THE GRADUATE INSTITUTE | GENEVA

INSTITUT DE HAUTES ÉTUDES
INTERNATIONALES ET DU DÉVELOPPEMENT

GRADUATE INSTITUTE OF INTERNATIONAL
AND DEVELOPMENT STUDIES

Women, Islam and International Law

Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women

Ekaterina Yahyaoui Krivenko

MARTINUS NIJHOFF PUBLISHERS

Women, Islam and International Law

Graduate Institute of International and Development Studies

VOLUME 8

The titles published in this series are listed at the end of this volume.

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MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2009

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Yahyaoui Krivenko, Ekaterina.
Women, Islam, and international law : within the context of the Convention on the Elimination of All Forms of Discrimination against Women / by Ekaterina Yahyaoui Krivenko.
p. cm. -- (Graduate Institute of International and Development Studies ; v. 8)
Includes bibliographical references and index.
ISBN 978-90-04-17144-2 (hardback : alk. paper) 1. Women--Legal status, laws, etc. (Islamic law) 2. Convention on the Elimination of All Forms of Discrimination against Women (1980) 3. Civil rights (Islamic law) 4. Women's rights. I. Title.

KBP526.3.K75 2009
341.4'858--dc22

2008037710

ISSN 1572-5618
ISBN 978 90 04 17144 2

PRINTED IN THE NETHERLANDS

To my husband Yahyaoui M.B.S., my supporter and companion

CONTENTS

ABBREVIATIONS

AFDI	Annuaire français du droit international.
BYbIL	British Yearbook of International Law
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Committee of the Rights of the Child
EuCHR	European Convention on Human Rights
EuComHR	European Commission of Human Rights
EuCtHR	European Court of Human Rights
EuGRZ	Europäische Grundrechte Zeitschrift
Fn	Footnote
HRLJ	Human Rights Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILM	International Legal Materials
Int.-Am.CHR	Inter-American Convention on Human Rights
Int.-Am.CtHR	Inter-American Court of Human Rights
LoNOJ	League of Nations Official Journal
NILR	Netherlands International Law Review
RdC	Recueil des Cours. Académie de Droit International
R.G.D.I.P.	Revue Général de Droit International Publique
UN	United Nations
UNTS	United Nations Treaty Series
YbEuCHR	Yearbook of the European Convention on Human Rights
YbILC	Yearbook of the International Law Commission

INTRODUCTION

THEORY AND REALITY OF HUMAN RIGHTS

Justice is an experience of the impossible.

Derrida, Force of Law, p. 947

I. Framework, Goals and Structure

When faced with the issue of the nature of international law, traditional international law doctrine emphasizes such characteristics as objectivity and impartiality. Order-creating and order-maintaining functions of international law are also often put forward as evidence of the nature of international law as a legal system. On the other hand, the reality of international relations contains many examples of inadequate and biased responses given by international law to a number of situations of conflict and crises. One has the impression that a more powerful State (or States) is able to protect its interests and impose its will on the rest of the world despite any existing limitations and regulations of international law.

As far as modern international law is concerned, this contradiction is mirrored in the discussion surrounding issues of globalization and changing nature of international law. Thus, the argument is formulated in the modern doctrine of international law that with the advancement of globalization and related economic and technological developments the nature of international law also changes. Erosion of sovereignty, role of soft-law and ius cogens as well as emergence of obligations binding on States without their consent are the most significant issues discussed in this connection. However, in practice, globalization often looks more like domination, appears as a new form of colonialism and despite all existing international law commitments dominant States find ways to protect and impose their own interests even in spite of and in violation of rules of international law.[1]

However, law can be defined in various ways. If one takes a more nuanced and broad approach to the definition of international law, one can discover more subtle

1 One very illustrative example of this vision of international law, although expressed in a more delicate form, is the book by Goldsmith, Jack L., Posner, Eric A. *The Limits of International Law*, Oxford: Oxford University Press, 2005. See also the discussion of this book in various articles resulting from a symposium and published in vol. 34 (2006) of the Georgia Journal of International and Comparative Law.

ways in which international law operates being still able to achieve compliance. Unfortunately, these "other" ways are very timid, often invisible to an external observer, and of questionable effectiveness in certain situations. Thus, although one might admit importance of these more subtle ways in which international law operates, one is nevertheless disappointed by many ways in which powerful States are still able to escape compliance with rules of international law and impose their will on the rest of the world.

This contradiction – or set of contradictions and problems – is also reflected and appears even more visible in the field of human rights law. Nowadays international human rights law covers a very wide area, if not all, areas of human life. Moreover, there is not only a great number of international human rights instruments formulating guarantees of a multitude of rights, but also an extensive machinery for the protection and enforcement of these rights. Despite all these developments, our world is very far from a situation where human rights violations would represent an exception.

One of the most important problems or difficulties which international human rights law is facing relates to the issues of enforcement, implementation and respect of the multitude of human rights formulated in various international instruments. Although, for different reasons, States accept a variety of human rights obligations, they are usually not really concerned with the respect for human rights or are not able to ensure respect for human rights. Even when States undertake certain actions in response to human rights violations, the primary motivation behind these actions is not the concern with human rights themselves but other, more benign and egoistic considerations. Otherwise, we might ask why States could agree on the necessity of intervention and actually intervene, although too late and not always effectively in the genocide in the former Yugoslavia but simply stood by and watched on the genocide in Rwanda. Why violations of women's rights and support of terrorist activities is a reason enough to intervene in Afghanistan and not in Saudi Arabia? As pointed out by one author: "The abyss between should and is, assumptions and analysis, is cloaked underneath a vocabulary of virtual reality, in which ratification of a human rights treaty is assumed to entail a commitment to human rights(…)."[2]

Thus, when the issue of effectiveness and enforcement of human rights is addressed in literature or in human rights practice, the unsuitability of States for the fulfillment of the role of protectors of human rights is readily admitted.[3] Proposals for improvement of compliance with human rights norms usually address such issues as necessity for education, rising of human rights awareness and human rights activism combined with the internal pressure on governments to pursue a human rights

2 Tomasevski, Katarina. *Responding to Human Rights Violations 1946–1999*. International Studies in Human Rights, Vol. 63, The Hague, Boston, London: Martinus Nijhoff Publishers, 2000, p. 3.

3 In this connection the self-interest of States as a driving force for their actions is emphasized. This self-interest can secure stability and effectiveness of traditional international law, because it is based on reciprocal in nature obligations comparable to contractual obligations in private law. In contrast, human rights law lacks these characteristics and States have no self-interest in the protection of human rights.

friendly national and foreign policy. Although I do not question the necessity and effectiveness of such measures, it is important to emphasize here that such measures do not belong to the traditional legal sphere. Moreover, what is more important, these measures do not fit into the State-centered vision and structure of international law in general and human rights law in particular. All these measures place emphasis on individuals as an active agency. Traditional international law does not recognize such an active role of individuals.

The compliance will thus be achieved, not because of the functioning of traditional international law – including human rights law – but despite it. Furthermore, such a pattern of compliance based on persuasion and lack of legal enforcement raises another fundamental question, namely that of universality of human rights values as reflected in official human rights instruments. No educational or awareness-raising measures will be effective in a community which regards values reflected in human rights instruments as alien and imposed on them from outside. Moreover, taking into account power-play inherent in realities of international law, the following question is often raised: Is the definition of human rights standards by representatives of certain communities (States, cultures) another way to impose the world-view of a more powerful State/culture? Is it not a new, more indirect method of achieving domination?

My reflection on all these contradictions gave rise to the present research. To address all these contradictions in a general framework of international law or human rights law would require a very extensive research going beyond the limits of this book. I chose therefore the form of a case-study to examine some of these contradictions in a particular context. This will also allow us to go to the core of problems and issues and to provide more or less concrete and practical answers to certain questions. One particular area chosen for the research is the area of women's human rights,[4] because, as will become clear later, it reflects a number of problems and contradictions within human rights law. Furthermore, issues of inclusion/exclusion, universality/diversity are at the core of discussions surrounding issues of women's rights and interests.

In relation to human rights of women the set of problems mentioned above appears in the following form. If one looks through international law books and more specifically human rights textbooks and compilations of documents, one will discover a significant number of instruments dealing in one way or another with the status of women.[5] The legal significance of these instruments varies from declarations and resolutions to conventions adopted by the UN as well as by its specialized agencies.[6]

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4 If not further specified, the expression "women's human rights" is used in this paper to refer in general to any provisions of international human rights law dealing with issues relative to women.

5 For a detailed overview of instruments dealing with women's human rights see: ALFREDSSON, Gudmundur, TOMASEVSKI, Katarina, eds. *A Thematic Guide to Documents on the Human Rights of Women: Global and Regional Standards Adopted by Intergovernmental Organizations, International Non-Governmental Organizations and Professional Associations*. The Hague, Boston, London: Martinus Nijhoff Publishers, 1995, XVII-434 pp.

6 More on nature and significance of various instruments on human rights of women see below: Chapter One, I.A. 1 & 2.

The Convention on the Elimination of All Forms of Discrimination Against Women[7] ratified by more than 180 States[8] can be regarded as a culmination of this long process of putting women's needs to the paper.[9] This Convention is supposed to be a comprehensive instrument guaranteeing women's rights in all areas of life.

Such a great number of international instruments aimed at protecting women's rights gives an impression that human rights of women are sufficiently taken into account by international law, can be derived from sources of international law, and form, therefore, a part of international law. As a consequence, one could suppose that interests of women are respected and protected by international law. However, a closer look at the situation with regard to women's rights at the international as well as at national levels reveals a more complex picture. Not only is the situation of women in many countries disastrous, not only do many governments not care for the respect of women's rights despite their voluntary assumed international obligations, but certain States do even claim the necessity to maintain women in a subjugated position based on their religious, cultural or traditional peculiarities.[10]

The most familiar example of an opposition between women's human rights as defined by international law and internal peculiarities of States is that existing between the status of women according to Islam as commonly understood[11] and the status granted to women by international human rights law. From the point of view of subject-matter the position of women according to the rules of Islam, at least as commonly represented, violates several fundamental women's human rights. The issue of women's rights is one of the most controversial, if not the most controversial issue in the dialogue between Islam and human rights. However, contrary to what one could expect, the progress and constructive interaction at the level of enforcement and implementation is more common and easier as far as many States with the Muslim majority population are concerned, than on the part of some States commonly considered as more "human rights friendly". This is particularly visible in the context of the CEDAW.

The desire to find ways to deal constructively with diversity at the international law level can be identified as a very general goal of this research. To put it differently, the purpose of this research could be described as an attempt to understand from the study of one particular situation how, where, and why international human rights law failed to address and to deal adequately with differences based on culture, tradition or religion. The study of this particular situation should provide some guidance as to appropriate

7 Further referred to as the CEDAW or the Convention.

8 By the end of 2007, there were 185 States parties to the CEDAW.

9 Adopted by the General Assembly resolution 34/180 (1979) on 18 December 1979.

10 The reference is made here to tradition, custom and religion as a whole because sometimes it is difficult to distinguish practices based on tradition or custom from religious practices. The former are often justified in religious terms or are so deeply rooted in the consciousness of populations as being based on religion that it requires much effort to prove the contrary. It should be therefore kept in mind that when a reference is made in this paper to one of the three notions, it implies in most cases a reference to the mixed concept of "tradition, custom and religion". The contrary is always indicated expressly.

11 An inquiry as to the real content of Islamic rules on the status of women will be made in a separate part of Chapter One.

means and ways for improvement: Why is the dialogue between Islam and human rights more successful in the context of the CEDAW, despite the fact that contradictions between both are apparently deeper in this area? Seen in this light the research can contribute to the discussion taking place under the heading of "cultural relativism".

Yet at another level of abstraction, the general purpose of this research may be described as follows: Given the realities of modern international and human rights law, namely the possibility of domination and pressure by more powerful States on the rest of the world, the constant presence of certain (often quite significant) degree of self-interest and power-play in the practice of international law and human rights law as its branch, what can we (lawyers) do to make globalization (and not domination) and universality (of human rights and not imposition of particular values) a stronger characteristic of modern international law/relations. In particular, what role should available legal mechanisms play in this context (how can they be used)? Instead of hiding behind common illusions about the nature of international law, let us face the reality, analyze contradictions/problems as they appear in practice and use them as a tool for directing the further development of the practice of international law in a desired direction promoting inclusion and dialogue.

The principal thesis defended in this book is the following. A comparative analysis of any given set of ides, in our case Islamic and human rights' visions of women's status, even if they appear to be irreconcilable, will demonstrate that, being human creatures, they contain a number of similarities.[12] For the same reason, any system of ideas bears a potential for renewal. In order to develop a constructive interaction between two sets of ideas, it is necessary to discover similarities between them, their common points and initiate a dialogue on this basis. However, oftentimes, it is very difficult to see and to admit these similarities. As a consequence, even if a dialogue is initiated, the parties do not fully (and sometimes not at all) understand each other. What is needed in such cases is an unbiased, fresh comparative look at both systems and an open-minded attitude of the parties involved. I also argue that international law in general, and human rights law in particular, if functioning adequately, provides a unique space for such an open-minded, unbiased encounter and dialogue. However, working methods and attitudes adopted by lawyers in modern international legal framework are often simply inadequate, sometimes even dangerous for the promotion of this dialogue.

Chapter One will present two apparently competing or contradictory forces which for purposes of simplification are labeled women and Islam As far as the former is concerned, taking into account general purposes of the research and the fact that women were to some extent successful in bringing their demands to international law, its presentation is framed in the following way: The Chapter starts with a general description of human rights law and an attempt to situate it in a larger framework of international law, its structure and processes. Then the place attributed to the interests

12 To say that Islamic law is a human creature does not mean in this context the denial or rejection of its divine origin. For a detailed explanation see part on Islam and Islamic law in Chapter One.

of women by human rights law and its ways to deal with them is analyzed. Particular attention is paid to the CEDAW and to the analysis of its provisions. Finally, as a conclusion of this first part of the Chapter, feminist critiques of the way the CEDAW addresses women's needs will be presented in order to shed some light on inadequacies, drawbacks of the protection granted by the human rights law to women's interests, but also of international law framework in general. In this context, feminist critiques appear as a continuing voice of this first force or actor: women.

Next part of Chapter One deals with the force defined as Islam.[13] In particular, the nature and fundamental characteristics of Islamic law and attempts at its implementation and application in various parts of the world will be analyzed. The basic aim of this part is to offer a possibility to develop a deeper and more complete understanding of the forces hiding behind the general label of Islam. It should also help to shed later more light on the possibilities of interaction between women's human rights and Islam.

Chapter Two will present the arena where later our two actors will meet. In terms of international law, this Chapter will present the reservations regime in general with all its ambiguities and contradictions. This analysis is also particularly useful as means of understanding ways by which international law accommodates and responds to the universality/diversity tension/dichotomy and its ways to address diversity. The two forces, Islam and human rights law related to the status of women, which were simply placed side by side in Chapter One will meet each other and interact in Chapter Three. This encounter is described through analysis of participation of Muslim States in the CEDAW. Reservations entered by these States when becoming parties to the CEDAW and the reservations regime in general as reflected in their practice are placed at the center of the analysis of Chapter Three. The main purpose of Chapters Two and Tree is to illustrate how the contradictions mentioned before in this introduction are reflected in the reservations regime in general and in certain aspects of application, enforcement and implementation of women's human rights in particular. Furthermore, different ways to deal with related problems and difficulties developed in the practice of States and bodies established for the supervision and monitoring of human rights are also analyzed.

On the basis of this new understanding of the interaction Chapter Four will provide some tentative suggestions about more adequate ways to deal with problems and contradictions described in Chapters Two and Three. These suggestions will concentrate on the particular case of the participation of Muslim States in the CEDAW. However, the overall analysis also has a much wider significance, which will be articulated in the concluding part. In particular, it will come back to some general ideas about the nature of human rights law and international law and their mutual relationship.

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13 As already mentioned before, any discriminatory practice is not simply a religious prescription or cultural attitude or a tradition but rather a mixture of them. However, since the focus of the present research is on religious and in particular on Islam based justifications for practices discriminatory against women, the term "Islam" is used in the absence of a better designation of these by Islam motivated and justified forces.

Thus, the methodology chosen for this research is based on deductive analysis. From the study of particular cases/areas more general conclusions are made. Peculiarities of each area of analysis form basis for suggestions made at the end of the research. The methodology of the research and the way in which its results are presented deserves some further clarifications.

II. On Methodology

It should be kept in mind that the analysis and presentation, although not based entirely on, are to a very large extent inspired by my understanding of feminist legal scholarship.[14] This scholarship is for me a method, a guidance, not necessarily a theory. For this reason, I will not expressly refer to it systematically. For the same reason it is necessary to give an overview of my vision of the feminist legal scholarship and clarify its relationship to and significance for the analysis of the subject.

Feminist legal scholarship has been originally developed in the context of national laws of different countries. Later its methods were also applied to human rights law and international law more generally. They are very useful as a tool for getting a fresh, new vision of a subject, for adopting a more constructively critical attitude towards apparently well-regulated and resolved issues. After a short presentation of feminist legal methods in general, their application to the area of human rights of women will be presented.

A. *Feminist Legal Methods*

Feminist legal scholarship developed various methods opening a way for challenge of existing legal structures and processes.[15] Central to feminist legal methods is asking "the woman question" which means inquiring by every analysis whether women have been left out of consideration.[16] This approach implies the questioning of the fundamental

14 I have to emphasize and explain MY in this phrase. It originates from the acknowledgement of the impossibility to define an "authentic" feminist scholarship, except, probably for some very general ideas which I will attempt to identify below. I have to stress, however, that sometimes differences between various representatives of the feminist legal scholarship are deeper or more significant than similarities. The following article is illustrative of this diversity: Romero, Adam P. "Methodological Descriptions: "Feminist" and "Queer" Legal Theories. Book Review of Janet Halley's *Split Decisions: How and Why to take a Break from Feminism*." 19 *Yale Journal of Law and Feminism* 2007, pp. 227–258; and for a historical perspective Lacey, Nicola. "Feminist Legal Theory and the Rights of Women" in: Knop, Karen, ed. *Gender and Human Rights*, Oxford: Oxford University Press, 2004, pp. 13–55.

15 For a detailed analysis of feminist legal methods see e.g. Barlett, Katharine T. "Feminist Legal Methods." 103 *Harvard Law Review* 1989–1990, pp. 829–888.

16 See e.g. Gould, Carol C. "The Woman Question: Philosophy of Liberation and the Liberation of Philosophy." In: Gould, Carol C., Wartofsky, Marx W., eds. *Women and Philosophy: Toward a Theory of Liberation*. New York: Perigee Books, 1980, pp. 5–44; Barlett, loc. cit. above, fn. 15, pp. 837–849.

assumption about law and legal system as an objective and neutral construction. More concretely this method consists of an inquiry about consequences for women of particular rules and practices, even those which appear at the first sight as gender-neutral or favorable to women.[17] Feminist legal methods are also characterized by a more context-situated analysis. They depart from the generalized representation of situations common to the legal analysis in favor of more contextualized, complex and multifaceted versions. Many feminist scholars would plead in this context for more general rules which leave room for new readings and applications because not all readings and applications, not all situations and contexts can reasonably be taken into account by the rule-maker.[18] Feminist legal methods place emphasis in this connection on the great diversity of human experience and the necessity to take into account competing claims, new situations and perspectives rather than attempting to force them into already existing prescribed categories.[19] Sharing and articulation of various experiences of women, in particular on a public, institutional level is also an important element of the feminist legal methodology. It provides feminist literature with a valuable background for their further analysis, including the asking of "the woman question".[20]

B. *Applying Feminist Methods to Human Rights Law*

All feminist critiques of international law in general and of human rights law in particular, including the issue of human rights of women, can be divided in two large groups according to the criterion of their relationship to the object of their critiques. One group can be described as external critiques because the critical analysis developed by this group of authors questions the legal system itself, its ability to respond to real needs and interests of women. Representatives of external critiques usually are close to critical legal studies, deconstruct without offering something else as solutions. Another group can in contrast be defined as internal feminist critiques because the system itself is not questioned, but certain aspects of the system are criticized and proposals for reform are made. As far as human rights law is concerned, there are very few critiques which can be described as external critiques. The overwhelming majority of feminist authors does not question the human rights system as such, but formulate various proposals for its reformation.

The feminist literature on women's human rights which can be categorized as internal critiques despite a multitude of approaches has one characteristic common to all its categories. This common characteristic is the distinction made between definition of women's human rights in international law and real interests of women. This distinction is already

17 E.g. Wishik, "To Question Everything: The Inquiries of Feminist Jurisprudence." 1 *Berkeley Women's Law Journal*, 1985, pp. 64, 72–77; Conaghan, Joanne, "Reassessing the Feminist Theoretical Project in Law." 27 *Journal of Law and Society* 2000, p. 351.

18 Barlett, loc. cit. above, fn. 15, pp. 852–853.

19 Barlett, loc. cit. above, fn. 15, pp. 854–858, Binion, Gayle. "Human Rights: A Feminist Perspective." 17 *HRQ* 1995, p. 512.

20 Barlett, loc. cit above, fn. 15, pp. 863–867; MacKinnon, Catharine A. "Feminism, Marxism, Method and the State: An Agenda for Theory." 7 *Signs: Journal of Women in Culture and Society* 1982, pp. 515–544.

reflected in the choice of terminology. The term "women's rights" is used to describe the ideal picture of what should be women's human rights when they accommodate adequately the experience and interests of women. In contrast, as "human rights of women" are described rights granted to women by modern human rights law and which are consequently criticized for paying not enough attention to the real situation of women.[21]

Critiques expressed in the feminist literature on human rights law concerning women are very different as feminist theories of law and feminist methodologies are different. It is not easy to divide them into categories, in particular because different theories often overlap in the writings of the same author.[22]

Without going into detail of all these critiques I will just describe the principal reproaches made in the feminist literature to the actual status of women's human rights in international human rights law. Critiques start already with such formal aspect as language used by human rights instruments. The language of human rights law is described as a male language, where "man" is used instead of "human being" and the pronoun "he" as a reference to the whole humanity.[23] Developed further, this critique of language goes so far as to describe the entire legal system and legal language as a male conception which is construed to defend and protect traditional domination of women by men.[24] One of the main characteristics of this law defined by men and for men is the distinction drawn between public and private domains. Public life dominated by men is subject to legal regulation, private life as domain of women is excluded from the sphere of law. In terms of human rights law this resulted in the formulation of and emphasis on rights for public domain and therefore for men, namely civil and political rights. Moreover, as noted by some feminist scholars even within this category of rights the experience and needs of women are not taken into account.[25] This public/private distinction can be defined in different ways and this definition has been modified at different stages of development of human rights law. This distinction can, therefore, be criticized from different points of view.[26] For example, at the international law level: reflection of this public/private distinction can be found in a clear separation

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21 See e. g. the use of terminology in Engle, Karen. "International Human Rights and Feminism: When Discourses Meet." 13 *Michigan Journal of International Law* 1992, pp. 517–610.

22 For a clear and concentrated presentation of feminist theories and their application to international law see Charlesworth, Hilary, Chinkin, Christine. *The Boundaries of International Law: A Feminist Analysis*. Manchester: Juris Publishing Manchester University Press, 2001, pp. 38–61.

23 See in particular, Spender, D. *Man Made Language*. London, Boston: Routledge & Paul Kegan, 1980.

24 See for example Charlesworth, Hilary. "Alienating Oscar? Feminist Analysis of International Law." In: Dallmeyer, Dorinda G., ed. *Reconceiving Reality: Women and International Law*. Studies in Transnational Legal Policy N° 25, The American Society of International Law, Washington, D.C.1993, pp. 1–18; or for more detail and further references Charlesworth, Hilary, Chinkin, Christine, loc. cit. above, fn. 22.

25 Charlesworth, Hilary, Chinkin, Christine, loc. cit. above, fn. 22, pp. 233–237.

26 See different opinions expressed in feminist literature, e.g. Engle, Karen. "After the Collapse of the Public/Private Distinction: Strategizing Women's Rights." In: Dallmeyer, Dorinda G., ed. *Reconceiving Reality: Women and International Law*. Studies in Transnational Legal

between external relations between States, which are the subject of international legal regulations and internal affairs of States which are protected by the principle of non-interference not only by other States, but also by international law itself.[27] In human rights law this dichotomy takes shape of a distinction made between civil and political rights on the one hand and economic, social and cultural rights on the other hand. Even inside the category of economic, social and cultural rights the categories of public sphere and private sphere can also be distinguished.

Another aspect of modern human rights law criticized in feminist literature is the non-discrimination focus of modern human rights law relating to women. This non-discrimination or equality basis of women's human rights means treatment of women in the same way as men. The critiques put forward the question of whether men's interests, the situation of men is the same as that of women, whether rights defined by men and for men can adequately respond to women's needs?[28]

Finally, even if some authors admit that in the last years human rights law turned towards women and formulated rights for women, they stressed that these rights cannot improve the situation of women significantly because women's human rights are not taken seriously.[29] They emphasize such characteristics of women's human rights as weakness of provisions and enforcement possibilities, marginalization of human rights of women. They also turn to potential conflicts of rights which do not seem to be resolved in practice in favor of human rights granted to women.[30]

Women who live in communities with practices and traditions that are discriminatory and prejudicial to them and who condone such practices and traditions are often regarded

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Policy N° 25, The American Society of International Law, Washington, D.C.1993, pp. 143–156; Olsen, Frances E. "International Law: Feminist Critiques of the Public/Private Distinction." In: Dallmeyer, Dorinda G., ed. *Reconceiving Reality: Women and International Law*. Studies in Transnational Legal Policy N° 25, The American Society of International Law, Washington, D.C.1993, pp. 157–170; Romany, Celina. "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law." 6 *Harvard Human Rights Journal* 1993, pp. 87–125; Sullivan, Donna. "The Public/Private Distinction in International Human Rights Law." In: Peters, Julia, Wolper, Andrea, eds. *Women's Rights, Human Rights: International Feminist Perspectives*. New York, London: Routledge, 1995, pp. 126–134.

27 For a detailed analysis of this dichotomy in general international law see: Walker, Kristen. "An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law." 26 *New York University Journal of International Law and Politics* 1994, pp. 173–199.

28 For an example of such an analysis see: Wright, Shelley. "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions." 12 *Australian Year Book of International Law* 1992, pp. 241–264.

29 Flor, Patricia. "<Gender Mainstreaming> - Damit die Gleichberechtigung der Geschlechter Wirklichkeit wird." In: G. Baum, E. Riedel, M. Schaefer, eds. *Menschenrechtsschutz in der Praxis der Vereinten Nationen*. Baden-Baden: Nomos Verlagsgesellschaft, 1998, pp. 167–178; Gallagher, Anne. "Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System." 19 *HRQ* 1997, pp. 283–333.

30 Compare for example Howland, Courtney W. "The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter." 35 *Columbia Journal of Transnational Law* 1997, pp. 271–377 and Sullivan, Donna. "Gender Equality and Religious Freedom: Towards a Framework for Conflict Resolution."

in the feminist literature as victims, influenced, unable to decide, oppressed and in need of guidance and help from the outside. There is a certain kind of superiority – we know what is good for you better than you – and segregation – "we" and "they" – established in this context by the mainstream Western feminist tradition. When faced with the fact that women who are subjected to certain discriminatory practices can also condone such practices, they do not inquire about the real reasons behind such an attitude but simply reject the possibility that, for some reasons, these women can sincerely support any discriminatory practices. More often, the possibility of the existence of such women is not raised or addressed at all. This is particularly true for the part of feminist scholarship defined above as external critique.[31]

Once the existence of this category of women is accepted or recognized, which has been made by a part of the feminist scholarship, it is necessary to find ways and means to deal with "them", to address "their" experience and interests. Without going into detail of the different attitudes adopted in the feminist literature in this connection, I will just mention that any constructive dialogue implies respect and taking the position, experience and interests of the other seriously. In this context it is impossible just to talk in the categories of right and wrong; in any case, not on the basis of the premises "I am right you are wrong". Therefore, any plain interdiction of all culturally and traditionally determined practices is detrimental to the promotion of mutual respect as a basis for a dialogue and simply ineffective.[32]

C. *Whose "Right" and Who is "Right"?*

Here we come to another important point addressed in the feminist literature, namely that of the objectivity of law and its ability to define and determine what is "right": who and how defines the rightness.[33] In this connection Katharine Barlett describes

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24 *Journal of International Law and Politics* 1992, pp. 795–856 who attempt to find theoretical arguments allowing resolution of possible conflicts between human rights of women and religious human rights in favor of women's human rights with an article by Mayer: Mayer, Ann Elizabeth. "A "Benign" Apartheid: How Gender Apartheid Has been Rationalized." 5 *UCLA Journal of International Law and Foreign Affairs* 2001, pp. 237–338, which clearly demonstrates bias of human rights law in its approach to gender discrimination justified by religious practices.

31 For a more detailed analysis and critique of attitudes towards this issue in feminist literature see Engle, Karen. "Female Subjects of Public International Law: Human Rights and the Exotic Other Female." 26 *New England Law Review* 1992, pp. 1509–1526.

32 For an example of propositions developed in order to address this problem see Gunning, Isabelle R. "Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries." 23 *Columbia Human Rights Law Review* 1991–1992, pp. 189–247. For an example of studies using the case of polygamy in order to demonstrate that its simple interdiction without appropriately addressing all linked issues can result in greater inequalities and suffering for women see: Griffiths, Anne. "Gendering Culture: Towards a Plural Perspective on Kwena Women's Rights." In: Cowan, Jane K., Dembour, Marie-Benedicte, Wilson, Richard A., eds. *Culture and Rights*: *Anthropological Perspectives*. Cambridge: Cambridge University Press, 2001, pp. 102–126. This article analyzes the situation in an African country.

33 Feminist answers to this question reach from rational position assuming the possibility of objectivity of law and objective knowledge of "right" to postmodernist theories questioning

a stance which she calls positionality and which combines acknowledgement of existence of empirical truths, values and knowledge with their contingency. It brings some very useful suggestions also for the possibility of engaging the widest possible palette of voices in the search for truth. Although rejecting the perfectability and objectivity of truth, positionality recognizes the possibility of situated – emerged from practical involvements and relationships – and partial – individual perspectives are necessarily incomplete – truth.[34] "Because knowledge arises within social contexts and in multiple forms, the key to increasing knowledge lies in the effort to extend one's limited perspectives."[35] "If there is such thing as ultimate or objective truth, I can never, in my own lifetime, be absolutely sure that I have discovered it (…) [T]here can be only partial, locatable, critical knowledges (…) [I]ndeed, there is no place at which we could finally arrive. Truth-seeking demands "ceaseless critical engagement"."[36]

Positionality locates the source of community in its diversity.[37] This attitude, this vision of truth could prove to be a useful tool for reconciling diverse experiences within a unique tradition; to address the issue of universality and diversity, which is again and again emerging in the present research.

What is attractive in this methodology is first of all its care for the situation of a particular group of individuals (women), of an individual (a woman) with all its peculiarities. As already stated above, my major concern is also with the possibility to find ways by which international law can be used to improve the situation of women suffering from various discriminatory practices. As a matter of principle, at least when attempting to show drawback in the protection of women's rights, feminist scholars are able to adopt a very constructively critical attitude. An attitude which can provide useful insights in other areas, especially as a tool for introduction of a new constructive dynamic. Feminist scholarship's ability to remain critical toward itself is also a factor which can contribute to the initiation and promotion of a constructive dialogue.

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the very possibility of knowledge. For a detailed analysis see e. g. Barlett, loc. cit. above, fn. 15, pp. 867–880.

34 Id., pp. 880–881.

35 Id., p. 881.

36 Id., p. 885.

37 Id., p. 886.

I

WHERE AND WHAT ARE WOMEN'S RIGHTS FOR ONE AND FOR THE OTHER

If there is such thing as ultimate or objective truth, I can never, in my own lifetime, be absolutely sure that I have discovered it (...) [I]ndeed, there is no place at which we could finally arrive.

Katharine T. Barlett, Feminist Legal Methods, p. 885

Know that it is beautiful to seek the truth, but every time you claim to have found it, you are flirting with a lie, and risking the ugliness of conceit.

Khaled M. Abou El Fadl, Conference of the Books, p. 351

I. International Law, Human Rights, and the Status of Women

A. *Introductory Remarks*

Law is made of rules. It determines how these rules are formulated, applied and implemented.

International law deals with rules applicable to States or inter-State relations. When a traditional international lawyer observes the world he or she sees States. Rules are formulated, established, applied and implemented by States. According to traditional international law, no rule can bind States without their consent. This consent can be either expressed in an explicit form or be implied. As an overall generalization we can presume that explicit consent is required when rules are formulated in treaties, whereas custom is a source of rules which only presumes consent. To put it differently, rules can be established in two ways. Firstly, States can agree on certain provisions, write them down and expressly give their consent to comply with these provisions. Secondly, when States behave in a certain way with a belief that they comply thereby with a rule of law, they establish this rule through their behavior.[38] According to the doctrine of

38 Obviously, it is a very simplified presentation of the doctrine of sources in international law. Especially in the modern doctrine of international law various nuanced theories have been developed. However, till now neither of these theories did fundamentally change this simplified vision of international law sources. For some issues discussed in modern literature in relation to the doctrine of sources see e.g. Cohen, Harlan Grant. "Finding International Law: Rethinking the Doctrine of Sources." 93 *Iowa Law Review* 2007, pp. 1–52; Hollis, Duncan B. "Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law." 23 *Berkeley Journal of International Law* 2005, pp. 1–39; Ochoa, Christiana. "The Individual and Customary

traditional international law, there is a third source of rules for States, namely general principles of law. However, the exact nature of this source is relatively obscure, but can be traced back to the implied consent of States.[39]

Once rules are established through one or another source of international law, application and implementation of these rules lies exclusively in the hands of States.[40]

In case of a breach of a rule of international law consequences are also determined by States. In classical international law they were determined by affected States themselves through different forms of self-help. In the modern international law "punishment" and enforcement of the violated rule is often effected through institutions established by States and is associated with denial of benefits and advantages of being a member of a particular institution or structure.

The effective functioning of such a system which contains no official relations of hierarchy but is based on horizontal relationship between equal subjects is possible only due to reciprocity inherent to such relationships. It is in this sense that international legal order is often described as a system of contractual obligations between independent States.

Thus, law operates between States on the basis of their consent and reciprocity.[41] The centrality and independence of the State in this system are expressed through the notion of sovereignty which also protects States from any outside intervention.

Human rights law appeared as a part of international law only after the Second World War in response to this war's atrocities. The Universal Declaration of Human Rights of 1948[42] for the first time recognized that not only States, but also human beings may have rights protected at international level, that States should not be completely free to treat their citizens – a category initially protected by the notion of sovereignty from any control or influence from outside – as they wish. Thus, conceptually, human rights are safeguards against the abuse of power by governments/States relying on self-restraint of the same governments/States.

However, the drafters of the Universal Declaration did not really care about the question of compliance with standards defined therein; even less did the question of enforcement come to their minds, since declaration is supposed to be a non-binding instrument.

International Law Formation." 48 *Virginia Journal of International Law* 2007, pp. 119–186; Vagts, Detlev F. "International Relations Looks at Customary International Law: A Traditionalist's Defence." 15 *European Journal of International Law* 2004, pp. 1031–1040.

39 More about general principles of law as a source of international law see below I.B.2.a) with further references.

40 Sometimes States can establish bodies empowered to different extent with implementation and supervisory functions. However, in all cases States have to agree to establish such a body and determine themselves modalities of establishment and powers granted to such bodies, so that at the final analysis the decision rests with States.

41 It has to be stressed again that despite all new doctrines developed in international law, this traditional vision remains valid and even returns in a new form. For some examples see Hollis, loc. cit. above, fn. 38 and Parisi, Francesco, Ghei, Nita. "The Role of Reciprocity in International Law." 36 *Cornell International Law Journal* 2003, pp. 93–123.

42 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

> *Indeed, many of the states that contributed to the drafting of the Universal Declaration saw no apparent contradiction between endorsing international norms abroad and continuing oppression at home. They thought that the Universal Declaration would remain a pious set of clichés more practiced in the breach than in the observance.*[43]

Rights rhetoric became very popular; several treaties for protection of human rights were drafted and concluded subsequently. However, despite further articulation of various human rights, even as formal obligations incumbent on States, there have been very few changes in other areas of human rights law. Thus, the question of compliance with and enforcement of these internationally defined human rights norms remained largely unresolved. States being principal subjects of international law and the entity responsible for the respect of human rights are at the same time the principal perpetrators of human rights violations. The international law system has not been able to respond to this paradox adequately and it continues to influence realities of functioning of human rights law, mostly to its detriment.

B. *Human Rights Law and the Status of Women: Defining Women's Needs as Human Rights*

After having more or less clarified the nature and basic tensions of human rights law, it is necessary to get a closer look at the framing and content of the problem of women's rights and interests as a human rights issue and related questions.

1. A Historical Perspective

When one is presenting a historical development of an issue, the first question to answer is about a point of time which can be identified as the starting point. This is an important and not always easy to answer question, also with regard to the issue of the incorporation of women's needs into the definition of human rights.

There are at least two principal points of departure for a historical overview of women's human rights. If we understand human rights as a part of international law, it is impossible to look at women's struggle for the recognition of their needs as an issue of human rights law before the emergence of human rights themselves. Therefore, our history would not start before the Second World War but with some aspects of it going back to the era of the League of Nations. However, if we define human rights in a broader sense, as a struggle of human beings for equality, justice and recognition of their fundamental needs, it can be traced as far back as to the origins of human culture itself. This broader vision of human rights and therefore of women's role therein is very illustrative of the situation of women in general and is very helpful for a correct understanding of the underlying motives of women's movements from the very beginning till modern times. I choose, therefore, to present the latter historical perspective. It should also be kept in mind that this is just a general overview, the aim of which is not to go into historical detail, but to give the reader a broad vision of the movement, its principal aims and motives.

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43 IGNATIEF, Michael. *Human Rights as Politics and Idolatry*. Princeton, Oxford: Princeton University Press, 2001, p. 6.

In the primitive human society a woman's biological role also determined her social position. Taking into account the life conditions in that society it was difficult for women to extend their activities beyond child bearing, home work etc. With the advancement of technical progress, women have freed more and more time from the above-mentioned traditional biologically determined activities. Nevertheless, access to other activities has been denied to women by men who already dominated all other areas by different means, the most important being denial of the acquisition of knowledge justified by the "natural role of women". Thus, the original contributors to women's human rights in broader sense were those who first taught women to read and, therefore, to explore the world outside the home and immediate community.[44]

We may conclude that two principal factors determined not only the choice by women of ways and means in their struggle for recognition of their rights, but also the way in which international human rights law has been reflecting women's needs. These factors are, firstly, limitation of women's role by various means to the domain of family and home and, secondly, male domination of other areas of life.

Since the struggle for human rights, as any other activity out of home, initially was also male dominated, it did not reflect adequately – at the beginning not at all – women's needs. The term "rights" already presupposed that it relates to one or another aspect of the so-called public sphere closed to women for a very long time. This division of life in public and private and understanding of rights as only civil and political rights hindered the advancement of women even after they have got access to the public sphere.

With the increase of women's human rights movement women gradually introduced their demands into human rights law. The first step consisted in introducing equal treatment as far as the existing rights are concerned. In legal terms this meant introduction of non-discrimination clauses into various human rights instruments. However, civil and political rights could not respond adequately to women's needs because the principal domain of women's activities remained the home and not public or political life. Therefore, the next step was to work towards the recognition of specific needs of women. Economic, social and cultural rights are, to some extent, more attentive to women's needs. However, since the formulation of this type of right was also made almost exclusively by men, they did not always reflect adequately the experience of women. Moreover, the recognition of some women's needs often had a detrimental effect reinforcing the traditional vision of women's role as being limited to their home. Therefore, the next requirement formulated by women's movements has been the elimination of this traditional division of roles between men and women. In this connection the thesis has been put forward that the entire body of human rights law or international law in general should be reformulated in order to accommodate adequately the experience of women.[45]

All the above-described tendencies can be perfectly illustrated by the development of international human rights law concerning women.

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44 FRASER, Arvonne S. "Becoming Human: the Origins and Development of Women's Human Rights." 21 *HRQ* 1999, p. 855.

45 More to this aspect see under II.C. below.

Already the Charter of the UN contains a provision stating the necessity of respect for human rights "for all without distinction as to race, sex, language, or religion",[46] It could be asked what type of human rights does the UN Charter refer to. Without going into the detail of this ambiguous issue, one can presume that at least the rights enumerated in the Universal Declaration of Human Rights should fall into this category.[47] The majority of rights formulated in the Declaration belong to the group of civil and political rights. Although the Declaration emphasizes in the Preamble equal rights of men and women, it also contains some ambiguous provisions. The role attributed to the family in the Universal Declaration is particularly problematic from the point of view of the status of women: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[48]

Without any further clarification and in the absence of any other regulations this provision can be very easily used by traditionalists to reinforce the stereotype about the "natural" role of women.[49] This trend of reinforcement of the stereotype of inferiority of women is even more visible in two ILO Conventions: the Convention Concerning Night Work of Women Employed in Industry[50] and the Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds.[51] Both conventions contain a blanket prohibition of certain types of work for women. Only women and all women without exception are prohibited from exercising certain types of work. Such a prohibition is based on the assumption of a necessity to protect the family through the protection of women's health, safety, and morality. Moreover, a blanket prohibition also implies the assumption that women are not able to make individual decisions as to the appropriateness for them of one or another type of work.

With the growing influence of women's movements on international human rights law the awareness of real women's needs and problems increased. This led to the

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46 Article 1, paragraph 3 of the UN Charter.

47 For a more detailed interpretation of the expression "human rights and fundamental freedoms" as used in the UN Charter see SIMMA, Bruno, ed. *The Charter of the United Nations: A Commentary*. München: C.H. Beck, 1994, commentary to article 1 pp. 53, 55–56 & commentary to article 55 (c) pp. 776–793.

48 Article 16, paragraph 3 of the Universal Declaration. See also the use of the word "man" instead of "human being" in the third paragraph of the Preamble to the Declaration. The constant use of the pronoun "he" as a reference to those who can enjoy enumerated rights is also remarkable.

49 For a detailed critical analysis of the Universal Declaration from the point of view of women's interests see HOLMES, Helen B. "A Feminist Analysis of the Universal Declaration of Human Rights." In: Gould, Carol C., ed. *Beyond Domination: New Perspectives on Women and Philosophy*, Totowa: Rouman & Littlefield Publications, 1983, pp. 250–264.

50 Originally drafted in 1919, revised and modified in 1934 and 1949. Still in force for several States, although a new more gender-neutral convention on the night work was adopted by the ILO in 1990 (Convention N° 171). Texts of all ILO Conventions including relevant guidelines adopted by competent bodies and ratification information are available at the following official web-site of the ILO: http://www.ilo.org/ilolex/english/index.htm.

51 Originally drafted in 1935, revised in 1946. Still in force, although a more recent instrument, the Convention on the Safety and Health on Mines (ILO Convention N° 176) was adopted in 1995 and deals with a similar issue for both men and women workers from a gender-neutral perspective.

drafting of several instruments aimed at contributing to the improvement of some situations peculiar to women: the Convention on the Nationality of Married Women[52]; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.[53] The ILO also shifted the emphasis of its work related to women from a "protectionist" to an "egalitarian" perspective. The result of this shift was the adoption of the following ILO conventions: the ILO Convention N° 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value[54]; the ILO Convention N° 111 concerning Discrimination in respect of Employment and Occupation.[55] The need to protect this "egalitarian" view of women's status is reflected also in the Convention on the Political Rights of Women[56] and the Convention against Discrimination in Education.[57]

Introduction and recognition of the importance of such a category of rights as social, economic and cultural rights opened a new perspective for a better incorporation of women's needs into international human rights law. However, this category of rights has not been taken seriously by States. The United Nations Covenant on Economic Social and Cultural Rights,[58] the most comprehensive codification instrument of this category of rights, is formulated in vaguer and weaker terms than its counterpart the United Nations Covenant on Civil and Political Rights[59] dealing with traditional civil and political rights.

The continuous struggle of women's movements for the introduction of their specific needs into human rights law resulted in the adoption of the CEDAW. Although this Convention can be criticized from several points of view, it should be admitted that it represents a significant step forward in introducing experience specific to women into human rights law. The Declaration on the Elimination of Violence against Women,[60] although formally not binding on States, should also be mentioned as a significant achievement on the way towards the recognition of specific women's needs by international human rights law.

Thus, all the above-mentioned human rights instruments reflect quite a long history of a gradual introduction into international human rights law of demands made by women. As far as the demand of equal treatment is concerned it can be regarded as

52 Adopted by the General Assembly of the UN by its resolution 1040 (XI) of 29 January 1957, and entered into force on 11 August 1958.

53 Adopted by the General Assembly of the UN by its resolution 1763 (XVII) of 7 November 1962, entered into force on 9 December 1964.

54 Adopted by the General Conference of the ILO on 29 June 1951, and entered into force on 23 May 1953.

55 Adopted by the General Conference of the ILO on 25 June 1958 and entered into force on 15 June 1960.

56 Adopted by the General Assembly of the UN by its resolution 640 (VII) of 20 December 1952, and entered into force on 7 July 1954.

57 Adopted by the General Conference of the UNESCO on 14 December 1960, entered into force on 22 May 1962.

58 Further referred to as the ICESCR.

59 Further referred to as the ICCPR.

60 Adopted by the General Assembly resolution A/RES/48/104 at its 85th plenary meeting on 20 December 1993.

fully incorporated.[61] At present, a more complicated task is on the agenda of women's movements, namely the recognition of specific women's needs and experiences which are accommodated by modern human rights law only to a very limited extent.

2. Where and What are Women's Human Rights

a) *Identifying Sources of Women's Human Rights*

The above overview of the historical development of the struggle by women for the recognition of their needs led us to the conclusion that something called "women's human rights" exists. In terms of international law the existence of a right – or a rule in general – should be proven by reference to the sources of international law.[62] Moreover, legal force and legal consequences of a rule in relation to each particular State will depend significantly on the nature of the source from which the rule is derived. Furthermore, in terms of international law it is impossible to start discussing obligations of States as far as the implementation of one or another right is concerned without having defined the right and proved that the right in question is binding upon the State with reference to one of the sources of international law.

As already mentioned above, there are a great number of instruments dealing with women's human rights. As a first step, the instruments having binding force on States shall be distinguished from those which have no such force. In this way we will already distinguish treaties – a formal source of international law – binding on all States parties to a particular treaty from non-binding declarations, expressions of intent, etc. The latter, while representing a significant point of reference for defining desires, programs and aims of international community are, nevertheless, not formally binding on States.[63]

The advantage of a treaty as a source of international law is a relative clarity of norms, provisions applicable to each State.[64] There is also, as a rule, no doubt as to

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61 From the point of view of some feminist authors this emphasis on equality in modern human rights law relating to women is of questionable value to real interests of women. More about feminist critics see below in this Chapter under II.C.

62 According to the traditional theory of sources of international law the ICJ Statute in its Article 38, paragraph 1 formulates and defines the three existing sources. The further analysis in this Chapter will refer to a rather traditional presentation of sources in international law without referring to existing challenges to and discussion around this theory.

63 About the discussion of the legal force and legal significance of this type of international instruments see e.g. CHINKIN, Christine. "The Challenges of soft law: development and change in international law." 38 *ICLQ* 1989, pp. 850-866; PELLET, Alain. "The Normative Dilemma: Will and Consent in International Law-Making." 12 *Australian Year Book of International Law* 1992, pp. 22-53; SHELTON, Dinah (Ed.) *Commitment and Compliance: the Role of Non–Binding Norms in the International Legal System*. Oxford: Oxford University Press, 2000, XXVI, 560 p.; SHELTON, Dinah L. "Soft Law." In: *Handbook of International Law*, Routledge Press, Forthcoming 2008 Available at SSRN: http://ssrn.com/abstract=1003387.

64 Some problems as to the exact content of one or another provision of a treaty may arise in certain cases, in particular when provisions are formulated in vague, very general terms.

whether one or another State is bound by a particular rule incorporated into the treaty.[65] In contrast, the disadvantage of a treaty as a source is that only States which expressly consented to be bound by the provisions of the treaty are obliged to comply with rules formulated in that treaty. It is clear that in the majority of cases States opposed to principles and purposes of one or another treaty will remain outside of its regime. From the point of view of international law there will be very few, if any, means or possibilities to intervene in order to improve the situation in these States. These two characteristics distinguish a treaty from custom as a source of international law.

Custom, defined as "evidence of a general practice accepted as law"[66] does not have such a clear content. Sometimes it is even impossible to make an unambiguous determination as to whether one or another rule already acquired a character of a customary rule of law or not. However, once established without doubts, a rule of customary law binds all States without exception, even those which did not expressly consent to it.[67]

Finally, rules or norms of public international law can also have as their source general principles of law. The exact definition of this source of international law and ways of determining the content of these principles is subject to a debate in the doctrine of international law.[68] The notion of general principle presupposes that the rule derived from this source can only be of a very general character. A general principle of law shall be respected by all States without exception.

Women's human rights are the subject of a very wide range of treaties. Some of these treaties deal exclusively or mainly with women's rights. Others, while being

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However, rules of interpretation of treaties embodied in articles 31-33 of the Vienna Convention on the Law of Treaties provide a sufficient guidance for resolution of such problems in most cases. For more detail about the interpretation of treaties see e.g. Yambrusic, Edouard Slavko. *Treaty Interpretation: Theory and Reality*. Lanham: University Press of America, 1987 with further references.

65 One exception relates to the issue of reservations. This issue will be treated in detail in Chapter Two.

66 Article 38, paragraph 1 (b) of the ICJ Statute.

67 The only possible exception represents the notion of the persistent objector. However, the requirements established by international law for a State to be able to rely on this notion and thus to escape the observance of customary rule are very strict. Moreover, the notion itself, its scope and consequences are subject of much discussion in international law. See e.g. Abi-Saab, Georges. "Cours général de droit international public." 207 *RdC* 1987 (VII), pp. 180-182; Akehurst, Michael. "Custom as a Source of International Law." 47 *BYbIL* 1974-75, pp. 23-27; Stein, Ted L. "The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law." 26 *Harvard International Law Journal* 1985, pp. 457-482; Guzman, Andrew T. "Saving Customary International Law." *UC Berkeley Public Law Research Paper* No. 708721, April 2005, Available at SSRN: http://ssrn.com/abstract=708721, pp. 52-68 in particular.

68 Two different opinions have been expressed in the literature on this issue. The first one holds that these principles should be derived from rules accepted in the domestic law of all civilized States. The other view regards them as general principles of jurisprudence, in particular of private law, in so far as they are applicable to relations of States. For more detail and further references see e.g. Brownlie, Ian. *Principles of Public International Law*. Fifth Edition, Oxford: Clarendon Press, 1998, pp. 15-18.

of general character, address some issues specific to women.[69] Although these treaties are ratified by a great number of States, the main problem relates to the fact that States remaining outside of the treaty are in most cases those where the situation of women is particularly precarious. Are there some rules of customary law which could be applicable to such States? It is very difficult to determine the customary character of any rule relating to women's human rights due to the inconsistency of State practice. The only women-related rule which can be defined as a rule of customary law with certain degree of certainty is the general requirement of non-discrimination on the basis of sex. However, its limits and exact scope are very fluid, because there is no unanimous interpretation of the rule prohibiting gender discrimination.[70]

Thus, despite a great number of treaties and other instruments dealing with women's human rights there are very few rules of customary law or general principles of law dealing with similar issues, and those which exist have a very limited scope. The further analysis will therefore concentrate on written instruments dealing with women's human rights leaving custom and general principles of law outside. Another reason why instruments and in particular treaties form the subject of the present study is that the overwhelming majority of women's human rights, especially those which reflect specific needs of women can be derived only from provisions of treaties. Since the most comprehensive treaty dealing with women's interests is the CEDAW, the next part of the study will concentrate on this treaty. Analysis of this treaty should shed some light on the second part of the question formulated in the title of this chapter, namely what are women's human rights. Other instruments containing provisions relative to women's human rights will also be taken into account where necessary.

b) *Convention on the Elimination of All Forms of Discrimination Against Women*

(1) Facts and Figures

As a starting point, I will recall some historical facts and the most important figures in relation to the CEDAW. The first concrete debate about the possibility of adoption of a convention dealing with the situation of women took place in 1972 in the Commission on the Status of Women.[71] In 1976 the CSW presented its draft of the CEDAW to the General Assembly. After discussion and amendment of this draft by the Third Committee of the General Assembly, the General Assembly adopted the CEDAW on

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69 For a general overview of treaties dealing with women's human rights see ALFREDSSON, Gudmundur, TOMASEVSKI, Katarina, eds. loc. cit. above, fn. 5, and I.B.1. above.

70 However, even the customary character of the rule prohibiting gender discrimination is in no case unambiguously established. See e.g. the list of human rights violations sufficiently established as customary law according to the Third restatement of the Foreign Relations Law of the United States, 1987, para. 702. Compare also WANG, Shirley C. "The Maturation of Gender Equality into Customary Law." 27 *New York University Journal of International Law and Politics* 1995, pp. 899-932.

71 Further referred to as the CSW. The CSW decided to request the Secretary General to call upon member States of the UN to transmit their views or proposals on the envisaged international convention. This request was addressed to the Secretary-General in CSW's resolution 5 (XXIV).

18 December 1979 by its resolution 34/180 (1979). The CEDAW entered into force on 3 September 1981, on the thirtieth day after the deposit of the twentieth instrument of ratification.[72] By the end of 2007 there were 185 States parties to the CEDAW.[73] Seventy-six of these States used of their right to enter reservations which is limited only by the principle incorporated in article 28, paragraph 2 of the CEDAW according to which incompatible reservations shall not be permitted. Seventeen of these States subsequently withdrew their reservations in total,[74] so that at present there are fifty-nine States maintaining their reservations.[75] An important step forward in the strengthening of the CEDAW was the adoption on 6 October 1999 by the General Assembly in its resolution 54/4 of an Optional Protocol to the CEDAW. The Optional Protocol providing for special procedures of the supervision of the compliance of States parties with the CEDAW entered into force on 22 December 2000. By the end of 2007 there were 90 States parties to this protocol.[76]

As to the process and circumstances of adoption of the CEDAW, it is characterized by two main tendencies. Firstly, when the idea about a convention on women appeared, there were many voices arguing that such a convention would be unnecessary and superfluous. When it nevertheless came to the negotiation of the text of such a convention this tendency has been transformed into an ideological and religious confrontation[77] and, therefore, a need to use the "constructive ambiguity" in formulating the terms of the future convention. Such an attitude resulted in a relatively long time being taken in elaboration of the Convention[78] and what a lawyer would call weak terms of the convention. In other words, various provisions of the CEDAW are formulated in very general and ambiguous terms. As a consequence, many provisions of the Convention have a character of policy statements or expressions of intentions rather than concrete legal obligations.

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72 In accordance with article 27, paragraph 1 of the CEDAW.

73 One State signed the Convention without yet having ratified it. This State is the United States of America. Taking into account a very long period of time elapsed since the signature of the CEDAW by the United States and its internal situation, it cannot be reasonably expected to ratify the CEDAW in the immediate future.

74 Twenty-one States withdrew their reservations only in part.

75 Among these fifty-nine reservations eighteen are only procedural in nature and do not affect substantive provisions of the CEDAW.

76 The Optional Protocol will be analyzed in more detail below in this Chapter under I.B.2.b). (6)., and in Chapter Three, III.C.

77 Two lines of confrontation existed at the time of elaboration of the CEDAW: firstly, between socialist and Western States and, secondly, between Islamic and Western and socialists States. Nowadays, the former line of confrontation disappeared almost completely thereby reinforcing the latter line of confrontation.

78 Particularly long was the first stage of elaboration of the CEDAW, namely the seeking of opinions on the possibility of adoption of such a convention (prior to the year 1975). Afterwards, due to various factors, the process accelerated, sometimes too much. Compare, for example the procedure of elaboration and adoption of the CERD with more detail in Donner, Laura A. "Gender Bias in Drafting International Discrimination Conventions: The 1979 Women's Convention Compared With the 1965 Racial Convention." 24 *California Western International Law Journal* 1994, pp. 241-246.

The second tendency became apparent after 1975, when the International Women's Year[79] and a Decade for Women[80] were proclaimed by the UN. An International Women's Conference had been planned for the year 1980 which should be a culmination of the Decade for Women. Starting with the year 1975 there was, therefore, a rush toward the adoption of the Convention. As a consequence, some controversial questions have been left aside, the terms of the Convention could not be discussed in much detail; and again an ambiguity of terms reflects this attitude. All the above-mentioned tendencies influenced already the formulation of the Preamble of the CEDAW.

(2) Purposes and Principles

The fifteen-paragraph Preamble is commonly regarded as being too long and too political.[81] It does not concentrate on the purposes of the Convention but rather uses the language of a political declaration. Furthermore, statements made in the Preamble are not always taken up in the main text of the Convention.

After a reference to previous instruments dealing with a similar subject,[82] as usual in preambles to the UN conventions, the concern is expressed that "despite various instruments extensive discrimination against women continues to exist".[83] The following paragraph states that the discrimination against women violates the principles of equality of rights and respect for human dignity and describes how it affects not only the situation of women, but also the family and society as a whole. The concern is also expressed that in situations of poverty women are the most affected group.[84]

The next three paragraphs form the most controversial part of the Preamble. Thus, paragraph 9 states that "the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women". Leaving aside the discussion of the nature of the new economic order and the degree to which justice and equality do really form the basis of this order, it is difficult to understand how this paragraph relates to the remainder of the CEDAW. This statement would fit more into the CEDAW and would better reflect

79 By its resolution 168 (LII) the ECOSOC designed the year 1975 as International Women's Year in June 1972. The General Assembly confirmed this by resolution 3010 (XXVII) in December 1972.

80 The UN Decade for Women: Equality, Development and Peace (1976-1985).

81 Burrows, Noreen. "The 1979 Convention on the Elimination of All Forms of Discrimination Against Women." XXXII *NILR* 1985, pp. 421, 423, Donner, Laura A., loc. cit. above fn. 78, pp. 246-247, Reanda, Laura. "The Commission on the Status of Women." In: Alston, P., ed. *The United Nations and Human Rights: A Critical Appraisal*. Oxford: Clarendon Press, 1992, p. 287. Compare also the opinion expressed by the United Kingdom during the preparatory work: UN Doc. A/C.3/34/SR 71, para. 49, p. 9 and A/32/218/Add. 1, para. 14, p. 4.

82 Paragraph 1 of the Preamble refers to the Charter of the UN, the following paragraph to the Universal Declaration of Human Rights, the next one to the International Covenants on Human Rights. Paragraphs 4 and 5 make a general reference to the international conventions concluded and to the resolutions, declarations and recommendations adopted under the auspices of the UN and its specialized agencies.

83 Paragraph 6 of the Preamble to the CEDAW.

84 Paragraph 8 of the Preamble to the CEDAW.

its purposes should the presumption incorporated therein be reversed: the promotion of real equality between men and women will contribute significantly to the establishment of a new economic order based on equality and justice.

Paragraph 10 relates to the full enjoyment of the rights of men and women, without specifying the need for equality between sexes and is, therefore, already in this sense not appropriately placed in the preamble of a convention aimed at the establishment of equality between men and women. Moreover, the content of the paragraph as a whole is so general that it could be placed in a preamble of any human rights treaty:

> *the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women.*

The negative effect of such general statements in the preamble which is commonly considered to be the place for the formulation of purposes and principles of a convention is that this declaratory and vague character will be transferred even to the substantive provisions of the convention. In case of doubt as to the character of one or another provision it would rather be presumed to contain no concrete and immediate obligation but an intention to work towards implementation of some goals with a consequence of weakening the legal force of such provisions and complicating the supervision of compliance with them.

The same general character of political declaration is found in the eleventh paragraph which refers to such general notions as international peace and security, mutual co-operation among States, disarmament, justice, equality and mutual benefit in relations among countries, right to self-determination, respect of national sovereignty and territorial integrity.[85]

In contrast, the three following paragraphs are important as they set up a framework, purposes and ways of eliminating discrimination against women. Firstly, the conviction is expressed that "the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields". Although quite general, this statement emphasizes the importance of women's role and their participation in all areas of life.

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85 "The strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women". Although it could be assumed that all the factors listed in this paragraph will promote social progress and development, it is very questionable whether and to what extent a consequence of this progress and development would be the attainment of a full equality between men and women. Taking into account this uncertainty of consequences it is even more surprising that States affirm it. Affirm means to state formally or confidently that something is true or correct. Moreover, it is the only paragraph of the Preamble introduced by the word "affirm".

Paragraph 13 deals with the role of women in a family and the significance of maternity. An important step forward is the emphasis placed on the role of both parents in the family and in the upbringing of children and the fact that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a shared responsibility between men and women and society as a whole. These ideas are reinforced in the next paragraph stressing the importance of a change in the traditional role of men as well as the role of women in society for the full achievement of equality between men and women.

The final paragraph recalls the principles set forth in the Declaration on the Elimination of Discrimination against Women and the necessity to adopt all measures required for the elimination of such discrimination in all its forms and manifestations.

Traditionally, preambles to other human rights treaties are more concrete and concentrate on clear objectives. They firstly place a new instrument into an already existing human rights framework recalling the most important provisions of international instruments in force relating to the subject. Secondly, an explanation is given as to the reason for the adoption of a new instrument. Finally, principles and purposes of this new instrument are set forth. If we compare, for example the preamble of the CEDAW with that of the CERD, which served as a model during the drafting of the former, the difference will become obvious. Although the Preamble to the CERD is also quite long – it contains twelve paragraphs –, it is very substantive and deals only with the three above-mentioned points without making recourse to the language of political declarations.[86] We can also have a look at the Preamble to the Convention on the Rights of the Child.[87] This Convention has some common points with the CEDAW, in that it deals with a group which did not traditionally get enough attention in international human rights law, regulates new areas commonly considered to be outside of a domain suitable for legal regulation etc. Despite all these facts the Preamble explains in clear and concentrated terms the place of this instrument in human rights law, reasons for adoption of this instrument and gives a description of principles and purposes which the Convention intends to achieve.

Thus, as already mentioned above, this political declaration language can be detrimental to the effective implementation of the CEDAW and weaken the legal force of its provisions. However, there is a way to understand these elements of political declaration as an aim, as an attempt to place the issue of discrimination against women in a larger framework beyond traditional legal spheres, an attempt to make clear for States that elimination of discrimination requires not only efforts of a purely legal character but – in order to be real and effective – should go beyond traditional legal spheres and include actions in all aspects of human life. Unfortunately, the drafters of the CEDAW did not express this idea more explicitly. Moreover, these aspects of the Preamble are reflected in the main text of the CEDAW only to a limited extent.

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86 More detailed comparison between preambles of both conventions is made in DONNER, Laura A., loc. cit. above fn. 78, pp. 246–247.

87 Adopted by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990.

(3) Definition of Discrimination

The term "discrimination against women" is defined in article 1 of the CEDAW as

> *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

Firstly, this definition deals with discrimination against women, and not with a more general concept of discrimination based on sex. The choice in favor of the former was made deliberately during the preparatory work of the CEDAW.[88] The second important general feature of the definition relates to the fact that it does not limit discrimination to rights and freedoms enumerated in the CEDAW itself. It relates to any human right or fundamental freedom. As a consequence, in cases not falling under one of the articles defining specific rights of women it should be possible to grant protection on the basis of article 1 exclusively.

