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Islamic Reservations to the Convention on the Elimination of All Forms of Discrimination against Women

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Abstract

My study is about the Islamic reservations to the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and their compatibility under the regime of the Vienna Convention on the Law of the Treaties (VCLT). It is focused in the substantive reservations invoking *Shari'a* Laws entered by some Muslim countries to the central articles of the Convention which are, therefore, impermissible as incompatible whit the object and purpose of the Convention. I highlight the paradox of maximizing the Convention's universal application at the cost of compromising its integrity and how substantive reservations to the CEDAW provisions, tolerating discrepancy between states' laws and practice and the obligations of the Convention, pose a risk to the achievement of the Convention's goals. I also question if the compatibility criterion of the VCLT is effective in view of acceptance of some substantive reservations of a derogatory nature I consider that the "object and purpose" test is subjective, the practice by the objecting states is not uniform and that looking at those which are (or are not) the objecting states in respect of a particular reservation, it is evident how political or extralegal considerations intervene when states evaluate the compatibility of reservations. I especially focus on the paradox of the objections to a reservation which have the same effect as an acceptance when the objecting and reserving states are still maintaining treaty relation. Therefore, there is no difference in the legal effects of a reservation accepted and one objected without opposing the entry into force of the treaty between itself and the reserving state. I further analyze how reservations invoking *Shari'a* Law entail conflicting norms (freedom of religion and equality rules). Recalling the view of the "balancing of interest" I argue that it could be a reasonable approach, but in practice it is difficult to

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find some sort of equilibrium not prejudiced against women. I then analyze if these reservations are suggestive of a wider ideological conflict between women's rights enunciated in Islam and the ones formulated under the human rights treaties, and how they are representative of the women's situation in the reserving states. I question what are the motivating factors behind the decision to reserve and if the reservations should be seen in the broader political and socio-economic perspective of domestic and international context? I then ask if the States ratify the Convention affording its objectives as a real commitment or if they only do so at political opportune moments? I consider that is not Islamic religious beliefs, but evolving political situations which are the determinant factors in making these kinds of reservations. I finally analyze the work of the CEDAW Committee considering its efforts disappointing as many of the new Muslim states parties did not pay attention to the criteria set out by the Committee, continuing to enter either very general reservations or reservations to specific substantive articles. The new states parties with a predominantly Muslim population referred to the Islamic *Shari'a* Law as prevailing over the Convention without mentioning any specific articles, clearly not following the Committee's recommendations in the formulation of impermissible reservations.

Keywords: Islam; Reservations; Convention on the Elimination of All Forms of Discrimination against Women; Human Rights.

1. Introduction

Under the Vienna Convention on the Law of the Treaties[1] (VCLT) and according to the International Court of Justice[2] (ICJ), when a state enters a reservation, it establishes that it will be bound by the convention, with the exception of the reserved point.[3] Not every reservation has the same importance and the same effect on the treaty. With the Convention on the Elimination of All Forms of Discrimination Against Women[4] (CEDAW), many countries have claimed that they will be bound by the Convention, as long as it does not contravene religious laws. Some Islamic countries, for example, Bangladesh, Egypt, Iraq, and Morocco, took reservations to parts of the Convention citing prejudice to *Shari'a* laws.[5] These kind of reservations undermine the effectiveness of the Convention.

The problem of reservations by Islamic States to the CEDAW encompasses women's rights, freedom of religion, as well the question of cultural relativism. It also highlights the tension between the law of reservations and the politics of reservations. The reservations show that economic, social and political considerations could determine the formulation and the withdrawal of reservations, as well as the objections to them.

Part I of this work analyzes the status of the reservations entered to the CEDAW by countries with a predominantly Muslim population, focusing on the reservations invoking *Shari'a* laws. It critically examines whether these reservations are really the expression of a tension between religious rights and women's rights in the Islamic countries. It also asks whether the reservations are compatible with the general principles of Public International Law. Part II

1. See: Vienna Convention on the Law of Treaties, adopted 23rd May 1969, entered into force 27th January 1980, U.N.Doc. A/CONF 39.26.
2. See: International Court of Justice, *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion 1951, I.C.J. Report 1951 [hereinafter: ICJ *Genocide case*].
3. See: Article2(d) of the VCLT states:
   "reservation' means 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 of the treaty in their application to that State"
4. See: Convention on the Elimination of All Forms of Discrimination against Women, adopted 18th December 1979, entered into force 3rd September 1981, U.N.Doc. A/34/46 [hereinafter: CEDAW].
5. See: Committee on the Elimination of Discrimination against Women, Fourth-tent meeting of States Parties, Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Form of Discrimination against Women, New York (2006) CEDAW/SP/2006/2 [hereinafter: CEDAW/SP/2006/2], text of reservations and declarations by Bangladesh, Egypt, Iraq, and Morocco; Multilateral treaties deposited with the Secretary General: status as at 31 December 2004, United Nations publications, Sales no. E.05.V.3, ST/LEG/SER/.E/23 [hereinafter: Multilateral Treaties].

considers the general dilemma between universality and integrity, arising in reservations to human right treaties, such as the CEDAW. It considers how to deal with these kind of reservations. Finally, Part III explains why the ICJ/VCLT approach and the current regime on reservations under the CEDAW is inadequate.

