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Donders, Y.M.

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UNIVERSITY OF AMSTERDAM

CULTURAL PLURALISM  
IN INTERNATIONAL HUMAN RIGHTS LAW:  
THE ROLE OF RESERVATIONS

Yvonne Donders

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University of Amsterdam



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# Cultural Pluralism in International Human Rights Law: the Role of Reservations

Yvonne Donders<sup>1</sup>

## 1. Introduction

The link between international human rights law and cultural diversity was clearly expressed in the Universal Declaration on Cultural Diversity, adopted by the Member States of UNESCO in 2001, which holds that “the defence of cultural diversity is...inseparable from respect for human dignity” and that it “...implies a commitment to human rights and fundamental freedoms”. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in 2005, states that “cultural diversity can be protected and promoted only if human rights and fundamental freedoms...are guaranteed” (Article 2(1)). International bodies supervising the implementation of human rights treaties have also regularly confirmed the value for human dignity of cultural diversity in a pluralistic society. The precise relationship between cultural diversity and international human rights law, however, leaves room for further exploration from different angles and perspectives.

In the instruments above, the concept of cultural diversity is used. This concept should be distinguished from the concept of cultural pluralism. Cultural diversity is a neutral term to describe the factual situation of the existence of cultural differences between and within states. Cultural pluralism, on the other hand, refers to the way such cultural diversity is valued and translated in laws and policies. The link between cultural diversity and cultural pluralism is explained in the Universal Declaration on Cultural Diversity. In Article 2, called from cultural diversity to cultural pluralism, it is stated that “...cultural pluralism gives policy expression to the reality of cultural diversity”. In other words, cultural diversity reflects the factual situation, also termed ‘plurality’. There may be different responses to the factual situation of cultural diversity. The response in the sense of the adoption of laws and policies to protect and promote cultural diversity reflects cultural pluralism. Cultural pluralism implies that cultural diversity is valued as something good, as a desirable and socially and politically beneficial condition. It implies that individuals and communities are given the opportunity to maintain their specific cultural identity, provided that they are consistent with the laws, policies and values of the wider society. Consequently, although cultural diversity is the term often used in relation to international human rights law, what is often meant is cultural pluralism<sup>2</sup>, which is why this concept is used in this chapter.

This chapter addresses cultural pluralism in international human rights law by analysing one specific aspect of international law, namely reservations to human rights treaties. It has been argued that reservations “...are a legitimate, perhaps even desirable, means of accounting for cultural, religious, or political value diversity

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<sup>1</sup> Prof. Dr. Y.M. Donders is Professor International Human Rights and Cultural Diversity and Executive Director of the Amsterdam Center for International Law (ACIL) of the University of Amsterdam. This paper is part of the ACIL Research Programme The International Rule of Law.

<sup>2</sup> The term pluralism in relation to international law is also used to describe differences in legal systems or in institutional structures between and within States. This chapter concerns cultural pluralism in relation to the substantive aspects of international human rights law.

across nations”.<sup>3</sup> Others have expressed concern about reservations, in particular those referring to cultural diversity, as they would undermine the universality of human rights and would not be allowed as being against the object and purpose of the treaty.<sup>4</sup>

This chapter elaborates on the question whether and to what extent the instrument of reservations is used by states to express cultural pluralism, including religious pluralism, between and among them. Another question is how other states and international supervisory bodies have reacted to such reservations, including to what extent such reservations are accepted as a reflection of cultural pluralism between states.

The first part of the chapter, dealing mainly with the first question, contains an empirical evaluation of how often and in what way reservations to human rights treaties are made that refer to cultural pluralism. Cultural pluralism is taken broadly, to include reservations that refer to the specific culture, religion, customs or history of or within a state. The second part of the chapter deals with the second question by looking at how these “cultural reservations” have been received. Sometimes other states explicitly objected to these reservations and the monitoring bodies of these treaties have also expressed their concern on them. Such criticism on cultural reservations gives an idea about the extent to which states are limited in the use of such reservations. In some instances, states have withdrawn or adjusted their reservations. On the basis of this, conclusions can be drawn reflecting on the role of reservations as a tool for states to reaffirm cultural pluralism.

The general regime concerning reservations to treaties is laid down in the Vienna Convention on the Law of Treaties (VCLT).<sup>5</sup> Sometimes human rights treaties have their own specific provisions on reservations. Fact is that human rights treaties are a special kind of multilateral treaties, which makes the general VCLT rules on reservations not easily applicable. Unlike other multilateral treaties, on for example trade or the law of the sea, human rights treaties involve not only states, but also individuals and communities as main beneficiaries of those treaties. The contractual dimension of human rights treaties, including the important element of reciprocity, is complemented by the moral, broader dimension of fulfilling certain legal obligations not towards the contractual counterparts, but to third parties, being individuals and/or communities. Consequently, the VCLT rules on reservations do not always fit well to reservations in human rights treaties.

The treaty selected for this chapter is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).<sup>6</sup> This treaty was selected for several reasons: firstly it is one of the human rights treaties that is widely, almost universally, ratified by states, from all regions of the world. Secondly, CEDAW belongs to those

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<sup>3</sup> Neumayer, ‘Qualified Ratification: explaining reservations to international human rights treaties’, 36(2) *Journal of Legal Studies* (2007) 397, at 398.

<sup>4</sup> Neumayer, *supra* note 3, at 398; Pergantis, ‘Reservations to Human Rights Treaties, Cultural Relativism and the Universal Protection of Human Rights’, in K. Koufa (ed), *Multiculturalism and International Law* (2007) 427, at 433-434, 437, 447.

<sup>5</sup> Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, done at Vienna on 23 May 1969, entry into force 27 January 1980.

<sup>6</sup> Convention on the Elimination of All Forms of Discrimination Against Women, adopted GA Res. 34/180, 18 December 1979, entry into force 3 September 1981.

treaties on which the largest number of States Parties have filed one or more reservations.<sup>7</sup> Thirdly, these reservations quite often refer to cultural or religious arguments as justification for the reservation. This has to do with the fact that several provisions in CEDAW, on for instance equality between men and women in family matters, have strong cultural connotations. Most of the reservations are justified with reference to cultural pluralism *between* states, but a few also refer to cultural pluralism *within* states. Where the latter is the case, it will be explicitly shown. This chapter focuses on the role of reservations to express and maintain pluralism between states.

## 2. Reservations to International Human Rights Treaties

Reservations allow a state to become party to a treaty, while exempting itself from certain specific obligations in the treaty in question. Reservations find their *rationale* in two important factors in the international legal system: state sovereignty and diversity between states. States as main subjects of international law are sovereign, which means that they decide for themselves whether, and to what extent, they wish to become parties to international treaties. In other words, states can only be bound to international treaties that they have explicitly consented to and *vice versa*, they cannot be bound to international standards or norms that they have explicitly objected to. This situation implies that states negotiate and draft treaties and in doing so, they try to come to a common set of rules, applicable to all of the parties equally. This may lead to a watering down or compromising of the provisions, but the end result should reflect an agreement on common norms and standards of behaviour. This is why first and foremost treaties are a contractual agreement between states.<sup>8</sup>

At the same time, states across the world vary as regards their cultural, economic, historical and social setting and moreover, they often wish to promote and defend this variety. States may therefore during the drafting process disagree on certain issues, for example because of conflict with their national interest. This may very well be a national interest of a cultural or religious nature, raising the issue of the diversity between states. When states finally adopt and sign a treaty, some of them may feel that their specific interest is not sufficiently reflected in the treaty or they may disagree with certain specific provisions. Some states may decide not to become parties to the treaty at all. A state may also decide to become a party to the treaty, but with the explicit notification, in the form of a reservation, that it does not want or consider itself to be bound to certain aspects or provisions of the treaty.<sup>9</sup>

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<sup>7</sup> The other treaty widely ratified on which many States Parties have filed reservations is the Convention on the Rights of the Child (CRC), adopted GA Res. 44/25, 20 November 1989, entry into force 2 September 1990. A first research on the reservations to the CRC shows similar patterns as those on the CEDAW. See, also, Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UUN Convention on the Rights of the Child', 25(1) *Human Rights Quarterly*, 2003, at 130-181.

<sup>8</sup> L. Lijnzaad, *Reservations to UN Human Rights Treaties – Ratify or Ruin?* (1994), at 107; Pergantis, *supra* note 4, at 435.

<sup>9</sup> Interestingly, research shows that these reservations often reflect the same issues as expressed during the drafting of the treaty. See J. Klabbbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations', in I. Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004) 149, at 182

This possibility to opt out has been an important factor in encouraging states to become parties to human rights treaties.<sup>10</sup> Reservations allow states to express that they do not want to be bound to certain elements or provisions of the treaty, without having to reject the treaty as a whole.<sup>11</sup> In this regard, "...reservations carry the promise of reconciling the interests of individual states with those of the international community at large" which is to have the largest amount of states parties possible.<sup>12</sup> Similarly, reservations to human rights treaties have been considered as a possible solution to the 'universality-integrity dilemma'.<sup>13</sup> The universality approach reflects the interest to have as many states as possible ratify the treaty, in particular because of the importance of international and national human rights promotion and protection. The integrity approach relates to the idea that human rights treaties should be seen as a coherent package that states should accept in full. Reservations could be a way to overcome the challenge of balancing universal participation with the integrity of the treaty.<sup>14</sup>

With reservations, states express that they do not want or consider themselves to be bound to certain elements or provisions of the treaty. Sometimes this non-bindingness is meant to be of a temporary nature. A state can maintain that it is not ready yet to implement the treaty in full, because it still has to adjust certain national laws and policies. With the reservation, it wants to "buy time" and make clear to the other states parties that it cannot fulfil certain parts of the treaty. Sometimes the non-bindingness is supposed to be of a more structural nature. In this case, a state finding certain provisions for instance incompatible with its own cultural or religious rules, wishes to remain free to disregard that provision in the treaty and not be bound by it. The reservation is to show other states that there are differences that the state party intends to keep.<sup>15</sup>

The international legal regime for reservations is laid down in the Vienna Convention on the Law of Treaties (VCLT). According to Article 2(d) of the VCLT a reservation is "...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." This provision implies that no matter how a state calls its statement, if it is meant to exclude or modify the legal effect of certain provisions, it is considered a reservation.

The possibility for states to make reservations is limited. According to Article 19 VCLT: "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;

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<sup>10</sup> Lijnzaad, however, argues that the argument that reservations facilitate ratification is not absolutely valid. See Lijnzaad, *supra* note 8, at 107.

<sup>11</sup> Klabbers argues that reservations may also be important for democratic concerns, allowing the legislator to protect itself from some legal consequences of a treaty submitted to it by the executive. See Klabbers, *supra* note 9, at 166.

