

Draft Teaching Manual

Islamic Law and Human Rights: Comparative Perspectives

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Introduction

The present teaching manual is part of an on-going initiative of a number of institutions and colleagues to make materials and resources available and accessible for a range of Islamic law modules to an English speaking audience.¹ The manuals are not prescriptive and only an indicative input into how teachers may develop courses in the area at undergraduate and postgraduate levels. We have drawn upon existing courses offered at various institutions at home and abroad and gratefully acknowledge these inputs.²

¹ For details of this project see <http://www.ukcle.ac.uk/research/projects/ali.html>. Draft manuals prepared thus far by the project team may be accessed at <http://www.ukcle.ac.uk/resources/islamiclaw/index.html> and include the following: Sources of Islamic law; An introduction to Islamic criminal justice; An introduction to Islamic family law; An introduction to Islamic international law (*Siyar*); Introduction to welfare and *Zakat* law in Islam. Other resources include: [Developing resources on Islamic law: bibliography and other useful information](#); [Glossary of key Arabic terms for teaching and learning Islamic law](#), and “Approaches to teaching and learning Islamic law: Sharing Some National and International Perspectives”.

² For example, we looked at the following modules: **Human Rights and Islamic Law (15PLAC150) is offered by SOAS, University of London. Course Convenor is Prof Mashood Baderin. The course outline is as follows:** The relationship between human rights and Islamic law is a subject of intense contemporary debate within both international and domestic socio-cultural and politico-legal discourse globally. Thus, this course will critically explore the different perspectives to the relationship between the two legal regimes. Based on modern English-language scholarship, the course will cover relevant socio-cultural and politico-legal questions regarding areas of common ground and areas of tension between human rights and Islamic law. The main focus is to critically examine this relationship and analyse the relevant theoretical and practical issues with the aim of identifying possible means of how human rights can be best realised within the Islamic ethos of Muslim States. The course will thereby explore the different theoretical perspectives to the relationship between these two legal regimes and also examine the practices of some relevant Muslim States in that regard. Initially, we will examine relevant theoretical and conceptual issues relating to the nature of both human rights and Islamic law respectively. This will include a critical analysis of the theoretical foundations of human rights, its sources, contents and enforcement methods in relation to the nature, sources and methods of Islamic law, and its current role, application and influence in Muslim States. We will also examine whether or not there is a concept of human rights in Islamic law and explore the areas of common grounds and the areas of conceptual differences between the two. Following this, we will undertake a critical study of some “Islamic” human rights instruments and, over the course, critically analyse, in relation to Islamic law, specific and topical issues such as the right to freedom of thought, conscience and religion; right to freedom of opinion and expression; rights of minority groups; women’s rights; children’s rights; prohibition of torture, cruel, inhuman and degrading treatments and punishments; right to fair trial and due process; human rights enforcement; and case studies of the human rights practices of some selected Muslim States. We will then round up with a desideratum of possible domestic, regional and universal mechanisms through which the enforcement of international human rights can be realistically achieved in the Muslim world, especially in Muslim States that apply Islamic law. Another module may be found at <http://www.law.ucla.edu/home/index.asp?page=331>. Accessed on 16 April 2009. This course is entitled **Law 549 - Seminar: Islamic Law and Human Rights and has the following description:**

“This course will introduce students to the discourses on Islamic law and human rights. There has been an essential and lively debate on Islamic law and culture and their implications for human rights. Our goal is to study this debate and rigorously engage it. In this context, we will examine the debates in favor of universal human rights and cultural and religious relativism. We will focus on Islamic rights schemes and the arguments of their proponents and critics. We will also study human rights discourses of Muslim countries and the social and political contexts of these discourses.

We suggest that this manual is used in conjunction with other resources developed by the project team and available on the website. In particular the manual on *Sources of Islamic Law* provides a background to the origins and sources of Islamic law and hence of the comparative discourse and debates on Islamic Law and Human Rights.

Aims of the module:

The main aim of this module is to introduce students to comparative perspectives on Islamic law and Human Rights drawing upon English language scholarship in the field. It is intended to provide an understanding of sources of the Islamic legal tradition, including the *Qur'an*, *Hadith*, *Ijma*, *Qiyas* and *Ijtihad* with a view to explore the basis of human rights within this tradition and available spaces for discursive engagement. Finally, this module aims to use a case study method to analyse some key themes including Islamic human rights perspectives on women's human rights, children's rights, rights of minorities, family law and Islamic criminal justice.

The specific objectives are:

- To provide an understanding of the sources of Islamic law; evolutionary processes of the Islamic legal tradition including the emergence of the various schools of juristic thought in law.

Furthermore, we will examine the human rights practices and arguments of certain groups, such as the Muslim Brotherhood, and Islamic countries such as Pakistan, Iran, Sudan and Saudi Arabia. Some of the topics covered will be the human rights implications of Islamic criminal law, family law, religious minorities and the position of women. We will conclude the course by examining the Islamic human rights discourse from a comparative perspective. No prior knowledge of Islam or Islamic history is necessary for this course. Some knowledge of International human rights law would be useful but not necessary. There are no required course prerequisites." Also see, <http://www.unimaas.nl/default.asp?template=werkveld.htm&id=4C6U7656073H2B4O4164&taal=nl> offered as a module on 'Comparative Law: The Islamic Legal System' on the BA Islamic Law at the University of Maastricht

- To examine the diversity within the Islamic legal tradition and approaches towards human rights.
- To think critically about the overall relationship of the Islamic legal tradition and its perspectives on human rights with modern international law and human rights law;
- To examine the role and relationship of historical *Shari'a* with a range of subjects within human rights law including women's rights, children's rights, family law, minority rights and criminal justice;
- To critically examine alternative interpretations within the Islamic legal tradition and human rights norms with a view to expose students to skills of cross-cultural dialogue and engagement.

Learning Outcomes for this module:

The module provides opportunities for students to develop and demonstrate knowledge and understanding, qualities, skills and other attributes in the following areas:

(A) Knowledge and Understanding

- Students will demonstrate knowledge and understanding of the basic principles and standards of the Islamic legal tradition and its relationship with international law and human rights law.
 - Ability to understand the issues of diversity within the Islamic legal tradition which provides compatibility with modern human rights values.
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(B) Cognitive (thinking) Skills

Students will have developed their skills:

- In demonstrating an ability to research and comprehend complex areas of the Islamic legal tradition and that of *Shari'a* more broadly.
- In establishing originality in the application of knowledge of the Islamic legal tradition and *Shar'ia*, together with a practical understanding of how techniques of research and enquiry are used to create and interpret these.
- In demonstrating conceptual understanding to evaluate critically complex issues of tension within the Islamic legal tradition *vis-à-vis* international human rights law.

(C) Other Skills and Attributes (Practical/Professional/Transferable)

(i) Autonomy and the Ability to Learn

Students will have shown an ability to undertake independent research and to manage their learning through preparation for, and participation in, the seminars and through completion of the written assignment.

(ii) Communication and Literacy

Students will have developed their written skills through work in seminars, in completing the written assignment. Students will also identify and utilise primary and secondary sources of law in retrieving information relevant to weekly discussions, assignment and exam topics.

