One important role of a litigant is to do the research on behalf of the judges,"* said Ramadan about the effort done by public interest lawyers to guide to a possible change.

There is a very limited legal framework governing the affairs of the Baha'iyya. That framework was put in place purposefully to prohibit their religious practice and doesn't answer all legal questions and concerns raised by Baha'is in courts; that's why judges hearing these cases tend to practice excessive discretion especially on issues of administrative nature. EIPR public interest lawyers wanted to avoid getting into the ambiguous situation of betting on the judge's opinion. Halem's lawyers, also, aimed at diverting judges from the bigger question of state recognition of Baha'iyya which is a matter of Muslim scholars debate and should be left outside the court's jurisdiction. That's why Lawyers based their argument on a 1987 court of cassation decision no. 2691 saying, *"the court cannot try the Baha'i belief because it's a matter existing outside its jurisdiction, which ought to be discussed among trained religion scholars."*<sup>170</sup>

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<sup>168</sup> *Halem v MOI*, Plaintiff Submission by EIPR (2008) at 16.

<sup>169</sup> *Supra* note 42.

<sup>170</sup> *Halem v MOI*. Administrative Court First Circuit, Plaintiff Submission by EIPR 18354/84. 10 (January 31, 2007). Accessed through EIPR's institutional database.

#### **D. Influencing Societal Attitude Towards the Baha'i Minority**

During the trial lifetime, a media campaign was organized to influence society's long-standing position against the Baha'is.<sup>171</sup> Approaching opposing writers and columnists with information to alter their stand, prepare clients to appear on TV to advocate their cause, and to coordinate their speech with that of the human rights advocates were all strategies of the media campaign. In that way, clients were active participants, more as agents themselves, in advancing their case through a public campaign.

Inside EIPR, the work on the case was done collectively and involved public interest lawyers who took care of the case proceeding in the court supported by groups of legal researchers who provided them with documented instances of state abuse against Baha'is. The case work also involved human rights activists and advocates who were in charge of the media campaign as well as cared for advancing the case in international circles. A campaign manager was responsible for training lawyers on how to present a clear argument serving the message of the case in front of an audience - a simplified version of that used as a legal argument in the submission. The main purpose of this media campaign was to loosen society's strict attitude towards the Baha'i minority and to expose state systematic abuse of their rights. The campaign aimed at making the public accept the possible change in the Baha'is status.<sup>172</sup>

Some of the campaign tactics went beyond the local context. EIPR activists utilized the organisation's connections with international human rights organizations to attract attention to the case. The connection EIPR had with the Special Rapporteur on Freedom of Religion was helpful.<sup>173</sup> A report entitled "Prohibited Identities" written in cooperation with Human Rights Watch attracted international attention to practices by the Egyptian state that undermines Baha'is rights as well as members of other unrecognized religions in general. The report attracted international attention and pressured the Egyptian government to refrain from influencing the Judiciary seeing Halem's case.<sup>174</sup>

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<sup>171</sup> *Supra* note 151.

<sup>172</sup> *Supra* note 43.

<sup>173</sup> *Supra* note 29.

<sup>174</sup> *Supra* note 29.

Throughout the court proceeding, public interest lawyers working on Halem's case made several tactical choices that were fundamental in reaching the court decision. The first tactical choice was to settle on filing their case in front of SAC to make sure Halem gets a decision in a short period; most importantly, to make sure the case will be used as a precedent in other cases filed by Baha'is. Public interest lawyers had the interest of all the Baha'i minority in mind. The second tactical choice was to focus on the administrative aspect of Halem's case and not to delve, deeply, into the aspect of their freedom of belief. Cause lawyers' decision on that matter was motivated by an interest to highlight the administrative aspect of state discrimination against Baha'i citizens, which is practiced against them for the mere reason of their religious affiliation to Baha'iyya. Halem's lawyers made their third and fourth tactical choices as they decided on the legal argument, which focused on the administrative suffering of Halem's family and other Baha'is in Egypt. To do that, public interest lawyers used Shari'a as a legal reference for their argument to engage with the state on its platform. Public interest lawyers made one last tactical choice to launch a media campaign to influence public perception on the Baha'i minority.