<sup>12</sup> Klabbers, *supra* note 9, at 150.

<sup>13</sup> This dilemma is described in detail by Lijnzaad, *supra* note 8, at 103-112.

<sup>14</sup> Lijnzaad, *supra* note 8, at 105; Klabbers, *supra* note 9, at 155, 165, 169; Pergantis, *supra* note 4, at 442.

<sup>15</sup> See, Neumayer, *supra* note 3, at 403; Klabbers, *supra* note 9, at 167; Seibert-Fohr, 'The Potentials of the Vienna Convention on the Law of Treaties with respect to Reservations to Human Rights Treaties', in I. Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004) 183, at 184.

(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.”

States may, according to the above, not make reservations which are incompatible with the object and purpose of the treaty.<sup>16</sup> The object and purpose of the treaty are, however, not easy to define, which makes the assessment whether certain reservations are compatible or not a difficult matter.<sup>17</sup> This assessment is traditionally done by other states parties. After a reservation is made, other states parties to the treaty may object to this reservation. Such an objection, according to Article 20(4)b VCLT, does, however, “...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.”

Moreover, there is reciprocity: according to Article 21(1) VCLT the reservation “...modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and...modifies those provisions to the same extent for that other party in its relations with the reserving State.” This idea is based on the contractual character of treaties, which usually contain reciprocal rights and obligations for the states that become parties to those treaties. Human rights treaties, however, are a special kind of treaties, which bears the question to what extent the regime of the VCLT is appropriate in relation to human rights treaties.<sup>18</sup>

Human rights treaties differ from the strict contractual treaty model, since they regulate states’ domestic behaviour more than states’ behaviour *inter se*. The obligations of states in human rights treaties are owed not so much to fellow states parties, but mostly to individuals and communities as beneficiaries. This was indicated by the International Court of Justice (ICJ) in its Advisory Opinion on reservations to the Genocide Convention. According to the ICJ, such treaties do not maintain a “...perfect contractual balance between rights and duties...” and states do not have individual advantages or disadvantages nor interest of their own, but merely a common interest.<sup>19</sup> The Human Rights Committee (HRC), supervising the International Covenant on Civil and Political Rights (ICCPR)<sup>20</sup>, formulated it as follows: “Such treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with

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<sup>16</sup> According to Lijnzaad, this is something else than stating that the reservation should be in conformity with the object and purpose. See Lijnzaad, *supra* note 8, at 84.

<sup>17</sup> See, for an extensive analysis of the object and purpose theory, Lijnzaad, *supra* note 8, at 80-102.

<sup>18</sup> This matter has been extensively discussed in academic literature. See, for example, J.P. Gardner (ed), *Human Rights as General Norms and a State’s Right to Opt Out – Reservations and Objections to Human Rights Conventions* (1997); L. Lijnzaad, *Reservations to UN Human Rights Treaties – Ratify or Ruin?* (1994); I. Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004); Tyagi, ‘The Conflict of Law and Policy on Reservations to Human Rights Treaties’, *British Yearbook of International Law* (2000), at 181-258; Klabbers, ‘Accepting the Unacceptable? A new Nordic approach to Reservations to Multilateral Treaties’, 69 *Nordic Journal of International Law* (2000), at 179-193.

<sup>19</sup> International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, ICJ Reports (1951) 19, 28 May 1951, at 12. See, also, Lijnzaad, *supra* note 8, at 110-111.

<sup>20</sup> International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), adopted 16 December 1966, entry into force 23 March 1976.



rights. The principle of inter-state reciprocity has no place.”<sup>21</sup> In other words, the important purpose of human rights treaties – the advancement of human rights for individuals and communities – goes beyond the mere contractual model.

This has consequences for the working and effect of reservations to human rights treaties in relation to the acceptance or rejection of reservations by other states. The ICJ in its Advisory Opinion on reservations to the Genocide Convention indicated that it does not think that there is a rule of international law concerning the absolute integrity of a convention. Consequently, it cannot be maintained that the effect of a reservation would be subjected to the express or tacit assent of all of the contracting parties. Similarly, a reservation is not merely accepted if none of the other states parties has objected to it.<sup>22</sup> The ICJ concluded that the “...appraisal of a reservation and the effect of objections...depend upon the particular circumstances of each individual case.”<sup>23</sup>

The ICJ in the same Advisory Opinion confirmed that it is in principle states as contractors that assess the validity of reservations by other states parties. States can object to reservations, for instance if they are considered to be incompatible with the object and purpose of the treaty. However, in relation to human rights treaties, because of their *erga omnes* character and importance for individuals and communities as beneficiaries, not only states, but also international monitoring bodies have increasingly involved themselves in the assessment of the compatibility of reservations with the object and purpose of the treaty. The Human Rights Committee has formally given itself this role by its General Comment 24, in which it maintained that “...it necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States Parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions...Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.”<sup>24</sup> In other words, the Human Rights Committee finds itself the most appropriate body to assess the compatibility of reservations with the object and purpose of the treaty. It should be noted that several states expressed formal objections to this General Comment, disagreeing with this role the Committee gave itself.<sup>25</sup>

Although other treaty bodies have not been so explicit, they also concern themselves with reservations. They ask questions to states parties about their reservations during the reporting procedure and the treaty bodies that have an individual

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<sup>21</sup> Human Rights Committee, General Comment No. 24: 'Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant', Fifty-Second Session (4 November 1994), UN Doc. CCPR/C/21/Rev.1/Add.6, at 17. See, also Pergantis, *supra* note 4, at 439.

<sup>22</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, ICJ Reports (1951) 19, 28 May 1951, at 13.

<sup>23</sup> *Ibidem*, at 15.

<sup>24</sup> Human Rights Committee, General Comment No. 24, *supra* note 20, at 18.

<sup>25</sup> The United States of America, the United Kingdom and France made formal objections. See Human Rights Committee, Annual Report, GAOR, Suppl. No. 40 (1994-1995) in UN Doc. A/50/40, Vol. I, p. 126-131, at 5-16 and Human Rights Committee Annual Report, GAOR, Suppl. No. 40 (1996) in UN Doc. A/51/40, Vol. I, p.104-106, at 1-2.

complaint procedure, have dealt with reservations in relation to individual complaints as well.<sup>26</sup> Practice shows that states parties include information on reservations in their reports to be discussed by and with the treaty bodies, thereby broadly accepting this role of the treaty body. Most treaty bodies comment on reservations and their (in)compatibility with the object and purpose of the treaty. The treaty bodies also urge States Parties to redraft or withdraw certain reservations. However, although the treaty bodies deal with reservations as monitoring bodies of the implementation of their respective treaties, their role remains a complementary one, as the "...control of the permissibility of reservations is the primary responsibility of the States Parties".<sup>27</sup> The International Law Commission (ILC) has emphasized this primary role of states by stating that although monitoring bodies may be competent to comment upon and make recommendations with regard to the admissibility of reservations, this does not "...affect the traditional modalities of control by the contracting parties" as laid down in the VCLT.<sup>28</sup>

The consequences of an invalid reservation once again show the primacy of the normative character of human rights treaties over their contractual character. International monitoring bodies broadly adhere to the so-called 'severability thesis', whereby a state is bound by the treaty even if a reservation made by that state to the treaty is invalid. The reservation is 'severed' from the rest of the treaty. This approach finds support in the normative character of human rights treaties and the search for universal application. 'Non-severability' would namely oblige a state to withdraw from the treaty and to re-enter without the invalid reservation, which might mean that the state does not become a party anymore and falls outside the monitoring by international bodies.<sup>29</sup> The ILC, however, has been critical about the severability approach, emphasizing that it is the responsibility of the reserving state to take action in case of inadmissibility of a reservation, for example by modifying or withdrawing it "...or forgoing becoming a party to the treaty."<sup>30</sup>

### **3. Cultural Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women**

Below first an overview is given of the cultural reservations made by the different states parties to the Convention on the Elimination of All Forms of Discrimination

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<sup>26</sup> See, for instance, the following cases for the European Court of Human Rights: *Temeltasch v. Switzerland* (Commission, Application 9116/80) (1983) DR 31, 120; *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132; *Weber v. Switzerland*, ECHR (1990) Series A, No. 177; *Chorherr v. Austria*, ECHR (1993) Series A, No. 266-B. The Inter-American Court of Human Rights took a similar position in its Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention (Articles 74-75), 24 September 1982, at 29. See, for a discussion, Marks, 'Three Regional Human Rights Treaties and their Experience of Reservations', in J.P. Gardner (ed), *Human Rights as General Norms and a State's Right to Opt Out – Reservations and Objections to Human Rights Conventions* (1997), at 37-63.

<sup>27</sup> CEDAW Committee, 'Statements on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women', Eighteenth and Nineteenth Sessions (1998) UN Doc. A/53/38/Rev.1, at 22-24. Lijnzaad even calls it the obligation of States Parties to respond to reservations that are incompatible with the object and purpose of the treaty. See Lijnzaad, *supra* note 8, at 97.

<sup>28</sup> International Law Commission, 'Preliminary Conclusions on Reservations to Normative Multilateral Treaties including Human Rights Treaties', *Yearbook of the International Law Commission*, Vol. II, Part 2, 1997, at 57, para. 6.

<sup>29</sup> Klabbbers, *supra* note 18, at 188-190.

<sup>30</sup> International Law Commission, *supra* note 28, at 57, para. 10..

Against Women (CEDAW). Reservations can be categorized in different ways: firstly, according to the *scope* of the reservation, distinguishing between reservations that concern a particular provision and general reservations that concern the treaty as a whole. Secondly, reservations can be classified according to the *type* of reservation, distinguishing between substantive, procedural and territorial reservations. And thirdly, reservations can be categorized according to the *source of justification*, for instance national law, international law, religious law, religion, culture or custom.

The reservations analyzed below were firstly selected on the basis of the sources of justification. Only reservations that referred to cultural pluralism, including religion and custom, as justification to make the reservation, were included. Sometimes religion and custom were referred to as a source in themselves, sometimes they were referred to as legal sources, for instance as part of national law. As regards the scope of these cultural reservations, the selection includes broad and general ones, reserving the treaty as a whole, but also those referring to a specific provision in the treaty. As regards the type, the reservations selected are mainly substantive reservations. They concern the substance of the treaty and/or a provision and are not linked to the non-acceptance of a procedure or the limited or specific application of the treaty to a certain territory. It appears that cultural justifications are typically connected to the substance of the norms.