Chapter One

Human Rights in Islam and International Law

This chapter contains suggestions for the opening lectures/seminars of the module. Since no pre-requisites are anticipated for a module of this kind, it is important to provide background knowledge of the formative and classical periods of Islamic Law, with a view to developing an understanding of the sources of Islamic law as well as sources, and origins of human rights law emanating from the United Nations and the discourse of human rights within Islam. Further, we also need to take account of the fact that students in non-Muslim jurisdictions are unlikely to have much knowledge of Islam or of the development of Islamic thought. Students in Muslim jurisdictions will have some knowledge of Islam and evolution of Islamic law but may not have made connections with the human rights discourse within the Islamic legal tradition. Further, all students of this module, irrespective of jurisdiction will need an introduction to international human rights law thus paving the way for comparative perspectives on the subject. We therefore recommend that these sessions are adapted accordingly.³ The aims and objectives of these sessions are to:

- set the formation and development of human rights and Islamic Law in historical context
- give students an understanding of the core sources of human rights and Islamic law
- illustrate the plurality of thought, custom and application of law within Muslim communities
- introduce students to the critical discourse on this subject

³ A more detailed treatment of the sources and evolution of Islamic law can be found in the companion *Course Manual on Sources of Islamic Law*. See <http://www.ukcle.ac.uk/resources/islamiclaw/index.html>

- introduce students to comparative perspectives on human rights in Islam and international law

Lectures/Seminars

Individual tutors will be able to decide the best way of delivering this module to their students.

However, we suggest that in view of the comparative nature of this subject as well as the expected prior knowledge of students opting for it, it may be a good idea to divide the teaching time between one hour lecture followed by a one hour seminar where the ideas and themes in the lecture may be clarified and augmented. It is also important that students come prepared to class with the tasks assigned to them for the seminars. Another mode of delivery may be a two hour lecture every week followed by a one hour seminar every fortnight.

The first two weeks of the lectures and seminars may be devoted to providing an overview of the conceptual foundations of human rights in Islam and international human rights law. We suggest this introductory unit of the module be taken up in three main sections:

- At the outset students may be introduced to a range of perspectives on the origins and development of the concept of human rights asking themselves some important critical questions: What are human rights? What are their origins? Are human rights a universal phenomenon? On what basis may we make this assumption? To what extent may human rights be relative in relation to culture, custom, tradition or religion?
- Next we suggest an overview of the early development of Islamic law and emergence of the various schools of juristic thought in this legal tradition. Salient features of the 4 schools of Sunni juristic thought, the Hanafi, Maliki, Shafi'i and Hanbali will be explored as well as 3 main schools of Shia jurisprudence, the Athna Asharia, Zaidya and Ismailia. An important point to bear in mind in the teaching and learning of Islamic law is the fact that division of

Muslims into Shia and Sunni impacts heavily on the understanding of sources of Islamic law by both sects and consequent development of jurisprudence. The initial lectures therefore need to explore a number of concepts highlighting these differences with concrete examples to set the discussion of Islamic law in its historical and ideological context. Lectures on the main sources of Islamic law i.e., the *Qur'an*, *Hadith*, *Ijma*, *Qiyas* as well as some juristic techniques including *Ijtihad*, *Talfiq*, *Takhayur* are appropriate moments to present these differences of interpretation. For instance, why do Shia and Sunni laws of inheritance give different shares to daughters in the absence of a male offspring? Why do Sunni schools of juristic thought require the presence of witnesses for a valid contract of marriage whereas Shia jurists consider it optional? Why do some juristic schools of thought believe that an adult Muslim woman is *sui juris* and others require a male guardian to consent on her behalf to a contract of marriage? What is the juristic position and understanding of *ijtihad* in the major schools of thought in the Islamic legal tradition? What are the implications of these interpretative differences for the human rights discourse? What are conceptual foundations of human rights in Islam?

- After introducing students to the above concepts and ideas on human rights in Islam and international human rights, we suggest a comparative analysis of both human rights traditions with a view to identifying commonalities and difference in approach and perspectives. The themes identified for comparison will form the basis for the remaining lectures and seminars for this module.

Readings:

- Steiner and Alston, *International Human Rights in Context* (Oxford: OUP, 2nd Ed.) Chapter 5.
- Donnelly, J., "Human Rights and Human Dignity: An Analytic Critique of Non-Western

- Conceptions of Human Rights” (1982) 76 *American Political Science Review*, pp. 303-316.
- Evans, T., “Universal Human Rights: ‘As Much Round and Round As Ever Onward’” (2003) 7 *International Journal of Human Rights*, No.4, pp.155-168.
 - Ali, S. S. “The Conceptual Foundations of Human Rights: A Comparative Perspective” (1997) Vol.3, Issue 2 *European Public Law*, pp. 261-282.
 - Rehman, J. (2003) *International Human Rights. A Practical Approach* (2003) Harlow: Pearson Education Limited. Chapters 2 and 3.
 - Waltz, S. (2002) “Reclaiming and rebuilding the history of the Universal Declaration of Human Rights” 23 *Third World Quarterly*
 - Morgan-Foster, J. (2005) “Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement”, 8 *Yale Human Rights and Development Law Journal* 67.
 - Ishay, M. R. (2004) “What are human rights? Six historical controversies” 3 *Journal of Human Rights* 359-371.
 - Berween, M. (2003) International Bills of Human Rights: An Islamic Critique” 7 *International Journal of Human Rights* 129-142.
 - Baderin, M. A. “Human Rights and Islamic law: the Myth of Discord” (2005) 2 *European Human Rights Law Review*, pp. 165-185
 - Bielefeldt, H. “Muslim Voices in the Human Rights Debate” (1995) 17 *Human Rights Quarterly* pp. 518-617.
 - Moosa, E. “The Dilemma of Islamic Human Rights Schemes” (2000) 15 *Journal of Law and Religion*, pp. 185-215.

Seminars

To initiate students in a comparative discourse on human rights in Islam and international law, we suggest 2 seminars on the subject of the lectures above.

Seminar 1

Readings recommended above point to a number of concepts of interest and importance for a comparative discussion on human rights. The tutor may choose some of these concepts and terms and ask students to think about them and come prepared to class with a view to share their understandings with the group and discuss the impact and implications of these concepts and terms for a comparative understanding and discourse of human rights in Islam and international law. These terms and concepts may include:

Human Rights and Human Dignity;

Rights, Duties and Entitlements;

Individual Rights, Collective Rights, Group Rights;

Equality, Equity, Complementarity.

Students are asked to come prepared to class and share their understandings of these concepts and their impact and implication for the universality of human rights.

Some tips for this task:

The tutor may want to find out what these concept/terms mean in other (non-western) languages and share these meanings and interpretations with the class. How do these concepts differ from each other and what might be the impact on a human rights covenant or treaty, were non-western meanings and understandings to be imported into the discourse.

Are there no duties in the western human rights discourse and no rights in the Islamic tradition? If there is, then why does it appear (at least to the no-western eye), that it is very much a rights-centred discourse?

Seminar 2.

An interesting exercise in comparative perspectives on human rights in Islam and international law is one where the class prepares a comparative table of human rights in Islam and in the Universal Declaration of Human Rights 1948 (UDHR). I first set this task for my LLM class on Human Rights at the Faculty of Law, University of Peshawar, Pakistan in 1995 and again for students at the Law School, Washington University in St. Louis, USA. On both occasions the sessions were lively and participation enthusiastic resulting in constructive dialogue and conversations.