2. Islamic Reservation to the CEDAW

2.1. Status of the Islamic Reservations

More reservations have been entered to the Women's Convention than to any other human rights treaty.[1] As of 1st April 2006, 182 states had ratified or accepted the Convention[2]; of these 54 states have entered reservations.[3] More substantively, 13 state parties to CEDAW have made reservations on certain provisions to avoid conflict with the Islamic law of *Shari'a*.[4] Example of Muslims countries that have cited the observance to Islam to enter substantive reservations to the Convention and limit their obligations are Bangladesh, Egypt, Iraq and Morocco.[5] All these countries have registered reservations the Convention that are essentially based on the Islamic *Shari'a*.[6]

Bangladesh submitted a reservation to Article 2 because it "conflicts with *Shari'a* law".[7] Egypt placed reservations on Articles 9, 16 and 29 and a general reservation to Article 2, excusing itself from respecting any obligation or duty that "runs counter to the Islamic *Shari'a*".[8] Iraq, similarly, reserved on Articles 2, 9, 16, and 29[9] while Morocco reserved to accede to Article 9, 16 and 29.[10] They also based their reservations on the Islamic *Shari'a*.

All these reservations are vague and imprecise. Often they are entered without offering "any explanation at all" (Minor, 1994: 144), except the conflict with the Islamic *Shari'a,* whose content is indefinite. The reservations to Article 2, the general and most important provision requiring the ratifying

1. See: Minor, 1994: 137-144.
2. See: CEDAW SP/2006/2; *Text of Declarations and Reservations*; Multilateral Treaties.
3. See: CEDAW SP/2006/2; text of reservations and declarations.
4. See: CEDAW SP/2006/2; text of reservations and declarations by Bahrain, Bangladesh, Egypt, Iraq, Kuwait, Libyan Arab Jamahiriya, Malaysia, Maldives, Mauritania, Morocco, Oman, Syrian Arab Republic and United Arab Emirates.
5. See: CEDAW SP/2006/2 text of reservations and declarations by Bangladesh, Egypt, Iraq, and Morocco.
6. See: CEDAW SP/2006/2. See also: Morrison & Foerster on behalf of B'nai B'rith Women, 'All Appropriate Measures: United States Conformance with the Requirements of the United Nations Convention on the Elimination of All Forms of Discrimination against Women' (1993) at 10; Venkatraman, 1995: 60.
7. See: CEDAW SP/2006/2, text of reservations and declarations by Bangladesh.
8. See: CEDAW SP/2006/2, text of reservations and declarations by Egypt.
9. See: CEDAW SP/2006/2, text of reservations and declarations by Iraq.
10. See: CEDAW SP/2006/2, text of reservations and declarations by Morocco.

states to "incorporate the convention into domestic policy" (V.A.1999: 637-638)[1], and Article 16, which governs family relations, are especially grave. These reservations to the core provisions of the Convention, concerning the obligation to modify domestic law, mean not rectifying gender discrimination and leaving women threatened with inequity in the most personal aspect of their lives.[2]

In these countries, personal status laws, based on the *Shari'a*, clearly favor males. Egypt's position is that "the Islamic law has liberated women from any form of discrimination"[3] and "no other rights are necessary for women other than those already provided under Shari'a".[4] This, therefore, means that the promotion of the CEDAW in Egypt is superfluous, as the women already have all the rights they need.[5] In Egypt women cannot work outside the home if the husband is opposed. The female illiteracy rate rises 90%. Many women do not have identity cards or birth certificates (they are, therefore, ineligible for social programs, cannot vote, cannot go to courts; the practice of female genital mutilation is extensive: 70% and 90-95% in rural areas.[6] In Bangladesh violence against women, even wife-beating and death for adultery, are normal and tolerated. Polygamous marriage for men is encouraged and the normal form of divorce for men is the "talaq al-bid'a"[7], but women only can do in a court and only for reasons stipulated by Muslim law.[8]

So, what does the ratification of the CEDAW mean in this context? Are the reservations entered an easy subterfuge to avoid any change toward women's rights and to perpetuate an unequal *status quo*? Do ratifications with these kinds of reservations signify a step toward the elimination of discrimination or a hypocritical evasion of the obligations?[9]

2.2. Reservations Invoking Shari'a Laws: Tension between Women's Rights and Religious Rights?

The religious based reservations to the CEDAW encompass a complex connection

1. See: Riddle, 2002: 605-628.
2. See: Jenefsky, 1991: 205; also see: Clark, 1991: 281- 311.
3. See: Committee on the Elimination of Discrimination against Women, Third session, U.N. Doc. A/39/45 (1984) [hereinafter CEDAW *Report 1984*] §§ 215, 6.
4. See: Committee on the Elimination of Discrimination against Women, Third session, U.N. Doc. A/39/45 (1984) [hereinafter CEDAW *Report 1984*] §§ 215, 6.
5. See: Brandt & Kaplan, 1996: 105-121.
6. See: Brandt & Kaplan, 1996: 118.
7. The divorce is automatically granted to the man on the third occasion of the husband's public repudiation of the wife.
8. See: Brandt & Kaplan, 1996: 122.
9. See: Brandt & Kaplan, 1996: 128.

between its principles, the nature of Islamic *Shari'a* and the situation of women in certain reserving countries. Commentators have pointed out how the large number of substantive reservations to the CEDAW invoking *Shari'a* laws represent the tension between women rights and freedom of religion, or religious rights in general.[1] Part of this scholarship found biases in the CEDAW, and considered it culturally insensitive.[2] Many states have argued that the CEDAW represents a Western attack on Islamic countries.[3] Consequently, proposals to limit reservations have been objected to as being anti-Islamic.[4] The question is how can the CEDAW address the tension between international standards for women's rights and religious rights, and respond to broad reservations based upon religion, which prevent the realizations of its goals.[5] Meron proposes a "balancing test" to apply to the restrictions of human rights in order to protect religious freedom.[6] This view, however, has been criticized by a number of authors.[7] Mayer, in particular, has argued that this alleged freedom of religion is not freedom, but a coercive governmental imposition of discriminatory laws.[8]