### **3.1 The CEDAW and Reservations**

The CEDAW has been ratified by 187 states.<sup>31</sup> Of all states parties, 62 of them currently maintain one or more reservations. Several more made reservations in the past, but withdrew them. The CEDAW itself contains a specific provision on reservations. Article 28 reads:

- “1. The Secretary-General of the United Nations shall receive and circulate to all states the text of reservations made by states at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all states thereof. Such notification shall take effect on the date on which it is received.”<sup>32</sup>

In comparison with the general regime on reservations in Article 19 and 20 VCLT, it should be noted that while the VCLT includes that states may formulate reservations unless they are incompatible with the object and purpose of the treaty, the CEDAW is somewhat stronger stating that such reservations are not permitted. There is, however, no further specification in the CEDAW of the consequence of an incompatible reservation or of an objection to a reservation by other States Parties.<sup>33</sup>

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<sup>31</sup> See United Nations Treaty Collection, via [www.ohchr.org](http://www.ohchr.org), last accessed on 1 August 2012.

<sup>32</sup> Article 29 of the CEDAW concerns a dispute settlement procedure. According to Article 29(2): “Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.” Several States have made such reservations, which will not be dealt with here.

<sup>33</sup> The Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 by GA Res. 2106, entry into force 4 January 1969) contains in its Article 20(2) that a reservation shall be regarded as incompatible or inhibitive if it is objected to by two thirds of the other States Parties.

The cultural reservations made by States Parties concern mainly articles 2, 9, 15 and 16 of the CEDAW. It appears that many states that entered into reservations on these provisions, were already critical on their content during the drafting of these provisions and voted against their adoption.<sup>34</sup>

Article 2 CEDAW is the general provision condemning discrimination of women and containing the obligation of States Parties to adopt legislative and other measures and pursue policies to eliminate discrimination against women. It also obliges States Parties to embody the principle of the equality of men and women and to integrate that in their national constitution and other legislation. Article 2(f) obliges States Parties to "...take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women..." This last paragraph has a link with cultural or religious norms or rules at the national level, which, according to this provision, should be changed if they comprise discrimination against women.

Article 9 concerns equal rights of men and women in relation to nationality, including in relation to family life. Article 9(1) states that States Parties should ensure that "...neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband" and article 9(2) states that States Parties should "...grant women equal rights with men with respect to the nationality of their children".

Article 15 concerns equality between women and men before the law, including identical legal capacity in civil matters. Article 15(4) states that States Parties should give women and men equal rights in relation to movement of persons and the freedom to choose residence and domicile.

Article 16 concerns marriage and family life and is the provision on which most cultural reservations are made. It read as follows:

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts

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<sup>34</sup> GAOR, 34<sup>th</sup> Session (18 December 1979), Agenda Item 75, UN Doc. A/34/PV.107, in Connors, 'The Women's Convention in the Muslim World', in J.P. Gardner (ed), *Human Rights as General Norms and a State's Right to Opt Out – Reservations and Objections to Human Rights Conventions* (1997), at 88-89.

exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

Cultural reservations made by states parties to CEDAW are mostly justified with reference to Islamic law and/or the Sharia. These will be dealt with first. Sometimes, the national Constitution or specific national private or family laws are also indicated as sources of justification for reservations. Although these laws may be based on religious precepts, reservations that only refer to national laws were not included, as the link with cultural or religious pluralism is not as clearly established. Next, cultural reservations that are justified with reference to other religions or customs are dealt with.

### **3.2 Cultural Reservations with Reference to Islamic Law and the Sharia**

Some of the reservations referring to Islamic Law and the Sharia are of a general nature and have a very broad scope, others were made in relation to specific provisions. Some states have made use of both broad and specific reservations.<sup>35</sup>

General and broad reservations were made by *Brunei Darussalam*, *Mauritania*, *Saudi Arabia*, *Oman* and *Malaysia*. These states all made reservations stating that they do not consider themselves bound by any provisions of the CEDAW that may be or are contrary to Islam or the Shariah.<sup>36</sup>

Several states parties made reservations with reference to Islamic law or the Sharia on specific provisions of the CEDAW. Most of these reservations concern Articles 2, 9, 15 and 16, or parts thereof. Sometimes only a reference to Islam and/or Sharia was given, sometimes a bit more explanation was provided for.

*Brunei Darussalam* and *Saudi Arabia*, apart from their general reservations, made specific reservations to Article 9(2) without further justification. *Oman* and *Malaysia* also reserved specifically Articles 9(2), 15(4), 16(1)(a), (c) and (f) without further justification.

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<sup>35</sup> The texts of the reservations were taken from the website of the UN Office of the High Commissioner for Human Rights [www.ohchr.org](http://www.ohchr.org) and the UN treaty collection database, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last accessed 1 August 2012).

<sup>36</sup> Reservation *Brunei Darussalam*: all provisions that may be contrary to "...the beliefs and principles of Islam, the official religion of Brunei Darussalam". Reservation *Mauritania*: approving all parts of the CEDAW "...which are not contrary to Islamic Sharia". Reservation *Saudi Arabia*: "In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention." Reservation *Oman*: "...all provisions of the Convention not in accordance with the provisions of the Islamic sharia". Declaration *Malaysia*: accession is subject "...to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law".

Reservations on specific provisions of the CEDAW making only a general reference to Islam or Sharia were made by Bahrain, Qatar, Syria, Kuwait and the Maldives. *Bahrain* made a reservation to Articles 2, 9, 15(4) and 16, whereby it indicated that the reservation to Article 2 was "...in order to ensure its implementation within the bounds of the provisions of the Islamic Shariah" and in relation to Article 16 "...in so far as it is incompatible with the provisions of the Islamic Shariah." *Qatar* made reservations to Articles 2(a), 9(2), 15 (1) and 16(1)(a), (c) and (f), whereby it referred to Articles 15 and 16 as being inconsistent with the provisions of Islamic law. *Syria* made reservations to Article 2, Article 9(2), Article 15(4), Article 16(1)(c), (d), (f) and (g) and Article 16(2) "...inasmuch as this provision is incompatible with the provisions of the Islamic Shariah". *Kuwait* made a reservation to Article 16(f) "...inasmuch as it conflicts with the provisions of the *Islamic Shariah*, Islam being the official religion of the State." The *Maldives* made a similar reservation stating the right to apply Article 16 "...without prejudice to the provisions of the Islamic Sharia, which govern all marital and family relations of the 100 percent Muslim population of the Maldives."

More specific elaboration of the elements of the Islam and/or Sharia that were considered incompatible with the CEDAW was given in the reservations by Egypt, Iraq, Libya, Morocco and the United Arab Emirates.

*Egypt* made a reservation to Article 2, stating that it is willing to comply with the content of this provision "...provided that such compliance does not run counter to the Islamic *Sharia*." *Egypt* also made a reservation to Article 16 "...without prejudice to the Islamic *Sharia*'s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them." *Egypt* explained the specific aspects of religious laws concerning marriage that conflict with Article 16 CEDAW, which led to the reservation made. "This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in *Egypt* and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband."

*Iraq* made a reservation on Article 2(f) and (g), Article 9(1) and (2) and Article 16. As regards Article 16 it did so "...without prejudice to the provisions of the Islamic *Shariah* according women rights equivalent to the rights of their spouses so as to ensure a just balance between them."

*Libya* made a reservation to Article 2 in that it should be implemented "...with due regard for the peremptory norms of the Islamic *Shariah* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male." It also made a reservation stating that it would implement Article 16(c) and (d) "...without prejudice to any of the rights guaranteed to women by the Islamic *Shariah*."

*Morocco* made a declaration that it would apply Article 2 provided that it does not conflict with the provisions of the Islamic Sharia and that the provisions in the Moroccan Law on Personal Status, which accord women different rights than men, may not be infringed upon, because they derive primarily from the Islamic Sharia.

The *United Arab Emirates* made reservations to Articles 2(f), because it "...violates the rules of inheritance established in accordance with the precepts of the Shariah" and Article 15(2) because it is "in conflict with the precepts of the Shariah". In relation to other provisions, such as Article 16, it states that it will respect the provisions "...insofar as they are not in conflict with the principles of the Shariah". The United Arab Emirates further explained in this regard that it "...considers that the payment of a dower and of support after divorce is an obligation of the husband, and the husband has the right to divorce, just as the wife has her independent financial security and her full rights to her property and is not required to pay her husband's or her own expenses out of her own property. The Shariah makes a woman's right to divorce conditional on a judicial decision, in a case in which she has been harmed."

It is interesting to see that, although at first sight similar, the reservations are formulated slightly differently. Some states parties state that they consider themselves not to be bound by these provisions, because they are in conflict with Islamic law or the Sharia. *Bangladesh*, for example, made a reservation that it does not consider "...as binding upon itself the provisions of article 2, [... and ...] 16 (1) (c) as they conflict with *Sharia* law based on Holy Quran and Sunna." The State of Bangladesh clearly considers that Article 2 and 16 *are* in conflict with the Sharia. *Qatar* made reservations to Article 15 and 16, because it found them to be inconsistent with the provisions of Islamic law. Other states, however, consider themselves bound to these provisions, *provided that* or *insofar as* they do not conflict with Islamic law and Sharia. For example, Bahrain, Egypt, Iraq, Kuwait, Maldives, Libya, Morocco and Syria let the Sharia prevail in case of conflict. These states parties do not categorically reject the provisions, only to the extent that they would be in conflict with Islamic law and the Sharia. It depends therefore on the interpretation of the provisions in question. The United Arab Emirates made a mixed reservation: it considers Article 2 and Article 15(2) to be in conflict with the Sharia, but reserves Article 16 only in case of conflict with the Sharia.

Most states parties justify their reservations by simply referring to the (potential) incompatibility of these provisions with Islamic law or the Sharia. Other states parties, including Egypt and United Arab Emirates, not only refer to Islamic law or the Sharia in general, but also elaborate on the specific aspects of Islam or of the Convention that would be incompatible.

### **3.3 Cultural Reservations with Reference to Other Religions or Customs**

Several states parties made reservations referring to other religions or to local customs or traditions. The latter group of reservations may refer not only to pluralism *between* states, but also *within* states.

References to other religions than Islam were made by Israel and Singapore. *Israel* made a reservation to Article 7(b) on the rights of women to perform all public

functions at all levels of government on equal terms with men. It expressed a reservation in relation to the appointment of women as judges in religious courts "...where this is prohibited by the laws of any of the religious communities in Israel." It also made a reservation to Article 16 "...to the extent that the laws on personal status which are binding on the various religious communities in Israel do not conform with the provisions of that article." *Singapore* made reservations to Articles 2(a) to (f), and article 16(1)(a), (c), (h), and 16(2) "...where compliance with these provisions would be contrary to their religious or personal laws." It justified these reservations by referring to "...Singapore's multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws".