## V. Making Sense of the Impact of the Baha'i Public Law Litigation case

The Baha'i case had lasted for two years before SAC decided to annul the MOI's decision twice and ordered the Civil Status Administration to issue birth certificates for Halem's children with a dash in the religion category instead of being forced to choose one of the three Abrahamic religions established a precedent that triumphs for the rights of Baha'is (the latest was a decision no. 520/2009). In practice, the court decision annulled the MOI directorate circulated among officials of the Civil Status Administration in 2000 instructing them to refrain from issuing any official documents to any of the members of the Baha'i religion in case they don't comply with the regulations to register one of the Abrahamic religions.

The outcome of the case was satisfactory for the client.<sup>175</sup> In the end, none of the family members was forced to register one of the Abrahamic religions in the mandatory religion category. Ever since the court made its decision, Halem's children gained the right to conduct their life in a normal setting; they could enroll in schools, open bank accounts, acquire property, and many other more practices that they were denied due to their inability to obtain official documents proving their identity.

The Baha'i case, similar to any other public law litigation case, wasn't adjudicated for the sole purpose of fulfilling Halem's demand, rather than to contribute to the bigger strategic goal of protecting a vulnerable group of the society, the Baha'i minority, from the state's systematic violation of their rights as equal citizens. Such a strategic goal required a change in state policy vis-a-vis the Baha'i minority and, generally, from all unrecognized religious minorities, which wasn't achieved by the court decision in this case. Also, similar to other public law litigation cases, the Baha'i case is the work of a political movement aiming at advancing the Baha'is' demands for equality and justice. This chapter goes beyond the immediate court decision on the Baha'i case to examine the case outcome from a broad perspective.

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<sup>175</sup> *Supra* note 42.

### A. Did the rest of Baha'is achieve legal gains?

A fundamental purpose of a public law litigation case is to extend the case impact beyond the interest of its client to other individuals of vulnerable social groups who are suffering the same conditions.<sup>176</sup> Public interest lawyers of the Baha'i case shared a similar motivation: to extend the case's legal gain to the rest of Baha'is in Egypt. To reach this goal, public interest lawyers made the tactical choice to adjudicate the case in front of SAC to establish a legal precedent to guide judges, in future instances, who will hear cases filed by Baha'is advancing similar demands to that presented in Halem's case. The case was a success on that ground.

Previously, the court established its decisions in cases involving Baha'i subjects on the ground of the 'public order' legal doctrine. Such a doctrine established on the premise to promise the modern nation-state, its political order, as well as its economic stability. The public order doctrine was defined by the state council in 1955 as "*Everything connected to a public interest that is linked to the overall system of the society, whether this interest is political, social or economic.*"<sup>177</sup> In another opinion, drafted later in 1977, the state council added to its definition when referred to public order as the specific political, socio-economic foundation on which the existence of the state rests, which is shaped by the laws applied and the customs followed within it.<sup>178</sup>

The supreme constitutional court's decision of 1975 introduced an early application of the public order doctrine on Baha'is.<sup>179</sup> The supreme court, in that decision, perceived the Baha'i minority as a threat to the unity of the Muslim majority which, accordingly, threaten the wider public order; this opinion appeared in its jurisprudence when said, "*The stable opinion, according to the general assembly of the legislation and opinion sections of the court, considers the Baha'i faith an outsider religious faith to all Abrahamic religions, and that the public practice of its adherents to their religious rites, similar to that conducted in the Baha'i spiritual assemblies, threatens the stability of the*

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<sup>176</sup> Ezzat, (2019) at 8.

<sup>177</sup> *State Council*, legal Opinion no. 544. (July 13, 1977). Accessed through EIPR's institutional database.

<sup>178</sup> *Pink*, (2005) at 151.

<sup>179</sup> *Halem v MOI*. Administrative Court First Circuit, MOI Defence Submission, 18354/57. 10 (January 23, 2007). Accessed through EIPR's institutional database.