2.3. Interpretation of the Reservations based on the *Shari'a* Laws

How should the international community interpret these reservations? They are related to the question of interpretation of the *Shari'a*[9], the Islamic Law which, despite its divine authority, has altered since it came into force, 1,500 years ago, and varies dramatically in different Muslim countries.[10]

The disagreements about the requirements of the *Shari'a* Laws lead to different interpretations by the Muslim countries themselves in making reservations. For this reason the reservations are subject to change in accordance with evolving interpretations of Shari'a, not in accordance with objective international standards. They inhibit the dynamic potential of the convention as well as the work of the CEDAW Committee.[11] From the point of view of the other States parties, reservations that need knowledge of laws, or cultural and religious

1. See, for instance: Steiner & Alston, 1999: 959.
2. See: Venkatraman, 1996: 1999.
3. See: An-Na'im, 1987-1988: 491.
4. See: Tomasevki, 1993: 119.
5. See: Tomasevki, 1993: 119.
6. See: Meron, 1986: 155.
7. See: Ljinzaad, 1995; Mayer, 2002.
8. See: Mayer, 2002: 110.
9. See: Chinkin, 2001: 61.
10. See: Mayer, 2002: 111.
11. See: Chinkin, 2001: 3.

beliefs of the reserving party to be comprehensible, are difficult and inappropriate.[1] As Clark argues, only the reserving state knows what the reservation means and, therefore, to accept this kind of reservations involves the other parties accepting a certain degree of insecurity about the treaty relationship.[2] Connors questions, as well, whether the reservations made by these countries are, in fact, required by the *Shari'a* or, particularly where they are wide-sweeping and unexplained, are a product of an ideology.[3]

The CEDAW Committee pointed out how the *Shari'a* itself gave equality to women, but the problem is its interpretation.[4] It added that the thinking about religious roles has not evolved and it is not proper to apply to the present world a standard that was applied several centuries ago.[5] Therefore, efforts could be made to proceed to an interpretation of the *Shari'a* permissible for the advancement of women. Until that happens, religion could remain a limit for women's human rights and a way to perpetuate the patriarchal status quo.[6] This may include the practical gender discrimination, intrinsic in many traditions, cultures and religious laws. Until progressive interpretation happens, religious, historical and cultural arguments will continue to be used with impunity to excuse flagrant violations of women's equality.[7]

2.3. Are these Reservations Really "Religious Reservations"?

In the attempt to understand these reservations it is, perhaps, not useful to focus on the *Shari'a* and its different interpretations, nor in religious tensions since it is doubtful these are the prime motivating factors behind the reservations. The states' practice suggests that political matters surrounding the convention prevent a purely legal application of the law of reservations. There are political reasons behind states' citation of *Shari'a* laws in the reservations process, whether they are making, reviewing and withdrawing them.[8] Similarly, political interests determine the other parties' decision whether or not to object and whether or not to consider the reserving state as party to the treaty.[9]

1. See: Clark, 1991: 5.
2. See: Clark, 1991: 5.
3. See: Connors, 1997: 7.
4. Committee for the Elimination of Discrimination against Women, 49th session, U.N. GAOR Supp. No. 38 at 16 See: U.N. Doc. A/49/38 (1994) [hereinafter: CEDAW A/49/38] § 132; Schabas, 1997: 99.
5. See: CEDAW A/49/38.
6. See: Mayer, 2002.
7. See: Mayer, 2002.
8. See: Mayer, 2002.
9. See: Clark, 1991: 290.

The CEDAW is probably the most political human rights instrument.[1] Mayer has strongly argued that political factors are behind the decision to enter reservations. Reservations are not due to religious beliefs, but instead reflect political calculations, which are often influenced by strategic alliances.[2] Reservations entered by Muslim countries are motivated by a wide range of factors, including political and socio-economic considerations. This is also evident when we compare the lack of reservations that the same Muslim states have entered to the Convention on the Rights of the Child.[3] As Ali pointed out, it appears that these States do not have any problem in accepting equal rights for males and females until the age of eighteen; why, then, are the same concepts rejected when formulated in the CEDAW?[4]

Societal conditions, political opinions opposing reform of Muslim personal laws, economic interests and fragile coalitions are the motivations behind the decisions of the reservations. These are the factors, by implication, behind the decisions of what rights are protected in domestic law, as well as in international human rights law. They have politicized *Shari'a* law and utilized it as a powerful tool, as Islam is used as a political tool to obtain a level of indulgence by other parties that would be otherwise impossible.