Custom was referred to by Micronesia, Niger, New Zealand and India. *Micronesia* made a reservation reserving the right "...not to apply the provisions of Articles 2 (f), 5, and 16 to the succession of certain well-established traditional titles, and to marital customs that divide tasks or decision-making in purely voluntary or consensual private conduct." *Niger* made reservations to articles 2(d) and (f), Article 5(a), Article 15(4), Article 16(1)(c), (e) and (g), stating that these provisions cannot be applied immediately, "...as they are contrary to existing customs and practices which, by their nature, can be modified only with the passage of time and the evolution of society and cannot, therefore, be abolished by an act of authority". It seems that Niger is willing to try and change these customs and practices, but that it needs time to do so.

*New Zealand* made a reservation not to apply Article 2(f) and 5(a) where they are inconsistent with "...the customs governing the inheritance of certain Cook Islands chief titles...". *India* made a declaration in relation to Article 16(2), stating that it supported the principle of compulsory registration of marriages, but that it found this "...not practical in a vast country like India with its variety of customs, religions and level of literacy." As this declaration is more a general statement and does not seem to specifically refer to the legal effect of this provision, it is not necessarily a reservation.

### **3.4 Reservations to Article 5 CEDAW**

An important provision in relation to cultural pluralism between, but also within states, is Article 5 of the CEDAW. It reads:

"States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

Several states made declarations, not reservations, on this provision. For instance *France* and *Niger* made a declaration that article 5 will be applied subject to Article



17 of the International Covenant on Civil and Political Rights (ICCPR), which contains the right to respect for private life and family life.

*India* declared that it will abide by Article 5 "...in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent."

*Qatar* made a more specific statement on this matter, declaring that "...the question of the modification of "patterns" referred to in article 5 (a) must not be understood as encouraging women to abandon their role as mothers and their role in child-rearing, thereby undermining the structure of the family."

In short, most reservations that are made in relation to cultural pluralism between states concern religion or religious laws, mostly Islamic law, which states parties want to let prevail over CEDAW provisions. While some of the reservations are very broad in scope and concern the whole of the CEDAW, most concern specific provisions, including Articles 2, 9, 15 and 16 CEDAW. Not surprisingly, these are the provisions on discrimination in family affairs and legal affairs, where the tension with religious laws is most present and therefore states parties decided to make reservations. However, other states parties not always agree with these reservations, and some made specific objections to them.

#### **4. Objections to Cultural Reservations by Other States Parties**

24 States parties have made objections to one or more reservations by other states parties.<sup>37</sup> Most objections concern the reservations referring to Islamic law or the Sharia. It is worth noting that sometimes states parties object to reservations by certain states parties, but not to similar reservations by other states parties. It is unclear how states select the reservations they object to, but it seems it is not always done systematically and consistently. It is, however, not the intention here to focus on the use, or lack of use, of objections by specific states parties, but to provide a general overview of objections to cultural reservations and most importantly, the arguments used by states parties for such objections. Broadly two sorts of arguments were used: 1) reservations were objected to, because they raised doubts on the commitment of the other state party, and 2) reservations were objected to, because they were considered to be incompatible with the object and purpose of the treaty. This once again reflects the double nature of human rights treaties: they are not only contracts between states, but also standards to be implemented for the benefit of individuals and communities.

Broadly speaking, general and broad reservations are objected to because they raise doubts as to what extent the state party considers itself bound, and reservations to specific provisions are objected to because they are considered to be against the object and purpose of the treaty.

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<sup>37</sup> The texts of the objections were taken from the website of the UN Office of the High Commissioner for Human Rights [www.ohchr.org](http://www.ohchr.org) and the UN treaty collection database, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last accessed 1 August 2012).

#### **4.1 Objections to general reservations – doubts as to the commitment**

Several states parties objected to the general reservations made by *inter alia* Saudi Arabia, Brunei, Mauritania and Oman. They found these reservations to be too general, broad and vague, in the sense of the broadness of the reservation itself, reserving the treaty as a whole, and/or in relation to the justification by reference to Islamic law or the Sharia, which was considered to be not specific enough. Objecting states parties considered such reservations to leave too much uncertainty as to which obligations the other state party actually felt bound to. Sometimes this was linked to the object and purpose of the treaty, either by raising doubts about the commitment of the other state party “as to the object and purpose of the Convention”, or by explicitly maintaining that the reservation in question was considered to be incompatible with the object and purpose of the treaty. States parties broadly use similar language as regards the objections they make to the different reservations.

*Poland* for instance, objecting to the general reservations by Oman, Brunei Darussalam and Qatar indicated that it found that by making a general reference to the Islamic Sharia without indicating the provisions of the Convention to which the Islamic Sharia applies, these states did not specify the exact extent of the limitations and thus did not define precisely enough the extent to which they accepted the obligations under the Convention. While mentioning Article 28(2) and Article 19(c) VCLT, Poland did not specify further on the incompatibility of these reservations with the object and purpose of the treaty.

*Belgium* expressed objections to the general reservations of Brunei Darussalam, Oman and Qatar, using similar language in each of them. Belgium considered that making the implementation of the Convention’s provisions dependent upon their compatibility with national laws and the beliefs and principles of Islam created uncertainty as to which obligations under the Convention these states parties intended to observe and raised doubts as to these states parties’ respect for the object and purpose of the Convention.

The *Czech Republic* and *Hungary* objected to the general reservations by Oman, because they did not “...clearly define for the other States Parties to the Convention the extent to which the Sultanate of Oman has accepted the obligations of the Convention and therefore raises concerns as to its commitment to the object and purpose of the Convention.” The Czech Republic made similar objections to the general reservation by Brunei. The Czech Republic also objected to the general reservation by Qatar, whereby it specifically noted its objection to notions such as “Islamic law” and “established practice” being used without specifying its contents.

*Romania* formulated objections to reservations by Brunei, Oman and Qatar stating that such general reservations are “...problematic as they raise questions with regard to the actual obligations the respective State Party understood to undertake by acceding to the Convention, and with regard to its commitment to the object and purpose of the Convention.”

Some states objected for similar reasons to the general reservations, but added the argument of the incompatibility of such reservations with the object and purpose of the treaty. *Canada* for instance objected to the general reservation made by Brunei

Darussalam stating that "...such general reservation of unlimited scope and undefined character does not clearly define for the other States Parties to the Convention the extent to which Brunei Darussalam has accepted the obligations of the Convention and creates serious doubts as to the commitment of the state to fulfill its obligations under the Convention. Accordingly, the Government of Canada considers this reservation to be incompatible with the object and purpose of the Convention."

*Germany* made objections to the reservations made by Saudi Arabia, Mauritania, Bahrain, Syria, United Arab Emirates, Oman and Brunei all in similar terms. It argued that "...by giving precedence to the beliefs and principles of Islam and its own constitutional law over the application of the provisions of the Convention, Brunei Darussalam has made a reservation which leaves it unclear to what extent it feels bound by the obligations of the Convention and which is incompatible with the object and purpose of the Convention." The *United Kingdom* used comparable language in its objections to the general reservations made by Saudi Arabia, Mauritania and Oman, as well as in its objections to the reservations to specific provisions by Syria, Bahrain, United Arab Emirates and Brunei.

*Spain* objected in similar terms to the general reservation made by Saudi Arabia, pointing at the lack of clarity on the commitment by Saudi Arabia. It also added that it found such reservation incompatible with the object and purpose of the Convention "...since it refers to the Convention as a whole and seriously restricts or even excludes its application on a basis as ill-defined as the general reference to Islamic law."

*Finland* used similar language in its objection to the general reservation by Maldives. "The unlimited and undefined character of the said reservations creates serious doubts about the commitment of the reserving state to fulfill its obligations under the Convention. In their extensive formulation, they are clearly contrary to the object and purpose of the Convention."

*Austria* objected to the general reservation made by Saudi Arabia in the following terms: "The fact that the reservation concerning any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom raises doubts as to the commitment of the Kingdom of Saudi Arabia to the Convention. Given the general character of this reservation a final assessment as to its admissibility under international law cannot be made without further clarification. Until the scope of the legal effects of this reservation is sufficiently specified by the Government of Saudi Arabia, Austria considers the reservation as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the Convention. In Austria's view, however, the reservation in question is inadmissible to the extent that its application negatively affects the compliance by Saudi Arabia with its obligations under the Convention essential for the fulfillment of its object and purpose. Austria does not consider the reservation made by the Government of Saudi Arabia as admissible unless the Government of Saudi Arabia, by providing additional information or through subsequent practice, ensures that the reservation is compatible with the provisions essential for the implementation of the object and purpose of the Convention." This

objection shows that Austria basically considers the reservation as non-existent until Saudi Arabia provides additional information, on the basis of which it better assess the scope of this reservation.

A similar approach was taken by Austria in the objection to another broad reservation, the one of Mauritania. Again it was pointed out that "...in the absence of further clarification, this reservation raises doubts as to the degree of commitment assumed by Mauritania in becoming a party to the Convention since it refers to the contents of Islamic Sharia...." The lack of clarity was this time explicitly linked to the incompatibility of the reservation with the object and purpose of the treaty by stating that "...according to art. 28(2) of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted." Similar objections and remarks were made by Austria to reservations made by Bahrain, Syria, the United Arab Emirates and Oman.

Some states not only object to the general reservations in terms of commitment or (in)compatibility with the object and purpose of the treaty, they also touch upon the working and effect of such reservations in international law.

*Denmark*, in its objection to the reservation by Saudi Arabia, stated that "...the general reservation with reference to the provisions of Islamic law are of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservations as being incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law." Denmark hereby not only objected to the reservation, but also formally declared it invalid. It used the same language in its objection to the reservations by Mauritania, Bahrain and Oman.

*Finland* objected to the reservations by Libya, Malaysia, Saudi Arabia, Mauritania, Bahrain, Syria, United Arab Emirates, Oman, Brunei and Qatar stating that such reservations "...consisting of a general reference to religious and national law without specifying the contents thereof and without stating unequivocally the provisions the legal effect of which may be excluded or modified, do not clearly define to the other Parties of the Convention the extent to which the reserving state commits itself to the Convention and therefore creates serious doubts about the commitment of the reserving state to fulfill its obligations under the Convention. Reservations of such unspecified nature may contribute to undermining the basis of international human rights treaties." Finland hereby expressed a more general concern that general, broad and unspecified reservations could damage the working of human rights treaties.

*France* also linked its objection to a more overall concern on general reservations and their impact on human rights treaties. In its objection to the reservation by Saudi Arabia it stated that "...the Kingdom of Saudi Arabia formulates a reservation of general, indeterminate scope that gives the other States Parties absolutely no idea which provisions of the Convention are affected or might be affected in future. The Government of the French Republic believes that the reservation could make the provisions of the Convention completely ineffective..."