As in the case of the definition adopted in the CERD, the words "effect or purpose" indicate that intention is not a necessary element in establishing the existence of discrimination.[89] Inclusion of unintentional discrimination into the definition is decisive to the elimination of all forms of discrimination against women including those which, for example, are based on the so-called best interest of women and in fact safeguard and reinforce prejudicial stereotyped notions of sex roles.

A further important element of the definition is the phrase "irrespective of their marital status" which in addition to the equal treatment of men and women requires equal treatment of married as well as unmarried women.

Finally, the field of application of the CEDAW and its definition of the discrimination extends not only to public life, as traditionally, but also covers private life.[90] Some authors questioned to what extent such interference of legal regulations into the private

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88 Some States proposed and would prefer to have a definition of discrimination based on sex in general, without limiting it to discrimination against women. See e.g. proposals of Sweden and Canada in UN Doc. A/32/218/Add.1, para. 6, p. 2 and evaluation of this proposal by the Secretary General in UN Doc. E/CN.6/591, paras. 30–33, p. 10.

89 Such definition of discrimination which does not require intent corresponds to a widely accepted definition of discrimination in international law in general. See e.g. Bayefsky, Anne F. "The Principle of Equality or Non-Discrimination in International Law." 11 *Human Rights Law Journal* 1990, pp. 8–10; Bossuyt, Marc. *L'interdiction de la discrimination dans le droit international des droits de l'homme*. Bruxelles: Bruylant, 1976, pp. 36–37; McKean, Warwick. *Equality and Discrimination under International Law*. Oxford: Clarendon Press, 1983, pp. 264–284.

90 This is particularly clear if we compare the definition of discrimination formulated in article 1 of the CEDAW with that of the CERD. The latter refers to "political, economic, social, cultural or any other field of **public life**" (emphasis added). This reference to public life initially contained in various proposals of definition of discrimination during the preparatory work of the CEDAW was finally omitted at the proposal of several States and international bodies. See e.g. proposal of Portugal in UN Doc. E/CN.6/591, p. 52.

sphere can be effective and whether it is desirable.[91] On the other hand, in the light of the fact that the majority of discriminatory practices against women take place in this private sphere, such a definition of discrimination can only be welcomed.[92]

The next important characteristic of the definition of discrimination adopted in the CEDAW is the omission of the word "preference" as compared to the definition contained in the CERD. During preparatory work States discussed very actively whether and in which form this notion of preference should be included into the definition. Due to the problematic nature of this notion it was finally decided to remove the word "preference" from the definition.[93] Thus, the more restrictive definition of the CEDAW contains a danger of leaving some forms of discrimination outside of the legal framework established by the Convention.

Exceptions to this definition of discrimination against women are formulated in article 4 and article 11 of the CEDAW. Article 4 deals with two types of protective measures. Firstly, according to paragraph 1

> *Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*

This paragraph deals with temporary protective measures in contrast to paragraph 2, which concerns permanent protective measures. However, only measures aimed at protecting maternity can have permanent character:

> *Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.*[94]

Although the idea of protective measures is generally favorable to the achievement of equality between men and women, it should not be overlooked that under certain

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91 See e.g. the following observation made by Theodor Meron: "It is certainly true that discrimination against women in personal and family life is rampant and may obviate equal opportunities which may be available in public life. There is danger, however, that state regulation of interpersonal conduct may violate the privacy and associational rights of the individual and conflict with the principles of freedom of opinion, expression, and belief." In: MERON, Theodor. *Human Rights Law-Making in the United Nations: A Critique of Instruments and Process*. Oxford: Clarendon Press, 1986, p. 62.

92 A majority of authors and in particular feminist authors see the extension of protection against discrimination according to the CEDAW to the private sphere as one of the main, if not the main, achievement of the CEDAW. Of course, difficulties related to the effectiveness of the CEDAW may arise. The problem of conflict of rights addressed above in the statement by Theodor Meron (see previous footnote) cannot be denied. It would go beyond the scope of the present research to address all these issues in detail. At the present stage it is important to emphasize that it is impossible to achieve de facto equality between men and women without interference into private sphere. To what extent such interference is necessary, what are the appropriate means and ways are distinct questions which cannot be addressed here.

93 UN Doc. E/CN.6/SR.632, para. 50–51; E/5909, para. 32, p. 30.

94 Some of the measures of second type are already prescribed by the CEDAW, namely, in paragraph 2 of its article 11.

circumstances they may have adverse effects on the position of women in the society. Particular attention and supervision is therefore required in application of protective measures.

(4) General Undertakings of States Parties

As a following step the CEDAW describes in general terms means by which the required equality can be achieved and imposes on States parties an obligation to use these means.

Thus, article 2 obliges States to take a number of measures primarily in the legislative, but also in other spheres deemed to ensure that States pursue a policy of eliminating discrimination against women. These measures include the embodiment of the principle of equality in the constitution or other relevant legislation and its practical realization; prohibition of discrimination; legal protection of rights of women, in particular through national tribunals and other public institutions; obligation to refrain from engaging in any act or practice of discrimination and, as a consequence, necessity to control public authorities in order to ensure that they act in conformity with this obligation; suppression of any national penal provision which constitutes discrimination against women. The above-enumerated obligations contained in paragraphs (a) to (d) and (g) of article 2 deal with the so-called public sphere. They are also formulated primarily as obligations requiring concrete action with a concrete result, although some elements of these obligations require a certain type of conduct and not necessarily an immediate result.

Obligations imposed on States in paragraphs (e) and (f) of article 2 are different in nature. Already the language of these two provisions distinguishes them from the above-mentioned group of obligations. According to them States "take all appropriate measures" to achieve certain goals:

- "to eliminate discrimination against women by any person, organization or enterprise" in the case of paragraph (e) and
- "to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" in the case of paragraph (f).

No definition of what is appropriate is provided. To some extent these two provisions, as well as all other general undertakings of States parties described in this part are concretized in the part of the CEDAW which deals with several specific rights of women. Nevertheless, the vague language of these paragraphs leaves implementation of a significant part of the obligation to the discretion of each particular State. Moreover, even when an objective judgment by an independent body about the implementation of these obligations can be made, it should take into account to a very great extent individual circumstances of each particular State. Nevertheless, this type of obligation does not allow a State to remain passive without undertaking any action. As clearly stated in the introductory phrase of article 2, all the measures described therein should be undertaken "without delay".

General obligations imposed on States parties by virtue of articles 3 and 5 of the CEDAW are of a similar nature as obligations embodied in paragraphs (e) and (f) of article 2.

Article 3 is formulated in very general terms and appears to be a mere repetition of obligations contained in other articles of the Convention:

> *States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*

A specific significance of this article may be seen in the fact that the provision turns the attention of States to non-legal fields, such as education, media and other public information where States through appropriate action should also contribute to the advancement of equality between men and women.

More innovative and significant is article 5. This article deals with an area traditionally quite distant from law, namely, social and cultural patterns of conduct, which, according to the text of the article, should be modified

> *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.*

To a lawyer it is a very problematic provision because there are almost no criteria for objective assessment of compliance by a State with the terms of this article.[95] However, seen from a less pragmatic point of view, this provision is crucial to the effective elimination of any form of discrimination against women, since, as has been explained above, the real, primary causes of inequality and inferior position of women are deeply rooted in tradition and culture.

Second paragraph of article 5 requires States to ensure by all appropriate measures

> *that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibilities 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.*

This provision is also characterized by a high degree of ambiguity, in particular the part of it dealing with the proper understanding of maternity as a social function. There is no indication at all as to what this proper understanding is. Therefore, a way for a potential misuse of the provision is open.

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95 The Committee dealt with this article in its General Recommendation N° 3 adopted at its 6th Session. In this recommendation the Committee after having stressed that in many different countries stereotypes and prejudices about women still exist urged all States parties effectively to adopt educational and public information programs which will help to eliminate prejudices and current practices that hinder the full operation of the principle of social equality of women. Seen in the light of this comment made by the Committee article 5 becomes closely related to obligations formulated for States in article 3. From a purely legal point of view this does not, however, add much to concretization and increase of the legal force of the provision. For the full text of all recommendations adopted by the CEDAW Committee see Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.8, 8 May 2006; also available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ca12c3a4ea8d6c53c1256d500056e56f?Opendocument.

The above presented general provisions can thus be divided into two groups the first one containing the so-called "hard" obligations of a rather traditional type, the second one including "soft" obligations of effort. The former deals with areas traditionally covered by law and compliance with this type of provision can relatively easily be measured on hand of objective criteria and requires achievement of a concrete result. The latter type intervenes into spheres traditionally labeled as "extra-legal" and placed during a very long period of time out of the reach of legal regulations. As far as their implementation and enforcement is concerned, there is a big margin of discretion for States. However, one thing is clear: should a State undertake no action at all in order to comply with this type of provision, it will be found in violation of its obligations under the CEDAW.

Finally, since we deal with a non-discrimination convention, it is useful to compare its general provisions with some similar provisions of another non-discrimination convention, namely, the CERD. As far as the general undertakings of States parties are concerned, there is one striking difference. The CEDAW contains no article similar to article 4 of the CERD which requires States parties to declare illegal and prohibit organizations and all other propaganda activities which promote and incite racial discrimination.[96] Several questions arise in this connection: Does this mean that discrimination against women, discrimination based on sex is less important, or to put it differently, of a lesser gravity than discrimination based on race? Both the UN Charter and the Universal Declaration of Human Rights as well as other instruments containing non-discrimination clauses list both grounds of discrimination – race and sex – side by side without making any distinction between both, without establishing any hierarchy. The absence of a provision similar to article 4 would, however, suggest that if, for example, a religious group would propagate the idea that one or another group of human beings is inferior due to its physical characteristics, such as color of skin, the group shall be either prohibited or obliged to abstain from the part of its activities which propagate the idea. Should the State fail to do so, it will violate its international obligations. On the other hand, a religious or any other group propagating and defending the idea that a half of humanity is inferior due to one of its physical characteristics, namely sex, cannot be prohibited or restricted in its activities. The only action a State is authorized and required to undertake is to "take all appropriate measures" with a view of "achieving the elimination" of these traditional stereotypical ideas in accordance with article 5 read in conjunction with article 3 of the CEDAW. The difference is striking. It even allows organizations and groups propagating ideas of inferiority of women to defend their right to do so on the basis of freedom of expression, religious belief, etc.

How to deal with these contradictions, conflicts between rights? An attempt to provide an answer to this question in the context of Islam will be made in the final

96 Article 4 (b) of the CERD reads as follows: "[States] shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law."

chapter of the research, when the scope of the rights of women according to the CEDAW, as well as the scope of provisions of Islamic law dealing with the status of women will become clear.

The final article of the general part of the CEDAW requires States parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." The place of this article in the part of the CEDAW dealing with general obligations can only be explained by the fact that to place it in any other part of the CEDAW would be even more inappropriate.

(5) Specific Obligations of States Parties

(a) *Public and Political Life.* Rights of women in the area of public and political life are addressed in Part Two of the Convention. Article 7 explicitly mentions three sets of rights which States shall ensure to women on equal terms with men. Firstly, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies. Secondly, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government. Thirdly, the right to participate in non-governmental organizations and associations concerned with the public and political life of the country.

The issue of political rights of women already forms the subject of one UN convention, namely the Convention on the Political Rights of Women. However, the CEDAW formulates some rights going beyond those guaranteed by the above-mentioned convention. These are the rights to participate in the formulation of government policy and implementation thereof and to participate in non-governmental organizations and associations.[97]

It should also be mentioned that article 7 does not limit rights of women in public and political life to three sets of rights enumerated therein. According to article 7, States have a general obligation to take all appropriate measures to eliminate discrimination against women in this area.[98]

Article 8 deals with the representation by women of their governments at the international level and their participation in international organizations. Once again, the article is formulated in such a manner as to require States to take "all appropriate measures to ensure to women, on equal terms with men and without any discrimination" the above-mentioned opportunity.

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97 This imposes on States an obligation to ensure that such entities as political parties, trade unions and other similar non-governmental bodies do not discriminate against women. See Committee's General Recommendation N° 23, paras. 33 and 42.

98 See General Recommendation N° 23, para. 5: "The obligation specified in article 7 extends to all areas of public and political life and is not limited to those areas specified in subparagraphs (a), (b) and (c). The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels. The concept also includes many aspects of civil society (…)."

Finally, Part Two of the CEDAW contains article 9 dealing with the question of nationality, one of the most controversial articles of the Convention.[99] The question of nationality of married women forms a subject of a separate convention. This Convention on the Nationality of Married Women adopted in 1957 overlaps to some extent with article 9 of the CEDAW. Thus, article 9 repeats one of the central provisions of the 1957 Convention, namely, that

> *neither marriage to an alien nor change of nationality by husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.*[100]

However, whereas the CEDAW formulates in article 9 just a general statement of principle, the 1957 Convention contains more detailed regulations. In two aspects article 9 of the CEDAW can be characterized as a step forward in comparison with the 1957 Convention. Firstly, the 1957 Convention contains a provision stating that special naturalization procedures should be available to the alien wife to enable her more easily to obtain the nationality of her husband.[101] This provision is a presumption that the nationality of the wife shall follow that of her husband and not vice versa. Thus, although aimed at improving the situation of married women with regard to the question of nationality, this convention did not intend to introduce the same treatment of men and women as far as their nationality is concerned. The CEDAW, in contrast, contains an unambiguous statement of the principle of equality between men and women with regard to their nationality: "States Parties shall grant women equal rights with men to acquire, change or retain their nationality."[102]

The second provision which distinguishes significantly the principle set forth in article 9 of the CEDAW from the rules and ideas reflected in the 1957 Convention is the second paragraph of article 9 which requires States to "grant women equal rights with men with respect to the nationality of their children".

In contrast to many other provisions of the CEDAW, article 9 contains "hard" obligations: "States Parties shall grant women equal rights (…)." Thus, a State Party to the CEDAW in order to comply with this article should at least have legislative provisions granting women the above-mentioned rights. It could be imagined that a

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99 The Committee addressed article 9 in its General Recommendation N° 21 on Equality in Marriage and Family Relations and not in General Recommendation N°23 dealing with political rights of women where articles 7 and 8 are addressed. The reason for such a division can be the fact that discriminatory practices in relation to nationality of women are very closely linked to the marital status of women and the traditional division of roles in the family viewing a husband as a head of the family, other members of the family being obliged to follow his nationality. Comments of the Committee on article 9 are very brief and emphasize importance of nationality to full participation in society and repeat once again the traditional rule on nationality preventing automatic change of nationality of women. See para. 6 of the General Recommendation N° 21.

100 Paragraph 1 of article 9 of the CEDAW and articles 1 and 2 of the 1957 Convention on the Nationality of Married Women.

101 See article 3 of the 1957 Convention on the Nationality of Married Women.

102 Paragraph 1, article 9 of the CEDAW.

State ratifies the CEDAW without already having brought its legislation into accordance with article 9 of the CEDAW. In such a case the State in order not to violate its obligations under the Convention should at least undertake immediately all necessary steps for modification of relevant legislation.

(b) *Economic and Social Life.* The next very extensive part of the CEDAW deals with rights of women in economic and social life. It addresses the rights of women in four principal areas: education, employment, health care and the rights of rural women.

Almost all provisions of this part of the CEDAW are introduced by the phrase "States Parties shall take all appropriate measures to eliminate discrimination against women (…) in order to ensure on a basis of equality with men (…)" followed by enumeration of the most important rights in the area concerned or the mentioning of the area itself. Everything said above about the relative weakness and difficulties of supervision of compliance of this type of provision is also valid here. Without going into much detail of each article of this part of the CEDAW the analysis below concentrates on differences between the CEDAW and previous international instruments dealing with similar issues.

The issue of equality in education addressed in article 10 of the CEDAW already forms the subject of the 1960 UNESCO Convention against Discrimination in Education. The principal difference between these two documents lies in the fact that the UNESCO Convention does not limit itself to discrimination in education based on sex but includes any other form of discrimination and cannot therefore address the particular needs of women. Thus, for example, paragraph (f) of article 10 of the CEDAW requires States to ensure by all appropriate measures the reduction of female student drop-out rates and the organization of programs for girls and women who have left school prematurely. There is no corresponding provision in the UNESCO Convention. Furthermore, article 2, paragraph (a) of the UNESCO Convention permits the establishment and the maintenance of separate educational systems or institutions for pupils of two sexes,

> *if these systems or institutions offer* ***equivalent*** *access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the* ***same or equivalent*** *courses of study. (emphases added)*

Although the CEDAW does not prohibit separate education of girls and boys, it expressly encourages coeducation. Moreover, the above-quoted provision of the UNESCO Convention uses the term "equivalent" (as opposed to the term "same") to describe access to education and courses of study offered by separate educational systems. This implies at least a tolerance of one of the justifications of differential and discriminatory treatment of women, namely, that of women being equal but different. In contrast, one of the principal aims of the CEDAW is the elimination of stereotypical views on the role of men and women, which is primarily formulated in its article 5, but also re-emphasized in article 10 dealing with education. Not only is the term "equivalent" replaced by the term "same", but States are also required to ensure by all appropriate means

> *the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which*

will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.[103]

Finally, States are required to ensure access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning equally to men and women.[104]

The issue of equality in employment addressed in article 11 of the CEDAW forms the subject of several ILO conventions.[105] However, in this area, once again, the CEDAW is not limited to the repetition of already existing regulations.[106] Thus, for example, paragraph 1, (d) of article 11 takes up the issue of equal remuneration already covered by the ILO Convention N°100 (1951). The provision of the CEDAW on this subject goes, however, further than the ILO Convention, extending the definition of remuneration to benefits, treatment, and evaluation of the quality of work.[107]

The right to social security addressed in sub-paragraph (e) of article 11 of the CEDAW is already recognized by article 9 of the ICESCR. In contrast to the CEDAW, the ICESCR does not define the scope of this right nor does it contain any indication as to the appropriate understanding of this right. The provision of the CEDAW is more concrete and gives examples of cases when the right to social security shall be granted: retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.

It is clear that some countries, in particular developing countries, will have many difficulties to apply this and some similar provisions due to a low level of development

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103 Paragraph (c) of article 10 of the CEDAW.

104 Paragraph (h) of article 10 of the CEDAW.

105 N° 122 (1964) Employment Policy Convention; N° 100 (1951) Equal Remuneration Convention; N° 111 (1958) Discrimination in Respect of Employment and Occupation Convention etc. For an overview of ILO Conventions relative to women see e.g. ILO, *Women's Workers Rights*, 1994, Module 2 in particular; "Women Workers: Protection of Equality." 6 *Conditions of work Digest* 1987 (2); "Work and Family: The Child Care Challenge." 7 *Conditions of Work Digest* 1988 (2); "Maternity and Work" 13 *Conditions of Work Digest* 1994.

106 The Committee adopted two general recommendations relative to the equality in employment. General Recommendation N°17 deals with such important and relatively new issues as evaluation and quantification of non-paid women's home work and its consideration in GNP. The Committee requires all States to report any information related to this issue. Earlier, at its 8th Session the Committee adopted General Recommendation N° 13 on equal remuneration for work of equal value. In this recommendation the Committee does not limit itself to the repetition of the principle which forms the subject of the ILO Convention N° 100 and urges all States which did not yet do so to ratify this Convention and apply its provisions in practice. It also requires States to study development and adoption of job evaluation systems based on gender-neutral criteria.

107 The ILO Convention contains in its article 1(a) the following statement about the content of the term "remuneration": the term "remuneration" includes the ordinary, basic or minimum wage of salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment. According to article 11, paragraph 1 (d) of the CEDAW: "the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work."

of their economy.[108] What is important, however, in such cases in the context of the CEDAW is the respect of the principle of equality which means that if one or another right (in our case in the area of social security) is granted to men, it shall also be provided to women. If due to its financial, economic situation a State is unable to provide a benefit to anybody, there is no violation of the CEDAW.

Rights to protection of health and to safety of working conditions, including the safeguarding of the function of reproduction addressed in article 11 of the CEDAW forms the subject of several ILO Conventions. Some of these conventions were adopted before the Second World War, and have been criticized for their "protectionist" attitude towards women. Such an attitude officially recognized and laid down in the legislation is of a very questionable value in the achievement of real equality between sexes. Several of these "protectionist" ILO Conventions still remain in force although their subject-matter is regulated at the same time by recently adopted ILO conventions with a gender-neutral language.[109] To avoid such situations the CEDAW contains in paragraph 3 of article 11 the following rule:

> *Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.*

This requirement is also applicable to several provisions of second paragraph of article 11 dealing with discrimination against women on the grounds of marriage and maternity, in particular, the provision requiring States parties to provide by all appropriate means "special protection to women during pregnancy in types of work proved to be harmful to them."[110]

Furthermore, the second paragraph of article 11 contains one provision essential to the effective advancement of the equality between men and women. It addresses the issue of the possibility for parents to combine family obligations with work responsibilities and participation in public life. The crucial point is the fact that the article addresses the family obligations of both parents making no difference between men and women.[111]

Article 12 dealing with health care is formulated in general terms and requires States parties to take all appropriate measures to ensure to women, on a basis of

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108 See, for example, India's objection during the preparatory work of the CEDAW: UN Doc. E/CN.6/591.

109 See for example the above-mentioned Convention on the Night Work of Women and the recently adopted Convention on Night Work: Chapter One, I.A. More about the policy of the ILO with regard to women workers see in TREBILCOCK, Anne. "ILO Convention and Women Workers." In: Askin, Kelly D., Koenig, Dorean M., eds. *Women and International Human Rights Law*. Vol. II, Ardsley: Transnational Publishers Inc., 2000, pp. 301–318.

110 Article 11, paragraph 2 (d).

111 "(….) States Parties shall take all appropriate measures (…) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities". Article 11, paragraph 2 (c).

equality of men and women, access to health care services, including those related to family planning. The second paragraph of this article emphasizes importance of special services in connection with pregnancy, confinement and the post-natal period. States parties shall ensure to women all appropriate services in these matters and grant free services where necessary, as well as adequate nutrition during pregnancy and lactation.

The recourse to very general language in article 12 can be explained by the absence of a provision dealing with this issue at the initial stage of the preparatory work. The provision was inserted following the 1975 conference on women[112] and reflects ideas expressed in the declaration and program for action adopted at this conference.[113] It is interesting to note that the second part of this article dealing with pregnancy and other related matters, in contrast to other provisions, is formulated in strong terms without making recourse to "appropriate measures" language. This general provision of the CEDAW forms the subject of a very detailed general recommendation adopted by the Committee. This general recommendation explains not only what kind of measures the States should adopt in order to comply with the article but also how they should report on the article in order to provide to the Committee all necessary information to decide whether States fulfill their obligations under this article.[114]

All other matters related to economic and social life are covered by article 13 which also uses "appropriate measures" language. This article was inserted by the General Assembly to cover any possible omissions in the area of economic and social life.

A relatively new area of legal regulation is covered by article 14 dealing with the situation of rural women. Discussion of this subject during the preparatory work of the CEDAW was introduced by the FAO. The initiative to introduce such an article came from India and an official joint proposal was made by Egypt, India, Indonesia, Iran, Pakistan, Thailand and the USA.[115] This article which will not be discussed in further detail also uses "appropriate measures" language except for a general obligation of States parties to "take into account the particular problems faced by

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112 Some references to health care were also made in earlier versions of the CEDAW. However, they were always connected to other provisions of the draft such as employment, social security, family planning, rural women. No separate article on equality in health care was included in documents leading up to the adoption of the version of the CEDAW by the CSW and the ECOSOC.

113 See Report of the World Conference of the International Women's Year, Mexico City, 19 June-2 July 1975, UN Doc. E/CONF.66/34; UN Publications Sales Number E.76.IV.1; in particular part E "Health and Nutrition" (paras 108–123, pp. 24–26) of the World Plan of Action for the Implementation of the International Women's Year.

114 See General Recommendation N° 24 adopted at the twentieth session of the Committee. Contained in the Report of the Committee on the work of its Twentieth and Twenty-first session. UN Doc. A/54/38/Rev.1 at pp. 3–7. Some other issues related to health care are addressed in earlier general recommendations of the Committee: General Recommendation N° 12 on violence against women; General Recommendation N° 14 on female circumcision; General Recommendation N°15 on avoidance of discrimination against women in national strategies for prevention and control of acquired immunodeficiency syndrome (AIDS); General Recommendation N° 19 on violence against women.

115 UN Doc. E/CN.6/L.687, 28 September 1976.

rural women and the significant roles which rural women play in the economic survival of their families (…)"[116]

As a concluding remark the almost exclusive use of "appropriate measures" language in this part of the CEDAW should be emphasized. The three exceptions are the following: the obligation to review protective legislation (article 11, paragraph 3), the obligation to ensure services in relation to pregnancy (article 12, paragraph 2) and the obligation to take into account the particular situation of rural women (article 14, paragraph 1).

(c) *Marriage, Family and other Civil Matters.* Part Four of the CEDAW dealing with marriage, family and other civil matters contains only two articles one of which is formulated in strong terms, the other one uses "appropriate measures" language.

Article 15 deals with several issues in the area of civil matters which are of particular importance to women. Firstly, according to the first paragraph of this article, States shall accord to women equality with men before the law. Secondly, the same legal capacity in all civil matters and the same opportunity to exercise that capacity shall be granted to men and women. The provision places particular emphasis on equal rights to conclude contracts, to administer property and equal treatment in all stages of procedure in courts and tribunals.[117] The Committee emphasized in one of its general recommendations the particular importance of the latter set of rights to women's ability to provide for themselves and their dependants.[118]

The third paragraph of article 15 deals with a sensitive issue of what is defined as "contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women". In accordance with this provision of the CEDAW States parties agree that all such instruments shall be deemed null and void. It is not very clear what kind of contracts fall into this category, but according to some authors this can also include some matrimonial regimes providing for the right of the husband to administer the property of the wife or restricting the capacity of the wife to enter into contracts without the consent of her husband.[119] If interpreted in this manner the provision can be problematic for a great number of countries even those where religion does not play a major role.

Finally, according to the fourth paragraph of the same article, States parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile. This provision also gave rise to much discussion at the stage of preparatory work, in particular as far as the situation in some Muslim States is concerned.[120] It is interesting

116 Article 14, paragraph 1 of the CEDAW.

117 Article 15, paragraph 2 of the CEDAW.

118 General Recommendation N° 21 on Equality in Marriage and Family Relations, para. 7.

119 BURROWS, Noreen, loc. cit. above, fn. 81, p. 449. The Committee did not, however, clarify the content of this provision.

120 See, for example, the position adopted by Egypt during the 650th meeting of the 26th session of the CSW held on September 27th, 1976: UN Doc. E/CN.6/SR.650, para. 2, p. 2 and comments made in this relation by Indonesia (para. 3, p. 2) and Iran (para. 5, p. 2).

to note that the Declaration on the Elimination of Discrimination against Women[121] in its article 6 dealing with similar issues (civil matters) states that equal rights of women in all civil matters shall be ensured by States "without prejudice to the safeguarding of the unity and harmony of the family, which remains the basic unit of any society (…)" This clause permitting States to justify some discriminatory practices was not included in the text of the CEDAW.

Article 16 is the most controversial article of the CEDAW. Although the "appropriate measures" language weakens this provision, nevertheless, it remains a breakthrough in the area of human rights in general and a significant achievement of women's movements in particular since it attempts to regulate some aspects of the so-called private sphere. During the stage of preparatory work position of Muslim States as a group with regard to various provisions of this article was not very coherent or unanimous.[122] The only exception represents reference to unmarried mothers/parents present in some provisional versions of article 16. Due to the sensitivity of the issue and taking into consideration the fact that relevant provisions might be considered as relating more to the discrimination against children than discrimination against women, provisions containing such reference were either deleted or reformulated.[123]

The Committee in its general recommendation dealing with equality in marriage and family relations when introducing article 16, firstly emphasized different treatment of human activity in public and private life and the view of the latter which is traditionally performed by women as inferior.[124] As a next step the Committee stressed that activities in the private sphere are invaluable for the survival of society and that there can, therefore, be no justification for applying different and discriminatory laws or customs to them. Unfortunately, however, the reality is different.

> *Even where de jure equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality contained in particular in article 16 and also in articles 2, 5 and 24 of the Convention are being violated.*[125]

Article 16 particularly emphasizes the following rights in the area of marriage and family relations: the right to enter into marriage and freely to choose a spouse and to

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121 Adopted by General Assembly resolution 2263 (XXII) on 7 November 1967.

122 Thus, while Egypt and Morocco had significant reservations on the sub-paragraph dealing with rights and responsibilities of spouses during and after dissolution of marriage, Bahrain was more concerned with the provision concerning same rights and responsibilities towards children, irrespective of marital status. Compare UN Doc. E/CN.6/SR.650, paras. 72–75, 77, 83, 90–92; UN Doc. A/C.3/34/SR.70, para.11; UN Doc. A/C.3/33/L.47/Add.2, paras. 204–206, and UN Doc. A/32/218, para. 127.

123 See e.g. reformulation of the introductory paragraph of article 16 (UN Doc. A/C.3/33/WG.1/CRP.1/Add.2, p. 13 and UN Doc. A/C.3/33/L.47/Add.2, paras. 194–196, 199) and discussions leading to non-adoption of third paragraph of article 16 dealing with children born out of wedlock summarized in Rehof, Lars Adam. *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*. International Studies in Human Rights, Vol. 29, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993, pp. 184–186.

124 General recommendation N° 21, para.11.

125 Ibid, para. 12.

enter into marriage only with free and full consent; rights and responsibilities during marriage and at its dissolution; rights and responsibilities as parents; the right to decide freely and responsibly on the number and spacing of children and to have access to the information, education and means to enable them to exercise these rights; rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children or similar institutions; personal rights as husband and wife, including the right to choose a family name, a profession, an occupation; rights in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.

In its general recommendation the Committee particularly stressed the gap existing in many countries between provisions of national laws and the reality of women's lives due to custom, tradition and failure to enforce these laws.[126]

(6) Mechanism for the Enforcement of the CEDAW

The CEDAW itself provides only for a reporting procedure. According to article 17 of the Convention a Committee on the Elimination of Discrimination against Women shall be established "for the purpose of considering the progress made in the implementation of the present Convention". Very few means are, however, placed at the disposal of the Committee in order to enable it to fulfill this function effectively. Firstly, according to article 18

> *States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect (...)*

Secondly, as provided by paragraph 1 of article 21 "The Committee (…) may make suggestions and general recommendations based on the examination of reports and information received from the States Parties (…)"

Much has been written about the weak character of enforcement provisions of the CEDAW.[127] Without going into detail of this criticism I will just mention some most significant shortcomings of the CEDAW's enforcement mechanism. First of all, originally the Committee had no powers similar to those granted to other human rights treaty monitoring bodies, such as, for example, fact-finding or consideration of complaints. The only power granted to the Committee, namely consideration of reports submitted by

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126 See, for example, para. 15 in the General Recommendation N° 21.

127 BUSTELO, Mara R. "The Committee on the Elimination of Discrimination Against Women at the Crossroads." In: Alston, Philip, Crawford, James, eds. *The Future of UN Human Rights Treaty Monitoring*. Cambridge: Cambridge University Press, 2000, pp.79–111; BYRNES, Andrew C. "The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women." 14 *Yale Journal of International Law* 1989, pp. 1–67; JACOBSON, Roberta. "The Committee on the Elimination of Discrimination against Women." In: Alston, Philip, ed. *The United Nations and Human Rights: A Critical Appraisal*. Oxford: Clarendon Press, 1992, pp. 444–472; MERON, Theodor. "Enhancing the Effectiveness of the Prohibition of Discrimination against Women." 84 *AJIL* 1990, pp.213–217; SCHÖPP-SCHILLING, Hanna Beate. "Effektivität von Abkommen zum Schutz der Menschenrechte am Beispiel der CEDAW." 74 *Die Friedens-Warte* 1999, pp. 204–228.

States parties faces many problems and has been in itself criticized as not very effective.[128] Furthermore, the text of the CEDAW itself expressly limited the time at the disposal of the Committee for consideration of reports to two weeks per year.[129] Not only is this period insufficient and shorter than the time used by other treaty-monitoring bodies, but the fact of limiting the time of meetings of a treaty-monitoring body is a unique practice in this connection. The CEDAW attempted to amend the text of the Convention correspondingly, however, without success.[130] Finally, institutional separation of the Committee from other human rights treaty-monitoring bodies and services provided to them was often invoked as a cause and evidence of marginalization of women's human rights.[131] This lasted till the 40th session of the CEDAW (held between 14 January and 4 February 2008) when responsibility for servicing the Committee was transferred to the Office of the High Commissioner for Human Rights based in Geneva as is the case for all other human rights treaty-monitoring bodies. As concluded by one author

> *The Convention and the Committee reflect the society that created them. Responsibility for the weakness of the Committee lies with the states that drafted the Convention, which are apparently not ready to embrace women's equality wholeheartedly.*[132]

One significant step forward towards strengthening of the CEDAW was made quite recently with the adoption of an optional protocol.[133] This protocol allows individual women, or groups of women to submit claims under a communication procedure and creates an inquiry procedure in case of grave or systematic violations of women's rights.[134] Although the Protocol already entered into force in December 2000 it is still impossible to judge how its operation will influence the effectiveness of the CEDAW. On the one hand these additional powers of the Committee place it on the same footing with other treaty-monitoring bodies and open a possibility for positive developments. The very fact of the adoption of the Protocol can be interpreted as a sign that individual

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128 For the consideration of problems related to the reporting procedure see for example Note by the Secretary-General "Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights." UN Doc. A/44/668, 8 November 1989, paras. 31–53, pp. 18–23; the letter and the attached annex from the Dutch Human Rights and Foreign Policy Advisory Committee addressed to the Secretary General of the United Nations by the Minister for Foreign Affairs of the Netherlands: "Reporting Obligations of States Parties to United Nations Instruments on Human Rights", UN Doc. A/C.3/43/5, 5 October 1988.

129 Article 20 of the CEDAW.

130 See General Recommendation N°22 adopted by the Committee on 3 February 1995, contained in the UN Doc. A/50/38.

131 See e.g. Bustelo, Mara R., loc. cit. above, fn. 127, pp. 98–103; Byrnes, Andrew C., loc. cit. above, fn. 127, pp. 60–61.

132 Minor, Julie A. "An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women." 24 *Georgia Journal of International and Comparative Law* 1994, p. 151; Similar Byrnes, Andrew C., loc. cit. above, fn. 100, p. 59.

133 The Optional Protocol was adopted by the General Assembly of the UN on 6 October 1999 and opened for signature, ratification and accession on 10 December of the same year; entered into force on 22 December 2000.

134 More about the Optional Protocol and its procedures see below, Chapter Three, III.C.

States and international community as a whole are taking women's rights more seriously. On the other hand, apart from traditional difficulties faced by treaty-monitoring bodies in the context of similar procedures, doubts may arise as to whether the Protocol will significantly improve the situation since an authority for reviewing communications in case of violations of women's right has been already granted to the CSW.[135] This procedure in the CSW proved to be almost ineffective. It should be, however, noted that this ineffectiveness could also be explained by limited powers granted to the CSW in relation to this procedure.[136]

3. Human Rights of Women v. Women's Rights: Feminist Critiques of the Way Human Rights Law Addresses Women's Interests

The above-made presentation leaves an impression of an international document which despite certain weaknesses of its enforcement provisions responds to real demands and reflects real interests of women. The weakness of the enforcement provisions could appear as a logical consequence of it being a human rights treaty: enforcement of human rights treaties in general is characterized by recourse to "soft" mechanisms. However, certain representatives of the feminist legal scholarship will regard the very fact that the elaboration of a separate convention dealing with women's human rights was necessary as a proof of the failure of human rights law to address women's interests adequately.

Nevertheless, the instrument coming closer than any other to demands made by feminist critiques is the CEDAW. In certain sense this Convention can even be regarded as a product of feminist movements. It attempts to speak neutral language, to escape all stereotypical images, even to eliminate them, recognizes different needs of women, and attempts to eliminate public/private distinction. Nevertheless, despite all possible improvements introduced through this document, from the point of view of feminist analysis several critiques are applicable to the Convention itself. For example, the CEDAW does not go far enough in defining and protecting women's rights in the private sphere. Thus, the issue of violence against women, including domestic violence, is not even mentioned in the text of the Convention, although it was at

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135 Originally the authority to review communications was granted to the CSW in 1948 first under the ECOSOC resolution 76(V) and later under the ECOSOC resolution 304 (XI). Subsequently there were several attempts to modify and improve this procedure which did not, however, lead to any significant positive changes. For more detail see e.g. GALEY, Margaret E. "International Enforcement of Women's Rights." 6 *HRQ* 1984, pp. 464–475; RREANDA, Laura. "The Commission on the Status of Women." In: Alston, Philip, ed. *The United Nations and Human Rights: A Critical Appraisal*. Oxford: Clarendon Press, 1992, pp.295–300.

136 Thus, for almost thirty years the CSW could only "take note" of communications received. Subsequent reforms improved some aspects of this procedure. Any step forward was, however, accompanied by hot debates. In 1974 the CSW even decided to discontinue receiving communications and changed its decision only in 1976 after strenuous lobbying by several NGOs and three of its members: see Report of the CSW on the work of its twenty-fifth session, 14 January – 1 February 1974, UN Doc. E/CN.6/589 (1974) at 52 and Report of the CSW on the work of its twenty-sixth session 13 September – 1 October and 6–17 December 1976, UN Doc. E/CN.6/608 (1976) at 24–25.

concern as an issue of women's rights at the agenda of NGO's already at the preparatory stage of the Convention. Despite this fact, violence against women was mentioned for the first time in an official document as an issue of human rights law only in 1985.[137] Subsequently, the Committee on the Elimination of Discrimination against Women attempted to fill this gap through the adoption of general recommendations dealing with the issue of violence against women.[138]

Furthermore, the protective provisions contained in the CEDAW, if not adequately interpreted and applied, can be detrimental to the elimination of discriminatory stereotypical attitudes and practices.[139]

Finally, many refer to article 5 calling for the elimination of prejudicial practices and traditions as a significant step forward. Some feminist authors would, however, be very critical in celebrating the insertion of this provision as an ultimate means for achieving recognition of women's rights and needs. It has been shown in the feminist literature that the simple prohibition of certain cultural practices, even if they are at the first sight discriminatory against women can result in even greater inequalities, injustice and suffering of women.[140] This has to do with another set of critiques developed in the feminist literature quite recently.

This type of critique can be more adequately described as inside feminist critique, because it invokes such default of feminist literature as its failure to address different experiences of women in particular of women living in a cultural and historical context distinct from the environment of traditional feminist women, namely that of white educated women living in developed Western countries.[141] What is at the center of this type of critique is the definition of "the woman". Being concerned with and concentrated on differences between men and women as the two distinct and opposed groups, many feminist authors assume the sameness of all women and do not consider seriously the possibility that legitimate differences might exist between women themselves. From

137 United Nations Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15–26 July 1985, UN Doc. A/CONF.116/27/Rev.1, UN Sales N° E.85.IV.10(1986).

138 General Recommendation N° 12 and General Recommendation N° 19 "Violence against Women" adopted on 30 January 1992 GAOR, 47th session, Supplement N°38 UN Doc. A/47/38 (1993).

139 For a detailed discussion of protective laws in general and CEDAW's provisions in particular see Chen, Mai. "Protective Laws and the Convention on the Elimination of All Forms of Discrimination against Women." 15 *Women's Rights Law Reporter* 1993, pp. 1–36.

140 See e. g. Bell, Diane. "Considering Gender: Are Human Rights for Women Too? An Australian Case." In: An-Na'im, Abdullahi A., ed. *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. Philadelphia: University of Pennsylvania Press, 1992, pp. 339–362 using as example the case of Australian aboriginal population; Griffiths, Anne. "Gendering Culture: Towards a Plural Perspective on Kwena Women's Rights." In: Cowan, Jane K., Dembour, Marie-Benedicte, Wilson, Richard A., eds. *Culture and Rights*: *Anthropological Perspectives*. Cambridge: Cambridge University Press, 2001, pp. 102–126 who addresses traditional practices of polygamy and customary marriage in Botswana.

141 For an example see Johnson-Odim, C. "Common Themes, Different Contexts." In: C. Mohanty, A. Russo, L. Torres, eds. *Third World Women and the Politics of Feminism*. Bloomington: Indiana University Press, 1991, pp. 314–327.

this point of view the CEDAW can be described as simplistic in that it pays no attention at all – except its provision on rural women – to different experiences of women.

C. *Conclusions*

It should be acknowledged that the last years are marked by some significant improvements in the situation with women's human rights, such as attempts to address specific women's needs in the private sphere, attempts to deal with stereotyped roles of sexes and cultural and religious justifications of discrimination against women. Nevertheless, a closer look at the situation leaves us with a rather negative impression of human rights of women, which are not taken sufficiently seriously by States as well as by the international community as a whole with a consequence of marginalization of this type of human rights.

In terms of a sources based analysis this lack of seriousness on the part of States results in the limitation of any positive developments in the area of women's human rights to treaty law. Such a development is in so far undesirable as it allows States which remain outside of the treaty regime to continue their practices discriminatory against women.

The most progressive and comprehensive among existing international treaties dealing with women's human rights, the CEDAW, encompasses almost all previous instruments on the subject and goes even further in attempting to remedy shortcomings of these previous instruments. The CEDAW also attempts to address new issues and to open new perspectives for further development of human rights law concerning women.

Despite all possible criticism, recent improvements in the CEDAW's enforcement mechanism open the way for hope and belief that better incorporation of women's needs and experiences into human rights law is possible.

Moreover, the Committee, through its working methods and despite the few powers granted to it, makes many not unsuccessful efforts to remedy enforcement difficulties, structural weaknesses and other deficiencies of the Convention.

Thus, we can affirm that the voice of our first actor, namely the feminist movements as expressing women's needs, was at least to certain extent successful in bringing its claims and demands to international law. There exists certain degree of interpenetration between feminist movements and international law, which we will see is not the case with our second actor labeled for convenience simply as Islam.

In its work the Committee should, however, take into account two points of criticism developed in the feminist literature. Firstly, being formulated under the influence of Western feminist movements, this Convention is hardly suited to address specific experiences, needs and situations of women living in circumstances different from the standard Western style of life. Although the CEDAW addresses the issue of cultural and traditional practices, it does it in a very simplistic way. Relevant provisions of the Convention simply call for elimination of practices discriminatory against women without giving any guidance to governments which have to deal with this complex phenomenon. Many anthropological studies have demonstrated that even when certain traditional and cultural practices appear discriminatory against women, their simple prohibition can not only be ineffective, but even lead to new inequalities and create situations more detrimental to women than initially.

Secondly, critiques of the pretentious objectivity and "truthfulness" of law and legal provisions expressed in feminist literature should also be taken into account in evaluating the extent to which the Convention reflects real interests of women and contributes to the improvement of their status. As already pointed out above, what may appear the best solution from the standpoint of experience available now, can become incomplete and ineffective in the light of new future experience.

Thus, the Convention being a product of feminist legal thought, or more precisely a reflection of some parts of feminist legal ideals at a certain point of time, reveals more and more of its weaknesses with each year passing. At present, it is even imaginable that one day it might become obsolete and in need of complete revision. While it reflects the ideas developed by the author (feminist movements) which is also our first actor, this author remains the most critical towards its own creation.

The analysis made in this part of the Chapter had as a primary goal to present the first actor or force in our interaction which in general terms can be labeled as women's needs, but which in fact took a form of an analysis of women's rights as reflected by international law. The fact is that a great part of these needs as expressed by feminist movements was able to make itself heard and accepted by public international law and by human rights law more specifically. Although we speak here only about a part of women's needs and feminists are first who will themselves continue to criticize insufficiencies of international law, this reflection by international law of certain expectancies and demands of feminist movements is in itself a significant achievement. Islam as our second actor or force cannot demonstrate any such achievement. It is rather confined to internal legal systems of various States and appears at the international arena only through voices of different States. Therefore, the analysis and presentation in the next part of the Chapter are constructed in a different manner.

As a concluding remark, I would like to emphasize again that women's needs should not be easily associated with women's rights as reflected in human rights law instruments. The following statement reflects very well the essence of the modern feminist scholarship and its attitude towards traditional legal discourse:

> *This is, I contend, a goal central to feminism: to be engaged, with others, in a critical, transformative process of seeking further partial knowledges from one's admittedly limited habitat. This goal is the grounding of feminism, a grounding that combines the search for further understandings and sustained criticism toward those understandings. Feminist doing is, in this sense, feminist knowing. And vice versa.*[142]

II. Women in Islam and Islamic Law

A. *Introductory Notes*

If one looks at the legislation on the status of women in various States claiming to apply in this area Islamic law, one will discover a variety of situations reaching from significant liberty as in Tunisia or Morocco to almost unbelievable exclusionary

142 Barlett, loc. cit. above, fn. 15, p. 888.

practices as in Saudi Arabia. Obviously, each State has a different vision of a proper Islamic way of treating women. Therefore, as a next step we have to understand what the term Islam and its different manifestations mean; why different interpretations of Islamic law are possible; what motivates States in adopting one or another interpretation as official law of the State.

In the context of the goals of this research and keeping in mind the desire to develop a constructive dialogue on the issue of the status of women, the question arises, whether it is really possible to develop such an interpretation of Islamic law concerning women which would not contradict the requirements of equality reflected in the CEDAW. If the answer is in the affirmative, in what context such an interpretation of Islamic law is possible, what factors are able to favor a move towards such an interpretation, in particular in the context of international law? In order to be able to give at least a tentative answer to all these questions, an attempt should first be made to understand what Islam and Islamic law means and how they function. Particular attention will be paid to the latter concept. The understanding of the nature of Islamic law is also important in the context of developments towards dynamism, diversity, and negotiation visible in the articulation of women's rights. Is Islamic law able to adapt to these developments? Are dynamism and diversity compatible with the nature of Islamic law?

If not further specified, the term Islam has been used in this paper to describe all forces motivated and justified by Islam. It is in this sense that the term is also used in the title of the research. However, one has always to keep in mind that Islam is a very complex and multifaceted phenomenon. In this part some more nuanced approaches to the definition of Islam will be introduced, and an attempt is made to understand the basic characteristics of this phenomenon.

B. *Terminological Clarifications*

First important clarification deals with the dichotomy between "Islamic" and "Muslim" attributes, which according to my conception cannot always be used as interchangeable terms. The term "Islamic" is used to describe ideal situations, states, acts or concepts determined by God. The term "Muslim" refers, in contrast, to situations, states, acts or concepts as appearing in the practice of communities or individuals claiming to follow Islam as a way of life. For example, I referred in the previous parts to "Muslim States", intentionally avoiding the expression "Islamic States" because, as will be explained later, no State can claim the full and correct compliance with the requirements of Islam. Although it should be admitted that it is not always easy and possible to decide which of two attributes is better suited to describe one or another phenomenon, concept or idea.[143] Nevertheless, at present it should be made clear that in my conception these two terms describe two distinct phenomenons and cannot be

143 The best example to illustrate this difficulty is the term "Islamic law" itself. As will be shown below, as a purely human creation law, even if based on Islam, cannot be "Islamic" in the above-mentioned sense. On the other hand, having a Divine origin it cannot be properly called "Muslim law" either. For the purposes of convenience and in the way of simplification the term "Islamic law" is usually used in this book.

used interchangeably. The most important question related to this dichotomy is the question about who and how should find out what is the will of God and, therefore, the ideal way of life prescribed by God.

Related to the above-mentioned dichotomy is the necessity to understand the distinction between two Arabic terms, Shari'a and Fiqh. Both terms are often translated into English as Islamic or Muslim law and their use in literature is often misleading. We need therefore to define and make a distinction between these two concepts.

When one attempts to get a deeper understanding of Islam and Islamic law, one is always faced with various types of dichotomies (between unity and diversity, between stability and change, between general and particular etc.). All these dichotomies spring from a fundamental distinction made in Islam between divine and human. Contrary to other religions and beliefs Islam rejects the possibility for a human being fully to understand and incorporate the divine. It does not mean that any knowledge of divine is impossible for human beings, but that any knowledge or understanding human beings can have of the divine will never be complete and perfect. Neither does it mean that human beings should not attempt to get this knowledge and understanding, to the contrary any effort in this direction is rewarded. Human beings should, however, always be aware of the limitations of any result they may achieve in such an effort. In the following few pages an attempt is made to clarify this dichotomy and its consequences in particular in relation to Islamic law.

Finally, it should be kept in mind that the presentation and analysis of Islamic law made below does not address the differences between the two major movements of Islam, namely the Shi'i and the Sunni Islam. Only the latter which forms the basis for legislation in all Muslim States analyzed later except Bahrain is addressed below.[144]

C. *Islamic Law: A Search for the Divine Will*

1. General Clarifications

In order to understand the nature of Islamic law and its different manifestations, we should keep in mind some basic beliefs of Islamic faith. One of such fundamental beliefs is that God communicated his Will to the humankind through the revelation which is contained in an unchanged form in the Quran. The Quran is understood by the believers not as a mere collection of ideas, but as a direct uncorrupted word of God indicating his Will as to the correct way of organizing the life of human beings individually and in community with others. Believers are expected to make all possible efforts to learn and to understand this Will of God and implement it by organizing their lives accordingly.

The Quran was revealed to the Prophet Muhammad over a period of more than twenty years.[145]

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144 It should be mentioned that the majority population of Oman does not belong to either of these movements, but identifies itself as Ibadi community. In its practices relating to personal status laws they are very close to Sunni Islam.

145 From 610 to 632 AD. A written version of the Quran in its present form appeared for the first time around the year 653 AD., some twenty years after the Prophet's death. Before this compilation the Quran was known in oral tradition and was learned by heart by

Although the Quran is supposed to contain responses to and guidance with respect to all situations, it does not provide Muslims with an all-encompassing and well developed legal system.[146] Moreover, even when certain matters are addressed in the Quran it does not always mean that a clear and unambiguous rule exists. Rather, the practical application and implementation of Quranic injunctions requires human interpretation in the majority of cases. During the lifetime of the Prophet the Muslim community had the possibility to address any questions related to the interpretation of the Quran and its application in concrete situations to the Prophet. He naturally played the role of a religious, moral, political leader and of a legislator and judge in all situations related to any aspect of life of the Muslim community, because according to the beliefs of Islam his infallibility was divinely protected. Sometimes the revelation was a direct response to questions addressed to the Prophet by members of the Muslim community. After the death of the Prophet, although the Muslims had the divine guidance as expressed in the Quran, they had no divinely protected infallible authority to which they could address their questions and doubts arising out of the desire for practical application and implementation of the Divine Will reflected in the Quran. Human beings were willing to follow the way of God, to implement his Will. However, these fallible human beings had first to understand this Will, to translate the ambiguous, unclear message of the Quran into simple rules adapted to the realities of their lives. Islamic law can be defined as an attempt to understand the Divine Will, as a search for the Divine Will in a desire to organize life accordingly.

From this understanding of the relationship between the divine message contained in the Quran and the human understanding of it is derived the distinction made in Islamic law between the concept of Shari'a and the concept of Fiqh. Shari'a literally means "the path or the road leading to the water". Used in a religious context this term means "the way of good life". This way is understood to be shown or ordained by God, the source of religious values.[147] However, God shows this way to human beings not as a clear-cut road but only through indicators.[148] Human beings, in order to follow

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many Muslims since the life-time of the Prophet. Some diffuse written pieces of the Quran also circulated at that time. From the point of view of Islamic law and belief it is impossible to doubt the authenticity of the Quran, although some Western scholars would do so. However, this is counter-productive for the constructive dialogue between the Muslim world and the human rights movement.

146 Muslim jurists and modern scholars agree that there are about 500 verses with legal content. If compared to the overall number of verses in the Quran, which is more than 6000, it could appear insignificant at the first glance. However, if one takes into account the fact that non-legal verses are often repeated and of shorter length than legal verses, then the amount of legal verses will appear quite important. See e.g. the argument made in: GOITEIN, S.G. "The Birth-Hour of Muslim Law." 50 *Muslim World* 1960, p. 24.

147 Correlative to the concept of Shari'a is the concept of Din ("submission"). This latter concept implies the following of "the way of good life" by a human being. The material content, the subject-matter of both concepts – which is the good way of life – is the same. For more detail see RAHMAN, Fazlur. *Islam*. Second Edition, Chicago, London: University of Chicago Press, 1979, pp. 100–109.

148 Technically from the point of view of Islamic legal theory "an indicator is that through which a rule of law becomes manifest to us." This concept of "indicators" (adilla) implies that rules as such are not manifest, are not dictated as such by God. As indicated by Weiss

this way, have to know, to learn these indicators, as far as they are accessible to the simple process of learning. However, more often the simple knowledge of given, obvious indicators is not sufficient. The main purpose of Islamic law is to discover and explain these indicators, which necessarily requires human intellectual activity: understanding, comprehension designed in Arabic with the term Fiqh. It is this latter aspect of Islamic legal thought which in its developed form is usually associated with Islamic law, but often also labeled as Shari'a. The following quotation illustrates very well the relationship between Shari'a and Fiqh:

> *Shari'a law is a sort of Platonic ideal that scholars try to realize, however imperfectly and fallibly, in their fiqh. Fiqh law accordingly derives its validity from its character as the closest approximation of Shari'a law that scholars are capable of achieving.*[149]

In this sense no human being can claim full and definite knowledge of Shari'a. Moreover, Fiqh – the human understanding of the Divine Will – shall be undertaken in accordance with a body of carefully worked out methodological principles. These methodological principles are worked out by the science of Usul al-fiqh, which therefore can be defined as a mechanism of deducing concrete legal enactments, legal norms and regulations from the word of God. Only a person who is able to use this methodology is traditionally regarded by classical Muslim scholars as authorized to deduce concrete legal regulations from the word of God. In order to be able to understand the structure and process of Islamic law, as well as to address some current issues relating to the life of contemporary Muslim communities, we should make an attempt to understand this methodology and its historical development.

Before starting a more detailed presentation, it should be emphasized that the vision and understanding of Islamic law presented here are not self-evident and cannot be regarded as commonly accepted not only in minds of many ordinary Muslims, but also of many Muslim lawyers.[150] Nevertheless, this vision can be defended as correct and based on Islamic judicial tradition.

"The indicators are thus clues to what is ab initio hidden from sight. Human scholars – the mujtahids – use them to bring the rules of law to light." Weiss, Bernard G. *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi*. University of Utah Press, 1992, p. 152. Islamic legal theory in its developed form has an elaborate classification of all indicators which cannot be addressed further here. What is important to emphasize and keep in mind at this point, is the general idea behind the concept of indicators well-established in Islamic legal tradition, namely, that God did not formulate rules of law ready for application. Even the most precise legal injunctions contained in the Quran are no more than an indication of what a rule of law might be, no more than a possibility to develop a rule of law.

149 Weiss, loc. cit. above, fn. 148, p. 16.

150 See for example the description of Shari'a as encompassing primary sources (Quran and Sunna) and Fiqh as a secondary source whereas Shari'a is defined as having higher authority in: Morgan-Foster, Jason. "Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement." 8 *Yale Human Rights and Development Law Journal* 2005, pp. 102–103; the statement that the word for Islamic law is Shari'a and that "Shari'a regulates all aspects of Muslim lives" without in this general description of Islamic law even mentioning the word fiqh: Guichon, Audrey. "Some Arguments on the Universality of Human Rights in Islam." In: Rehman, Javaid, Breau, Susan, eds. *Religion,*

2. Islamic Law in its Traditional Form

a) *Sources of Islamic Law*

Usually any presentation of Islamic law starts with the enumeration and description of its sources: the Quran, the Sunna (tradition of the Prophet), qiyas (analogy), and ijma (consensus).[151] It is important to clarify that only the Quran and the Sunna can be described as sources stricto sensu. All possible rulings and regulations are derived exclusively from these two sources. Ijma and qiyas are sources through which regulations are derived and should, therefore, more properly be described as a methodology of Islamic law.

As already mentioned above, the Quran is the message transmitted by God to human beings through the Prophet with the purpose to guide them, to help them organize their lives in the best way, in a way prescribed by God. It has to be emphasized again that as with any text the interpretative process plays the central role in the understanding of the message contained in this text. Even what might appear nowadays to many Muslims as clear and unambiguous statements is the result of centuries of insistence/preference for a certain understanding. This interpretative process and its influence on the creation of meaning in the understanding of the Quran as well as the consequences for determination of concrete rules of Islamic law became an important subject of Muslim scholarship particularly in modern times. This issue will be discussed in more detail on hand of several examples later, when certain provisions of Islamic law on women will be addressed. At this point it is important to mention that authors analyzing this interpretative process particularly emphasize its subjectivity, the influence of the status of the interpreter, and the environment in which the interpretation takes place. An analysis made from the point of view of feminist studies emphasizes the almost complete male domination of this interpretative process and the fact that it took place mainly in societies and at times when women traditionally were regarded as a second-class population.[152]

When we turn to the second source from which concrete regulations can be derived, namely the Sunna, we have to deal in addition to the issue of interpretation also with the issue of authenticity of available texts. By way of simplification one can say that the Sunna – tradition or example of the Prophet – is contained in Hadith. Hadith means a story, a narration and refers in its technical sense to "a narrative, usually very short, purporting to give information about what the Prophet said, did, or approved or disapproved or, of similar information about his Companions (…)."[153] Each Hadith

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Human Rights and International Law. A Critical Examination of Islamic State Practices. Leiden, Boston: Martinus Nijhof Publishers, 2007, pp. 178–179.

151 These are usual translations not necessarily reflecting adequately the meaning attributed to the corresponding Arabic term. Thus, qiyas as a logical reasoning is not limited to analogy, although analogy forms the basis of this method. See e. g. Hallaq, Wael B. "Non-Analogical Arguments in Sunni Juridical Qias." 36 *Arabica* 1989, pp. 286–306.

152 For examples of such analysis see e. g. Mernissi, Fatima. *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*. New York: Addison-Wesley Publishing Company, 19901; Barlas, Asma. "*Believing Women" In Islam: Unreading Patriarchal Interpretations of the Qur'-an*. Austin: University of Texas Press, 2002, XVI-254 pp.

153 Rahman, loc. cit. above, fn. 147, p. 54.

can be divided into two parts, chain of transmitters containing reference to persons who successively, transmitted the story generation by generation and the text or the story itself.[154]

The Sunna as an oral tradition was not systematically collected and learned by heart during the lifetime of the Prophet, as was the case with the Quran. Furthermore, no claim of divinely protected authenticity can be made on its behalf. The systematic collection of Prophetic oral traditions started only after Prophet's death, towards the end of the first century of Islam (720AD).[155] This process of collection brought to the surface a wide range of very different, sometimes even contradictory narratives, so that the question about verification of their authenticity became of primary importance. Out of this attempt to establish a more or less authentic collection of Prophetic traditions the so-called science of Hadith came into existence. The science of Hadith in its developed form is a very complex construction. Its main aim is the determination of the authenticity of each narrative.[156] Various methods in particular related to the chain of transmitters were developed by Muslim scholars to prove and establish the authenticity of each Hadith. The verification places a very strong emphasis on the credibility of each transmitter according to the best available information. Based on this verification process of all recorded narratives, they are classified according to various degrees of authenticity. As pointed out by certain modern authors, the principal weakness of this verification process relates to its insufficient methods which need to be more historically grounded.[157] It should not also be forgotten that as in any selection process a certain degree of subjectivity is always present.

Thus, without disputing the divine origin of the Quran and the necessity to follow the example of the Prophet, we have to admit the paramount role of human enterprise in conveying concrete meaning to and implementing the message contained in these two sources of Islamic law.

The involvement of fallible human beings in the creation of concrete legal regulations becomes even more important if not exclusive with the recourse to and the very fact of recognition of the next two traditional methods of Islamic law, namely, ijma and qiyas. The qiyas as a general concept referring to methods of logical reasoning raises less questions than ijma which can be defined as a sanctioning authority of a generation of Muslim community. According to the traditional concept of ijma, any

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154 More about distinction between Sunna and Hadith see e.g. Rahman, loc. cit. above, fn. 147, pp. 43–67.

155 It is during this period that the so-called travel in search of knowledge (talab al-'ilm) became a common practice. The foremost goal of these traveling students was collection of hadith (narratives about the sayings and acts of the Prophet).

156 More about the authentication process and the question of authenticity of Hadith see e.g. in Azimi, Mohammad Mustafa. *Studies in Early Hadith Literature*. Indianapolis: American Trust Publications, 1978, pp. 248–268; verification of the authenticity of some early hadith: pp. 269–292.

157 See e.g. suggestions by Abu El Fadl to pay particular attention to complexities of life circumstances of individuals, as well as to the issue of creative selection and recollection. He also discussed the relationship between reliability of a particular Hadith and its legal effects. Abou El Fadl, Khaled M. *Speaking in God's Name: Islamic Law, Authority and Women*. Oxford: Oneworld Publications, 2001, pp. 87–89.

question on which a consensus of a generation of Muslim community is considered to be reached should be regarded as resolved definitely and subsequent generations of Muslims are prevented from introducing any modifications concerning the same subject-matter. Questions start already with the definition of the Muslim community. Many questions which may occur during the process of establishing a consensus inside the Muslim community have no unanimous answers in the Islamic legal theory. What value should be attributed to the silence of some scholars? How should the term "generation" be defined? Can a scholar change his or her opinion at a later point in time after having expressed the same opinion as all other scholars of his or her generation?[158] In order to emphasize once again all the ambiguities surrounding the doctrine of ijma and its human origin I reproduce the following quotation:

> *The ambiguities surrounding the doctrine of consensus effectively meant that the claim of ijma was often used as a rhetorical device in the polemics among the various schools. Jurists from a particular school would often claim the existence of a consensus among Muslims on a certain point in order to confound the arguments of his opponents. Furthermore, several jurists wrote books known as kutub al-ijma attempting to list all issues that have been resolved by consensus in Islam. But these books themselves did not achieve a level of prominence or widespread acceptance in Islamic juristic discourses (...), the books on "the established consensus" remained of ambiguous legitimacy and authoritativeness.*[159]

Without going into the detail of this methodology, I will just emphasize the following fact, proven in writings of several modern Muslim scholars. At the beginning all these methods did not exist. Since the whole methodology was a creation of later generations of Muslim scholars, one of the later functions of Islamic law became "the justification and 're-enactment' of the processes of legal reasoning behind existing rules".[160] To put it differently, since the early generation of Muslim scholars did not use these elaborated mechanisms of classical Islamic theory to issue their rulings, one of the objectives of classical Islamic law became the theoretical justification of these rulings.

Islamic law – which more precisely should be called Islamic legal theory or methodology – is in so far peculiar as its main focus is on the process or methodology of law-creation and formulation of rules rather than on the rules themselves.[161]

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158 One of the influential manuals on Sunni Usul al-Fiqh by Sayf al-Din al-Amidi (d. 1233) addresses among others the following issues when he discusses the concept of ijma: Whether the participants in an Ijma'ic consensus must be Muslims and contemporaries of each other; whether commoners must be included along with mujtahids among the participants in an Ijma'ic consensus; whether an innovating mujtahid must be included; whether the opinion of the majority of mujtahids is constitutive of Ijma; whether the silence of mujtahids in the face of a known opinion is constitutive of Ijma; whether the division of the people of a particular age between two opinions is tantamount to an Ima'ic consensus to the effect that these two opinions alone will be acceptable in the future. WEISS, loc. cit. above, fn. 148, pp. ix–x.