Divide the class into groups, depending on numbers. Ask the class to read the Universal Declaration of Human Rights 1948 (UDHR) and the Cairo Declaration on Human Rights in Islam 1990. Assign a set of articles of the UDHR to each group asking them to prepare a table of comparable articles from the Cairo Declaration. Using internet sources, ask the class to now compare the UDHR with verses from the Qur'an highlighting areas of convergent/divergent human rights

The final part of the task is to prepare a list of themes based on this exploration for further debate and discussion in class.

Some tips handed out to students to help them prepare this task:

Read the documents set in the seminar readings above.

Compare the two documents and draw up a list of commonalities and differences in the formulation of rights and entitlements in these documents.

What meanings can we infer from the term 'impermissible discrimination' in the Cairo Declaration of Human Rights?

How does this differ from provisions regarding non-discrimination and equality in the UDHR?

How many rights in both documents would you say may be described as 'universal' and common to all humankind?

Identify rights that you find particular to the Islamic tradition and those you might describe as 'western'.

Chapter Two

Islamic law and Women's human rights

A module on Islamic law and human rights has the potential of using a wide range of themes and case studies to engage students in a comparative discussion and analysis of human rights in these traditions. As indicated in the introduction above, we have chosen some aspects of human rights as examples to demonstrate possible ways of delivering a module of this nature. The first case study we present here is that of women's rights.

The richness and range of literature on the subject in hand opens up various possibilities of delivering a unit on Islamic law and women's human rights, we propose the following structure:

- (i) Provide an overview of the evolution of the norm of non-discrimination and equality and women's human rights in international law
- (ii) Provide a detailed analytical overview of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its Optional Protocol (OP).
- (iii) Proceed to build on this overview by introducing women's human rights in Islam
- (iv) Use reservations to CEDAW to explore comparative perspectives of women's human rights in Islam and international law.

Part 1

Non-discrimination and Equality: Evolution of Women's human rights in International human rights law

Traditional international law, of which human rights law is an offshoot, has historically been a male domain. Issues of sovereignty, territory, use of force and state responsibility appear gender neutral/gender free in their application in inter-state relations. Increasingly robust critiques of this approach highlight the reality that international law is a thoroughly gendered institution (concerns and justice for the female gender being virtually absent). In recent years a strong sense of awareness among women of their rights has emerged which includes critiques of power and its symbolization in gender terms, as well as discussions of specifically gendered definitions of security, rights and authority.

International economic processes too strongly affect women around the world. In particular the structural adjustment programmes of many south countries, often at the behest of the International Monetary Fund (IMF) and the World Bank (WB) have had gender-specific consequences. Even the apparently most insulated arena of all, i.e., family relations, is affected by changes at the international level. For example, changes in policies and trends at the international levels in medicine, contraception, new role models of and ideologies of male-female and parent-child impact on women's position.

Women's human rights are thus complexly interwoven strands of socio-economic, legal, political, religious and cultural strands linked to problems of women's subordination at local, national and international levels. What are the contours of women's human rights and how closely (or not) is this reflected in notions of 'justice' are crucial questions that we hope to explore throughout the course but especially in this session.

Readings:**Declarations and Treaties:**

1945 The United Nations Charter

1948 Universal Declaration of Human Rights

1949 Convention for the Suppression of the Traffic in Persons and Exploitation of the Prostitution of Others

1952 Convention on the Political Rights of Women

1957 Convention on the Nationality of Married Women

1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

1966 International Covenant on Economic, Social and Cultural Rights

1966 International Covenant on Civil and Political Rights.

1967 Declaration on the Elimination of Discrimination Against Women

1979 Convention on the Elimination of All Forms of Discrimination Against Women

1993 UN G.A Res. 48/104 Declaration on the Elimination of Violence Against Women

1993 Vienna Declaration and Program of Action adopted 25 June 1993 by the World Conference on Human Rights.

1995 The Beijing Platform of Action.

1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.

I.L.O. standards:

1935 Underground Work (Women) Convention, no. 45

1948 Night Work (Women) (Revised) Convention, no. 89

1951 Equal Remuneration Convention, no. 100

1952 Maternity Protection (Revised), 1952

1958 Discrimination (Employment and Occupation), 1058

1981 Workers With Family Responsibilities Convention, no. 156

1990 Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948

Books and Articles:

Charlesworth, H. (1994) "What are international human rights law?" in Cook, R. J. (ed.) *Human Rights of Women. National and International Perspectives*, Philadelphia: University of Pennsylvania Press pp. 58-84.

Charlesworth, H. Chinkin, C. & Wright, S (1991) "Feminist Approaches to International Law" 85 *American Journal of International Law* 613-645.

Ali, S.S. (2000) "Development of the International Norm of Non-Discrimination on the Basis of Sex: An Evaluation of Women's Human Rights in International Law" in Ali, S.S. *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* The Hague: Kluwer Law International Chapter 6.

Charlesworth, H. and Chinkin, C. (1993) "The Gender of *Jus Cogens*" 15 *Human Rights Quarterly* 63-76.

Connors, J. (2000) "Mainstreaming gender Within the International framework" in Stewart, A. (ed.) *Gender, Law and Social Justice*, London: Blackstone pp. 19-43

Bayefsky, A.F. (1990) "The Principle of Equality or Non-Discrimination in International Law" 11 *Human Rights Law Journal* 1

Kapur, R. (2006) "Revisioning the role of law in women's human rights struggles" in Meckled-Garcia, S. and Cali, B. (eds.) *The Legalization of Human Rights Multidisciplinary perspectives on human rights and human rights law*, London: Routledge pp. 101-116.

Orford, A. (1999) "Contesting Globalization: A Feminist Perspective on the Future of Human Rights" in Weston, B. H. and Marks, S. P. (eds.) *The Future of International Human Rights*, New York: Transnational Publishers Inc pp. 157-186.

Halliday, F. (1991) "Hidden from international relations: women and the international arena" in Grant, R. and Newland, K. (eds.) *Gender and International Relations*, Buckingham: Open University Press pp. 158-169.

Grant, R. (1991) "The Sources of gender bias in international relations theory" in Grant, R. and Newland, K. (eds.) *Gender and International Relations*, Buckingham: Open University Press.

Charlesworth, H. (1993) "Alienating Oscar? A Feminist Analysis of International Law" in Dallmeyer, D. (ed.) *Reconceiving Reality: Women and International Law*, Washington DC: The American Society of International Law, pp. 1-18.

Bunch, C. (1990) "Women's Rights as Human Rights" 12 *Human Rights Quarterly* 486

Reanda, L. (1981) "Human Rights and Women's Rights: The UN Approach" 3 *Human Rights Quarterly* 11

Eisler, R. (1987) "Human Rights: Towards an integrated Theory for Action" 9 *Human Rights Quarterly* 287

Heavener, N. (1986) "An Analysis of Gender Based Treaty Law" 8 *Human Rights Quarterly* 78

Cook, R. (1993) "Women's International Human Rights Law: The Way Forward" 15 *Human Rights Quarterly* 230

Morsink, J. (1991) "Women's Rights in the Universal Declaration" 13 *Human Rights Quarterly* 229

Seminar questions for discussion:

1. What is the potential of human rights law as an effective tool for women's empowerment?
2. What are the difficulties arising from employing notions of formal equality to women in a diverse world?
3. Why are women's human rights so contentious?
4. Why is the religious/cultural/traditional argument of compatibility used primarily in the case of women's human rights.