*Ireland* used similar language in its objection to the reservations by Saudi Arabia, Brunei, Oman and Qatar, stating that "...a reservation which consists of a general reference to religious law without specifying the content thereof and which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, may cast doubts on the commitment of the reserving state to fulfill its obligations under the Convention. The Government of Ireland is furthermore of the view that such a general reservation may undermine the basis of international treaty law." The *Netherlands* and *Portugal* used similar language in their objections to the reservations by Saudi Arabia, Mauritania, Bahrain, Syria, United Arab Emirates, Oman, Brunei and Qatar.

*Norway* expressed similar objections to reservations made by Libya, Maldives, Brunei and Kuwait. Its objection was formulated as follows: "A reservation by which a State Party limits its responsibilities under the Convention by invoking religious law (Shariah), which is subject to interpretation, modification, and selective application in different states adhering to Islamic principles, may create doubts about the commitments of the reserving state to the object and purpose of the Convention. It may also undermine the basis of international treaty law. All states have common interest in securing that all parties respect treaties to which they have chosen to become parties."

#### ***4.2 Objections to reservations on specific provisions – against the object and purpose of the treaty***

Several states parties objected to reservations made by other states parties to specific provisions of the treaty, often with the argument that these reservations were considered to be incompatible with the object and purpose of the treaty. Hereby some states parties specifically refer to Article 28(2) CEDAW and/or Article 19(c) VCLT, others do not. Sometimes the objections also include a judgment on the validity of the reservation, apart from the permissibility, sometimes not.

*Austria*, for example, objected to the reservation by Saudi Arabia concerning Article 9(2) as being incompatible with the object and purpose of the treaty. For the same reasons, Austria objected to the reservation by the Maldives on article 16, which it found inadmissible under article 19(c) VCLT and article 28(2) CEDAW. *Canada* objected for similar reasons to the reservation by Maldives.

*Denmark* objected to the reservations by Niger to parts of Articles 2, 5, 15 and 16, because it found these reservations "...not in conformity with the object and purpose of the Convention." *The Netherlands* made similar objections to the reservations by Egypt, Iraq, Libya, Kuwait and Malaysia.

*Greece* objected to the reservations made by Bahrain, Syria, United Arab Emirates, Oman and Brunei, arguing that reservations which contain a reference to the provisions of the Islamic Sharia are of unlimited scope and, therefore, incompatible with the object and purpose of the Convention. *Spain* used similar argumentation to object to the reservations made by Syria, United Arab Emirates, Oman, Brunei and Qatar.

*Latvia* objected to the reservations made by United Arab Emirates, Brunei and Oman with the general argument that they were against the object and purpose of the treaty, whereby it elaborated on the purpose of the provisions in relation to the reservations.

*Estonia* objected to the reservation by Syria to Article 16(2), because of the general reference to the Islamic Sharia. It stated that "...in the absence of further clarification, this reservation which does not clearly specify the extent of the Syrian Arab Republic's derogation from the provision in question raises serious doubts as to the commitment of the Syrian Arab Republic to the object and purpose of the Convention." Similar objections were made by Estonia on reservations by and Brunei and Oman to Article 16(2).

Again, some of states parties in their objections to reservations to specific provisions not only referred to the incompatibility of these reservations with the object and purpose of the Convention, but also signalled the risk of such reservations for the working of general international law.

*France*, for example, in its objection to the reservations by Bahrain, Syria, United Arab Emirates, Oman and Brunei on (parts of) Articles 2, 9, 15 and 16, stated that such reservations "...would likely be incompatible with the object and purpose of the Convention". It also stated that such reservations "...could make the provisions of the Convention completely ineffective" (Bahrain), or could deprive "the provisions of the Convention of any effect" (United Arab Emirates).

*Estonia* in its objection to the reservation by the Syrian Arab Republic to Article 2, maintains that "...by making a reservation to this article, the Government of the Syrian Arab Republic is making a reservation of general scope that renders the provisions of the Convention completely ineffective".

*Finland* in its objection to the reservation by Kuwait to Article 16(f), stated that "...the unlimited and undefined character of the reservation to article 16 (f) leaves open to what extent the reserving state commits itself to the Convention and therefore creates serious doubts about the commitment of the reserving state to fulfill its obligations under the Convention. Reservations of such unspecified nature may contribute to undermining the basis of international human rights treaties."

*Sweden* emphasized in this regard the contractual nature of the convention by stating that "...the reason why reservations incompatible with the object and purpose of a treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless. Incompatible reservations...do not only cast doubts on the commitments of the reserving states to the objects and purpose of this Convention, but moreover, contribute to undermine the basis of international contractual law." Sweden also made objections to reservations to specific provisions by Saudi Arabia, Mauritania, Bahrain, Syria, United Arab Emirates, Oman, Brunei and Qatar.

#### **4.3 Objections against Reservations on Provisions of a Fundamental Nature**

Some states parties objected to reservations to specific provisions, because of their incompatibility with the object and purpose of the treaty, whereby they indicated that the provisions in question are considered to be of a fundamental nature or core provisions of the treaty.

*Belgium*, for example, in its objections to reservations made by Brunei, Oman and Qatar, indicated that it considers Articles 9(2), 15(4) and 16 fundamental provisions, making reservations to these provisions incompatible with the object and purpose of the treaty. *Canada* also indicated that Article 9(2) is a fundamental provision, making reservations incompatible with the object and purpose, in its objection to the reservation by Brunei. *Ireland* indicated that the reservation by Saudi Arabia on Article 9(2) would be contrary to the essence of the Convention. *Slovakia* also objected to the reservation by Brunei to Article 9(2) that it undermined one of the key provisions of the Convention and was incompatible with its object and purpose.

*Denmark*, *Sweden*, *Estonia* and *Greece* consider the reservation by Syria to Article 2 incompatible with the object and purpose of the Convention, using the term 'core article' in relation to Article 2. In its objection to the reservations by Oman, *Estonia* also called Article 16 one of the core provisions of the Convention "...to which reservations are incompatible with the Convention and therefore impermissible." *Italy* also considered Articles 2 and 16 to be 'core provisions' of the Convention, the observance of which is necessary to achieve its purpose. It added in its objection to the reservations by Qatar that "...neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention."

*Finland* stated in its objection to reservations by Malaysia and Niger that Article 2(f) and 5(a) were "fundamental provisions...the implementation of which is essential to fulfilling its object and purpose." *Norway* also maintained in its objection to the reservation by Niger that Article 2 is the core provision of the CEDAW. In its objection to the reservation by Syria to Articles 2, 9(2), 15(4) and 16 *Norway* stated that "...the said reservations, as they relate to core provisions of the Convention, render the provisions of the Convention ineffective. Moreover, and due to the reference to Islamic Sharia, it is not clearly defined for other States Parties to what extent the reserving state has undertaken the obligations of the Convention."

Another way of formulating the key importance of certain provisions, is by stating that a reservation to this provision would "inevitably lead to discrimination of women", the stopping of which is of course the central aim of the CEDAW. Several states parties have used such formulations in their objections to reservations.

*Denmark*, for example, stated that the reservations to Articles 9(2), 15(4) and 16(1) by Syria, Oman and Brunei would "...inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention". Other States Parties, for example the *Czech Republic* in its objection to reservations by Oman, Brunei and Qatar, *Austria* in its objections to the reservations by Bahrain, Qatar and Malaysia, *Germany* in its objections to reservations by Mauritania, United Arab Emirates, Oman and Brunei, *Hungary* in its objections to reservations by Oman, Brunei and Qatar and *Slovakia* in its objections to reservations by Qatar, instead of calling these provisions 'fundamental', indicate their

importance by stating that reservations would automatically lead to violations of the treaty.

#### ***4.4 Objections by States Parties to Non-Islamic Reservations***

Almost no objections were made to the cultural reservations made by states parties with reference to other arguments than Islamic law or the Sharia.

*Sweden* objected to the reservation by *Micronesia*, stating that "...this reservation raises serious doubts as to the commitment of the Government of *Micronesia* to the object and purpose of the Convention. The reservation would, if put into practice, result in discrimination against women on the basis of sex." All three arguments – doubts about the commitment, possible incompatibility with the object and purpose and automatic violation of the treaty – are used here.

*Sweden* also objected to the reservation by *New Zealand* on Article 2(f) and 5(a) as being incompatible to the object and purpose of the Convention. *Sweden* added that "...the reason why reservations incompatible with the object and purpose of a treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless. Incompatible reservations, made in respect of the Convention on the elimination of all forms of discrimination against women, do not only cast doubts on the commitments of the reserving states to the objects and purpose of this Convention, but moreover, contribute to undermine the basis of international contractual law."

#### ***4.5 Concluding Remarks on the Objections by Other States Parties***

Although the practice of objections is rather variable and unpredictable, since states parties do not consistently object to reservations, some concluding remarks could be made.

It appears that most objections concern the reservations justified by references to Islamic law and the Sharia. While states parties avoid a general qualification of the compatibility of these religious laws with the CEDAW, they indicate that general references are too broad and vague, as they do not specify the possible conflict between these religious laws and the CEDAW. Moreover, some states argue that religion is not static and also a matter of interpretation, which makes the concrete consequences of the reservation unclear.

As regards the scope of the reservations, it is no surprise that general reservations, possibly exempting the state party from the treaty as a whole, are firmly objected to by other states parties. Most of the objections contain the lack of clarity on the commitment of the other state party, emphasizing the contractual relationship between states parties to the treaty. This raises the question to what extent reservations based on Islamic law would be accepted by other States parties if they were more specific.

Reservations to specific provisions are also objected to, often with the argument that these reservations are considered to be incompatible with the object and purpose of the treaty. While the object and purpose of the treaty are not defined specifically, the



objections show that states parties generally agree that Articles 2, 9, 15 and 16 CEDAW reflect its object and purpose. Would this mean that no reservations to such provisions would be acceptable? Or could very specific reservations to particular parts of these provisions be acceptable? This could be the case, considering that fact that hardly any objections were made to more specific cultural reservations made to the same provisions, but justified by other arguments than Islamic law and the Sharia.

Most states parties that have objected to reservations by other states parties, have clearly indicated that their objection does not preclude the entry into force of the treaty between them. This is in line with Article 20(4)(b) VCLT as outlined above. Some states indicated that they considered the reservation to be invalid. Some states, notably the Nordic countries but also Estonia, added that the reserving state would not benefit from its reservations.<sup>38</sup>

The above also shows that a large majority of states parties does not object to cultural reservations. This does not necessarily mean that they agree with them. One reason could be that states parties aim for an inclusive approach, preferring to have states on board, allowing for international supervision, even with general or broad reservations, than to have them outside the scope of the treaty.<sup>39</sup> States may also consider objecting as a politically unfriendly act that they do not wish to conduct. Probably the most important reason is that there is not much practical effect in an objection to a reservation. Precisely because the reciprocity between contracting parties is mostly absent in human rights treaties, objections by other States Parties have “primarily symbolic significance.”<sup>40</sup>

## **5. The Committee on the Elimination of Discrimination Against Women**

### ***5.1 The Role of the Committee in Relation to Reservations***

The CEDAW Committee has since its establishment expressed its general concern about the large number of reservations to its treaty. It has, however, always been aware of the question as to what extent treaty bodies are formally competent to determine whether a specific reservation was incompatible with the object and purpose of the treaty. In the 1980s the CEDAW Committee sought legal advice from the UN secretariat on this matter. The reply was that “...the functions of the Committee do not appear to include a determination of the incompatibility of

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<sup>38</sup> This new approach whereby the reserving States does not get what it wants and cannot profit from its reservation is explained by Klabbers, who doubts that this approach is compatible with the rules on reservations in the VCLT. See Klabbers, *supra* note 18, at 179-193.