159 ABOU EL FADL, loc. cit. above, fn. 157, pp. 64–65.

160 HALLAQ, Wael B. *A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh*. Cambridge: Cambridge University Press, 1997, note 1, p. 2.

161 See e. g. description of Islamic law as "a doctrine and a method rather than a code" by Joseph Schacht: SCHACHT, Joseph. "Problems of Modern Islamic Legislation." 12 *Studia Islamica* 1960, p.108.

Then the question arises as to who can determine rules applicable to concrete situations. Can every Muslim do it for him or herself or only specialists, and what qualifications should these specialists have etc.

Conceptually, according to the nature of Islam, it is a personal duty of every Muslim to make all possible efforts to discover, understand and follow the way of life ordained by God. There is no person or institution which can claim to be a representative of God's Will thus discharging others from the duty to seek for the right way and also depriving them of their right to form and live according to their personal opinion about the nature and substance of God's Will. The only real limitation to the exercise of this personal duty – and a right at the same time – is the Quran as a direct and unchanged word of God.[162]

Since the primary text of Islamic law is open to various interpretations and every Muslim has a duty and a right to interpret this text according to his or her personal understanding, the first few centuries of Islam faced a flourishing diversity of opinions on different substantive questions relative to the life of Muslim communities. Moreover, one of the fundamental principles of Islamic law requires every person engaged in this interpretative process to respect opinions expressed by other persons engaged in the same process as potentially correct, because nobody can pretend to know the real content of God's Will. Others can review and criticize only the correctness, sincerity etc. of the interpretative process itself, but not the results of this process.[163] This spirit of egalitarianism and acceptance and even encouragement of diversity characterizing particularly the first centuries of Islam led to the proliferation of schools of legal thought in Islam.[164] Schools of legal thought were organized initially according to purely geographic criteria. Moreover, differences between schools were also conditioned by geographical factors, including differences in social conditions, local custom and traditions.[165] Simultaneously, in response to this diversity, another trend has been gaining more and more power in discourses of Muslim scholars. As in any legal system the diversity is tolerable only to the extent that it does not offend the unity of the system as such. Therefore, some mechanisms had to be established which would not

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162 While talking about the Quran as the word of God, one has always to keep in mind that despite its divine origin it requires as any other book human understanding in order to be implemented. The text of the Quran is not always clear and unambiguous, therefore constituting a source of different interpretations and opinions. It should be stressed that even where the meaning appears nowadays clear the process of creation of this meaning inevitably took place, but has been forgotten and is regarded as unchallengeable.

163 This principle known as "every mujtahid is correct" has been itself debated among Muslim scholars as to its exact meaning; however, nobody disputed the idea of egalitarianism and absence of ultimate representation of the Divine will embodied in this principle. See e.g. Abou El Fadl, loc. cit. above, fn. 157, pp. 9–10, 33–39.

164 The term "school" does not refer to any formal organization or structure but implies a certain degree of methodological unity leading to same solutions in majority of concrete situations.

165 See e. g. Schacht, Joseph. *An Introduction to Islamic Law*. Oxford: Clarendon Press, 1964, pp. 28–36; Coulson, Noel J. *A History of Islamic Law*. Edinburgh: Edinburgh University Press, 1964, pp. 36–52.

allow an extreme discrepancy between opinions of different scholars thus protecting the basic unity of the system. Although this need was not expressly articulated by scholars, it can be deduced from the development of additional notions of Islamic law, in particular such as ijma and qiyas. Therefore, to a certain extent this gradual articulation of juristic methodology can be described as a battle for domination of juristic discourse. This trend led to the extinction of some early schools and to the crystallization of four schools mutually accepted as authentic. Each of these four schools is centered around one particular jurist, holds his name and is characterized by the unity of methodology and therefore agreement on similar solutions in similar situations. These four schools are Hanafi, Hanbali, Maliki and Schafii.

Thus, it is clear that with time a certain "official" hierarchy was established which would not allow a "non-specialist" to participate in this process of determination of applicable rules and regulations.

b) *Ijtihad, Mujtahids and "Official" Discourse in Islamic Law*

The previous part has shown that from the point of view of Islamic doctrine which regards God as the sole legislator and the only infallible agency, nobody can claim legislative power. If a person or an entity usurps the power to determine for everybody what is God's Will thus pretending to having attained the Truth, this very fact negates their authority because only God can know the Truth. Different social factors, however, led to the creation of certain categorizations, and introduction of a doctrine which would limit the circle of those entitled to deduce regulations for practical cases thus creating a substitute to the "official" "legislative" power, a tradition initially absent from Islamic discourse. One of the basic distinctions introduced in this connection is the distinction between those who have sufficient qualifications to deduce new legal principles and rulings and apply them to new facts and those who are not sufficiently qualified to do so and have to follow an opinion of a qualified person. Those belonging to the former group are known under the term "mujtahids". The activity they exercise, namely, the deduction of new rulings and principles for new cases is known as ijtihad. The term ijtihad literally means hard striving or strenuousness and is understood by classical Muslim scholars as "the exertion of mental energy in the search for a legal opinion to an extent that the faculties of the jurist become incapable of further effort".[166] Those who are not qualified to exercise this effort are called muqallids (followers). Their following of the opinion of qualified persons is, however, not blind. They are even obliged to inquire as far as possible – according to external circumstances and their individual intellectual abilities – about the character, qualifications of the person whose opinion they follow as well as to choose and follow the opinion which they find the most convincing as a reflection of God's Will.

Gradually the doctrine developed various degrees of mujtahids and muqallids so that according to the most sophisticated classification only the founders of four schools of Islamic law are regarded as absolute mujtahids who did not follow anybody's

166 HALLAQ, Wael B. "Was the Gate of Ijtihad Closed?" 16 *International Journal of Middle East Studies* 1984, p. 3; similar but more detailed definition WEISS, loc. cit. above, fn. 148, pp. 683–684.

opinion and were able to form their personal opinion on any issue of Islamic law directly on the basis of textual sources.[167] One of the intermediary categories of mujtahids are those who are qualified to solve unprecedented cases, but only within the limits of and in accordance with the principles laid down by the founder of the school to which they belong. To the extent to which they follow principles laid down by the founder of their school, they are followers and do not exercise independent reasoning. At the bottom of this hierarchy are those who just follow somebody's opinion without being able to exercise any individual intellectual effort in the field of Islamic law.[168] The basic aim of this categorization was to create a fixed structure of authority in Islamic law thus introducing stability, unity and predictability into a fluid and multifaceted system which it represented at an early stage.[169]

In this connection the tremendous importance of those qualified to exercises ijtihad becomes clear. They were those who determined the content of law in its application to concrete cases, they determined what and how the ruler should administer and implement. The only legitimization of this authority of mujtahids came originally from their ability to understand and interpret God's Will, from their ability to use the sophisticated methodology. Often they did not claim any official power and even dissociated themselves very clearly from the ruling elite protecting and maintaining the independence of their class, for example, through private financing of their educational and other institutions.[170]

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167 That this construction – that the four prominent jurists Malik, Hanbal, Abu Hanifa and Shafii did not follow anybody's opinion and were the founders of corresponding schools – is an artificial one and developed for different reasons by later generation of Muslims is very well proven and illustrated by Hallaq, Wael B. "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?" 25 *International Journal of Middle East Studies* 1993, pp. 587–605 and Hallaq, Wael B. *Authority, Continuity, and Change in Islamic Law*. Cambridge: Cambridge University Press, 2001, pp. 57–85; see also for similar ideas Melchert, Christopher. The Formation of Sunni Schools of Law, 9th–10th Centuries C.E. Leiden, New York: Brill, 1997, XXVIII-244 pp.; Calder, Norman. *Studies in Early Muslim Jurisprudence*. Oxford: Clarendon Press, 1993, X-267 pp.

168 One has to keep in mind that there are several types of such classification. All of them are the product of later Muslim scholars. One of the earliest if not the earliest of such classifications was developed by Ibn Rushd, a Malikite jurist, (d. 520/1126) at the beginning of the fifth Islamic century. His classification includes only three categories in contrast to later classifications which distinguished six (developed about a century later by a Shafi'ite jurist Abu 'Amar 'Uthman Ibn al-Salah (d. 643/1245)) or seven categories (according to the Hanafite classification articulated by Ahmad Ibn Kamal Pashazadeh (d. 940/1533)).

169 Remember the note about role of ijma, consensus and that it is in relation to this method of Islamic law that the question of qualifications of persons whose opinion should be relevant to the formation of consensus (mujtahids) arose.

170 More about position of Muslim scholars and their educational system during the classical period see e.g. in Makdisi, George. *The Rise of Colleagues: Institutions of Learning in Islam and the West*. Edinburgh: Edinburgh University Press, 1981, pp. 187–223 in particular; Makdisi, George. "Freedom in Islamic Jurisprudence: Ijtihad, Taqlid, and Academic Freedom." In: Makdisi, George, Sourdel, D., Sourdel-Thomine, J., eds. *La notion de la liberte au Moyen Age: Islam, Byzance, Occident*. Paris: Les belles Lettres, 1985, pp. 79–88. More about the relationship between jurists and official ruling elite during this period: Hallaq, Wael B. *Authority, Continuity, and Change in Islamic Law*. Cambridge: Cambridge

It does not mean that these lawyers-interpreters could be completely free from any influence, but at the initial stage this influence rarely, if ever, grew to the degree of a complete control. At the same time the gradual development of the sophisticated methodology required more and more qualifications in different areas of knowledge in order to be able to participate in the interpretative process which replaced legislation in Muslim tradition. As a consequence, more and more Muslims have been excluded from the interpretative process, making it more unified, but also more open to manipulation. A very limited number of persons authorized according to the above-described rules to participate in the interpretative and law-creating process offered an opportunity of complete control over the interpretative process by a centralized power.

With the development of State structures and centralization of State power this law-creating discourse became dominated by State power, was influenced by it and served not only personal interests but also participated in the articulation, justification, and protection of State interests. It should be noted that due to the informal character of this law-creating interpretative activity there are very few, if any, control mechanisms of the correctness of the process and therefore of its results.

In this connection it is important to mention the thesis about the closer of the gate of ijtihad. At a certain point in time of history this thesis about the closer of the gate of ijtihad appeared in the writings of Muslim scholars. As commonly represented in the traditionalists' discourse, this thesis says that by the end of the tenth century all possible questions of Islamic law had been resolved and no new interpretations and therefore law-creation was needed. It is often used in official discourses in modern times to prevent any changes in the existing beliefs about the correct "Islamic" way of life. It is important to mention here that certain studies have shown that it was not in this sense that the thesis appeared originally in writings of Muslim scholars[171], and that "the gate of ijtihad was not closed in theory nor in practice".[172]

At the present stage and for the purposes of further analysis, it is important to emphasize that the introduction of the European State system with its centralized structure, the European legislative system with its courts and codifications allowed manipulation and use of this methodology for creation of rulings suited to the needs of the ruling elite/State.[173] The possibility of a political control over and influence

University Press, 2001; Tyan, Emile. Histoire de l'organisation judiciaire en pays d'Islam. Leiden: E.J. Brill, 2nd revised edition, 1960; Tyan, Emile. "Judicial Organization." In: Khadduri, Majid, Liebesny Herbert J., eds. *Origin and Development of Islamic Law*. Washington D.C.: Middle East Institute, 1984, pp. 236–278.

171 Hallaq, Wael B. "Was the Gate of Ijtihad Closed?" 16 *International Journal of Middle East Studies* 1984, pp. 3–41 and Hallaq, Wael B. "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad." 63 *Studia Islamica* 1986, pp. 129–141. These studies demonstrate that the issue of the closer of the gate of ijtihad which appeared in the writings of Muslim scholars only in sixth/twelfth century and in relation to the question of qualifications of mujtahids and existence of mujtahids, but not the resolution of all possible questions.

172 Id., p. 4.

173 As rightly pointed out by two authors: "Not only were indigenous Islamic laws disturbed or displaced by the misfortunes of colonialism, the Shari'a as a legal system was not allowed a natural growth (…) In the urgency to build nation-States and to repress ethnic, cultural and

upon the legislature signified the end of independence and therefore of diversity of the Islamic judicial thinking. The introduction of the practice of codification put an end to the diversity, dynamism and continuous change which constituted the ultimate mechanism allowing the adaptation to changing circumstances. This inability of the traditional Islamic legal system to function in the framework of a State based upon the European model was mentioned by colonial powers and new Muslim States themselves. This resulted in the replacement of laws based on Islamic thinking in all areas vital to the survival of the State. Any attempt to introduce legal codes based on principles developed by Islamic legal theory on such issues as contracts, commercial interaction, taxation etc was abandoned. Simultaneously, while asserting their independence, Muslim States felt the necessity to maintain their Muslim or Islamic identity. The symbol of this identity became enthusiastic codification and application of the so-called Islamic family or personal status law, which negatively affected in the first place women.

As a result, what we see nowadays is a very sophisticated construction elaborated by human beings which is presented often in many official and "officialized" discourses as divine and immutable. It is on the basis of this construction that all rules are formulated including those dealing with the issues of personal status, in particular the status of women. The following parts will demonstrate how this human construction is used and misused to produce rules discriminatory against women, which are accepted by the ruling elite of the majority of Muslim States as THE Islamic way of treating women. On the other hand it will be shown that even inside the same construction, using the same methodology one can come to opposite results.

D. *Status of Women under Islamic Law: Between Tradition and Modernity*

The main aim of the previous part was to describe the basic features of the complex construction called traditional or classical Islamic law and particularly to show that this construction is as human as any other legal structure/system. It is obvious that Islamic law is based on the Divine message but any step going beyond the simple processes of reproducing the text introduces an element of human involvement. Islam regards any human activity as open to contestation and criticism. Islamic law in its traditional form should therefore also be de-sacralized and the possibility of contestation and new developments should be recognized. Ways and means by which this process could take place cannot be discussed in the framework of the present research.[174] However, some examples as to how the revision of and new approach towards the tradition of Islamic law can change the status of women and the whole vision of the role to be played by women will be given below.

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religious identities, Islam and the Shari'a were frequently used to repress pluralism and the rule of law." Rehman, Javaid, Breau, Susan, editors. Introductory reflections to *Religion, Human Rights and International Law. A Critical Examination of Islamic State Practices*. Leiden, Boston: Martinus Nijhof Publishers, 2007, p. 14.

174 These issues are sometimes addressed by Muslim scholars. See e.g. works of Abdullahi A. An-Na'im.

The presentation of the modern legislation in Muslim States in Chapter Three will show the differences of approaches existing nowadays even inside the traditional Islamic law. Particularly illustrative is the discussion surrounding the issue of polygamy. The presentation below is, however, not limited to the simple description of officially recognized rules and regulations, but goes further and analyzes, although very briefly, certain aspects of the reasoning behind the existing official rules and presents some alternative solutions proposed in the literature. The solutions chosen are those which open a possibility for a new egalitarian vision of women's rights in conformity with the requirements of the CEDAW at the same time respecting the Islamic heritage and being even based on the traditional methodology of Islamic law.

Due to the limited space and the fact that the focus of this research is not on the status of women under Islamic law as such, I will limit the presentation below to issues that present the greatest challenge to Muslim communities today as far as the issue of equality between men and women is concerned. It means that the presentation will focus on issues that cannot be easily reconciled with the present conditions in Muslim States and play a significant role in these countries from the legislative point of view. As far as their subject-matter is concerned, these issues belong to the area of family law. The following issues are chosen taking into account also the reservations practice of Muslim States parties to the CEDAW: the ability of women to enter into marriage without coercion and the right to freely choose a spouse; rights and obligations of spouses during the marriage; possibilities for the dissolution of marriage; custody and guardianship of children in particular upon dissolution of marriage; polygamy.

It should be noted that in a great majority of Muslim countries participation of women in public and political life, even their ability to hold high-ranking positions in a State apparatus can be justified and supported from the point of view of Islamic law.[175] However, it will be shown later that the inequality existing in family matters and related traditions and practices are often closely linked to the actual ability of women to exercise their rights in public and political spheres.

1. General Differences between Approaches

The traditional or conservative literature in the overwhelming majority of cases encompasses a well-established apologetic tradition. Almost all books and articles of this type place a strong emphasis on the general egalitarian message of the Quran stating that men and women as human beings, as God's creation and his servants are equal. An important part of this traditional approach forms the emphasis on the difference in the status of women before the advent of Islam, in Christianity and Judaism and in other ancient civilizations, thus showing that Islam liberated women and gave them rights which at that time no other religion or civilization accorded to women. The problematic or questionable part of their presentation comes at the

175 Although it should be mentioned that a minority of Muslims argues for the limitation of certain political rights of women. See below, fn. 395.

next stage. After having produced an amount of evidence as to the equality of all human beings, the authors of this group turn to "innate differences" between both sexes. As formulated by one of them:

> *These differences do not affect their equality, dignity and eligibility to certain rights, no do they give precedence to one sex over the other. Both sexes have different innate dispositions. They have different temperaments and different constitutions. These different dispositions help them to fulfil their different yet equally important tasks in life for which they have been created*[176]

They would ascribe to women such characteristics as shyness, love for adornment and beautification, weakness in disputation, emotionality, sensitivity, cunningness etc. They would say that women should not be blamed for such characteristics, because they are "inherent" to their nature. Moreover, these characteristics do not affect women's status as dignified human beings, but help them fulfill their tasks in life as wives and mothers. At the final analysis the whole concept of rights and obligations of women in Islam according to this vision is based on this fundamental differentiation of nature and therefore of roles ascribed to both sexes.[177] These authors base their assumption about innate differences of sexes mostly on some apparently available empirical evidence.[178] The Quran itself does not contain any general statement about differences in roles ascribed to men and women or the superiority of men over women. However, there are in the Quran some verses which can be interpreted as defining the position of women and men in terms of difference or subordination, but only in relation to certain very particular matters and not as a general statement. Moreover, these parts of the Quran have also been interpreted by some modernist authors in such a way as to eliminate any idea of superiority of men over women. These issues will be addressed in more detail later, in relation to specific issues of personal status law. Furthermore, quite a significant number of Prophetic traditions (Hadith) is produced by conservative authors as evidence of the difference in roles but in the first place of the superiority of men over women. An analysis of these traditions is beyond the scope of the present research. It should be, however, noted that these traditions are often of a questionable authenticity and their interpretation and understanding is always influenced by the subjective views and experience of the male dominated interpretative community. These types of tradition came under attack from several modernist authors who were able to show on the basis of available empirical evidence

176 Naseef, Fatima Umar. *Women in Islam: A Discourse in Rights and Obligations*. New Dehli: Sterling Publishers, 1999, p. 57.

177 See e.g. Doi, Abdur Rahman I. *Women in Shariah*. Kuala Lumpur: A.S. Noordeen, 1992, p. 1; El-Bahnassawi, Salem. *Women Between Islam and World Legislations: A Comparative Study*. Kuwait: Dar-ul-Qalam, 1985, pp. 107–130; El-Nimr, Raga'. "Women in Islamic Law." In: Yamani, Mai, ed., *Feminism and Islam: Legal and Literary Perspectives*. New York: New York University Press, 1996, p. 93; Iqbal, Safia. *Women and Islamic Law*. Delhi: Adam Publishers, 1991, pp. 10–19; Mutahhari, Murtada. *The Rights of Women in Islam*. Tehran: WOFIS, 1981, pp. 167–187; Naseef, loc. cit. above, fn. 176, pp. 57–69.

178 See e.g. El-Bahnassawi, loc. cit. above, fn. 177, p. 130; Mutahhari, loc. cit above, fn. 177, pp. 167–170, 180–187.

not only the possibility of a different, anti-discriminatory reading of some of these traditions, but also a very low degree of authenticity of many of these traditions.[179]

This conservative apologetic approach to the role to be played by women is not the only possible or the only available one. There exists a trend among Muslim scholars toward a new, egalitarian definition of the status of women in the framework of principles developed by the Islamic legal theory. This trend existed since the beginning of Islamic history, but it became particularly strong in the present time with the changing conditions of life of Muslim communities. Unfortunately, for different reasons, these "other" voices are hardly heard and accepted by the so-called official discourse, which is also more influential upon the population and especially ruling elite of Muslim States. An attempt to define some of these reasons will be done later.

In their approach to women's status under Islamic law all modernist authors place greater emphasis on those parts of primary texts that deal with the importance and centrality of such concepts as equality and justice.[180] Since the application of laws, as formulated by conservative authors, results not only in inequality but also in injustice toward women, they go to primary texts and propose a new understanding and interpretation of these texts which do not violate fundamental principles of equality and justice.

Another common trend among modernist authors is a great attention to the historical circumstances of revelation, conditions under which a conservative interpretation was developed as well as the qualitatively new character of the conditions of life of Muslim communities at present. In this light, an important element of many reformist proposals becomes the revision of the science of Hadith with an aim of improving the authentication process in order to be able to distinguish fabricated traditions which due to prejudices and subjectivity of earlier scholars have been accepted as authentic.[181]

Below, I will present some of these "other", modernist opinions on the role of women in order to give an idea about the diversity and difference of views still existing in Islam and possible even in the framework of traditional methodology of Islamic legal theory. This is done on hand of some concrete examples of application

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179 It is impossible to go into further detail of this issue in the framework of the present research. For a new analysis of discriminatory Hadiths and their critique see e. g. Abou El Fadl, loc. cit. above, fn. 157, pp. 180–188, 210–249; Abou El Fadl, Khaled M. *And God Knows the Soldiers*: *The Authoritative and Authoritarian in Islamic Discourses*. Lanham, New York, Oxford: University Press of America, 2001, pp. 62–82.

180 For some authors this distinction between the general message of the Quran emphasizing equality and justice and particular rules for concrete situations forms the core of their reform proposal. They advocate a rule of abrogation according to which in the present time all particular rules application of which results in injustice and inequality are abrogated by parts of the Quran containing a general message of equality and justice. For more detail see An-Na'im, Abdullahi Ahmed. *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*. Syracuse: Syracuse University Press, 1996.

181 Some authors would, however, prefer to reject the science of Hadith to the extent that it is incompatible with the Quranic principles of equality and justice due to the impossibility to distinguish false traditions from true traditions: "(…) I believe that any attempt to sift the genuine [Hadith] from the false [Hadith], or to reinstate previously discredited reports of Sunna, is a hopeless task to undertake today." An-Na'im, loc. cit. above, fn. 180, p. 23.

of different methodologies to the same subject-matter. In each case a traditionalist approach is confronted with only one sort of modernist approach with an aim to show the resulting change for the achievement of equality between men and women.

2. Right to Marry and Choose a Spouse

I will start with presenting a rather traditional view on the possibility for women to marry and freely choose a spouse. The first question which arises in relation to the right to marry is the question of the age of marriage. Usually the achieving of puberty is regarded as the age from which the marriage is possible. According to some traditionalist authors even a girl-child who has not yet reached the age of puberty can be given into marriage by her guardian.[182] However, the majority of contemporary authors even in this category conclude that the consent of a bride is required for the validity of a marriage contract be she a young girl, a virgin or a woman who was already married.[183]

A distinct question is whether the consent of her guardian is required for a marriage contract to be valid and whether she can at all conclude a marriage contract herself. These questions are not always discussed but often carefully avoided by some conservative authors. The issue at point relates to the fact that according to the mainstream doctrine of the three schools of Islamic law of Sunni Islam, namely Hanbali, Maliki and Shafii, a woman is not able to conclude her marriage contract herself. A marriage agreement is not valid, cannot even be concluded without a guardian, who must be a male.[184] Conservative authors who address the question of guardianship usually refer to the necessity to protect women's interests and safety as a justification for this rule.[185]

Further important consideration is the suitability of the match.[186] According to this traditional opinion a guardian cannot refuse to marry a woman to somebody who is a

182 There is some disagreement among those who accept such a possibility as to whether only the father and grandfather can conclude a marriage contract on behalf of his daughter or also other male relatives when they play the role of a guardian. The majority of authors are of the opinion that only a father and a grandfather can conclude a marriage contract on behalf of their daughter or grand-daughter without her consent. 'Abd al 'Ati, Hammudah. *The Family Structure in Islam*. American Trust Publications, 1977, pp. 80–84.

183 El-Bahnassawi, loc. cit. above, fn. 177, pp. 50–53; El-Nimr, loc. cit. above, fn. 177, p. 96; Mutahhari, loc. cit. above, fn. 177, pp. 67–74; Naseef, loc. cit. above, fn. 176, pp. 89–96.

184 Usually the father of the bride will be her guardian. If for some reason he is unable to perform this function other close male relatives or on some instances also an "Islamic magistrate/judge" or other representative of public authority will play this role. It is interesting to note that some, in particular earlier, jurists set the condition that the guardian must be an upright, non-corrupt person. However, the majority of the later jurists held the opinion that a corrupt person may also be a guardian. See e.g. Al-Misri, Ahmad ibn Naqib. *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*. Beltsville: Amana Publications, Revised Edition 1994, p. 519, m.3.4.

185 Doi, loc. cit. above, fn. 177, pp. 34–35; El-Bahnassawi, loc. cit. above, fn. 177, p. 51; Mutahhari, loc. cit. above, fn. 177, pp. 68–71; Zafrullah Khan, Muhammad. *Islam and Human Rights*. Islamabad, Tilford: Islam International Publications Ltd., Fourth Edition, 1989, p. 105.

186 The suitability is defined in terms of lineage, religiousness, profession and being free from a defect that permits the annulment of a marriage, or some of these characteristics, depending

suitable match[187] and consequently cannot marry a woman to an unsuitable match without her acceptance and the acceptance of all who can be guardians.

Despite small openings permitting a woman to express her opinion about the suitor and the marriage, the submissiveness of a woman to the will of her guardian is perfectly illustrated in the following passage from a manual of Islamic law:

> *If a bride selects a suitor who is not a suitable match for her, the guardian is not obliged to marry her to him. If she selects a suitable match but her guardian chooses a different suitor who is also a suitable match, then the man chosen by the guardian takes precedence if the guardian is one who may lawfully compel her to marry (i.e. father or grandfather)*[188]

Of course, all the above described rules are applicable only to women, men being considered as able to marry themselves. The only exception is a young boy on whose behalf a father is also authorized to conclude a marriage contract by those authors who accept the possibility of a conclusion of marriage contracts on behalf of children.

All the above-described provisions are not based on the Quran, but on certain Prophetic traditions.

A different approach to these issues is adopted by the fourth school, namely the Hanafi school. According to the opinion of this school any adult woman has the right to conclude a marriage contract herself, without asking the permission of a guardian.[189] However, the need to ascertain the male authority and control over women's behavior places constraints upon this freedom accorded to women. The male guardian of a woman has a right to intervene and ask for the annulment of a marriage contract on the ground that the husband is not an equal to or compatible with the woman. Here we come again to the notion of suitability of a husband and its definition, which in the prevailing Hanafi doctrine includes six considerations: descent, Islam, profession, freedom, good character and wealth or means.[190] Thus, although by more indirect and sophisticated means, the woman's choice is also subordinated to male approval.

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on the school to which a jurist belongs and his personal opinion. The last requirement usually refers to the sanity of the person and some defects of sexual organs that do not permit sexual intercourse. As unsuitable can also be considered the following: a non-Arab man for an Arab woman, a corrupt man for a virtuous woman, a man of a lowly profession for the daughter of someone with a higher profession. It is also emphasized that suitability is not a mere recommendation but a legal restriction intended to protect a woman's interests. See e.g. 'Abd al 'Ati, loc. cit. above, fn. 182, pp. 84–97; Al-Misri, loc. cit. above, fn. 184, pp. 523–524; Bakhtiar, Laleh. *Encyclopedia of Islamic Law: A Compendium of the Views of the Major Schools*. Chicago: ABC International Group, Inc., KAZI Publications, 1996, pp. 427–428.

187 If a guardian refuses to marry a woman to a suitable groom, a judge has the power to conclude the marriage without the consent of the guardian.

188 Al-Misri, loc. cit. above, fn. 184, p. 523, m.3.15.

189 Ibn 'Abidin, Muhammad Amin Ibn 'Umar. *Radd Al-Muhtar 'ala al-Durr al-Mukhtar Shah Tanwir al-Absar*. Vol. IV, Beirut: Dar al-Kutub al-'Ilmiya, 1994, p. 155.

190 For a detailed discussion of this aspect of the Hanafi marriage laws see Siddiqui, Mona. "Law and Desire for Social Control: An Insight into the Hanafi Concept of Kafa'a with Reference to the Fatwa 'Alamgiri (1664–1672)." In: Yamani, Mai, ed. *Feminism and Islam: Legal and Literary Perspectives*. New York: New York University Press, 1996, pp. 49–68; Siddiqui, Mona. "The Concept of Wilaya in Hanafi Law: Authority versus Consent in al-Fatwa al-'Alamgiri." 5 *Yearbook of Islamic and Middle Eastern Law* 1998–1999, pp. 171–185.

Thus, even the majority of conservative authors do not question the necessity of a woman's consent for the conclusion of her marriage contract. The most problematic issue relates to the role of a guardian in the conclusion of a marriage contract, in particular, from the point of view of those schools which require his participation in the conclusion of the contract. An interesting analysis of reasons behind this requirement and therefore a new vision of the role of a guardian is presented in an article by Mohammad Fadel.[191] The principal argument may be summarized as follows: First of all, he asserts that the guardian's role is exclusively a function of majority, or lack thereof, of the ward, not the gender of the ward, since a guardian is required for both boys and girls as long as they are minor. The most important difference between male and female children relates to the rule of emancipation (definition of majority). Whereas a male child was automatically emancipated upon reaching maturity, a female was not emancipated until she got married and proved her ability to manage property. Thus, women were presumed to be unable to manage their financial affairs and therefore placed under the supervision of a guardian. However, and here he points to a contradiction in the reasoning of Maliki jurists, a man who in his daily life demonstrated inability to manage his financial affairs still enjoyed a right to marry, although his guardian had the option of annulling his marriage. Thus, he denounces this difference in treatment of men and women as "a major error in legal reasoning" and adds the following note: "In some sense it is charitable to describe this as a 'mistake' and not attribute it to some other, less benign, explanations". In his further analysis of the role of a guardian he comes to the conclusion that the requirement of a guardian could make sense if one assumes that the guardian will strike a better "bargain" for his principal, which does not imply any assumption about the ability of a woman to negotiate. Rather it might be a recognition that parties to a marriage, because of the nature of the relationship, are poorly situated to reach the bargain that both parties would presumably want to reach. In this connection the recognition by the Maliki jurists of the possibility for a woman to choose her guardian, including the possibility to entrust a public authority (e.g. a judge) with the role of a guardian is of fundamental importance.[192] This analysis shows that even in the framework of an apparently well-established and elaborated doctrine possibilities for improvement are always present, if one adopts a constructive critical approach.[193]

Modern national legislation of many Muslim States is based on the traditional approach. Thus, as far as the conclusion of a marriage is concerned, a strong emphasis is placed on the invalidity of a marriage concluded under coercion. However, a virgin

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191 FADEL, Mohammad. "Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The Case of the Maliki School." 3 *Journal of Islamic Law* 1998, pp. 1–23.

192 It should be recalled that a marriage contract in Islamic law is the basis for subsequent claims of both spouses and may contain many provisions describing in detail not only rights and obligations of spouses during the marriage but also upon its dissolution as well as some aspects of the procedure of dissolution itself. In particular it offers women a possibility to specify additional rights, not granted by the legislation expressly.

193 After having discovered the above-mentioned mistake in the reasoning of jurists and established the real role of a guardian one can also make an attempt to formulate another rule eliminating dangers contained, for example, in the presumed guardianship of a father,

is mostly held by a legislator as unable to conclude a marriage without a guardian. As a general rule, it is forbidden for a guardian to compel his ward to marry. The guardian retains, however, the right to prevent a marriage if it is "in her best interests".[194] In all cases of a dispute a judge intervenes and replaces the guardian. Article 12, paragraph 4 of the Moroccan Personal Status Law applicable till the adoption in 2004 of new Family Code is illustrative of this "hidden" power of a guardian:

> *The guardian, even if he is the father, shall not compel his daughter who has reached puberty, even if she is a virgin, to marry without her permission and consent unless the temptation is feared, in which case the judge shall have the right to compel her to marry in order that she may be under the protection of an equal husband who will take care of her.*

First of all, the term "temptation" is a very vague one and can be easily misused by a guardian to make a case before a judge. Secondly, taking into account the fact that the majority of judges, if not all of them are male, often equipped with the same prejudices about female nature and the appropriate role of women in society as the guardians themselves, it is logical to conclude that judges will generally accept the guardian's argumentation. Thirdly, the husband is defined as an "equal", which means that the above described requirements of the suitability of a match are still applicable with all possible negative consequences for women. Finally, the very fact that women are regarded as unable to manage their affairs and as being in need of "protection" either of their guardians or husbands places them in a subordinate position not only at the level of custom and traditions but also at the official, legislative level.

More women-friendly is the Egyptian legislation which, being based on the Hanafi school of law, allows women to conclude the marriage contract without an intermediary of the guardian and does not require his consent. However, the possibility for a guardian to request the annulment of a marriage contract if the husband is not an equal of the wife, although limited to a certain extent, can still be used to the detriment of women.

A noticeable development towards the improvement of women's status in this area represents the new Moroccan Family Code which in essence adopts the modern interpretation of the right to marry and choose a spouse proposed by Mohammad Fadel and presented above.

3. Rights and Obligations of Spouses during the Marriage

Once a woman is married the question of her rights and obligations during the marriage arises. Here the major part of efforts is deployed by conservative authors to describe

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who can be an authoritarian and violent person intimidating his daughter and preventing her from appointing another guardian, or adapting the medieval procedure of the conclusion of a marriage contract to the present State structure. This new rule can for instance allow a woman to conclude a marriage contract herself, without a guardian, making the negotiation of the marriage contract a regular procedure before a judge, where both parties may entrust somebody to negotiate on their behalf.

194 So for example, article 12, paragraph 4 of former Moroccan Law of Personal Status replaced by new Family Code, articles 12 and 13 of Algerian Personal Status Code.

and explain duties of women as wives than to accord them any rights.[195] The only real and strongly articulated right of a wife is her right to maintenance,[196] which in all cases includes food, clothing and accommodation.[197] However, in return for this right a wife is required to fulfill a number of obligations which place her in a subordinate position vis-à-vis her husband. The two main obligations of a wife from which a variety of other obligations can be derived are the following: to be devoutly obedient to the husband[198] and to satisfy her husband's desire for sexual intercourse. In justifying the requirement of obedience of a wife to her husband the conservative authors usually refer to his obligation of maintenance, as well as to the above-described inherent characteristics of women that prevent them from passing a sound judgment of a situation, in particular in relation to matters beyond child-raising and home management.

The husband's duty of maintenance and the corresponding duty of a wife to obedience have been discussed in the modernist literature more than any other issue. Reasons for such an attention can be seen in the fact that firstly, this rule pretends to be based on a clear text of the Quran, and secondly, it establishes a relationship of subordination unprecedented in the doctrine of Islamic law.

The following translation of the relevant part of the Quran reflects the conservative and "official" understanding of it:

> *Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient and guard in (the husband's) absence what Allah would have them guard. As to those women on whose part you fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly) (...).*[199]

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195 For example Naseef treats matrimonial rights of women on 5 pages and obligations of women as wives on 16 pages: Naseef, loc. cit. above, fn. 176.

196 This right to maintenance is granted to a woman at any stage of her life: when she is a child it is her father's duty to provide for her, when she gets married, the duty is transferred to the husband. On some instances her son, her brother or the Muslim community will also fulfill this duty.

197 According to some authors and traditional opinion of several Muslim scholars, the husband is not even obliged to provide for medical care expenses of his wife, except those linked to pregnancy and child-birth. See e.g. 'Abd al 'Ati, loc. cit. above, fn. 182, pp. 151–157; Al-Misri, loc. cit. above, fn. 184, p. 544, m.11.4; Bakhtiar, loc. cit. above, fn. 186, pp. 484–485; Naseef, loc. cit. above, fn. 176, pp. 169–173.

198 The obligation of obedience is restricted to what is lawful and correct in accordance with the Divine Will. However, the definition of this lawfulness varies very much from one group of scholars to another. Thus, many scholars will agree that a husband may prevent his wife from visiting her relatives and friends and receiving them at home, and under certain circumstances even prevent her from seeing her parents. For the majority of scholars of this group it is obvious that the permission of a husband is required for a wife to be able to work, to go outside of the home, to travel. As far as travel is concerned, the opinion of most conservative authors goes so far as to forbid women to travel alone in any circumstances. Such is the law, for example, in Saudi Arabia.

199 English translation of Quran by an official institution of Saudi Arabia: The Presidency of Islamic Researchers, IFTA, Call and Guidance.

It is in the first place from this verse of the Quran that all rules relating to the wife's obedience to her husband and the superiority of men over women are derived.[200]

However, the original Arabic text of the Quran is in no way so clear as it may appear from this "translation" and has been interpreted by many modernist scholars and even by earlier commentators of the Quran so as to convey a more egalitarian spirit. The majority of arguments are based on the correct understanding of the meaning of such Arabic terms as qawwam (translated above as "protectors and maintainers" because of the superiority of one of them over the other); adribuhunna (translated above as "beat them") and nushuz (translated above as "disloyalty and ill-conduct" on the part of wives). The analysis of the grammatical construction of the sentence is equally important.

In translating the term qawwama modernist authors place emphasis on the material and moral responsibility of men towards women, but not on their superiority. Thus, Khaled Abou El Fadl commenting on this term gives the following explanation:

> *The verse explicitly conditions the status of qiwama to a very particular operative clause ('illa), and the operative clause is the ability to earn and spend. In other words, this is not an unqualified status that men enjoy, or suffer, just by the virtue of being men. It is something hinged on certain conditions precedent that needs to be fulfilled. If they are not fulfilled, either because the man is not supporting the family, or because the woman is contributing financially to an equal extent, or perhaps because the woman has an equal earning potential that she choose to forgo, then a man's qiwama cannot exist.*[201]

As far as the term nushaz is concerned, the modernist authors emphasize, although to a different degree, the gravity of the wife's misconduct.[202] The most restrictive understanding of this term refers only to the case of sexual lewdness upon the testimony of four witnesses.[203]

Most difficulties arise in relation to the word translated above as the beating. Only one author, as far as it is know to me, proposes another understanding of this term and

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200 As already mentioned above, this is not the only verse of the Quran which might be interpreted as detrimental to women's rights. However, other verses are more contextualized and apply to particular areas only, whereas this verse is of a more general character.

201 Abou El Fadl, Khaled M. *Conference of the Books: The Search for Beauty in Islam*. Lanham, New York, Oxford: University of America Press, 2001, p. 273. Similar interpretations of this term and its significance are given by many other modernist authors. See e. g. Al-Hibri, Azizah. "Islamic Law and Custom: Redefining Women's Rights." In: Askin, Kelly D., Koenig, Dorean M., eds. *Women and International Human Rights Law*. Vol. III, Ardsley: Transnational Publishers Inc., 2001, pp. 402–410. An interesting comparison between different understandings of this passage is made by Stowasser. She shows in her study that earlier commentators of the Quran adopted a more women-friendly interpretation of this verse. With the advancement of time each successive interpreter gave to it a more and more restrictive meaning. See: Stowasser, Barbara. "The Status of Women in Early Islam." In: Hussain, F., ed. *Muslim Women*. St. Martin's Press, 1984, pp. 25–26.

202 Engineer, Asghar Ali. *The Qur'an, Women and Modern Society*. New Delhi: Sterling Publishers, 1999, quoting different commentators, pp. 57–58.

203 Abou El Fadl, Conference of the Books, loc. cit. above, fn. 201, pp. 167–188. He arrives at this conclusion through the contextual and systematic analysis of this verse and several related verses as well as a saying of the Prophet during his final pilgrimage.

attributes it the meaning of "having sexual intercourse".[204] However, this opinion is not supported by others, even modernist authors. Many of them being not able to find a more plausible explanation, would either avoid addressing the issue or would attach lengthy commentaries explaining that this beating should be only symbolic, and that anyway according to the Prophetic tradition beating is reprehensible and should better be avoided.[205] Nevertheless, some of them arrived at more appropriate interpretations. According to these interpretations the "beating" means corporal punishment which may only be ordained by a competent Islamic tribunal upon examination of the case and if sufficient evidence is available.[206]

Finally, it is also emphasized that when this sentence from the Quran speaks about an obedient woman, it does not indicate explicitly to whom the obedience is due. Modernist authors interpret it as obedience only to God and his commands.[207] Important is also the emphasis made by many modernist authors of the fact that superiority/responsibility mentioned in this verse is not an absolute one, but is linked to the fulfillment of material obligations. If the husband does not fulfill his duties or the wife contributes to the material welfare of the family, no superiority can be established. Developed further this logic can also lead us to the conclusion that a wife, if she is a principal maintainer of the family, can also have this degree over her husband.

As far as the relationship between husband and wife during marriage is concerned, modern legislation in Muslim countries also does not change significantly the above-described submissive position of a wife justified by the husband's duty of maintenance. Moreover, legislation in some countries goes even further. Thus, under the traditional Islamic law chastity of both spouses is one of their primary duties in marriage. However, the former Moroccan Law of Personal Status in its article 36, paragraph 1 made it the right of a husband that his wife shall guard her chastity. However, the new Moroccan Family Code changed this provision. Thus, as on today Morocco and Tunisia are the

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204 Meaning attributed to this term by Ahmed Ali as quoted in Abou El Fadl, Conference of the Books, loc. cit. above, fn. 201, pp. 178–179 and Engineer, loc. cit. above, fn. 202, p. 60. Both reject either implicitly or expressly this interpretation.

205 See e.g. Engineer, loc. cit. above, fn. 202, pp. 58–64 (emphasizing the contradiction between permitting wife-beating and the general egalitarian message of the Quran as well as the contextual and not general character of this permission); Ali, Shaheen Sardar. *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* The Hague, Boston, London: Kluwer Law International, 2000, pp. 63–70 (analyzing various modernist, women-friendly interpretations of the first part of this passage, but completely avoiding the issue of beating); Al-Hibri, loc. cit. above, fn. 201, pp. 402–410 (she discusses only the first part of this passage and promises to address the rest of it, including the issue of wife-beating in a series of subsequent articles).

206 This view is held, for example, by Abou El Fadl (Abou El Fadl, Conference of the Books, loc. cit. above, fn. 201, pp. 167–188), Parvez (as quoted in Engineer, loc. cit. above, fn. 202, p. 61). However, the details of application of this punishment as well as methods by which they arrived at this conclusion differ from one author to another. On the basis of their reasoning it can also be argued – and is actually argued by some of them – that this punishment should be applied to women as well as to men.

207 See e.g. Abou El Fadl, Conference of the Books, loc. cit. above, fn. 201, p. 299; Engineer, loc. cit. above, fn. 202, pp. 56–57 with further references.

only countries which attempted to improve the situation and reflect in its legislation some of the modernist ideas. In Morocco article 4 of the Family Code states that the family shall be headed and guided by both spouses. In Tunisia, the legislator although maintaining the provision of its legislation declaring the husband head of household, interprets this role of the husband as a responsibility and instead of requiring obedience from the wife places emphasis on mutual cooperation between spouses.

4. Dissolution of Marriage

The same argument about the emotional nature of women is often used by conservative authors to justify the very limited possibilities for women to ask for the dissolution of a marriage as compared to the almost unrestricted right of a husband to dissolve the marriage.[208] It should be emphasized that issues relating to the dissolution of marriage are discussed by this group of authors only to a very limited extent, if at all. Without going into detail of this multifaceted issue, I will just describe some basic features of the system of the dissolution of a marriage which is currently widely accepted as an authoritative and authentic Islamic system.

The right to dissolve a marriage is an original right of a husband. All so-called classical Muslim scholars agree that a husband has a right to divorce his wife by simply pronouncing a specific formula and is not even obliged to inform the authorities about such a divorce.[209] A marriage can also be dissolved by a judge on the request of a wife on certain restricted grounds, such as insanity, major defects making sexual intercourse impossible, some other cases of illness, mistreatment and inability of a husband to fulfill his duty of maintenance.[210] A wife can divorce from her husband herself only if such a power was delegated to her by him, but she may also request a divorce in return of a payment of an amount of money agreed between her and her husband.[211]

Now we have to recall the difference existing between the Hanafi school and other schools in relation to the ability of a woman to conclude a marriage contract herself. It was stated that the Hanafi school recognizes this ability of women and although

208 See e.g. Doi, loc. cit. above, fn. 177, p. 95. Other justifications include for example the fact that a man is obliged to pay a dowry, which remains to the wife's disposition; the obligation of maintenance is also sometimes linked to this issue. See e.g. the reservation entered by Egypt to article 16 of the CEDAW. Some authors will simply deny that there is any discrimination in divorce laws: see e. g. Mahmood, Tahir. *The Grandeur of Womanhood in Islam*, p. 11.

209 For an overview of classical opinions of Muslim scholars on divorce see, for example: 'Abd al 'Ati, loc. cit. above, fn. 182, pp. 222–243.

210 It should be mentioned that even in these restricted cases the annulment is often further complicated by some additional requirements or simply by the difficulty for a women to bring necessary proof in support of her claim.

211 It is clear that the former will rarely be the case while the latter will become a "commercial deal" where a husband will refuse to grant a divorce in order to get more money from his wife, because, although the procedure of a wife "buying" a divorce may occur before a judge, it is husband who, according to the traditional opinion of Muslim scholars, actually grants the divorce. Bahtiar, loc. cit. above, fn. 186, pp. 517–518.

making it subject to certain control allows women more freedom in this respect than other schools. At this stage, I have to emphasize the difference existing between the Hanafi school and other schools in relation to the possibility for women to apply for dissolution of a marriage by a judge. This possibility is limited in the traditional doctrine of the Hanafi school only to cases of impotence and other diseases preventing sexual intercourse and procreation. Some later jurists of this school also added the case of insanity to this list.[212] Nevertheless, it is obvious that the freedom given to women at the stage of the conclusion of a marriage has to be paid by a price of virtual impossibility for a woman to get out of the marriage. Even cases of lack of maintenance and mistreatment are not reasons enough to allow for a divorce by a judge.

The divorce is therefore made very easy for a husband and very difficult for a wife. Furthermore, the financial situation of a divorced woman can be very precarious, since in some cases the right to financial support from the husband is either not recognized at all, or not beyond the waiting period of three months.[213]

The difficulty of dealing with the issue of the dissolution of marriage is demonstrated by the fact that even modernist authors, when faced with this issue, have a general tendency to emphasize the protection accorded to women in the case of dissolution of a marriage contract. This, however, does not resolve the problem of the inequality inherent to such a system placing the decision almost exclusively in the hands of husbands. Nevertheless, at least on one occasion a new interpretation of Quranic injunctions dealing with this issue was proposed.[214] According to this interpretation, there is nothing in the Quran which would prevent women from having the same rights to dissolve a marriage as men. This interpretation is based on following theses. Firstly, none of the Quranic verses explicitly grants men the power to divorce women. Rather, they seem to assume it. These verses are formulated in such a way as not to empower men, but to mitigate their discretion. Secondly, the Quran often refers to divorce or reconciliation between spouses as a collective decision of both wife and husband, which indicates a normative moral trajectory. Thus, the Quran assumes on the basis of the already existing practice that men will divorce women. This does not necessarily mean that only men can divorce. "Why can't we argue that the consent of women is necessary for a divorce as well? Or, why can't we argue that women shall have an equal power to divorce as long as they share with men the obligation of qiwama?"[215]

In modern national legislation of Muslim States the traditional approach is dominant. However, various procedural measures are often introduced with the aim to mitigate possible negative consequences for women. Many States recognize in their legislation the widest possible range of grounds on which a judge can be asked

212 In all cases before granting a divorce, a judge shall ordain a waiting period to see whether some improvements in the state of the husband will occur. Thus, for example, in the case of impotence this waiting period is laid down at one year.

213 'Abd al 'Ati, loc. cit. above, fn. 182, p. 246; Bakhtiar, loc. cit above, fn. 186, pp. 476–483 with further references.

214 Abou El Fadl, Conference of the Books, loc. cit. above, fn. 201, pp. 265–277

215 Id., p. 276

for a divorce as well as the largest possible powers of a judge to grant a divorce without the consent of a husband. Thus, although the traditional view of the Hanafi school allows for dissolution of marriage on the petition of a wife without consent of a husband only in the case of impotence and other similar diseases and under a condition that the wife was not aware of these defects at the time of a marriage, in Muslim countries where the Hanafi school is the prevailing one and its opinions form a basis for the legislation in issues of personal status, the modern legislator nevertheless introduced some additional grounds for divorce by a judge. For example the legislation of Egypt, although based on the Hanafi school, recognizes "other defects" on the part of a husband, injury, absence of a husband and the non-payment of maintenance as additional grounds for granting divorce to a wife without asking the consent of a husband. Furthermore, dissolution of marriage on the initiative of a wife through the financial settlement is also made subject to certain restrictions in many Muslim States. Thus, the legislation of some States specifies the maximum limit of the material consideration payable by a wife to a husband. This material consideration can be determined by court without the consent of a husband if he unreasonably refuses to come to an agreement. Finally, if according to many traditionalist authors after reaching an agreement about financial settlement it is the husband who pronounces the divorce, the legislation of many States grants this right to declare the marriage dissolved to a court.

5. Custody and Guardianship of Children

According to the opinion of the majority of conservative scholars, a divorced wife is only entitled to custody of her young children; the guardianship of children always remains with the father or another male relative.[216] In practical terms it means that children just live with the mother. The father is not only obliged to pay maintenance for his children (provide food, clothes and other necessary material support), but also remains the decision-maker in all affairs relating to the children's life, such as studies, school, travel, education etc. This limited ability of a mother to take care of her children can only be exercised when the children are very young. Usually this age till which the mother is entitled to custody is the age of puberty for boys and the age of marriage for girls.[217] Anyway, a woman looses her right to custody if she remarries.[218] Once again, the justification is based on some "inherent" characteristics of women, in

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216 'Abd al 'Ati, loc. cit. above, fn. 182, pp. 198–203, 246; Bakhtiar, loc. cit. above, fn. 186, 469–475

217 This is the accepted Maliki opinion. The majority Hanafi opinion sets this limit at the age of seven years for boys and nine years for girls; the Schafi'i school does not set a precise age, but says that a child shall remain with the mother till he or she is able to make a choice between both parents; Hanbali also leaves the choice of the parent to the child, but say that it should be made at the age of seven till which the child remains with his or her mother. Some authors limit this age even to two years, the age till which a child should be weaned. See the Jafari ruling for boys. Bakhtiar, loc. cit. above, fn. 186, pp. 471–472.

218 Esposito, John L. *Women in Muslim Family Law*. Syracuse: Syracuse University Press, 1982, p. 37.

particular her weakness, and thus inability to protect her child, as well as her intellectual capacities, which would prevent her from educating the child and preparing him or her for life. In the case of remarriage it is said that she will be so preoccupied with fulfilling her duties toward a new husband, that she will have no time for her children. In sum, custody and care for children are presented in the apologetic tradition as a burden from which women are liberated through the above described-rulings.[219]

The legislator in many Muslim countries attempted to soften this rule by giving the children the right to decide about the appropriate parent to stay with after they reach the age when the mother usually looses her custody. Laws also often emphasize interests of the child and say that the rule about the termination of a mother's custody can be disregarded if it is in the best interests of the child. The problem however, is that even when the mother can have custody of her children she can almost never obtain the guardianship of children. Even when the father is not able to exercise the guardianship, be it because of his death or because of his bad character and behavior, the guardianship will usually be attributed to another male relative but not to the mother. Women are regarded as unable to fulfill the duties of a guardian. This is linked to the above-mentioned thesis about the inability of women to manage their affairs, in particular financial affairs.

This division of domains between men and women is in contradiction with other provisions of Islamic law, for example, those allowing women to manage their own property without any control. Since this rule is in no way expressly supported by the Quran, it should be easier to modify it in particular placing greater emphasis on the interests of the child.

6. Polygamy

On the basis of several passages from the Quran conservative authors insist that the practice of polygamy is not only legitimate in Islam but simply could not be forbidden: It is impossible to forbid something which is permitted by God. Those who defend the maintenance of this practice would say that polygamy according to the prescriptions of the Quran is more restricted than the practice of the pre-Islamic Arabia, because it limits the number of wives to four. The argument is also made that the polygamy is better than extra-marital relationships which lead to the break-up of the family, sexually transmitted diseases etc.[220]

The message contained in the Quran in relation to the polygamy is however not as express and unambiguous as conservative authors tend to represent it. The modernist authors interpret the relevant passages from the Quaran as an interdiction of polygamy, because one of the requirements for polygamy is to treat co-wives justly and equally which is a condition impossible to fulfill according to modernist authors.[221]

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219 Iqbal, loc. cit. above, fn. 177, pp. 207–209.

220 Doi, loc. cit. above, fn. 177, p. 52; Iqbal, loc. cit. above, fn. 177, pp. 171–172.

221 Ali, loc. cit. above, fn. 205, pp. 73–75; Falaturi, Abdooljavad. "Die Sari'a – Islamische Rechtssystem." In: *Zur Diskussion gestellt: Weltmacht Islam*, München, 1988, pp. 110–111; Sayeh, Leila P., Morse, Adriaen M. "Islam and the Treatment of Women: An Incomplete

This interpretation can also easily be supported by the text of the Quran itself. The final part of the sentence addressing the issue of polygamy states that having only one wife is more suitable because it prevents from doing injustice.[222] It is interesting to note, that this phrase is interpreted by many conservative authors as implying only financial equality, meaning providing for co-wives equal material support, although the Arabic term 'adl used in the Quran in this context is clearly associated with justice in large sense and has never been reduced to its material aspect. In order to impose this reading of Quran permissive of polygamy, some authors go so far as to introduce it into translations of Quran: "If you fear lest you become unfair, then you shall be content with only one, or with what you already have. Additionally, you are thus more likely to avoid financial hardship."[223] The progressive understanding of the Quran's message limiting polygamy gains more and more support, so that even at the official level this opinion is taken seriously. The interdiction of polygamy in Tunisia was made possible on the basis of this modern interpretation. A similar view was adopted by the High court of Bangladesh and transmitted to the parliament for the adoption as a law. In some Muslim States polygamy is subject to several restrictions and especially to the authorization of a judge or of the wife or both. Although all these restrictions and authorizations do not eliminate the discriminatory practice as such, they are nevertheless often an effective way for restricting this practice and moving gradually to its complete elimination. As with many other cultural and traditional practices, it should be kept in mind that a high degree of caution is required in attempts to modify and eliminate them in order not to bring new and more profound suffering and inequalities.

7. Conclusions

As for the conservative visions of the status of women, the male biases are clearly visible not only in the fact of the subordinated position accorded to women, but also in a stronger emphasis placed on rights of men and corresponding duties of women, and not on the rights of women and corresponding duties of men. Thus, although maintenance is defined as a duty of men with a possibility for women to make certain claims, according to the majority Hanafi opinion, the non-fulfillment of this duty is not even a ground for a wife to claim divorce. Furthermore, in return for maintenance the wife has to sacrifice almost all her rights being placed in a position similar to a domestic servant or even slave. Such rights of a wife as a fair and honorable treatment, mutual agreement and consultation in all matters relating to family life, which are expressly articulated in the primary text, in the Quran are either not mentioned at all or have only

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Understanding of Gradualism." 30 *Texas International Law Journal* 1995, p. 329. This opinion is based on a statement contained in the Quran as to the impossibility to treat co-wives justly: 4:129.

222 Quran 4:3. In an English translation by Yusuf Ali: "this will be more suitable, to prevent you from doing injustice"; in the translation by Pickthal: "this is more proper that you will not deviate from the right course".

223 So the translation proposed by Khalifa at http://www.submission.org/quran/webqt.php?&indata=4+3&t[]=1.

the status of moral injunctions, advices to husbands with no consequences for them in the case of non-respect. The inequality of value and legal force accorded to these rights of a wife and the right of a husband to the obedience of his wife the slightest detail of which is defined and has legal consequences attached to it is flagrant.

The above presentation of new interpretations of some issues relating to the status of women shows that Islam and gender equality are not two fundamentally irreconcilable concepts. Islam and Islamic law by their very nature presuppose, allow and even require the development of new interpretations. Unfortunately, for different reasons this diversity of views – or certain parts of it – is not only ignored, but often even suppressed by the official ruling elite in Muslim States. My aim in this chapter was not to advocate one or another reform proposal but to show that the possibility for a non-discriminatory interpretation of the Quranic message relating to women is possible and actually exists among Muslim scholars. Moreover, even at the level of official discourses in Muslim States, in their internal legislation, certain advancement, modern re-interpretation and diversity is visible.[224] Thus, it is possible to affirm that despite all impediments and difficulties Islam and Islamic law remain a very multifaceted and constantly developing phenomenon, a characteristic which is often overlooked by Western societies, politicians and even international lawyers who regard it as a fixed and rigid block.

III. Islamic Law as a Process

The analysis of the nature of Islamic law made above has demonstrated that from the very beginning it was characterized by the support for the diversity of views and orientation towards the search for best solutions in concrete situations rather than formulation and imposition of rigid rules. For various reasons mainly related to the officialization of the Islamic legal discourse this orientation towards dynamism and diversity, this preference for regulation of the process, of methodology rather than formulation of rules has been suppressed and forgotten in the course of the historical development. In particular as far as the status of women is concerned rigidity and conservatism became synonyms of "authentic Islamic way of life". However, in modern times, many Muslim scholars criticize this conservative vision of the status of women and propose new approaches to various aspects of this issue either through complete redefinition of Islamic law or through return to dynamic and process-oriented methodology of Islamic law as it was widespread at its origins.

It is, however, necessary to warn already at this stage against any hasty adoption of the opinion of one or another scholar as an authentic one, as an official basis for legislation and codification. Even the adoption of the most progressive view can sooner or later result in injustice and inequalities and violation of the fundamental principles of Islam. Moreover, as the human rights law is always developing further, at some point even these new interpretations can appear contradictory to certain provisions of human

224 See e.g. the recognition of the interpretation forbidding polygamy in Tunisia and in Bangladesh; restrictions placed on the unilateral right of a husband to dissolve the marriage in Malaysia and the suppression of all restrictions existing before with regard to the right of women to marry and choose a spouse in Morocco.

rights law. Thus, nobody will deny that the recognition of the legal personality of women, their rights to participate in the life of society, to inherit, to participate in the choice of their husbands in a society that denied woman's humanity signified a step forward. However, the later adoption of the medieval understanding of women's role in society and their rights as an authentic and official one resulted in a degradation of women's status to a position of a domestic servant. In contemporary Muslim societies many advocates of women's rights call for the adoption of legislation upon the example of Western States arguing that the status of women in the West is that of real equality. I do not deny that the situation of women in the West is significantly better than in Muslim States and that legislative reforms – be they secular or based on one or another new interpretation of the message of the Quran – can lead to short-term improvements. However, I have to re-call what was said in previous parts about the feminist movement and feminist critiques of the legislation concerning women not only at the national level, but also of such an apparently progressive international instrument as the CEDAW. At the time of its adoption the CEDAW was probably a very progressive document which met few, if any, critiques from the point of view of its subject-matter. Nowadays, feminist movements advocate for new rights and provisions to be adopted at the international law level. It is not unimaginable today that the CEDAW will be modified or somehow completed one day. In this context a situation can arise when Muslim States will through a long process of re-interpretation and social re-orientation come to a new "Islamic" understanding of women's rights and status and adopt new legislation which corresponds to the present requirements of human rights law. On its side, the feminist movement would succeed in bringing certain of its new claims to be recognized at international level and adopted either as an amendment of the CEDAW or as a new international treaty. As a result, Muslim States will again find themselves in conflict with the requirements of human rights law, Islam again being the obstacle. Should Muslim States re-initiate the entire process once again? In my opinion, the real solution for the issue of the status of women in Muslim societies lies not in the competition for a better legislation, but in the reorientation of understanding of the nature of law, whereby the famous expression attributed to Abu Hanifa, the founder of the Hanafi school of Islamic law, should become a constant remainder: "I believe that my opinion is right, but possibly wrong, and your opinion is wrong, but possibly right.".

If a State chooses to implement in its legislation Islamic law, it should place emphasis on the understanding of Islamic law not as a compilation of rules, but as a continuing process of the search for just and equitable solutions in concrete cases, the search for the Divine Will, the understanding which characterized Islamic law at its origins.[225] How can this be done in practice? Is the realization of such a project at all realistic in the contemporary State-centered world of centralized States? A detailed

225 The essence of this enterprising is very well expressed in the following advice reproduced by Abou El Fadl in one of his books and attributed to his teachers (Shaykhs): "Search for God with confidence and determination, but never allow yourself the arrogance of believing you can ever capture God's full majesty. Yield to God with humility, and never claim to know the will of God with absolute certainty. (…) Know that it is beautiful to seek the truth, but every time you claim to have found it, you are flirting with a lie, andrisking the ugliness of conceit." Abou El Fadl, Conference of the Books, loc. cit. above, fn. 201, pp. 350–351.

answer to these questions goes beyond the scope of present research. However some implications of this proposition on the compliance of Muslim States with human rights standards on the status of women and on the supervision and monitoring of this compliance will be discussed in the concluding Chapter.

IV. Concluding Remarks

A significant part of feminist critique of law advocates its preference for concrete solutions in concrete cases and calls for constant (self)re-examination. The CEDAW, unfortunately, remains a rather traditional international human rights convention, which although allowing certain degree of improvement in the expression of women's demands and interests at the international law level; does not pay due attention to such fundamental demands of feminism as contextuality and contestability. In this way the "officialization" of the feminist discourse at the level of international law also led to erosion of certain fundamental principles of feminist thought and to the freezing of the process of "seeking truths".

Islamic law, at least at its origins and also as reflected in works of a significant part of modernist authors, by its very nature is a procedure, a methodology developed to search for best solutions in concrete situations and constantly requires lawyers to be critical of themselves and conscious of their fallibility.

In Islam, however, these characteristics remain rather at the level of a purely explored potential, although some tendencies towards their use at the official level of States are visible. Moreover, the analysis of the practice of reservations to the CEDAW based on Islam will also reveal that these characteristics of Islamic law influence the practice of States to a quite significant extent.

When comparing these general characteristics in the development of demands of our two actors, one notices similarity in that at their origins both are process- and context-oriented. What they seek, is the best solution in each concrete case. However, once they "officialize" their demands and discourses, they lose or at least have difficulties in maintaining these fundamental characteristics.

I submit that this potentially process-oriented nature of Islamic law if explored correctly will lead to improvement of the situation of women living in countries pretending or willing to apply Islamic personal status laws. Is international law able to explore this potential? One of the purposes of the following Chapters is to demonstrate whether, how and to what extent international law uses this potential, as well as to propose some possible ways for improvement.