Class Task

A practical task to concretise some of the questions arising from the discussions above may be used as a task set for the class: Students are asked to identify three 'universal' women's human rights that in their opinion would result in 'global' justice. Identify three other women's human rights that would NOT lead to 'global' justice. Each student may be given the opportunity of sharing these ideas in class and be prepared to defend their position.

Part 2

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW); the Optional Protocol to CEDAW (1999) and Jurisprudence of CEDAW.

This part of the unit focuses on the UN Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW). We will look at the substantive rights outlined in the treaty, its implementation mechanism, the Optional Protocol to CEDAW and the emerging jurisprudence of the CEDAW Committee, with a view to assessing how ‘universal’ and effective these rights are for women in diverse locations.

Reading:

Basic Documents:

1967 Declaration on the Elimination of Discrimination Against Women

1979 Convention on the Elimination of All Forms of Discrimination Against Women

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women 1999.

General Recommendations of CEDAW Committee (available at the website below):

<http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>

Article 21 of the Convention on the Elimination of All Forms of Discrimination against Women empowers the Committee on the Elimination of Discrimination against Women (CEDAW) to make suggestions and general recommendations based on the examination of reports and information received from States parties. These, as well as comments from States parties, are included in the session reports of the Committee. Suggestions are usually directed at United Nations entities, while

general recommendations are addressed to States parties and usually elaborate the Committee's view of the obligations assumed under the Convention.

As of January 2009, CEDAW had adopted 26 general recommendations. Those adopted during the Committee's first ten years were short and modest, addressing such issues as the content of reports, reservations to the Convention and resources.

At its tenth session in 1991, the Committee decided to adopt the practice of issuing general recommendations on specific provisions of the Convention and on the relationship between the Convention Articles and what the Committee described as "cross-cutting" themes. Following this decision, CEDAW issued more detailed and comprehensive general recommendations which offer States parties clear guidance on the application of the Convention in particular situations.

In 1997, the Committee adopted a three-stage process for the formulation of general recommendations. The first stage consists of an open dialogue between the Committee, non-governmental organizations and others regarding the topic of the general recommendation. A Committee member is then asked to draft the general recommendation, which is discussed at the next session of the Committee in one of its working groups. At the following session, the revised draft is adopted by the Committee.

The following general recommendations have been adopted by the Committee:

- General recommendation No. 1 -- fifth session, 1986 reporting guidelines
- General recommendation No. 2 -- sixth session, 1987 reporting guidelines
- General recommendation No. 3 -- sixth session, 1987 education and public information programmes
- General recommendation No. 4 -- sixth session, 1987 reservations

- General recommendation No. 5 -- seventh session, 1988 temporary special measures
- General recommendation No. 6 -- seventh session, 1988 effective national machinery and publicity
- General recommendation No. 7 -- seventh session, 1988 resources
- General recommendation No. 8 -- seventh session, 1988 article 8
- General recommendation No. 9 -- eighth session, 1989 statistical data
- General recommendation No. 10 -- eighth session, 1989 tenth anniversary of the adoption of CEDAW
- General recommendation No. 11 -- eighth session, 1989 technical advisory services for reporting
- General recommendation No. 12 -- eighth session, 1989 violence against women
- General recommendation No. 13 -- eighth session, 1989 equal remuneration for work of equal value
- General recommendation No. 14 -- ninth session, 1990 female circumcision
- General recommendation No. 15 -- ninth session, 1990 women and AIDS
- General recommendation No. 16 -- tenth session, 1991 unpaid women workers in rural and urban family enterprises
- General recommendation No. 17 -- tenth session, 1991 measurement and quantification of the unremunerated domestic activities of women and their recognition in the GNP
- General recommendation No. 18 -- tenth session, 1991 disabled women

- General recommendation No. 19 -- eleventh session, 1992 violence against women
- General recommendation No. 20 -- eleventh session, 1992 reservations
- General recommendation No. 21 -- thirteenth session, 1994 equality in marriage and family relations
- General recommendation No. 22 -- fourteenth session, 1995 article 20 of the Convention
- General recommendation No. 23 -- sixteenth session, 1997 women in political and public life
- General recommendation No. 24 -- twentieth session, 1999 article 12 - women and health
- General recommendation No. 25 -- thirtieth session, 2004 article 4 paragraph 1 - Temporary special measures
- General recommendation No. 26 – forty-second 2008, Women Migrant Workers

Decision and Views of the CEDAW Committee under the Optional Protocol and may be accessed at <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>

B.-J. v. Germany, 1/2003

A.T. v. Hungary, 2/2003

Dung Thi Thuy Nguyen vs The Netherlands, 3/2004

A.S. vs Hungary, 4/2004

Şahide Goekce (deceased) v. Austria, 5/2005

Fatma Yildirim (deceased) v. Austria, 6/2005

Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain 7/2005

Rahime Kayhan v. Turkey, 8/2005

N.S.F. v. United Kingdom of Great Britain and Northern Ireland, 10/2005

Constance Ragan Salgado v. United Kingdom of Great Britain and Northern Ireland, 11/2006

The Committee completed its first inquiry under article 8 of the Optional Protocol in July 2004.

CEDAW/C/2005/OP.8/MEXICO

Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico.

Readings:

Ali, S.S. (2002) "Women's rights, CEDAW and international human rights debates. Towards empowerment?" in Rai, S. Parpart, J. & Staudt (eds.,) *Gender and Empowerment in a Local Global World*, Routledge pp. 61-78.

Rehman, J. (2003) *International Human Rights Law A practical Approach*, Pearson Education chapter 13

Mayer, A.E. (1996) "Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?" 23 *Hastings Constitutional Law Quarterly* 727-823.

Parisi, L. (2002) "Feminist praxis and women's human rights" 4 *Journal of Human Rights* 571-585

Clark, B. (1991) "The Vienna Convention Reservation regime and the Convention on Discrimination Against Women" 85 *American Journal of International Law* 281

Charlesworth, H. Chinkin, C. and Wright, S. (1993) "Feminist approaches to International Law" 85 *American Journal of International Law* 613

Cook, R. (1990) "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" *Vanderbilt Journal of International Law*.

Cook, R. (1994) "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women" in Cook, R. (ed.) *Human Rights of Women National and International Perspectives*, Philadelphia: University of Pennsylvania Press, pp. 228-256.

Bayefsky, A. (1994) "General Approaches to the Domestic Application of Women's International Human Rights Law" in Cook, R. (ed.) *Human Rights of Women National and International Perspectives*, Philadelphia: University of Pennsylvania Press, pp. 351-374.

Brynes, A. (1988-90) "Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?" 12 *Australian Yearbook of International Law*

Sullivan, D. (1994) "Women's Human Rights and the 1993 World Conference on Human Rights Current Developments" 88 *American Journal of International Law* 152

Jacobson, R. (1992) "The Committee on the Elimination of Discrimination Against Women" in Alston, P. (ed.), *The UN and Human Rights*, Oxford: OUP.

Brynes, A. (1988) "The Other Human Rights Committee" 14 *Yale Journal of International Law*.

Tinker, C. (1981) Human Rights for Women: The UN Convention on the Elimination of All Forms of Discrimination Against Women" 3 *Human Rights Quarterly* 32

Ali, S.S. (2000) *Gender and Human Rights in Islam and International Law. Equal before Allah, Unequal before Man?* Hague: Kluwer Law International

Wright, S. (1988-90) "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions" 12 *Australian Yearbook of International Law* 240

Meron, T. (1990) "Enhancing the Effectiveness of the Prohibition of Discrimination Against Women", editorial comment *American Journal of International Law* 213

Seminar Questions and Tasks:

Does CEDAW represent a 'synthesis' of women human rights? Is it/ can it be 'global' in its reach?

