

# **Comparative Law: The Islamic Legal System**

*The Johns Hopkins University  
Paul H. Nitze School of Advanced International Studies*

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## **Course Description:**

Unlike the American legal system, which is secular, the Islamic legal system is of a religious nature. Islam is both a religion and a social order. As such, it comprises rules concerning devotional obligations as well as rules regulating civil and commercial relations. According to Islamic beliefs, these two types of rules are of a divine origin. The origins of Islamic law, its sources, and various schools of Islamic jurisprudence will be discussed as an introduction to the course.

The course will explore several substantive areas of Islamic law, including: constitutional law; banking law and insurance; international law; crimes and punishments; marriage, divorce, and child custody; and succession and wills. These areas will be examined through a study of various cases where Islamic law has been debated in American courts. The course will also focus on human rights in the Islamic legal tradition and in the contemporary Islamic world, especially in countries of the Middle East. Concepts of human rights, women's rights, and minority rights in Islam will be analyzed in light of international human rights standards.

Class discussions will focus on particular exercises. Students are encouraged to participate in class discussions by preparing for each of these exercises. Students may choose a take-home examination or write a research paper in lieu of the examination. Final grades will be based on class participation (40%) and the final exam/paper (60%).

## **Suggested Reading Materials for Overall Course:**

1. Coulson, Noel J., *A History of Islamic Law*, 2011.
2. Feldman, Noah, *The Fall and Rise of the Islamic State*, 2010.
3. A'la Maududi, S. Abul, *Islamic Law and Constitution*, 1992. (Free download available at: <http://www.quranenglish.com/books/The%20Islamic%20Law%20&%20Constitution.pdf>.)
4. Mayer, Ann Elizabeth, *Islam and Human Rights: Tradition and Politics*, 4th ed., 2006.
5. Ramadan, Tariq, *Western Muslims and the Future of Islam*, 2003.
6. Schacht, Joseph, *Introduction to Islamic Law*, 1964.

### **1. Introduction (Sep 6)**

#### **Basic Concepts:**

Overview of syllabus; discussion of reading materials; the general characteristics of Islam as a divine law; the place of the Islamic legal system in the legal family - a comparative analysis.

### **Assigned Materials:**

- S. Abul A'la Maududi, *Islamic Law and Constitution* (1992), Chapter 6: First Principles of the Islamic State, p. 202 – 252.
- John J. Donohue and John L. Esposito, *Islam in Transition: Muslim Perspectives* (1982). Excerpts:
  - Hasan al Banna, *The New Renaissance*, p. 78 – 83.
  - Sayyid Qutb, *Social Justice in Islam*, p. 123 – 128.
  - Najib Mahfuz, *Debate on the Application of the Shari'a in Egypt*, p. 239 – 240.
  - 'Abd Al-Halim Mahmud, *Debate on the Application of the Shari'a in Egypt*, p. 241 – 242.
  - Zaki Najib Mahmud, *Debate on the Application of the Shari'a in Egypt*, p.243 – 245.
- *Elkhatib v. Dunkin Donuts*, 493 F.3d 827 (2007).
- *Nat. Group for Comm. and Computers Ltd. v. Lucent Technologies Int'l Inc.*, 331 F. Supp. 2d 290 (2004).

## **2. Nature and Sources of Islamic Law (Sep 13)**

### **Basic Concepts:**

Primary and secondary sources of law (Quran, Sunnah, Consensus and Analogy); the process of system-building in Islamic law.

### **Assigned Materials:**

- Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. Islamic & Near E.L. 135 (2002).
- Ali Khan, *Islam as Intellectual Property "My Lord! Increase Me in Knowledge,"* 31 Cumb. L. Rev. 631 (2000-2001).

## **3. Interpretation of the Islamic Text (Sep 20)**

### **Basic Concepts**

The theory of interpretation; Islamic jurisprudence; Islamic schools of law (Hanafi, Maliki, Shaifi and the Hanbali schools).