<sup>39</sup> Lijnzaad, *supra* note 8, at 105.

<sup>40</sup> Chinkin, ‘Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women’, in J.P. Gardner (ed), *Human Rights as General Norms and a State’s Right to Opt Out – Reservations and Objections to Human Rights Conventions* (1997), at 76. As the Human Rights Committee stated in its General Comment 24: “...because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant”, see General Comment No. 24, *supra* note 21, at para.17.

reservations, although reservations undoubtedly affect the application of the Convention and the Committee might have to comment thereon in its reports...”<sup>41</sup>

The CEDAW Committee did, however, express its opinion on the issue of reservations in so-called General Recommendations. With these General Recommendations, which are based on its experience in the assessment of state reports, the Committee elaborates on general issues in relation to the Convention or on the normative content and state obligations of specific provisions. These General Recommendations are not legally binding. In its General Recommendation 4 of 1987, the Committee stated that many reservations “...appeared to be incompatible with the object and purpose of the Convention”, carefully avoiding a final verdict on the issue. It did suggest States Parties to “...reconsider such reservations with a view to withdrawing them”.<sup>42</sup>

On a number of occasions, the Committee asked for more information and study on the relationship between the Convention and Islamic law, which was, however, never carried out by the UN.<sup>43</sup> In the meantime, the Committee formulated a new General Recommendation on reservations in 1992. In this Recommendation, the Committee recommended states parties to reconsider their reservations and consider the introduction of “...a procedure on reservations to the Convention comparable with that of other human rights treaties”. It most likely referred to the procedure in Article 20 of the Convention on the Elimination of All Forms of Racial Discrimination<sup>44</sup>, that a reservation shall be regarded as incompatible or inhibitive if it is objected to by two thirds of the other states parties. States parties, however, did not want such a procedure.<sup>45</sup>

In the beginning of the nineties, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed to seek an advisory opinion of the International Court of Justice on the validity and legal effect of reservations to the CEDAW, following the example of the Advisory Opinion on reservations to the Genocide Convention. The Committee took up this idea, but wanted to do so together with other treaty bodies.<sup>46</sup> As the CEDAW Committee is not competent to seek such an advisory opinion itself, it should have persuaded the ECOSOC or the General Assembly to do so. This idea, however, never materialized.<sup>47</sup>

The CEDAW Committee has dealt with the reservations in its assessment of states parties' reports within the framework of the periodic reporting procedure. According

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<sup>41</sup> Report of the Secretariat on Ways and Means of Improving the Work of the Committee (30 May 2001), UN Doc. CEDAW/C/2001/II/4 Annex VI, at 33-34; or UN Doc. A/39/45, Vol. II, Annex II. See Schöpp-Schilling, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: An unresolved issue or (no) new developments?' in I. Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), at 13.

<sup>42</sup> CEDAW Committee, General Recommendation No. 4, 'Reservations', Sixth Session (1987) UN Doc. A/42/38.

<sup>43</sup> Report of the Committee on the Elimination of Discrimination Against Women, Seventh Session (1988) UN Doc. A/43/38, at 61, in: Connors, *supra* note 34, at 99; Schöpp-Schilling, *supra* note 41, at 14.

<sup>44</sup> International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106 (XX), adopted 21 December 1965, entry into force 4 January 1969.

<sup>45</sup> Schöpp-Schilling, *supra* note 41, at 15.

<sup>46</sup> See Reports of CEDAW: Report of the Committee on the Elimination of Discrimination against Women, Eleventh Session (1992), UN Doc. A/47/38, at 106, para 469; Report of the Committee on the Elimination of Discrimination against Women, Twelfth Session (1993) UN Doc. A/48/38, at 7, para. 4, in Schöpp-Schilling, *supra* note 41, at 16-17.

<sup>47</sup> Chinkin, *supra* note 40, at 81-82; Schöpp-Schilling, *supra* note 41, at 17.

to this procedure, states parties should periodically report on what legal and other measures they have taken to implement the Convention and what challenges they face in advancing the rights in the Convention. In the beginning of the nineties, the Committee amended its guidelines for the reporting procedure and required states to include in their reports information on their reservations, the reasons for making them and their effect.<sup>48</sup> After having received the report, the Committee prepares a so-called list of issues that it wishes to discuss and the state party gets the opportunity to respond to these issues in writing. Then the state party is invited for a dialogue with the Committee, where the issues and other points are discussed in person. Finally, the Committee adopts Concluding Observations, in which it indicates the positive aspects of the state party's implementation, as well as its concerns and it provides the state with recommendations. These Concluding Observations are not legally binding, but should encourage the state party to improve its implementation of the treaty. Not all states that made cultural reservations have (yet) taken part in the reporting procedure.

As shown above, the Convention nor the VCLT give the Committee formal powers to rule on the compatibility of reservations with the object and purpose of the Convention. However, the Committee has dealt with the issue of reservations in its General Recommendations on specific provisions. In its General Recommendation 21 on equality in marriage and family relations, the Committee addressed reservations to Articles 9, 15 and 16, in particular those based on cultural or religious beliefs. It explains that "...many of these countries hold a belief in the patriarchal structure of the family which places the father, husband or son in a favourable position." The Committee requires States Parties to "...gradually progress to a stage where, by its resolute discouragement of notions of the inequality of women in the home, each country will withdraw its reservation, in particular to articles 9, 15 and 16 of the Convention." Furthermore, "states parties should resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom, and progress to the stage where reservations, particularly to article 16, will be withdrawn."<sup>49</sup> Although the Committee hereby confirms the crucial importance of these provisions and strongly urges states parties to withdraw these reservations, it does not categorically reject them as being against the object and purpose of the treaty.<sup>50</sup>

More recently, the Committee expressed itself in more explicit terms. In its General Recommendation on Article 2, the Committee underlined that it finds Article 2 the very essence of the Convention and therefore "...considers reservations to 2 or to subparagraphs of article 2 to be in principle, incompatible of the object and purpose of the Convention and thus impermissible under article 28, paragraph 2."<sup>51</sup>

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<sup>48</sup> Reporting Guidelines adopted at the 27<sup>th</sup> session of the CEDAW Committee (1994), UN Doc. A/57/38, Report of the Committee on the Elimination of Discrimination against Women, Twenty-Seventh Session (1994), UN Doc. A/48/38 at 137; see also Connors, *supra* note 34, at 99-100, Schöpp-Schilling, *supra* note 41, at 29.

<sup>49</sup> CEDAW Committee, General Recommendation No. 21, 'Equality in Marriage and Family Relations', Thirteenth Session (1994), UN Doc. CEDAW/C/GC/21, at paras 41-47.

<sup>50</sup> See, also, Schöpp-Schilling, *supra* note 41, at 19.

<sup>51</sup> CEDAW Committee, General Recommendation No. 28, 'The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', Forty-Seventh Session (2010), UN Doc. CEDAW/C/GC/28, at para 41

## **5.2 The Assessment of Cultural Reservations by the Committee in its Dialogues with States Parties**

Reservations, including cultural reservations, have formed a recurrent item in the assessment of state parties' reports. In relation to general reservations, as well as those on specific provisions such as Articles 2, 9, 15 and 16, the Committee has in its list of issues always asked states parties to clarify the scope of the reservations and to describe the impact of the reservations on the practical realization of the principle of equality between women and men.<sup>52</sup> Sometimes states indeed provide additional justification and clarification of their reservations, explaining in more detail why they deem them necessary.

*Oman*, for example, stated that the "...reservations can in no way be considered discrimination against women within the meaning of the Convention, nor do they detract from the realization of the principle of equality and non-discrimination provided for in article 2 thereof."<sup>53</sup> It further indicated that the reservation to Article 15(4) was made because the provision was inconsistent with national law, which prescribed that "...a wife must live with her husband in the home that he has prepared and move from it when he moves, unless stipulated otherwise in the marriage contract or unless the husband intends to harm his wife by moving."<sup>54</sup> *Oman* also indicated that it was studying the possibility of withdrawing or reducing the reservations.<sup>55</sup>

The *United Arab Emirates* gave extensive explanations for its reservations. In the response to the list of issues the United Arab Emirates first explained why it had no reservation with respect to article 2(a): "...because it believes in the importance of making women full partners in the development process, both through participation in that process and by benefiting from the fruits of development projects." It further gave reasoning for its reservations on other specific provisions. It argued, for example, that Article 2(f) on the abolishment of laws, customs and practices which constitute discrimination, conflicts with the provisions of the Islamic Sharia concerning inheritance. With regard to its reservation to Article 9, it argued that it found the acquisition of nationality an internal matter and that national laws provided that a child shall acquire nationality through its father. It found Article 15(2) as regards equality to conclude contracts and in procedures in courts and tribunals to be in conflict with the Islamic Sharia, "...with regard to jurisdiction, testimony and the character of a legal contract under the sharia." As regards Article 16 the United Arab Emirates explained that it "...believes that a husband is obliged to pay dowry and maintenance after divorce; a husband has the right to seek a divorce; and a wife has independent financial security and full rights to her own property. A wife is under no obligation to support her husband or herself from her own funds. The Islamic sharia limits a wife's right to seek divorce, stipulating that it should be at the discretion of a

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<sup>52</sup> See, for example, the list of issues for *Oman*, 'List of Issues and Questions with Regard to the Consideration of Initial Reports' (7 March 2011), UN Doc. CEDAW/C/OMN/Q/1, at para 3; the United Arab Emirates, 'List of Issues and Questions with Regard to the Consideration of Initial Reports' (13 March 2009), CEDAW/C/ARE/Q/1, at para 4; Saudi Arabia, 'List of Issues and Questions with Regard to the Consideration of Periodic Reports' (17 August 2007) UN Doc. CEDAW/C/SAU/Q2, at para 2.

<sup>53</sup> *Oman's* reply to the 'List of Issues and Questions with Regard to the Consideration of Initial Reports' (18 May 2011), UN Doc. CEDAW/C/OMN/Q/1/Add.1, at para 12.