Does CEDAW extend to non –state actors? [See in particular Article 2 (d), (e)]

What are the silences in CEDAW?

To what extent have the General Recommendations adopted by the CEDAW Committee stretched the boundaries and borders of human rights jurisprudence for women? Prepare a paragraph in relation to at least 1 General Recommendation.

Part 3

We now proceed to build a comparative perspective on the above overview of the development of international norm of non-discrimination and equality by introducing women's human rights in Islam into the discussion. Again we do not wish to be prescriptive regarding the methodology adopted for this part of the teaching unit but make some suggestions on the way forward.

Students will by now be familiar with sources of Islamic law and make the connection that human rights afforded to women in the Islamic tradition emanate from its main sources, i.e., the *Quran*, *Hadith*, *Ijma* and *Qiyas*. Yet, the body of principles informing Islamic law, collectively known as the *Sharia'* do not form a homogenous entity as these depend on interpretations of the sources, particularly the *Quran* and *Hadith*, influenced by cultural and ethnic differences, historical contexts, colonial pasts, the sect or school of jurisprudence (*madhab*) that a particular community subscribes to, as well as political and economic policy of Muslim States. Hence, the need to study a diverse range of interpretations for exploring a women's human rights framework in Islamic law.

Students of Islamic law and human rights need to appreciate the presence of conflicting images of women in the religious texts of Islam. The relevance of these conflicts for women human rights cannot be overstated as it shows that accommodating the principle of equality in an Islamic human rights scheme involves dealing with two aspects in the Islamic tradition, one egalitarian and the other mandating sexual and religious discrimination, as well as mixed reactions of contemporary Muslims to these two aspects. The question that writers on Islamic law pose is, why Muslims (and probably other religious and cultural traditions as well), have made such selective and scarce use of the ethical dimension of regulatory norms favouring equality and non-discrimination for women. For instance, nowadays there is general agreement among Muslims that slavery is unacceptable, and the large body of the *sharia'* regulating it has been effectively discarded. Why is it then, that Muslims are so deeply divided on the question of whether legal distinctions based on sex and religion have become similarly superseded, and need to be addressed in the light of changing circumstances and needs of the community? Why do they so vigorously disagree about whether a legal system in which women and non-Muslims were given equal rights with Muslim men would be compatible with the

requirements of Islam? There are no easy or straightforward answers to these questions and a module on Islamic law and human rights offers a unique opportunity to debate such issues.

Students may be introduced to two different analytical frameworks for understanding women's human rights in Islam. Detailed discussion of both may be found in Ali, S. S. (2000) *Gender and Human Rights in Islam and International Law. Equal Before Allah, Unequal Before Man?* The Hague: Kluwer Law International pp. 42-88. In brief these consist of the following:

Ibadaat and Muamalaat: Esposito's Hierarchical Notion of Rights in the Islamic Tradition

Esposito, J.L. (1982) *Women in Muslim Family Law* Syracuse: Syracuse University Press. He believes that a useful way to understand and interpret an hierarchy of rights in Islam (for instance inequality between women and men) is to look at the context within which one could understand the value of specific *Quranic* regulations by shifting the emphasis beyond the specific regulations to its intent, to the value it sought to uphold. Thus the *Quranic* prescription has two levels of importance - the specific injunction or command, whose details may be relative to its space and time context, and the ideal or *Quranic* value, whose realisation the specific regulation intends to fulfil. Since the task of the Muslim community is the realisation of these *Quranic* values, the goals of jurists is to ensure that *fiqh* regulations embody these *Sharia'* values as fully and perfectly as possible. While the status difference of men and women in the socio-economic sphere belongs to the category of *Muamalaat* (social relations), which are subject to change, their moral and religious equality belongs to the category of *Ibadaat* (religious duties towards God), which are immutable. By applying the principle of "hierarchization" of *Quranic* values, the Muslim reformers argue that the moral and religious equality of men and women "represents the highest expression of the value of equality" and therefore constitutes the most important aspect of the *Quranic* paradigm on the issue. Keeping this scheme of "hierarchization" in mind, it is possible then to categorise women's human rights in Islam.

Women's Human Rights in Islam As Categories Of Entitlements (Using Hevener's categorization of rights. See N. Hevener, *International Law and the Status of Women*, (1983) Boulder, CO: Westview Press)

Another tool for analyzing women's human right in Islam is to use a method of "categorisation" of these rights. Shaheen Ali drew upon and further developed Hevener's classification of international human rights instruments relating to women, as having undergone a progressive journey through three stages, each representing international consensus on women's human rights. These categories are: **protective, corrective, and non-discriminatory**. The protective category is one where laws are formulated which reflect a societal conceptualisation of women as a group which either should not or cannot engage in specified activities. They imply that women are a subordinate, weak and disadvantaged group in society; hence the need to extend protection of unlimited duration. The second category is the corrective category which also identifies women as a separate group which needs separate treatment. But the aim of the corrective provisions is "to alter and improve specific treatment that women are receiving, without making any overt comparison to the treatment of men in the area. They may be of limited duration, depending on the time period required to achieve the alteration desired." Finally, the non-discriminatory, sex-neutral, category includes provisions which reject a conceptualisation of women as a separate group, and rather reflect one of men and women as entitled to equal treatment. The concept is one which holds that biological differences should not be a basis for the social and political allocation of benefits and burdens within a society. These provisions treat women in the same manner as men. For the purpose of analysing women's human rights in Islam, it is proposed to add here a fourth category, i.e., the **discriminatory** category wherein certain injunctions, rules and regulations of the *Quran* and *Hadith* literature may be placed, where women and men clearly appear unequal. In the remaining part of this section, it is proposed to use a combination of the methods of "hierarchization" and "categorisation" of women's human rights to discuss these within the Islamic tradition.

The non-discriminatory category of rights, *Ibadaat* and women's human rights

The Protective and Corrective Category, *Muamalaat* and women's human rights

Discriminatory Category of Rights: The Verse 4:34 Debate

Evidentiary Value of Women's Testimony

Inheritance rights of women: A Fixed, Unchangeable Share or the Basic Minimum?

Polygamy: An Acknowledgement of "Different Needs" or Statement of Male Superiority?

Hijab (Veiling of Women): A Prescription for Female Modesty or Symbolic Division of Muslim Space on the basis of Gender?

Gradualism as a method of Interpretation for Women's Human Rights in Islam

Evolutionary Approach to Women's Human Rights in Islam

Students may find it useful to read up on these issues and engage in a discussion in class comparing these with provisions of CEDAW and other human rights instruments.

Part 4

As is evident from the discussion in part 3 there are areas of conceptual and normative divergence between women's human rights as enunciated in international human rights instruments and those within the Islamic legal tradition. Reservations to CEDAW by Muslim state parties are an example of this divergence which we propose students to engage with and develop their own understandings regarding debates on universality versus relativism with regard to women's human rights in Islam and international law.

We will initiate our discussion by looking at reservations to CEDAW.

Reservations to Human Rights Treaties.

Should human rights treaties be treated at par with 'other' multi-lateral treaties between states?