3. Why are these Reservations Incompatible?

3.1. Against the Object and Purpose of the Treaty

According to Articles 19 of the Vienna Convention and 28 CEDAW, a reservation is incompatible when it goes against the object and purpose of the Convention. What is the object and purpose of the CEDAW? As its name suggests, and scholars argue, it is the de iure et de facto elimination of all forms and manifestations of discrimination against women.[5]

Cook notices that even if the states are situated at different points on the road to realization of the Convention's obligations, and they progress at different rapidity, there are certain reservations which are clearly unacceptable.[6] Chinkin especially criticizes the reservations made to the first articles of the Convention, which have fundamental importance for the fulfillment of the

1. See: Ali, 2000: 238; Venkatraman, 1996.
2. See: Mayer, 2002: 105.
3. See: Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2nd September 1990 [hereinafter: CRC]
4. See: Ali, 2000: 225.
5. See: Cook, 1990: 643.
6. See: Cook, 1990: 690.

objectives of the Convention.[1] Similarly Dormady argues that the reservations to Article 2, the crux of CEDAW, "are particularly disconcerting".[2] The head of the CEDAW Committee, Salma Kahn, stated that "when you enter a reservation on Article 2, you are violating and nullifying the whole concept and sense of the Convention".[3] Minor maintains that these reservations conflict with the object and purpose of the Convention and clearly hinder its objective which is the elimination of discrimination.[4]

Furthermore, reservations to one article are more questionable when they are entered by states that have also made reservations to other articles. When a state qualifies its acceptance of the CEDAW by a group of reservations that evidences a systematic purpose not to be bound by its major goals.[5] As Sweden proposed in its objection, the compatibility criteria should not to be applied only separately to individual reservations, but to the effects of all reservations as a whole.[6]

The Convention, paradoxically, allows states to commit themselves to women's equality, while they simultaneously admit that they do not have any intention of conceding it. In essence, system of reservations permits discrimination. The substantive reservations of cultural practice invoking Shari'a laws do not indicate any attempt to change customs or attitudes. Instead, it demonstrate an emblematic acceptance of the Convention and an unwillingness to implement its obligations.[7] Such types of reservation are hostile to women's equality and negate the Convention's major requirement of correcting states parities' legal, religious and customary system, in order to achieve the objectives of the CEDAW. They are indeterminate, imprecise, open-ended and not accompanied by explanations of their legal or practical scope.[8] Its impact in refuting women's equality is significant, and they mean that discrimination will remain.[9]

3.2. Against Principles of Public International Law

Commentators have further questioned the permissibility of these reservations within the framework of international law. Generally, international law does not recognize domestic law as an adequate excuse for failing to comply with

1. See: Chinkin, 2001: 70.
2. See: Dormady, 1999: 638.
3. See: Deen, 1998.
4. See: Minor, 1994: 5.
5. See: Clark, 1991: 314.
6. Submission by Sweden to the Secretary General, U.N. Doc. A/41/608 at 14.
7. See: Cook, 1990.
8. See: Chinkin, 2001.
9. See: Cook, 1990.

an international treaty.[1] The degree of uncertainty, which is allowed by reservations invoking Shari'a laws, is not tolerable by other parties, as they can understand them only interpreting other states' domestic laws. Even considering the fact that reservations based on the Shari'a laws are expression of religious faith and, therefore, protected by international human rights law, religion cannot be used as a justification for the derogation of universal recognized rights.[2]

Substantive incompatible reservations also contradict the general pacta sunt servanda and the good faith principles. Islamic states are bound by these rules, which are equivalent, as Artz explains, to the siyar principle of Islamic international law.[3] Because the conflicts with Shari'a laws were predictable, the Islamic states, upon the principles of good faith, should have avoided ratifying the Convention, as they knew they were not able to fulfill their obligations.[4]

An other area of debate is whether the norms of non-discrimination on the basis of sex could be considered as jus cogens. If the substantive provisions of CEDAW constitute jus cogens it will make the derogations through reservations unacceptable. The argument that non-discrimination on basis of gender constitutes peremptory norm from which no derogation is permitted, is defended by a number of notable authors.[5] Therefore, a formulation of an invalid reservation do not provide an excuse to the state party to deny an obligation of an international human rights treaty that, otherwise, is binding erga omnes. Therefore the state remains bound by the general treaty provisions including the provision against which it has entered a reservation.

4. How to Deal with the Incompatible Reservations? Inefficacy of the Regime on Reservations

4.1. Universality v. Integrity

Commentators have pointed out that the broadly stated reservations to the CEDAW express the paradox of the Convention: in the process of gaining universality, its integrity has been jeopardized.[6] The reservations also represent

1. See: Connors, 1991; Cook, 1990: 100,1; See also: Amnesty International, Reservation to the Convention on the Elimination of All Form of Discrimination Against Women. Weakening the Protection of Women From Violence in the Middle East and North Africa Region(2004)available at: http://Web.Amnesty.Org/Library/Index/Engior510092004.
2. See: Venkatraman, 1996: 3.
3. See: Arzt, 1990: 202 at 212, 3.
4. See: Ljinzaad, 1995: 305.
5. See: Askari, 1998: 8; S. Cal. Rev. L. & Women's Stud. 3; Schilling (supra note 25) at 45, Cook, 1990; Chinkin: 2001.
6. See for instance: Cook, 1990: 643, 5; Ljinzaad, 1995: 310,5.

the general dilemma, unsolved by the VCLT regime, between universality of the treaty, which maximizes membership, and its integrity, which requires full commitment to the Convention by states parties. The CEDAW has undoubtedly benefited from maximizing the number of ratifications. However, by allowing for such extensive reservations, the CEDAW's effectiveness and integrity have been compromised.[1]

A treaty containing many signatures has limited value when the signatures come at the cost of many reservations and its provisions have little effect on the domestic policy of the reserving state.[2] Keller, similarly, expresses the view that there is a weakening of the Convention when states have the option of holding reservations to provisions that would necessitate substantial changes to their national laws or cultural norms.[3] Schabas questions whether the great and rapid success of the Convention, in terms of the number of States parties, would have been the same were the possibility of reservation treated more pejoratively. He questions whether the offensive reservations are merely part of a more general strategy aimed at weakening and undermining the spread of universal human rights norms.[4]