II

RESERVATIONS TO TREATIES: SOME THEORETICAL ISSUES

How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself ***as*** *other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case?*

Derrida, Force of Law, p. 949 (emphasis in original)

I. Introduction: Why Reservations?

When one is attempting to understand position of one or another State with regard to certain requirements of international and human rights law, the best place to investigate this position/attitude is to examine the participation of this State or these States in the corresponding treaty, provided these requirements (rules of law) are codified in a treaty. Human rights treaties often provide for the establishment of treaty-monitoring bodies entrusted with supervision of implementation of treaties by States parties to that treaty. Various documents produced in the process of this supervision offer a valuable source for the understanding and analysis of States' attitudes towards rules formulated in the treaty. However, this is true only in relation to States which either completely agree with rules formulated in the treaty or have only minor points of disagreement. As far as States which do not agree with some provisions of a treaty are concerned, they will either refrain from becoming parties to a treaty or join the treaty with certain reservations. In the latter case the reserving State can either adopt a cooperative attitude and comply with all requirements related to the functions of the supervisory body, or reduce its participation in the treaty only to the nominal act of adherence and refrain from cooperation with the supervisory body. In the latter case, as well as in the above-mentioned case of non-participation of a State in the treaty, the task of determining its attitudes and motives becomes very problematical and can be accomplished mainly through reference to internal, national documents, laws etc. of the State in question. However, sometimes, even if a State formally complies with its reporting obligation it can escape in providing only very general and limited information. In contrast, reservations combined with reactions of other States to them offer wonderful material for the analysis of disagreements about rules formulated in a treaty. In this sense the practice

of reservations is a reflection of existing diversity of views and a place where these different views or visions can meet and eventually enter into a dialogue.

What is also important, objections provide information not only about the opinion of the States opposing one or another rule, but also about reactions of other States to this opposition, as well as views expressed by a supervisory body. To the extent that reserving States comply with requirements related to the functions of the supervisory body, various documents produced during this process can also contain additional information about motives, desires, plans behind different positions adopted by States and supervisory bodies. Thus, the entire process becomes an interaction, a dialogue and can help to understand why and how these divergent views reflected in reservations and objections could be united around similar goals expressed in a single document. This is in so far significant, as the relationship between human rights of women and Islam is often defined in terms of opposition. For the purposes of our research it is important not only to identify the exact points of discord, but also to determine motives behind, reasons for opposition, as well as responses by various States, by the international community. We need to observe how international law rules and processes are used during this "negotiation".

This Chapter deals with some theoretical aspects of the reservations regime in general, as well as in relation to human rights treaties in particular. Without attempting to provide exhaustive answers to all unresolved questions of the reservations regime, it concentrates on issues which are of significant importance for the application of the reservations regime to human rights treaties and for the understanding of this emerging negotiative process. In this sense it is also a description of the arena where our two actors or forces meet and under favorable circumstances negotiate their claims.

The practice developed by States parties and the CEDAW Committee in relation to reservations based on Islam forms the subject of Chapter Three. This type of reservation has been chosen because these reservations are always cited as an example of the most dangerous reservations, depriving States' participation in the Convention of any sense and even threatening the content of the Convention itself. This analysis of practice shall help in understanding how States and the Committee are dealing with the problematic issues described in the theoretical part, and which solutions they choose, if any. As a final step, some general conclusions on the problems of the reservations regime and possibilities of their resolution in the light of the practice shall be made. In more concrete terms we will see how international law can and does intervene into and direct the negotiative process in the contexts of reservations to the CEDAW based on Islam and what influence does it have on the dialogue or interaction between women's needs and Islam.

II. Reservations in International Law in General

A. *Concept of Reservations*

1. Definition and Historical Remarks

A reservation can be defined as a unilateral statement made by a State which "purports to exclude or to modify the legal effect of certain provisions of the treaty in their

application to that State".[226] Reservations enable a State to become party to a treaty despite its unwillingness or the impossibility for a State to comply with certain minor provisions of a treaty. Although reservations first appeared at the end of the eighteenth and the beginning of the nineteenth century, they did not become a widespread phenomenon until the beginning of the twentieth century.[227] The first general legal regulation of this phenomenon was made in connection with the codification work of the League of Nations.[228]

Current rules on reservations applicable in international law in general are codified in the Vienna Convention on the Law of Treaties.[229] Although the Vienna Convention did not enter into force until January 1980, most of the rules on reservations codified therein can be regarded as having become a part of general international law around the middle of the sixties when the ILC adopted draft articles on the law of treaties.[230]

Although, theoretically, it is quite clear what a reservation is, practice brought to the surface some difficulties relating to the fact that States often do not expressly name their reservations "reservations". Often, when expressing their consent to be bound by a treaty, States formulate declarations, statements etc., which are in fact reservations. State practice, jurisprudence and doctrine are very clear on the point that the decisive factor is the nature, not the name of a statement. In practice it is, however, not always easy to distinguish a true reservation, subject to the regime discussed below, from an interpretative declaration which does not have the same legal effects and relates to treaty interpretation rather than the making of treaties, as reservations.[231]

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226 This definition is given in article 2, paragraph 1 (d) of the Vienna Convention on the Law of Treaties (hereafter referred to as "the Vienna Convention") which is nowadays accepted as a codification of the rules of general international law on reservations. The Vienna Convention was signed on 23 May 1969: UN Doc. A/CONF.39/11/Add.2 and came into force in 1980.

227 See e.g. Behnsen, Alexander, *Das Vorbehaltsrecht völkerrechtlicher Verträge. Vorschlag einer Reform*, Berlin: Duncker & Humblot, 2007, Kapitel 2; Horn, Frank. *Reservations and Interpretative Declarations to Multilateral Treaties*. Amsterdam, New York, Oxford, Tokyo: North-Holland, 1988, pp. 7–8; Kühner, Rolf. *Vorbehalte zu multilateralen völkerrechtlichen Verträgen*. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 91, Heidelberg: Springer-Verlag, 1986, pp. 53–64; Ruda, José Maria. "Reservations to Treaties." *146 RdC 1975 (III)*, pp. 11–112.

228 See the resolution adopted by the Council of the League of Nations on 17 June 1927: Document C.266.(2) 1927.V., LoN OJ, July 1927, pp. 800–801. More about the work of the League of Nations on reservations see in: Horn, loc. cit. above fn. 227, p. 15; Kühner, Vorbehalte, loc. cit. above, fn. 227, pp. 57–61; Ruda, loc. cit. above, fn. 227, pp. 112–115.

229 Adopted on 22 May 1969 by the UN Conference on the Law of Treaties held at Vienna in 1968 and 1969: UN Doc. A/Conf.39/11 and Add. 1.

230 The final text of the articles on reservations was adopted in 1965, although some minor amendments were made in 1966. For the text with commentary see YbILC 1966, Vol. II, pp. 189–190; 202–209.

231 The issue of the relationship and distinction between reservations and interpretative declarations is a very complicated one and goes beyond the scope of the present research. For more information see a very detailed report presented by the Special Rapporteur of the ILC in the framework of the study of Reservations to Treaties: Third report on Reservations to Treaties by Alain Pellet, UN Doc. A/CN.4/491/Add. 1 & Add.2 & Add.3 & Add.4 with further references.

2. Theories

To say what a reservation is does not explain what effects it has. International law knows two major theories on reservations.[232] One of them, the so-called unanimity rule, requires acceptance of a reservation proposed by one State by all the States parties to a treaty in order for the reserving State to become a party to that treaty and for the reservation to become operative.[233]

The second theory has been developed on a regional level in the framework of the Pan American Union (the predecessor of the Organization of American States). This Pan American system of reservations influenced very much the evolution of the regime of reservations in international law in general, and forms a basis of the regime of reservations in modern international law. According to this system a State which accompanied its signature or ratification of a treaty by a reservation may become a party to this treaty if the reservation is accepted by at least one State party to the treaty. An objection from another State party to that reservation did not preclude the reserving State from becoming a party to the treaty.[234] The following rules on the judicial effects of reservations were formulated in a report and Draft Regulations approved by the Governing Board of the Pan American Union:

> *With respect to the judicial status of treaties ratified, with reservations, which have not been accepted, the Governing Board of the Pan American Union understands that:*
>
> 1. *The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.*
> 2. *It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.*

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232 The Soviet theory on reservations – the absolute sovereignty theory – according to which States have an absolute right to make reservations is not addressed here. This theory was rejected during the preparatory stage of the Vienna Convention even by the Soviet authors themselves and has, therefore, only historical significance. According to this theory the right to make reservations is an expression of the sovereignty of a State. Therefore, reservations become valid irrespective of any reactions of other States. Reservations have thus a character of unilateral acts. More about this doctrine see in Horn, Frank, loc. cit. above, fn. 140, pp. 28–30 or original works e.g. Borisov, S. "Suverennoe pravo gosudarstv uchastnikov mnogostoronnih dogovorov zaiavlat ogovorki." *Sovietskoe Gosudarstvo I Pravo 1952*, pp. 64–69.

233 One of the best formulations of the unanimity rule can be found in the report submitted by the Committee of Experts to the Council of the League of Nations and approved in the above mentioned resolution adopted on 17 June 1927 (fn. 228): "In order that any reservation whatever may be validly made in regard to a clause of a treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void." LoN OJ, 1927, p. 881.

234 It should be noted that this system has been developed over several years. The year 1927 when the International Commission of American Jurists approved a "Draft on Treaties" can be seen as a starting point. More detail about the historical development of the Pan American system of reservations see e.g. in Ruda, loc. cit. above, fn. 227, pp. 115–133.

> *3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.*[235]

The principal aim of the unanimity rule has been described as protection of the absolute integrity of a treaty.[236] The Pan American system sacrifices integrity of a treaty in favor of the promotion of interaction between States, in favor of universality of participation. In both cases the sovereign will of States forms the basis of the system.

All other attempts to develop a new or different regime of reservations are no more than a combination, in one manner or another, of these two systems. The only really new element which is also contained in the modern regime of reservations is the object and purpose test. This object and purpose test appeared for the first time in the advisory opinion of the ICJ on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[237] delivered on May 28th, 1951.[238] In its request for an advisory opinion, the General Assembly of the UN formulated the following questions:

> *I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?*
>
> *II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:*
>
> *(a) The parties which object to the reservation?*
> *(b) Those which accept it?*
>
> *III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:*
>
> *(a) By a signatory which has not yet ratified?*
> *(b) By a State entitled to sign or accede but which has not yet done so?*[239]

All three questions were expressly limited to the Convention on the Prevention and Punishment of the Crime of Genocide.[240] The answer given by the ICJ to the last question is not relevant to the present research and will not therefore be addressed further.

After having observed that Question I does not refer to the possibility of making reservations which according to the ICJ is implicitly admitted,[241] it turns to the core of the question, namely, the possibility for a State to maintain a reservation objected to by some parties to the Convention while remaining a party to the Convention. The ICJ

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235 ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Pleadings, Oral arguments, Documents, 1951, p. 17.

236 This thesis has been questioned to a certain extent by some scholars. See e.g. Horn, loc. cit. above, fn. 227, pp. 24–25.

237 The Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948; 78 UNTS 277.

238 ICJ Reports, 1951, pp. 15–69.

239 Id., p. 16.

240 Id., p. 16 and 20.

241 Id., pp. 21–23.

particularly emphasized the special character of the Convention which was intended to be universal in scope and its purely humanitarian object.[242] The particular object and purpose of the Convention imply that "it was the intention of the General Assembly, and of the States which adopted it that as many States as possible should participate".[243] The ICJ therefore affirmed that the regime of reservations applicable to this type of treaty allows for very wide freedom in making reservations.

The freedom in making reservations is, however, limited by the criterion of the compatibility of a reservation with the object and purpose of the treaty.[244] The ICJ concludes, therefore, that no absolute answer can be given to Question I[245] and proceeds to the examination of the second question. After having recalled that no State can be bound by a reservation to which it has not consented, the ICJ states that it will be up to each individual State to decide, when objecting, whether the reserving State is, or is not, a party to the Convention.[246] The ICJ noted, in this connection, the following:

> *It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and its application.*[247]

Finally, the ICJ mentioned that a State can object to a reservation without claiming that the reservation is incompatible with the object and purpose of the Convention. In this case, the reserving and the objecting States might come to an understanding that "the Convention will enter into force between them, except for the clauses affected by the reservation."[248]

By introducing the criterion of compatibility with the object and purpose of a treaty the judges attempted to protect the integrity of a treaty without affecting significantly the universality of participation promoted by the Pan American system. Moreover, the object and purpose test introduces an objective element into the regime of reservations and places emphasis on the interests of the international community as a whole, on the common interests of all States as a group, and not only as individual States.

The regime of reservations codified by the Vienna Convention mostly adopts the solution proposed by the ICJ, in its advisory opinion, and is therefore based on the

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242 Id., p. 23. In this connection the ICJ emphasized: "In such a convention the contracting States do not have any interest on their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention."

243 Id., p. 24.

244 Id. "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them."

245 Id., p. 26. "The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case."

246 Id.

247 Id., p. 27.

248 Id.

Pan American system restricted by the compatibility criterion. Some traces of the unanimity rule can however be found as well.[249]

B. *The Vienna Convention Regime*

1. Permissibility of Reservations

a) *General Observations*

According to the Vienna Convention regime any reservation shall fulfill two conditions in order to become binding or opposable.[250] Firstly, it must be admissible in principle. Secondly, it must be accepted by another party. The first condition, namely the admissibility of a reservation, which is more often called the permissibility of a reservation, is addressed in article 19 of the Vienna Convention:

> *A State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless:*
>
> *(a) the reservation is prohibited by the treaty;*
> *(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
> *(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.*

Should, for example, a State formulate a reservation which is prohibited by a treaty to which it relates, no question of the acceptance of such a reservation arises. The test of permissibility is, therefore, a preliminary test which in the case of a positive result either renders the reservation valid and opposable (if the treaty authorizes specified reservations: art. 19 (b)) or gives other States parties a right either to accept the reservation or to object to it.

This interpretation of article 19 is supported by the preparatory work of the Vienna Convention, where the drafters discussed the use of different terms such as "make", "propose" or "formulate" reservations. The word "formulate" was used in the final text of article 19 because of its neutrality, in that it does not presuppose that a reservation becomes valid and effective from the moment of its communication, as is the case with the term "make". Neither does it exclude cases of reservations specifically authorized by a treaty which become operative in advance, as is the case when the word "propose" is used.[251]

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249 The unanimity rule is applicable in the case of restricted multilateral treaties: article 20, paragraph 2 of the Vienna Convention.

250 It means that the reservation can be invoked as legally binding by the reserving State vis-à-vis all accepting States and vice versa. More about the effects of reservations and acceptance see below II.B.2.

251 See, for example, the analysis of article 19 and of the terminology used therein in YbILC, 1962, Vol. II, pp. 62, 65 and Vol. I, p. 149; 1965, vol. II, p. 52; FITUMAURICE, Gerald G. "The Law and Procedure of the International Court of Justice, 1951–1954: Treaty Interpretation and Other Treaty Points." *XXXIII BYbIL 1957*, pp. 274–275; DETTER, Ingrid. *Essays on the Law of Treaties*. Stockholm, London: P.A. Norstedt & Söners förlag, Sweet & Maxwell,1967,

b) *Compatibility Test*

(1) Doctrinal Debate

The first two paragraphs of article 19 can be applied without any difficulty.[252] The application of the compatibility test is however very problematic. One of the main difficulties relates to the fact that the Vienna Convention establishes no general procedure for the authoritative determination of the nature of reservations.[253] Despite numerous proposals and initiatives during the preparatory stage of the Vienna Convention, this question has been left open.[254] From this ambiguity of the text of the Vienna Convention, a doctrinal debate between the so-called "opposability" and "permissibility" schools arose. In very general terms it can be summarized as follows. According to the "opposability school" the validity of reservations depends solely on the acceptance of reservations by other States parties.[255] More precisely it means that

> *The validity of reservations depends, under the Convention's system, on whether the reservation is or is not accepted by another State, not on the fulfillment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty.*

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pp. 50–51; Imbert, Pierre-Henri. *Les réserves aux traités multilatéraux: Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour Internationale de Justice le 28 mai 1951*. Paris: Pédone, 1979, pp. 83–86; Ruda, loc. cit. above, fn. 227, pp. 179–183. Alain Pellet also mentions this problem in his Fifth Report without going into much detail: "The use of the verb formulate rather than make in the above provisions is the result of a deliberate choice: the authors of the Convention wanted to make it clear that a reservation is not sufficient in itself and produces effects (hence is "made") only if it is either accepted or expressly authorized by the treaty. This choice does not, of course, solve every problem (…)" A/CN.4/508/Add.3, paras. 228–229, p. 6; finally he expressly adheres to this vision in his Tenth Report: A/CN.4/558/Add.2, paras. 201–206, pp. 25–27.

252 It should just be mentioned in this connection that article 19 (b) of the Vienna Convention relates to a preclusive authorization of reservations, in other words, to treaties permitting reservations only of certain kind or to certain provisions, whereby reservations of another kind or to other provisions are prohibited: See the insertion of the word "only" in the Draft Articles at the Vienna Conference (A/CONF.39/C.1./L.136). See also UN Doc. A/16309/Rev.1, YbILC, 1966, Vol. II, p. 207. Some difficulties might also arise in relation to the application of these at first glance simple rules. They are, however, less important than those related to article 19 (c), and to deal with them would go beyond the scope of this research. For more detail see, for example: Greig DW, Robert Garran. "Reservations: Equity as a Balancing Factor?" *16 Australian Yearbook of International Law 1995*, pp. 58, 64, and the Tenth Report, first part of which discusses definition and exact understanding of article 19 (a) and (b): A/CN.4/558.

253 Other difficulties arising in connection with incompatible reservations will be analyzed later. See, in particular, fn. 268 and the accompanying text.

254 YbILC, 1962, Vol. I, pp. 162–165; 1965, Vol. II, p. 52; A/CONF.39/C.1/L.133/rev.1.

255 Combacau, Jean. *Le droit des traits*. P.U.F., "Que sais-je" N° 2613, Paris, 1991, p. 60; Gaja, Giorgio. "Unruly Treaty Reservations." In: *International Law at the Time of Codification. Essays in honor of Roberto Ago*. Milano: Dott.A. Guiffrè Editore, 1987, pp. 313–320; Reuter, Paul. *Introduction to the Law of Treaties*. Publication of the Graduate Institute of International Studies, Geneva, London, New York: Kegan Paul International, 1995, second rev. edition, p. 82; Imbert, Les reserves, loc. cit. above, fn. 251, pp. 134–137; Ruda, loc. cit. above, fn. 227, p. 190; Zemanek, Karl. "Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties." In: Makarczyk,

> *These simple conclusions justify our regarding* ***Article 19, subparagraph (c), as a mere doctrinal assertion,*** *which may serve as a basis for guidance to States regarding acceptance of reservations,* ***but no more than that****.*[256]

In contrast, the "permissibility school" defends the thesis that the permissibility of reservations can be determined objectively, independently of reactions of other States parties.[257] In fact, the difference between these two schools is already evident in the use of terminology. Supporters of the "opposability school" use, very frequently, the expression "validity of reservation". Those who represent the "permissibility school" use either the term "permissibility" or "opposability" in relation to reservations. They avoid intentionally the expression "validity of reservation" which confuses these two notions.[258] According to the "permissibility school"

> *The issue of "permissibility" is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservation acceptable or not. (...) The issue of "opposability" is the secondary issue and pre-supposes that the reservation is permissible. Whether a Party chooses to accept the reservation, (...) is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review.*[259]

Without pretending to resolve this very complicated doctrinal debate, I would like just to emphasize some, in my view, very important aspects. First of all, the "permissibility school's" theory seems to correspond better to the interpretation based on the travaux préparatoires, given above, to article 19 of the Vienna Convention.[260] An additional argument in favor of the thesis forwarded by the "permissibility school" is the interpretation of article 19 and its relationship to articles 20 and 21 in the light of the principle of effectiveness. The provision of article 19 (c) has, in fact, no relevance if one admits that this provision is no more than "a doctrinal assertion".[261] Another argument is based on the interpretation of the phrase "a reservation established with regard

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Jerzy, ed. *Essays in International Law in Honor of Judge Manfred Lachs*. The Hague, Boston, Lancaster: Martinus Nijhoff Publishers, 1984, pp. 331–333.

256 RUDA, loc. cit. above, fn. 227, p. 190. Emphasis added.

257 One of the main representatives of the permissibility school is Sir Derek Bowett: BOWETT, Derek, W. "Reservations to Non-Restricted Multilateral Treaties." *BYbIL 1976–1977*, pp. 67–92. See also HORN, loc. cit. above, fn. 227, in particular pp. 111–122. Overwhelming majority of human rights activists also supports this school. See, for example, SIMMA, Bruno. "Reservations to Human Rights Treaties: Some Recent Developments." In: Hafner, G. Loibl, G., Rest, A., Sucharipa-Behrmann, L., Zemanek, K., eds. *Liber Amicorum Professor Seidl-Hohenveldern – in honor of his 80th birthday*. Leiden: Kluwer Law International, 1998, p. 663.

258 See, for example, critics of the term "validity" by representatives of the United Kingdom: UN Doc A/C.6/48/SR.24, para. 42.

259 BOWETT, loc. cit. above, fn. 257, p. 88.

260 See above II.B.1.a).

261 GIEGERICH, Thomas. "Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien." *55 ZaöRV 1995*, pp. 725–726; REDGWELL, Catherine J. "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties." *64 BYbIL 199*3, p. 261.

to another party in accordance with articles 19, 20 and 23" contained in article 21 of the Vienna Convention. This phrase implies that rules formulated in article 21 apply only to reservations which comply with the requirements of article 19: to permissible reservations. A prohibited reservation formulated contrary to article 19, is not established "in accordance with" that article and article 21 will not apply to such a reservation. Incompatible reservations are, therefore, treated separately and cannot be accepted.[262]

In conclusion, I will just make some general observations. Of course, the solution chosen by the "opposability school" is more "appropriate" in practical terms. In the absence of any procedure for the establishment of the compatibility of reservations, States remain the ultimate judges. However, in its attempt to simplify and resolve some problems in practical terms the "opposability school" ignores and overlooks some significant features of the regime.

The theory developed by the "permissibility school" shows a number of deficiencies in practical terms, but it admits them. They do not destroy the logic and structure of the regime. Moreover, surprisingly enough, instead of being content with the solution of leaving everything to their discretion States, in practice, develop attitudes which confirm the thesis proposed by the "permissibility school" and thus provide answers to some unresolved questions. Some examples will be given below when the practice developed by States parties to the CEDAW is analyzed. Here it shall be emphasized that the main difficulty inherent in the theory developed by the "permissibility school" relates to the question of the procedure for determining the compatibility of reservations.

(2) Procedure for the Determination of the Compatibility of Reservations

(a) *General Observations.* As already mentioned above, the Vienna Convention prescribes no particular procedure for the determination of the compatibility of reservations. Based on this gap the supporters of the "opposability school" developed an interpretation according to which the drafters of the Vienna Convention preferred to leave the decision about the compatibility of reservations to the discretion of States parties. A detailed analysis of travaux préparatoires reveals, however, another reality. In fact various proposals as to the appropriate procedure for the determination of the compatibility were made during the drafting process, including those which favored the determination by individual States, as well as those which pleaded for collective or objective determination.[263] Finally, none of these proposals was adopted and the question has been deliberately left open. In the absence of a regulation, the issue of compatibility would in most cases be decided by States. The solution proposed by

262 Higgins, Rosalyn, Introduction to Gardner, J.P., ed. *Human Rights as General Norms and a State's Rights to Opt Out*: *Reservations and Objections to Human Rights Conventions*. London: British Institute of International and Comparative Law, 1997, p. xx; Redgwell, Universality or Integrity, loc. cit. above, fn. 261, p. 261. Same view has been expressed by James Crawford during the discussion of the Second Report of Alain Pellet in the ILC: YbILC, 1997, Vol. I, para. 81, p. 188, and finally Tenth Report A/CN.4/558/Add.2, para.203, p. 26.

263 YbILC, 1962, Vol. I, pp. 162–163; UN Doc. A/CONF.39/11, p. 128, 133.

the "opposability school" will therefore be applied in practice in most cases. The absence of an express regulation does not, however, mean the support of subjective determination by individual States[264] and permits the development of other procedures for the determination of compatibility, which could lead to the establishment of a customary rule in relation to multilateral treaties in general, or a particular group of treaties. As a next step, some of the most important tendencies with regard to the procedural aspect of the determination of compatibility in international law in general, are presented.

Some treaties prescribe themselves a general procedure for the determination of the compatibility of reservations. The best example, from the area of human rights treaties, is the International Convention on the Elimination of All Forms of Racial Discrimination.[265] Article 20 (2) of this Convention states:

> *A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.*

If a treaty provides for an obligatory dispute settlement procedure in case of disputes relating to the application or interpretation of the treaty, an objective determination of the compatibility of a reservation should also be possible. Any dispute concerning the nature of a reservation, being connected to the interpretation and application of a treaty, can be submitted to the ICJ or an arbitration tribunal, according to the terms of the dispute settlement clause of the treaty.

Unfortunately, the majority of multilateral treaties leave the question of procedure for the determination of compatibility of reservations open, neither do they provide for an obligatory dispute settlement procedure. In international law in general, and in human rights law in particular, a relatively widespread practice exists to include some dispute settlement provisions in the text of a treaty. Reservations to these provisions are, however, permitted. Any State can therefore exclude the application of these provisions. As a consequence only disputes between States which enter no reservations to dispute settlement clause can be submitted to the organ referred to in the clause.[266]

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264 Cameron, Iain & Horn, Frank. "Reservations to the European Convention on Human Rights: The Belilos Case." *33 German Yearbook of International Law 1990*, p. 89.

265 Adopted and opened for signature and ratification by General Assembly resolution 2106 A (XX) of 21 December 1965, entered into force on 4 January 1969. 660 UNTS 195.

266 An interesting new argument is developing in the modern international law. This argument consists in attribution to dispute settlement clauses of certain treaties of such a central role that a reservation to them should be regarded as incompatible with the object and purpose of a treaty. This would obviously be the case if the very object of a treaty is to establish a dispute settlement mechanism (see e.g. Tenth Report A/CN.4/558/Add.1, para. 99, p. 19). Going beyond that, the argument is formulated according to which a dispute settlement or supervisory mechanism is required in order to evaluate independently States' compliance with its fundamental obligations. This argument is particularly well formulated in the Joint Separate Opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma to the Judgement in the Armed Activities on the Territory of Congo

Thus, in the majority of cases, the objective criterion of compatibility can be applied only subjectively,[267] namely by leaving the determination of compatibility to the discretion of individual States. As a consequence many questions remain unresolved. Should, for example, only one State object to a reservation on the ground of incompatibility does it mean that the reservation is qualified as incompatible? If the answer is in the negative, how many objections on the ground of incompatibility are necessary in order to qualify the reservation as incompatible? Should the objections refer at all to the incompatibility of a reservation?[268] Obviously, since compatibility is an objective criterion, it is impossible to treat the same reservation as incompatible vis-à-vis some States and as compatible vis-à-vis others. But how should clearly incompatible reservations which were not objected to by other States parties be dealt with?

These are only some questions left open by the drafters of the Vienna Convention. An attempt to find some answers is made later in this study, in particular in the light of the practice developed by the States parties to the CEDAW in the context of reservations based on Islam.

(b) *Competence of Treaty-Monitoring Bodies.* Another set of questions arises in relation to those treaties which establish a treaty-monitoring body. Being vested, as a rule, with general supervisory functions with regard to the implementation of a treaty by which they are established, they do not have express authorization to pronounce on the compatibility of reservations. What is the role of this type of body in the context of the determination of the compatibility of reservations?

As a first step, the distinction between treaty-monitoring bodies with mandatory powers and treaty-monitoring bodies without mandatory powers shall be made. Decisions taken by the former are obligatory for States parties, whereas the latter can

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(New Application: 2002) case. Taking into account the nature of the crime of genocide and the fact that according to the wording of article IX of the Genocide Convention, the ICJ should have the power to resolve inter-State disputes not only about the interpretation of the Genocide Convention, but also about fulfillment by States of their obligations, and thus, ultimately, about States' responsibility for genocide, the judges affirmed the following: "It is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration." para. 29, p. 6. That this argument constitutes just a development toward an eventual future establishment of a rule is visible already from the quotation.

267 So Ago in YbILC, 1965, Vol. I, p. 161.

268 Alain Pellet raises similar and some further questions concerning impermissible reservations unresolved by the Vienna Convention in his First Report: UN Doc. A/CN.4/470, para. 112, p. 52 and also para. 124, pp. 57–58. Most important of these questions are the following: What is the precise meaning of the expressions "compatibility with the object and purpose of the treaty"? Is an impermissible reservation null and void in itself and does its nullity give rise (or not give rise) to the nullity of the expression of consent by the State to be bound? Is an impermissible reservation null and void regardless of the objections that may be made? Can the other contracting States accept an impermissible reservation? What are the effects of such acceptance? If due note has been taken (by whom?) of the impermissibility of a reservation, can the reserving State replace it with another reservation or withdraw from the treaty?

just make recommendations. This question of the legal nature of the decisions taken or determinations made by a treaty-monitoring body shall not be confused with another question, whether a particular treaty-monitoring body can evaluate the compatibility of reservations. It is illogical to argue that a treaty-monitoring body cannot pronounce on the compatibility of reservations because it lacks the authority to render binding interpretations or judgments.[269] "That is to confuse a competence to do something with the binding effect of that which is done."[270]

Furthermore, it is important to keep in mind that neither the ICJ, in its advisory opinion in 1951, nor the drafters of the Vienna Convention ever had to deal with the question of the competence of treaty-monitoring bodies because, at the time, this phenomenon simply did not exist.[271] It is, therefore, impossible to draw any conclusions as to the powers of treaty-monitoring bodies in relation to the determination of compatibility of reservations only on the basis of analysis of the above-mentioned advisory opinion of the ICJ, or travaux préparatoires of the Vienna Convention. Primary consideration shall be given to the nature of the treaty-monitoring bodies themselves.

Since the phenomenon of treaty-monitoring bodies is linked, to a very great extent, to human rights treaties, the role of these bodies in the determination of the compatibility of reservations will be considered more closely in the section dealing with reservations to human rights treaties. In very general terms, as a preliminary conclusion, it can be said that although not granted expressly the competence to determine the extent and therefore also the compatibility of reservations is inherent in the functions of these bodies. A body vested with the supervision of the implementation of a treaty shall verify the extent of the obligations of States under a treaty and therefore interpret possible reservations, including the determination of their compatibility.[272]

(3) Consequences of Determination of Incompatibility

Once the incompatibility of a reservation is established the question of the effects of such a reservation arises. Since the Vienna Convention provides no unambiguous

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269 Such was, for example, the reasoning of the United States and of France in their observations on the General Comment N° 24(52) adopted by the HRC, a treaty-monitoring body established in accordance with article 28 of the ICCPR, on 2 November 1994. The observations of the United States are contained in the UN Doc. A/50/40 (see part 1 in particular); the observations of France are contained in the UN Doc. A/51/40 (see para. 7 in particular). For the text of the General Comment see UN Doc CCPR/C/21/Rev.1/Add.6.

270 HIGGINS, Introduction, loc. cit. above, fn. 262, p. xxii.

271 See, in this connection, comments made by Rosalyn Higgins in her Introduction, pp. xviii-xxi; Alain Pellet agreed with her arguments. See his Second Report: UN Doc. A/CN.4/477/Add.1, para. 178, p. 55. See also similar observations by SHELTON, Dinah. "State Practice on Reservations to Human Rights Treaties." *Canadian Yearbook of Human Rights 1983*, p. 229.

272 See similar arguments advanced by Alain Pellet in his Second Report UN Doc. A/CN.4/477/add. 1, paras. 206–208, pp. 68–69. The ICJ indirectly confirmed this when in the case of Armed Activities on the Territory of the Congo (New Application: 2002) it expressed its assessment of the compatibility of Rwanda's reservation to the dispute settlement provision of the Genocide Convention (article IX): *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002*, I.C.J. Reports 2002, p. 246, para. 72).

guidance on the subject, it is very difficult to find a definite answer.[273] The problem of the effects of incompatible reservations is closely linked to the above-mentioned debate between the "permissibility" and "opposability" schools. Three principal solutions have been envisaged by the doctrine:[274]

- Firstly, an incompatible reservation becomes null and void and being an indispensable condition of the State's participation in a treaty annuls the State's consent to be bound by the treaty. The State is no more a party to the treaty.
- Under the second scenario, the State's will to participate in the treaty prevails over its reservation. Only the reservation becomes therefore null and void and the State remains a party to the treaty as if no reservations had been made.
- Finally, the possibility exists to treat incompatible reservations, as far as their effects are concerned, in the same way as permissible reservations. The effects of incompatible reservations will be determined in this case according to the rules codified by the Vienna Convention.

The first two solutions have been proposed by the supporters of the "permissibility school" who reject the possibility that an incompatible reservation can have any legal effects. However, since treaties are based on the consent of States, it depends on the prevailing will of the State which of the two solutions will be chosen in each particular case.[275] The third solution is defended by the "opposability school".[276] Before taking the position of one or the other side it is necessary to analyze the relevant provisions of the Vienna Convention.[277]

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273 See more about unresolved questions and difficulties above fn. 268 and accompanying text.

274 See e.g. Nowak, Manfred. "The Activities of the UN Human Rights Committee: Developments From 1 August 1992 to 31 July 1995." *16 HRLJ 1995*, p. 382; Cameron & Horn, loc. cit. above, fn. 264, pp. 115–116. The fourth possibility, which has almost never been invoked in the literature, but has been developed in the States practice, is the modification of reservations. This procedure is discussed in more detail below II.B.3.

275 A very difficult question arises in this connection: How should the prevailing will of a State be determined? For different solutions proposed in literature see, in particular, Bowett, loc. cit. above, fn. 257, p. 89, but also Nowak, loc. cit. above, fn. 274, p. 382; Cameron & Horn, loc. cit. above, fn. 264, p. 119, Horn, loc. cit. above, fn. 227, pp. 119–120. It may also be asked whether it is at all necessary to enquire about this will of the reserving State at the time when the State becomes a party to a treaty and formulates its reservation, as the will of the State can change over time and a State with an initially prevailing will not to be a party, can become willing to assume its treaty obligations. This question relates, however, to the issue of the dynamic nature of the reservations regime and will be addressed later, when the dynamism of the reservations regime will be discussed.

276 Kühner, Rolf. "Vorbehalte und Auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen "auslegenden Erklärung" zu Art. 6 Abs. 3 lit. e MRK." *42 ZaöRV 1982*, pp. 82–87; Kälin, Walter. "Die Vorbehalte der Türkei zu ihrer Erklärung gem. Art. 25 EMRK." *14 EuGRZ 1987*, p. 429; Tomuschat, Christian. "Turkey's Declaration under Article 25 of the European Convention on Human Rights." In: Nowak, M., Steurer, D., Tretter, H., eds. *Fortschritte im Bewusstsein der Grind- und Menschenrechte: Festschrift für F. Ermakora*. Kehl am Rhein, Strassbourg, Arlington: N.P. Engel Verlag, 1988, pp. 132–133.

277 Alain Pellet in his First Report made the following very interesting observation concerning the relationship between opinions adopted by the "permissibility" and the "opposability"

2. Reactions of States to Reservations and their Effects

If a reservation has passed a test established by article 19 of the Vienna Convention, other States parties have a choice between acceptance of the reservation and an objection to it. Whereby according to the regime incorporated in the Vienna Convention

> *a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.*[278]

The main problem arising, in practice, in connection with this time-limit rule, is that twelve months is not always a sufficient period for States to evaluate the nature of a reservation and to express their opinion in this regard. Moreover, sometimes one even has an impression that States do not regard this rule as imperative but as a mere indication which, depending on circumstances, can be disregarded.[279]

The acceptance of a reservation renders this reservation opposable vis-à-vis an accepting State. As formulated in article 21, paragraph 1 of the Vienna Convention, an accepted reservation

> *(a) modifies for the reserving State in its relations with that other party (accepting State) the provisions of the treaty to which the reservation related to the extent of the reservation, and*
> *(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.*

This provision is called the rule of reciprocity of reservations.[280] The consent of States forms the basis of any treaty relations. It is therefore unacceptable that one State by its unilateral action would change the terms of the treaty. If one State, through its reservation, gets a privileged position allowing it not to comply with an obligation, another State which accepts such a situation shall also have the same benefits in relation to the reserving State. The reservation does not, however, modify treaty relations for other States parties inter se.[281] The function of this rule of reciprocity is to re-establish the equilibrium of the treaty which has been broken by a reservation. Thus, the principle of consent is respected allowing at the same time a wider participation in the treaty,

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schools: "In all cases, however, the will of the contracting States must prevail, but, depending on the standpoint, the emphasis will be placed on the initial will of the negotiators or on the subsequent will of the States making reservations or objections". UN Doc. A/CN.4/470, para. 105, p. 50.

278 Article 20, paragraph 5 of the Vienna Convention.

279 See the analysis of practice and the interpretation given to article 20, paragraph 5 by Clark, Belinda. "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women." *85 AJIL 1991*, pp. 312–314; Greig DW, loc. cit. above, fn. 252, pp. 118–135; see also Horn, loc. cit. above, fn. 227, pp. 206–209; Swaine, Edward T. "Reserving." 31 *Yale Journal of International Law* 2006, p. 319. This opinion did not receive support from the Special Rapporteur of the ILC. See Eleventh Report: UN Doc. A/CN.4/574, para. 144, p. 52.

280 Ruda, loc. cit. above, fn. 227, p. 196.

281 Article 21, paragraph 2 of the Vienna Convention.

although the terms of the treaty as applicable between the reserving and the accepting States are not the same as those which apply between other States parties.

However, if a State disagrees with a reservation, it shall be able to protect itself from this unilateral modification of a treaty. In this case the Vienna Convention opens a possibility for States to object to reservations. Obviously, the effects of objections shall be different from those of acceptance. According to the provisions of the Vienna Convention on the effects of objections, the objecting State has the right to oppose the entry into force of the treaty between itself and the reserving State.[282] However, if the objecting State did not express such an intention explicitly, its objection does not preclude the entry into force of the treaty as between the reserving and objecting States.[283] Treaty relations between these two States are modified according to the following rule formulated in the Vienna Convention: "the provisions to which the reservation relates do not apply as between the two States to the extent of reservation."[284] A question that has been discussed very actively in literature is whether, and to what extent, the situation established in accordance with the rules of the Vienna Convention between the reserving and the accepting States is different from that between the reserving and the objecting States.[285] This difference might be almost invisible in the case of the reservation aimed to exclude the application of certain provisions ("excluding reservations") in contrast to "modifying reservations".[286] However, as pointed out by several authors, the liberty of action which in practice might indeed be the same vis-à-vis the accepting as well as the objecting State, can be disputed by the objecting but not by the accepting State.[287] Thus, an objection, although often leaving the objecting State in a disadvantaged position in practical terms, allows this State to preserve its legal position in the case of disputes, in other words the objecting State reserves its right to complaint. Moreover, in certain circumstances objections can reinforce the norm incorporated in the reserved provision.

Now, when the effects of objections to reservations according to rules codified in the Vienna Convention are more or less clear, we can make an attempt to answer the following question: is it logical to apply the same rules to permissible as well

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282 See article 20, paragraph 4 (b) and article 21, paragraph 3 of the Vienna Convention.

283 Article 20, paragraph 4 (b) of the Vienna Convention.

284 Article 21, paragraph 3 of the Vienna Convention.

285 Cassese, Antonio. "A New Reservations Clause (Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)." In: *Recueil d'etudes de droit international en hommage à Paul Guggenheim*, Genève: Institut Universitaire de Hautes Etudes Internationales, 1968, pp. 280–281; Clark, loc. cit. above, fn. 279, pp. 307–310; Coccia, Massimo. "Reservations to Multilateral Treaties on Human Rights." *15 California Western International Law Journal 1985*, pp. 34–38; Cook, Rebecca J. "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women." *30 VJIL 1990*, pp. 653, 656–660; Ruda, loc. cit. above, fn. 227, p.199–200; Sinclair, Ian. *The Vienna Convention on the Law of Treaties*. Second edition, Manchester: Manchester University Press, 1984, pp. 76–77

286 Ruda, loc. cit. above, fn. 227, p. 199; Zoller, Elisabeth "L'affaire de la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande Bretagne et d'Irlande du Nord." *23 AFDI 1977*, p. 308.

287 Coccia, loc. cit. above, fn. 285, pp. 37–38; Cook, loc. cit. above, fn. 285, pp. 658–659; Horn, loc. cit. above, fn. 227, p. 182.

as to impermissible, including incompatible, reservations?[288] In his First Report on Reservations to Treaties the Special Rapporteur of the ILC made the following observation:

> *It may, however, be asked whether these rules [rules formulated in the Vienna Convention] can and should be applied when the reservation is impermissible (...) In other words, can the objection have the paradoxical result of "cloaking" the impermissibility and, ultimately – apart only from the provisions excluded by the reservation – have the same effect as acceptance (...)?*[289]

Although the Vienna Convention makes no explicit distinction between these two cases, it seems that, in the light of the interpretation given to article 19 above,[290] the rules formulated in articles 20, paragraph 4 (b) and 21, paragraph 3 are applicable only to objections to permissible reservations.[291] In this connection the following statement regarding article 19 paragraph (c) in the ILC commentary shall be recalled:

> *The admissibility or otherwise of reservation under paragraph (c), on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of Article 17 (now Article 20) regarding acceptance of and objection to reservations.*[292]

Many authors are of the opinion that this passage supports the view according to which the decision about the compatibility of reservations shall be left to the discretion of States, and that the same rules are applicable to objections to compatible as well as to incompatible reservations.[293] Nevertheless, it was also suggested that this phrase indicates that some different rules shall apply to incompatible reservations.[294]

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288 See First Report of Alain Pellet: UN Doc. A/CN.4/470, paras. 118–120, pp. 55–56.

289 Id., para. 120, p. 56.

290 See above II.B.1.b).

291 This view has been supported e.g. by Bowett, loc. cit. above, fn. 257, p. 78 in particular; Cameron & Horn, loc. cit. above, fn. 264, p. 89; Nowak, loc. cit. above, fn. 274, p. 382; Schabas, William A. "Reservations to the Convention on the Rights of the Child." *18 HRQ 1996*, p. 481.

292 YbILC 1966, Vol. II, p. 207.

293 See e.g. Ruda, loc. cit. above, fn. 227, p. 183.

294 Tomuschat, Christian. "Admissibility and Legal Effects of Reservations to Multilateral Treaties. Comments on Arts. 16 and 17 of the ILC's 1966 Draft Articles on the Law of Treaties." *27 ZaöRV 1967*, p. 477. After having affirmed that this phrase in the commentary means that some different rules shall apply to incompatible reservations, he analyses the wording of the Vienna Convention itself. Having found no support of this interpretation of the commentary in the text of the Vienna Convention itself, he finally comes to the conclusion that the rules concerning acceptance and objections to reservation and their effects, in particular article 17, paragraph 4 (now article 20), are also applicable to incompatible reservations. See also Redgwell, Universality or Integrity, loc. cit. above, fn. 261, pp. 255–260. She shows that this ambiguous phrase in the ILC commentary gave rise to discussion during the Diplomatic Conference as to whether article 17, paragraph 4 (now article 20) shall be applicable to incompatible reservations. Despite numerous proposals from States to clarify this question of the relationship between article 19, paragraph (c) and article 20, paragraph 4, the Conference failed to adopt any solution. The question has, therefore, been left open.

Unfortunately, the text of subsequent articles is not sufficiently clear. However, all ambiguities and gaps in the Vienna Convention shall not be interpreted as implying more than a lack of consensus among States at the time of adoption of the Convention. It may well be the case that during the time elapsed since the adoption of the Vienna Convention, practice developed a particular interpretation, filling these gaps and removing ambiguities.

3. Possibility of Modification of Reservations

As already mentioned above, States practice developed this possibility despite the fact that it is not mentioned in the Vienna Convention at all. This procedure was developed in relation to reservations judged as incompatible. Modification in this context means reformulation of a reservation in such a manner as to make it compatible with the object and purpose of the treaty. For the first time the question of the possibility to modify reservations has been actively discussed in the literature, although to a very limited extent, in relation to the decision of the EuCtHR in the Belilos case.[295]

The possibility of modification of reservations is also mentioned without being analyzed by Alain Pellet in his First[296] and Fifth[297] Reports. In the Fifth Report the modification of reservations is compared with the partial withdrawal of reservations: "(…) The modification of reservations can be means of partially withdrawing them, something which remains highly problematic and should therefore be studied at the same time as withdrawal *stricto sensu*." Alain Pellet mentions the modification of reservations as one of the possible reactions of a State on the determination of incompatibility of its reservation during the discussion of his Second Report in the ILC:

> *Fourthly, another possibility which seemed more satisfactory and justifiable from the legal point of view, despite some difficulties, was that the reserving State could "regularize" its situation by replacing its impermissible reservation by a more limited, permissible one.*[298]

The procedure of modification of reservations is discussed in detail in the Seventh report on reservations to treaties presented by Alain Pellet in 2002.[299] This issue is discussed side by side with the withdrawal of reservations as suggested previously by

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295 See e. g. Cameron & Horn, loc. cit. above, fn. 264, pp. 118–119; Bourguignon, Henry J. "The Belilos Case: New Light on Reservations to Multilateral Treaties." *29 Virginia Journal of International Law 1989*, p. 383, who describes this idea as a "bizarre novelty in international law". See also some comments on the possibility to modify reservations made by Greig DW, loc. cit. above, fn. 252, pp. 116–118; 157–159. It should be noted, however, that certain references to the possibility of modification of reservations were also made in literature previously. See e. g. Imbert, Les reserves, loc. cit. above, fn. 251, p. 293. Few treaties did also mention expressly the possibility to modify reservations or partially withdraw them. See references in the Seventh Report by Alain Pellet: UN Doc. A/CN.4/526/Add.3, paras. 188–192, pp. 2–4.

296 UN Doc. A/CN.4/470, para. 124, p. 57.

297 UN Doc. A/CN.4/508/Add.3, para. 224, p. 5.

298 YbILC, 1997, Vol. I, para. 39, p. 194.

299 UN Doc. A/CN.4/526/Add.3.

the Special Rapporteur. In this report two kinds of modification of reservations are distinguished. Firstly, if the modification is intended to lessen the scope of the reservation, in which case nothing prevents the modification of the reservation, it shall be treated as a partial withdrawal.[300] Secondly, if the effect of the modification is to strengthen an existing reservation it is comparable to the late formulation of a reservation and should therefore not be permitted without the consent of States parties, except in cases where a treaty itself allows such a procedure.[301]

As far as the modification which amounts to a partial withdrawal is concerned, the Special Rapporteur suggests that the same procedure should be applied to it as to the withdrawal of reservations. In particular, he criticizes the practice adopted by the Secretary-General in his function as a depositary of treaties, whereby when receiving a modification of a reservation he communicates to other States parties to a treaty the following message:

> *in keeping with the (...) practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objections on the part of any of the Contracting Parties, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of notification.*

According to the Special Rapporteur such a communication is unnecessary if it is clear that the proposed modification is no more than a partial withdrawal of a reservation:

> *To require a one-year time period before the limitation of a reservation can produce effects, subjecting it to the risk of a "veto" by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty's integrity should be preserved.*[302]

Finally, as far as reactions of other States to a modification are concerned, the Report states that it is unlikely that States would object to a modification which reduces the scope of the reservation:

> *If they have adapted to the initial reservation, it is difficult to see how they could object to the new one, the effects of which, in theory, have been reduced. Just as a State cannot object to a pure and simple withdrawal, it cannot object to a partial withdrawal.*[303]

Although I agree with these general premises, the following should be noted. Firstly, it is not always clear whether and how far a proposed modification reduces the scope of the initial reservation. It is therefore desirable to make any modification the effects of which are not obvious enough subject to the above-described procedure used by the Secretary-General. Secondly, what is more important is the issue of reactions of other States to the modification. In my opinion, even in the case of an obvious partial withdrawal of reservations it is desirable to give other States parties a possibility to

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300 Id., paras. 185, 187, p. 2.

301 Id., para. 185, p. 2, compare also the discussion of the late formulation of reservations in the Fifth Report, UN Doc. A/CN.4/508/Add. 3 and 4.

302 Seventh Report on Reservations to Treaties by Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/526/Add.3, para. 207, p. 9.

303 Id., para. 208, p. 9.

formulate a new objection. However, these objections should be subject to the same rules as initial objections, namely that of the Vienna Convention, whereby a single State party is unable to prevent the entry into force of the limited reservation. This possibility to express an opinion on the proposed partial withdrawal is particularly important in the context of incompatible reservations. Thus, for example in a situation where a partial withdrawal changes the nature of a reservation with a consequence that an incompatible reservation becomes a compatible one objecting States parties may still have some justified objections, although of a different nature. In particular, States which objected to an incompatible reservation and because of its incompatibility objected to the entry of a treaty into force between itself and the objecting State might reasonably be expected to reformulate their objections so as to allow the entry into force of a treaty. Furthermore, I do not see any reasons to prevent other States, even those which did not object to the initial reservation, from objecting to the modified reservation. Taking into account the often mentioned fact that a non-objection by States to a reservation does not always mean its acceptance, but can also be due to the short period of time during which States can object and insufficiency of States' resources, why should they not be able to use the new possibility to object to a modified reservation?

Issues related to the procedure to be adopted in case of modifications of reservations and their effects also arose in the context of reservations to the CEDAW based on Islam. They will therefore be discussed in more detail in the context of practice developed by States in relation to reservations to the CEDAW based on Islam.

C. *Purposes, Functions and Mechanisms of the Reservations Regime in International Law in General*

On the basis of the above-made brief presentation of the general regime of reservations as codified in the Vienna Convention, some conclusions about its purposes, functions, basic mechanisms and features can be made.

The basic function of any reservations regime is the establishment of the balance between the universality of participation and the integrity of a treaty. As emphasized by the Special Rapporteur of the ILC on Reservations to Treaties, Alain Pellet,

> *It is this conflict between universality and integrity which gives rise to all reservations regimes, be they general (applicable to all treaties which do not provide for a specific regime) or particular (established by express clauses incorporated into the treaty).*[304]

Depending on the emphasis this function can be described, for example, in terms of the balance between "the legitimate role of States to protect their sovereign interests and the legitimate role of the treaty bodies to promote the effective guarantee of human rights"[305] in the context of human rights treaties, or in terms of consent as a balance between the freedom of consent of the reserving State and that of the other States parties. Alain Pellet particularly stressed the importance of the latter aspect,

304 Second Report of Alain Pellet, UN Doc. A/CN.4/477/Add. 1, para. 90, p. 16.
305 Higgins, loc. cit. above fn. 262, p. xv.

namely the balance between the conflicting freedoms of consent of the reserving State and of other States parties, quoting various scholars as well as decisions of courts and tribunals.[306] He also presented a sufficient amount of evidence in favor of the fact that the drafters of the Vienna Convention always had in mind the necessity to strike this double balance.[307] The regime of reservations should therefore be adapted to the successful fulfillment of this function.

In order to understand a particular system it is important to know not only which functions the system shall fulfill, but also the means or mechanisms used in order to fulfill this function. As already shown above, the reservations regime of the Vienna Convention contains, as one of its essential mechanisms, the play of acceptance and objections based, to a significant degree, on reciprocity. All the authors, who analyzed the role of reciprocity in the reservations regime, agree that reciprocity is an indispensable element allowing the reservations regime to fulfill its function, although they admit that reciprocity is not present in all areas of this regime.[308] Thus, it is true that as Alain Pellet concluded "reciprocity is not a function inherent in a reservations regime and is not in any way the object of such a regime",[309] it nevertheless plays a central role in the fulfillment of the function and can not, therefore, be disregarded in the analysis and application of this regime.

III. Reservations to Human Rights Treaties

A. *Are Human Rights Treaties Different?*

Human rights treaties have one particular feature which has been addressed, in one manner or another, by all authors writing on the subject. Participation in human rights treaties imposes on States obligations which are not primarily vis-à-vis other States but rather vis-à-vis individuals on their own territory. As a consequence the doctrine admits that the reciprocity has a very little, if any, role to play not only in human rights treaties, but also in human rights law in general.[310] The majority of these authors conclude, therefore, that the Vienna Convention regime based on the play of reservations and objections in the context of reciprocity is not suited to the application to human rights treaties. At first glance this logic appears faultless. However, in order to be able to give

306 Second Report of Alain Pellet, UN Doc. A/CN.4/477/Add. 1, paras. 95–96, pp. 17–19.

307 Balance between "(a) the requirements of universality and integrity of the treaty and (b) the freedom of consent of the reserving State and that of the other States parties": Second Report of Alain Pellet, UN Doc. A/CN.4/477/Add. 1, para. 97, p. 19. See also paras. 99–101, pp. 19–20.

308 See e.g. Decaux, Emmanuel. *La réciprocité en droit international*. Paris: Librairie générale de droit et de jurisprudence, 1980, pp. 63–78; Horn, loc. cit. above, fn. 227, pp. 145–183; Simma, Bruno. *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge*. Berlin: Duncker & Humbolt, 1972, pp. 161–219.

309 Second Report of Alain Pellet, UN Doc. A/CN.4/477/Add.1, para. 156, p. 43.

310 Cohen-Jonathan, Gérard. "Les réserves dans les traités institutionnels relatifs aux droits de l'homme, nouveaux aspects européens et internationaux." *100 R.G.D.I.P. 1996*, p. 916; Giegerich, loc. cit. above, fn. 261, pp. 742–745; Provost, René. "Reciprocity in Human

a more detailed and objective judgment, it is necessary to have a closer look at the exact role of reciprocity in the context of human rights treaties. It is also necessary to be more precise in defining how far the absence or deficit of reciprocity affects the application of the general reservations regime.

Alain Pellet, in his Second Report, firstly, emphasized that reciprocity is not totally absent from human rights treaties[311] and secondly, that human rights treaties are not the only group of treaties where the role of reciprocity is diminished.[312] A similar view has been expressed in the doctrine[313] and is shared by the author of this research. Nevertheless it is important to point out, once again, that "reciprocity is certainly less omnipresent in human rights treaties than in other treaties and that (…) the obligations resulting from such treaties "are essentially of an objective character (…)"[314] The Inter-American Court of Human Rights put this idea in the following way:

> *In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they,* ***for the common good,*** *assume various obligations not in relation to other States, but towards all individuals within their jurisdiction*[315]

Rights and Humanitarian Law." *65 BYbIL 1994*, pp. 383–454; Simma, Bruno. "International Human Rights and General International Law: A Comparative Analysis." *Collected Courses of the Academy of European Law, 1993, The Protection of Human Rights in Europe, Vol. IV Book 2*, The Hague, Boston, London: Martinus Nijhoff Publishers, 1995, p. 170.

311 UN Doc. A/CN.4/477/Add. 1, para. 85, p. 14–15. It has been argued in the doctrine that reciprocity, as far as the reservations regime is concerned, is present in human rights treaties on two levels. Firstly, for the purposes of claiming a violation, a reserving State is prevented from claiming a violation of the reserved provision by another State party, even if this other State party entered no reservations. Secondly, it has been submitted that reciprocity is present at the level of procedural provisions of a human rights treaty providing for the right of States parties to bring a question to consideration (or a dispute for settlement) by a special organ. Thus, a reserving State would lose its right to bring a question to the consideration (or a dispute for settlement) in relation to the reserved provision. However, this second aspect of reciprocity is of a very limited importance, first of all, because in most cases other States parties to a treaty would be able to bring a question to the consideration by the body. Furthermore, the EuComHR rejected any arguments of responding Governments which invoked reservations entered by applicant Governments as an obstacle to the examination of the matter: see, in particular, Application N° 9940/82 France v. Turkey, 26 YbEuCHR 1983, pp. 29–31, but also Austria v. Italy (Pfunder case) 4 YbEuCHR 1961, pp. 139–140. See more about both aspects in Horn, loc. cit. above, fn. 227, pp. 156–160; see also remarks made by Hafner in the ILC during the discussion of the Second Report on Reservations to Treaties: YbILC 1997, Vol. I, para. 64, p. 185.

312 UN Doc. A/CN.4/477/Add.1, paras. 77–88, pp. 12–15. It is important to note that reciprocity may be absent not only due to the nature of a treaty or its provisions, but also due to the nature of the reservation itself: Id., para. 155, p. 42–43; Horn, loc. cit. above, fn. 227, pp. 165–167 or due to external circumstances: Horn, loc. cit. above, fn. 227, pp. 167–169.

313 See e.g. Imbert, Pierre-Henri. "Reservations and Human Rights Conventions." *VI Human Rights Review 1981*, p. 36

314 Second Report by Alain Pellet, UN Doc. A/CN.4/477/Add. 1, para. 152, p. 42.

315 Int.-Am.CtHR, the Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion N° OC-2/82 of 24 September 1982, Ser. A, N° 2. Reprinted in 22 ILM 1983, para. 29 (emphasis added). Alain Pellet also quoted this passage in his Second Report: UN Doc. A/CN.4/477/Add. 1, para. 152, p. 42. Other human rights bodies also adopted a similar view. See e.g. EuComHR

What effects does this peculiarity of human rights treaties have on the application of the general reservations regime? Should, therefore, another different regime apply to reservations to human rights treaties?

B. *Reciprocity and Reservations to Human Rights Treaties*

As rightly pointed out by Alain Pellet in his Second Report, a primary objective of any reservations regime is to strike the dual balance between universality and integrity and between divergent consents of States to be bound by the treaty.[316] This is true for all types of treaties including human rights treaties. From this point of view there is no reason to treat human rights treaties differently. Alain Pellet, however, goes further and argues that since reciprocity is not a function inherent in the reservations regime, there is no need for a separate or different treatment of reservations to human rights treaties.[317] The only consequence of this lack of reciprocity, according to Alain Pellet, is that "one simply cannot say here that the reservation is established with regard to another party."[318] Alain Pellet concludes that when a State enters a reservation to a treaty provision that must apply without reciprocity, the provisions of article 21, paragraph 3 of the Vienna Convention do not apply. It does not mean that the reservations regime instituted by the Vienna Convention does not apply in this case.[319]

This argumentation contained in the Second Report presented by Alain Pellet to the ILC, although based on correct premises, does not give us the correct conclusion, because it overlooks some very important elements. It is true that, as already pointed out above, reciprocity is not a function or objective of the reservations regime. However, in pursuing its goal, the reservations regime uses particular ways and mechanisms, one of which is the reciprocity, in most cases inherent, in multilateral international treaties. As has been shown above, reciprocity, as far as the operation of an accepted reservation is concerned, has a central role to play. A reservation becoming operative through a single

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in Pfunder case: Decision on Admissibility from 11.01.1961, Application N° 7881/60, Austria v. Italy, 4 YbEuCHR 1961, pp. 138, 140; even the ICJ in its Advisory Opinion on Reservations to the Genocide Convention particularly emphasized this aspect: ICJ Reports, 1951, p. 23. Similar ideas, although formulated in different terms, can also be found in many decisions taken by different bodies. See e.g. Advisory Opinion N° OC-1/82 of September 24, 1982. "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64). Reprinted in 22 ILM 1983, pp. 51–65, para. 24; Advisory Opinion N° OC-3/83 of September 8, 1983. Restrictions to the Death Penalty (Arts. 4(2) and 4(4)). Reprinted in 23 ILM 1984, pp. 321–350, para. 50; General Comment N° 24 adopted by the HRC on 2 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para. 17. For a systematization of these differently expressed ideas on peculiarity of human rights treaties see FITZMAURICE, M. "On the Protection of Human Rights the Rome Statute and Reservations." 10 *Singapore Yearbook of International Law* 2006, pp. 156–157; CRAVEN, Mathew. "Legal Differentiation and the Concept of the Human Rights Treaty in International Law." 11 *European Journal of International Law* 2000, pp. 513–517.

316 See above II.C.

317 Id.

318 Second Report by Alain Pellet, UN Doc. A/CN.4/477/Add. 1, para.157, p. 43 (emphasized in original).

319 Id., para. 155, p. 42; see also paras. 157–158, pp. 43–44.

acceptance shall not affect treaty relations of other States parties inter se. This reservation shall be established only and exclusively "**with regard to another party**",[320] namely the accepting one. This mechanism promotes universality of participation, because one acceptance only is sufficient in order for the reserving State to become a party to the treaty, while at the same time preserving the integrity of the treaty (only treaty relations between the accepting and the reserving States are affected by the reservation) and permitting respect of the principle of mutuality of consent. If, however, a reservation is made to a provision according to which States assume obligations "for the common good", it is impossible to say that the reservation is established only with regard to the accepting State. Indeed, it affects the entire treaty relations, including those between other States parties inter se. All States parties are affected by this "non-respect" of a treaty provision to which the reservation relates. This situation is different from other cases of the absence of reciprocity, as for example in the case of the non-reciprocal nature of reservations. Since such a reservation does not concern any provisions protecting common good, it does not affect treaty relations of other States parties inter se. The accepting State simply can not benefit from the reservation, as is normally the case. Thus, only the absence of reciprocity due to the nature of treaty provisions to which the reservation relates, namely, provisions according to which States assume obligations "for the common good", will be of such an extent that some basic mechanisms of the reservations regime will become inoperative and therefore unable to achieve the required objective.

Which consequences shall this "enlarged effectiveness" of reservations to certain treaty provisions have on the operation of the reservations regime? Do human rights treaties or other treaties according to which States assume obligations "for the common good" require a separate, new reservations regime? In my opinion there is no necessity for such a radical change. We can recall here briefly all the arguments put forward by Alain Pellet: the Vienna Convention regime is a flexible and general regime adapted to peculiarities of all types of treaties; human rights treaties are still treaties and are based on the principle of consent, objectives of the reservations regime are the same in the context of human rights treaties as in multilateral treaties in general.

On the other hand, there is an obvious specificity in the application of the reservations regime to provisions according to which States assume obligations "for the common good". This type of provision forms the majority of provisions of human rights treaties. This specificity should not be disregarded. On the contrary, some measures should be taken in order to re-establish the broken balance and permit the reservations regime to fulfill its functions also in relation to human rights treaties. Through the deficit of reciprocity the balance has been shifted towards universality not adequately protecting integrity of a treaty and towards the consent of the reserving State at the expense of the consent of other States. It is therefore necessary to introduce some additional measures for the protection of integrity and of the consent of other States parties. These measures do not necessarily mean the rejection of the Vienna Convention regime. They can be developed in the framework of the limits imposed by this regime using its grey areas.

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320 Article 21, paragraph 1 of the Vienna Convention. For the full text of this article see above II.B.2.

The central role in the protection of the integrity of a treaty is played by the object and purpose test. It is, therefore, very important to reinforce this test by limiting, as far as possible, cases in which incompatible reservations can have any effects. The consent of other States can be protected by enlarging their possibility for reaction. These two objectives can be achieved by firstly, allowing the States to object to reservations in particular on the ground of incompatibility beyond the 12 months time-limit. This deviation from the general reservations regime shall not create any difficulties since the time-limit rule is not a compulsory one and can be disregarded under certain circumstances.[321] The second measure is the more active role of treaty-monitoring bodies in the determination of the compatibility of reservations. Of course, if a treaty-monitoring body is not vested with mandatory powers, it cannot make any determinations obligatory for States. However, within the limits of the powers granted to them, they are able to influence, to a very great extent, the position of States as far as incompatible reservations are concerned. How these two measures can be implemented in practice, whether there are some tendencies towards the increasing use of these two measures in the practice of States and treaty-monitoring bodies will be shown on the example of the CEDAW. At this stage of our analysis it is necessary to present some general developments with regard to the reservations regime in the practice of States parties to human rights treaties, human rights treaty-monitoring bodies and opinions of scholars in this regard.