*system operating in the Egyptian state as well as contradicts with public order.*”<sup>180</sup> In this important precedent, cited and used in every submission argued by different authorities of the Egyptian state in front of Egyptian courts, based its argument on the assumption that the Baha’i religion is a threat to the order maintained by the Egyptian state. That philosophy of fear of the potential threat that the Baha’is pose on the Muslim society resonates in the mindset of Egyptian courts, that’s why SAC found it justifiable, on many occasions, to refuse to issue official documents mentioning their religion. In 2006, SAC states “*The intention behind the plaintiff’s request to change the data of his children’s birth certificate and identification cards, proving their adherence to the Baha’i faith, isn’t to recognize their civic condition but to force the Egyptian state to recognize the Baha’i religion. That’s why his request is rejected on the grounds of violating the public order and the norms established by the consecutive constitutions limiting the recognizable religions to the three Abrahamic religions: Islam, Christianity, and Judaism.*”<sup>181</sup> Similar arguments found in nearly every court decision arguing for limiting the rights of the Baha’i minority. A similar sentiment of fear of the Baha’i minority on public order presented in the MOI’s 2000 directorate which marks the beginning of yet another series of abuse of the Baha’is rights.<sup>182</sup>

Public interest lawyers had to find a way to overcome the chances of applying the public order doctrine on the Baha’i case; for that, they engaged in extensive legal research to analyze patterns through which courts decide on these cases.<sup>183</sup> The first pattern concerned cases adjudicating Baha’is freedom of belief. Previously, the court decided against cases involving Baha’i subject which concerns the bigger question of state recognition of Baha’iyya. The court, in many instances, rejected claims by Baha’is relating to the right of the minority to practice their religious rites. Public interest lawyers believed it was obviously futile to adjudicate the Baha’i case on that platform.

Tactically, public interest lawyers built their case to engage with the question of the legal consequence of being a Baha’i in Egypt, which is the second pattern of cases involving Baha’i subjects. These cases engage with a particular aspect of the Baha’is’

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<sup>180</sup> *Egyptian Baha’is v. Egypt*, Supreme Constitutional Court Decision (1975) at para. 5.

<sup>181</sup> *Halem v. MOI*. Supreme Administrative Court Decision 18971/2. (issued on February 15, 2006).

<sup>182</sup> *Supra* note 1.

<sup>183</sup> *Supra* note 42.

suffering in Egypt which is their inability to fulfill their right to be an equal citizen in front of the law through obtaining official documents with their religion mentioned in the mandatory category. These are cases of administrative nature seen by the administrative court of Egypt and to which the administrative authority of the state is a counterparty.

In practice, Baha'is found it very difficult to put that precedent into action mainly because administrative employees continue to refrain from issuing documents that register Baha'iyya in the religion category.<sup>184</sup> A tradition was made for Baha'is to follow; they file for documents and get rejected until they file an official complaint that's when their requested document is issued. To avoid such an unpleasant encounter with civil officials, which includes a formal interrogation in many cases, Baha'is continue to conduct their lives in an informal setting similar to that maintained before the case;<sup>185</sup> they continue to conduct their financial and social affairs unofficially as a way to avoid potential conflict with the state. Until now some Baha'is carry birth certificates and identification cards mentioning a religion that they don't adhere to.

The 2009 SAC decision forced the ministry of interior to not force citizens to officially register a religion that they do not adhere to in their official document, but it didn't establish a general rule.<sup>186</sup> The decision is a small concession compared to the struggle of the minority for their constitutional rights. The court didn't, in any instance, recognize the right of members of the Baha'i minority to equal treatment to that of other Egyptian citizens.

### **B. Was Shari'a the suitable legal argument?**

Traditionally, public interest lawyers use arguments of international human rights law and constitutional guarantees in their submission; that's what differentiates them and any other lawyer.<sup>187</sup> That tradition was developed over time as human rights organizations invested in training their public interest lawyers on how to utilize legal arguments from international human rights law and the constitution to serve their cause. Gradually,

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<sup>184</sup> *Supra* note 151.

<sup>185</sup> *Cantini*, (2009) at 24.

<sup>186</sup> *Cantini*, (2009) at 59.

<sup>187</sup> *Ezzat*, (2019) at 11.

International human rights law and constitutional guarantees became of greater value to public interest lawyers than a mere legal argument, it became their normative background. For four decades, public interest lawyers reverted to this normative background in courts to transform social demands into actual legal rights; that's how public interest lawyers inject human rights values, as drafted in international human rights law and the constitution, into court decisions, therefore transforming these values into applicable legal rights and entitlements.<sup>188</sup>

Public interest lawyers of the Baha'i case made a pragmatic decision to argue their case based on Shari'a rather than international human rights law. Public interest lawyers believed that arguing the case using Shari'a framework would enable them to negotiate with the state on the same foundation of its position from the Baha'is rights.<sup>189</sup> For years, different Egyptian courts denied Baha'is their right to equal treatment and to issue their official documents based on the argument that Shari'a recognizes only the three Abrahamic religions, therefore denies Baha'iyya any recognition and allows systematic discrimination to be practiced against its adherents.<sup>190</sup> Public interest lawyers adopted an ambitious plan: to focus their case on the administrative aspect of the Baha'i suffering and to use arguments from Shari'a and the Islamic prophetic history to prove that Islam didn't expose members of non-Muslim minorities to similar discrimination circumstances.