<sup>54</sup> *Ibid*, at para. 117.

<sup>55</sup> *Ibid*, at paras. 13, 117.

judge, when she has suffered injury.”<sup>56</sup> In its concluding observations, the Committee urged the State Party to withdraw or narrow its reservations to Article 2(f), 9, 15(2) and 16. In particular, it argued that Article 2 and 16 are central to the object and purpose of the Convention and that “...in accordance with article 28, paragraph 2, reservations to these articles should be withdrawn”.<sup>57</sup> As regards Article 16, it called upon the state party to, inter alia, “...end the practices of dowry and polygamy....”<sup>58</sup>

*Libya* indicated that it had modified its original general reservation that stated that accession should not conflict with the Islamic Shariah, and changed it into reservations to specific provisions. It made reservations to Article 2 in particular concerning Sharia rules on the determination of the share of the heirs to the estate of a deceased person, male or female, and Article 16(c) and (d). In relation to the latter, Libya stipulated to maintain its reserving position “...on everything which conflicts with the clear and definitive Koranic texts”.<sup>59</sup> Libya reiterated this in its response to the list of issues, also stating that “Libyan legislation distinguishes between men and women only in the areas in which the Libyan Arab Jamahiriya has formulated a reservation to the Convention.”<sup>60</sup> In other words, Libya does not consider this discrimination, but distinction based on religious laws.

*Bahrain* in its report dealt extensively with its reservations, trying to explain the reasons for them as well as their scope. For example, the reason for its reservation to Article 2 was “...to ensure that this article is implemented within the framework of the Islamic Sharia...Therefore, Bahrain’s reservation stems from its desire not to apply the aforesaid article literally, i.e., in a way that would lead to a conflict with Shariah provisions on the woman's position in the family, particularly regarding inheritance.”<sup>61</sup> Bahrain then elaborated extensively on its interpretation of inheritance under Islamic laws, explaining that “...a literal interpretation of the Shariah provision that grants a woman one-half of the inheritance of a man might be challenged on the grounds that it discriminates against women.”<sup>62</sup> “...Islam does not make a woman's inheritance one-half that of a man as a general rule in inheritance. Rather, this rule applies only in some cases for explicable reasons. A woman sometimes receives one-half the share of a man...Sometimes a woman receives more than a man, as in the case where a person dies, leaving behind one daughter and his two parents: The two parents each receive one sixth of the inheritance, whereas the daughter receives one half, which is more than the share or received by her grandfather, a man. Moreover, in the case of a surviving daughter and father, the daughter receives three quarters, whereas her grandfather receives only one quarter.”<sup>63</sup> As regards the reservation made by Bahrain to Article 9 concerning nationality, it explained the national system of patrilineal jus sanguinis as the sole

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<sup>56</sup> United Arab Emirates reply to the ‘List of Issues and Questions with Regard to the Consideration of Initial Reports’ (19 October 2009) UN Doc. CEDAW/C/ARE/Q/1/Add.1, at para. 4

<sup>57</sup> CEDAW ‘Concluding Observations of the CEDAW Committee’, United Arab Emirates (5 February 2010), UN Doc. CEDAW/C/ARE/CO/1, at paras 16, 17, 33, 45, 46.

<sup>58</sup> *Ibid.*, at para. 48

<sup>59</sup> CEDAW, ‘Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women’, Libyan Arab Jamahiriya, (4 December 2008), UN Doc. CEDAW/C/LBY/5, at 13.

<sup>60</sup> Libyan Arab Jamahiriya’s reply to the ‘List of issues and questions with regard to the consideration of the second periodic report’ (9 January 2009), UN Doc. CEDAW/C/LBY/Q/2/Add.1, at para. 5.

<sup>61</sup> CEDAW, ‘Concluding Observations of the CEDAW Committee’, Libyan Arab Jamahiriya (6 February 2009), UN Doc. CEDAW/C/LBY/CO/5, at paras. 83-84.

<sup>62</sup> *Ibid.*, at para. 85.

<sup>63</sup> *Ibid.*, at para. 85-86.

basis for the granting of Bahraini nationality. However, Bahrain indicated that it was working on matrilineal jus sanguinis be established as a criterion for determining nationality.<sup>64</sup> As regards Bahrain's reservation to Article 15, it stated that although Islamic law requires a woman to obtain the permission of the husband or guardian to travel and move, this was not applied in practice and that there were no legal impediments to a woman's movement and travel. It stated that the reservation was limited to a married woman's freedom to choose her residence. "In this regard, the Islamic Shariah requires a married woman to live in the matrimonial home. Moreover, religious teachings and social customs require that an unmarried woman live with her family. Consequently, Bahrain's reservation concerning residence is a logical consequence of the necessity entailed by the marriage contract for the wife to actually live in the residence prepared for her by the husband, so that she may assume her responsibilities as a wife and mother in the matrimonial home. The wife's right to maintenance is forfeited if she is found to be disobedient under a judicial judgment, i.e., if she refuses to reside in the matrimonial home without reasonable justification."<sup>65</sup>

*Saudi Arabia* argued that it considered its reservations to be "...consistent with articles 19-23 of the Vienna Conventions on the Law of Treaties, concerning reservations, especially as they accord with the subject of the Convention and are not incompatible with its purpose".<sup>66</sup> Saudi Arabia explained that "...it made this reservation on the basis of its conviction that the Islamic sharia is compatible with the obligations contained in the general principles of the Convention, even if there is a small disparity with regard to some of the implementing provisions. Judgements about whether or not such a disparity exists are made on the basis of the texts of the Islamic sharia and the relevant provisions of the Convention on a case-by-case basis."<sup>67</sup> Saudi Arabia further stated that its general reservation did not affect the core of the Convention and that it did not believe "that the wording of its reservation interferes with its obligations under the Convention." It was merely "...a precautionary measure at a time when human rights concepts are developing rapidly as a result of interpretations following the entry into force of international human rights instruments such as the Convention." It seems that Saudi Arabia wanted to emphasise that it wished to remain the final say in the interpretation of the provisions of the Convention.<sup>68</sup> It finally emphasised that its report showed that "...there is no contradiction between the main provisions that form the basis of the Convention and Islamic sharia principles relating to women's rights."<sup>69</sup>

*Niger* explained in its report that it made a reservation to Article 5(a) because it considered that "...social and cultural patterns of conduct that are deeply rooted in

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<sup>64</sup> *Ibid.*, at para. 164-165.

<sup>65</sup> *Ibid.*, at paras. 317-318.

<sup>66</sup> CEDAW, 'Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women', Saudi Arabia (29 March 2007) UN Doc. CEDAW/C/SAU/2, at para 6

<sup>67</sup> Saudi Arabia's reply to the 'List of Issues and Questions with Regard to the Consideration of the Second Reports', (18 December 2007), UN Doc. CEDAW/C/SAU/Q/2/Add.1, at para 2.

<sup>68</sup> According to Lijnzaad, uncertainty and possible disagreement with the (future) interpretation of provisions of human rights treaties is a common argument for making reservations to human rights treaties. See Lijnzaad, *supra* note 8, at 79-80.

<sup>69</sup> Saudi Arabia's reply to the 'List of Issues and Questions with Regard to the Consideration of the Second Reports', (18 December 2007), UN Doc. CEDAW/C/SAU/Q/2/Add.1, at para 2.

the collective consciousness cannot be modified simply by enacting legislation. Modifications can take place only gradually.”<sup>70</sup>

The Committee has generally indicated to states parties its concern on cultural reservations, especially the general ones. It has, however, not always been clear and consistent in its qualification of the various reservations in terms of their (in)compatibility with the object and purpose of the treaty.<sup>71</sup> The Committee has moreover been careful in the language it used; even if it finds certain reservations in conflict with the object and purpose of the treaty and therefore impermissible, it does not declare them inadmissible or invalid. It merely requests states parties to reconsider, modify, narrow or withdraw them, and to do so within a limited timeframe.<sup>72</sup>

For instance in relation to Oman, the Committee stated that it was of the opinion that “...a general reservation, as well as the reservation to article 16 are contrary to the object and purpose of the Convention and are thus impermissible under article 28 of the Convention...”. In the case of Libya, the Committee expressed its concern at the remaining reservations, which it found to be contrary to the object and purpose of the Convention. It made an interesting link with the ICCPR, noting that “...the state party did not enter any reservations to the International Covenant on Civil and Political Rights, which also requires equality between women and men in these areas.” A similar reference was made in the concluding observations of Niger. The Committee expressed its concern on the reservations by Niger and noted that “...reservations to articles 2 and 16 are contrary to the object and purpose of the Convention”. It also noted that Niger had not entered reservations to other human rights treaties, “...which all contain the principle of equality between women and men and the prohibition of discrimination on the basis of sex.”<sup>73</sup> It therefore urged Niger to withdraw the reservations.<sup>74</sup>

In relation to Bahrain, the Committee in its concluding observations took note of the explanations, but was still of the opinion that these reservations were contrary to the object and purpose of the Convention and urged Bahrain to withdraw them.<sup>75</sup> In its Concluding Observations on Saudi Arabia, the Committee stated that it was concerned about this general reservation “...which is drawn so widely that it is contrary to the object and purpose of the Convention”. Here the Committee did not refer to Article 28(2). The Committee also urged Saudi Arabia to consider to withdraw its reservation, “...particularly in light of the fact that the delegation assured

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<sup>70</sup> CEDAW, ‘List of Issues and Questions with Regard to the Consideration of Initial Reports’, Niger (21 November 2005), UN Doc. CEDAW/C/NER/1-2, at para 3.3.

<sup>71</sup> Schöpp-Schilling, *supra* note 41, at 34-35.

<sup>72</sup> For example in the case of Oman, ‘List of issues and questions with regard to the consideration of initial reports’ (7 March 2011) UN Doc. CEDAW/C/OMN/Q/1, at para. 3, 29; the United Arab Emirates, ‘List of issues and questions with regard to the consideration of initial reports’ (5 February 2010) UN Doc. CEDAW/C/ARE/Q/1 at para.17, 33, 45; ‘Concluding observations of the CEDAW Committee’, Bahrain (14 November 2008) UN Doc. CEDAW/C/BHR/CO/2, at paras. 17, 31.

<sup>73</sup> CEDAW ‘Concluding observations of the CEDAW Committee’, Niger, (11 June 2007) UN Doc. CEDAW/C/NER/CO/2, at para. 9.

<sup>74</sup> CEDAW ‘Concluding observations of the CEDAW Committee’, Niger, (11 June 2007) UN Doc. CEDAW/C/NER/CO/2, at para. 10.