C. *Attitude of States and Treaty-Monitoring Bodies in Face of Reservations to Human Rights Treaties in the Light of the Doctrine*

1. General Trends in the Practice of Treaty-Monitoring Bodies

a) *At the Regional Level*

Regional human rights conventions have one particular characteristic which distinguishes them from general human rights treaties. All of them have, as one of its supervisory organs, a court empowered to take binding decisions in the exercise of its functions.[322] This particular feature of regional human rights treaties, namely the

321 The reservation is only considered as accepted. See above II.B.2. Moreover, it is not at all clear, as far as the terms of the Vienna Convention are concerned, whether this time-limit rule is applicable to inadmissible reservations. As pointed out by James Crawford during the discussion of the Second Report on Reservations to Treaties in the ILC "article 19 of the 1969 Vienna Convention drew no distinction between reservations that were incompatible with the object and purpose of the treaty and reservations that were prohibited by the treaty itself. It seemed to him inconceivable that a State which, for some reason or other, remained silent in the face of a prohibited reservation was nonetheless deemed to have accepted it. (…) If that was true of prohibited reservations, it must also be true of reservations that were incompatible with the object and purpose of the treaty (article 19, subparagraph (c))." YbILC, 1997, para. 82, p. 188. See also similar view by Cameron & Horn, loc. cit. above, fn. 264, p. 89.

322 The three regional human rights instruments are the European Convention on Human Rights, the Inter-American Convention on Human Rights and the African Charter of Human and Peoples' Rights. However, powers granted to Courts established according to provisions of each of these instruments, as well as circumstances under which courts can exercise their powers, are not identical.

existence of courts as supervisory organs, favored some important developments in the context of the reservations regime during last few decades.

The most significant event at the regional level, as far as the reservations regime is concerned, is the judgment delivered by the EuCtHR in the Belilos case on 29 April 1988.[323] In this judgment the EuCtHR, faced with an "interpretative declaration" which accompanied Switzerland's act of ratification, not only interpreted this declaration qualifying it as a reservation and determined the nature of this reservation as invalid,[324] but also pronounced on the consequences which the invalidity of the reservation shall have on treaty relations of Switzerland. In the words of the EuCtHR: "it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration".[325] Thus, although without detailed explanations, the EuCtHR found that the reservation was severable from the Swiss acceptance of the Convention. The overriding intention of Switzerland was to remain party to the Convention.[326] Several years later, on 23 March 1995, in its judgment on preliminary objections in the Loizidou case[327] the EuCtHR reaffirmed its statements and findings made in the Belilos case. After having declared that restrictions ratione loci attached to Turkey's Article 25 and Article 46 declarations[328] were invalid,[329] the EuCtHR considered the consequences of this invalidity. The EuCtHR, firstly, emphasized that it falls to the Court – and not to the government of Turkey – to decide the issue of the consequences of Turkey's restrictions. Finally it decided that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.[330] Arguably, the same view has been taken by the Int.-Am.CtHR in its advisory opinion on the Effect of Reservations on the Entry into Force of the American Convention on Human Rights.[331] The Int.-Am.CtHR stated inter alia that States parties desiring to object to reservations as incompatible with the

323 Belilos v. Switzerland, 29 April 1988, Ser. A, N° 132.

324 The power of organs of the ECHR to interpret and determine validity of reservations was recognized by the EuComHR in the Temeltasch case already in 1982: Temeltasch v. Switzerland, App. N° 9116/80, Report of 5 May 1982, Decisions and Reports 120. The case was referred to the Committee of Ministers and endorsed by a resolution of the Committee: 31 Decisions and Reports p. 153.

325 Belilos v. Switzerland, 29 April 1988, Publications of the EuCtHR, Ser. A, N° 132, p. 28.

326 It should be mentioned that, on several occasions during the proceedings, Switzerland stressed its willingness to remain bound by the Convention. Belilos case. Note of the Public Hearing held on 26 October 1987 (morning), 45.

327 Loizidou v. Turkey, Preliminary Objections, 23 March 1995, Publications of the EuCtHR, Ser. A, N° 310.

328 These declarations recognize the competence of the EuComHR and the EuCtHR respectively, but place certain restrictions on the exercise of functions of these institutions.

329 Loizidou v. Turkey, Preliminary Objections, 23 March 1995, Publications of the EuCtHR, Ser. A, N° 310, paras. 65–89, pp. 25–30.

330 Id., paras. 90–98, pp. 30–32.

331 Int.-Am.CtHR, the Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82 of 24 September 1982, Ser. A, N° 2. Reprinted in 22 ILM 37, 38 (1983).

object and purpose of the Convention are free to make use of the "adjudicatory and advisory machinery established by the Convention".[332]

In these cases judicial organs pronounced themselves on some controversial issues concerning the reservations regime. The most important step is the rejection of the application of rules on the effects of reservations (articles 20-21 of the Vienna Convention) to incompatible reservations. Referring, in the first line, to the willingness of a State to remain a party to the convention, the EuCtHR preferred to declare Switzerland a party to the Convention without the benefit of the reservation.[333] The EuCtHR went even further in the Loizidou case leaving aside the statement made by the Turkish government according to which the conditions built into Turkey's Article 25 declaration were so essential that disregarding any of them would make the entire declaration void with the consequence that Turkey's acceptance of the right of individual petition would lapse. The same statement was made with regard to Turkey's Article 46 declaration.[334] This is an obvious stand in favor of ideas developed and defended by the "permissibility school".

There are in the doctrine some strong voices attempting to reduce the importance of these developments to the regional level.[335] The concept of the European public

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332 Id. para. 38 or in 22 ILM, p. 49. In another advisory case the Int.-Am.CtHR found itself empowered to interpret a reservation and to determine its compatibility. However, it avoided to pronounce itself on the consequences of incompatible reservations by giving the reservation under consideration a narrow interpretation compatible with the terms of the Int.-Am.CHR: Int.-Am.CtHR. *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4)), Advisory Opinion OC-3/83 of 8 September 1983, Ser. A, N° 3, para. 61 in particular.

333 One could question the effects and value of such a determination in the case when Switzerland, Turkey or any other State in a similar situation would terminate its participation in the treaty. Besides, this possibility was invoked and even very seriously discussed in the Swiss parliament. Nevertheless, Switzerland remained the party to the EuCHR because of the failure of the motion in the Swiss Federal Council by 16 votes against 15. For more detail see WILDHABER, Luzius. "Rund um Belilos. Die schweizerischen Vorbehalte und auslegenden Erklärungen zur Europäischen Menschenrechtskonvention im Verlaufe der Zeit und im Lichte der Rechtsprechung." In: Riklin, A., Wildhaber, L., Wille, H., eds. *Kleinstaat und Menschenrechte: Festgabe für Gerard Batliner zum 65. Geburtstag*. Basel, Frankfurt am Main: Helbing & Lichtenhahn, pp. 331–332. The danger of Turkey's withdrawal from the EuCHR was not so eminent due to the Turkey's peculiar political relationship to the European Union. The EuCtHR was aware of this situation. This political situation allowed the EuCtHR to take such a strong position in the Loizidou case vis-à-vis Turkey. Nevertheless, despite some controversial points, one thing is clear: it would be even more unacceptable that an inadmissible reservation would have the same effects as an admissible one. The EuCtHR clearly expressed this view in its judgments in the Belilos and Loizidou cases.

334 Loizidou v. Turkey, Preliminary Objections, 23 March 1995, Publications of the EuCtHR, Ser. A, N° 310, para. 90, p. 30.

335 The discussion which took place in the ILC in relation to the Second Report on Reservations to Treaties presented by Alain Pellet is a very good illustration of different views on the issue: YbILC, 1997, Vol. I. Compare opinions expressed by Kateka, para. 18, p. 180; Brownlie, paras. 78–79, p. 187; Pellet, paras. 38–39, pp. 193–194; Rosenstock, para. 53, p. 196 who restrict the above-mentioned new developments to the European level with those of Dugard, para. 71, p. 186; Simma, paras. 31–34, p. 201 ; Bennuna, para. 42, p. 202, who see in European developments predecessors of developments which are already visible at the universal level.

order is the principal argument of those who refuse to recognize the universal, and not only regional, value of these developments. However, the careful reading of relevant decisions makes clear that references to the European public order, even if made occasionally, are not the principal argument of judges and in no way do they form the basis for the decisions.[336] Let us just take the example of the judgment of the EuCtHR in the Belilos case. In this case the Court determined the validity of a reservation by reference to article 64 of the EuCHR dealing with reservations. This article of the EuCHR prohibits general reservations and requires that any reservation shall contain a brief statement of the law concerned.[337] These provisions are one of the peculiarities of the EuCHR. In this sense, one cannot say, for example, that according to rules of general international law all general reservations, or all reservations containing no description of relevant provisions of national law are inadmissible, taking the Belilos judgment as a precedent. The determination of the validity of the reservation in the Belilos case was made on the basis of one particular provision of the EuCHR. Therefore, even when general international law contains some similar rules, other arguments should be found to prove it. The precedent of the Belilos case is limited in this sense to the EuCHR, and therefore also to the regional level. However, if we turn to other aspects of the judgment, such as the power of the Court (or other treaty body) to determine the nature of reservations, or the question of consequences of incompatible reservations, we can use the judgment as a precedent not only at the regional, but also at the universal level. When deciding on these aspects, the EuCtHR refers to rules of international law in general without limiting itself to the terms of the EuCHR. Moreover, one cannot ignore that similar developments are visible not only in the Americas but also at the universal level.

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336 See, for example, decision of the EuComHR on Application N° 9940/82 France v. Turkey, where the public order of Europe is mentioned (para. 40). This notion is, however, of secondary nature for the Commission's conclusions. Having defined the issue before it as a question of reciprocal application of a reservation, the EuComHR, firstly, stated that principle of reciprocity embodied in article 21, paragraph 1 of the Vienna Convention does not apply to obligations under the EuCHR which are essentially of an objective character. Provisions of the EuCHR are rather designed to protect the fundamental rights of individual human beings from infringement by any of the Contracting Parties than to create subjective and reciprocal rights for the Parties themselves (para. 39). A State Party when referring to an alleged breach of the Convention is not regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe (para. 40). Thus, the public order of Europe is a more precise description of the objective character mentioned before; the objective character which is inherent to all human rights treaties.

337 Article 64 of the EuCHR reads as follows:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned."

b) *At the Universal Level*

The HRC adopted a General Comment N° 24(52) relating to reservations at its 1382nd meeting on 2 November 1994.[338] The most significant and most controversial statements made by the HRC in this Comment concerns the authority to make a determination as to the compatibility of reservations and the effects of incompatible reservations. After having affirmed that despite the silence of the ICCPR on the issue of reservations, the matter is governed by general international law and the compatibility test of article 19, paragraph 3 of the Vienna Convention is applicable also to the ICCPR[339], the HRC addressed the question of an entity authorized to determine the compatibility of reservations. In the opinion of the HRC "It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant."[340] In this connection the HRC emphasized that although some rules on reservations regime codified by the Vienna Convention are applicable to the Covenant, "provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties."[341] The HRC admits, however, that objections may provide guidance for the Committee in its determination of the nature of reservations.[342]

Finally the HRC stated:

> *Because of the special character of a human rights treaty,*[343] *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. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation*[344]

Thus, the HRC does not reject the application of the Vienna Convention's regime to human rights treaties. The compatibility test as well as the rules on objections and acceptance of reservations are applicable to human rights treaties. However, it presumes that provisions on effects of acceptance and objections do not apply to incompatible reservations; at least as far as human rights treaties are concerned.[345] Faced with one of

338 UN Doc. CCPR/C/21/Rev.1/Add.6.

339 Id., para. 6.

340 Id., para. 18.

341 Id., para. 17.

342 Id.

343 This special character of human rights treaties is described by the HRC in the following way: "Such treaties (…) are not a web on inter-States exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41." Id.

344 Id., para. 18.

345 It is not very clear from the Comment whether the HRC takes the view that the Vienna Convention rules on objections and their effect do not apply to inadmissible reservations in general, or only as far as human rights treaties are concerned. Compare also observations by the United Kingdom on the General Comment N° 24: "The Committee correctly identifies Articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules

the unresolved questions of the Vienna Convention regime of reservations, the HRC is looking for the most appropriate solution. As far as the effects of incompatible reservations are concerned, it preferred the solution proposed by the "permissibility school" and reaffirmed by the EuCtHR in the Belilos case. It means that the qualification of a reservation as incompatible can have one of two consequences: either a treaty will not be in force at all for a reserving party or a treaty will be operative for the reserving party without the benefit of the reservation. The HRC explicitly favored the latter solution. The weak point concerns the question of the body authorized to make a determination about the character of a reservation. Although it is true, as the HRC pointed out, that it is particularly well placed to make such a determination, and in fact it cannot even perform its function without making such determinations, one can agree with critics who stress that such a determination is not binding on States.[346] In this connection the HRC can find itself involved in some awkward situations, in particular when States are reluctant to comply with its findings.[347]

However, the fact that only three States parties to the ICCPR raised objections to the conclusions made by the HRC in this Comment[348] can be seen as a proof of the acceptance of the Committee's conclusions, at least in general terms, by the majority of States parties. Moreover, not all conclusions of the HRC were rejected by these three States and not all objections are formulated as rejections of the statements made in the Comment. Sometimes these objections are mere comments or demands for clarification.[349] It will also be shown later that there is evidence, in the practice

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which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders, however, whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (…). It is questionable, however, whether they were intended also to cover reservations which are inadmissible in limine." Para. 13.

346 See in particular observations on the General Comment made by the United Kingdom (contained in the UN Doc A/50/40), the United States (contained in the UN Doc A/50/40) and France (contained in the UN Doc A/51/40).

347 The situation which has arisen out of the denunciation by Trinidad and Tobago, Jamaica and Guyana of the First Optional Protocol to the ICCPR is illustrative of this possibility This Protocol providing for the individual complaint procedure was denounced by Jamaica and Trinidad and Tobago in 1998 and by Guyana in 1999. The ground for the withdrawal from the Protocol was the question of death penalty. Since this type of penalty is still practiced in these countries, they desired to protect their domestic legal systems, in particular to prevent the possibility of submission of communications by individuals. In 1999 both Trinidad and Tobago and Guyana again became parties to the Optional Protocol, but with reservations preventing the HRC from considering communications from individuals under the sentence of death penalty relating to proceedings against them. After the HRC nevertheless considered a communication from a citizen of Trinidad and Tobago who was under the sentence of death, the country again renounced its participation in the Protocol in 2000. More about the case see few paragraphs below.

348 These three States are the United Kingdom, the United States and France.

349 Particularly remarkable in this connection are observations made by the United Kingdom. For example, as far as the question of the competence to determine the nature of reservations is concerned, "the United Kingdom shares the analysis that the Committee must necessarily be able to take a view of the status and effects of a reservation where this is required in

developed in the context of other human rights treaties (with special reference to the CEDAW), in support of the basic ideas expressed in the Comment.

Among human rights treaty-monitoring bodies a very strong general trend towards a more direct and critical attitude with regard to the determination of compatibility and admissibility of reservations is visible. If in the early eighties treaty-monitoring bodies either expressly refrained from taking position on the matter,[350] or adopted a waiting attitude,[351] by the end of the eighties, and particularly in the nineties, the situation changed radically. Not only did individual human rights treaty-monitoring bodies affirm and make use of their right to make determinations about the validity of reservations,[352] but also the Chairpersons of human rights treaty bodies discussed the issue of reservations at their meetings and recommended inter alia that the treaty

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order to permit the Committee to carry out its substantive functions under the Covenant. (…) Paragraph 20 of the General Comment, however, users the verb "determine" in connection with the Committee's functions towards the status of reservations (…). This would appear to have implications which call for comment." (para. 11 of observations) After this statement the United Kingdom "without wishing to take a final view on the matter" just makes some points which show the difference between judicial decisions and determinations made without the benefit of a judicial process, emphasizing that the Committee was not yet given any new competence allowing it to make binding determinations (para. 12 of observations). In relation to a very controversial question of legal effects of incompatible reservations the United Kingdom also expresses rather human rights "friendly" view. After having clarified that in its opinion articles 20 and 21 of the Vienna Convention on effects of reservations do not apply to incompatible reservations (this was not stated unambiguously by the HRC in the General Comment: see above, fn 345) it does not in principle reject the severability doctrine preferred by the HRC: "The United Kingdom agrees that severability of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice." (para. 14 of observations) However, it prefers another solution which the HRC also envisaged in its General Comment. "The United Kingdom believes that the only sound approach is accordingly that adopted by the International Court of Justice: a State which purports to ratify a human rights treaty subject to a reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all – unless it withdraws the reservation." (para. 15 of observations).

350 See, for example, decisions taken by the CERD and the CEDAW to refrain from determining the nature or scope of States' reservations: Report by the CERD to the General Assembly of the UN adopted in 1978 UN Doc A/33/18, para. 374; Report by the CEDAW to the General Assembly of the UN adopted in 1984 UN Doc A/39/45, Vol. II, Annex III.

351 See, for example, the attitude of the HRC adopted in its decisions of 8 November 1989 in M.K. v. France (CCPR/C/37/D/220/1987) and T.K. v. France (CCPR/C/37/D/222/1987) and the analysis of the practice of the HRC by Schmidt, Markus G. "Reservations to United Nations Human Rights Treaties – the Case of the Two Covenants." In: Gardner, J.P., ed. *Human Rights as General Norms and a State's Rights to Opt Out: Reservations and Objections to Human Rights Conventions*. London: British Institute of International and Comparative Law, 1997, pp. 20–34.

352 E.g. the HRC, the CRC, and the CEDAW address reservations in guidelines for the preparation of reports; nearly all bodies question States parties about reservations and recommend considering the withdrawal; several bodies expressed doubts as to the compatibility. More in the light of the practice developed by the CEDAW in relation to reservations based on Islam in the next Chapter.

bodies should require States parties to explain their reservations and treaty bodies should clearly state that certain reservations were incompatible with treaty law.[353]

A case decided by the HRC under the Optional Protocol to the ICCPR[354] shall serve as an illustration of the above-described recent developments, but at the same time also of difficulties faced by treaty-monitoring bodies in their work related to reservations. In this case the HRC had before it a communication from a citizen of Trinidad and Tobago, who claimed to be a victim of violations by Trinidad and Tobago of several articles of the ICCPR in relation to his death sentence. At the time of the submission of the communication the author was awaiting execution.[355] Before coming to the consideration of merits the HRC had to decide whether it had competence to deal with the communication. The question of competence arose because Trinidad and Tobago, upon its re-accession to the Optional Protocol on 26 August 1998, entered a reservation excluding from the competence of the HRC all cases concerning a "prisoner who is under sentence of death in respect of any matters relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith." The State party submitted in this connection that the HRC had already exceeded its jurisdiction in registering the communication and purporting to impose interim measures. According to the State party the very fact of the existence of the reservation and that the author of the communication was a prisoner under sentence of death were sufficient to preclude the competence of the HRC in the present case.[356] The author of the communication argued, however, that firstly, the body to whose jurisdiction a purported reservation is addressed decides on the validity and effects of that reservation.[357] Moreover, secondly, the reservation under consideration significantly impairing the competence of the HRC is incompatible with the object and purpose of the Protocol and is, therefore, without effect and thus presents no bar to the HRC's consideration of this communication.[358]

The HRC rejected the submission of the State party and affirmed its opinion expressed in the General Comment N° 24 that it belongs to the competence of the Committee, as the treaty body of the ICCPR and its Optional Protocols, to interpret and determine the validity of reservations made to the treaties.[359] The HRC qualified the reservation of Trinidad and Tobago as incompatible with the object and purpose of the ICCPR and its Protocols. "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol."[360]

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353 A/49/537, Annex, para. 30.

354 This Optional Protocol opens a possibility for individual nationals of States which ratified the Protocol to submit communications concerning violations of the ICCPR. The Optional Protocol was adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966.

355 Communication N° 845/1999 : Trinidad and Tobago, Decision of the HRC under the Optional Protocol to the ICCPR, 67th Session, 31 December 1999, UN Doc. CCPR/C/67/D/845/1999.

356 Id., para. 4.2.

357 This rule is qualified by the author as a general principle of law: Id., para. 5

358 Id., para. 3.14.

359 Id., para. 6.4.

360 Id., para. 6.7.

Four members of the HRC adopted an individual dissenting opinion which represents a middle way between the two above-described solutions. The four members agreed that the HRC has the competence to receive and consider communications including the question of whether the State party's reservation to the Optional Protocol makes the communication inadmissible.[361] They found, however, no reason to consider the State party's reservation incompatible with the object and purpose of the Optional Protocol and would, therefore, hold the communication inadmissible.[362] Although this conclusion makes any further analysis unnecessary, the four members decided to express their views on the issue of the effects of an invalid reservation because of the importance of this question. First of all, they found it unfortunate that the HRC simply concluded that the consequence of an incompatible reservation is that the Committee is not precluded from considering the present communication under the Optional Protocol, without giving any reasons for this consequence, "which is far from self-evident".[363] In the opinion of these four members, even the HRC itself in its General Comment N°24 "did not take the view that in every case an unacceptable reservation will fall aside, leaving the reserving state to become a party to the Covenant without benefit of the reservation. (…) The Committee merely stated that this would *normally* be the case."[364] Therefore, in cases when it is abundantly clear that the reserving State's agreement to becoming a party to a treaty is dependent on the acceptability of the reservation the consequence of the determination of incompatibility of the reservation would be that the State is not a party to the treaty.[365] As far as the case under consideration is concerned, the four members of the HRC stressed that Trinidad and Tobago denounced the Optional Protocol on 26 May 1998 and immediately re-acceded with the reservation. It is, therefore, quite clear that this State was not prepared to be a party to the Optional Protocol without the particular reservation. The four members conclude:

> *It follows that if we had accepted the Committee's view that the reservation is invalid we would have had to hold that Trinidad and Tobago is not a party to the Optional Protocol. This would, of course, also have made the communication inadmissible.*[366]

This decision of the HRC is an illustration of the changing attitude of treaty-monitoring bodies towards reservations. At the same time, it reflects all the difficulties which may arise, in particular in practical terms, in connection with this change. However, one should not overestimate either the former or the latter because, finally, the applicable rules are those codified in the Vienna Convention, and actions taken by treaty-monitoring bodies lie within the limits of powers granted to them in their constituting documents. It is unfortunate that, due to some policy considerations, treaty-monitoring bodies were not able to use powers granted them to the full extent before. Nevertheless,

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361 Id., Appendix, para. 1.
362 Id., para. 12.
363 Id., para. 14.
364 Id., para. 16 (emphasized in original). They quoted in this connection a passage from paragraph 18 of the General Comment. For the text see above, text accompanying fn. 344.
365 Id.
366 Id., para. 17.

the final decision belongs, as before, to the State. For example, in the case described above, Trinidad and Tobago can always terminate its participation in the Optional Protocol if it prefers the view expressed in the individual dissenting opinion. This solution was actually chosen by the government of Trinidad and Tobago which terminated its participation in the Optional Protocol on 27 March 2000. Moreover, a disagreeing State unwilling to cooperate can simply choose a passive attitude. No treaty – monitoring body will have any coercive power to compel the State, for example, to submit a report.

2. Developments in the Practice of States

State practice in relation to reservations to human rights treaties has been marked by some very interesting progressive developments during last decade or two. The analysis of reservations and objections to human rights treaties shows a general tendency among some groups of States to pursue a consequential policy of objections. It means that not only do such States object consequently to certain types of reservations, in particular those judged by them as incompatible, but also that objections made by these States represent a reflection of their opinion on some controversial issues of the reservations regime discussed above and an attempt to persuade other States to follow this opinion. The most active States in this sense are Austria, Denmark, Finland, Germany, the Netherlands, Norway and Sweden.[367] To analyze this practice developed in the context of human rights treaties in detail would go beyond the framework of the present research. At this stage, only the most interesting trends in relation to human rights treaties in general will be presented. A detailed analysis of some of these trends in the context of the CEDAW and reservations based on Islam is made in Chapter Three.

The most important statement from the point of view of doctrinal debate made by all of the above mentioned States on at least one occasion is the statement related to the effects of incompatible reservations. According to them an incompatible reservation is devoid of legal effects and a treaty thus becomes operative between the objecting and the reserving States in its entirety without the reserving State benefiting from its reservation.[368] Such statements not only deny the application of article 21, paragraph 3 of the Vienna Convention to incompatible reservations, therefore, suggesting that some

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367 Such States as Belgium, Canada, France, Ireland, Italy, Mexico, Portugal, and Spain as well as several other States show a similar attitude from time to time, but they have not yet brought it to the level of a continuous policy.

368 See, for example, objections made by Denmark to reservations entered by Djibouti, Iran, Pakistan, Syria, Brunei Darussalam and Saudi Arabia to the Convention on the Rights of the Child; objections made by Finland to reservations of Iran, Malaysia, Qatar, Brunei Darussalam and Oman entered to the same convention and to the reservation of Bangladesh to the ICESCR; objections of Portugal to reservations entered by Brunei Darussalam and Saudi Arabia to the Convention on the Rights of the Child; objections of Sweden to reservations entered by Iran, Saudi Arabia, Oman and Brunei Darussalam to the Convention on the Rights of the Child and to reservations entered by Kuwait and Bangladesh to the ICESCR; objection of Italy to the reservation of Kuwait to the ICESCR and of the United States to the ICCPR; objection made by the Netherlands to the reservation entered by the United States to the ICCPR.

different rules shall be applicable to this type of reservations, but they go even further and express a very clear opinion as to the effects of incompatible reservations, namely, that such reservations cannot have any legal effects and the State which proposed the reservation remains bound by the treaty.

A further very important statement also relates to incompatible reservations. According to the opinion of the States listed above no time limit applies to reservations which are inadmissible under international law.[369] This type of statement also places inadmissible (including incompatible) reservations in a special position, separating them and rules applicable to them from compatible reservations and rules codified in the Vienna Convention. Moreover, these statements claim a wider scope of possibility of reaction for States faced with incompatible reservations, in particular when they concern provisions according to which States assume obligations for the common good.[370]

Finally, the third type of statement which deserves to be mentioned here is interesting more in terms of policy considerations than in terms of doctrinal debate, although it can have some significant implications for the legal regime of reservations. This third type of statement has been made in relation to one particular type of reservations, namely, in relation to general, unspecified reservations. Being faced with such reservations, States after mentioning that general reservations raise doubts as to the commitment of the reserving State to the object and purpose of the treaty and contribute to undermining the basis of international treaty law, conclude that a final assessment as to the admissibility of these reservations under international law cannot be made without further clarification. However, in order to preserve its legal interests the objecting State goes further and states that it does not consider the reservation as admissible unless the reserving State, by providing additional information or through subsequent practice, ensures that the reservation is compatible with the object and purpose of the treaty.[371] Sometimes the objecting State expressly invites the reserving State to reconsider its reservation.[372] Such an approach of an objecting State can be very fruitful in achieving both universality and integrity of a treaty. Universality is promoted by not excluding treaty relations with a reserving State and even encouraging more active participation in a treaty. The integrity is nevertheless preserved by the very fact of objection and can even lead to an improvement in the degree of the participation of the reserving State in a treaty, since the way for a dialogue is opened.

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369 See, for example, the objections of Denmark, mentioned above in fn. 368; the objection of Belgium to the reservation entered by Qatar to the Convention on the Rights of the Child; objections made by Sweden to reservations of Brunei Darussalam and Singapore to the same Convention.

370 It should be emphasized that on various occasions objecting States stress common interest of all States in the respect of the object and purpose of the treaty to which they choose to become parties.

371 See, for example, objections made by Austria to reservations entered by Iran, Malaysia, Brunei Darussalam, Saudi Arabia, Oman, United Arab Emirates to the Convention on the Rights of the Child; above mentioned (fn. 368) objections of Finland made in relation to several reservations entered to the same convention; the objection of Sweden to the reservation entered by Saudi Arabia to the same convention.

372 See, for example, the above-mentioned objections of Finland (fn. 368).

In terms of reservations regime these statements bring to the surface a number of questions. First of all, the time-limit rule of the Vienna Convention should be rejected in order for the mechanism proposed in these statements to become workable. In particular, the changing nature of reservations also requires a greater margin for the possibility of reactions for other States, including the possibility of a renewed reaction for the already objected State. The situation could be quite difficult to reconcile with the traditional vision of the Vienna Convention regime of reservations, in particular, because of the form which the "clarification" of a general reservation can take. In some instances this "clarification" can be formulated as a modification of the reservation in the form of a partial withdrawal, a procedure still lying inside the framework established by the Vienna Convention regime.[373] However, the "clarification" can be made just as an explanation communicated to other States parties through the depositary of the treaty. One example of this type of "clarifications" is provided by Syria with regard to its reservation to the Convention on the Rights of the Child. In response to the objection of Germany, Syria submitted a communication explaining the reasons and effects of its reservation without modifying, in any respect, its reservation made upon ratification which reads as follows:

> *The Syrian Arab Republic has reservations on the provisions of the Convention which are not in conformity with the legislation of the Syrian Arab Republic and with the principles of Islamic Shariah, in particular the content of article 14 related to the right of the child to freedom of religion, and articles 20 and 21 concerning adoption.*

The communication submitted by Syria just gives more detail on the content of relevant national legislation and the country's interpretation of the relationship between these provisions of the national legislation and the reserved articles of the Convention.[374] The communication is included only in the text of notes of the collection

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373 See above, fn. 274 and II.B.3.

374 The communication reads as follows: "The laws in effect in the Syrian Arab Republic do not recognize the system of adoption, although they do require that protection and assistance should be provided to those for whatever reason permanently or temporarily deprived of their family environment and that alternative care should be assured them through foster placement and kafalah, in care centers and special institutions and, without assimilation to their blood lineage (nasab), by foster families, in accordance with the legislation in force based on the principles of the Islamic Shari'a. The reservations of the Syrian Arab Republic to articles 20 and 21 mean that approval of the Convention should not in any way be interpreted as recognizing or permitting the system of adoption to which reference is made in these two articles and are subject to these limitations only. The reservations of the Syrian Arab Republic to article 14 of the Convention are restricted only to its provisions relating to religion and do not concern those relating to thought or conscience. They concern: the extent to which the right in question might conflict with the right of parents and guardians to ensure the religious education of their children, as recognized by the United Nations and set forth in article 18, paragraph 4, of the International Covenant on Civil and Political Rights; extent to which it might conflict with the right, established by the laws in force, of a child to choose a religion at an appointed time or in accordance with designated procedures or at a particular age in the case where he clearly has the mental and legal capacity to do so; and the extent to which it might conflict with public order and principles of the Islamic Shari'a on this matter that are in effect in the Syrian Arab Republic with respect to each case."

of treaties deposited with the Secretary-General, but not in the text of reservations. Moreover, being expressly formulated as an answer to one particular objection, namely, the objection by Germany, it could have only limited significance in the context of bilateral relations between the two States. On the other hand, such limitation appears illogical, because, as a matter of fact, the same clarification could be given to any other objecting State.

Finally, it should be mentioned that the practice of withdrawal and modification of reservations is much more common in the context of human rights treaties than one could expect. Moreover, the withdrawal and modification of reservations is often made by States whose reservations attracted the greatest number of objections, in particular, on the ground of incompatibility.[375]

IV. Regime of Reservations and Dynamism of Human Rights Treaties

The analysis of the functions of the reservations regime in international law made above has demonstrated that the primary goal of this system is to strike a balance between universality and integrity. To put it differently, the principal dilemma which the reservations regime addresses is how to ensure the widest possible acceptance of certain provisions despite existing disagreements. The mechanism established to this end in the modern reservations regime of international law is based on the reciprocity inherent in classical inter-State relations of traditional international law. However, the paradox intrinsic to human rights law, namely the fact that States which are the principal perpetrators of human rights violations assume at the same time the obligation to protect and respect human rights, also affects the functioning of the reservations regime rendering certain of its mechanisms ineffective.

In this connection, one of the theses underlining the present analysis deals with the role of reciprocity in relation to the application of the reservations regime to human rights treaties. It was submitted that reciprocity is an important mechanism of the reservations regime which allows this regime to fulfill its functions. Since the overwhelming majority of provisions of human rights treaties are provisions according to which States assume obligations "for the common good" and not for the benefit of individual States, this mechanism fails to fulfill its functions, at least to some extent. Two possible remedies were, therefore, proposed. The first consists in the enlarged possibility of reaction for non-reserving States, in particular in relation to reservations judged by them as incompatible. The second remedy relates to the more active role of treaty-monitoring bodies. The analysis of practice of States and treaty-monitoring bodies demonstrated a clear tendency among States to claim a greater flexibility as far as reactions to incompatible reservations are concerned. The best examples of such an attitude are statements made by some objecting States as to the non-applicability of the time-limit rule for formulation of objections to inadmissible reservations in general. Treaty-monitoring bodies demonstrated a clear tendency towards more

375 See, for example, withdrawal of their originally entered reservations to the Convention on the Rights of the Child by Malaysia, Myanmar, Pakistan, and Thailand.

active use of powers granted to them for the purposes of protection of the object and purpose of a treaty. Moreover, this analysis shows also that not only do States attempt to find ways of adapting the Vienna Convention regime to some peculiarities of human rights treaties, but they go even further. They express their views on some unresolved questions of the reservations regime codified in the Vienna Convention and put a lot of effort into making their views accepted by other States and bodies.

Human rights treaties have some characteristics which distinguish them from classical multilateral international treaties. Some of these peculiarities have already been mentioned above. At this stage of analysis, some dynamic elements or characteristics of human rights treaties should be emphasized.

Human rights treaties differ from classical international treaties in that States are pushed to be more active through various procedures established by a treaty, such as reporting procedure, inquiry procedure, but also through intervention of other actors in treaty relations. These other actors, such as individuals or treaty monitoring bodies, although having limited powers – complaints procedure for individuals; consultative or advisory powers of treaty monitoring bodies – influence the life of a treaty, and, therefore, its States parties to a very great extent.

Surprisingly enough, States also become more active. Not being directly affected by provisions of a human rights treaty, which purport primarily to protect individuals, they are ready to discuss more sensitive issues.

How do these characteristics of human rights treaties affect the reservations regime? Firstly, in the context of human rights treaties States being ready to discuss more sensitive issues provide answers on some controversial questions of the regime of reservations. The best examples of such an attitude are statements made by several objecting States determining effects of incompatible reservations. Secondly, treaty-monitoring bodies in the framework of powers granted to them by a treaty develop attitudes and policies allowing them to influence, to a very great extent, the position of reserving States. The best example from this area is the practice of withdrawal and modification of reservations very common in the context of human rights treaties.

My conclusion is, therefore, the following: practice developed in relation to the reservations regime in the context of human rights treaties is, under the best scenario, an indicator or predecessor of future developments at the universal level, and an answer to gaps and ambiguities of the reservations regime codified in the Vienna Convention. In any case, all these developments, although containing some peculiarities, do not constitute a separate reservations regime, but take place inside the general reservations regime.

The dynamism of human rights treaties has been particularly stressed in the context of interpretation of human rights treaties. In this context dynamism or the principle of dynamic interpretation means that the understanding and interpretation of terms of a treaty is not limited by the sense attributed to them by States during the preparatory work, but can evolve over time with the changing conditions and circumstances. The above analysis shows that it also influences other aspects of the treaty regime, namely, the reservations regime of human rights treaties. In the context of the reservations regime it can lead to situations when through the changing interpretation and understanding of

provisions of a human rights treaty some reservations will become incompatible, although initially they were compatible or vice versa.[376]

In sum, more flexibility and dynamism is required from the reservations regime in the context of human rights treaties in order to ensure that promotion of the universality of participation through the reservations regime does not function to the detriment of the integrity of human rights treaties.

This arena where the two forces meet is thus characterized by a tension between a general reservations regime and the framing of the latter in general public international law on the one hand and the practical functioning of this regime in the context of human rights treaties, which results in more dynamism, flexibility and openness to negotiation and dialogue on the other hand.

The next Chapter dealing with the practice developed in the context of reservations to the CEDAW based on Islam shall help us to analyze more precisely all the above-mentioned developments. It will give us more detail about concrete mechanisms and procedures established in this connection and bring new evidence in support of the above-made suggestions.

376 Practically, the latter possibility is less probable than the former, but is not impossible.

III

PRACTICE DEVELOPED IN THE CONTEXT OF RESERVATIONS TO THE CEDAW BASED ON ISLAM

Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.

Derrida, Force of Law, p. 961

I. Content of Reservations to the CEDAW Based on Islam

A. *Articles Affected*

1. General Remarks

Out of more than forty States of the world with legislation which incorporates or at least reflects to some extent Islamic laws and customs, thirty-six are parties to the CEDAW.[377] Not all of them entered reservations and not all reservations were made because of the willingness to preserve Islamic laws and practices. Therefore, the analysis below takes into account twenty countries[378] selected on the following criteria:

- The majority of the population (above 70%) of the country are Muslims[379];
- Substantive reservations made by these countries have as a primary aim the preservation of Islamic law (even if this is not always expressly stated or where Islamic law plays only a minor role in the legislation)

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377 It is difficult to give the exact number because all depends on the criteria adopted for the selection. Should for example such States as Tunisia or Turkey be included in the analysis, which although having a Muslim majority population and a rich Islamic tradition in the past, have nowadays only very few traces of Islamic law in their legislation? Or should also India be taken into account which, although having a Muslim minority population, maintains a separate Court system and Personal Status Laws for the Muslim minority?

378 It should be noted that Turkey is not included into analysis, although initially it acceded to the Convention with reservations quite similar to those of other Muslim States: articles 15, paragraphs 2 and 4, article 16 (c), (d), (f) and (g) and article 9 §1. But after the changes in the legislation of this country and the following withdrawal of its reservations the last traces of Islamic Shari'a are eroded. Turkey does not therefore fulfill the second condition for countries to be considered for the analysis.

379 These States are therefore referred to as Muslim States. There is a number of countries with a Muslim minority which entered substantive reservations aiming to preserve among others

Table 1 shows States whose practice will be analyzed below indicating articles which are reserved by each of them. The following analysis will first determine a general pattern among Muslim States identifying concrete provisions of the CEDAW which appear to be problematic for these States on the basis of possible contradictions with Islam. As a next step, a more detailed analysis of the position of each country will be undertaken. This analysis will consider not only the reservations themselves and information provided to the treaty-monitoring body, namely the Committee on the Elimination of Discrimination Against Women, but also relevant national legislation of the States concerned. The next stage of analysis will concentrate on reactions of other States parties and the treaty-monitoring body to the reservations based on Islam. This will provide us with guidance as to the practical responses of international law to the "opposition" by Muslim States and its ways to deal with emerging tensions and contradictions.

Table 1

Country	**Articles affected**	
Algeria	Art. 2 Art. 9 §2 Art. 15 §4 Art. 16	
Bahrain	Art. 2 Art. 9 §2 Art. 15 §4 Art. 16	
Bangladesh	Upon accession: Art. 2 Art. 13 (a)	Modified on 23 July 1997: Art. 2 Art. 16§1 (c)
Brunei	General (those provisions that may be contrary to the Constitution and to the beliefs and principles of Islam); Art. 9 §2	
Egypt	Upon signature, confirmed upon ratification: Art. 9 §2 Art. 16	Upon ratification: Art. 2
Iraq	Art. 2 (f) (g) Art. 9 §1, 2 Art. 16	

also Islamic laws and practices. So for example the reservation of Israel: "(…) The State of Israel hereby expresses its reservation with regard to article 16 of the Convention, 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". To include this type of reservation into analysis would introduce a number of new elements going beyond the purposes of this research.

Table 1. Continued

Country	Articles affected	
Jordan	Art. 9 §2 Art. 15 §4 Art. 16 §1 (c) (d) (g)	
Kuwait	Art. 7 (a) Art. 9 §2 Art. 16 (f)	Modification on 9 December 2005: Art. 9 §2 Art. 16 (f)
Libya	Upon accession: general (no conflicts with the laws on personal status derived from Islamic Shari'a)	Modification on 5 July 1995: Art. 2 Art. 16 (c) (d)
Malaysia	Upon accession: Art. 2 (f) Art. 5 (a) Art. 7 (b) Art. 9 Art. 11 Art. 16	Modification on 6 February 1998[380]: Art. 5 (a) Art. 7 (b) Art. 9 §2 Art. 11 Art. 16 §1 (a) §2
Maldives	Upon accession: general ("*except those [provisions] which the Government may consider contradictory to the principles of the Islamic Shari'a*")	Modification on 29 January 1999: Art. 7 (a) Art. 16
Mauritania	General (approves the Convention *"in each and every one of its parts which are not contrary to Islamic Sharia and are in accordance with /the/ Convention"*)	
Morocco	Art. 2 Art. 9 §2 Art. 15 §4 Art. 16	
Niger	Art. 2 (d) (f) Art. 5 (a) Art. 15 §4 Art. 16 §1 (c) (e) (g)	
Oman	General (*"All provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force…*"); Art. 9 §2 Art. 15 §4 Art. 16 (a) (c) (f) in particular	

380 This modification was not accepted and did not therefore formally enter into force. More about the practice of modification of reservations see below in this Chapter. Reactions of other States parties to modifications are treated below in II.C.2.

Table 1. Continued

Country	Articles affected	
Pakistan	General ("*The accession (...) is subject to the provisions of the Constitution of the Islamic Republic of Pakistan*")	
Saudi Arabia	General ("*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*"); Art. 9 §2	
Syria	Art. 2 Art. 9 §2 Art. 15 §4 Art. 16 §1 (c), (d), (f), (g) and §2	
Tunisia	General declaration: ("*Tunisian Government (...) shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of chapter I of the Tunisian Constitution*")	And reservations to Art. 9 §2 Art. 15 §4 Art. 16 §1 (c) (d) (f) (g) (h)
UAE	Art. 2 (f) Art. 9 Art. 15 §2 Art. 16	

(i) *Note on the Practice Adopted With Regard to Modifications of Reservations*[381]

Before beginning a closer analysis of reservations based on Islam, some clarification with regard to the practice of modification of reservations is necessary. Five of the twenty States included in the analysis attempted a modification of their initial reservations made upon accession, signature or ratification.[382] In two cases, namely in the case of Malaysia and the Maldives, the Secretary-General transmitted to other States parties the following notification:

> *In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification.*

381 Some further aspects of this issue are addressed in more detail below: II.C.2.

382 The sixth State which expressed very precise and concrete intention to modify its initial reservation is Morocco. This intention was done on the occasion of submission of the combined third and fourth periodic report at the 40th session of the CEDAW Committee which took place from 14 January to 1 February 2008. However, this intention was not yet officially submitted to the Secretary General as Depositary of the treaty.

The modification of Malaysia was not formally regarded as accepted[383] because France objected thereto. This non-acceptance is, however, very illogical and inconsequent. First of all, the above-quoted text of notification by the Secretary-General makes the acceptance of this modification dependent on the absence of objections related either to the deposit itself or to the procedure envisaged, but not to the substance of the modification. The objection of France states the following:

> *France considers that the reservation made by Malaysia, as expressed in the partial withdrawal and modifications made by Malaysia on 6 February 1998, is incompatible with the object and purpose of the Convention. France therefore objects to the (reservation.).*

It is obvious that this objection relates to the substance of the modified reservation and does not call into question either the deposit of the modification or the procedure

383 The situation is a very ambiguous in so far as the text of the original reservation of Malaysia appears in the main text in the Collection of treaties together with an enumeration of articles proposed for withdrawal. The practice, however, is to maintain in the main text only the text of the modified reservation. Furthermore, the government of Malaysia when withdrawing reservations to certain articles added some clarifications with regard to the remaining reserved articles. These clarifications are contained only in the text of footnotes, although being communicated at the same time as the withdrawal, they should formally be regarded as a new formulation of a reservation and, if accepted, be placed in the main text in place of the original reservation. Furthermore, in the CEDAW official document "Declarations, reservations, objections and notifications of withdrawal of reservations relating to the CEDAW" its Annex I contains a comprehensive table of States parties that maintain their reservations. This table has among others two separate columns: one for reservations made and another for reservations withdrawn. This document in its 2000 edition (CEDAW/SP/2000/2) contains no information on reservations withdrawn by Malaysia. The corresponding space in the column "withdrawn" is empty (see p. 93). In the 2002 edition (CEDAW/SP/2002/2) the situation is different. All the reservations intended by Malaysia for withdrawal are indicated as withdrawn (see p. 77). In 2004 (CEDAW/SP/2004/2), surprisingly, only one reservation appears as withdrawn, namely that to article 2(f) (see p. 28). In document prepared in 2006 (CEDAW/SP/2006/2) all the reservations intended by Malaysia for withdrawal are again indicated as withdrawn (see p. 51). In practice, finally after more than ten years following the actual act of withdrawal, the consensus seems to have been reached to consider that Malaysia's reservations are those remaining after the partial withdrawal. This became particularly clear during the consideration of the finally submitted combined initial and second periodic report of Malaysia in 2006. Not only had the government of Malaysia stated in the report that: Following the Beijing Conference, steps were taken to review Malaysia's reservations to the Convention. As a result, reservations for Articles 2(f), 9(1), 16(b), (d), (e) and (h) were withdrawn and declarations were made for Articles 5(a), 7(b), 9(2) 16(1)(a) and 16(2). The remaining reservations on the Articles are because they are in conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia." See Combined initial and second periodic report of Malaysia submitted on 12 April 2004. UN Doc. CEDAW/C/MYS/1-2, para. 69, p. 17. But even the members of the CEDAW Committee never questioned Malaysia on her original reservations. See Concluding Comments of the Committee, Consideration of combined initial and second periodic report of Malaysia, 2006, UN Doc. CEDAW/C/MYS/CO/2, para. 4 at p. 1 and para. 9 at p. 2 in particular. The situation is very illustrative of all the ambiguities and inadequacies of the formalistic application of the reservations regime.

envisaged. It is thus very important to make a clear distinction between an objection related to the substance of a reservation and a mere procedural objection. Only the latter would imply that the modified reservation cannot have any legal effects. In the former case the ordinary rules on the effects of objections should be applicable.[384]

Another point is that the same procedure for the modification of reservations was followed by the Secretary-General only in the case of the Maldives, but not of other States which expressed their desire to modify their initial reservations. The difference can be seen in the type of change a State wishes to make. Thus, Bangladesh and Kuwait informed the Secretary-General about partial withdrawal of reservations and Libya about a new formulation. The changes envisaged by Malaysia and the Maldives were, however, called modifications by the States themselves. The problem relates to the fact that, although it is true that changes envisaged by States can be very different, this difference should be measured by the nature of the change itself and not by the name given to this change by a State. It is possible, therefore, to distinguish between partial withdrawal and modification of a reservation. No procedure of acceptance is required in the former case, where the State extends the scope of its undertakings under the Convention. Other States parties should, however, have a possibility to object to or express their view on the substance of the changed reservation. A modification is a change the consequences of which are not so obvious and can, under certain circumstances, imply a restriction of a State's undertakings initially assumed under a treaty. A modification requires, therefore, a special procedure of acceptance as proposed by the Secretary-General. In more concrete terms changes made by Bangladesh, Kuwait and Malaysia are partial withdrawals of reservations and do not, therefore, require any acceptance. Changes made by Libya and the Maldives should, however, be qualified as modifications and require acceptance by other States parties. The procedure of acceptance initiated by the Secretary-General with regard to the change proposed by Malaysia is, therefore, not justified. In contrast, the acceptance of Libya's "new formulation" without a formal procedure of acceptance shall not be permitted under this rule.

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384 Alain Pellet in his Fifth Report discussed this issue although in a slightly different context. The relevant part of his report deals with late reservations: "The question arises, however, whether a distinction should not be made between, on the one hand, objections in principle to the formulation of late reservations and, on the other hand, "traditional" objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (b) of the Vienna Convention (…). This distinction appears to be necessary, for it is hard to see why co-contracting parties should not have a choice between all or nothing, (…) whereas they may have reasons which are acceptable to their partners. Furthermore, in the absence of such a distinction, States (…) which are not parties when the late reservation is formulated but which become parties subsequently (…) would be confronted with a fait accompli. The unanimous consent of other contracting parties should therefore be regarded as necessary for the late formulation of reservations. On the other hand, the normal rules regarding acceptance of and objections to reservations, as codified in articles 20 to 23 of the Vienna Convention, should be applicable as usual with regard to the actual content of late reservations, to which the other parties should be able to object "as usual". UN Doc. A/CN.4/508/Add.4, paras 307–308, p. 2. This reasoning is also applicable, to a very great extent, to modifications of reservations because they are very similar to late reservations.

It would be illogical, and even dangerous, for the successful implementation of the Convention to reject proposals of States which intend to restrict limitations initially imposed by these States in their reservations. If a State expresses its will to be engaged more widely in the implementation of the Convention, it shall be encouraged and supported, even if the new version of reservation still appears very far-reaching as far as the State's participation in the Convention is concerned.[385]

Table 1 shows that the only article which has been reserved by all States included in the analysis is article 16 relating to marriage and family relations. The majority of Muslim States also reserved article 2 on general measures on the elimination of discrimination against women and article 9 with respect to the nationality. A significant number of them also entered reservations to article 15, paragraph 4, which deals with the freedom to choose one's own residence and domicile, while only the UAE reserved the second paragraph of this article.

Three reservations have been made to article 7. In only one case was this reservation justified by the application of Islamic laws, namely, in the case of Malaysia. In the text of its proposed modification of the reservation it states that

> *the application of said article 7 (b) shall not affect appointment to certain public offices like the Mufti Syariah Court Judges, and the Imam which is in accordance with the provisions of the Islamic Shariah law.*[386]

The Maldives explained in its initial report, submitted on 28 January 2001,[387] that according to the Constitution of the Maldives the Head of State of the Maldives should be male[388] without making any reference to the Islamic law. Finally, Kuwait gave no explanations in the text of its reservation, but neither in its combined initial and second report no in its answers to CEDAW Committee members' questions during the consideration of this reports did representatives of Kuwait mention Islam as a ground for reserving this provision.[389] Furthermore, Kuwait withdrew its reservation to this provision in 2005.

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385 In this sense I agree with the conclusions made by Alain Pellet in his Seventh Report on Reservations to Treaties concerning the modification of reservations which amounts to a partial withdrawal of reservations, namely that it is counterproductive to delay the entry into force of the limitation of a reservation envisaged in such a modification and to run a danger of preventing its entry into force by the "vote" of a single State party. (see above Chapter Two, II.B.3.) However, as already mentioned above, on the basis of States practice and arising issues I arrived at different conclusions as far as the possibility of objections to modified reservations, including those amounting to partial withdrawals, is concerned. I will address this issue later in this Chapter, when the practice of objections will be discussed (see below II.C.).

386 Although the modification was not accepted, this clarification is equally applicable to the initial reservation of Malaysia.

387 *Initial report of the Maldives* submitted on 28 January 2000, UN Doc. CEDAW/C/MDV/1.

388 Id., para. 58.

389 *Combined Initial and Second Report of Kuwait* submitted on 1 May 2003, UN Doc. CEDAW/C/KWT/1-2, p. 28; Consideration of the combined initial and second periodic report submitted by Kuwait, 30th session, Summary records of the 642nd meeting, 22 January 2004, UN Doc. CEDAW/C/SR.642, para. 3, p. 2.

Malaysia is the only State which entered reservations to article 11. Article 5(a) of the CEDAW was reserved only by Malaysia and Niger. These reservations will be analyzed further only when discussing the national legislation of Malaysia. The reason for this is the fact that Malaysia's reservations to these two articles appear peculiar to this country even if the government explains them by application of Islamic law. The reservation entered by Niger to article 5 (a) is simply motivated by difficulties inherent in an attempt to change a customary or religious practice. The text of the proposed modification of Malaysia's reservation declares that the provision of article 5(a) is subject to the Shari'a law on the division of inherited property.

Finally, the reservation by Bangladesh to article 13 (a) withdrawn on 23 July 1997 is also difficult to explain, in particular taking into account the statement made in the combined third and fourth periodic reports of Bangladesh:

> *Although the Government of Bangladesh has entered a reservation on this article, women in the government service are receiving the same family benefits as men.*[390]

Thus, only in the case of reservations to articles 2, 9, 15 and 16 has the contradiction between Islamic law and the provisions of the Convention been invoked as ground for making reservations. Further analysis will therefore concentrate on these articles.

2. Article 2

> *States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:*
>
> *(a) to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;*
> *(b) to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;*
> *(c) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;*
> *(d) to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;*
> *(e) to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;*
> *(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;*
> *(g) to repeal all national penal provisions which constitute discrimination against women.*

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390 *Combined third and fourth periodic reports of Bangladesh* submitted on 1 April 1997, UN Doc. CEDAW/C/BGD/3-4, para. 2.12.1 The following paragraph 2.12.2 entitled "Reservation on article 13(a)" does not bring more clarity: "Bangladesh is not a welfare state and does not provide any welfare benefits to its citizens, either men or women. However, certain service benefits are provided to government employees. These are provided equally to men and women. In fact women enjoy certain additional benefits as mentioned above."

a) *Nature of Obligation*

By virtue of article 2 States parties undertake "to insure by all appropriate means and without delay a policy of eliminating discrimination against women". Article 2 also prescribes appropriate measures in the legislative as well as the non-legislative sphere to be adopted by States in order to comply with this general obligation "to insure (…) a policy". Certain legal obligations are therefore laid down in this article. However, these obligations are of a general nature. As all articles of the General Part (articles 2-6)[391] of the CEDAW article 2 prescribes in general terms ways in which States parties shall behave, whereas provisions of the Special Part (articles 7-16) indicate specific areas and specific groups of rights which shall be guaranteed and respected using the means indicated in the General Part. The obligation embodied in article 2 can therefore be described both as an obligation of means and of result.

Article 2 is a core provision of the Convention. If a State refuses to comply with one or another obligation laid down in this article, it will inevitably find itself sooner or later violating other provisions of the Convention, in particular those contained in the Special Part of the Convention.

b) *Content of Reservations*

Reservations entered to article 2 by ten Muslim States can be divided into three groups with one State – the UAE – remaining apart.[392] The first group encompasses reservations entered by Bangladesh and Malaysia. The reservation of Bangladesh reads as follows:

> *The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2, [….] and 16 (1) (c) […..] as they conflict with Sharia law based on Holy Quaran and Sunna.*[393]

This type of reservation listing article 2 side by side with other articles of the Convention places article 2 in the same position as any other article of the CEDAW without paying due regard to its particular role in the context of the Convention.

The reservation of Iraq simply states that

> *Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of article 2, paragraphs (f) and (g), of article 9, paragraphs 1 and 2, nor of article 16 of the Convention.*

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391 Except article 6. This article deals with a particular area, namely traffic in women and exploitation of prostitution and its place in the General Part is, in my opinion, illogical.

392 Although article 2 (f) is a general provision, the UAE reserved it in order to preserve one particular area, namely inheritance rights established in accordance with Shari'a: "The United Arab Emirates, being of the opinion that this paragraph violates the rules of inheritance established in accordance with the precepts of the Shari'a, makes a reservation thereto and does not consider itself bound by the provisions thereof."

393 The initial reservation entered by Malaysia is of a similar nature and reads as follows: "The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Shari'a law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2 (f), 5 (a), 7 (b), 9 and 16 of the aforesaid Convention."

The reservation of Syria also lists article 2 side by side with other articles without explaining the reason for reserving each particular article.[394] Such a statement, which does not give the reasons or motives for making the reservation, is even more far reaching than the above-mentioned type of reservation, because it sets no limits to the reservation. The first type of reservation sets at least some limits by giving a criterion which shall be used when deciding whether a particular action or measure falls within the scope of the reservation. Of course, one may doubt whether these two types of reservations are very different in practical terms since, firstly, there are few people able to determine what the scope of Shari'a law really is. Secondly, even among these people there exist a number of differences about the exact rules of Shari'a law in a number of areas, particularly those related to the status of women. Nevertheless, the difference exists. If one would like to have a discussion with a State about, for example, the necessity of maintaining the reservation, in the case of the first type of reservation there is at least a point of departure for discussion, a basis on which to argue and to develop a constructive dialogue with a State.

The six remaining States constitute a third group. Reservations entered by this group of States contain the grounds for making reservations and sometimes even explanations about the consequences of their reservations. Thus, with regard to article 2 Algeria made the following reservation:

> *The Government of the People's Republic of Algeria declares that it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code*

Bahrain, Egypt, Libya, Niger and Morocco formulated similar reservations, just replacing Family Code by Shari'a law in the case of first three States, by the Code of Personal Status in the case of Morocco and by customs and practices in the case of Niger. The reservation entered by Niger specifies paragraphs of this article to which it relates, namely (f) and (d) and mentions one particular issue involved, namely succession.[395] The particular feature of the reservations entered by these six States lies, however, not in the text of the reservation to article 2 itself, but in the cumulative effect of

394 It is only in relation to its reservation to article 16, paragraph 2 that Syrian government explains that this provision is reserved "inasmuch as (it) is incompatible with the provisions of the Islamic Shari'a."

395 This fact does not change the nature of the reservation, as a general or "cover" reservation because the text is clear in making reference to changing customs and practices in general: "The Government of the Republic of the Niger expresses reservations with regard to article 2, paragraphs (d) and (f), concerning the taking of all appropriate measures to abolish all customs and practices which constitute discrimination against women, particularly in respect of succession." In this regard, the reservation entered by the UAE, although it also mentions issue of inheritance, stays apart, at least as far as it is possible to interpret the text of the reservation. It is in fact a reservation concerning one specific right: "The United Arab Emirates, being of the opinion that this paragraph violates the rules of inheritance established in accordance with the precepts of the Shari'a, makes a reservation thereto and does not consider itself bound by the provisions thereof."

all the reservations, including those relating to other articles of the Convention. If one analyses the text of reservations to other articles, it becomes clear that they play the role of clarification of the reservation entered to article 2. For example, Algeria's reservations to articles 9, paragraph 2, article 15, paragraph 4 and article 16 also mention the Algerian Family Code, but contrary to the reservation to article 2, indicate specific rights or provisions of the Family Code, which shall not be affected by Algeria's participation in the Convention. These reservations, when interpreted as being interconnected, lead to the following conclusion: should the reservations to articles 9, paragraph 2, article 15, paragraph 4 and article 16 be removed, the reservation to article 2 will no more be necessary. The same is true also for Bahrain, Egypt, Libya, Morocco and Niger.

This interpretation is in conformity with the place of article 2 in the General Part of the Convention and its role as a provision forming the basis for the successful implementation of all specific rights guaranteed to women by the Convention. Keeping in mind requirements of article 2, it is logical to conclude that a State strictly complying with article 2 will find itself acting in conformity with all other provisions of the Convention.

Did the six above-mentioned States really take into consideration all these ideas? In my view the answer is in the affirmative because the text of their reservations shows a high degree of precision. They do not just simply mention articles of the Convention but explain which provisions of national law could in their opinion contradict the reserved articles of the Convention and often even how the rights embodied in these articles are affected by reservations. One has the impression that these States really reflected upon the importance of formulation, terms of reservations and their consequences.

3. Article 9

> *1. States Parties shall grant women equal right with men to acquire, change or retain their nationality. They shall ensure in particular 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.*
> *2. States Parties shall grant women equal rights with men with respect to the nationality of their children.*

a) *Nature of Obligation*

Article 9 concerns the equality, with respect to nationality, of women. The first paragraph of article 9 requires States to grant women equal rights with men in the acquisition, change or retention of their nationality. Paragraph 2 of this article contains the obligation of States to grant women equal rights with men with respect to the nationality of their children.

The Committee in its comment particularly emphasized the importance of the first aspect of the right to nationality. It stressed that the status as nationals or citizens is essential for the exercise of such rights as the right to vote, to run for public office, for access to public benefits and choice of residence. Thus, nationality "should be capable of change by an adult woman" and "should not be arbitrarily removed

because of marriage or dissolution of marriage or because her husband or father changes his nationality"[396]

b) *Content of Reservations*

The majority – thirteen out of twenty – of Muslim States entered reservations to article 9. Only three of them, namely Iraq, Malaysia and the UAE, reserved the first paragraph of this article. On 9 February 1998, Malaysia attempted to withdraw its reservation to the first paragraph, retaining the reservation to the second paragraph of article 9.[397]

The second paragraph of article 9 seems, therefore, to be a problematic provision for States applying Islamic law according to their interpretation.

Iraq entered a reservation to paragraph 1 of article 9 because, according to national laws of this country, a woman loses her citizenship upon marriage to a foreigner, if she wants to obtain the citizenship of her husband[398]. Moreover, according to Iraqi law, a foreign woman who marries an Iraqi man acquires the Iraqi nationality.[399] The UAE does not give much detail on the impact of its reservation to article 9. It simply reserves the question of nationality as an internal matter without mentioning Islam, although the religion is mentioned with respect to other reserved articles. Thus, we can conclude that reservations to article 9, paragraph 1 are not linked to the application of Islam. This is also suggested by the exceptionality of this reservation among Muslim States.

4. Article 15

1. *States Parties shall accord to women equality with men before the law.*
2. *States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.*
3. *States agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.*
4. *States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.*

a) *Nature of Obligation*

Article 15 deals with the equality before the law (paragraph 1), equality in civil matters and the legal capacity of women and the opportunity to exercise it (paragraphs 2–3) and finally with the law relating to the movement of persons (paragraph 4).

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396 General recommendation N° 21. Equality in Marriage and Family Relations. Contained in UN Doc. A/49/38, para. 6.

397 The reservation to the first paragraph of article 9 will not be taken into account, since the willingness of Malaysia to withdraw it is a sufficient proof of the fact that the ground for making this reservation was not linked to the application of Islamic law in Malaysia or is not fundamental to its application.

398 *Combined second and third periodic reports of Iraq* submitted on 19 October 1999, UN Doc. CEDAW/C/IRQ/2-3, at p. 13.

399 Id.

A woman shall be able to provide for herself and her dependants. Such rights as ownership, administration of property and full legal capacity to conclude legal contracts are essential in this connection. Thus, the Committee stressed in its comment "when a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or male relative's concurrence or guarantee, she is denied legal autonomy".[400] The Committee qualifies as an obstacle to women's ability to provide for herself and her dependents, such practices existing in certain States, as the limitation of women's right to bring litigation and of her status as a witness. Such practices also diminish women's standing as independent, responsible and valued members of their community.[401]

As far as the right to choose one's own domicile is concerned, its importance is evident in the context of the need for a woman, as any other citizen, to have free access to the courts in the country in which she lives, as well as the possibility to enter and leave a country freely.[402]

b) *Content of Reservations*

Nine Muslim States entered reservations to article 15.[403] All these reservations with one exception[404] relate exclusively to paragraph 4 of article 15 and affect primarily the right of women to choose their residence and domicile.

In the case of Tunisia and Morocco periodic reports clarify that

> *a married woman must accompany her husband when he changes residence. She has no right to elect a domicile other than the conjugal domicile.*[405]

According to explanations provided by Jordan in its initial periodic report, the reservation entered by this country seems to be more far-reaching than that of Morocco and Tunisia:

> *Women are forbidden to travel alone (...) They must be accompanied by either a close male relative or a group of women known for their integrity(...) [T]he State religion views a woman as belonging to her husband, and as unable, whether married or single, to make an independent choice of dwelling place.*[406]

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400 General recommendation N° 21. Equality in Marriage and Family Relations. Contained in UN Doc. A/49/38, para. 7.

401 Id., para. 8.

402 Id., para. 9.

403 These nine States are Algeria, Bahrain, Jordan, Morocco, Niger, Oman, Syria, Tunisia and the UAE.

404 The UAE reserved the second paragraph of article 15 with the explanation that the provision is "in conflict with the precepts of the Shari'a regarding legal capacity, testimony and the right to conclude contracts".