Should reservations be permissible when acceding to human rights treaties? Does it ensure 'inclusivity' by encouraging more states into the human rights 'fold', or does it undermine the very nature of the human rights protection being offered? In Baxi's words:

“The fine print of reservations usually cancels the capital font of universality. In this sense, the contestation concerning universality of human rights enunciations is diversionary, embodying the politics of, rather than for, human rights.” (Baxi: 2002: 101)

Readings

Documents:

The UN Convention on the Elimination of All Forms of Discrimination Against Women

The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

The Vienna Convention on the Law of Treaties 1969 (VCLT). Read in particular (Articles 2(1)(d) and 19)

Article 2(1)(d) VCLT defines a reservation as:

“. . . a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions in the treaty, in their application to that State.”

Article 19 VCLT states

“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

It is important for students to have access to reservations to CEDAW made by Muslim state parties. These are compulsory reading and must be covered. See the discussion in: Ali, S. S.

(2006) *Conceptualising Islamic law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of application of CEDAW in Bangladesh, India and Pakistan* UNIFEM Regional Office: Delhi pp. 245

Books, articles:

Ali, S.S. and Rehman, J. (2003) "Freedom of Religion versus Equality in International Human Rights law: Conflicting Norms or Hierarchical Human Rights? (A case study of Pakistan)" 21 *Nordic Journal for Human Rights*, pp. 404-429

Bahin Tahzib-Lie (2000) "Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief" 3 *Brigham Young University Law Review* pp. 967-987.

Lerner, N. (2000) 'The Nature and Minimum Standards of Religion or Belief' 3 *Brigham Young University Law Review* pp. 905-932.

Ali, S. S. (2000) *Gender and Human Rights in Islam and International Law Equal before Allah, Unequal before Man?* (2000) The Hague: Kluwer Law International chapter 7.

Mayer, A. E (1996) 'Reflections on the Proposed Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?' 23 *Hastings L. Q.* 727-823

Mayer, A. E. (1998) 'Islamic Reservations to Human Rights Convention: A Critical Assessment' 15 *Recht van de Islam*, pp-25-45

Baxi, U. (1996) 'A 'Work in Progress?': Reflections on the Proposed United States' Report to the United Nations Human Rights Committee,' 36 *Indian J. Int'l. L.* 34

Gardner, J P. (1997) *Human Rights as General Norms and a State's Right to Opt Out. Reservations and Objections to Human Rights Conventions* London: The British Institute of International and Comparative Law. This collection contains a number of relevant and interesting articles. See in particular the following:

Redgwell, C. (1997) 'The law of reservations in Respect of Multilateral Conventions' pp. 3-19.

Schmidt, M. G. (1997) 'Reservations to United Nations Human Rights Treaties – The case of the Two Covenants' pp. 20-34.

Meron, T. "Women's Equality and Freedom of Religion: Reflections on Normative Conflicts" in T.Meron (ed.), *Human Rights Law-Making in the United Nations*

Rehman, A. (1990) "Religious Rights vs. Women's Rights: A Case Study on India", *Colorado Journal of Transnational Law*

Bunting, A. (1993) "Theorising Women's Cultural Diversity in Feminist International Human Rights Strategies", 20(1), *Journal of Law and Society* 6

O'Sullivan, D. (1988) "UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief", *American Journal of International Law* 487

Ali, S.S. and Mullally, S. (1992) "Women's Rights and Human Rights in Muslim Countries: A Case Study" in Hinds, H. Phoenix, A. and Stacey, J. (eds.), *Working Out: New Directions for Women's Studies*, London, Falmer Press

Ali, S.S. (1995) *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law and the Laws of Pakistan*, Peshawar, Shaheen Printing Press.

AA An-Naim, (ed), *Islamic Family Law in a Changing World: A Global Resource Book* (London, Zed Books Ltd, 2002

Ahmed An-Na'im, Abdullahi. "A New Islamic Politics: Faith and Human Rights in the Middle East." *Foreign Affairs* (May/June 1996) (reader).

Franck, Thomas. "Are Human Rights Universal?" *Foreign Affairs* (January/Feb. 1997) (reader).

Sakakibara, Eisuke. "The End of Progressivism: A Search for New Goals." *Foreign Affairs* (March/April 1995) (reader).

Leila Ahmed. *Women and Gender in Islam*, New Haven, CT: Yale University Press, 1992, 208-248.

John L. Esposito & Natana J. DeLong-Bas. *Women in Muslim Family Law*. (Syracuse: Syracuse University Press, 2001) 93-126.

AA An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (New York, Syracuse University Press, 1990)

Some questions for consideration in class

- Consider the rights provided by Islamic Law to Women and whether reservations to CEDAW by Muslim states parties in the name of Islamic law are convergent with these rights.
- Is Islamic Law compatible to modern women's rights law (as envisioned through CEDAW)?
If so, analyze the rationale behind these large-scale reservations.

- If Islamic Law is incompatible to modern women's rights law, what step can be undertaken to make it more compatible?
- Is 'compatibility' the right approach to adopt or is transformative processes through active engagement of the two normative systems the more positive way forward?

Chapter Four

Children's Rights in Islamic Law and International Human Rights Law: A Comparative Analysis

We suggest the following format for lectures/seminars in this unit:

- (i) The first part provides an overview of the development of the international human rights norms on children's rights leading to the adoption of the CRC and its two Optional Protocols.
- (ii) The second part of the teaching time may be devoted to human rights instruments adopted by the Organisation of Islamic Conference (OIC) and other Muslim forums with specific reference to children's rights.
- (iii) The third part may be dedicated to the reservations debate within the CRC regime with reference to the substantive articles of this treaty reserved by Muslim states. It will attempt to place these in context of the 'Islamic' human rights documents as well as the practice of Muslim states and communities in the field of child rights. Some specific case studies will be undertaken to illustrate these points including case study on adoption and freedom of religion or belief.
- (iv) The final part of the unit offers space for engagement between child rights in Islam and international human rights law and possibilities of transformative processes within these human rights tradition by using some examples.

Readings:**Documents (These are compulsory):****The UN Convention on Rights of the Child 1989****Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2000)****Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child pornography (2000)****African Charter on the Rights and Welfare of the Child**http://www.achpr.org/english/info/child_en.html**Cairo Declaration on Human Rights in Islam (Annex to Res No 49/19-P) Adopted in Cairo on the 14th Muharram 1411 H/5th August 1990.**

See in particular the following articles:

Article 3

- (a) In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children...

Article 7

- (a) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the foetus and the mother must be protected and accorded special care.

- (b) Parents and those in such like capacity have the right to choose and the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with the ethical values and the principles of the Shari'ah.
- (c) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the Shari'ah.

Universal Islamic Declaration of Human Rights

<http://www.alhewar.com/ISLAMDECL.HTML>

Adopted on 21 Dhul Qaidah 1401/19 September 1981.

See in particular the following article:

XIX. Right to Found a Family and Related matters

- a) Every person is entitled to marry, to found a family and to bring up children in conformity with his religion, traditions and culture.
- b)
- c) Every husband is obligated to maintain his wife and children according to his means
- d) Every child has the right to be maintained and properly brought up by its parents, it being forbidden that children are made to work at an early age or that nay burden is put on them which would arrest or harm their natural developments
- e) If parents are for some reasons unable to discharge their obligations towards a child it becomes the responsibility of the community to fulfil these obligations at public expense.
- f) Every person is entitled to material support, as well as care and protection, from his family during his childhood, old age, or incapacity. Parents are entitled to material support as well as care and protection from their children.