<sup>75</sup> CEDAW ‘Concluding observations of the CEDAW Committee’, Bahrain (14 November 2008) UN Doc. CEDAW/C/BHR/CO/2, at paras. 16 and 17.

that there is no contradiction in substance between the Convention and Islamic Sharia.”<sup>76</sup> It also requested Saudi Arabia to withdraw its reservation to Article 9(2).<sup>77</sup>

Sometimes states parties have indeed decided to withdraw their reservations. Malaysia, for example, decided to withdraw its reservations to Articles 2(f), 9(1), 16(b), (d), (e) and (h), as it did not find them to be in contradiction with Islamic Sharia law. It kept reservations to articles 9(2) and 16(1)(a), (f) and (g), because Malaysia found these to be in conflict with the provisions of the Islamic Sharia law. It further made declarations, sometimes similar to reservations, for Articles 5(a), 7(b), 9(2) 16(1)(a) and 16(2).<sup>78</sup> In its concluding observations, the Committee, while commending Malaysia for the withdrawal of certain reservations, urged Malaysia to remove the remaining ones, “...especially reservations to article 16, which are contrary to the object and purpose of the Convention.” The Committee was particularly concerned about the state party’s position that laws based on Sharia interpretation could not be reformed.<sup>79</sup>

The Maldives changed its reservation from a general one into a more specific reservation. Upon accession the Maldives had a general reservation that it would not comply with provisions of the Convention that the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded. Its current reservation only concerns article 16.

Libya also withdrew its general reservation that accession could not conflict with the laws on personal status derived from the Islamic Sharia. It now has a reservation on Article 2 and 16(c) and (d). Singapore withdrew its reservation to Article 9. And where it had first made a reservation to Articles 2 and 16 as a whole, it later changed that into specific paragraphs of these provisions.

Syria is an example of a state party that had decided to withdraw its reservations, but never really did. Originally, Syria had made cultural reservations to Articles 2, 9, 15(4), 16(1)(c), (g) and (f) and 16(2). In its report it indicated that after examination and dialogue at national level, it decided to remove the reservations to Articles 2, 15(4), 16(1)(g) and 16(2), as these were considered not to be incompatible with the Islamic Sharia. It kept its reservations to Articles 9 and 16(1)(c) and (f), because of their incompatibility with the Sharia.<sup>80</sup> In the List of Issues, the Committee asked the Syrian authorities to describe progress made in the removal of the mentioned reservations.<sup>81</sup> In its written replies, Syria indicated that the matter was being

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<sup>76</sup> CEDAW ‘Concluding observations of the CEDAW Committee’, Saudi Arabia (8 April 2008) UN Doc. CEDAW/C/SAU/CO/2, at paras. 9-10.

<sup>77</sup> CEDAW ‘Concluding observations of the CEDAW’, Saudi Arabia (8 April 2008) UN Doc. CEDAW/C/SAU/CO/2, at para. 28.

<sup>78</sup> CEDAW ‘Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women’, ‘Combined initial and second periodic reports of States parties’, Malaysia (12 April 2004), UN Doc. CEDAW/C/MYS/1-2, at para. 69.

<sup>79</sup> CEDAW ‘Concluding observations of the CEDAW Committee’, Malaysia (31 May 2006), UN Doc. CEDAW/C/MYS/CO/2, at paras. 9-10.

<sup>80</sup> CEDAW ‘Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women’, Syria, (29 August 2005), UN Doc. CEDAW/C/SYR/1, Section 2, Introduction, at paras. 10-15.

<sup>81</sup> CEDAW ‘Concluding comments of the Committee on the Elimination of Discrimination against Women: Syrian Arab Republic’ (5 October 2006), UN Doc. CEDAW/C/SYR/Q/1/, at para. 3.



considered by the competent Ministries.<sup>82</sup> In its concluding observations, the Committee called upon Syria to speed up this process, as well as to "...review and withdraw all remaining reservations, and especially reservations to articles 9 and 16, which are incompatible with the object and purpose of the Convention."<sup>83</sup> It appears that Syria never went through with the withdrawal of the reservations, as they are still in place.

The above shows that the Committee pays a lot of attention to reservations in its state reporting procedure. It is a valuable addition to the formal objections by other states parties, as this procedure allows for dialogue and discussion on the scope, content and effect of the reservations as well as their (in)compatibility with provisions of the CEDAW.<sup>84</sup> Sometimes, further study by the state party on the compatibility of the provisions of the Convention and the Sharia – perhaps partially pushed by the Committee – can have led to a change in the state's position and revision of the reservations.

The CEDAW Committee commonly considers general and broad reservations, as well as reservations to Articles 2 and 16 to be contrary to the object and purpose of the Convention. The Committee, logically, does not so much address reservations as problematic in the sense of not knowing what the state party has bound itself to. Where states parties in their objections often refer to the lack of clarity concerning the commitment by the other state party, the Committee focuses on the possible lack of respect for and protection of the rights. It is interesting that the Committee in this regard also refers to the fact that for similar provisions in other human rights treaties, no reservations were made.

## **6. Concluding Remarks: Cultural Pluralism through Reservations**

From the above it can be concluded that indeed states have made reservations to the CEDAW based on cultural, mostly religious, differences between them. By making such reservations, these states express their will not to be bound by certain provisions of this treaty, because they want their own cultural or religious particularities to prevail. These cultural reservations reflect cultural pluralism between states in relation to this human rights treaty.

The large majority of the cultural reservations to the CEDAW are based on Islamic laws and the Sharia and they concern its provisions on equality in matters of nationality, family affairs and legal affairs. It is on these issues that, according to the reservations made, Islamic law may be different and should prevail.

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<sup>82</sup> Syrian reply to the 'List of issues and questions with regard to the consideration of initial reports' (2 March 2007), UN Doc. CEDAW/C/SYR/Q/1/Add/1, answer to question 3.

<sup>83</sup> CEDAW 'Concluding observations of the CEDAW Committee', Syria (11 June 2007) UN Doc. CEDAW/C/SYR/CO/1, at paras. 11-12.

<sup>84</sup> Reservations to human rights treaties, including those to the CEDAW, are also discussed in the Universal Periodic Review within the Human Rights Council, composed of States representatives. States mainly urge each other to reconsider or withdraw their reservations, for example in the case of Bahrain, Oman and Saudi Arabia. See 'Report of the Working Group on the Universal Periodic Review Bahrain' (22 May 2008), UN Doc. A/HRC/8/19, at para. 9 and Recommendation 2; 'Report of the Working Group on the Universal Periodic Review Oman' (24 March 2011), UN Doc. A/HRC/17/71, at paras. 90.16 and 90.17; 'Report of the Working Group on the Universal Periodic Review' (4 March 2009), UN Doc. A/HRC/11/23, at paras. 27, 44, 46, 49, 54 and 79.

Most of these cultural reservations made by states parties were objected to by other states parties and they also met with great concern from the CEDAW Committee. The main problem seems to be that most cultural reservations were formulated too broadly and generally, as regards to their scope of application (the treaty as a whole) and as regards their justification (Islamic law in general without specifying which parts of Islamic law). The vagueness of these reservations leaves too much ambiguity as regards their outcome and thereby the scope of commitment of the state party. Other states parties therefore objected to these reservations, because of doubt as regards the obligations the state party is prepared to respect.

Cultural reservations to specific provisions were also objected to. The argument in these cases was often that the reservations were incompatible with the object and purpose of the CEDAW. The object and purpose of the treaty form a general limitation to the making of acceptable reservations. These objections based on the incompatibility with the object and purpose not only concerned contractual considerations; they also reflected disagreement with the cultural or religious arguments underlying the reservation.<sup>85</sup> At the same time, it is not so much the cultural or religious argument per se that is the object of disagreement, but the consequences for the implementation of the CEDAW. In other words, cultural or religion may be accepted as justifications for reservations and cultural reservations are not categorically rejected. This is also shown by the fact that reservations based on other cultural arguments than Islamic law are hardly objected to by other states parties and do not meet as much concern by the Committee. It is merely where cultural or religious arguments undermine the working of the treaty that they are not accepted by other states parties and by the Committee. In other words, relying on cultural or religious arguments to reserve a certain provision is acceptable, as long as this is not contrary to the object and purpose of the treaty and the rights in the treaty are respected and protected.

It should be noted that a minority of states object to reservations. This might mean that other states parties find these reservations acceptable and have no objections to them. There can also be other reasons why states parties do not object, including possible ignorance of the reservations, diplomatic reasons avoiding political or economic problems with another state, but also the lack of effect of an objection. Practice shows that the severability approach is broadly accepted, whereby states remain parties of and bound by the treaty, despite their reservations being considered invalid.

The two faces of human rights treaties, the one being contracts between states and the other being normative standards for states' behaviour towards individuals and communities, clearly appear in relation to cultural reservations and the objections to them. States parties often emphasize their contractual relationship in their objections by stating that, as contract partners, they want to know to what extent their fellow states parties consider themselves bound by the provisions of the treaty. At the same time, they emphasize the normative importance of the treaty by stating that the objection to the reservation does not preclude the entry into force of the treaty between them.

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<sup>85</sup> Klabbers, *supra* note 9, at 179.

The monitoring body, not being a contracting party and in its role of supervisor of the implementation of the treaty, links its objection to the protection and promotion of human rights towards the beneficiaries. It emphasises the possible negative impact of some cultural reservations on the implementation of the rights in the CEDAW. Although the Committee could use the objections by other states parties as indication of the permissibility of these reservations, it appears to make its own assessment on the matter.

In conclusion it can be stated that the principle remains that states parties may reserve from certain provisions in a human rights treaty with reference to their specific cultural or religious background. Reservations thereby may indeed be a useful or even necessary reflection of cultural pluralism.<sup>86</sup> Such cultural reservations, however, must be formulated in concrete and specific terms. They must state which specific (parts of) provisions of the treaty the state party does not consider itself bound to and explain the cultural or religious reasons behind the reservation, which determine the scope, content and consequences of the reservation.

Moreover, cultural reservations have to be able to pass the object and purpose test, to prevent them from going against the essential parts of the treaty or undermining the effect of the treaty as a whole. It seems that existing reservations to the CEDAW based on cultural arguments do not often pass that test. In the case of the CEDAW, this also reflects the continuing lack of universal consensus on women's rights. Whereas discrimination based on race is more or less universally objected, discrimination based on sex is still often justified, exactly with religious, cultural and historical arguments, whereby reservations are used as a tool.<sup>87</sup> However, as with all tools, they should be used with caution. While reservations may be means of accounting for cultural diversity, it should be emphasised, as indicated in the UNESCO instruments, that the promotion of cultural diversity always requires that human rights are guaranteed.

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<sup>86</sup> Pergantis, *supra* note 4, at 455.

<sup>87</sup> Chinkin, *supra* note 40, at 77; Neumayer, *supra* note 3, at 404.