4.2. Ways to Prevent the Formulation of Incompatible Reservations

4.2.1. VCLT/ICJ Regime

The decision of the ICJ in the Genocide Convention Case and the Vienna Convention cover the modern approach to reservations. The ICJ eliminated the unanimous consent to states reservations and held that states could ratify a treaty despite the existence of objectionable reservations. It also established the "object and purpose test" as a standard for states to object to reservations.[5] The VCLT added that the failure to object to reservations is equal to accepting the reservation through silence. Therefore, the VCLT effectively eliminated any difference between accepting and rejecting a reservation.[6]

Article 19 of the VCLT states the rule on the formulation of reservations establishing that: "a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a)the reservation is

1. See: Riddle, 2002: 628.
2. See: Riddle, 2002: 623.
3. See: Keller, 2004-2005: 40, 5.
4. See: Schabas, 1997: 110, 1.
5. See: Riddle, 2002: 636.
6. See: Riddle, 2002: 624.

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 failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty". Article 20.4 rules the acceptance of and the objection to the reservations stating that: "[…] acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States [and] an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State". Article 21.3 on the legal effects of reservations and objections states that: "[w]hen a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation".

Is the regime provided by the ICJ and codified in the VCLT applicable in human rights treaties? The problem is that the Vienna Convention does not take into account the content or compatibility of the reservation and does not explain who the authority is that could determine whether or not a reservation goes against the object and purpose of the treaty. The current regime, letting a lacuna open to different interpretations, is not a satisfactory solution to the problem of the consequences of invalid reservations.

Coccia proposes that the test of admissibility is simply the acceptance by other states parties.[1] Cook argues that Article 19 of the VCLT governs the permissibility and Article 20 the opposability of reservations, and that under Article 19 a state may not formulate an incompatible reservation, as this formulation constitutes a breach of international legal obligations, arising from the VCLT and customary law.[2] Accordingly, the reservation is not a breach of the convention itself, but rather a breach of the legal norm embodied in the Vienna convention, which prohibits the formulation of incompatible reservations.[3] Commentators argue, and states' practice also suggests, that the VCLT's criteria is constituted by a two tier test: the reservation not only has to be permissible, which is the preliminary issue, but it has also to be accepted.[4]

1. See: Coccia, 1985: 45, 50.
2. See: Cook, 1990.
3. See: Cook, 1990.
4. See: Sinclair, 1984; Ruda, 1975: 146; Recueil des Cours III 95; Bowett, 1976/1977: 67; Clark, 1991.

Schabas points out that the prevailing view, supported by judgments of the European Court of Human Rights,[1] is that a determination must be made as to whether the reservation is "severable".[2] Bowett considers that if the reservation is severable, the treaty will be in force, including the provisions to which invalid reservations have been entered and if it is not severable, the reservation compromises the ratification of the treaty as a whole and it should be considered not in effect.[3] Bowett noted a contradiction in the motivation of a state that ratifies a treaty while attaching an illegal condition to it.[4] In the same view, the Human Rights Committee has stated that "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party" and "such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of reservation".[5]

Human rights treaties are different from other multilateral treaties because there are no direct advantages or disadvantages to the states parties. The ICJ/VCLT approach to reservations could preserve the integrity of treaty provisions if states judge and object to reservations, but it is limited when states do not have a direct motivation to control reservations.[6] The current reservations system has, therefore, proven inadequacies in dealing with the competing values of universality and integrity. In addition, it is doubtful whether or not the ICJ/VCLT regime is compatible with human rights treaties since it has been argued that it jeopardizes their integrity.[7]

4.2.2. CEDAW Regime

The CEDAW adopted the ICJ/VCLT approach to deal with reservations as it allows a state to remain a party to the Convention and have the benefit of a reservation, irrespective of other states' objections to the reservation. Because the CEDAW assumes this regime without implementing any other safeguards against broad and incompatible reservations, it necessarily works under the presumption that universality, rather than integrity, is the ultimate goal of the Conventions.[8]

1. See: *Loizidou* v. *Turkey* (preliminary objections), ECHR, Application no. 15318/89, and Judgment of 23 March 1995.
2. See: Schabas, 1997: 108.
3. See: Bowett, 1976/1977: 69; Schabas, 1997: 108.
4. See: Bowett, 1976/1977: 75; Schabas, 1997: 109.
5. See: Human Rights Committee: Fifty-second session, General Comment No. 24, U.N. Doc. CCPR/C/21/ Rev.1/Add.6 (1994) [hereinafter: *General Comment 24*]
6. See: Riddle, 2002: 625.
7. See: Riddle, 2002: 624.
8. See: Riddle, 2002: 623; Also see: Baylis, 1999: 287.

The CEDAW uses the Article 19 VCLT approach which allows reservations unless they are contrary to the object and purpose of the treaty. When a treaty contains specific criteria by which to judge the reservations' compatibility, the combination of the VCLT and the treaty itself could permit an objective approach to evaluating the reservation. Instead, when the treaty is silent on the compatibility of reservations, as the CEDAW is, each state party determines the object and purpose of the treaty on its own, allowing for much more subjectivity and vulnerability to outside influences and considerations.[1] Article 28.2 of the CEDAW prohibits incompatible reservations simply stating that: "[a] reservation incompatible with the object and purpose of the […] Convention shall not be permitted".