OIC Covenant on the Rights of the Child in Islam (2004)

OIC Rabat Declaration on Child Issues in the Islamic World (2005)

Books and articles:

Bentley, K. A. (2005) “Can There Be Any Universal Children’s Rights?” *International Journal of Human Rights* 107-123.

Morgan-Foster, J. (2005) “Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement”, 8 *Yale Human Rights and Development Law Journal* 67.

Jackson, R. D. (1999) “The War over Children’s Rights: And Justice for All? Equalizing the rights of Children” 5 *Buffalo Human Rights Law Review* 223.

Brysk, A. (2004) “Children across Borders. Patrimony, Property, or Persons?” in Brysk, A. and Shafir, G. (eds.) *People Out of Place. Globalization, Human Rights and the Citizenship Gap*, London: Routledge, chapter 9

Rehman, J. (2003) *International Human Rights. A Practical Approach* Harlow: Pearson Education Limited. Chapter 14.

Baderin, M. A. (2003) ‘International Human Rights and Islamic Law’ Oxford: Oxford University Press pp.153-156.

Syed, S. (1998) “The Impact of Islamic law on the Implementation of the Convention on the Rights of the Child: The Plight of Non-marital Children under Shari’a” 6 *International Journal*

of Children's Rights, No. 359-393

LeBlanc, L. J. (1996) "Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice" 4 *International Journal of Children's Rights*, pp. 357-381

Steiner, H. J. & Alston, P. (eds.) (2002) 2nd. edition *International Human Rights in Context. Law, Politics, Morals*, Oxford: Oxford University Press pp. 511-538.

Van Bueren, G. (1995) *The International Law on the Rights of the Child* Dordrecht: Martinus Nijhoff Publishers.

Ali, S.S. and Jamil, B. (1994) *The United Nations Convention the Rights of the Child, Islamic Law and Pakistan Legislation: A Comparative Study* Peshawar: Shaheen Printing Press.

Ali, S. S. (2007) in "A Comparative Perspective of the Convention on the Rights of the Child and the principles of Islamic law. Law Reform and Children's Rights in Muslim Jurisdictions" in Goonesekere, S. (ed.) *Protecting the World's Children. Impact of the Convention on the Rights of the Child in Diverse Legal Systems* Cambridge: Cambridge University Press pp. 142-208.

Ali, S. S. (2006) "Rights of the Child under Islamic Law and Laws of Pakistan: A Thematic Overview" Vol. 2 *Journal of Islamic State Practices in International Law*, pp. 1– 16.

Freeman, M. and Veerman, P. (eds.) (1992) *Ideologies of Children's Rights* Dordrecht: Martinus Nijhoff Publishers.

Alston, P. Parker, S. and Seymour, J. (1992) *Children Rights and the Law* Oxford: Clarendon Press.

Freestone, D. (ed.,) (1990) *Children and the Law: Essays in Honour of Professor H. K. Bevan* Hull: Hull University Press.

Rogers, W. S. and Roche, J. (1994) *Children's Welfare & Children's Rights: A Practical Guide to the Law* London: Hodder & Stoughton.

UNICEF (2001) *Poverty and Children. Lessons of the 90s for least Developed Countries.*

Thukral, E. G. Ali, B. and Mathur, S. "Children"

<http://www.infochangeindia.org/ChildrenIbpprint.jsp>

McGoldrick, D. (1991) "The United Nations Convention on the Rights of the Child" 5 *International Journal of Law and the Family*", no.2, p.132

Walsh, B. (1990) "The United Nations Convention on the Rights of the Child: A British View" 5 *International Journal of Law and the Family*, no. 2, p.170.

Hammersberg, T. (1990) "The UN Convention on the Rights of the Child - And how to make it work" 12 *HRQ* 97

Cerdia, J. S. (1990) "The Draft Convention on the Rights of the Child: New Rights" 12 *HRQ* 115

Balton, D. A. (1990) "The Convention on the Rights of the Child: Prospects for International Enforcement" 12 *HRQ* 120.

Davidson, J. S. (1990) "The European Convention on Human Rights and the Illegitimate Child" in Freestone (ed.), *Children and the Law: Essays in honour of Professor H.K.Bevan* (Hull: University Press) 75.

Storey (1990) "The Right to Family Life and Immigration cases at Strasbourg, 39 *International and Comparative Law Quarterly* 238.

Price, C. P. Hart, S. N. & Kosloske, S. M. (1996) "Monitoring the United Nations Conventions on the Rights of the Child: The Challenge of Information Management" Vol. 18 *Human Rights Quarterly* 439-471.

Schabas, W. A. (1996) "Reservations to the Convention on the Rights of the Child" Vol. 18 *Human Rights Quarterly* 472-491.

Part 1

The first part of the teaching in this unit of the module (which could be either 1 or 2 sessions depending upon the teaching space available), would provide an overview of the development of the international human rights norms on children's rights leading to the adoption of the CRC and its two Optional Protocols. In addition to these instruments, students may be introduced to other human rights instruments affording special protection to children due to their vulnerable position. Starting from the UDHR to all other human rights treaties, the principle of equality and non-discrimination has offered children equal rights within the human rights paradigm. Thus, for example, Article 24 of the ICCPR provides specifically for the rights of the child. At the regional level, recognising the

need for specific human rights instrument for the protection of children, the African Charter on the Rights and Welfare of the Child was adopted in 1990. The scope and remit of CRC has also been expanded to include 2 Optional Protocols including the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2000) and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000).

The UN Convention on Rights of the Child (CRC) is the (almost) universally ratified human rights treaty with Somalia and the United States of America being the only two states that have failed to ratify the treaty. It therefore presents an interesting opportunity for engaging in a comparative discussion to evaluate the extent to which this treaty is indeed representative of universal values and norms on children's rights including in particular, Islamic human rights norms. Savitri Goonesekere states that:

“The CRC is sometimes perceived in Asian and African countries, and even by some scholars in the West, as a Convention that originated in the West and articulated the legal norms and values on children that had evolved in the West. This is correct perception, as there was a noticeable absence of participation from other regions in the early stages of the drafting of the Convention, although participation was broadened later. Some articles such as those on adoption (article 20) and on the role of the extended family (article 5) thus reflect some of the concerns of the Asian and African regions.”⁴

After providing an overview of the international norms on children's rights under the UN human rights and regional regimes, some issues and questions may be discussed in class in order to

⁴⁴ Goonesekere, S. “Introduction and Overview. Protecting the World's Children. Impact of the Convention on the Rights of the Child in Diverse Legal Systems” in Goonesekere, S. (ed.) *Protecting the World's Children. Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (2007) Cambridge: Cambridge University Press at p. 2.

contextualise the comparative perspectives of the discussions to come in the succeeding parts of the unit. These may include the following:

Some Discussion Questions for the CRC:

1. Are there any rights that are distinctively, universal "children's rights"?
2. Compare the Convention on the Rights of the Child with the African Charter on the Rights and Welfare of the Child to frame your comments.
3. What are the potential difficulties in implementing or enforcing children's rights?
4. What does the concept of the best interests of the child mean in the context of international human rights law?
5. Who should have the power to claim a child's rights: the parents, the state, the child him/herself?