Public interest lawyers believe that the case outcome was satisfactory for Halem's family who became legally capable of issuing official documents and to conduct their lives in a normal setting as they can enroll in education and became able to access the banking system and many other services that require official documents to prove their identity.<sup>191</sup> Public interest lawyers' Shari'a arguments were undoubtedly convincing to the judges hearing the case.

Despite that, the tactical choice of that legal argument wasn't successful from the public law litigation perspective. Public law litigation, by virtue, goes beyond clients' immediate demand to achieve other strategic goals like, in the context of the Baha'i case,

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<sup>188</sup> *Ezzat*, (2019) at 40.

<sup>189</sup> *Supra* note 42.

<sup>190</sup> *Supra* note 42.

<sup>191</sup> *Supra* note 42.

to counter the state narrative about the Baha'i minority and to translate social demands into actual rights voiced out by the court decision. The Baha'i case didn't satisfy that strategic goal since the court decision only allowed Halem to issue official documents for his children with a small dash on the religion category; it didn't allow them to mention their true religion in these documents.<sup>192</sup> The court mentions in its jurisprudence that its decision was established on the worry that Baha'is, if not identified, will live in the Egyptian society as Muslims.<sup>193</sup>

Some political groups criticize public law litigation for integrating social demands into the legal ideology of the state rather than fulfilling them through challenging this ideology.<sup>194</sup> For them, public interest lawyers utilize loopholes in the state law to file cases in front of a judicial system that is put in place, and controlled, by the state; something like that cannot result in challenging the state, on the contrary, it aids the state to reproduce social and political repression.<sup>195</sup> The court decision in the Baha'i case allows Halem's children to issue official documents but doesn't grant them equality in any way; they conduct their lives in Egypt carrying identification cards to mark them as unequal citizens. Public interest lawyers didn't rely on international human rights or the constitution to challenge the state position from Baha'is, instead they reverted to negotiating with the state on the same platform; this decision enabled the court to decide the case using the state ideology established on Shari'a. In the end, the court decision enforced the state ideology and didn't condemn the social and political repression practiced against Baha'is in Egypt.

### **C. Was the Baha'i case a successful political movement?**

Public law litigation is not exclusively about adjudicating social demands in court, but it's about conducting legal action as a political movement. Public law litigation is a collective action taken by a group of lawyers to challenge state policies and practices and

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<sup>192</sup> *Ezzat*, (2019) at 44.

<sup>193</sup> *Halem v. MOI*, Supreme Constitutional Court, court decision, 18354/84 (15 April 2009).

<sup>194</sup> *Ezzat*, (2019) at 33.

<sup>195</sup> *Supra* note 192.

to achieve strategic goals capitalizing on a favorable legal and political context.<sup>196</sup> As a political movement, the process of shaping the Baha'i case was successful to a great extent. The Case was a product of collective work between members of the litigation team. The cooperation within the litigation team was established on a clear division of labor. Adel Ramadan led a group of public interest lawyers and researchers at EIPR to formulate the legal arguments and Khaled Ali, who is known for his excellent pleading skills, argued the case in court.<sup>197</sup> Public interest lawyers' strategy behind the case had a long-term strategic goal to influence state policy from unrecognized religions and to prepare the public opinion for such a possible policy change.

For a political movement, a legal opportunity design is determined by the existing law and the standing rules and systems.<sup>198</sup> The capability of public interest lawyers to mobilize the legal opportunity to serve their case determines the success of their litigation.<sup>199</sup> Public interest lawyers of the Baha'i case made several tactical choices to maximize their benefit from the available legal opportunity; the first of these tactics is to file their case in front of SAC to focus on the administrative aspect of the state discrimination against the Baha'i citizens represented by Halem in this case. Most importantly, public interest lawyers chose SAC because they wanted to establish a precedent that helps other citizens suffering from similar discrimination like Halem; they expected that once the court decide in their favor other Baha'is will have the courage to file cases to rectify their legal condition. Public interest lawyers wanted to maximize the opportunity of other Baha'is to seek remedy in court.