There are, therefore, no specific articles to which reservations are prohibited, nor consequences for incompatible reservations, nor non-derogation clause establishing the invalidity of the reservations of non-dereogable rights. Moreover, CEDAW contains no explicit requirement that a reservation must be specific. This has unfortunately allowed general reservations which exclude the means of the Convention to move toward its goals and compromised compliance with its object and purpose. The CEDAW is silent, as well, about who has the authority to determine the impermissibility of a reservation. Even if the implications of Article 28 is that the test of incompatibility of reservations is objective, in practice the permissibility turns simply on whether other states parties have expressly or tacitly accepted a particular reservation or have objected to it. In such instance the test is subjective as there are no fixed parameters.

Clark argues that a distinction between derogable and non-derogable rights would prevent reservations to the latter provisions.[2] Clark adds that the system needs modifications by providing that reservations purporting to derogate from non-derogable rights are not only incompatible, but also invalid or impermissible.[3] In this way, a broad reservation to non-derogable right, like the ones entered by Bangladesh or Egypt to Article 2 invoking domestic laws or religion, could automatically be considered as impermissible by the Convention itself and could not be formulated. Instead, the poor provisions of the Convention on the reservations leave the impression that it is not so binding as others human rights treaties.

1. See: Riddle, 2002: 625.
2. See: Clark, 1991.
3. See: Clark, 1991.

4.3. Ways to Respond to Incompatible Reservations

4.3.1. The Objections by Other States Parties

The response of the states parties to the invalid reservations to the CEDAW entered by some Muslim countries has also suffered from inefficacy, weakness and inadequacy. Relatively few states parties have formulated objections to the reservations of other countries and, even those that have done so, have objected to different reservations.[1] Moreover, when they have made an objection, they have, at the same time, maintained treaty relationships with the reserving state, weakening the non discrimination norm. Even when a state's reservation is a condition of acceptance, the objecting state, which finds the reservation invalid, could choose not to be in the treaty relationship with the reserving state. However, in no case has an objecting state decided that its objection preclude the entry into force of the CEDAW between itself and the reserving state.[2] The reason behind either the small number of states that have entered an objection and the no preclusion of the entering into force of the Convention, are both generated by a structural weakness of the CEDAW reservation regime itself, and other external factors.

A main problem is the paradox of the objection regime itself. According to the Article 20.4 VCLT, when a state objects to a reservation, the treaty between the reserving state and the objecting state still comes into force unless the objecting state expressly holds otherwise. Clark stresses that there is no difference between accepting a reservation and objecting to a reservation.[3] Riddle points out that only by accepting the state's reservations can the other party enforce any of the treaty provisions.[4] The implication of a state remaining a treaty partner with an other state, whose reservation is declared objectionable, is that the reservation is not incompatible with the object a purpose of the treaty, unless the objection state so declares. By preventing the enforcement of the treaty the objecting state is legitimizing the reservation.[5] Ultimately the legal effect of an objection and an acceptance are identical when the treaty remains in force.[6] Does this render the objection a symbolic gesture? If so, accepting all reservations would have the same legal effect and make the compatibility criteria superfluous.[7]

1. See: CEDAW/SP/2006/2, Objections to Certain Reservations and Declarations; Multilateral Treaties.
2. See: CEDAW/SP/2006/2, *Objections to Certain Reservations and Declarations*; Multilateral Treaties.
3. See: Clark, 1991: 286, 90.
4. See: Riddle, 2002: 624.
5. See: Riddle, 2002: 624.
6. See: Clark, 1991: 309; Ruda, 1975: 77; Sinclair, 1984: 200.
7. See: Clark, 1991: 310, 1.

Inconsistencies in the objection process are also determined by political and economic reasons. Many states parties have a vested interest in protecting their relationship with countries with whom they have some political or economic alliance. For example, many States have economic ties with the oil-producing countries, like Kuwait.[1] These political factors discourage them from making objections viewed as hostile acts.[2] Chinkin points out that objections to reservations are viewed as politically unfriendly acts towards states with whom they have significant trading, strategic or other interest.[3] Schabas also says that although the VCLT recognizes the technique of formulating an objection, its application to human rights treaties appears to have a political rather than a legal significance.[4] Examples of objections demonstrate that either that states subjectively disagree with reservations that are incompatible with the object and purpose treaty,[5] or that other concerns about foreign relations prevented them from objecting to the reservations.[6]

The Human Rights Committee concludes that the VCLT objections is "inappropriate to address the problem of reservations to human rights treaties".[7] The often chaotic and subjective nature of objections, the unwillingness of states to deal with the compatibility of the reservations, as well as the political and economic pressure not to enter objections, demonstrates that the current regime does not adequately tackle the issue of incompatible reservations to the CEDAW.