Part 2

After providing an overview of children's rights from within the United Nations and regional regimes, we may now introduce the comparative perspectives on children's rights by introducing similar concepts from within the Islamic legal tradition. To this end, human rights instruments emanating from the Organisation of Islamic Conference (OIC) and other Muslim forums may be discussed and specific provisions relating to children's rights highlighted. These may include among others, the Cairo Declaration on Human Rights in Islam, the Universal Islamic Declaration, the OIC Covenant on the Rights of the Child in Islam (2004) and the OIC Rabat Declaration on Child Issues in the Islamic World. Some of the relevant provisions of these instruments are given below and reflect the variance in language and nuance of the rights language.

Cairo Declaration on Human Rights in Islam (Annex to Res No 49/19-P) Adopted in Cairo on the 14th Muharram 1411 H/5th August 1990.

See in particular the following articles:

Article 3

- (b) In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children...

Article 7

- (d) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the foetus and the mother must be protected and accorded special care.
- (e) Parents and those in such like capacity have the right to choose and the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with the ethical values and the principles of the Shari'ah.
- (f) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the Shari'ah.

Universal Islamic Declaration of Human Rights

<http://www.alhewar.com/ISLAMDECL.HTML>

Adopted on 21 Dhul Qaidah 1401/19 September 1981.

See in particular the following article:

XIX. Right to Found a Family and Related matters

- g) Every person is entitled to marry, to found a family and to bring up children in conformity with his religion, traditions and culture.
- h)
- i) Every husband is obligated to maintain his wife and children according to his means
- j) Every child has the right to be maintained and properly brought up by its parents, it being forbidden that children are made to work at an early age or that any burden is put on them which would arrest or harm their natural developments

- k) If parents are for some reasons unable to discharge their obligations towards a child it becomes the responsibility of the community to fulfil these obligations at public expense.
- l) Every person is entitled to material support, as well as care and protection, from his family during his childhood, old age, or incapacity. Parents are entitled to material support as well as care and protection from their children.

OIC Covenant on the Rights of the Child in Islam (2005) OIC/9-IGGE/HRI/2004/Rep.Final

This human rights instrument as in the Rabat Declaration below, acknowledge the commitment to the UN human rights regime especially in the field of child rights. Thus in the preamble of the Covenant on the Rights of the Child in Islam, ownership of the CRC is referred to in the following words:

“Proceeding from Islamic efforts on issues of childhood which contributed to the development of the 1989 United Nations Convention on Rights of the Child”

Secondly, the Covenant on the Rights of the Child in Islam and the UN Convention on Rights of the Child (CRC) have a degree of convergence on definition of what constitutes a child under these instruments which reads thus:

“Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” (CRC)

The Rights of the Child in Islam defines the child thus:

“Article One. Definition of the Child.

For the purposes of the present Covenant, a child means every human being who according to the law applicable to him/her has not attained majority.”

OIC Rabat Declaration on Child Issues in the Islamic World (2005)

In this declaration, conceptual convergence and commonalities are evident as seen from the excerpt provided below which may be flagged up for discussion:

“Call upon all Member States to take the necessary measures to eliminate all forms of discrimination against girls and all harmful traditional or customary practices, such as child marriage and female genital mutilation, in the light of the Cairo Declaration on Legal Tools for the Prevention of Female Genital Mutilation and the Maputo Protocol, to enact and implement proper legislations and formulate, where appropriate, national plans, programmes and strategies protecting girls;

11. Thank the Member States that have ratified relevant human rights conventions and urge States that have not ratified and implemented yet the International Labour Organization’s Conventions concerning Minimum Age for Admission to Employment (Convention No. 138) and Prohibition of the Worst Forms of Child Labour, 1999 (Convention No. 182), and the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography to do so;

12. Welcome the adoption by the United Nations General Assembly of Resolution N° 59/165 (2005) on Working towards the Elimination of Crimes against Women and Girls Committed in the Name of Honour, by taking appropriate legislative and administrative measures and devise suitable programmes;”

A task for the class would be to develop a table of common and conflicting rights based on a study of the two child rights instruments emanating from the OIC and the text of the CRC and its two Optional Protocols.

Part 3

- (i) The third part may be dedicated to the reservations debate within the CRC regime with reference to the substantive articles of this treaty reserved by Muslim states. It will attempt to place these in context of the ‘Islamic’ human rights documents as well as the practice of Muslim states and communities in the field of child rights. Some specific case studies will be undertaken to illustrate these points including case study on adoption and freedom of religion or belief.

Shaheen Ali notes with reference to the CRC and the Islamic norms of children's rights:⁵

“But does this near universal acclamation denote universality of norms represented in the substantive provisions of the CRC? Some of the contentious issues debated during the drafting process and evident from a study of the *travaux preparatoires*, reflects divergence in opinion among representatives of various state parties. Indeed, it is those very issues, translated as “difficult” provisions that emerged as reservations in the post-CRC period and remain contested terrain.

In the early stages of the drafting process, the “north” was overrepresented, leading to the fear that the treaty would be a “heavily Northern-oriented text,”ⁱ but this was attenuated by active participation from a number of countries from the South including many Muslim jurisdictions. Treaty formulations entail protracted debate and controversy and the CRC was no exception. What is relevant for purposes of our discussion is the fact that those controversial provisions became the subject of reservations and impinge on the universality of child rights norms espoused in the CRC.

The first issue in question was definition of the minimum age of the child. (whether childhood started at conception or at birth) The existing formulation of Article 1 was a compromise to get over this difficulty. The second problem area was the extent and scope of Article 14 regarding freedom of religion. Initially modelled on Article 18 of the ICCPR, which included ‘the freedom to have or to adopt a religion . . . of his choice,’ this article was reworded to address the strong objections articulated by representatives of Muslim jurisdictions. They pointed out that in the Islamic tradition, a child who is born to Muslim parents, does not have the right to change his/her religion. Another area where Muslim States Parties raised objections was the institution of adoption as

⁵ Ali, S. S. “A Comparative Perspective of the Convention on the Rights of the Child and the principles of Islamic law. Law reform and Children's Rights in Muslim Jurisdictions” in Goonesekere, S. (ed.) *Protecting the World's Children. Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (2007) Cambridge: Cambridge University Press pp. 142-208 at pp.174-175.

conceptualised in the “Western” legal tradition. The final example of controversial issues was the age at which children should be permitted to take part in armed conflict.”⁶

Some of the questions for consideration in our examination of Islamic law and rights of the child are as follows:

1. Does Islamic Law recognize the concept of Children’s rights?
2. What are the similarities and differences in the scope of the children’s rights under the UN Convention on the Rights of the Child (1989) and the OIC Covenant on the Rights of the Child in Islam (2004)?
3. What are the reservations of Muslim States to the UN Convention on the Rights of the Child (1989)? Are all these reservations on grounds of Islamic law?

Part Four

The final part of the unit offers space for engagement between child rights in Islam and international human rights law and possibilities of transformative processes within these human rights tradition by using some examples. From the earlier parts of this unit, it is evident that a number of issues may be selected for a comparative discourse on human rights in Islam and international law. We may pose the questions as under:

1. What are the main areas of differences regarding Children’s rights in Islamic law and under the UN Convention on the Rights of the Child?
2. Can the areas of differences be resolved? If so how best can this be achieved?

Examples/case studies may include adoption, rights of the child born out of wedlock and age of majority.

⁶ Ali, S. S. “A Comparative Perspective of the Convention on the Rights of the Child and the principles of Islamic law. Law reform and Children’s Rights in Muslim Jurisdictions” in Goonesekere, S. (ed.) *Protecting the World’s Children. Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (2007) Cambridge: Cambridge University Press pp. 142-208 at pp.174-175.