### **Assigned Materials:**

- Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 Am. J. Comp. L. 199 (1978).
- Salah-Eldin Abdel-Wahhab, *Meaning and Structure of Law in Islam*, 16 Vand. L. Rev. (1962).
- Nazeem M. I. Goolam, *Ijtihad and Its Significance for Islamic Legal Interpretation*, Mich. St. L. Rev. 1443 (2006).

### **Project 1:**

Prepare an analysis of a fatwa issued by an Islamic scholar on the Islamic view of a contemporary social, political, or economic issue examining its sources and reasoning.

#### 4. Islamic Constitutional Law (Sep 27)

##### Basic Concepts:

The principle of non-separation of state and religion in the Islamic legal system (the establishment clause); the relationship between Islamic Shari'a and the constitutional provisions (the supremacy clause); the independence of the judicial authority and the relationship between the executive and the legislative branches of government; does Islamic law recognize the theory of separation of powers?

##### Assigned Materials:

- Mohamed Y. Mattar, Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash Between “Human Rights” and “Islamic Law” be Reconciled in Future Legislative Enactments and Judicial Interpretations? 30 Fordham Int'l L. J. 126 (2006).
- Clark B. Lombardi & Nathan J. Brown, Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law, 21 Am. U. Int'l L. Rev. 379 (2006).
- S. Abul A'la Maududi, *Islamic Law and Constitution* (1992), Chapter 7: Fundamentals of Islamic Constitution, p. 253 – 271.
- A. Michael Tarazi, Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government, 34 Harv. Int'l L. J. 258 (1993).
- A Text of the 1979 Constitution of the Islamic Republic of Iran.

##### Project 2:

Present a memorandum on comparative constitutionalism explaining the influence of Islamic law on a constitution of your choice.

#### 5. Islamic Law in American Courts: Rights of Muslim Inmates to Religious Freedom (Oct 4)

##### Basic Concepts:

The bill of rights in Islamic law; rights of Muslim prison inmates and the constitutional freedom of religion.

- Abdulhaseeb v. Calbone, 600 F.3d 1301 (2010).
- Brown v. Ray, 2010 U.S. Dist. LEXIS 17363 (2010).
- Leonard v. State of Louisiana, 2010 U.S. Dist. LEXIS 31892 (2010).
- Lewis v. Ollison, 571 F. Supp. 2d 1162 (2008).
- Azuzallah v. Dipaolo, 138 F. Supp. 2d 99 (2001).
- Mack v. O'Leary, 80 F. 3d 1175 (1996).
- Lewis v. Scott, 910 F. Supp. 282 (1995).
- Darab v. U.S., 623 A.2d 127 (1993).
- Petition for Kassas, 788 F. Supp. 993 (1992).
- Equal Opportunity Employment Commission v. Reads, 759 F. Supp 1150 (1991).
- O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).
- Abdullah v. Kinnison, 769 F. 2d 345 (1985).

- Al Shakir v. Carlson, 605 F. Supp. 374 (1984).
- Rivera v. Smith, 63 N.Y. 2d 501, 472 N.E. 2d 1015 (1984).
- Wilson v. Beame, 380 F. Supp 1232 (1974).

### **Project 3:**

Submit a summary of one of the cases mentioned above explaining the facts of the case and the balancing test adopted by the court in reaching its conclusions.

## **6. Islamic Theory of Crimes and Punishment (Oct 11)**

### **Basic Concepts:**

Categories of criminal acts (Hudud offenses, Qesas crimes, and Taazir); classification of Hudud offenses (theft, adultery and fornication, defamation, highway robbery, use of alcohol, apostasy and rebellion); Al-Qesas (death penalty); the conditions of implementation; honor killings; mercy killing and the right to die; destruction of the unborn child; trafficking in persons, especially women and children.

### **Assigned Materials:**

- Mohamed Y. Mattar, *Combating Trafficking in Persons in Accordance with the Principles of Islamic Law*, UNODC (2009).
- Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law and the Salman Rushdie Affair*, 11 Am. U. J. Int'l L. & Pol'y (1996).
- Hossein Esmaili & Jeremy Gansast, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals In Saudi Murder Trials*, 28 Denv. J. Int'l L. & Pol'y 145 (2000).
- Kathryn Christine Arnold, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordan Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 Am. U. Int'l L. Rev. 1343 (2001).
- Nicholas Garces, *Islam, Till Death Do You Part? Rethinking Apostasy Laws under Islamic Law and International Legal Obligations*, 16 Sw. J. Int'l L. 229 (2010).