4.3.2. Role of the CEDAW Committee

Who is the competent monitoring body to make the decision around the compatibility of these reservations with the object and purpose of the CEDAW? The CEDAW Committee has, in general, limited powers to enforce the provisions under the convention or to interpret its substantive parts. Under the CEDAW there is no independent adjudicative body evaluating reservations.[8] The United Nations Legal Advisor states "that neither the Secretary-General, as depository, nor CEDAW has the power to determine the compatibility of reservations".[9]

1. See: Ridde, 2002: 625; Also see: Schabas, 1997: 90 (giving the example of Canada which objected to the Republic of Maldives' reservation but took no action with respect to a subsequent and comparable reservation by Kuwait)
2. See: Clark, 1991: 307, 11.
3. See: Chinkin, 2001: 60, 2.
4. See: Schabas, 1997: 80.
5. See: Clark, 1991: 310.
6. See: Riddle, 2002: 625.
7. See: General Comment 24.
8. See: Donner, 1994: 241.
9. See: CEDAW *Report 1984.*

The CEDAW Committee lacks any mandate or authority to independently determine whether a reservation goes against the object and purpose of the treaty. Its power to investigate and determine compatibility of the reservations is nearly non-existent and the Committee is even discouraged from criticizing reservations.[1]

Authors consider that the CEDAW Committee suffers from the impact of international skepticism toward "second-generation rights".[2] Because CEDAW primarily addresses more about social and economic rights instead of civil and political, or first-generation rights, it sits lower in the hierarchy of human rights.[3] As Byrnes explains, there is a perception that the CEDW Committee is the "poor cousin" of the human rights treaty bodies and is provided with less technical and legal resources than the other treaty bodies.[4] Commentators argue, moreover, that the CEDAW Committee lacks sufficient time and consistent information, which prevent the Committee from examining significantly the country reports.[5]

The efforts of the CEDAW committee, however, have been considerable, even if its real powers of enforcement are limited to publicly, reviewing country reports and recommendations, to withdrawal of the reservations. Under Article 18 of the CEDAW, states parties have to submit a report on the legislative, judicial and administrative measures which they have adopted to give effect to the provisions of the Convention.[6] States, therefore, have to explain why the reservations entered are necessary and what their effects are. Through the process called "constructive dialogue",[7] the Committee promote the review of the states parties' laws and policies in conformity with the CEDAW, in order to make possible withdrawal of reservations. Unfortunately, despite its efforts, the Committee has largely failed to convince states to remove their reservations to CEDAW.[8]

Even though the CEDAW Committee has attempted to encourage states to

1. See: Riddle, 2002: 630.
2. See: Meron, 1986: 215; Crooms, 1996: 619 at 627; Riddle, 2002: 629.
3. See: Meron, 1986: 213, 4; Riddle, 2002: 629.
4. See: Byrnes, 1989: 57.
5. See: Meron, 1986: 215; Riddle, 2002: 629.
6. See: Article 18 CEDAW establishes that: ".1.States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect: (a) Within one year after the entry into force for the State concerned; (b) Thereafter at least every four years and further whenever the Committee so requests".
7. See: Byrnes, 1989: 19.
8. See: Schilling (*supra* note 25); Ljinzaad, 1995; Riddle, 2002.

remove reservations, it has no authority to invalidate incompatible reservations. Few states, therefore, have removed their reservations, and the states with broad reservations have implemented the CEDAW's provisions in a "particularly discouraging"[1] way. In an "atmosphere of inertia"[2] many states express the intention to withdrawal reservations, but then fail to do so. During the first meetings of the Committee, the Islamic countries accused the western countries of cultural insensitivity and of interference with the sovereign right to make reservation. Consequently, the CEDAW in its resolution, did not directly address the issue of reservations.[3] Similarly, the initiative of the Committee to promote studies on the status of women under Islam laws was declined by the ECOSOC because of the instigation of Islamic states who saw the initiative as hostile to Islamic values.[4]

Unfortunately, looking at the practice of the new states parties with predominantly Muslim populations that ratified the CEDAW it is easy to see that they have not followed the Committee's guidelines and that they have not taken account of their terms.[5] These states did not pay attention to the criteria set out by the Committee, continuing to enter either very general reservations or reservations to specific substantive articles. The new states parties with a predominantly Muslim population referred to the Islamic Shari'a Law as prevailing over the Convention without mentioning any specific articles, clearly not following the Committee's recommendations in the formulation of impermissible reservations.[6] The lack of formal power of the Committee to rule the compatibility of the reservations has limited the CEDAW's efficacy. Similarly, the efforts of the CEDAW Committee in convincing states to limit or withdraw their reservations has been inadequate, due to the Committee's lack of resources and legal authority.[7]

5. Scholarship's Recommendations

Commentators have proposed different way to deal with the problems presented by the incompatible reservations entered by Muslim countries and recommended how the Convention could react to these reservations which nullify and ruin its core principles and purpose.

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1. See: Riddle, 2002: 630.
2. See: Ljinzaad, 1995: 304.
3. See: Committee on the Elimination of Discrimination, Eleventh session, General Recommendation 20, 'Reservations to the Convention' U.N.Doc.A/47/38 (1993).
4. See: Chinkin, 1991: 78.
5. See: Schöpp Schilling (*supra* note 25) at 35
6. See for instance: reservations by Pakistan and Saudi Arabia in CEDAW/SP/2006/2.
7. See: Riddle, 2002: 630.