405 *Combined initial and second periodic reports of Tunisia* submitted on 12 April 1994, UN Doc. CEDAW/C/TUN/1-2, para. 912. A similar statement was made by Morocco: *Second periodic report of Morocco* submitted on 29 February 2000, UN Doc. CEDAW/C/MOR/2, at p. 56.

406 *Initial periodic report of Jordan* submitted on 10 November 1997, UN Doc. CEDAW/C/JOR/1, at pp. 23–24.

This interpretation given by Jordan to its reservation to article 15, paragraph 4 restricts not only the right of women to choose their own domicile, but also women's freedom of movement.[407]

The reservation of Niger states that it can comply with the provisions of article 15, paragraph 4 "only to the extent these provisions refer only to unmarried women".

Syria's reservation to this provision is the only one which clearly states that both women's freedom of movement and that of residence and domicile are affected.

Thus, in order to determine the nature and effects of any reservation entered to article 15, paragraph 4 it is important to enquire whether the reservation restricts only the right to choose one's residence and domicile or also the freedom of movement.[408] The reservation can also have different effects on women depending on their marital status.

5. Article 16

> *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 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 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 the 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.*

a) *Nature of Obligation*

Article 16 deals with the issue of equality in marriage and family relations. Provisions of this article deal with matters belonging to the so-called private sphere. Traditionally, human rights treaties excluded this sphere from the scope of their regulation. Law in general views public and private life differently and generally does not regard it as

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407 The text of the reservation simply states that "a wife's residence is with her husband".

408 These two rights are closely related one to another. They are, however, not identical.

necessary to regulate the latter. However, as emphasized by the Committee, activities in the private or domestic sphere, which have been traditionally reserved to women "are invaluable for the survival of society". There can, therefore, be no justification for applying different and discriminatory laws or customs to them.[409]

"The treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people".[410] Stating this as an objective, article 16 requires States to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations starting with the right to enter into marriage, to choose a spouse, including the rights and responsibilities during marriage, as parents, and finally the rights at the dissolution of marriage.

The Committee draws particular attention to the following practices qualified as a contravention of one or another requirement of article 16 of the CEDAW: polygamous marriages, forced marriages, attribution to the husband of the status of head of household and primary decision maker, denial of legal protection to de facto unions and rights of parents of children born in such unions, forced pregnancies, abortions or sterilization, obligation for a woman to change her name upon marriage or at its dissolution, granting to men a greater share of property upon dissolution of marriage.[411]

b) *Content of Reservations*

Article 16, paragraph 1 appears to be the most problematic provision for Muslim States, because all of these States if they did not simply formulate general reservations entered reservations to this provision.[412] The scope of reservations is, however, not identical but in contrast quite different. Bangladesh, for example, maintains only the reservation to article 16, paragraph 1 (c), Kuwait reserved article 16 paragraph 1 (f) and Algeria declares that any provision of article 16

> *concerning equal rights for men and women in all matters relating to marriage, both during marriage and at its dissolution, should not contradict the provisions of the Algerian Family Code*

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409 General recommendation N° 21. Equality in Marriage and Family Relations. Contained in UN Doc. A/49/38, para. 12.

410 Id. para. 13.

411 General recommendation N° 21. Equality in Marriage and Family Relations. Contained in UN Doc. A/49/38, paras. 14–29. In relation to the marital property the Committee mentioned that the same weight should be accorded to financial as well as non-financial contributions, since such non-financial contributions by the wife as raising children, caring for elderly relatives, discharging household duties enable the husband to earn an income. (para. 32) The Committee also stressed that in the area of inheritance men and women in the same degree of relationship to a deceased shall be entitled to equal shares in the estate and to equal rank in the order of succession. (para. 34)

412 Only one Muslim State, namely Syria, entered a reservation to the second paragraph of article 16. In case of other Muslim States, even if some reservations mention article 16 generally (without specifying the paragraph), it is clear from reports submitted by States that the reservation relates only to the first paragraph of article 16.

These differences follow from the difference in the degree of incorporation of provisions of Islamic law into the legislation of each country and also from different interpretations of the relevant provisions of Islamic law. One should therefore be particularly careful when deciding about the extent and nature of reservations entered by States on the ground of contradictions between Islamic law and article 16. Reservations of two different States to the same provision can have a different meaning depending on the interpretation of Islamic law adopted by each of them.

6. Conclusions

All reservations analyzed above have the same ground and the same aim: they have been made in order to preserve values of Islam incorporated in legislation of one or another country. However, despite some common tendencies, these reservations are of a different scope and do not have the same influence on the effectiveness of the implementation of the CEDAW. In order to understand the real effects of these reservations and their nature, it is very important, firstly, to analyze the reservations entered by each State as a whole, keeping in mind that a reservation to one provision could have required reservations to another provision. The relationship between reservations to article 2 and reservations to articles of the Special Part of the Convention is of particular importance in this connection. Secondly, one should take into account the relevant national legislation of each country in order to understand the real impact and nature of the reservation.

B. *Nature of Reservations*

1. Algeria

Algeria entered a reservation to article 2 stating that the application of this article is possible only to the extent to which it does not contradict the Algerian Family Code. In its initial report submitted on 1 September 1998, the government does not, however, indicate further the content of this reservation. Surprisingly enough, it states that

> *the rights of women in Algeria are assured (...) by the provisions of the Constitution that guarantee the equality of all citizens. (...) With respect to the adoption of legislation prohibiting all forms of discrimination against women, the principle of equality between sexes is in itself sufficient, since any law that is not consistent with that principle will be annulled by the Constitutional Council.*[413]

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413 *Initial report of Algeria* submitted on 1 September 1998, UN Doc. CEDAW/C/DZA/1, at p. 12. The situation reflected in Algeria's second periodic report is very similar in the sense that the government does not address the reservation at all and simply demonstrates the adherence of Algeria to the principle of equality as embodied in various legislative provisions: *Second periodic report of Algeria* submitted on 5 January 2003, UN Doc. CEDAW/C/DZA/2, at pp. 11–12. However, the introductory part of the second report is more nuanced in discussing the implementation of the principle of equality: "As in all Arab-Muslim societies, the legal status of women in Algeria presents a dichotomy. The constitutional principle of equality of the sexes is scrupulously respected when it comes to civil and political rights: women have full status as citizens. Questions of personal status are governed by the Family Code, which is **supposedly** based on the Shari'a." Id., at p. 9 (emphasis added).

The reservation to Article 9 is also not addressed further. However, since provisions of relevant legislation are quoted both in the text of the reservation and in the initial report, it is clear that the reservation relates to the right of women to transmit their nationality to their children.[414]

The reservation of Algeria to article 15, paragraph 4 states that provisions of this article concerning the right of women to choose their residence and domicile "should not be interpreted in such a manner as to contradict the provisions of chapter 4 (art. 37) of the Algerian Family Code." The initial report, however, simply refers to the provision of the Algerian Constitution which guarantees the freedom of movement and the right to choose one's place of residence and domicile without giving any clarification as to the content of article 37 of the Algerian Family Code:

> *Article 44 (of the Algerian Constitution) provides that all citizens in possession of their civil and political rights have the right to choose freely their place of residence, and to move freely about the national territory. It also guarantees the right to enter and to leave the country. This article is general in its scope, and applies equally to men and to women, without distinction.*[415]

The words "general in scope" can imply that some exceptions exist. The exact scope and consequences of the reservation are, however, difficult to determine if we refer exclusively to the information provided in the reports. In order to understand the real impact of the reservation, we have to turn to relevant provisions of national legislation of Algeria, in particular to Algerian Family Code. According to article 39 of this Code, a wife must obey her husband, regard him as the head of the family, and respect his parents and relations. From this wife's duty of obedience the wife's duty to seek permission from the husband before leaving the home is derived.

A similar attitude as to the question of the extent and practical consequences of the reservation is adopted by Algeria in its initial as well as in the second periodic reports with regard to article 16. The relevant part of both reports does not expressly address the issue of the reservation. Moreover, none of the provisions of Algerian law mentioned in the report gives an impression that the reservation is necessary. The only exception could be a part of the initial report dealing with the issue of dissolution of marriage. Although the reservation is not addressed explicitly either, it becomes clear after reading this part of the initial report that the scope of the right to the dissolution of marriage is not exactly the same for men and women.[416]

An analysis of the Family Code reveals that women's status in relation to family matters is also affected in many other respects. Inequality is introduced already at the

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414 See above I.A.3 and Id., at pp. 23–24.

415 *Initial report of Algeria* submitted on 1 September 1998, UN Doc. CEDAW/C/DZA/1, at p. 39.

416 The report quotes article 48 of the Family Code which states that "divorce occurs at the will of the husband, by mutual consent, or on the petition of the wife". Both a wife and a husband are obliged to pay reparation if they separate from their spouses without any reasonable ground. The difference is that grounds on which the wife is entitled to petition for a divorce are prescribed by law; in contrast, if the divorce occurs at the will of the husband, it is on a judge to decide whether the grounds for the divorce are unreasonable. The applicable law provides no guidance on the subject. Id., at pp. 40–41.

stage of conclusion of a marriage contract. Not only is the minimum age of marriage lower for women (18 years) than for men (21 years), but the conclusion of the marriage contract is impossible for a woman without the intermediary of a guardian. Article 11 of the Family Code expressly requires that marriage of a woman shall be conducted by a guardian who is her father, failing which a close agnate relative of hers. It should however be noted that articles 12 and 13 attempt to establish a certain degree of protection against possible misuse by the guardian of his position. It is stated that no guardian can stop his ward from marrying if she so wishes or compel her to marry against her consent. Unfortunately, this protective function of articles 12 and 13 is weakened by an additional clause permitting the father to prevent a marriage of his virgin daughter if this is in her best interest. If the guardian opposes the marriage without valid cause, the judge may authorize it.

Although marriage is defined as "a contract lawfully concluded between a man and a woman, the ends of which are, inter alia, the formation of a family based on love, compassion, co-operation, chastity of the two spouses and the preservation of legitimate lineage"[417], legally established obligations of spouses during the marriage do not really reflect these ends of a marriage. Thus, the wife is required, according to article 39 of the Family Code, to obey her husband, to accord him respect as a head of a household. The only real obligation of a husband is to provide maintenance which includes, according to article 78, food, clothing, housing and the amenities thereof, treatment fees according to custom and servants for women whose equals have servants. Thus, whereas the obligation of a husband is material or financial in nature, the obligation of a wife for obedience is interpreted so widely as to include any form of independent behavior. Thus, the husband can prevent his wife inter alia from working, going outside the home, traveling etc.[418] This makes any other rights de jure available to women according to Algerian legislation, such as the right to dispose of their own property and to administer it, almost senseless. A husband can even vote on behalf of his wife.[419]

The situation is further complicated by limited rights of women as far as the dissolution of a marriage is concerned. The husband can unilaterally dissolve the marriage without giving any valid reason or justification. Such unilateral dissolution of a marriage by a husband shall take effect from the time it is recorded with the court of jurisdiction of the locality if not effected before a judge. In a case of abuse of his right to unilateral dissolution of a marriage by a husband a judge shall award damages to a wife. This form of dissolution of a marriage is not available to a wife. To a certain extent two other procedures for dissolution of a marriage available to women compensate for the impossibility to use the same unilateral right as a husband. Firstly, the

417 Article 4 of the Algerian Family Code.

418 See above in relation to article 15, paragraph 4, and also Crowther, Ann Luerssen. "Note: Empty Gestures: The (In)significance of Recent Attempts to Liberalize Algerian Family Law." 6 *William and Mary Journal of Women and Law* 2000, p. 630, Messaoudi, Khalida, Schemla, Elisabeth. *Unbowed: An Algerian Woman Confronts Islamic Fundamentalism*. Philadelphia: University of Pennsylvania Press, 1998, p. 52, Entelis, Jo Ile. "Note. International Human Rights: Islam's Friend or Foe?" 20 *Fordham International Law Journal* 1997, p. 1278

419 Crowther, loc. cit. above, fn. 418, p. 630.

dissolution of a marriage may be effected by a court on specific grounds expressly enumerated in the Family Code as was stated in the initial report of Algeria:

> *According to article 53 of the Family Code, the wife is entitled to petition for divorce on the following grounds:*
>
> *(a) Failure to provide for the wife's maintenance, unless she was aware of her husband's indigence at the time of marriage (...);*
> *(b) Infirmity preventing consummation of the marriage;*
> *(c) The husband's refusal to share the wife's bed for a period of four months;*
> *(d) Sentencing of a husband to a penalty involving loss of civil rights and liberty for a period of more than one year which brings dishonor upon the family and renders it impossible for man and wife to live together and resume their conjugal life;*
> *(e) Absence for more than one year without valid excuse or provision for maintenance;*
> *(f) Any damage recognized as such by law (...);*
> *(g) A verified serious moral failing.*[420]

In addition a woman can obtain separation from her husband in return for some compensation. Usually, she needs to obtain consent from her husband for such dissolution of her marriage. However, if the husband persists in refusing to agree on any terms of such a divorce, a judge may declare the divorce and determine the amount of compensation to be paid not exceeding the amount of a proper dower.

At the first glance it can appear that the unilateral right of a husband to dissolution of a marriage is compensated by the two forms of dissolution of marriage given to a wife, the dissolution of a marriage for compensation corresponding to cases when a wife is awarded damages by a judge for a misuse of this right to unilateral dissolution of a marriage by a husband and the divorce before a judge on prescribed grounds to cases when no compensation is awarded. However, as already mentioned above, apart from practical difficulties faced by women seeking a divorce,[421] the very fact of express regulation of reasonable grounds for seeking divorce only by a wife places women in a disadvantageous position. Since the determination of reasonableness or arbitrariness of the unilateral dissolution of a marriage pronounced by a husband is left to the discretion of judges, it is very probable that judges being male and in the majority of cases equipped with the same prejudices against women as their husbands will interpret a wider palette of cases in favor of husbands.

Finally, the issue of polygamy which is still permitted in Algeria should also be mentioned. If originally the Algerian Family Code did not significantly restrict this right of men to marry up to four women, the reform of 1998 introduced some restrictions,

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420 *Initial report of Algeria* submitted on 1 September 1998, CEDAW/C/DZA/1, pp. 40–41,

421 These difficulties include, for instance, obstacles faced by women with bringing of evidence, general lack of sufficient knowledge and education, the burden of facing the traditional stigma of a woman seeking a divorce as a destructor of the family, bad mother etc., legal impediments to constructing their life after divorce, including the question of custody of children. Although the custody of children is usually given to a mother till the age of 16 for boys and 18 for girls, the guardianship belongs to the husband who takes almost all decisions regarding the life of children. Moreover, a woman who remarries after a divorce usually loses her custody. MESSAOUDI, SCHEMLA, loc. cit. above, fn. 418, p. 53.

such as the requirement of a justified reason for a polygamous marriage, the need to obtain the consent of a spouse,[422] and notification of both spouses. Although these restrictions may appear insignificant, in particular because the legislator does not define the justified reason for a polygamous marriage, they still offer a possibility for women to get protection in the most obvious cases of abuse.

However unfortunate the special part of Algeria's reports and provisions of its Family Code, the general part of this report contains some statements which not only explain the reasons behind and the extent of the reservations[423] but also shed a new light on Algeria's attitude towards the implementation of the CEDAW in general:

> *The Government's stance has been to accede to the Convention with certain reservations (...), with implicit understanding that accession to this and other similar instruments must be used as an argument in favor of gradual changes in the country's social standards, and those reservations will be removed as those changes progress. Accession to the Convention prompted the government to envisage amendments to the Family Code.*[424]

Taking all these factors into account, the two following conclusions can be drawn: Firstly, Algeria's reservation to article 2 has no independent significance. It has sense only if read in conjunction with reservations to other articles, because as has been shown above, Algeria is willing to comply with all provisions of the Convention and in particular with the requirements of article 2. Both reports show that a number of measures, including legislative, have been adopted in order to comply with the Convention. Secondly, reservations do not serve to preserve existing discriminatory laws, traditions and practices. Reservations entered by Algeria are a mere reflection of the actual situation and an indication of areas of concern.

2. Bahrain

Bahrain became a State party to the Convention quite recently, on 18 June 2002. The only information available about the position of this country in the context of the Convention is therefore the text of the reservation itself. This text provides very few explanations about the reasons behind and the implications of the reservation for the compliance with the Convention. Thus, it states that article 2 is reserved in order to insure implementation within the bounds of the provisions of the Islamic Shari'a. Reservations to article 9, paragraph 2 and article 15, paragraph 4 contain no further comments. However, in relation to the reservation entered to article 16 it is stated that

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422 If her consent was not obtained, a woman may petition for a divorce.

423 According to conclusions of the Committee made on the basis of Algeria's report and the discussion of this report, the areas of concern are discriminatory provisions of the Family Code which "deny Algerian women their basic rights, such as free consent to marriage, equal rights to divorce, sharing of family and child-rearing responsibilities, shared child custody rights with fathers, the right to dignity and self-respect and, above all, the elimination of polygamy." Concluding comments of the Committee, Consideration of the initial report of Algeria, 1999, UN Doc. A/54/38/Rev.1, para. 91.

424 *Initial report of Algeria* submitted on 1 September 1998, CEDAW/C/DZA/1, at p. 11.

this article is reserved in so far as it is incompatible with the provisions of the Islamic Shari'a. The implication of this statement could be that not in all cases will the compliance with the provisions of the Islamic Shari'a relating to family matters lead to incompatibility with the requirements of article 16. The absence of any statement in relation to reservations entered to article 9, paragraph 2 and article 15, paragraph 4 does not mean that they are not motivated by preference to the application of Islamic Shari'a. Rather, this indicates the function of a reservation to article 2 as a general precaution with reservations to other articles being a clarification and specification of the reservation to article 2.

It is very difficult to ascertain objectively and obtain an independent evaluation of ways in which application of Shari'a will affect compliance with the CEDAW in Bahrain, because personal status law in this country is not codified. A separate court system established for the cases related to personal status applies "classical" Shari'a law of the Ja'fari Shii school (majority) or Shafi'i or Maliki Sunni schools (minorities). There is no official publication of Shari'a courts' decisions.

Should Bahrain comply with its reporting obligations,[425] the primary challenge for the Committee would be the determination of the content of personal status laws applicable in Bahrain. This indeterminate nature and lack of clarity, which cannot be completely removed even with the recourse to the national legislation of the country, is in my view the most problematic and challenging aspect of Bahrain's reservation.

3. Bangladesh

Initially Bangladesh entered reservations to article 2, article 13 (a) and article 16, paragraph 1 (c) and (f). On 23 July 1997 the government of Bangladesh decided to withdraw its reservations to articles 13 (a) and 16 (f). The Committee had till now five reports from Bangladesh. Four of them were submitted before the partial withdrawal of reservations. They take, therefore, into account all initially made reservations.

The text of the reservation itself simply mentions affected provisions of the Convention without any further explanation except the fact that the reserved provisions conflict with Shari'a law based on the Holy Quran and Sunna. Bangladesh's reports address the effects of reservations on the implementation of relevant provisions in more detail, especially the combined third and fourth periodic reports, which contain separate chapters on reservations to each reserved article.[426]

With regard to the reservation to article 2, the report contains the following statement:

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425 According to article 18 of the CEDAW the initial report is due within one year after the entry into force of the Convention for the State concerned; thereafter, at least every four years and further whenever the Committee so requests. However, as far as the submission of the initial report is concerned, a delay of one to three years is common among States parties to the CEDAW. The initial report of Bahrain can, therefore, still reasonably be expected.

426 *Combined third and fourth periodic reports of Bangladesh* submitted on 1 April 1997, UN Doc. CEDAW/C/BGD/3-4.

> *The Government of Bangladesh placed reservations to Articles 13 (a) and 16 (1) (c) which were thought to be in contradiction with Shariah Law derived from the Holy Quran and Sunnah.* **By deduction** *the reservation on Article 2 was placed.*[427]

This statement proves that the reservation to article 2 has no independent significance. This reservation is again only a reflection of reservations to other articles of the Special Part of the Convention.

It follows from the reports of Bangladesh, that the reservation to article 13 was not necessary at all.[428] More important and far-reaching is, however, the reservation to article 16 (c) and (f). Reports submitted by Bangladesh give a clear picture of the legal situation which led to the reservation. Since personal affairs like marriage, divorce, custody of children, inheritance etc. are governed in Bangladesh by religious laws for each religious community separately,[429] the legislation which led to the reservation concerns the Muslim community of Bangladesh only.[430] Reports show that areas of particular concern are dissolution of marriage, guardianship and maintenance of children, polygamy and inheritance.[431]

The initial report of Bangladesh presents, in detail, provisions of Islamic Shari'a with regard to inheritance as they are applicable in Bangladesh explaining the difference in shares inherited by men and women of the same degree of kinship[432] as follows:

> *woman inherits shares from her husband as well as from her father and also receives dower from her husband. Moreover, she has no responsibility to maintain anybody, and in the second instances, she gets her own maintenance from her child. Another reason was that, under Islam, a widow can marry again. So, if she remarries and takes with her large share of the property of her deceased husband, there will be social problems.*[433]

According to Islamic law as it is applicable in Bangladesh, the dissolution of marriage is possible for a man without showing any reason and without his wife's consent while the wife can unilaterally dissolve the marriage only if she is delegated the authority to do so by her husband at the time of marriage (generally in the marriage contract document). The wife can also seek dissolution of marriage through a court on certain reasons

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427 Id., para. 2.1.4 at p. 26 (emphasis added).

428 See above I.A.1.

429 *Initial Report of Bangladesh* submitted on 11 April 1986, UN Doc. CEDAW/C/5/Add.34, at p. 3.

430 It does not mean that regulations concerning personal matters of other religious communities are fully in accordance with the requirements of the CEDAW. It is not clear why the reservation mentions only the Shari'a law and protects therefore only the Muslim personal status law. This can partly be explained by the status of Islam as a state religion of the Republic of Bangladesh according to Article 2a of its Constitution. Other religions, such as Hinduism, Christianity and Buddhism, being only minority religions have no such status, although the freedom of religion and the right of religious minorities to practice their religions are also recognized in the Constitution.

431 Id., at pp. 4–7; *Combined third and fourth periodic report of Bangladesh* submitted on 1 April 1997, UN Doc. CEDAW/C/BGD/3-4, at pp. 77–83.

432 In most cases women inherit the half of the share inherited by men of the same degree of kinship.

433 *Initial report of Bangladesh* submitted on 11 April 1986, CEDAW/C/5/Add.34, at p. 4.

prescribed by law[434] or if none of these reasons can be proven through a procedure known as khol whereby a woman can obtain the dissolution of a marriage from her husband in return for certain amount of money or/and her agreement to forgo some (or all) of her material and financial rights. It is important to emphasize that according to the doctrine prevailing in Bangladesh the dissolution of marriage can only be effective if the husband agrees and actually grants the divorce to his wife. The role of a judge or a court is limited to merely procedural aspects, as for example, the registration of such dissolution of marriage and agreed conditions. Therefore, at the final analysis this procedure can be described as a deal whereby a woman buys her right to get out of a marriage. Fortunately, however, recent jurisprudence developed by courts in relation to such cases is slightly different and recognizes that the dissolution of a marriage may be granted in such cases by a judicial decision even without the husband's consent.[435]

As far as the guardianship of children upon the dissolution of marriage is concerned, Bangladesh's law states that a mother is not regarded as the guardian of her children. She is only entitled to the care and custody of young children.[436] Moreover, this custody is limited according to the prevailing opinion to the age of seven for boys. Once again, jurisprudence shows some progressive developments. In various cases courts, upon considering interests of a child, awarded custody of boys to their mothers beyond the age of seven. The possibility of deviation from the previously prevailing opinion is justified by the necessity to take into account the paramount interests of the child.[437]

An important statement with regard to this reservation was made in the combined third and fourth periodic reports of Bangladesh:

> *The Government of Bangladesh originally placed reservations on Articles 16 (1) (c) and 16 (1) (f) as conflicting with Shariah Law based on the Holy Quran and Sunnah. However, the Constitution is the fundamental source of law in Bangladesh and laws incompatible with its provisions have no status.[438] (...) In fact there have been many recent case laws where the higher judiciary is upholding, protecting and defending the Constitution (...), restricting the scope and application of laws that are inconsistent with the Constitution*

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434 *Combined third and fourth periodic reports of Bangladesh* submitted on 1 April 1997, CEDAW/C/BGD/3-4, para. 2.15.3. One of the reasons for seeking divorce is cruelty towards the wife.

435 Hasina Ahmed v. Sayed Abul Fazal. 32 *Dhaka Law Reports* 1980, 294.

436 *Combined third and fourth periodic reports of Bangladesh* submitted on 1 April 1997, CEDAW/C/BGD/3-4, para. 2.15.5. Unfortunately, as stated in the same report "the wife is not provided with any maintenance except the agreed upon "dower", which is often difficult to obtain. Thus, the fear of losing guardianship over children as well as losing security and property often makes women continue to live in oppressive situation as they have no other alternatives."

437 See e.g. Muhammad Abu Baker Siddique v. S.M.A. Bakar & others. 38 *Dhaka Law Reports*/ AD/ 1986. See also An-Na'im, Abdullahi, Ahmed, ed. *Islamic Family Law in a Changing World: A Global Resource Book*. London, New York: Zed Books, 2002, p. 218 for further references.

438 In another part of the report relevant provisions of the Constitution are reproduced showing that equality between men and women is guaranteed in Bangladesh without any restriction. See *Combined third and fourth periodic reports of Bangladesh* submitted on 1 April 1997, CEDAW/C/BGD/3-4, at pp. 23–24.

and therefore deemed to be automatically void. (...) Various decisions of the Bangladesh Supreme Court show that within existing laws liberal interpretations can result in judgments that uphold gender equality.[439]

This statement can be clarified as follows: The law of personal status is based on Islam for the Muslim population and is not codified, although, certain legislative acts contain some basic provisions. Nevertheless, the law based on Islam is not regarded as an immutable body of clear rules but as a set of guiding principles subject to reinterpretation. This allows courts to develop jurisprudence which takes women's interests into account more extensively.[440] Another important point relates to the fact that the Constitution recognizing full equality between sexes (at least in the public sphere) enjoys priority over other laws. Any law in contradiction with the provisions of the Constitution is automatically void.[441] On the basis of these principles courts developed jurisprudence enforcing equality and offering a new reading of Islamic texts dealing with the issues of personal status. Thus, in the case of Nelly Zaman v. Giasuddin Khan[442] a husband sued for forcible restitution of conjugal rights against his wife who was unwilling to live with her husband. The court rejected this plea as "a violation of the accepted State and Public Principle and Policy."[443] The court ruled that such restitution would violate the principle of equality guaranteed by articles 27, 28, paragraph 2 and 31 of the Constitution of Bangladesh because women and men do not have exactly the same right to request this restitution. The right of women is restricted to claims of maintenance and alimony only.

Furthermore in another decision the Court declared polygamous marriages to be against the principles of Islamic law and recommended the Ministry of Law to reconsider section 6 of the Muslim Family Law Ordinance permitting polygamy. As a justification the Court referred to opinions of Muslim scholars that since one of the conditions for polygamy is the requirement to treat co-wives justly and equally and that it is virtually impossible to do so, the permission of polygamy under certain conditions contained in the Quran means in fact prohibition. The case of Tunisia where polygamy was prohibited on the basis of this scholarly opinion was given as an example.[444]

Thus, despite the first impression which the reading of the text of the reservation leaves, the government of Bangladesh shows its readiness to make all necessary efforts in order to comply with the Convention. In this connection the previous assumption, that the reservation entered by Bangladesh places article 2 at the same

439 Id., at p. 84 (footnote added). Similar statement is contained in *Fifth periodic report of Bangladesh* submitted on 3 January 2003, UN Doc. CEDA/C/BGD/5, at p. 42.

440 As emphasized in the *Combined third and fourth periodic reports of Bangladesh* submitted on 1 April 1997, CEDAW/C/BGD/3-4: "Bangladesh does not have any "Shari'a Law" as such. Rather certain provisions are codified into legislation such as Muslim Family Law Ordinance and provisions of the Shari'a are not immutable but subject to reinterpretation based on the needs of the time." p. 26 para. 2.1.4.

441 Ibid, p. 26 para. 2.1.3.

442 Nelly Zaman v. Giasuddin Khan. 34 *Dhaka Law Reports* 1982, 221.

443 Id., p. 222.

444 Jesmin Sultana v. Mohammad Elias. 17 *Bangladesh Legal Decisions* 1997, 4.

level as other articles of the Convention[445] shall be rejected. Above-quoted statements from the reports submitted by Bangladesh, as well as its general attitude towards its remaining reservations and the necessity to comply with the Convention, show us that the reservation to article 2 has no independent significance and that the primary and probably the only goal of reservations entered by Bangladesh is to indicate areas of concern, among others, in order to allow more effective collaboration with the Committee.

4. Brunei

Brunei became a party to the CEDAW only in 2006 and accompanied its accession to the Convention by a reservation which can be separated into two parts. The first part of the text represents a general reservation which limits Brunei's undertakings not only by the Constitution of this country, but also expressly by the application of "beliefs and principles of Islam, the official religion of Brunei Darussalam". The second part of the text of the reservation relates to paragraph 2 of Article 9, but as the government stressed "without prejudice to the generality of the said reservations". Thus, a conclusion can be drawn, that the reservation to article 9 is not motivated by application of beliefs and principles of Islam.

As far as general information available about the content of personal status laws of this country is concerned, it applies traditional Sunni Shafi'i law. The situation in Brunei is often compared to that in Malaysia, since Islamic law applicable in both countries is quite close, although Brunei is usually regarded as being more conservative than Malaysia.

Should Brunei comply with its reporting obligations, the main challenge for the Committee would be to determine concrete areas of concern which the government of Brunei intended to cover by its general reservation.

5. Egypt

Egypt entered a reservation to article 2 saying that it shall not contradict Islamic Shari'a. The only area, however, which is indicated as being contradictory to Islamic Shari'a is the area covered by article 16. In its reservation to article 16 Egypt explains that provisions of Islamic Shari'a related to divorce, although not being equal for men and women, ensure nevertheless equivalency of rights and duties taking into account obligations imposed on spouses during marriage and upon its dissolution.[446] The reservation to article 9 is not justified in terms of compliance with

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445 See above I.A.2.b).

446 The reservation to article 16 reads as follows:

"Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, 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. 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

the provisions of Islam. Practical reasons are given to explain this reservation, in particular the necessity of preventing a child's acquisition of two nationalities.[447]

Reports submitted by Egypt do not shed more light on the consequences of Egypt's reservation to article 2. Moreover, when answering questions of the members of the Committee, the representative of Egypt said that

> *the reservations entered by his country would not affect the application of article 2 as the Constitution guaranteed equality for all persons irrespective of sex or religion.*[448]

With regard to the reservation to article 9, it was stated by Egypt on various occasions that the government is seeking the means to reconsider the reservation and reported on some measures taken in this direction.[449]

As far as the reservation to article 16 is concerned, the main problem remains the issue of dissolution of marriage already invoked by Egypt in the text of its reservation.[450]

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so as to ensure complementarity which guarantees true equality between spouses. The provisions of the Shari'a 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 Shari'a 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."

447 The reservation to article 9 reads as follows:

"Reservation to the text of article 9, paragraph 2, concerning the granting to women of equal rights with men with respect to the nationality of their children, without prejudice to the acquisition by a child born of a marriage of the nationality of his father. This is in order to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality."

448 Concluding comments of the Committee, Consideration of the second periodic report of Egypt, 1990, UN Doc. A/45/38, para. 389.

449 See Consideration of the second periodic report of Egypt, 9th session, Summary record of the 164th meeting, 31 January 1990, UN Doc. CEDAW/C/SR.164, para. 58; *Third periodic report of Egypt* submitted on 25 July 1996, UN Doc. CEDAW/C/EGY/3, at pp. 31–33; *Combined fourth and fifth periodic reports of Egypt* submitted on 30 March 2000, UN Doc. CEDAW/C/EGY/4-5, at pp. 31–32.

450 See Concluding comments of the Committee, Consideration of the initial report of Egypt, 1984, UN Doc. A/39/45, paras. 215–217 and, Concluding comments of the Committee, Consideration of the second periodic report of Egypt, 1990, UN Doc. A/45/38, para. 42. The issue of divorce is not presented in detail in Egypt's reports. The reservation states that "the provisions of the Shari'a 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 Shari'a 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." It becomes clear from discussions in the Committee during the consideration of Egypt's reports that according to Egyptian law women have the right to insert into a marriage contract a clause giving them the same right to divorce as that granted to men. See e.g. Consideration of the second periodic report of Egypt, 9th session, Summary record of the 164th meeting, 31 January 1990, UN Doc. CEDAW/C/SR.164, para. 74.

The polygamy still existing under Egyptian law can also be regarded as a discriminatory practice falling within the scope of this reservation.[451] The text of the reservation, the reports and their consideration by the Committee do not indicate any other problematic areas. The analysis of the relevant Egyptian legislation and jurisprudence in the matters of personal status shows that other issues are also involved in the question of compliance with the provisions of the CEDAW.

It is interesting to note that according to personal status law applicable in Egypt a woman can conclude her marriage contract herself, without the intermediary of a guardian, as is usual in many other Muslim countries.[452] The guardian, however, has the right to apply for the annulment of a marriage on the ground of unsuitability of a husband, if no children are born out of this marriage.[453]

During marriage, rights and obligations of husband and wife are defined in a traditional manner, the wife being obliged to obey her husband in return for maintenance, which is an obligation of a husband. It should be mentioned that according to Egypt's legislation the fact that a wife goes out of the home to work without her husband's permission is not regarded itself as disobedience. If the wife leaves the marital home for lawful work, she is not regarded as disobedient provided that it does not appear that her use of this right which is stipulated (in the marriage contract) involves misuse of the right, or is contrary to the interests of the family, in those instances in which her husband has asked her to refrain from this.[454]

The most controversial area of Egypt's personal status law is the issue of dissolution of marriage. The doctrine predominant in Egypt is particularly reluctant to recognize any rights of women to initiate a divorce and any limitations on the exclusivity of the unilateral right of a husband to grant a divorce. As in many other Muslim States the husband has an unlimited unilateral right to divorce.[455] The wife

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451 Concluding comments of the Committee, Consideration of the third and combined fourth and fifth periodic reports of Egypt, Advance unedited version, 2001, UN Doc. CEDAW/C/2001/I/Add.2, paras. 43–44.

452 The minimum age of marriage is 18 for men and 16 for women.

453 The suitability is traditionally defined according to the Hanafi doctrine and includes six considerations – lineage, Islam, freedom, property, trade or craft, and piety – which may vary according to the times, as stated in Egyptian jurisprudence. See e. g. Ruling of the Court of Appeal, discussed in El Alami, Dawoud Sudqi. *The marriage contract in Islamic law in the Shari'a and personal status laws of Egypt and Morocco*. London: Graham & Trotman Ltd., 1992, pp. 72–74. It is interesting that in this case decided in 1990 the Court also stated that the right of the guardian to request the annulment of the marriage lapses if his ward had given birth to a child or became pregnant. In this case interests of children prevail and marriage cannot be annulled.

454 Article 2 of the Law N° 100 of 1985 amending article 1 of Law N° 25 of 1920. Unfortunately this provision does not improve significantly the right of women to exercise freely a profession of their choice. Even if this right is stipulated in the marriage contract, the right of a husband to forbid his wife to work is unrestricted. It is also to be noted that the obligation of a wife to obey her husband implies significant restrictions which the husband can place on her right to leave the marital home are in obvious contradiction with the provision of article 15, paragraph 4 of the CEDAW. Nevertheless, no reservation was placed by Egypt on this article.

455 It should be again recalled that this right of a husband to dissolve the marriage gives him a unilateral, unconditional right to dissolve the marriage without requiring him to present

in contrast can either request a separation by the court on certain grounds recognized by law [456] or initiate a procedure known as khul' which sometimes is described as a financial settlement whereby a wife buys from her husband the dissolution of a marriage in return for some material compensation. In 2000 a new law regulating certain procedural aspects of personal status law aiming at facilitating this latter procedure of dissolution of marriage for women was adopted. According to this law the divorce shall be granted to women by a court in return for an amount of money not exceeding the amount of dower as specified in the marriage contract. The woman who divorces according to this procedure loses all her possible financial rights, such as for example maintenance from her husband. The law, however, attempted to grant to women who divorce according to this procedure a certain degree of financial security if they get the custody of their children upon divorce.[457] In this case they are entitled to an immediate alimony for their children which is payable by the ex-husband. Should he be unable or unwilling to do this, the State will provide divorced women with the alimony for their children through the Bank Nasser immediately and collect the money from the husband later. Finally, the divorce after an attempt of reconciliation shall be granted within three months. These procedural regulations if applied correctly would allow even women who cannot afford to support their

a case before a judge or a court. Modern legislation in many countries recognizing this right requires nevertheless official registration of such dissolution of a marriage and providing the wife with the information about the fact of dissolution. Often the legislator also stipulates for award of damages to an arbitrarily divorced wife. All these clauses can also be found in Egyptian legislation.

456 The range of grounds recognized by the legislature can be very limited, in particular in countries following the Hanafi schools of law, as is the case of Egypt. However, as a result of several legislative reforms Egyptian legislation recognized the possibility for women to sue for a divorce on following grounds: injury (article 6 of Law N° 25 of 1929), whereby injury is understood as a deliberate bad behavior of the husband with humiliation, cruelty or other violent behavior constituting the core of this concept of injury (for a detailed analysis of this concept see Naveh, Immanuel. "The Tort of Injury and Dissolution of Marriage at the Wife's Initiative in Egyptian Mahkamat Al-Naqd Rulings." 9 *Islamic Law and Society* 2001, p. 29 in particular); failure to pay maintenance (recognized already by article 4 of Law N° 25 of 1920); imprisonment for more than 3 years (article 14 of Law N° 25 of 1929); husband's absence for one year or more without sufficient reason (article 13 of Law N° 25 of 1929); defect on a part of a husband (such as dangerous or contagious disease). Law N° 44 of 1979 attempted to introduce polygamous marriage as an automatic ground for divorce because of it being harmful to women, but this law was declared unconstitutional on procedural grounds. Law N° 100 of 1985 which replaced the legislation of 1979 recognizes simply the right of women to apply for divorce in case of polygamous marriages; in order to actually get the divorce a woman has to prove that the polygamy of her husband really results in moral or physical harm to her. The decision about the harmful character of such a polygamous marriage is left to a judge; the burden of proof lies on a wife.

457 The custody of young children is usually awarded to women. Article 20 of Law N° 25 of 1929 as modified by article 3 of Law N° 100 of 1985 states: "A woman's right of custody terminates when a minor boy reaches the age of ten and when a minor girl reaches the age of twelve. After these ages have been reached, the judge may allow a boy, until the age of fifteen, and for girl, until she marries, to remain in the custody of the woman without payment for custody, if it is apparent that their interests require this."

children on their own to make recourse to an efficient and relatively short divorce procedure. Unfortunately, the practical application of this law faces many obstacles. Apart from difficulties related to the stigmatization and blame faced by women requesting a divorce they also have to deal with the reluctance on the part of judges to apply this law, as well as failure to implement the most important aspect of this law, the provision of child alimony via Bank Nasser.[458]

Difficulties arising during the application of this procedural law show the degree of importance of parallel societal changes. Any real improvement of the situation of women cannot be achieved exclusively through constant legislative reforms. Parallel changes in societal attitudes are as important as legal reforms.

The principal conclusion is that Egypt's reservation to article 2 is also a mere reflection of other reservations to some provisions of the Special Part of the CEDAW. The country is in principle willing to comply with the Convention, makes all necessary efforts in this direction and does not use reservations as a pretext and justification of non-compliance with the Convention, but as an indication of areas of concern.

6. Iraq

In contrast to the all above analyzed reservations to article 2, the reservation entered by Iraq to this article is presented in its initial report in a different manner. In particular, it explains reasons behind this reservation, and does not just simply avoid any substantive consideration of the reservation. The initial report of Iraq stresses that the problem of discrimination cannot be resolved independently from the general evolution of the Iraqi society, and that any changes in the legislation shall be coordinated with this evolution of the society. Since introduction of any new legislation relating to the situation of women would have as a consequence annulment or modification of existing regimes and rules accepted by the society, the government of Iraq judged it necessary to enter a reservation to article 2 (f) and (g).[459]

Such a statement clearly restricts obligations which the State party undertakes in virtue of its adherence to the treaty. On the other hand, the last part of this statement supports the idea that whenever a State reserves an article of the Special Part of the CEDAW due to divergences between its national legislation and the requirements of the Convention, a reservation to article 2 of the CEDAW is inevitable since it contains a general obligation to bring national legislation in conformity with the CEDAW.

The reservation to article 9 is explained in terms of the necessity to preserve the unity of each family also in the area of nationality.[460] The analysis of relevant national legislation quoted in Iraq's reports makes clear that not only some discriminatory

458 For an analysis of cases of divorce initiated according to this law during its first year of operation see Tadros, Mariz. "What price freedom?" In: *Al-Ahram Weekly Online*, 7–13 March 2002, N° 576.

459 *Initial report of Iraq* submitted on 16 August 1990, UN Doc. CEDAW/C/5/Add.66/Rev.1, at p. 10.

460 Id., at p. 16.

provisions with regard to the transmission of women's nationality to their children exist, but also that the right to acquire, change or retain their nationality, embodied in paragraph 1 of article 9 is not guaranteed to men and women on equal terms.[461] However, as stated in the text of Iraq's reservation, only article 16 is reserved in order to preserve provisions of Islamic Shari'a. In 2006 a new Nationality Law No 26 was adopted in Iraq. This law introduced certain improvements in the area of nationality. In particular, this new law does not conflict with the requirements of paragraph 1 of article 9 of the CEDAW. However, this law does not go so far as to fully comply with the second paragraph of this article, despite the fact that article 18 of the new Iraqi Constitution does not differentiate between men and women in this area.[462] Thus, the new Nationality Law discriminates against women with regard to the right of Iraqi women married to a foreigner to transmit their nationality to their children and foreign husbands. Their rights in these cases are not only more restricted as compared to similar rights of Iraqi men, but are placed under the discretion of the Ministry of Interior.

According to information provided by Iraq in its reports, the main area of concern in the area of marriage and family relations could be the issue of dissolution of marriage, since grounds for and procedures of the dissolution of marriage are not exactly the same for men and women.[463] Nevertheless, in the opinion of Iraq the entirety of provisions of the law on the dissolution of marriage if seen as interdependent comply with all requirements of article 16.[464] The initial report of Iraq addresses also the possibility for a man to have more than one wife. Although polygamy is not directly mentioned as a ground for entering the reservation, it falls within the scope of the reservation entered by Iraq to article 16.[465] Iraq entered no reservation to article 15, paragraph 4, nevertheless Iraq's law stipulating that the residence of a married woman is with her husband and of an unmarried one with her father[466] is the same as that which led other states to the reservation to article 15, paragraph 4.

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461 See id., at pp. 16–18 and *Combined second and third periodic reports of Iraq* submitted on 19 October 1999, UN Doc. CEDAW/C/IRQ/2-3, at pp. 12–13.

462 According to first two paragraphs of article 18 "Iraqi citizenship is a right for every Iraqi and is the basis of his nationality. Anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi. This shall be regulated by law."

463 See e.g. *Initial report of Iraq* submitted on 16 August 1990, UN Doc. CEDAW/C/5/Add.66/Rev.1, at pp. 34–53. Substantial provisions of Iraq's law define three types of dissolution of marriage: divorce initiated, as a rule, by the husband (a wife has the right to initiate a divorce only if this right was given to her in the marriage contract); judicial separation which can be requested by both men and women on the same grounds prescribed by law (additional grounds for the invocation of judicial separation are given to a wife); al-khul described as a voluntary separation by mutual consent of spouses, but which means a financial settlement whereas a wife acquires the husband's consent to dissolve the marriage for some material consideration.

464 Id., at p. 51 and *Combined second and third periodic reports of Iraq* submitted on 19 October 1999, CEDAW/C/IRQ/2-3 at p. 35.

465 *Initial report of Iraq* submitted on 16 August 1990, UN Doc. CEDAW/C/5/Add.66/Rev.1, at p. 38.

466 Id., at p. 34.

The analysis of Iraq's legislation on matters of personal status shows a picture very similar to that of other Muslim States. However, some peculiarities are also present. Thus, in contrast to the majority of other Muslim States the age of marriage is the same for men and women and is situated at 18 years. The legislator also expressly and unconditionally prohibits any compulsion in marriage and any attempt to prevent a person capable to marry from a marriage.[467] The obligations of spouses during the marriage are, however, defined in traditional terms of a wife owing obedience to her husband in return for maintenance.[468]

The issue of divorce is again the most complicated issue as far as the rights related to marriage are concerned since the right to unilateral dissolution of marriage granted to men has no corresponding right on the part of women. Although under the legislation of Iraq a unilateral dissolution of a marriage by a husband has to be confirmed by a court or at least registered by a judge and damages are awarded to an arbitrarily divorced wife[469] and a wife can have recourse to a procedure known as khul' whereby she may obtain a separation from her husband in return for a material consideration[470], constraints placed on women's right to seek divorce cannot be compared to the freedom enjoyed by men. A judicial separation by a court, a divorce proper, is possible for both men and women on certain specified grounds.[471] As already mentioned above, some additional grounds for requesting a divorce are formulated for women.[472] Unfortunately,

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467 Article 9 as amended by article 3 of Law N° 21 of 1978. "No kin or stranger may compel any person whether male or female to marry against his/her consent. A marriage contract under compulsion is void if no consummation has occurred. Similarly no kin or stranger may prevent the marriage of anyone who has the legal capacity for marriage under this Law."

468 A wife leaving the marital home without her husband's permission or lawful ground is not entitled to maintenance (art. 25, paragraph 1 of Iraqi Personal Status Law) as does an imprisoned wife (art. 25, paragraph 2) or a wife who refuses to travel with her husband without a lawful cause (art. 2, paragraph 3). These provisions clearly indicate the possibility of conflicts with article 15, paragraph 4 of the CEDAW not only with respect to the freedom of women to choose their own place of residence and domicile, but also with respect to the freedom of movement.

469 *Combined second and third periodic reports of Iraq* submitted on 19 October 1999, CEDAW/C/IRQ/2-3, pp. 32–33.

470 Article 46 of the Law of Personal Status stipulates that this procedure shall take place before a court. However, in order for the dissolution to be effective the husband should agree to the terms of the settlement. Furthermore, the amount payable by a wife to a husband is not limited by the legislator. The possibility of a misuse by husbands is therefore very high.

471 Either of the spouses can request a judge to dissolve the marriage on one of the following grounds formulated in article 40 of the Iraqi Law of Personal Status: if one of the spouses causes so much injury to the other or to their children that the common life becomes impossible; if one of the spouses commits adultery; if the marriage was contracted before both spouses reached the age of 18 and without judicial authorization; if the marriage was concluded by force and outside of a tribunal; and was consumed; if the husband marries a second wife without an approval from a court. See also *Combined second and third periodic reports of Iraq* submitted on 19 October 1999, CEDAW/C/IRQ/2-3, p. 33.

472 Article 43 formulates the following additional grounds allowing a request for separation by a woman: if the husband is sentenced to imprisonment for three years or more, even if he is

as many additional grounds as may be added to allow women to apply for divorce the problem will always remain the same: in face of the unconditional right of men to declare the marriage dissolved whereas the role of the court is limited to the mere registration of the already accomplished act, rights granted to women, in particular their protection in this regard, appear largely insufficient. Moreover, the determination of arbitrariness of the unilateral dissolution of a marriage by a husband in which case a wife can be awarded compensation is left to the discretion of judges which allows for a very wide possibility of manipulation.

Article 57 of the Iraqi Law of Personal Status grants the custody of children till the age of ten to the mother. During this time the father may supervise the conditions of living and education of his children. If the interests of children so require, the custody of the mother may be extended until the child completes the fifteenth year. A child of fifteen years of age shall choose him- or herself to live with either of the parents, or with another relative.

Such regulation of the custody of children is in many aspects favorable to women. However, one should not underestimate the power of the actual guardianship granted automatically to the father and related possibility of misuse.

After having discussed these legal provisions, it is necessary to recall, that after the fall of the regime of Saddam Hussein, and especially after the adoption of the new Iraqi Constitution, even the correct application of these laws is in danger. The Iraqi Law of Personal Status although containing some discriminatory provisions, is relatively progressive as compared to the legislation of many other Muslim countries of the region. Quite quickly after the fall of the Saddam's regime religious elites attempted to contest this progressive law. Their first attempt resulted in adoption of Resolution No 137 by the Governing Council on 29 December 2003. If applied this resolution would mean abolition of the 1959 Personal Status Law and application of uncodified religious laws of each religious community by religious clerics in all matters relating to personal status. Due to intense lobbying both from inside and outside of Iraq, the resolution was not passed into law. However, the new challenge came from the 2005 Iraqi Constitution. Not only does article 2 of the Constitution declare Islam to be the official religion and source of legislation, but also article 41 of the Constitution states: "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law". This formulation is open to various interpretations and can have the same effects as the Resolution No 137.

Thus, if we base our conclusions on reports all of which were submitted prior to the fall of Saddam Hussein, there are two principal differences between the reservations

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able to provide for his wife and children during this time; if the husband abandons his wife without a justified cause for two years or more; if after a conclusion of a marriage contract and before the consummation of a marriage the husband does not come to celebrate the marriage two years after the conclusion of the marriage contract; if the wife discovers that her husband is unable to fulfill his marital duties (sexual incapacity); sterility of the husband; if the husband does not pay maintenance as required by a decision of a court; if the husband does not maintain his wife without a valid reason. See also *Combined second and third periodic reports of Iraq* submitted on 19 October 1999, CEDAW/C/IRQ/2-3, pp. 33–34.

entered by Iraq and the reservations entered by other Muslim States. Firstly, Iraq reserved article 9, paragraph 1. This was not made by any other State included in the analysis. Iraq makes, however, no link between this reservation and the application of Islamic law. The reservation can therefore be disregarded for the purposes of the further analysis. The second difference is more important and concerns the reservation to article 2. This reservation, restricting the obligation to adopt the necessary legislation has as a primary aim the preservation of certain discriminatory provisions of internal law. Reports submitted by Iraq contain, however, some phrases and formulations indicating the country's willingness to work progressively towards full compliance with the Convention making this progress dependent on changes in societal attitudes and traditions.[473] The new regime established in Iraq with the assistance of the USA, does not, however, seem to commit itself to this relatively progressive attitude, but marginalizes women even further.[474]

7. Jordan

The reservation entered by Jordan to article 9, paragraph 2 has the same scope and goal as reservations entered to the same provision by other Muslim countries mentioned above.[475] Jordan's reservation to article 15, paragraph 4 can at first glance appear more far-reaching than reservations entered to this provision by other Muslim States mentioned above. Jordan's initial report contains an express statement that women cannot travel alone. This is not the case in many other Muslim States, at least according to their own interpretation reflected in reports.[476] One interesting point in this connection is the statement made by Jordan, in its second periodic report concerning women's rights to freedom of movement and to choose one's residence:

> *Women can in fact include in the contract clauses specifying the place of residence. (...) Some experts in fiqh (jurisconsults), notably the theologian Abdelaziz Al-Khayat, consider that according women the right to freedom of movement and to choose their place of residence is not contrary to the shariah, particularly since, as was stated above, women may set conditions on that subject in the marriage contract. Non-governmental organizations are demanding withdrawal of the reservation on the basis of this theological and legal interpretation, according to which it is lawful for women to live alone before marriage and thus also after marriage.*[477]

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473 See, for example, the above-quoted passage in connection with the reservation to article 2, which speaks about the necessity to co-ordinate developments in the legislation with the general evolution of the society.

474 For an overall comparison between de jure and de facto situation of women in contemporary Iraq, see: The Status of Women in Iraq: An Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards, Iraq Legal Development Project, American Bar Association, July 2005 and Update 2006 available at http://www.abanet.org/rol/publications/iraq_status_of_women_2005_english.pdf and http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf

475 It means that a woman married to a foreigner cannot transmit her nationality to her children: *Initial report of Jordan* submitted on 10 November 1997, UN Doc. CEDAW/C/JOR/1, at pp. 23–24.

476 See above I.A.4.b). and *Initial report of Jordan* submitted on 10 November 1997, UN Doc. CEDAW/C/JOR/1, at pp. 23–24.

Current situation as clarified in the last report submitted by Jordan is the following. As far as the freedom to choose one's domicile and residence is concerned, although as a matter of principle women are legally bound to follow their husband, as a matter of fact, they are free to stipulate the contrary, namely to reserve their freedom not to follow their husband, in the marriage contract. With regard to the freedom of movement the report states that

> *under Jordanian law a husband has not had the power to prevent his wife from traveling since 1976. It is thus clear that women do enjoy freedom of movement and freedom to travel on a basis of equality with men. Moreover, while it is true that there are some social barriers to women traveling unaccompanied by their husbands, as a practical matter many women do travel alone.*[478]

It also makes reference to resent amendments of Passport Act which allow women to obtain their passport without having to obtain consent of a father or a guardian concluding that this legislative change will allow women to more effectively exercise their freedom of movement.[479]

The reservation to article 16 specifies paragraphs of this article to which the reservation relates, namely, paragraph 1 (c) concerning the rights arising upon the dissolution of marriage with regard to maintenance and compensation[480] and (d) and (f). Reports submitted by Jordan provide sufficient information as to the relevant national legislation. They also explain which provisions of national law shall be preserved by reservations.

With regard to article 16, paragraph 1 (c) the initial report states that "men are guardian of women. A wife does not therefore have the right to behave exactly as she wishes."[481] The second periodic report of Jordan addresses the issue in more detail, defining the exact scope of the husband's duty of maintenance[482] and the wife's duty of obedience.[483] In return for the maintenance the wife also has the obligation to take care of the family, the children, and the home without remuneration.[484]

The second report of Jordan also provides additional information on the dissolution of marriage, a matter which falls within the scope of the reservation to article 16, paragraph

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477 Id., at pp. 62–63.

478 *Combined third and fourth periodic reports of Jordan* submitted on 10 March 2006, UN Doc. CEDAW/C/JOR/3-4, para. 241 at p. 88.

479 Id, para. 93 at p. 34 and para. 242 at p. 88.

480 So the text of the reservation.

481 *Initial report of Jordan* submitted on 10 November 1997, CEDAW/C/JOR/1, at p. 27.

482 *Second periodic report of Jordan* submitted on 26 October 1999, UN Doc. CEDAW/C/JOR/2, pp. 65–66, paras. 180–184. The maintenance is defined to include the dowry and support, namely, food, clothing, housing, appropriate beauty care and servants if women of the same rank have them. (Id., para 182).

483 The duty of obedience is basically defined as the prohibition for a woman to leave the marital home for no legitimate reason. As an example of a legitimate reason the beating and ill-treatment are indicated: *Second periodic report of Jordan* submitted on 26 October 1999, UN Doc. CEDAW/C/JOR/2, p. 66, para. 183.

484 Id., It is interesting to note that Jordan is the only reporting country which expressly admits that obedience is not the only duty of the wife in return for maintenance, but that she also has other obligations of a more "material" nature. This is implied in the provision of

1 (c). Jordan's law, based on Islam, gives women the right to request separation from their husbands on specific grounds expressly provided in the Personal Status Law.[485] The right to terminate the marriage herself, which is normally reserved to men, can only be exercised by a wife if the marriage contract expressly provides for it.[486] The separation on the initiative of a wife which takes the form of a financial settlement is not addressed in Jordan's reports, but is regulated by articles 102–112 of the Personal Status Law.

The reservation to paragraph 1 (d) of article 16 was necessary, according to Jordan, in order to preserve the provisions of Islamic Shari'a which although giving women custody of young children till the age of puberty, stipulates that the guardianship of children is granted to men.[487] Finally, the fact that according to Jordan, Islam permits women to pursue any respectable profession provided her husband agrees, necessitated the reservation to paragraph 1 (g) of article 16.[488]

Other possible areas of concern, although not always expressly mentioned in connection with the reservations, are polygamy and inheritance.[489] The issue of the consent to marriage could also be raised in this connection because, although all forms of compulsion to marry are excluded, the guardian still has the right to object to the marriage of his ward.

Reservations made by Jordan and relevant provisions of Jordan's law incorporating Islamic Shari'a as presented in its periodic reports can appear more restrictive with regard to women's rights than that of other above-mentioned States. The careful reading of reports and their consideration by the Committee combined with

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Egyptian law which allows women to work without an express permission of a husband except if this work is not in conflict with her family's interests or she was expressly prohibited by her husband from doing so. See above III.A.2.d).

485 These grounds include a defect preventing the husband from the fulfillment of his conjugal duties, insanity of a husband, his absence, disappearance or abandonment of his wife, inability to pay the first dower either in total or in part, and conflict or discord between spouses. In the latter case judges have to determine on whom the fault rests. Material rights and obligations of spouses upon the dissolution of marriage are dependent on this determination. *Second periodic report of Jordan* submitted on 26 October 1999, UN Doc. CEDAW/C/JOR/2, paras 185–187. The report also mentions a proposal to give a right to a wife to sue for a divorce if her husband takes another wife without her consent. (Id., p. 65, para. 181)

486 Id., p. 67, paras. 185. The legislation in Jordan requires merely a registration of a unilateral separation by a husband. However, the report indicates that amendments were proposed to make this type of separation valid only if effectuated before a court. In case of arbitrary separation by a husband damages are awarded to a wife but they cannot exceed the amount of one year's maintenance. Id., para. 187.

487 Id., pp. 68–69, paras. 190–191. *Initial report of Jordan* submitted on 10 November 1997, UN Doc. CEDAW/C/JOR/1, p. 27.

488 *Initial report of Jordan* submitted on 10 November 1997, UN Doc. CEDAW/C/JOR/1, p. 27. It is interesting to note that the second report of Jordan adds that, in fact, women can include in their marriage contracts provisions guaranteeing them the right to choose and exercise their profession without their husband's consent: *Second periodic report of Jordan* submitted on 26 October 1999, UN Doc. CEDAW/C/JOR/2, para. 196.

489 *Second periodic report of Jordan* submitted on 26 October 1999, UN Doc. CEDAW/C/JOR/2, paras. 176–177.

a more detailed analysis of national legislation shows, however, that the situation is not very different. Moreover, Jordan's presentation of Islamic law and its effects on the possibility of compliance with the provisions of the CEDAW is more detailed than those of other Muslim States. Jordan's reports also contain a presentation of the discussion existing among Muslim scholars on certain issues. This enables the Committee not only to get a more complete and multifaceted picture of the actual situation of women in the country, but also to intervene and argue on these issues.

8. Kuwait

Kuwait acceded to the CEDAW on 2 September 1994. However, it did not submit any reports for almost ten years. The combined initial and second periodic report of Kuwait was submitted on 1 May 2003.[490]

One distinguished feature of Kuwait's attitude towards the Convention was its reservation to article 7 (a) withdrawn in 2005 which states that

> *The Government of Kuwait enters a reservation regarding article 7 (a), inasmuch as the provision contained in that paragraph conflicts with the Kuwaiti Electoral Act, under which the right to be eligible for election and to vote is restricted to males.*

This reservation contains no reference to Islamic law. The majority of Muslim States recognize the right of women to vote and be eligible for elections and see no impediments whether based on Islamic law or any other ground to the granting of this right to women. The long way which led to the withdrawal of this reservation by Kuwait is linked to working methods of the CEDAW Committee and will be discussed in this relation.[491]

The reservation to article 9, paragraph 2 also makes no reference to Islamic law, but states that this provision "runs counter to the Kuwaiti Nationality Act, which stipulates that a child's nationality shall be determined by that of his father."

Islamic law is invoked as a justification only in relation to article 16 (f). It should be recalled that this provision deals with equality between men and women with regard

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490 *Combined initial and second periodic reports of Kuwait* submitted on 1 May 2003, UN Doc. CEDAW/C/KUW/1-2.

491 It is significant that many Muslim States are also parties to the Convention on Political Rights of Women without any reservations. It should also be noted that in the doctrine of Islamic law a minority opinion is present which would prevent women from election to certain offices requiring fulfillment of management and government functions, in particular in relation to men. If taken to its extreme this doctrine would also prevent women from voting because it would imply that women through election of a candidate would govern affairs of men. This would run counter the above-mentioned doctrine. Although this doctrine is defended only by a small minority of Muslims, very strong patriarchal attitudes and traditions make it difficult to introduce any changes even in this area. This was clearly demonstrated in Kuwait when the proposal by the Head of State of Kuwait to grant women voting rights was rejected by the legislative Assembly. This amendment was, however, refused by a majority of only few voices. The situation with the voting rights of women as present in Kuwait is not the only exception. There are several other Gulf States adopting a similar attitude. As far as the States parties to the CEDAW are concerned, Saudi Arabia is one of such States.

to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation. During the consideration of Kuwait's report the country's representative explained that the reservation relates to the issue of adoption envisaged in article 16 (f) which, according to the representative, s not permitted by Islamic Shari'a.[492]

More surprising is the absence of any reference to the issue of rights and obligations of spouses relating to family matters. The national legislation of Kuwait in this area is very similar to, and in some aspects even more conservative than the legislation of other Muslim States which joined the CEDAW with reservations to article 16. Thus for example, the legislator sets the minimum marriage age at 15 years for girls and 17 for boys and requires sanity and puberty as conditions for legal capacity to marry.[493] The registration and notarization of marriages of girls under 15 and boys fewer than 17 years is prohibited.[494] Furthermore, the role of a marriage guardian during the conclusion of a marriage contract of a woman who was not previously married or is under the age of 25 is not restricted in any manner.[495] The obligations of spouses during the marriage are defined in traditional terms, requiring the husband to maintain his wife and the wife to obey her husband.[496] Finally the three principal forms of dissolution of marriage known in other Muslim States are also available under Kuwaiti legislation. However, the national legislation of Kuwait contains no procedural regulations which are used in other Muslim States to protect women at least from gravest forms of misuse by a husband of his rights.[497]

Many of these provisions of Kuwaiti personal status legislation are in obvious contradiction with its undertakings under the CEDAW. Since the text of the reservation entered by Kuwait does not address in any manner the area of rights and obligations of spouses relating to marriage, including its conclusion and dissolution, Kuwait remains formally bound by the requirements of the CEDAW. As a consequence, this State has no excuses for making no efforts to bring its legislation in conformity with the requirements of the CEDAW. It is possible that this can be one of the reasons,

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492 Consideration of the combined initial and second periodic reports submitted by Kuwait, 13th session, Summary records of the 642nd meeting, 22 January 2004, UN Doc. CEDAW/C/SR.642, para. 4 at p. 2.

493 Article 25a of Law N° 51/1894 promulgated 7 July 1984.

494 Article 26 of Law N° 51/1894.

495 See article 29 of Law N° 51/1894. According to article 30 of the same law a woman who was previously married or is over the age of 25 has her own choice in marriage but has to delegate the act of entering into the contract to her guardian.

496 According to article 89 of Law N° 51/1894 the wife is not considered disobedient if she goes out for a lawful reason or lawful employment unless it is not in the family's interests.