### **Project 4:**

Present a list of recommendations on how the general principles of the Islamic religion may be used to combat the crime of human trafficking.

## **7. Islamic Banking and Insurance (Oct 18)**

### **Basic Concepts:**

Freedom of contract; formation of contract; frustration of contracts; economic hardship; termination of contract; the Islamic economic order; Riba (unlawful advantage by way of excess or deferment); the financial system based on Islamic ethics (Musharaka, Murabaha, Ijara, Qard hasan, Mudaraba); the prospects for success of an Islamic Banking system; insurance: is it a valid contract under Islamic Law?

### **Assigned Materials:**

- Bilal Khan & Emir Aly Crowne-Mohammed, The Value of Islamic Banking in the Current Financial Crisis, 29 Rev. Banking & Fin. L. 441 (2010).
- Barbara L. Seniwski, Riba Today: Social Equality, the Economy and Doing Business Under Islamic Law, 39 Colum. J. Transnat'l L. 701 (2001).
- Appendix 1—Federal Law No. 6-1985 on Islamic Banks, Financial Institutions and Investment Companies; Appendix 2—Dubai Islamic Bank Promises to Purchase Contract.
- Chafic Nehme, Credit Cards and Islamic Law, Middle East Executive Reports (July 1995).
- Hossein Mahdavi Najmabadi, "Proposal for a Modified Model of Musharakh Financing, with Emphasis on Iran," Arab Law Quarterly 282 (1999).
- Ahmed A. Al-Ghadyan, "Insurance: The Islamic Perspective and its Development in Saudi Arabia," Arab Law Quarterly 332 (1999).

### **Project 5:**

Choose an example of an Islamic bank and write a description of the forms of Islamic banking used by this bank.

## **8. Islamic Family Law: Marriage (Oct 25)**

### **Basic Concepts:**

Marriage; dowry agreements; polygamy; problems of reforming the personal status law in contemporary Middle Eastern legal systems.

### **Assigned Materials:**

- Text of The United Arab Draft Law for Personal Status.
- Tamilla F. Ghodsi, Tying a Slipknot: Temporary Marriages in Iran, 15 Mich. J. Int'l L. 645 (1994).
- Emily L. Thompson & F. Soniya Yunus, Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts, 25 Wis. Int'l L. J. 361 (2007).
- Rahman v. Hossain, LEXIS 1326 (2010).
- Dajani v. Dajani, 207 Cal. App. 3d 1387 (1988).
- Aziz v. Aziz, 488 N.Y. S. 2d 123 (1985).

### **Project 6:**

Explain the concepts of early marriage, arranged marriage, and temporary marriage in light of the various schools of Islamic jurisprudence.

## **9. Islamic Family Law: Divorce and Child Custody (Nov 1)**

### **Basic Concepts:**

Judicial and non-judicial divorce; parental rights and the issue of adoption; community property; child custody rules in Islamic law: are they applicable in American courts?

### **Assigned Materials:**

- Alan Reed, Transnational Non-Judicial Divorces: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence, 18 Loy. L.A. Int'l and Comp. L. J. 311 (1996).

- Monica E. Henderson, U.S. State Court Review of Islamic Law Custody Decrees-When Islamic Custody Decrees in the Child's Best Interest? 36 J. Fam. L. 423 (1997-98).
- In the Matter of Sonia Ramadan and Samer Ramadan, 891 A.2d 1186 (2006).
- Hosain v. Malik, 108 Md. App. 284, 671 A. 2d 988 (1996).
- Ali v. Ali, 279 N.J. Super 154, 652 A.d 253 (1994).

**Project 7:**

Write a brief on the reasons given by American judges on American courts refusing the recognition of Islamic child custody rules.