Public interest lawyers launched a media campaign to influence public perception of members of the Baha'i minority. Every concerned actor participated in the work of this campaign including the client, Halem, who was prepared by EIPR's campaign manager to promote the case in the media.<sup>200</sup> Public interest lawyers framed the campaign message to focus on state discrimination against the whole Baha'i minority and to give emphasise on

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<sup>196</sup> *Supra* note 24.

<sup>197</sup> *Supra* note 52.

<sup>198</sup> Vanhala, Lisa. *shaping the structure of legal opportunities: Environmental NGOs bringing international environmental procedural rights back home*. 40 law & policy 110 (2018).

<sup>199</sup> *Supra* note 198.

<sup>200</sup> *Supra* note 42.

the vulnerability of this particular social group.<sup>201</sup> Measuring the outcome of the campaign is very difficult, but the idea of launching a media campaign to support the case in court must have advanced the issue among a number of Egyptians.

The Baha'i case, like other political movements, created resources for future battles. Institutionally, the Baha'i case became a blueprint to adjudicate issues related to the administrative suffering of Egyptian citizens of unrecognized religious minorities. In 2009, EIPR filed a case defending the rights of converts who were originally Christian, who adhered to Islam before, to return to Christianity again.<sup>202</sup> This case engaged with the Shari'a-based law forbidding Muslims to convert to Christianity, which made it nearly impossible for the court to rule in favor of registering that conversion in official documents. EIPR's public interest lawyers focused on the administrative implications of having a Christian citizen carrying a Muslim identification card; a tactic that led the court to decide in favor of their client.<sup>203</sup> EIPR's victory, in this case, seems to prove the effectiveness of the legal argument and the model of litigation of the Baha'i case.

The Baha'i case concerned a very specific aspect of the administrative discrimination against Halem's children and the Baha'i minority in general. Despite the debatable outcome, the case created a precedent, a legal foundation, for other Baha'is to demand the issuance of their official documents. In that sense, the political movement behind the public law litigation case created resources to be used in future mobilization through cases advancing other aspects of redress for the Baha'i suffering in Egypt. For example, The decision gave the right to Baha'is who previously obtained documents mentioning Baha'is as their religion or whose parents carry documents stating the same information to file a request to the ministry of interior affairs to issue identification cards with a dash in the mandatory religion category.<sup>204</sup> Other Baha'is who don't carry documents with their religion are left in an ambiguous situation; this is the group that started mobilizing for their rights. The demands of this group weren't met by courts in Egypt, therefore, after exhausting local remedies, they filed a case in front of the African

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<sup>201</sup> *Supra* note 42.

<sup>202</sup> *The case is publicly known as "The Returnee to Christianity".*

<sup>203</sup> *Supra* note 42.

<sup>204</sup> *Halem v. MOI*. Supreme Administrative Court, State Council Opinion, 18453/58. 7 (6 July 2009).



Commission for Human and Peoples' Rights which they successfully obtained a favourable decision that is currently being used to pressure Egypt to fulfill their rights.<sup>205</sup>

The case sparked other demands by the Baha'i community. Now that, at least, some of them can issue identification cards, other administrative issues appeared to be important to address. The first example of these issues is the lack of recognition of Baha'i marriage. Many Baha'is issue identification cards as single because they cannot register their marriage certification; something that might result in their legal liability for violating the civil status law of 1994.<sup>206</sup> Another issue concerns the tension emerging around burying Baha'is in Muslim burial sites due to the lack of allocation of sufficient sites for unrecognized religions. The last state order to designate sites for the Baha'i minority was issued on 14 April 1949.<sup>207</sup> Over time, these sites appeared not enough and, subsequently, the minority had to resort to informal channels to get access to Muslim sites which became harder for Baha'is carrying identification cards with a dash.<sup>208</sup> These new issues are gradually becoming pressing for the minority and might lead to another public law litigation case.