497 The only exception is the provision of article 116 of Law 51/1894 explicitly prohibiting any coercion in reaching the financial settlement required in the marriage dissolution procedure initiated by a wife and invalidity of a condition in such a settlement that the father shall keep a child for a period of custody as stipulated in article 118 of the same law. The custody of children is attributed to their mother until the age of puberty for boys and age of majority or marriage for girls (article 194 of the law).

if not the reason for Kuwait's non-fulfillment of its reporting obligations under the Convention for such a long period of time. The report finally submitted is, however, very evasive and remains very general in all problematic matters. The paternalistic and protectionist attitude toward women is putted forward as a major achievement. For example, in the part of the report dealing with article 16 the government mentions that "Kuwait has devoted particular attention to women, as is evident from the care and consideration accorded to women in many of the relevant legislative enactments and laws, which endeavor to guarantee their security and stability."[498] An important conclusion which can be drawn from this type of statement is that the government simply does not regard its laws as being in any way discriminatory or detrimental to women. The major challenge in this situation is to persuade the government of the contrary.[499]

9. Libya

In the text of the reservation to article 2 Libya explains that this reservation is necessary in order to preserve

> *the peremptory norms of the Islamic Shariah relating to determination of the inheritance portion of the estate of a deceased person, whether female or male*

Libya's reports do not elaborate further on this reservation; in particular they do not explain why article 2 and not any other provision of the Convention should be contrary to the Islamic law on inheritance.[500]

The reservation to article 16, paragraphs (c) and (d) is formulated in very careful terms.

> *The implementation of paragraph 16 (c) and (d) of the Convention shall be without prejudice to any of the rights guaranteed to women by the Islamic Shariah.*

Such a formulation gives an impression that these provisions of the Convention are more restrictive than the corresponding provisions of Libya's internal laws. It becomes clear from periodic reports submitted by Libya, that the three areas relating to the reservation to article 16 are dissolution of marriage, the custody and guardianship of children upon the dissolution of marriage and polygamy.[501]

The Marriage and Divorce Regulations Act No. 10 was promulgated in Libya in 1984. Its provisions differ in certain aspects from those traditionally adopted in

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498 *Combined initial and second periodic reports of Kuwait* submitted on 1 May 2003, UN Doc. CEDAW/C/KUW/1-2 at p. 79.

499 That the task is not an easy one becomes even more obvious when reading the following phrase from the introduction to the report: "They (Kuwaiti women) are the foundation of the family, which is the nucleus of society, and have proved their competence and worth throughout history." Id., at p. 2.

500 Libya's initial report just mentions that the male child inherits twice the share of a female child: *Initial report of Libya* submitted on 18 February 1991, UN Doc. CEDAW/C/LIB/1 at p. 27.

501 Reports submitted by Libya simply state that women have the right to divorce and give some details concerning this right without comparing it with the right of men to divorce. The issue was, however, raised during the discussion in the Committee and it became clear

Muslim countries. The rights of a guardian are restricted in as much as he is expressly and unconditionally forbidden from forcing his ward to marry or prevent her from entering into a marriage. As far as the question of maintenance and obedience is concerned, the legislation makes it a husband's duty only within the limits of his ability and provided that he is not in hardship and his wife is not wealthy. As a consequence, either spouse (wife as well as husband) may obtain a maintenance order from a court.[502] The legislator also stipulates that

> *the marriage is an equal partnership between two equal parties, neither of whom may marry the other against their will or divorce them without their willing consent or pursuant to a fair trial.*[503]

However, procedures for the dissolution of marriage available to both spouses according to the Marriage and Divorce Regulations Act are not exactly the same for men and women and follow patterns similar to those of other Muslim countries. Thus, the husband retains his unilateral right to dissolve the marriage although the procedure has to take place before a court and damages may be awarded to an arbitrarily divorced wife. A wife may seek divorce on such grounds as non-maintenance, disappearance of the husband or a defect in her husband, as well as if the marriage is unstable. However, if she is not able to prove that she has suffered damage her legitimate rights upon divorce will lapse.[504] In the same vein, the wife may obtain a divorce in return for appropriate compensation which can include the forfeiture of her maintenance rights or custody of children. If a husband refuses to come to an agreement due to obstinacy, the court may grant divorce without his consent. Thus, women are again placed in a disadvantageous position, in particular when they cannot prove the damage suffered from their husbands. Especially dangerous is the possibility to include the custody of children which usually belongs to a mother till puberty for boys and till the age of marriage for girls as a condition in a settlement for dissolution of marriage initiated by a wife.

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that the provisions of Libya's law concerning divorce are discriminatory at least as far as the fact is concerned that a woman who wishes to end her marriage and is unable to prove that she has suffered damage from her husband will lose her legitimate rights, such as for example the right to maintenance. Concluding comments of the Committee, Consideration of the initial report of Libya, 1995, UN Doc. A/49/38, para. 169. With regard to the custody and guardianship of children the situation in Libya is the same as in many other Muslim States: it is a woman who has custody of young children upon divorce, but the guardianship goes to a man. See on both issues: *Initial report of Libya* submitted on 18 February 1991, UN Doc. CEDAW/C/LIB/1 para. 17.1; *Second periodic report of Libya* submitted on 15 March 1999, UN Doc. CEDAW/C/LBY/2 at pp. 46–48.

502 It is possible that as a consequence of this mixed duty of maintenance the wife has more freedom in marriage, in particular, the second report of Libya states that "the place of residence of a married couple is determined by a joint agreement between them." (*Second periodic report of Libya* submitted on 15 March 1999, UN Doc. CEDAW/C/LBY/2, p. 46). These provisions of Libya's national legislation can explain the absence of a reservation to paragraph 4 of article 15 of the CEDAW in contrast to many other Muslim States.

503 Article 21 of the Libyan Green Charter for Human Rights as quoted in the second periodic report: *Second periodic report of Libya* submitted on 15 March 1999, UN Doc. CEDAW/C/LBY/2, p. 47.

504 See above fn. 501.

Thus, after a closer look on the relevant national legislation of Libya, it can be concluded that despite some improvements the situation is not quite satisfactory, in particular in relation to the three above-mentioned areas, namely dissolution of marriage, polygamy and custody of children.

Furthermore, in the case of Libya the reservation to article 2 has a particular significance. It is not linked to other reservations and plays an independent role. This reservation relates, however, to a specific right, which other States reserved in connection with one or another article of the Special Part of the Convention.

10. Malaysia

The situation which arose out of Malaysia's attempt to partially withdraw its reservations is the most complicated one in legal terms. The fact that both the original reservation and the text of the attempted partial withdrawal are reproduced in the main text of the collection of multilateral treaties deposited with the Secretary-General would suggest that the reservation which determines the extent of obligations of Malaysia under the CEDAW is the original, more comprehensive reservation. In other cases of partial withdrawals of reservations only the modified reservation is reproduced in the main text, the fact of withdrawal and eventually the text of the original reservation is recorded in the text of the footnotes. As already suggested above, this situation may explain the reluctance of Malaysia to submit its periodic reports. However, since the submission and consideration of Malaysia's combined initial and second periodic reports, in practical terms, it is assumed that Malaysia partially withdrew its reservation.[505]

Without going into too much detail, it would be useful to consider national legislation of Malaysia, in particular on issues of personal status, in order to compare it to similar provisions of other Muslim States analyzed here and to evaluate the real impact of reservations.

Thus, Malaysia in its original reservation mentioned among others also article 2 (f) which requires States to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. In its attempted modification this reservation should be withdrawn. One can therefore suppose that the government acknowledges the necessity to modify discriminatory customs and practices and is ready to work towards this modification. On the other hand, the reservation to article 5 (a) which also requires elimination of traditions and practices discriminatory against women is maintained. The government specified, however, that this reservation relates only to the provisions of the Syariah (Malay version of the term Shari'a) law on the division of inherited property. Although it is true that traditional interpretation of Islamic law of inheritance is discriminatory against women in that female heirs receive half of the share given to male heirs of the same degree, many Muslim States did not preserve this provision through reservations. The situation in Malaysia is in so far peculiar in this respect, as inheritance laws,

505 This issue is discussed above I.A.1.(i).

although presumably based on Shari'a law, are significantly influenced and modified by local custom. If this custom could not be modified by Shari'a which is believed to be a divine law, it is even more difficult to deal with such customary practices through secular legislation. This could be a reason for maintaining the reservation. The idea that local customs are stronger in this area than laws based on Islam is supported by the fact that in many African countries, despite the application of one or another interpretation of Islamic law to such issues as marriage, divorce, marital rights and duties, the issue of inheritance remains subject to pre-Islamic customs and practices. Reservations are also entered by such States.

The reservation to article 7 (b) is explained in the proposed modified text as a protection of the rules concerning appointment to such public offices as judges of Islamic religious courts and imams, according to which only males can be eligible for such offices. It is interesting to note that although other Muslim States have the same practice of appointing only males to religious offices including judges in religious courts, no other State reserved expressly its right to do so.

The reservation to article 9, paragraph 2, as in case of other Muslim States is not justified by application of Islamic law. The proposed modification simply states that the "reservation will be reviewed if the Government amends the relevant law".[506]

The most extensive reservation was entered by Malaysia to article 16 of the CEDAW. The initial reservation was related to the entire article 16. The proposed modification reiterates the reservation only to certain paragraphs of article 16, namely paragraph 1 (a), (c), (f) and (g). Only the reservation to subparagraph (a) of article 16 is explained in the proposed modification as being necessary because, according to the national legislation of Malaysia, the minimum marriage age is different for men and women: eighteen for men and sixteen for women.[507] Other reservations to article 16 are not explained. The issues involved are, however, very similar to those of other Muslim States and include rights and responsibilities of spouses during the marriage, dissolution of marriage, custody and guardianship of children and polygamy.

A closer look at the national legislation of Malaysia reveals the following picture. Rights and obligations of spouses during marriage are regulated in a traditional manner similar to that of other Muslim States. The wife owes obedience to her husband in

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506 The proposed modification declared the withdrawal of the initial reservation to article 9, paragraph 1. This reservation does not need, therefore, to be considered further. It is clear from the very detailed report of Malaysia that problematic provisions with regard to the question of nationality include two issues: transmission of nationality by a Malay woman married to a foreigner to her child born outside of Malaysia and transmission of nationality to a foreign husband. *Combined initial and second periodic reports of Malaysia* submitted on 12 April 2004, UN Doc. CEDAW/C/MYS/1-2, paras. 147–148 at p. 46.

507 A careful reading of relevant legal provisions reveals that even this quite low age of marriage can be disregarded if a judge grants his permission. Section 8 of the Islamic Family Law Act states as follows: "no marriage may be solemnized or registered under this Act where either the man is under the age of 18 or the woman is under the age of 16 except where the *Syariah* Judge has granted his permission in writing in certain circumstances."

return for maintenance, payment of which is a duty of the husband. As in other Muslim countries this division of rights and duties between spouses limits significantly such rights of women as freedom of movement, free choice of profession or occupation etc. This explains the reservation to subparagraph (f) of article 16 and could lead to conflicts with other articles of the CEDAW, in particular with paragraph 4 of article 15. Malaysia did not, however, enter any further reservations in this connection.

More detailed regulations are formulated by the legislator concerning dissolution of marriage. Issues of personal status are regulated in Malaysia by the Islamic Family Law Act of 1984 as amended in 1994 and in 2005.[508] This Act limits the unilateral right of a husband to dissolve the marriage requiring firstly, to apply for a divorce, state reasons for the divorce and say whether reconciliation has been attempted and secondly, to pronounce the divorce upon a permission from a court and before a court. However, according to the new section 55A introduced in 1994, unilateral dissolution of marriage by a husband outside the court and without permission of the court can be approved by the court ex post facto.[509] A woman divorced arbitrarily, without a just cause may, however, apply for compensation which is determined by a court.

Women have the possibility to request divorce before a court on certain grounds prescribed by law[510] or to attempt a financial settlement as in other Muslim States. In addition, however, Malay law regulates quite extensively the right of women to apply for divorce on grounds stipulated in the marriage contract. In this latter case there is a significant difference between Islamic law as practiced in Malaysia and in other Muslim States. In other Muslim States the right of women to stipulate additional rights in relation to divorce in the marriage contract is recognized, but women almost never use this possibility because of the negative stigma attached to women using this right. In contrast, in Malaysia the legislator requires the Registrar of marriages to make available a form which is completed for these purposes at the time of registration of the marriage and becomes an integral part of the marriage contract. This is therefore a very efficient way to enlarge the wife's right to divorce.

An interesting regulation was originally contained in the 1984 Islamic Family Law Act concerning polygamy. According to its section 23 no polygamous marriage may be contracted unless at least the five following conditions are fulfilled: the proposed marriage is "just and necessary"; the applicant has financial means to support his

508 This Act is applicable to Federal Territories only. Each of the Malay federal states adopts its own legislation in matters of personal status. The Islamic Family Law Act is, however, used as a basis for analysis; significant divergences in states' legislation are mentioned.

509 Initially, such unilateral dissolution of a marriage by a husband outside the court was unconditionally regarded as invalid.

510 These grounds are the following: the husband's disappearance for over one year; failure to maintain for at least three months; failure to perform marital obligations for at least one year; continued impotence; mental illness lasting at least two years; leprosy or transmittable venereal disease; cruel treatment; the husband's refusal to consummate the marriage for four months; invalidity of the consent of the wife. The wife can also dissolve a marriage concluded by her guardian before she attained the age of 16, if she is below 18 years of age and the marriage was not consummated.

existing and future dependents; the consent of the existing wife; the applicant's ability to accord equal treatment to his wives; the proposed marriage would not cause harm to the existing wife or wives. In addition the law required that the proposed marriage would not directly or indirectly lower the living standards of the existing wife and dependents.[511] The law also indicates factors which should be taken into account in the determination of the "just and necessary" character of the proposed polygamous marriage. Section 23, paragraph 4 (a) indicates the following circumstances: sterility or physical infirmity of the existing wife, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, or insanity. Unfortunately, as a result of the amendments introduced in 1994, the evaluation of the intended polygamous marriage was left to the discretion of judges,[512] the law allowed for registration of polygamous marriages concluded outside the court and without the court's permission if the court considered such a marriage to be in accordance with the requirements of law.

These legislative changes illustrate a tension existing in Malay society between modernist and traditionalist Muslim forces. Moreover, the subsequent revocation of modernist legislation indicates once again that legislative reforms not supported by parallel changes in societal attitudes and practices are condemned to failure.

11. The Maldives

The Maldives' reservation to article 7 (a) is determined by the provision of the Maldives' Constitution which stipulates that only men are eligible for the post of the President of the Republic.[513] The Maldives make no connection between the reservation and any provision of Islamic Shari'a.[514]

The reservation to article 16 states that the application of this article in all matters relating to marriage and family relations shall be "without prejudice to the provisions of the Islamic Shari'a, which govern all marital and family relations of the 100 percent Muslim population of the Maldives." The initial report of the Maldives indicates such

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511 The legislator expressly requested that all conditions shall be met; determination of the existence of all these factors occurs before a court and in the presence and with participation of the existing wife: section 23, paragraph 5.

512 As a result, judges emphasize, more than anything else, a man's capacity to support a second wife, at the expense of almost all other conditions. See more about practical difficulties and tensions surrounding this law: KAMALI, Mohammad Hashim. "Islamic Law in Malaysia: Issues and Developments." 4 *Yearbook of Islamic and Middle Eastern Law* 1997–1998, pp. 153–179; pp.159–169 in particular.

513 See above I.A.1.

514 *Initial report of the Maldives* submitted on 28 January 2000, UN Doc. CEDAW/C/MDV/1, para. 58. During the introduction of the combined second and third periodic reports, the Maldives' representative stressed that President's proposal to remove the gender bar from this Constitutional provision is being considered by the Assembly, thus indicating country's willingness to withdraw its reservation to this article of the CEDAW. *Introductory statement* by Hon. Ms. Aishath Mohamed Didi, Minister of Gender and Family, Republic of Maldives, at p. 3.

areas of concern as polygamy and dissolution of marriage.[515] It is interesting to note that neither the right of women to choose and exercise their profession or occupation[516] nor the guardianship of children[517] poses any problems from the point of view of Islamic law as it is applicable in the Maldives.

It should be noted that the initial report was presented and considered before the entrance into force of the new Family Law of the Maldives which introduces certain improvements. Thus, according to this law the minimum marriage age is fixed at 18 for both men and women,[518] and the unilateral unconditional dissolution of marriage by a husband, although not eliminated, is regulated in that it can take place only before a court.[519]

It should be pointed out that although the Maldives entered no reservations to article 15 of the Convention, some provisions of the Maldives' internal laws as presented in its report are contrary to obligations undertaken by virtue of article 15. These areas are the law on succession[520] and the value accorded to the testimony of women before tribunals.[521] The frequently reserved paragraph 4 of this article seems to be compatible with the national legislation of the Maldives.

Finally, the Maldives entered no reservation to article 2. The Maldives' initial report, while addressing article 2, stresses that the Maldives continue to work towards a larger equality between sexes in all areas. Efforts are still required to eliminate discrimination de jure.[522] Reservations entered by the Maldives are, therefore, also an indication of areas of concern, not an attempt to render the country's participation in the Convention ineffective. In introducing its initial report the Maldives addressed the issue of reservations stating that the present report should permit to better understand the reasoning and logic which motivates reservations formulated by the government of the Maldives, and also to explain new measures

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515 See *Initial report of the Maldives* submitted on 28 January 2000, UN Doc. CEDAW/C/MDV/1, para. 155, 166. According to the information provided in the combined second and third periodic report, Court control over polygamy is introduced in that a judge will review the husband's ability to provide for all wives and children financially and emotionally and inform the former wife or wives about her husband's plans. *Combined second and third periodic reports of Maldives* submitted on 8 June 2005, UN Doc. CEDAW/C/MDV/2-3, para. 41 at p. 23.

516 According to the report women are free to choose a profession and an occupation, although there is no express provision to this end: Id., para. 163.

517 Upon the dissolution of a marriage it is the woman who has the priority of guardianship of children till the age of 7. Afterwards, if a dispute arises, a competent tribunal gives the guardianship either to the father or to the mother taking into account the preference expressed by the child. Id., para. 173.

518 *Combined second and third periodic reports of Maldives* submitted on 8 June 2005, UN Doc. CEDAW/C/MDV/2-3, para. 6.3.1. at p. 14.

519 Id., para. 6.2.2. In the absence of such a provision a husband can dissolve the marriage without either his wife or the public authorities having any knowledge of such dissolution.

520 Id., para. 148. The report does no give any detail about the content of this law.

521 The report simply states that in some matters the value of the testimony of women is limited without explaining further the meaning of this limitation. Id., para. 152.

522 Id., para. 58. (emphasized in original)

and actions which the government intends to undertake in the future. The government also expressed its hope that adoption of these measures would permit to reduce significantly the effects of these reservations.[523] In its introduction to the combined second and third periodic reports the government emphasized again its willingness to withdraw reservations, but also the difficulty in dealing with issues related to religion and culture:

> *With regard to the reservation made to Article 16 of CEDAW, I give you assurances that the Government of Maldives is committed to withdrawing the reservation, and that the process to initiate the necessary amendments to the Family Law will commence shortly. While it is our intention to capture the spirit of the Article in amending the law, I must note that in the present socio-cultural and political setting in the Maldives, and the prevailing interpretation of Shariah on matters relating to polygamy may impede efforts in this regard.*[524]

12. Mauritania

Mauritania became a party to the CEDAW on 09 June 2001 with a general reservation indicating approval of the Convention "in each and every one of its parts which are not contrary to Islamic Shari'a and are in accordance with our Constitution." On 2 August 2005 Mauritania submitted its initial report.[525]

The available information about relevant national legislation of Mauritania is more important since the adoption of Mauritanian Personal Status Code in 2001.[526] Before, as in many African countries the law in Mauritania represented a combination of customary, colonial and Islamic law with a family law remaining mostly uncodified.

The report is quite detailed and Mauritania's answers to questions formulated by the Committee help to clarify certain points.[527] However, in order to understand all implications of the Personal Status Code for the situation of women, it is necessary to read the text of the Code itself. The most problematic areas include conclusion of a marriage, which for a women is not possible without a male guardian (art. 9 and 10), polygamy which is still permitted, although subject to certain restrictions (art. 45) and divorce, where the unilateral right of a husband to repudiate his wife is maintained (art. 83). With regard to wife's right to divorce in exchange for a consideration (art. 92), it is interesting to note that the code states that if the object of the consideration is illegal, the divorce is effective without the husband benefiting from the consideration (art. 92). Moreover, according to article 93, if it is proven that the wife consented to the divorce for consideration just because she wanted to escape prejudices resulting from inadequate behavior of the husband, the divorce is effective and the compensation shall be

523 Id., p.3, para. 6.

524 *Introductory statement* by Hon. Ms. Aishath Mohamed Didi, Minister of Gender and Family, Republic of Maldives, at p. 3.

525 *Initial report of Mauritania* submitted on 2 August 2005, UN Doc. CEDAW/C/MRT/1.

526 Act No 2001-052 of 19 July 2001.

527 Responses to the list of issues and question for consideration of the initial report of Mauritania, 27 April 2007, UN Doc. CEDAW/C/MRT/Q/1/Add.1.

restituted to the wife. Equally, it is worth mentioning the peculiarity of Mauritania's regulation with regard to the guardianship of children upon divorce. According to article 123, priority is given to the mother. The guardianship of the mother lasts till marriage for girls and till the age of majority for boys (art. 126). A drawback is the regulation of second paragraph of article 126 stating that if the better interest of the child so require, the guardianship of the mother with respect to her son can be limited by a decision of a judge till the age of 7.

It should also be mentioned, that according to answers provided by Mauritania, certain provisions of its Nationality Act do not provide full equality between men and women. Thus, women do not have the same rights as men in the area of transfer of their nationality to children when they are married to foreigners, as well as with regard to the possibility of conferring their nationality to their foreign husbands.[528]

As far as the issue of Mauritania's reservation is concerned, the constant reoccurrence in Mauritania's report of the issue of cultural habits and traditions that constitute a real impediment to the advancement of women should be kept in mind.[529] Furthermore, when questioned about the possibility of withdrawal of its reservations, Mauritania stated: "In future, the Islamic Republic of Mauritania will specify the provisions to which it has reservations. This would entail providing a more specific and detailed reservation on a few provisions of the Convention to replace its general reservation."[530]

Thus, as in case of many other Muslim States, the overall attitude of the government demonstrates the willingness to work toward a full implementation of all provisions of the CEDAW with the reservation being an indication of the areas of concern.

13. Morocco

In the reservation to article 2 Morocco expresses its readiness to apply the provisions of this article provided that they do not conflict, firstly, with the provisions of Islamic Shari'a and, secondly, with the constitutional requirements that regulate the rules of succession to the throne of the Kingdom of Morocco. The latter restriction is in no way related to the application of Islam in Morocco and shall not, therefore, be taken into account for the purposes of this research.[531]

The reservation to article 9, paragraph 2 is also not connected to the application of Islamic Shari'a. As all other reservations entered by Muslim States to this provision, it has as a principal aim the preservation of a discriminatory provision of national law, which does not permit a woman married to a foreigner to transmit her nationality to her children as it is possible for a man. In its third and fourth combined periodic report the government of Morocco provided information about planed modification of the

528 Id., p. 17.

529 *Initial report of Mauritania* submitted on 2 August 2005, UN Doc. CEDAW/C/MRT/1, para. 102 at p. 20, paras. 123–124 at p. 23, para. 335 at p. 58.

530 Responses to the list of issues and question for consideration of the initial report of Mauritania, 27 April 2007, UN Doc. CEDAW/C/MRT/Q/1/Add.1., p. 3.

531 Similar reservations protecting the rules of succession to the throne were also entered by some other States maintaining this institution. See e.g. reservations entered by Luxemburg, Spain and the United Kingdom.

relevant provision of Moroccan Nationality Code which will remove this inequality.[532] For this reason the government also announces the withdrawal of its reservation to this article.[533] However, this withdrawal is not yet official, because no instrument of withdrawal has been deposited with the Secretary-General.

Two remaining reservations – to article 15, paragraph 4 and article 16 – are typical for States applying their version of Islamic law. The reservation to article 15, paragraph 4 concerns the right of women to choose their domicile and residence. The reports give the impression that Moroccan law restricted only the rights of a married woman to choose her domicile since it is a husband who decides about the place of the conjugal domicile.[534] There is no information which would indicate that an unmarried woman is limited in her choice of domicile, neither that the freedom of movement for women in general is affected in any way since Moroccan law does not require consent of a husband for a woman to obtain her travel passport.[535] Furthermore, in its last report Moroccan government expressly announced the withdrawal of this reservation as a consequence of legislative reforms.[536]

The text of the reservation to article 16 directly addresses the issue of the dissolution of marriage, which is possible for women only by a decision of a judge.

> *The provisions of the Islamic Shariah oblige the husband to provide a nuptial gift upon marriage and to support his family, while the wife is not required by law to support the family.*
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> *Further, at dissolution of marriage, the husband is obliged to pay maintenance. In contrast, the wife enjoys complete freedom of disposition of her property during the marriage and upon its dissolution without supervision by the husband, the husband having no jurisdiction over his wife's property.*

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532 *Combined third and fourth periodic report of Morocco* submitted on 18 September 2006, UN Doc. CEDAW/C/MOR/4, paras. 169–170 at p. 29.

533 Id.

534 *Initial report of Morocco* submitted on 3 November 1994, UN Doc. CEDAW/C/MOR/1, para. 94; *Second periodic report of Morocco* submitted on 29 February 2000, UN Doc. CEDAW/C/MOR/2, at p. 55.

535 *Initial report of Morocco* submitted on 3 November 1994, UN Doc. CEDAW/C/MOR/1, para. 59. Moroccan legislation also does not contain any express impediments to women's freedom of movement. According to the previous Moroccan Personal Status Law, although obedience is defined as a duty of a wife towards her husband, it is understood to be an obedience according to the established custom (article 36, paragraph 2 of the Moroccan Personal Status Law), which does not necessarily limit the wife's ability to travel on her own. Moreover, as stated in article 123 of the same law, abandonment by a wife of the matrimonial home does not in itself constitute disobedience with a consequence of a husband not being obliged to pay maintenance to his wife. Rather, a husband desiring to suspend a payment of maintenance has to apply for a judicial order obliging his wife to return to the matrimonial home. Only after non-compliance by a wife with such an order can the payment of maintenance be suspended. The situation is improved further by new Moroccan Family Code adopted in 2004, which does not contain any provision stating that the husband is the head of the family; rather article 51 of the Code defines reciprocal rights and obligations of spouses.

536 *Combined third and fourth periodic report of Morocco* submitted on 18 September 2006, UN Doc. CEDAW/C/Mor4, para. 350 at p. 57. The withdrawal was also announced with regard to article 15, paragraph 4, article 16, paragraph 1 (f) and paragraph 2.

For these reasons, the Islamic Shariah confers the right of divorce on a woman only by decision of a Shariah judge.

The reports submitted by Morocco do not provide much more information on the issue of the dissolution of marriage. The explanation provided by Morocco in its reservation gives however a quite clear picture of difficulties faced by a woman whose husband does not wish to let her go and which gave rise to the reservation. As in other Muslim States the unlimited unilateral right of a husband to dissolve the marriage is in discrepancy with the right of women to request a judge to grant a divorce only on certain grounds prescribed by law or in return for material consideration. Surely, the new Family Code mitigates certain negative effects; in particular, all forms of divorce shall take place before a judge and in presence of both spouses.[537] However, this does not eliminate the fundamental difference in the rights accorded to each of the spouses. If the husband can apply for divorce without specifying a reason, the wife shall always indicate, and thus prove that one of the reasons for divorce stipulated by the Code is present.[538] Furthermore, as a matter of principle, divorce pronounced by a court – to put it differently requested by a wife – is irrevocable, in contrast to the divorce **pronounced by the husband**, which is revocable.[539] The very possibility for the husband to revoke the divorce introduces a degree of uncertainty into the situation of the wife. This uncertainty is only mitigated but not removed completely by article 124 of the Family Code which stipulates that the husband wishing to revoke his divorce shall inform two Islamic witnesses, who in turn inform a judge. The judge informs the wife and if she is unwilling to resume the marriage, she can apply for divorce on the ground of irreconcilable differences.

Other problematic areas of the application of article 16 are also discussed in Morocco's reports. These include the permission of polygamy, inheritance rights of women, and eventually the custody and guardianship of children.[540]

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537 Id., para. 372 at p. 59.

538 Firstly, both spouses can apply for divorce on the basis of irreconcilable differences (art. 94ss of the Code. The reasons specific to the wife's demand for divorce are, according to article 98, the following: failure on the husband's part to observe one or more of the conditions stipulated in the marriage contract, hardship, non-support, absence, redhibitory defect, an oath of abstention from marital relations or desertion. The divorce in return for a consideration is also regulated in detail, so as to avoid as far as possible any misuse (art. 115–120)

539 See articles 122 and 123 of the Family Code. The very fact that such an expression as "divorce by the **husband**" as opposed to the "divorce by a **court**' appears in the text of the legal document regulating this issue is a symbol of supremacy of the husband in this regard and a proof of continuing patriarchal attitudes, even of such a progressive legislator.

540 See *Initial report of Morocco* submitted on 3 November 1994, UN Doc. CEDAW/C/MOR/1, paras. 87–110. As for the custody of children after the introduction of the new Family Code which is based in this respect on the principle of best interests of the child, Morocco announced the withdrawal of its reservation in this regard because only very minor inequalities remain with regard to the guardianship of children in the case of remarriage of the woman. However, the relevant provisions do not establish an unconditional rule according to which the woman would loose the guardianship of children if she remarries, but condition such cases primarily by the principle of best interests of the child. See articles 174 and 175 of Moroccan Family Code.

It is significant that with the adoption of the Family Code in 2004, Morocco removed a number of inequalities in the area of marriage. Thus, the marriage age is established at eighteen for both men and women according to article 18 of the Code.[541] Moreover, a woman can conclude her marriage contract without the intermediary of her guardian.[542] Husband is no more declared the head of the family by the Moroccan legislator[543] but mutual rights and obligations of spouses are formulated.[544]

It is particularly interesting to follow this evolution of the legislation in Morocco, because it happens, among others, under the influence of its participation in the CEDAW. It demonstrates an example of possible improvements for Muslim countries, while maintaining their traditional adherence to Islamic values. Despite remaining problematic areas, Morocco's attitude demonstrates its willingness toward continual improvement and again proves the fact that reservations are nor more than indicators of areas of concern.

14. Niger

Niger became party to the CEDAW on 7 November 1999 with reservations to a number of articles. These reservations are quite detailed, and on 21 November 2005 the government submitted its combined initial and second periodic reports.[545]

The reservation to article 2 concerns two paragraphs of this article, namely paragraph (d) requiring States to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation and paragraph (f) addressing the duty of States to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. The text of the reservation itself specifies that the government of Niger is concerned with the measures concerning the abolition of customs and practices which constitute discrimination against women, particularly in respect of succession.

The further reserved provision is article 5, paragraph (a) also dealing with the modification of social and cultural patterns of conduct of men and women.

As for the Special Part of the CEDAW, the government of Niger reserved articles 15, paragraph 4 and 16, paragraph 1 (c), (e) and (d). The reservations contain certain clarifications about the affected rights and the extent of limitations. Thus, in relation to

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541 Previously, article 8 of Moroccan Law of Personal Status established the age of marriage at 18 for boys and 15 for girls.

542 According to article 34 of the Family Code conclusion of marriage by intermediary of a guardian is a right of a women, but not an obligation to proceed in certain way as it was previously under article 12 of Moroccan Law of Personal Status.

543 Article 1 of the previously applicable Law of Personal Status declared that husband is the head of the family.

544 Article 51 of the Family Code. In contrast, article 36, paragraph 2 of the Law of Personal Status required the wife to obey her husband "in accordance with the established custom".

545 *Combined initial and second periodic report of Niger* submitted on 21 November 2005, UN Doc. CEDAW/C/NER/1-2.

article 15, paragraph 4 the reservation clarifies that the right of women to choose their residence and domicile is affected only to the extent that these provisions concern married women. In other words, only unmarried women can make use of this right to choose their residence and domicile. Married women do not enjoy this right because they have to follow their husbands who also have an exclusive right to make a choice about the place of the marital home.[546]

The reservation to certain provisions of article 16 enumerates the following affected areas: rights and responsibilities during the marriage and at its dissolution, rights to decide freely and responsibly on the number and spacing of children, and the right to choose the family name. However, the reservation does not contain any indication as to the extent to which these rights are affected. In order to understand the exact effect of this reservation, an analysis of national legislation is therefore required. It is however, difficult to get precise information on issues relating to the marriage and family relations, because these are governed in Niger mainly by custom and uncodified Islamic law.[547] The report helps to clarify certain issues, so the available information permits us to have an idea about existing inequalities in this area. As in many Muslim States, obligations of spouses during marriage are defined in terms of maintenance provided by a husband in return for the wife's obedience. This obligation of a wife to obey her husband is interpreted very widely and includes the requirement to obtain permission from a husband to leave the home whether for a visit, for work or any other reason. The unilateral extra-judicial dissolution of marriage by a husband is not restricted in any way except for the requirement of registration which at least allows divorced women to have definite knowledge about their status. Women can apply for a divorce only on certain restricted grounds or in return for compensation.

The situation in Niger is in so far peculiar, as the precedence given to customary law by Act N° 62-11 of 16 March 1962 over Civil Code contributes to further fragmentation of law and creates supplementary difficulties in establishing the content of applicable regulations. This is due to the fact that customary law is different from one region to another, from one ethnic group to another. Thus despite the fact that the Constitution establishes the principle of equality and that any law contrary to the CEDAW is regarded as invalid, the reality of women's life is very far from satisfactory. The government openly acknowledges all these contradictions and difficulties.[548] Significant in this regard is the situation with regard to the project of Family Code. The most recent version of the draft is dated 1993. However, till now the Code could not be adopted "because of a lack of consensus among religious leaders".[549]

The reservations entered by Niger contain a very important general statement declaring that the reserved provisions

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546 This follows from traditional rules of Islamic Shari'a as interpreted and applied in Niger.

547 *Combined initial and second periodic report submitted by Niger* on 21 November 2005, UN Doc. CEDAW/C/NER/1-2, para. 1.2.1 at p. 13.

548 It is, for example, remarkable that the report contains a part entitled "de jure discrimination": Id., para. 1.2.1 at p. 21. See also paras. 14.1.1 and 14.1.2 at pp. 63–64.

549 Id., para. 14.1.3 at p. 64.

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.

This statement is significant, as it indicates the willingness of the government to work progressively towards elimination of prejudicial customs and practices. Reservations obtain, therefore, an indicative character. They are not a means of protecting discriminatory practices, but an indication of the areas of concern. It appears to me that in the light of this latter statement the reservation to article 5 was not necessary, as it does not require an immediate abolition of discriminatory patterns of conduct, but only obliges States to work progressively towards their modification.

15. Oman

Oman adhered to the CEDAW in 2006 with a reservation which combines a general statement that any provision of the Convention not in accordance with Islamic Shari'a shall not be applicable to the country with reservations to some particular provisions. The articles of the CEDAW which are expressly mentioned by Oman in its reservation are: article 9, paragraph 2; article 15, paragraph 4, and article 16. Whereby, as far as article 16 is concerned, the reservation mentions subparagraphs (b), (c), and (f) as being of particular concern, however, without limiting its reservation to these subparagraphs exclusively. It seems that this reference to certain particular articles of the Convention serves as a simple indication of specific areas of concern.

Since the personal status law based on Islam remains uncodified, it is difficult to be very precise about any other provision of the Convention which could fall under the general reservation. The situation in Oman is in so far peculiar, as the Islamic doctrine of the majority population is neither Sunni, no Shi'i, but represents a separate Ibadi community. However, according to the available information, the version of Islamic law of this community applicable in matters of personal status does not differ much from traditional Sunni interpretations.

As in other countries, where law of personal status is uncodified and the reservation is very general in its formulation, the challenge for the Committee remains the determination of concrete areas of concern.

16. Pakistan

Since 1996, the year when Pakistan became a party to the CEDAW, this country has been reluctant to comply with its reporting obligations. The combined initial second and third periodic report was submitted only on 3 August 2005, almost ten years after its adherence to the Convention.[550] The reservation entered by Pakistan at the time of its accession to the Convention is of a very general nature, making the compliance with the provisions of the CEDAW subject to the provisions of the Constitution of the Islamic Republic of Pakistan. This Constitution not only proclaims Islam the State

550 *Combined initial, second, and third periodic report of Pakistan* submitted on 3 August 2005, UN Doc. CEDAW/C/PAK/1-3.

religion of Pakistan, but contains many other provisions intended to bring the entire legal system in accordance with the principles of Islam. In particular, it requires that all laws should be brought in accordance with the Islamic Shari'a.[551]

In this connection it is interesting to mention that the issue of adherence of Pakistan to the CEDAW was first discussed in 1984 and since this time remained subject to constant lobbying. During this process one of the texts of the eventual reservation which was proposed reads as follows:

> *The Government of the Islamic Republic of Pakistan agrees to ratify the convention to the extent that articles and sub-clauses are not repugnant to the teachings of the Holy Quran and the Government of Pakistan shall be the sole judge of the question whether such repugnancy exists.*[552]

This text was however rejected because many objections had to be expected. Since the Constitution of Pakistan clearly declares Islam the State religion and requires that all laws shall be in accordance with Islamic Shari'a, the actual reservation of Pakistan expresses the same idea and serves the same purpose, although in a hidden form. It should also be mentioned that during the discussion of the issue of the adherence of Pakistan to the CEDAW the image of Pakistan in the international arena came constantly to the forefront. The decision to ratify the Convention was finally taken two weeks before the Beijing Conference.[553]

The report starts with an amazing remark: "A compliance report was due within a year's time, but **somehow** it could not be produced alongwith subsequent two periodic report."[554] Then it is added that the preparation of the report took more than a year. Thus, once the willingness to prepare the report appeared, it did not take much time. The use of the word "somehow" can be explained in this context by the reluctance of the government to explain real reasons for non-submission of reports.

The reading of the report allows identifying the following areas of concern. With regard to rights embodied in article 9 of the CEDAW, the remaining inequality relates to the right of Pakistani women to transmit their nationality to their foreign husbands. The inequality with regard to the transmission of nationality to children by women married to a foreigner was abolished in 2000.[555] With regard to article 15, in the area of contracts, the relevant legislation requires one male witness, so that women's evidence is not admitted.[556] In matters of marriage and family life, areas of concern are similar to those of other Muslim States. Firstly, age of marriage is 18 for boys and 16

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551 See in particular article 2 (a), chapter 3 (a) and part IX "Islamic Provisions" of the Constitution of the Islamic Republic of Pakistan.

552 Text from Ali, Shaheen Sardar. *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* The Hague, Boston, London: Kluwer Law International, 2000, p. 269. The author also describes the entire internal process which finally led to the ratification of the CEDAW.

553 For more detail see Id., pp. 265–272.

554 *Combined initial, second, and third periodic report of Pakistan* submitted on 3 August 2005, UN Doc. CEDAW/C/PAK/1-3, p. 7.

555 Id., para. 191 at p. 54.

556 Id., para. 474 at p. 116.

for girls.[557] Dissolution of marriage is marked by the following typical discrepancy of rights of spouses. The husband can unilaterally divorce his wife without court/s intervention and without giving to his divorced wife any document attesting that she is divorced. However, if this divorce can be proven, the wife is entitled to maintenance. The wife's right to apply to a court for divorce is quite large, as she can ask for divorce also just because she dislikes her husband, without having to prove the existence of any particular reason in contrast to the situation in many other Muslim countries. However, a wife who sues for divorce is not entitled to maintenance.[558] Finally, with regard to the guardianship and custody of children upon dissolution of marriage, the wife is regarded as natural custodian, whereas the husband the natural guardian of children. However, it is reassuring that 'in all cases the deciding principle is the welfare of the child."[559]

Pakistani government gave the following explanation with regard to its reservation:

> *The Declaration facilitated Pakistan's accession to the Convention ... The objective was not to go against the object and purpose of the Convention while assuaging the concerns of those who had misgivings about the Convention. Subjecting the implementation of the Convention to the Constitution of Pakistan was a sensible course of action.*[560]

This statement is rather reassuring and allows interpreting the reservation as an indication of the areas of concern.

17. Saudi Arabia

The ratification of the CEDAW by the Kingdom of Saudi Arabia on 7 September 2000 was accompanied by a general reservation. The first part of this reservation releases the country from the obligation to comply with those provisions of the CEDAW which are contradictory to the norms of Islamic law. The second part of the reservation states that the Kingdom considers itself not bound by paragraph 2 of article 9 of the Convention. What follows from such a construction of the reservation is that the reservation to article 9 paragraph 2 is not linked to the application of Islamic law in Saudi Arabia.

It is not very difficult to identify provisions of the CEDAW contradictory to the Islamic law as understood by Saudi Arabia. As in many other Muslim States with a longstanding tradition of patriarchy, they include in the first place matters relating to marriage and family relations and inheritance rights. The interests of women in Saudi Arabia are however more seriously affected than in any other Muslim State. Discriminatory attitudes protected by law in Saudi Arabia are not limited to the private or family sphere as in the majority of Muslim States, but extend to almost all areas of public life, such as education, political activities, employment and even the

557 Id., para. 508 at p. 122.
558 Id., paras. 494 – 495 at pp. 119–120.
559 Id., para. 503 at p. 121.
560 Id., paras 2–3 at p. 8.

simple participation in the life of the society. On the other hand, it is difficult to give an exhaustive and detailed picture of all discriminatory rules and regulations because family law and law relating to personal status remain uncodified. Judicial decisions cannot always be taken as a source for determining applicable laws because they do not have the value of precedents as is the case in common law systems. The best source would probably be widely published collections of opinions of leading jurists. These opinions often constitute a basis for judicial decisions.[561]

The recently submitted and considered by the CEDAW Committee combined initial and second periodic report of Saudi Arabia does not contain any significant information on the content of relevant legislation.[562] The reading of the report as well as of replies to questions of the Committee leaves a very unsatisfactory impression. The government and its representatives adopt a very evasive attitude and sometimes just do not respond to questions giving some very general information when it comes to sensitive areas. Thus, for example, the government indicated in its report that women are entitled to participate in municipal elections, because the relevant law uses the word "citizen" without specifying the sex. However, for some unexplained reasons women did not participate in first elections. The Committee requested additional information both about "whether women are ensured the same rights as men to vote and to be eligible for election at all levels" and about concrete steps taken to ensure women's participation in the following municipal elections.[563] The reply given by Saudi Arabia was the following:

> *Women have the same political rights as men and are ensured the same right as men to participate in the decision-making process. The law does not prohibit women from participating in elections, although, in practice, that participation is not completely possible. Women also have the right to participate in elections of the council of chambers of commerce and have won seats in a number of those councils.*[564]

This answer does not give any additional information about rights of women to vote and be elected, even less about steps undertaken to ensure women's participation in forthcoming elections. It should rather be interpreted as an indication of the fact that women will not participate in the forthcoming elections. Similarly embarrassing is the government's response to question 22. The government was asked to provide statistics on women's and girls' participation in different **fields and areas of study**, as compared to men's and boys', in colleges and universities. In response, without any comment or explanation, are provided statistics on enrollment by **educational level**.[565]

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561 For more detail to this aspect see Vogel, Frank, E. "The Complementarity of Ifta and Qada: Three Saudi Fatwas on Divorce." In: Masud, Muhammad Khalid, Messick, Brinkley, Powers, David S., eds. *Islamic Legal Interpretation: Muftis and their Fatwas*. Cambridge, London: Harvard University Press, 1996, pp. 262–269.

562 *Combined initial and second periodic report of Saudi Arabia* submitted on 29 March 2007, UN Doc. CEDAW/C/SAU/2.

563 Responses by Saudi Arabia to the list of issues and questions contained in document number CEDAW/C/SAU/Q/2, 18 December 2007, UN Doc. CEDAW/C/SAU/Q/2/Add.1, question 16 at p. 14 and 15.

564 Id., at p. 15.

565 Id., at p. 20.

The government explained the reservation in following terms:

> *The Kingdom's ratification of the Convention is based on the fact that its general content is consistent with the country's approach to safeguarding the rights of women. ... To talk about the philosophy of domestic and international law and the application thereof in the Kingdom of Saudi Arabia in isolation from the Islamic Shariah is inconceivable. Lawmaking in an Islamic state proceeds from the Islamic Shariah.... As such, the country's laws cannot transgress the framework of the Islamic Shariah and, consequently, may not be changed or developed by the legislative authority in the Kingdom in a manner which would lead to the creation of new principles, inconsistent with the bases of the Islamic Shariah, in letter and spirit.... This is what is made clear, albeit in condensed form, by the Kingdom's explanatory reservation to the provisions of the Convention...*[566]

Such an attitude of a State does not necessarily imply negative consequences for the status of women. It simply expresses clearly what other States would not formulate in such unequivocal terms. At the final account, everything depends on the interpretation of Islamic law adopted in one or another State. However, such an unambiguous expression of primacy of Islamic law becomes dangerous connotations when one takes into account government's evasive attitude with regard to other matters, situation with women's rights in Saudi Arabia and the following vision described in the report:

> *Islam's view of woman derives from her shared humanity with man:... However, proceeding from a basis of realism, Islam holds that full likeness between men and women is contrary to the reality of their being ... Scientific studies attest to the physiological difference between them ... The Islamic Shariah respects these natural differences and accords woman a privileged position in order to achieve justice for her.*[567]

This vision of women being equal but different served as a justification for many discriminatory practices and did not provide to be very useful in improving the situation of women.

18. Syria

Syria accessed to the CEDAW quite recently, namely on 28 March 2003. This accession was accompanied by a quite extensive reservation which lists not only all articles traditionally reserved by Muslim States, namely article 2, article 9, paragraph 2, article 15, paragraph 4 and article 16, paragraph 1 (c), (d), (f), and (g), but also the second paragraph of article 16. Only the reservation to this latter provision is explained in terms of possible contradictions with Islamic Shari'a. However, a closer look at Syria's national legislation makes it clear that reservations to other provisions of the CEDAW are also motivated by a desire to protect Islamic law as applicable in Syria from immediate changes.

In its initial report Syria gave a detailed account of its reservations and legislative provisions which need to be reconsidered.[568] With regard to article 2, it was stated that the

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566 *Combined initial and second periodic report of Saudi Arabia* submitted on 29 March 2007, UN Doc. CEDAW/C/SAU/2, at p. 10–11.

567 Id., at p. 11.

568 *Initial report of Syria* submitted on 29 August 2005, UN Doc. CEDAW/C/SYR/1.

reservation "is not incompatible with the articles of the Syrian Constitution. Efforts are therefore being made to redress the situation by carrying out a review of Syria's reservations with the aim of removing them by and large."[569] The reservation to article 15, paragraph 4 is also considered for withdrawal.

> *since jurisprudents of the Hanafite, Malakite and Hanbalite schools believe that women are entitled to lay down as a contractual condition the right to choose their residence and to travel, in which case they possess that right. The failure to claim it in the contract, however, is regarded as an implicit forfeiture of that right. As for the freedom to choose a domicile, the rule is that it is the husband's choice, since he is the person who is legally obliged to provide maintenance. A woman may, however, reject the abode chosen by her husband, in which case maintenance is forfeited.*[570]

Furthermore, the reservation to article 9, paragraph 2 should also be withdrawn in the near future, because the relevant national legislative provision which creates inequality with regard to the right of women to transmit their nationality to children when they are married to foreigners is considered for appropriate modification.[571] It should be noted in this connection that the reservation is not linked to the applicability of Islamic law.

As far as article 16 is concerned, it was clearly stated that upon various consultations and workshops it was "agreed that the reservation to article 16, paragraphs 1 (g) and 2, should be withdrawn and that the reservation to paragraphs 1 (c) and (f) should remain on the basis of jurisprudential opinions that they are incompatible with the provisions of the Islamic Shari'a."[572] The report provides significant amount of information on relevant provisions of national legislation, so that it is possible to have a quite clear picture of the situation of women with regard to the reserved provisions. However, it is regrettable that as far as provisions to which reservation should be maintained are concerned, the government did not indicate whether, while maintaining the reservation, it is possible to introduce certain improvements. The Committee attempted to get additional information on the subject-matter of reforms of personal status law which is going on in Syria. The response was however unsatisfactory and did not address the content of proposed amendments.[573]

Thus, with regard to provisions which shall remain reserved the following areas of concern can be indicated. The right to marry of women is not limited by the requirement of a male guardian's consent. However, the guardian has the power to request the annulment of a marriage concluded without his consent if the condition of suitability of the husband is not fulfilled, which is a construction typical for the Hanafi school of law.[574] All traditional forms of divorce existing in the majority of Muslim countries – unilateral divorce by the husband, divorce in exchange for consideration and divorce

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569 Id., at p. 30.
570 Id., at p. 80.
571 Id., at p. 47.
572 Id., at p. 105.
573 Responses to the list of issues and questions with regard to the consideration of the initial periodic report of the Syria, 2 March 2007, UN Doc.CEDAW/C/SYR/Q/1/Add.1, question 30 and reply at p. 17.
574 See Chapter 1, II.B.2.

on certain defined grounds by court on the request of the wife – are defined in Syrian legislation in a traditional way.[575] However, the report when describing the unilateral divorce by the husband states: "Unilateral divorce by the husband is where a woman is under constant threat of divorce without knowing when or why it may occur."[576] This critical attitude is already an indication of possible future positive changes. The question of custody and guardianship of children is also regulated in a traditionally conservative manner.[577]

It is interesting to mention that polygamy, which is still permitted in Syria under some conditions, is described in the report as a practice which shall be eliminated because not in full accordance with Islamic values.[578]

The overall attitude of Syria can be defined as constructive and dialogue-oriented. The government submitted report in a timely manner, without any delay, discussed all questions openly and in detail. It can also serve as an example of certain good practices to be adopted by other Muslim States in order to negotiate possible positive solutions within the boundaries of Islamic tradition.

19. Tunisia

Tunisia entered no reservation to article 2. However, the "general declaration" according to which the Tunisian government

> *shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of chapter I of the Tunisian Constitution*[579]

can have negative effects not only on the application of article 2, of the Convention, but of any other article as well.

The reservation to article 9, paragraph 2 which reflects the inequality in respect of the transmission of nationality of parents to their children, is not dictated by any provision of the Islamic Shari'a. However, as suggested in the report of Tunisia, "the Tunisian patriarchal concept of the family may account for such inequality (…)"[580]

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575 *Initial report of Syria* submitted on 29 August 2005, UN Doc. CEDAW/C/SYR/1, at pp. 89–94.

576 *Initial report of Syria* submitted on 29 August 2005, UN Doc. CEDAW/C/SYR/1, at p. 93.

577 Id., at pp. 95–98.

578 *Initial report of Syria* submitted on 29 August 2005, UN Doc. CEDAW/C/SYR/1, at p. 88. This position is justified with reference to the text of the Quran and the example of the Prophet. See above, Chapter 1, II.B.6.

579 The first article of that chapter of the Tunisian Constitution declares Islam to be the official religion of the state.

580 *Combined initial and second periodic reports of Tunisia* submitted on 12 April 1994, UN Doc. CEDAW/C/TUN/1-2, para. 369. However, considerable changes as far as this patriarchal concept of family is concerned were introduced by an amendment in 1993. These changes are not reflected in the combined initial and second periodic report of Tunisia because this report was prepared before the amendments came into force. See *Combined third and fourth periodic reports of Tunisia* submitted on 2 August 2000, UN Doc. CEDAW/C/TUN/3-4 and below in this part.

This concept is incorporated in article 23 of the Tunisian Personal Status Code, which considers the husband the head of the family.[581] The same concept was used by the Tunisian legislator as justification of the restriction of the right of married women to choose their residence. According to Tunisian law "a married woman must accompany her husband when he changes residence. She has no right to elect a domicile other than the conjugal domicile."[582] This provision led to the reservation to article 15, paragraph 4. However, with the introduction of various amendments to the Tunisian Personal Status Code in 1993 this unconditional obligation of a wife to follow her husband was abolished. According to the present legislation the obligation is imposed on both spouses to have a common conjugal domicile, which does not prevent either of the spouses to a have a distinct temporary domicile if necessary.[583]

The Tunisian government also declared itself not bound by article 16, paragraph 1 (c), (d) and (f) without giving any further explanations in the text of the reservation itself. Paragraph (g) and (h) of the same article were reserved because they can conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance.[584]

As far as paragraphs (c), (d) and (f) of article 16 are concerned, possible reasons for reservations can be found in the fact that the husband is considered the head of the family. The wife does not, therefore, have exactly the same rights regarding family matters.[585] Another problematic area can be the custody and guardianship of children, because upon the dissolution of marriage the wife has custody of young children and the husband is the guardian of the children.[586] Other matters often invoked in connection with the reservations entered by Muslim States, such as polygamy and dissolution of marriage, play no role in the case of Tunisia. Polygamy is prohibited since the entry into force of the Tunisian Personal Status Code on 1 January 1957.[587] By the same Code equality between men and women is established with regard to the dissolution of marriage.[588]

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581 *Combined initial and second periodic reports of Tunisia* submitted on 12 April 1994, UN Doc. CEDAW/C/TUN/1-2, para. 913.

582 Id., para. 912.

583 *Combined third and fourth periodic reports of Tunisia* submitted on 2 August 2000, UN Doc. CEDAW/C/TUN/3-4, paras. 1035–1041, pp. 206–207; as derived from article 23 of the Tunisian Personal Status Code. Restrictions on this right are placed by article 61 which stipulates that when the custody of children is granted to the mother, she is prevented from moving far enough away to preclude the guardian from fulfillment of his duty towards his ward, otherwise she will lose her custody. In a similar vein article 67 stipulates that guardianship may be withdrawn from the father in favor of the mother if he abandons his home and has no known address or for any other reason likely to prejudice the interests of the child.

584 See the text of the reservation. As explained in the report, the legitimate children must take the name of their father: *Combined initial and second periodic reports of Tunisia* submitted on 12 April 1994, UN Doc. CEDAW/C/TUN/1-2, para. 971; inheritance law is based on Islamic Shari'a and does not always give men and women of the same degree of kinship the same share of heritage: Id., paras. 1003–1010.

585 Id., paras. 961–964.

586 Id., paras. 984–987, 955–966.

587 Id., para. 920.

588 Id., paras. 976–979.

It should be however stressed that changes introduced by the above-mentioned reform in 1993 significantly diminished the extent to which the reserved rights are affected, thus making certain reservations if not completely unnecessary then of a lesser significance. These improvements concern firstly, the rights and obligations of spouses during marriage and secondly custody and guardianship of children in general as well as upon a dissolution of a marriage in particular. The most important improvement is the new version of article 23 of the Personal Status Code. The former version of this article designed the husband as a head of the family and required a wife to obey her husband. The new version of this article, although maintaining the status of the husband as the head of a family, establishes the obligation of both spouses to cooperate in managing their family affairs:

> *Each of the spouses shall be considerate of, maintain good relations with and avoid causing injury to the other. Both spouses shall fulfill their conjugal duties in conformity with usage and custom.*
>
> *They shall cooperate in managing the family's affairs, the proper education of their children and the conduct of their affairs, including education, travel and financial transactions.*
>
> *The husband, as head of the family, should provide for needs of his wife and children to the extent of his means and in accordance with their status in terms of household needs.*
>
> *The wife shall contribute to the family's expenses if she has property.*[589]

As explained in the combined third and fourth periodic report of Tunisia the hierarchy or relationship of power inherent in the former concept of family and understanding of the relationship between the spouses is no longer valid. The position of head of household still attributed to the husband is justified by the country's economic realities[590] and is explained as follows:

> *The position of head of household is no longer a right granted to a husband to the detriment of his wife but an economic function and a responsibility linked to the duty incumbent on him to provide for the needs of his wife and children.*[591]

The report expressly recognizes that this role of head of household can be played by women giving the example of single mothers. It does not go further and does not

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589 The former version of article 23 defined the relationship between spouses in the following terms: "The husband shall be considerate of his wife and maintain good relations with her. He shall avoid causing her harm. He shall meet the expenses of the marriage and provide for the needs of his wife and their children to the extent of his abilities and in accordance with the status of the wife. The wife shall contribute to the expenses of the marriage if she has property. The wife shall respect the prerogatives of the husband as the head of the household and, to that extent, shall owe him obedience. The wife shall fulfill her conjugal duties in conformity with usage and custom."

590 A husband is the main economic provider. The economically active female population constitutes only 24 per cent of the total economically active population (data of the national census of 1994). *Combined third and fourth periodic reports of Tunisia* submitted on 2 August 2000, UN Doc. CEDAW/C/TUN/3-4, p. 212, para. 1063.

591 Id., p. 212, para.168.

discuss the situation in families where the main provider is a woman. Another suspicious aspect of this new article is the mentioning of usage and custom in relation to the conjugal duties of both spouses. It is clear that usage and custom will more often be detrimental to the promotion of equality than supportive of it. However, the more general spirit of mutual cooperation and equality of this article combined with other positive changes introduced into the Personal Status Code permits to qualify the attitude of Tunisia towards its obligations under the CEDAW as very promising and serious. Changes introduced in relation to the custody and guardianship of children should be addressed in this connection.

The most important novelty in connection with the custody and guardianship of children is the possibility for a woman to get not only the custody, but under certain circumstances also the guardianship of children. The Tunisian legislator connects this possibility to the changing economic position of women and the recognition of their contribution to the material welfare of the family. Thus, article 67 of the Tunisian Personal Status Code states that a mother who has the custody of her children also has "prerogatives of guardianship with respect to the travel and education of the child and the management of his or her financial accounts." Although the full guardianship is still automatically attributed to the father or another male relative, the very possibility for a woman to have the guardianship and not only the custody of children is a significant step forward. In its third and fourth combined periodic report Tunisia recognizes that the rights of parents with respect to the guardianship remain unequal, but it stresses that the father no longer enjoys an absolute right in the matter. Taking the interests of the child into account a magistrate may grant the attributes of the guardianship to the mother.[592]

Finally, it is important to stress the following statement made by Tunisia in its combined initial and second periodic report: "(…) reservations must be regarded as temporary until the various provisions of the Convention can be fully integrated into existing Tunisian legislation."[593] The combined third and fourth periodic report submitted by Tunisia only supports this statement.

20. United Arab Emirates

This country became a party to the CEDAW on 6 October 2004 with a reservation which has a distinguished feature: it expressly relates also to the second paragraph of article 15, which is not the case in any other Muslim country. This reservation is explained in terms of difference between men and women in such areas as legal capacity, testimony and the right to conclude contracts motivated by application of Islamic law. Other areas preserved by the reservation and motivated by the necessity to safeguard Islamic law are inheritance, which is invoked in relation to article 2 and rights and obligations of spouses during the marriage, its dissolution and subsequently in relation to article 16. The reservation to article 9, paragraph 2, in contrast, does not mention Islamic law, but simply preserves the matter of acquisition of nationality as an internal affair.

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592 Id., p. 220, paras. 117–119.

593 *Combined initial and second periodic reports of Tunisia* submitted on 12 April 1994, UN Doc. CEDAW/C/TUN/1-2, para. 122.

In the matters of personal status the United Arab Emirates apply classical Islamic law which is not codified. Therefore, although it is possible to identify areas of concern, it is difficult to be very precise about solutions chosen in this country. The forthcoming initial report should provide important indication about country's attitude and concrete issues of concern.

C. *Conclusions*

The most visible general trend among States analyzed above is to declare reservations to be of a temporary nature. They are interpreted as being mere indications of areas of concern, which will disappear as soon as necessary legislative changes supported by changing societal attitudes and customs are introduced. That such changes can take several years and sometimes – in cases where States make these changes dependent on social conditions, public opinion and other social and political factors – even decades is evident. This vision of reservations by a State – a reservation being a temporary indication of areas of concern – contains a danger of freezing the reservations. However, if a State is taking its undertakings under the Convention seriously, such interpretation of its reservations gives the Committee, as a treaty-monitoring body, a unique opportunity to influence legislative changes envisaged by a State in a manner most favorable to the effective implementation of the Convention.

Taking into account the position adopted by the overwhelming majority of Muslim States, in particular as far as reservations to article 2 and 16 are concerned, I came to the following conclusion: obligations embodied in articles 2 and 16 are of such a nature that they do not necessarily require an immediate result. As already mentioned above with regard to article 2, it contains "hard" obligations requiring an immediate result as well as "soft" obligations of effort. Furthermore, rights guaranteed by article 16 are of a particular nature. They can also be called obligations of effort; they require States to take "all appropriate measures" without specifying further what this appropriateness means. This implies first of all that much is left to the discretion of States. Therefore, implementation of such obligations is very much dependent on the internal situation of each particular State. For the implementation of this type of obligations, States have, as the practice of other treaty-monitoring bodies, in particular in relation to the ICESCR shows, a certain margin of appreciation and a certain period of time. No immediate results are required in this case. It does not mean that no action on the part of States is required. On the contrary, States' compliance with this type of provisions can be measured by steps undertaken by each particular State in order to bring the situation in the country in line with requirements of relevant articles of the Convention. In certain cases, this measurement can be done on hand of quite exact criteria, as for example the practice developed by the Committee on Economic, Social and Cultural rights shows.[594] However, it is not

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594 See e.g. Committee on Economic, Social and Cultural Rights, *State obligations, indicators, benchmarks and the right to education*, Background paper submitted by Paul Hunt, 16 July 1998, UN Doc. E/C.12/1998/11. and Green, Maria. "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement." 23 *HRQ* 2001, pp. 1062–1097.

suitable for all types of rights. Nevertheless, if in each periodic report a State indicates some further positive changes towards implementation of a particular provision, it can already be a sign of a seriousness of the State's undertakings. In general, it could be suggested that States themselves should at least indicate in their periodic reports what kind of measures and why they regard as appropriate in fulfilling one or another obligation and propose a plan of advancement in implementing this obligation over several years, and even decades, if necessary. In this connection, a comparison between the report of Saudi Arabia and, for example, Malaysia is very illustrative. If the former State adopts in its report a very evasive attitude without giving the members of the Committee the possibility to fully understand the relevant legislative framework, the latter adopts a very open and precise approach in fulfilling its reporting obligation with the members of the delegation having a high degree of competence in their respective areas.[595] In between can be positioned the stance adopted by Kuwait. Its report and discussion of issues raised by members of the Committee without attaining Malaysia's level of quality, is still satisfactory and allows understanding issues involved. However, one is simply incredulous when reading that one of the members of Kuwait's delegation when asked to respond to certain questions

> *said that she was taken aback by the thrust and details of the Committee's questions. Everyone was aware of the Convention, although practices might vary, with some countries being way below or way ahead of the stipulations of the Convention. However,* ***she had not read the report nor was she conversant with its subject matter****, as her duties as Kuwait's Ambassador to Vienna had concerned other matters. She was as surprised as members of the Committee at the contradictions.*[596]

Thus, these divergent attitudes indicate different level of seriousness of States with regard to their obligations and can serve as an indication of the fact whether States really and effectively used the time for the improvement of their compliance with the CEDAW.

States parties to the CEDAW having no indication of the possibility to dispose of this period of time and margin of appreciation as it is the case with regard to the ICESCR, enter reservations in order to indicate their understanding of obligations embodied in articles 2 and 16 as obligations of means not requiring immediate results.