**10. Islamic Law and Human Rights: Women's Rights (Nov 8)**

**Basic Concepts:**

Women as Equals in Islam; personal status laws in contemporary Islamic Codes; the Quranic view of gender relations; marital consent and the right of women to contract her own marriage; dowry; marriage; polygamy; the right of the wife to initiate divorce; maintenance; the right to education; right to employment; right to inheritance.

**Assigned Materials:**

- Adamantia Pollis and Peter Scwab, editors. *Human Rights – New Perspectives, New Realities* (2000), Chapter 4: by Zehra F. Arat, Women's Rights in Islam: Revisiting Quranic Rights, p. 69 – 93.
- Christie S. Warren, Lifting the Veil: Women and Islamic Law, 15 Cardozo J. L. & Gender 33 (2008).
- Azizah al-Hibri, Islam, Law and Custom: Redefining Muslim Women's Rights, 12 Am. U. J. Int'l L. & Pol'y 1 (1997).
- Zainab Chaudhry, The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law, 61 Alb. L. Rev. 511 (1997).
- Bharathi Anandhi Venktraman, Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?, 44 Am. U. L. Rev. 1949 (1995).

**Project 8:**

Write a memorandum on the extent of compliance of Islamic family law with international family law.

**11. Islamic Law and Human Rights: International Human Rights (Nov 15)**

**Basic Concepts:**

International Human Rights Standards; the concept of Human Rights in Islamic Law; relativism v. universalism; is international human rights law compatible with Islamic law?; the right to political asylum on the basis of fear of persecution; conversion from Islam to Christianity.

**Assigned Materials:**

- Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (1999), Chapter 8: Freedom of Religion in Islamic Human Rights Schemes.

- Isha Khan, *Islamic Human Rights: Islamic Law and International Human Rights Standards*, 5 Appeal 74 (1999).
- *Janem v. Mukasey*, 295 Fed. Appx. 89 (2008).
- *Syed v. Mukasy*, 288 Fed. Appx. 273 (2008).
- *Izquierdo v. Crawford*, 2007 U.S. Dist. LEXIS 71608 (2007).
- *Rehman v. Gonzalez*, 243 Fed. Appx. 647 (2007).
- *Suherwanto v. Attorney General of the United States*, 230 Fed. Appx. 211 (2007).
- *Bandari v. INS*, 227 F. 3d 1160 (2000).
- *Cheaib v. INS*, U.S. App (1999).
- *El Hadi v. INS*, U.S. App (1999).
- *Fisher v. INS*, 79 F. 3d 955 (1996).
- *Abedini v. INS*, 971 F. 2d 188 (1992).
- *Bastaniour v. INS*, 980 F. 2d 1129 (1992).
- *Saleh v. U.S.*, 962 F. 2d 234 (1992).
- *Elnager v. INS*, 930 F. 2d 784 (1991).

### **Project 9:**

Write a memo explaining arguments that may be made by a Muslim filing a law suit asking for political asylum in the United States.

## **12. Islamic Law and Human Rights: Minority Rights (Nov 29)**

### **Basic Concepts:**

Religious dissidents under Islamic law; religious discrimination and the rights of non-Muslims; foreign workers in Saudi Arabia: does the American law apply?; the rights of Coptics in Egypt; Jihad and the concept of just war.

### **Assigned Materials:**

- Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (1999), Chapter 7: Islamic Human Rights Schemes and Non-Muslims.
- Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 Wis. Int'l L. J. 349 (1996)
- James David Phipps, *Kiss of Death: Application of Title VII's Prohibition Against Religious Discrimination in the Kingdom of Saudi Arabia*, BYU L. R. 399 (1994).
- Scott Kent Brown II, *The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Non-State Discrimination*, BYU L. R. 1049 (2000).
- *Equal Employment Opportunity Commission v. ARMCO*, 499 U.S. 244 (1991).
- *Abrams v. Baylor College of Medicine*, 805 F. 2d 588 (1986).
- *Kern v. Dynallectron Corporation*, 577 F. Supp. 1196 (1983).
- *American Jewish Congress v. Carter*, 213 N.Y.S. 2d 60 (1961).

### **Project 10:**

Discuss the meaning of Jihad as interpreted by contemporary Muslim movements today.

## **13. Review (Dec. 6)**