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<sup>205</sup> *Hossam Ezzat & Rania Enayet (represented by Egyptian Initiative for Personal Rights And Interights) v The Arab Republic of Egypt*. African Commission Decision, Communication 355/07 (Feb. 17, 2016). In its 19th extraordinary session, the African Commission on Human and People's Rights decided in favour of the claimants when requested Egypt to adopt necessary measures for the neutral recognition of marriage of Baha'is and other persons under its jurisdiction who do not identify with the personal laws that are based on the three recognised religions.

<sup>206</sup> *Halem v. MOI*, State Council Opinion at 10.

<sup>207</sup> *Halem v. MOI*, State Council Opinion at 9.

<sup>208</sup> *Supra* note 206.

## **VI. Conclusion**

The research engaged with a critical question about how public law litigation operates in a restricted context like in Egypt, and how does this context influence the litigation process and its outcome. The research examined the Baha'i case to exhibit ways by which public interest lawyers interact with the context surrounding their case and the impact of that on their tactical choices, and, ultimately, on the success of their case. The immediate outcome of the Baha'i case was considerably successful as it satisfied Halem's demand to issue birth certificates for his two minor children. However, public law litigation is not about the immediate gain of the client as much it's about the bigger goal to benefit other individuals who are suffering from the same legal condition as Halem. For public interest lawyers of the Baha'i case, their public law litigation aimed at creating a legal precedent by SAC to maximize the opportunity of other Baha'is to gain the same rights as Halem. Public interest lawyers filed their case knowing that, on the long run, they aim at changing the state discriminatory policies against Baha'is, and members of other unrecognized religions, and to influence public perception about Baha'i citizens so that when such policy change happens it's socially accepted.

Public interest lawyers of the Baha'i case didn't have an easy task; they had to engage with a very resistant legal framework. The 1960 Law and the 1975 SCC decision created the framework governing Baha'is in Egypt which mainly concerned with their practice of religious rites and the operation of the minority religious sites; nothing in this legal framework organized the affairs of Baha'is as citizens in Egypt. The majority of cases filed by Baha'is in front of Egyptian courts focused on state discriminatory practices against members of the minority. The Baha'i case concerned the MOI denial of the clients' right to issue official documents on the foundation that they don't adhere to one of the three recognized Abrahamic religions.

For years, courts rejected Baha'is' demand for rights because Baha'iyya poses a threat to the Egyptian Muslim society. Judges reverted to Shari'a to justify their decisions to limit state recognition to the three Abrahamic religions. To counter that, public interest lawyers of the Baha'i case resorted to Shari'a for proof from Quran and the Prophetic

history that non-Muslim minorities lived peacefully in the Islamic state, and that all religious minorities were treated equally even the non-Abrahamic ones.

The choice of Shari'a as a legal argument impacted the case outcome; it allowed the court to reproduce the state discrimination against the Baha'i minority. The court decision instructed the MOI to issue official documents for Halem's children with a small dash in the religion category; at the same time, the court rationalized its decision that taking such a measure gives a distinctive status from other citizens allowed to register their religion in official documents. In the end, the decision instated state position from Baha'is as unequal individuals.

Beyond the immediate relief of Halem's children, the Baha'i case didn't result in a change in state policy or discriminatory practices against members of the minority. Other Baha'is found it very difficult to benefit from the precedent created by the case. Let alone that the court decision concerned a very small group of the Baha'i population who have legal evidence, documentation, to prove their adherence to Baha'iyya.

The Baha'i case was a greater success as a political movement. The public interest lawyers engaged with the case worked collectively to capitalize on the legal opportunity offered when they reverted to focus on the administrative aspect of state discrimination against Baha'is. A successful tactic that qualified the case to become a precedent established by SAC; something that lawyers had thought about to help other Baha'is establish their legal argument in court. The Baha'i case, also, created resources for future mobilization as it created a blueprint for EIPR and other human rights movements interested to adjudicate the rights of unrecognized religious minorities in Egypt. Most importantly, the case allowed a group of Baha'is, who managed to issue official documents, to mobilize for other legal gains like to legalize their marriage.

It's very difficult to assess the Baha'i case impact if we take into consideration the strategic goal that motivated public interest lawyers to engage with it from the beginning. On the one hand, the case successfully attained immediate relief for its client, however, on the other hand, the court decision only benefited a very small group of the Baha'i minority. Also, the case didn't result in policy change and assessing its impact on changing social perception is very difficult to be determined within the framework of this research.