A first alternative is that two states parties bring the issue of the incompatibility of reservations before the ICJ as a problem of interpretation and application.[1] This possibility is, however, restricted because of the reservations made to Article 29 CEDAW which rules the dispute resolutions mechanism.[2]

An other proposal is that the Committee seeks an advisory opinion from the ICJ on the validity and legal effect of reservation and on its power to evaluate reservations.[3] The criticism of this approach is that in answering the question the ICJ might not use an approach fundamentally different from the law of treaties, in which states are the only judges of object and purpose, and incompatible reservations will still be accepted.[4] The question is, however, whether states accept the ICJ's decision in the event it established that the Committee has the power to take action against state parties' reservations.[5]

A further possibility is the adoption of an approach similar to the Human Right Committee's General Comment 24. It would allow the Committee to sever reservations that go against the object and purpose of the Convention without relying on the contracting parties, like the ICCPR Committee does.[6] The Committee could standardize the roles for reservations and ask the parties to amend incompatible reservations. The CEDAW Committee, however, would undoubtedly suffer criticism for exceeding its mandate and authority, and such action may induce states to leave the Convention.[7]

It has also been proposed to amend the CEDAW's implementing reservation procedures and make them similar to the stronger provisions of the Convention on the Elimination of Racial Discrimination.[8] Under the CERD, reservations are considered incompatible and rejected as invalid with a two-thirds vote by the states parties. The imitation of the CERD would give the Committee more power in terms of interpreting the Convention and investigating state compliance.[9]

A final possibility comes from the adoption of the Optional Protocol.[10] It

1. See: Brand, 1987: 19; Cook, 1990.
2. See: Ljinzaad, 1995: 305,7.
3. See: Cook, 1990; Riddle, 2002: 633.
4. See: Ljinzaad 1975: 309.
5. See: Riddle, 2002: 633.
6. See: Baylis, 1990: 314, 20; Riddle, 2002: 630, 3.
7. See: Riddle, 2002: 637.
8. See: Convention on the Elimination of All Form of Racial Discrimination, entered into force 4 January 1969, GA Res. 2106 A (XX), U.N.T.S. 85.
9. See: Donner, 1994: 242.
10. See: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted 13th October 1999, entered into force 22nd December 2000 G.A. A/RES/54/4.

gives groups, like NGOs, and individuals the faculty to bring complaints to the CEDAW Committee about the state's failure to comply with the Convention. They can bring state reservations and their compatibility to the Committee's attention, thereby generating a method for condemning incompatible reservations for determination by the Committee. The Committee could also use the provisions under the Protocol's reporting and investigation procedures to analyze the effects the reservations have on women, to review them and to recommend ways of amending or removing those which are contrary to the object and purpose of the CEDAW.[1]

6. Conclusion

A quick overview on the situation of women's rights under the Islamic countries which have ratified the CEDAW with substantive reservations, is enough to see that the Convention has not been observed and gross violations of women's rights continue with impunity as components of states' customs and practice, as well as part of the overall marginalization of women rights. Even if invalidating state reservations does not automatically resolve this situation, reservations nullifying the ratification's effects remain an ironic, or tragic, element in the issue of the unequal women's rights. Even if a full ratification of the Convention without any reservation does not solve the problem of discrimination, the state should not use their ratification to refute criticism of their women's rights record.

Many Islamic countries have entered reservations invoking Shari'a laws, but neither religious beliefs, nor the alleged freedom of religion, nor respect for customs, are the real motives behind the formulation of such reservations. Rather it is political factors which drive the issue and result in the formulation of reservations. At the same time political interest and economic factors are again behind the decision of other states parties to not formulate objections. The reality is that these reservation are clearly incompatible with the object and purpose of the treaty, as they imply that discrimination against women will not be eliminated. The Convention tried to set normative standards for the recognition of women's rights, but the states parties that entered substantive reservations are not going to enforce these rights implementing the standards into their domestic legislation.

The general VCLT regime and the specific CEDAW regime on reservation

1. See: Riddle, 2002: 634, 5.

cannot deal with this kind of reservation as no clear criteria has been established, nor a competent body set up to decide on the matter of incompatible reservations. To leave this problem to the states is to leave the problem open to inertia and hypocrisy. The current procedures under CEDAW have failed to provide member states with a firm standard by which to judge state reservations, which has resulted a small number of inconsistent objections to reservations.

What the case of the CEDAW has shown is that the convention must establish rigid criteria on reservations. The treaty itself should be the only guiding principle to judge the compatibility and the reservation is, therefore, incompatible if it conflicts with the content of the treaty. The CEDAW needs to adopt additional procedures to make it impossible for states to get the political goodwill of treaty membership without reciprocally obligating themselves to essential treaty provisions. If the CEDAW wants to achieve its purpose of eliminating discrimination against women, it must adopt procedures that will more effectively deal with state reservations by rejecting reservations that are broad or against the object and purpose of the treaty. This is especially true of the reservations invoking Shari'a laws to essential provisions that show the reserving state's refusal to implement the provisions in its domestic legislation.

The Convention was not drafted with sufficient foresight to second-guess the inevitable reservations from states with predominantly Muslim population. The CEDAW could have provided a better mechanism on reservations instead of remaining silent and leaving the matter to the general regime under the VCLT. Useful guidelines could have been set by the provision on non-derogable rights and on the consequence of incompatible reservations, the definition of the object and purpose of the Convention or the attribution to the Committee the competence on judging on the acceptability of the reservations. When the treaty contains the normative on the permissibility of reservations, an incompatible one is a priori ruled out by the treaty itself. Then, if it assigns the power to judge the acceptability to an independent body, the political problem of compromising relation-ships and states' hypocrisy and inertia are avoided.

Applying the good faith principle to the object and purpose of the Convention as well to the reservations and viewing the CEDAW in connection with other human rights treaties, the incompatibility of reservations invoking domestic law and practice is evident. To seek an advisory opinion on the

compatibility of reservations to the ICJ, to adopt the approach of the General Comment 24, or the implementation of the new Protocol, are all valid, even if partial, solutions for dealing with them. Hopefully in the future non-discrimination on the basis of gender could reach the category of jus cogens. As a peremptory norm, gender equality will not be vulnerable to reservations on its scope not because they will be not permitted, but because reservations will simply not formulated.

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