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595 They always respond to questions and enquires with high degree of precision, even if the issue is sensitive and does not place the State in the best light. The reply given to the question of punishment of marital rape raised by some members of the Committee in relation to the issue of domestic violence is particularly illustrative. A member of Malaysian delegation stated: "after thorough consideration, the Parliamentary Select Committee had concluded that marital rape could not be made an offence, as that would be inconsistent with Shari'a law. As a compromise, the Select Committee had proposed that hurting or threatening to hurt a wife in order to compel her to have relations would constitute an offence." Consideration of the combined initial and second periodic report submitted by Malaysia, 35th session, Summary records of the 732nd meeting, 24 May 2006, UN Doc. CEDAW/C/SR.732, para. 54 at p. 8.

596 Consideration of the combined initial and second periodic report submitted by Kuwait, 30th session, Summary records of the 634th meeting, 15 January 2004, UN Doc. CEDAW/C/SR.634, para. 49 at p. 8., (emphasis added).

Reservations which are based on this reasoning are, therefore, in fact interpretative declarations and contain no danger for the effective implementation of the object and purpose of the Convention.

In this connection the following point should also be concretized. As already mentioned above, article 2 contains some obligations requiring an immediate result, and not a mere effort from States. Some Muslim States reserved the entire article 2 and thus also these "hard" obligations. At first glance the position of this group of Muslim States cannot be explained or justified by the reasoning proposed above. However, one should be aware of the following contradiction between the "hard" obligations of article 2 and requirement to take "all appropriate measures" in the context of many articles of the Special Part of the CEDAW. If a State takes advantage of the possibility to adapt gradually its internal situation to the provisions of the CEDAW, which is implicitly permitted in the all "appropriate measures" obligations, it will automatically be in breach of one or another "hard" obligation of the General Part, and in particular of article 2. Therefore, reservations entered to "hard" obligations of the General Part do not contradict the general idea behind the above-proposed explanation. Namely, that as long as States make all appropriate efforts to bring the situation in their country into conformity with substantive requirements of the Special Part of the CEDAW, their reservations should be interpreted as mere indications of areas of concern of temporary nature and not as impediments to the achievement of full equality. Should all these contradictions and ambiguities be clarified either in the text of the Convention itself, or by the Committee in its general recommendations, States would enter less reservations and would be less reluctant to withdraw already existing reservations.

Finally, some States did not enter reservations to all of the provisions of the CEDAW which conflict with their national legislation based on Islam. For example, Iraq and the Maldives did not reserve article 15 as other Muslim States did, although their legislation contains similar discriminatory provisions as that of reserving States. This can be explained either by the lack of attention and precision on the part of the States concerned or by the fact that they feel the necessity to eliminate relevant discriminatory provisions from their legislation as soon as possible and do not regard them as an essential part of Islamic laws and customs which form a part of countries' traditions and culture. The latter explanation corresponds better to the general attitude of those States which comply with their reporting obligations, an attitude which is marked by a high degree of attention and caution as far as Islamic laws are concerned. However, where a State fails to comply with its reporting obligations, it is very probable that it just failed to enter reservations which would protect sufficiently its national legislation from possible changes.

II. Reactions of States to Reservations

A. *Introductory Remarks*

As a next step, reactions of other States parties to the reservations entered by Muslim States will be analyzed. From a strictly legal point of view, knowledge of reactions of other States parties to reservations is indispensable for the determination of the extent

to which treaty relations can be modified by reservations. However, from a more general perspective reactions of other States offer us an insight into possibilities and ways for opening a dialogue on relevant issues; they offer a unique opportunity to engage in a real interaction and provide information about opinions of States on relevant issues of international law, as will be shown below.

Any State party, when faced with reservations entered by another State party, has, according to general international law two possibilities of reaction: either to accept the reservation or to object to it. Whereas, it shall be kept in mind that according to the rules of general international law only objections shall be explicit. Silence on the part of a State is considered as an acceptance.[597] Furthermore, an objecting State can oppose the entry into force of a treaty as between itself and the reserving State.[598]

The practice of the CEDAW shows, however, that there exists a wider range of possible reactions to reservations. All reactions made to reservations based on Islam as on 31 January 2008 are summarized in the Table 2 below. In this table O is used for objection, N for notification and C for communication. The nature and content of these reactions will be discussed later in corresponding parts of this chapter.

The table shows that very few States raised objections or expressly reacted in any other way to the reservations based on Islam.[599] Moreover, not all States who objected, for example, to one reservation based on Islam also raised objections to other reservations of a similar nature.

Statistics of reactions are the following:

8 notifications (2 of them are in fact objections to modifications of reservations)

14 communications (1 of them is in fact an objection to a modification of a reservation)

113 objections (1 of them relates to a modified reservation)

Total: 135 reactions

B. *Objections*

A written statement saying that a State making it objects to a particular reservation entered by another State is sufficient as an objection. The practice developed by States parties to the CEDAW shows, however, that States use objections as an opportunity to express their opinions on many other aspects of the regime of reservations. The analysis of objections made by States parties to the CEDAW to reservations based on Islam places

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597 See above Chapter Two, II.B.2.

598 Four types of situation are, therefore, possible as far as reservations and reactions to them are concerned. A reservation can, firstly, be accepted explicitly. This is quite a rare phenomenon. Secondly, a State can remain silent, in which case the reservation is considered to be accepted. Furthermore, a State can object to a reservation with an explicit statement preventing the entry into force of a treaty between itself and the reserving State. Finally, a simple objection can be made which does not prevent the entry into force of a treaty. These issues have been treated in more detail in Chapter Two.

599 If we remember that there are at present (as on 31 January 2008) 185 States parties to the Convention, twenty one State which in one or another way expressed their opinion on this group of reservations constitute less than 15%.

Table 2

	Austria	Belgium	Canada	Denmark	Estonia	Finland	France	Germany	Greece	Ireland	Italy	Latvia	Mexico	Netherl	Norway	Poland	Portugal	Romania	Spain	Sweden	UK
Algeria				N				O						O	O		N			N	
Bahrain	O			O		O	O	O	O					O						O	O
Bangl[600]								O					O	O						O	
Brunei				O																	
Egypt								O					O	O						O	
Iraq								O					O	O						O	
Jordan																				O	
Kuwait	N	N		C		O								O	O		N			O	
Libya[601]				O		O[602]		O					O	O	O					O	
Malay[603]				C		O	C[604]	O						O[605]	O					C	
Mald[606]	O		O	C		O[607]		O[608]						O	O		O			O	
Maurit	O			O		O	C	O		C				O	O		O			O	O
Morocco														O							
Niger				O		O	C							C	O					O	
Oman				O				O						O							
Pakistan	O			C		O		O						O	O		C			C	
Saudi Ar	O			O		O	O	O		O				O	O		O		O	O	O
Syria	O			O	O	O	O	O	O		O			O	O			O	O	O	O
Tunisia								O						O						O	
UAE	O			C		O	O	O	O			O		O	O	O	O		O	O	O

600 All objections were made with regard to the initial reservation of Bangladesh before the partial withdrawal made on 23 July 1997. See Table 1.
601 If not otherwise specified, objections relate to the initial, general reservation of Libya. See Table 1.
602 Finland objected on 8 July 1990 to the initial reservation of Libya and on 16 October 1996 to the modified reservation of Libya.
603 Objections and communications concern, if not otherwise specified, the initial reservation of Malaysia. See Table 1.
604 This communication was made by France with regard to the modification made by Malaysia on 6 February 1998. See Table 1.
605 On 21 July 1998 the Netherlands made also a communication with regard to the modification proposed by Malaysia on 6 February 1998. See Table 1.
606 Objections and communications concern, if not otherwise specified, the initial reservation of the Maldives. See Table 1.
607 On 17 August 1999 Finland also made a notification with regard to the modification made by the Maldives on 29 January 1999. See Table 1.
608 On 16 August 1999 Germany also made a notification with regard to the modification made by the Maldives on 29 January 1999. See Table 1.

these observations of objecting States in the centre of the analysis. Each part of this chapter will therefore concentrate on one type of statement made by objecting States.

1. Determination of the Nature of Reservations

The text of almost all objections states that the reservation to which the objection relates is incompatible with the object and purpose of the Convention.[609] Even where this is not stated expressly, it can be concluded through interpretation that the reservation is considered as being incompatible with the object and purpose of the Convention. There are three States which objected to reservations based on Islam without invoking expressly the incompatibility of the reservation with the object and purpose of the convention as a ground for objection. Firstly, Denmark, when objecting to the initial reservation of Libya stated the following:

> *The Government of Denmark has taken note of the reservation made by the Libyan Arab Jamahiriya when acceding (to the said Convention). In the view of the Government of Denmark this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.*

Furthermore, France in its objection to the reservation of Saudi Arabia after having mentioned the very general nature of the reservation, expresses its belief "that the reservation could make the provisions of the Convention completely ineffective and objects therefore to it." Finally, the United Kingdom in its objections to reservations entered by Saudi Arabia and Mauritania refers to the general nature of reservations without qualifying them as incompatible.

In the case of the objections made by Denmark and the United Kingdom, it is not so evident whether the objecting State had in mind the object and purpose of the Convention at all. It is possible to argue that among characteristics of incompatible reservations are such factors as invocation of internal law as justification for failure to perform a treaty and the very general character of reservations. The fact that both States mention these factors in their objections implies the qualification of related reservations as incompatible.

It should also be mentioned here that some objections, while containing a statement about the possibility to identify the character of reservations to which they relate as incompatible, do not state it unambiguously. Thus, the Government of Norway formulated three identical objections to the initial reservation of the Maldives and reservations of Kuwait and Pakistan. These objections state:

> *In the view of the Government of Norway, a reservation by which a State party limits its responsibilities under the Convention by invoking general principles of internal law* **may** *create doubts about the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermine the basis of international treaty*

609 Out of one hundred and thirteen objections, only four do not contain an express statement qualifying the corresponding reservation as incompatible with the object and purpose of the Convention.

> *law. It is in the common interest of States that treaties to which they have chosen to become parties also are respected, as to their object and purpose, by all parties.*[610]

The objection of Norway can be interpreted in two ways. The first possibility would be to make the determination of the incompatibility of the reservation depending on the degree of general character of the reference of the reservation to internal law. Such interpretation can lead to the conclusion that reservations of the Maldives and Pakistan constituting exclusively a general reference to internal law without mentioning neither provisions of the Convention nor the content or at least provisions of internal laws to which they relate are incompatible with the object and purpose of the Convention. The reservation of Kuwait, however, could be compatible with the object and purpose of the Convention because it makes reference to the articles of the Convention which are affected by the reservation. The second solution could be to see in this objection the same type of objection as that of Austria made to the reservation of Pakistan. Austria's objection is very similar in wording to the objection of Norway. It states among others that

> *a reservation by which a State limits its responsibilities under the Convention in a general and unspecified manner by invoking internal law creates doubts as to the commitment of the Islamic Republic of Pakistan with its obligations under the Convention, essential for the fulfillment of its object and purpose.*

It goes however further and adds

> *Austria cannot consider the reservation made by the Government of the Islamic Republic of Pakistan as admissible unless the Government of the Islamic Republic of Pakistan, 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.*

Thus the reservation is qualified as being incompatible. However, the reserving State is given an opportunity to change the nature of this reservation by making it more precise. The second interpretation corresponds better to the relationship between objections and reservations and the nature of objections. An objection is a statement, a determination made by one State with regard to a reservation entered by another State. An objecting State has the possibility to determine and define its position vis-à-vis a reserving State. It seems illogical that having such an opportunity and using it, the State will nevertheless leave the question of the nature of a reservation open, as is the case if the first interpretation applies. The second interpretation gives the reserving State the possibility to change the nature of its reservation. Nevertheless, it determines the nature of the reservation at the moment of objection.

The conclusion is, therefore, that in view of this interpretation of objections made by Norway to reservations of the Maldives, Pakistan and Kuwait, these three reservations shall be considered as being qualified by Norway as incompatible with the object and purpose of the Convention.

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610 Emphasis added.

2. Effects of Reservations and Objections

a) *Consequences for the Entry into Force of the Convention*

Another important statement contained in the majority of objections relates to the issue of the applicability and entry into force of the Convention. The most frequent statement from this category is that the objecting State does not consider the objection as an obstacle to the entry into force of the Convention as between itself and the reserving State.[611] In this connection it should be recalled that according to the rules of general international law codified in the Vienna Convention on the Law of Treaties

> *an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State.*[612]

Only one State, namely Sweden, expressed such an intention when objecting to reservations of the Maldives made upon accession.[613] The applicability of this rule to reservations and objections to CEDAW would have as a consequence the entry into force of the Convention also as between reserving States and those objecting States, which although objecting on the ground of incompatibility of the reservation with the object and purpose of the Convention, do not expressly state that the objection does not preclude the entry into force of the Convention.[614] Thus, the following question arises: Why did a great number of States find it necessary - despite the existence of the above-quoted provision of the Vienna Convention - to state expressly that their objections shall not preclude the entry into force of the Convention?

Are these types of statement superfluous? If not, which role do they play in the regime of reservations to the CEDAW? One possible solution which would explain the necessity of this type of statement is to see the primary reason for all these statements made by objecting States in the fact that they relate to reservations qualified as incompatible with the object and purpose of the Convention. First of all, it should be recalled that rules of general international law codified by the Vienna Convention do not cover all possible situations and problems of the regime of reservations. Some areas were deliberately left out of the codification; others, even if codified, are regulated in very general terms. The Vienna Convention provides just a general framework, contains basic rules and principles giving guidance in situations not regulated by more specific rules. Such was in fact the intention of the drafters of the Vienna Convention.[615] Unfortunately, there are very few treaties and very few provisions in

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611 One hundred and one of one hundred and thirteen objections to reservations based on Islam contain such an express statement or a similar statement expressly specifying that the Convention remains in force.

612 Article 20, paragraph 4 (b) of the Vienna Convention.

613 This intention was expressed as follows: "The Government of Sweden therefore objects to these reservations and considers that they constitute an obstacle to the entry into force of the Convention between Sweden and the Republic of Maldives."

614 There are eleven objections of this type.

615 See for example the following statement made by the ILC in 1951 during its work on the Vienna Convention on the Law of Treaties:

treaties specifying rules applicable to reservations. Therefore, in practice States are often faced with ambiguous situations. As a consequence, they attempt in some cases to remove these ambiguities by declaring their opinion and thus preserving the situation. The majority of unresolved questions of the Vienna Convention's regime relate, in one way or another, to the issue of incompatible reservations.[616]

Before coming to conclusions following from the above-mentioned statements of objecting States, attention should be drawn to another group of statements appearing in objections made to reservations based on Islam.

b) *Legal Effects of Incompatible Reservations*

Austria, in its objection to the reservation of the Maldives made upon accession, after having pointed out that this reservation is incompatible with the object and purpose of the Convention and therefore inadmissible under article 19 (c) of the Vienna Convention and not permitted according to article 28, paragraph 2 of the CEDAW states that "this reservation cannot alter or modify in any respect the obligations arising from the Convention for **any** State Party thereto."[617]

Similar statements saying that reservations to which they relate are devoid of legal effect were made by Finland[618], Norway[619], Portugal[620], and Sweden[621].

In the context of the debate on the regime of incompatible reservations these statements can be interpreted as a practice supporting the opinion represented by the "permissibility" school according to which all inadmissible reservations are null and void and cannot have any legal effects. Even the acceptance of this type of reservations by other States cannot render them valid. One of the consequences of this conception is that rules incorporated in the Vienna Convention, with regard to the effects of reservations, objections to them and acceptance are applicable only to admissible reservations. As far as the consequences of inadmissible reservations are concerned, the Vienna Convention remains, therefore, silent. Faced with this vacuum and uncertainty, States attempt to develop solutions in their practice. As has been shown above, three principal consequences of incompatible reservations can be

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"The Commission believes that multilateral conventions are so diversified in character and object that (…) no single rule uniformly applied can be wholly satisfactory. (…) [The] problem is not to recommend a rule which will be perfectly satisfactory, but that which seems to it [the Commission] to be the least unsatisfactory and to be suitable for application in the majority of cases." Whereby states and international organizations are invited to consider the insertion in multilateral conventions of provisions relating to reservations: YbILC, 1951, A/1858, para.28.

616 See more about these aspects of the Vienna Convention's regime of reservations and their consequences above in a part dealing with the reservations regime in general and in *First Report on the Law and Practice Relating to Reservations to Treaties*. Preliminary Report by Alain Pellet, Special Rapporteur, A/CN.4/470, 47th session of the ILC, 30 May 1995, paras. 91–149 at pp. 47–68.

617 Emphasis added.

618 With regard to reservations of Bahrain, Kuwait, Malaysia, Mauritania, Niger, Pakistan, Saudi Arabia, and Syria.

619 With regard to reservations of Niger, Mauritania and Saudi Arabia.

620 With regard to the reservation of the Maldives.

621 With regard to reservations of Bahrain, Mauritania, Saudi Arabia, and Syria.

envisaged.[622] This type of statement is a voice in favor of the solution defended by the "permissibility" school and adopted by the EuCtHR in the Belilos case and by the HRC in its General Comment N° 24.[623] This solution is opposed to the idea that an incompatible reservation can have any legal effect and therefore gives the reserving State an opportunity to decide what is more important for it: the participation in the treaty or the reservation. In the former case, the State will remain a party to the treaty without the benefit of reservations. In the latter case the State will terminate its participation in the treaty. Whereas, it should be noted that the EuCtHR and the HRC as well as States parties to the CEDAW which included the type of statement mentioned above in their objections favor the first – the so-called severability – solution.

In this connection, objections to incompatible reservations which state that they shall not preclude the entry into force of the Convention can be seen in a new light. Superfluous at first glance, they get their sense if interpreted as an expression of an opinion as to the effects of inadmissible reservations by a State which agrees that the Vienna Convention does not regulate this issue. The States presuming that the Vienna Convention rules do not apply to incompatible reservations and fearing that the simple objection can be interpreted as an obstacle to the entry into force of the Convention add statements making clear that although the reservation is incompatible, the Convention shall be in force. One further argument in favor of this interpretation can be the fact that several States, in their objections to reservations of Muslim States,[624] stated that their objections shall not preclude the entry into force of the Convention between the reserving and the objecting States "in its entirety".[625]

3. Other Types of Statements

a) *Reservations and International Law*

(1) Reservations and Treaty Law

A number of States included in their objections a determination that a reservation to which the objection relates contributes to undermining the basis of international treaty law.[626] In the opinion of these objecting States general and unspecified reservations create doubts as to the commitment of a reserving State, and therefore, contribute to

622 See above Chapter Two, II.B.1.b).(3).

623 See above Chapter Two, III.C.

624 See objections by Austria to reservations of Bahrain, Mauritania, Pakistan, Saudi Arabia, and Syria as well as objections of Denmark to reservations by Bahrain, Mauritania, Niger, Saudi Arabia, and Syria; objection of Greece to the reservation of Syria.

625 According to the Vienna Convention's regime the effect of an objection not precluding the entry into force of a treaty would be that the treaty will come into force between the reserving and the objecting State not in its entirety but except provisions to which the reservations relate. See above Chapter Two, II.B.2.

626 Such statements were made by Austria with regard to the reservation of Pakistan; by Finland with regard to reservations of Kuwait, Malaysia and Pakistan; by Ireland with regard to the reservation of Saudi Arabia; by the Netherlands with regard to reservations of Bahrain, Malaysia, Mauritania, Pakistan, Algeria, Saudi Arabia, and Syria; by Norway

undermining the basis of international treaty law.[627] It becomes evident from the objections containing such statements that for a reservation to be sufficiently specified, a reference shall be given to the provisions of the Convention which are affected by the reservation as well as to the extent of the derogation from relevant provisions of the Convention. Therefore, any reservation which just makes a reference to internal laws without specifying its content and the way in which a State's commitments under a treaty will be affected is general in nature. Moreover, as explained by Norway

> *A reservation by which a State Party limits its responsibilities under the Convention by invoking religious laws (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.*

In more general terms, it means that a reservation shall be formulated in such a manner as to give other States a clear picture of limitations imposed by a reservation on a State's undertakings under a treaty.

According to Sweden, all reservations incompatible with the object and purpose of a treaty undermine the basis of international treaty law.[628]

The Netherlands, Norway and Sweden emphasized in connection with these statements the importance for all States of the respect of treaties by each State party to a treaty. For example, the Netherlands emphasize that "it is in **common interest of States** that treaties to which they have chosen to become parties should be respected, as to object and purpose, by all parties."[629]

The above-mentioned statements can be interpreted as a qualification of the formulation of general reservations as a wrongful act. A further question would be whether

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with regard to all reservations making reference to religious laws and expressly to reservations by the Maldives, Kuwait, Malaysia and Pakistan; by Sweden with regard to all reservations incompatible with the object and purpose of the Convention, except reservations of Syria, Saudi Arabia, Mauritania, and Bahrain.

627 Several other States stressed in their objections the inadmissibility and questionable nature of general reservations without adding a statement about such reservations undermining the basis of treaty law. See objections made by Austria to reservations of Bahrain and Syria; by Denmark to reservations of Bahrain and Syria; by Germany to reservations of Syria and Bahrain; by Finland to reservations of Bahrain, Mauritania, Saudi Arabia, and Syria; by France to reservations of Bahrain, Saudi Arabia, and Syria; by Greece to the reservation of Bahrain; by Italy to the reservation of Syria; by Portugal to reservations of Saudi Arabia and Mauritania; by Spain to the reservation of Saudi Arabia and Syria; by Sweden to reservations of Syria, Saudi Arabia, Mauritania, and Bahrain; by the United Kingdom to reservations of Syria, Saudi Arabia, Mauritania, and Bahrain.

628 See observations made by Sweden in connection with its objections. It is important to note that all objections made by Sweden qualify corresponding reservations as incompatible with the object and purpose of the Convention.

629 Emphasis added. Both Norway and Sweden also mention the "common interest of States". According to Norway "all states have a common interest in securing that all parties respect treaties to which they have chosen to become parties". Sweden formulated this idea in the following way: "it is in the common interest of states that treaties to which they have chosen to become parties also are respected, as to object and purpose, by other parties."

all reservations incompatible with the object and purpose of a treaty can be qualified as a violation of rules of international law. One argument in favor of an affirmative answer could be the attitude of Sweden, which made the type of statements analyzed in this chapter in relation to all incompatible reservations objected by it.

Furthermore, the idea has been expressed above that reservations to provisions according to which States assume obligations for the common good cannot be subject to the same rules as ordinary reservations because they affect all States parties to a treaty and, therefore, are not established only with regard to the accepting State.[630] Here statements made by some objecting States emphasize the common interest of all States parties to respect the object and purpose of the treaty. It could be concluded that all incompatible reservations, since they affect common interests of all States parties are not subject to the same regime as ordinary (compatible) reservations.

(2) Reservations and International Human Rights Law

The government of Mexico, in its objections to reservations of Bangladesh, Egypt, Iraq and Libya, particularly emphasized the inconsistency of reservations with other contractual obligations previously assumed by these States. Mexico pointed out that the principles of equal rights of men and women and non-discrimination on the basis of sex are already embodied in the second preamble paragraph and article 1, paragraph 3 of the Charter of the United Nations; in articles 2 and 16 of the Universal Declaration of Human Rights of 1948; in article 2, paragraph 1 and article 3 of the ICCPR and in article 2, paragraph 2 and article 3 of the ICESCR. The majority of States which entered reservations based on Islam are parties to all above-mentioned treaties. Should it not be the case, Mexico stated that

> *the principles of the equal rights of men and women and of non-discrimination on the basis of sex, which are set forth in the Charter of the United Nations as one of its purposes, in the Universal Declaration of Human Rights of 1948 and in various multilateral instruments, have already become general principles of international law which apply to the international community.*[631]

Reservations to which this type of observation relate are, according to the opinion of Mexico, of such a nature that their implementation "would inevitably result in discrimination against women on the basis of sex". This would be contrary not only to the CEDAW but to all previous undertakings of the reserving States.

Similar statements were made by Sweden with regard to reservations of Bahrain, Bangladesh, Tunisia, Egypt, Iraq, Libya, Jordan, the Maldives, Kuwait, and Syria; by Denmark with regard to the reservation of Syria.

This type of observation can be interpreted as an indication of an opinion of States according to which reservations contradictory to human rights obligations, be it treaty obligations or obligations under general international law, previously assumed by the reserving State are inadmissible. A logical consequence of this rule would be the

630 See above, Chapter Two, III.B.

631 Mexico's objection to the reservation entered by the Republic of Korea.

conclusion that even reservations compatible with the object and purpose of a treaty are inadmissible if they contradict other obligations previously assumed by a State under international law.

A statement of another type was made by Germany in relation to all reservations based on Islam objected by it except the reservations of Saudi Arabia and Mauritania. This statement concerns a procedural aspect of human rights obligations and reads as follows:

> *In relation to the Federal Republic of Germany, they [reservations] may not be invoked in support of a legal practice which does not pay due regard to the legal status afforded to women and children in the Federal Republic of Germany in conformity with the above-mentioned articles of the Convention.*

This objection would therefore prevent the use of reservations to which it relates as a justification or defense with regard to non-respect of the reserved provision in any eventual proceedings where Germany and one of the reserving States are parties. This statement is a reflection of an idea often expressed by scholars in the context of the discussion on effects of objections. Some authors are of the opinion that objections, for example, to "modifying" reservations or to material provisions of human rights treaties have effects identical to acceptance. The part of the doctrine which disagrees with this view emphasizes the importance of objections as a tool for preserving the legal interests of the objecting State, in particular for the purposes of any future proceedings.[632] To put it differently, although in ordinary circumstances the utility of objections might be almost invisible, it becomes decisive in the case of judicial or quasi-judicial proceedings in relation to the reserved provision. Whereas the reserving State can rely on its reservations vis-à-vis accepting States, objections prevent it from doing so vis-à-vis objecting States.

b) *Reservations and National Law*

When objecting to reservations based on Islam a number of States emphasized that

> *reservations (...) are (...) subject to the general principle of the observance of treaties according to which a party may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations. It is in common interest of States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfill the object and purpose of the treaty.*[633]

On two occasions this principle is called by objecting States "the general principle of treaty interpretation".[634] Norway, in its objections, speaks in this connection just

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632 See above Chapter Two, II.B.2. and also II.B.3.

633 The objection of Finland to reservations made by Kuwait, Libya, Malaysia and Pakistan. Similar although not identical statements were made by Austria with regard to reservations of Bahrain and Syria; by Denmark with regard to the reservation by Libya; by Finland with regard to reservations of the Bahrain, the Maldives, Mauritania, Saudi Arabia, and Syria; by the Netherlands with regard to reservations of Bahrain, Mauritania, and Syria; by Norway with regard to reservations by the Maldives, Kuwait, Malaysia, Pakistan, Algeria, and Niger; by Sweden with regard to reservations of Bahrain and Syria.

634 See objections of Denmark to the reservation of Libya and of Finland to the reservation of the Maldives.

about a "well-established treaty law". Any State making a reservation which invokes provisions of its internal law as a justification of a failure to perform treaty obligations would therefore violate this principle of international law. Such reservations, even if they are not contrary to the object and purpose of a treaty, would be inadmissible under international law.

In this connection the objection made by Denmark to the reservation of Libya should be recalled.[635] This objection does not contain any statement as to the compatibility of the reservation with the object and purpose of the Convention, although making reference to the impossibility to invoke internal law as a justification for the failure to perform treaty obligations. In the light of the above-made interpretation of this type of statements, it is possible to conclude that according to Denmark the reservation of Libya is at least inadmissible.

Although the rule formulated in this type of statement cannot be disputed and even deserves to be supported, some clarifications are necessary in this connection. Not all reservations mentioning the internal law of a State fall necessarily into the category of inadmissible reservations invoked by objecting States in these statements. Internal law may be invoked in a reservation in three different ways:

Invocation of internal law in reservations of transitional nature intended to apply while national law is brought into harmony with provisions of a treaty is no more than a mere indication of areas of concern which can be very useful in the context of activities of treaty-monitoring bodies. This type of reservation is a sign of a cooperative attitude of a State, and gives an opportunity to a treaty-monitoring body to influence changes of internal law of a State in a way most favorable to the effective implementation of a treaty.

References to internal law in reservations explaining the relationship between some provisions of a treaty and corresponding provisions of national law in the belief that the latter are in line with requirements of a treaty can have the character of simple interpretative declarations. The danger lies, however, in the fact that this type of invocation of internal law can also be used in order to hide real reservations, in most cases inadmissible reservations belonging to the third group.

The third group includes such reservations which intend to protect the internal law of a State from any changes which may be necessary as a consequence of the State's adherence to a treaty. These reservations are inadmissible and in many cases also incompatible with the object and purpose of a treaty.

Statements of objecting States mentioned above relate only to the last group. In practice, it is not always easy to determine which of these three groups a particular reservation belongs to. States parties being faced with a reservation invoking internal law and believing that they have only a limited time for reaction have no choice but to object taking into account the worst scenario. A treaty-monitoring body should, however, be more careful. After a certain period of time the attitude of the reserving State, in particular its reports and discussions of these reports with the treaty-monitoring body can reveal the real nature of the reservation. The choice of a correct attitude

635 See above II.B.1.

towards reservations invoking internal law is of a tremendous importance for the effective implementation of the treaty. As the above-made analysis of reservations entered by Muslim States shows, many of them have revealed their nature as mere indications of areas of concern. Before the withdrawal of these reservations becomes possible, many years and sometimes even decades can elapse. However, these reservations do not run counter the object and purpose of the treaty.[636] In this connection the question of the value and effects of objections and statements contained therein arises. For example, what effects shall an objection made on the ground of incompatibility to a reservation of transitional nature have? Since compatibility is an objective criterion, it is impossible to imagine that due to an erroneous qualification by the objecting State the reservation would become incompatible. In my opinion, rules applicable to these objections and reservations are those formulated for ordinary (compatible) reservations. Here again, the need for a greater flexibility of the reservations regime is visible, in particular, as far as the time-limit rule is concerned. Not only should the States have a longer period of time in order to be able to judge the nature of reservations, but the possibility to modify an objection should also be opened.[637]

C. *Other Reactions*

Apart from objections State parties to the CEDAW used in their practice two other ways of reacting to reservations based on Islam. Firstly, there is what we can call "late objections". These are reactions of States to reservations identical to objections in their nature, but made after the expiry of a time-limit prescribed by law.[638] The second group includes reactions of States to modifications made by reserving States to their reservations entered upon signature, ratification or accession.[639]

1. "Late Objections"

This type of reaction does not appear in the same part of the collection of multilateral treaties deposited with the Secretary-General as objections, but in the text of notes to reservations and objections to each treaty. They are called either notifications or com-

636 It is important to emphasize that in cases where the text of the reservation itself is not sufficiently clear, a treaty-monitoring body should, from time to time, re-examine the attitude of the reserving State and, therefore, the nature of the reservation because the attitude of the State and, therefore, the nature of reservations can change as a result, for example, of the changing policy of the government.

637 This possibility to modify an objection is important also in the context of a possible change in the nature of the reservation, as mentioned above in the previous footnote.

638 Namely 12 months upon notification or signature, ratification or accession. See above II.A.

639 Reactions of States to modifications of reservations are of two types: either they are treated as ordinary objections, if they are made within the prescribed time-limit and the modification is accepted by all States (for example, the objection made by Finland to the modified reservation of Libya), or they belong to this second group of reactions, if the modification is not accepted or the time-limit was not respected. In the latter case they are very similar to the "late objections", but are nevertheless analyzed separately because the modification of reservations to which they relate is not a common practice and includes elements distinct from the ordinary practice of reservations.

munications, although from the point of view of content they are very similar and sometimes even identical to objections.

By the end of January 2008 eight notifications with regard to reservations based on Islam are known. Two notifications are treated separately, namely the notification made by Finland on 17 August 1999 and by Germany on 16 August 1999 with regard to the proposed modification of the Maldives. Thus, only six notifications are analyzed at the present stage. Three of them were made in connection with the reservation of Algeria[640] and three relate to the reservation of Kuwait.[641] All these notifications simply state that the reservations to which they relate are incompatible with the object and purpose of the Convention and therefore prohibited by virtue of article 28, paragraph 2 of the CEDAW.

Fourteen communications were made by the end of January 2008.[642] They have a richer content than notifications. Apart from qualifying reservations to which they relate as incompatible with the object and purpose of the Convention, they contain some other statements identical to those analyzed in relation to objections. Thus, Denmark included in its communications a statement as to the impossibility to invoke internal law as justification for failure to perform treaty obligations; Sweden and Portugal emphasized that general reservations contribute to undermining the basis of international law[643]; Sweden added that it is in the common interest of all States to respect treaties as to the object and purpose and to undertake necessary legislative changes[644]. All communications, after stating that they object to the relevant reservation, add that the objection does not preclude the entry into force of the Convention. Furthermore, Sweden, with regard to the reservation of Pakistan as well as Denmark with regard to all reservations addressed by it, said that reservations being incompatible with the object and purpose of the Convention are not only inadmissible, but also without legal effects under international law. More precisely it means that "the Convention will thus become operative between the two states without (the reserving state) benefiting from these reservations."[645]

The most significant and new statement which was made by Sweden in relation to the reservation of Pakistan and by Denmark with regard to all reservations addressed

640 These are notifications made by Sweden on 4 August 1997, by Portugal on 14 August 1997 and by Denmark on 24 March 1998.

641 They were submitted by Belgium on 19 January 1996, by Austria on 22 February 1996 and by Portugal on 15 May 1996.

642 France submitted its communications with regard to reservations entered by Mauritania and Niger; Denmark with regard to reservations made by Kuwait, Malaysia, the Maldives, Pakistan and the UAE; Ireland with regard to the reservation of Mauritania; the Netherlands with regard to the reservations of Niger; Portugal with regard to the reservation of Pakistan and Sweden with regard to reservations by Malaysia and Pakistan. The communication submitted by the Netherlands and by France with regard to the proposed modification of Malaysia is analyzed separately.

643 The Netherlands made a similar statement with regard to reservations invoking national law.

644 A similar statement was made by the Netherlands with regard to the reservation entered by Niger.

645 Communication by Sweden with regard to reservations of Singapore and Pakistan.

by it is the following: "no time-limit applies to objections against reservations, which are inadmissible under international law". The position of these States accords therefore with an opinion expressed in the doctrine according to which the time-limit rule is not a compulsory one. Depending on circumstances it can be disregarded.[646] These statements, however, also contain another more important implication. An explicit reference made to inadmissible reservations can be interpreted as an indication of the opinion of States according to which rules applicable to inadmissible (including incompatible) reservations are not identical to those applicable to admissible reservations.

In this connection the difference between notifications and communications becomes apparent. A notification simply informs other States or the depositary about one or another fact, opinion or situation. A communication is an attempt to catch up time and to object to a reservation despite the expiration of the time-limit. Communications analyzed in this chapter always use the words "objection", "object" etc.[647] In this sense only communications are true "late objections" because notifications do not contain the word "objection" and just qualify the reservation to which they relate as incompatible with the object and purpose of the Convention.[648]

It is interesting to note an attempt made by France to persuade the Secretary-General to accept its communication as a real objection. When objecting to the reservation of Niger it added the following statement:

> *[T]he reservations of the Republic of the Niger, made on 8 October 1999, were notified by the Secretary-General of the United Nations on 2 November 1999 and received by the French Republic on 16 November 1999. In these circumstances, the French Republic is still able, as at this date and until 15 November 2000, to lodge an objection and the Secretary-General of the United Nations cannot treat this act as a simple communication.*

What is suggested here by France is the calculation of the twelve-month period prescribed by international law not from the date of notification as stated in article 20, paragraph 5 of the Vienna Convention and usually practiced in international law, but from the date of receipt of the notification. Although France does not question the validity of the time-limit rule as such, this incident clearly shows that even when willing, States are not always able to comply with this rule. In this light, the time-limit rule appears even more questionable with regard to incompatible reservations.

Logically, the question of the legal consequences and value of such reactions, in particular of communications, arises. The depositary placing communications and notifications in the text of the footnotes does not afford them the same value as objections. In any case, notifications and communications as well as objections can be useful in the context of the work of the Committee, for example, as an indication for the determination

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646 See above Chapter Two, II.B.2.

647 Even Portugal, which did not include in its communication any statements concerning the application of the time-limit, says that it objects to the reservation.

648 The place of notifications in this part is, nevertheless, justified because in principle statements as to the nature of reservations, in particular their compatibility with the object and purpose of a treaty, belong to the text of objections. States making notifications are, therefore, also trying to do what they missed during the prescribed time.

of the nature of reservations, for the adoption of an appropriate attitude towards particular types of reservations, but also in the context of possible proceedings as a means of preserving the legal position of a State submitting communications or notifications etc. Such statements could also be important for the development of rules of general international law on the regime of reservations and in particular in order to complete and clarify the Vienna Convention regime of reservations. More concrete answers could be given only after an analysis of a much wider range of treaties. This goes, however, beyond the scope of this research.

2. Reactions to Modifications

First of all, it is important to emphasize that no State objected to the deposit and procedure adopted with regard to modifications. The practice developed regarding modification of reservations can therefore be judged as accepted, at least in the framework of the CEDAW. Four communications received in connection with modifications proposed by Malaysia and the Maldives relate exclusively to the material content of the said modifications.

Unfortunately, the situation that arose out of the reaction of France to the proposed modification of Malaysia described above led to much confusion.[649] Following this precedent, States faced with proposed modifications have to deal with a difficult dilemma if they wish to object to the material content of a modification. On the one hand, a State which proposes a modification of its reservation would, in most cases, modify it in such a manner as to enlarge the scope of its obligations under a treaty. This happened in the case of two modifications proposed in the framework of the CEDAW. Now, should another State nevertheless find it necessary to object to the modified reservation, it runs a danger of preventing this enlargement of obligations of the reserving State and to leave the reserving State with its initial more far-reaching reservation. Should this State, however, choose not to object in order to allow the modification to come into force, it will lose all possible rights and advantages following from an objection. The States which chose to react to modifications did so, therefore, either in very careful terms in order not to create by their statements an obstacle to the entry into force of the modification or expressed their objections after the expiration of the prescribed 90 days time-limit. The government of the Netherlands, for example, declared in relation to the modification proposed by Malaysia:

> *The Government of the Kingdom of the Netherlands has examined the modification of the reservation made by Malaysia (...)*
>
> *The Government (...) acknowledges that Malaysia has specified these reservations, made at the time of its accession to the Convention. Nevertheless the Government (...) wishes to declare that it assumes that Malaysia will ensure implementation of the rights enshrined in the above articles and will strive to bring its relevant national legislation into conformity with the obligations imposed by the Convention. The declaration shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Malaysia.*

649 See above I.A.1.(i).

The communication received from Finland in reaction to the modification proposed by the Maldives is of the same nature.[650] This type of communication does not include any express objections to the corresponding modification. It emphasizes the positive aspect of the modification. However, it also includes statements which, under certain circumstances, can be interpreted in such a manner as to constitute an objection.

Very different in contrast is the reaction of Germany to the modification proposed by the Maldives:

> *The modification does not constitute a withdrawal or a partial withdrawal of the original reservations (...) Instead the modification constitutes a new reservation (...) extending and reinforcing the original reservations. (...) After a State has bound itself to a treaty under international law it can no longer submit new reservation or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of Maldives with its modification.*

This communication being submitted after the prescribed time-limit date could not prevent the acceptance of the modification. One can dispute Germany's evaluation of the nature of this modification. It is, however, not the principal issue to discuss in connection with the regime of modifications and reactions to them. Another point addressed in this communication is of much greater importance. Germany stated that a State, after having bound itself by a treaty, cannot in any way restrict its obligations under this treaty. A reserving State can only withdraw its reservations either totally or partially. The statement confirms remarks on and evaluation of the practice of the Secretary-General with regard to proposed modifications presented above.[651] It means that the procedure of acceptance of modifications applied by the Secretary-General with regard to modifications proposed by Malaysia and the Maldives should be adopted in all cases where the possibility exists that a State is attempting to restrict its obligations under a treaty through the proposed modification. In cases, however, where there is an unambiguous withdrawal of reservations, either partial or total, no procedure of acceptance is necessary. It is important that the depositary of a treaty takes its decision about the necessity of the procedure of acceptance taking into account the nature of the proposed modification and not the name given to it by a State.

As to the legal value and consequences of communications received by the Secretary-General in connection with modifications, it is again difficult to draw any general conclusions regarding statements which are made after the expiration of the prescribed time-limit. As in the case of "late objections" they can be an indi-

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650 Finland, after having expressed its satisfaction with the fact that the Maldives specified its reservation made upon accession, added that "the reservations (…) still **include elements which are objectionable**. The Government of Finland therefore wishes to declare that it assumes that the Government of the Republic of Maldives will ensure the implementation of the rights recognized in the Convention and will do its utmost to bring its national legislation into compliance with obligations under the Convention with a view to withdrawing the reservation. The declaration does not preclude the entry into force of the Convention between the Maldives and Finland." (emphasis added).

651 See above I.A.1.(i).

cation of the opinion of States for the purposes of the Committee's work or an element of the formation of rules of general international law. A State submitting its communication in time has, in any case, a possibility to prevent the acceptance of a modification.

3. Views of States Parties to the Convention Submitted at the Request of the Secretary-General

States parties to the Convention had also another possibility to express their views on reservations that could be considered incompatible with article 28, paragraph 2 of the Convention. The issue of reservations to the Convention was discussed at the third meeting of States parties held on 25 March 1986 in New York. States being concerned with reservations falling within the scope of article 28, paragraph 2 requested the Secretary-General to seek the views of States parties on this type of reservations and to include these views in the report on the status of the Convention to the General Assembly at its forty-first session. Out of eighty-seven States parties to the Convention at the time of the request seventeen responded to it. These views were included as requested in the report of the Secretary-General on the status of the Convention to the General Assembly at its 41st session in 1986.

Some of the views submitted by States parties are very short and contain only a confirmation of an already existing situation with regard to their own reservations and objections (or their absence).[652] Other more extensive replies are of a very different content. Many of them make an attempt to define some criteria for the determination of the nature of reservations. The most comprehensive one is made by Canada. It suggested the following factors which might be relevant to a determination of whether a reservation falls within the scope of article 28, paragraph 2:

> *(a) Whether the reservation is made to one of the general provisions, that is, the definition of discrimination in article 1 or the general obligations of States parties ser forth in articles 2, 3 and 24;*
> *(b) Whether the reservation is in regard to a particularly crucial aspect of equality with men, such as the right to equal legal capacity set forth in article 15;*
> *(c) Whether the reservation is in regard to a provision that affects many women in a very significant facet of national life;*
> *(d) The nature of the reservation itself, that is, whether it involves a reservation in toto to the provision in question or is of a very specific nature.*[653]

Two countries stated that no reservations should be needed to provisions, which are mainly commitments to work towards the defined aims and cannot reasonably be expected to be reached immediately.[654]

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652 See, for example, replies by China, France and Gabon: General Assembly, 41st session, Report of the Secretary-General. Status of the Convention on the Elimination of All Forms of Discrimination against Women, 7 October 1986, UN Doc. A/41/608, at pp. 4 and 8.

653 Id., at p. 6.

654 See replies of Denmark and Sweden Id., at pp. 7–8 and 15.

Spain observed that reservations of a transitional nature intended to apply while internal legislation is brought into harmony with the contents of the Convention, as well as reservations that are merely explanations of the relationship between the provisions of the Convention and the national legislation, in the belief that the national legislation is in line with the objectives of the Convention, are not incompatible and do not affect the provisions of article 28, paragraph 2.[655] All reservations to article 16 are however regarded by Spain as incompatible with the object and purpose of the Convention.[656] In my view the statement of Spain according to which reservations of a transitional nature are not incompatible contradicts its final submission which regards all reservations to article 16 as incompatible. If it is true that some reservations can have a character of mere indicators of areas of concern, of objectives towards which a reserving State is working, why should this not be possible with regard to provisions of article 16 of the CEDAW?[657]

Portugal distinguishes three types of reservations: those which

> *may derive from an interpretation that goes beyond the obligations of the Convention, from the non-acceptance for the immediate future of certain of the strategies contemplated, or from the non-acceptance of fundamental obligations, the later being prohibited under article 28, paragraph 2.*[658]

According to my interpretation of reservations entered by Muslim States, they belong to the second type of reservations distinguished by Portugal, which are not qualified as incompatible.[659]

Sweden observed that even reservations

> *permissible per se would, if a state party has made several of them, tend to have an accumulative effect, making some States parties only selectively bound by treaty obligations, which, all of them together, could be said to constitute the object and purpose of the Convention.*[660]

Some States used this request as an opportunity to express their objections to some reservations[661], although it should be noted that these statements can not be considered

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655 Id., at p. 12.

656 Id., at p. 13.

657 More on ways in which national law may be invoked in reservations and their relationship with the question of compatibility of reservations see above I.C. and II.B.3.b).

658 General Assembly, 41st session, Report of the Secretary-General. Status of the Convention on the Elimination of All Forms of Discrimination against Women, 7 October 1986, UN Doc. A/41/608, at p. 11.

659 See above II.B.3.b).

660 General Assembly, 41st session, Report of the Secretary-General. Status of the Convention on the Elimination of All Forms of Discrimination against Women, 7 October 1986, UN Doc. A/41/608, at p. 14.

661 As far as reservations based on Islam are concerned, Portugal objected to reservations by Egypt and Tunisia; Saint Lucie objected to reservations of the same two states, although noting that these objections do not necessarily mean that the reservations are incompatible, and Spain qualified reservations of Bangladesh, Egypt and Tunisia as "totally incompatible with the objectives and purpose of the Convention" without formally objecting to them. Id., at pp. 11–13.

as objections in the strict sense of the term. The fact that they are made after the expiration of the time-limit is not an obstacle for such statements to have similar legal effects as objections.[662] However, what is more important, they are not addressed to the depositary of the Convention. They could be compared to the "late objections", but are not included by the depositary in the compilation of multilateral treaties deposited with the Secretary-General, even not in the text of footnotes. The legal value of such statements is therefore very limited, in particular because, although being able, States do not address their observations to the depositary of the Convention, so that they can be communicated to all States parties.

Mexico and Portugal made some observations concerning the possibility of acceptance of incompatible reservations. Mexico stated that acceptance of incompatible reservations constitutes a clear violation not only of article 28, paragraph 2 of the Convention, but also of article 19 (c) of the Vienna Convention on the Law of Treaties, "which enshrines the practice on this matter recognized by the international community".[663] Portugal simply states that all reservations incompatible with the object and purpose of a treaty are unacceptable.[664] These statements support the above-expressed opinion as to the impossibility of acceptance of incompatible reservations and therefore the inapplicability of rules on acceptance and objections codified in articles 20 and 21 of the Vienna Convention.[665]

Finally, Canada and the Soviet Union made some observations with regard to the powers of the Committee. According to Canada "the Committee may consider the effect of reservations on the application of the Convention, but is not empowered to make a final or binding determination of their incompatibility."[666] The Soviet Union is even more categorical. It states that the Committee "is not authorized either to interpret the reservations expressed by the States regarding the Convention or, much less, to consider the question of their legality."[667]

D. *Conclusions on General Trends in State Practice*

The above analysis of reactions of States to reservations based on Islam shows that the content of these reactions is more multifaceted than one could expect. States express in their reactions, not only their opinion on a particular reservation, but also their opinions on some very controversial issues of the reservations regime in general.

First of all, one should keep in mind that all the reactions analyzed above concern incompatible reservations, at least according to the interpretation given to the reservations

662 See above II.C.1.

663 General Assembly, 41st session, Report of the Secretary-General. Status of the Convention on the Elimination of All Forms of Discrimination against Women, 7 October 1986, UN Doc. A/41/608, at p. 10.

664 Id., at p. 11.

665 It is, in fact, support of the "permissibility" school. See above Chapter Two, II.B.1.b).(1). Compare also other statements by States of similar nature above II.B.2.b).

666 General Assembly, 41st session, Report of the Secretary-General. Status of the Convention on the Elimination of All Forms of Discrimination against Women, 7 October 1986, UN Doc. A/41/608, at p. 7.

667 Id., at p. 16.

by the reacting States.[668] Faced with incompatible reservations and the ambiguities of their regime, reacting States do not remain passive and silent, but attempt to clarify and express their opinion on some unresolved questions of the reservations regime codified in the Vienna Convention.

The most important general conclusion which can be drawn from reactions of States to reservations based on Islam is that the States refuse the application of the same rules on effects of reservations to incompatible (inadmissible) and to compatible (admissible) reservations. This follows first of all from statements denying the possibility that incompatible reservations may have any legal effects. Statements in which objecting States regard the Convention as being in force between themselves and the reserving State can also be interpreted as a rejection of the application of provisions on effects of objections and acceptance formulated in the Vienna Convention to incompatible reservations. In particular, when an objecting State clarifies that it does not oppose the entry into force of the Convention as between itself and the reserving State in its entirety, it obviously takes part of the "permissibility" school and pronounces for the severability doctrine. The fact that several States refused to apply the time-limit rule to incompatible reservations also places incompatible reservations in a particular position distinguishing them from other types of reservations.

Another very interesting trend developed in the context of reservations based on Islam is the practice of modification of reservations. Although the procedure adopted by the Secretary-General with regard to the modification of reservations and its practical implementation have some weak points,[669] the practice of modification of reservations as such deserves to be supported. It introduces flexibility and openness into the reservations regime, allowing for a better dialogue between States and promotes universality of participation improving at the same time compliance with the terms of a treaty. Together with the statements rejecting the applicability of the time-limit rule and some objections which invite reserving States to clarify or reconsider their reservations, the practice of modification of reservations introduces a dynamic element into the reservations regime. This dynamic element can be seen as an attempt of the States to deal with the ambiguities and gaps of the Vienna Convention regime without transgressing the limits of this regime.

Finally, the question of the status of reservations invoking internal law should be recalled. As already mentioned above, internal law can be invoked in reservations in different ways.[670] Not all of them would render the reservation incompatible with the object and purpose of the treaty. States do agree with this in general terms.[671] However, as far as certain provisions or certain reserving States are concerned, the objecting States refuse to apply this differential treatment. Thus, Spain stated that

668 In four cases this was not expressed in an unambiguous way. It can, however, be deduced through interpretation. See above II.B.1.

669 See above I.A.1.(i).

670 See above II.B.3.b).

671 See above II.C.3., especially views expressed by Spain and Portugal.

any reservation to article 16 of the CEDAW would be incompatible with the object and purpose of the Convention.[672] Some States, although accepting theoretically these different types of invocation of internal law in reservations, do not differentiate, when they object to reservations based on Islam.[673] Such an attitude of Western States can be explained in certain cases only in terms of prejudices existing towards Islamic culture. Why are some States not able to admit that due to the traditions and culture of certain countries, governments need a period of time in order to bring the legislation of their countries in line with the terms of the Convention? One should not forget that the position of women in Western societies has not always been the same. It suffices to recall how many years were required in several European States in order to introduce voting rights for women.

III. Practice of the Committee

The principal task of the Committee is the examination of reports submitted by States parties according to article 18 of the Convention. The Committee may, however, also "make suggestions and general recommendations based on the examination of reports and information received from States Parties."[674] The Committee shall annually report to the General Assembly on all its activities, including suggestions, recommendations and possible comments from States parties.[675] All these activities of the Committee open an opportunity to discuss any question relevant to its work. The issue of reservations being of tremendous importance has been addressed by the Committee during the discussion of countries' periodic reports as well as on other occasions, for example as part of its general recommendations and comments.

A new opportunity to deal with reservations has been opened to the Committee by the adoption of the Optional Protocol to the CEDAW providing for an individual complaints procedure, as well as for an inquiry procedure.[676]

A. *The Committee's Comments on Reservations as Part of Examination of States' Periodic Reports*

Periodic reports submitted by States parties are examined by the Committee during its meetings, whereas members of the Committee have the possibility to address their questions and suggestions to States' representatives. The Committee as an organ, as a whole gives its observations and recommendations in concluding comments drafted

672 Id.
673 See for example the objection of Portugal made to the reservation of the Maldives.
674 Article 21, paragraph 1 of the Convention.
675 Id.
676 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 54/4 of 6 October 1999. Entered into force in December of the following year. Hereafter referred to as "the Optional Protocol".

after a closed meeting following the discussion of a report and constructive dialogue with a representative of a State.[677]

The issue of reservations has been addressed both during the discussion of reports and in concluding comments. The most common form used by the Committee and its members is a general expression of concern at reservations.[678] It has often been suggested to States to review their reservations with a view to withdraw them.[679] However, more interesting are two other ways used by the Committee and its members to address reservations. One of them is to enter into a dialogue with a representative of a State about the exact content, consequences and sense of reservations, in particular in terms of the internal law of a State. The second way consists of giving a determination, explicit or implicit, of the nature of the State's reservations.

1. Discussing the Impact of Reservations with States

The following are examples of a dialogue about reservations based on Islam. During the discussion of the initial report of Bangladesh some members of the Committee wondered whether the reservations entered by this country, in particular to article 2, were really necessary taking into account the principle of equality proclaimed in the Constitution of Bangladesh and legislative reforms undertaken and planned.[680] During the consideration of Egypt's initial report some experts wondered, after having heard Egypt's explanation of its reservation to article 16, whether it was necessary to make this reservation.[681] The issue was addressed again in 1990 in relation to the second periodic report of Egypt. One of the experts of the Committee

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677 See *Procedures and Format for the Elaboration of Concluding Comments* adopted by the Committee at its 19th session in 1998. The text is contained in the Report of the Committee on the Elimination of Discrimination against Women to the General Assembly, 18th and 19th sessions, General Assembly Official Records, 53rd session, Supplement N° 38, UN Doc. A/53/38/Rev.1, paras. 395–397.

678 It appears in relation to all reservations based on Islam. See for example Concluding comments of the Committee, Consideration of first and second periodic reports of Jordan, 2000, UN Doc. A/55/38, para. 172; Concluding comments of the Committee, Consideration of the initial report of the Maldives, Unedited version, 2001, UN Doc. CEDAW/C/2001/I/Add.6, para. 17.

679 Such statements are also made in relation to all reservations based on Islam. See for example Concluding comments of the Committee, Consideration of the combined initial and second periodic reports of Tunisia, 1996, UN Doc. A/50/38, para. 271.

680 Consideration of the initial report submitted by Bangladesh, 6th session, Summary records of the 96th meeting, 8 April 1987, UN Doc. CEDAW/C/SR.96, para. 89: one of the members of the Committee stated that it did not understand why it was judged necessary to reserve article 2 taking into account the fact that the principle of equality between men and women is recognized in the country's Constitution as required by article 2 (a) of the Convention; Id. para. 96: another member expressed estimation that if all legislative and other programs described in the report were effectively applied without any restrictions the reservation to article 2 would not be necessary and could be withdrawn.

681 Concluding comments of the Committee, Consideration of the initial report submitted by Egypt, 1984, UN Doc. A/39/45, para. 217.

> *felt that the reservations to articles 2 and 16 did a disservice to the country. The reservation to article 2 should not exist at all, because Egyptian law excluded discrimination. The reservations to many subparagraphs of article 16 could also be withdrawn, because no conflict with Islamic law was involved.*[682]

Similar comments and suggestions were made during the consideration of Libya's initial report:

> *Since the Libyan Government believed that Islamic law provided more rights to women than national and international legislation, (...) it should consider the possibility of withdrawing those reservations which related particularly to article 2 of the Convention, taking into account the objections of many States parties in that regard.*[683]

This observation contains another very important reference, namely, that relating to objections expressed by other States. It is remarkable that in connection with Libya's initial report the issue of objections has been raised on several occasions, which has not been done during the discussion of any other report submitted by one of the Muslim States.[684]

The discussion of Morocco's initial report led some members of the Committee to similar observations. They stated, for example, that the "reservation to article 16 appeared to conflict with the Government's legal position"[685] or that the reservation to article 2 appeared to conflict with the aim of improving the status of women demonstrated by the government.[686]

Worth mentioning is also the following recommendation contained in concluding comments to Malaysia's report: "[The Committee] encourages the State party to obtain information on comparative jurisprudence and legislation, where more progressive interpretations of Islamic law have been codified in legislative reforms."[687] This encouragement is very valuable as it makes reference to internal resources and possibilities of

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682 Consideration of the second periodic report submitted by Egypt, 9th session, Summary record of the 164th meeting, 31 January 1990, UN Doc. CEDAW/C/SR.164, para. 81.

683 Consideration of the initial report submitted by Libya, 13th session, Summary record of the 237th meeting, 19 January 1994, UN Doc. CEDAW/C/SR.237, para. 42. Another member of the Committee said that "she did not see why those reservations should be upheld out of respect for Shari'a, when the report had emphasized the pioneering role the Shari'a had played in promoting women's rights. Furthermore, those reservations might imply that the Shari'a did not actually acknowledge the full rights of women." Id., para. 52.

684 Id., para. 35, 42. The principal question relating to objections was about Libya's possible responses to many objections made by other States parties. It should be recalled that the initial report of Libya was submitted and its consideration took place before the modification of Libya's general reservation.

685 Consideration of the initial report submitted by Morocco, 16th session, Summary record of the 313th meeting, 14 January 1997, UN Doc. CEDAW/C/SR.313, para. 12.

686 Id., para. 19. This expert of the Committee also added that "In many countries (…) in which Islam was the dominant religion, the Islamic Shari'a did not really regulate behavior, but was often put forward as an excuse. She therefore urged the Government to examine those areas in which Moroccan women still faced discrimination (…) and to decide whether the provisions of the Convention really conflicted with Islamic law."

687 Concluding Comments of the Committee with regard to the combined initial and second periodic report of Malaysia, 31 May 2006, UN Doc. CEDAW/C/MYS/CO/2, para. 14 at p. 3.

the country paying due attention to its peculiarities. The same encouraging effect which opens a way for constructive dialogue can be achieved by statements similar to the following made during the discussion of the Kuwait's combined initial and second periodic report:

> **Ms. Gaspard**, *noting the understandably deep concern among Committee members at Kuwait being the only remaining country to deny women the right to vote, said that history had provided many examples of men who had put up resistance to women's suffrage. In her own country, France, Parliament had rejected legislation to guarantee women's right to vote 21 times between 1919 and 1939. In Kuwait, objections were made by men who did not wish to see their wives or daughters being solicited by political candidates without a male presence. In France, a high-ranking prewar political official had said that a ballot would not be elegant in a woman's hands, which were meant for gloves and rings. In both instances, resistance to granting women full political citizenship came from political officials and parties. Contemporary Kuwait, however, offered a different example from pre-war France in that Kuwaiti women were highly educated, and, in some respects, better educated than their male counterparts.*[688]

This observation draws on the history, pointing out similarities in the development of the area, and thus on common values of both cultures. However, simultaneously, it does not have depreciative effect, because it also refers to advantageous differences between situations.

Comments and observations of this type allow States to see their reservations and obligations under the Convention in a new light, to initiate a constructive dialogue with representatives of States. This can lead to a positive change in a position of a State. The best examples are the partial withdrawal of reservations by Bangladesh and Kuwait, as well as the replacement of Libya's general reservation by a more precise reservation.

2. Determining the Nature of Reservations

As far as the second way to address reservations is concerned, namely the determination of the nature of reservations by the Committee, it was not used very frequently at the early stage of the existence of the Committee. Even if the nature of reservations was addressed also during the first years of the existence of the Committee, it was made exclusively by individual members in a rather indirect way. Members of the Committee emphasized, for example, the capital importance of some provisions, their central role for the enjoyment by women of their human rights, stating that these are core or key provisions of the Convention.[689] In particular when reservations to

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688 Consideration of the combined initial and second periodic report submitted by Kuwait, 30th session, Summary records of the 634th meeting, 15 January 2004, UN Doc. CEDAW/C/SR.634, para. 34 at p. 6.

689 See for example Consideration of the second report submitted by Bangladesh, 12th session, Summary record of the 227th meeting, 1 February 1993, UN Doc. CEDAW/C/SR.227, para. 58; Consideration of the initial report submitted by Iraq, 12th session, Summary record of the 212th meeting, 20 January 1993, UN Doc. CEDAW/C/SR.212, paras. 10, 13, 21; Consideration of the initial report submitted by Morocco, 16th session, Summary record of the 312th meeting, 14 January 1997, UN Doc. CEDAW/C/SR.312, paras. 13, 18, 19.

article 2 have been discussed, such observations were very frequent. It is also in relation to article 2 that the majority of explicit statements with regard to the incompatibility issue has been made.[690]

During the last years, the determination of the nature of reservations was made not only by the Committee's individual members, but also in the name of the Committee as a whole, as a body. This occurred almost systematically with regard to reservations to articles 2 and 16 and general reservations.[691] However, the Committee did not qualify as incompatible with the object and purpose of the Conventions the general reservation of Pakistan.

Why did the Committee find it necessary to make such determinations in relation to reservations of some States and not of others? Are reservations based on Islam entered by other States therefore judged compatible from the point of view of the Committee? My suggestion is that the Committee was not fully aware of the extent of Pakistan's reservation. The use of the Constitution as a pretext for entering the reservation and thus hiding the real reason, namely Islam, apparently played its role.

Finally, although Tunisia entered no reservation to article 2, it accompanied its ratification of the Convention by a general declaration, which has identical or even

690 For example, with regard to the reservation entered by Iraq to paragraphs (f) and (g) of article 2 one of the members of the Committee stated that "those paragraphs represented the basic obligations of States parties, and she had serious doubts about the compatibility between such reservations and the purpose of the Convention.": Consideration of the initial report submitted by Iraq, 12th session, Summary record of the 212th meeting, 20 January 1993, UN Doc. CEDAW/C/SR.212, para. 13; even more direct are remarks of another member of the Committee with regard to the reservation entered by Bangladesh to article 2: "She urged the Government of Bangladesh to give very early consideration to withdrawing its reservation to article 2 of the Convention, which was incompatible with the object and purpose of the Convention." Consideration of the combined third and fourth periodic reports submitted by Bangladesh, 17th session, Summary records of the 358th meeting, 23 July 1997, UN Doc. CEDAW/C/SR.358, para. 12.

691 Consideration of the third and the combined fourth and fifth periodic reports submitted by Egypt, Advance unedited version, 2001, UN Doc. CEDAW/C/2001/I/Add.2, para.16; Concluding comments of the Committee, Consideration of the combined second and third periodic reports of Iraq, Advance unedited version, 2000, UN Doc. CEDAW/C/2000/II/Add.4, para. 21; Concluding comments of the Committee, Consideration of the initial report submitted by Libya, 1995, UN Doc. A/49/38, para. 179; Consideration of the combined initial and second periodic report submitted by Malaysia, 31 May 2006, UN Doc. CEDAW/C/MYS/CO/2, para 10 at p. 2; Concluding comments of the Committee, Consideration of the initial report submitted by Morocco, 1997, UN Doc. A/52/38/Rev.1, para. 59; Concluding comments of the Committee, Consideration of the second periodic report by Alger, 15 February 2005, UN Doc. CEDAW/C/DZA/CC/2, para. 23 at p. 4; Concluding Comments of the Committee, Consideration of the combined second and third periodic report submitted by Maldives, UN Doc. CEDAW/C/MDV/CO/3, 2 February 2007, para. 11 at p. 3; Concluding comments of the Committee, Consideration of the initial report submitted by Syria, UN Doc. CEDAW/C/SYR/CO/1, para. 12 at p. 2; Concluding comments of the Committee, Consideration of the initial report submitted by Mauritania, UN Doc. CEDAW/C/MRT/CO/1, 11 June 2007, para. 10 at p. 2; Concluding Comments of the Committee, Consideration of the combined initial and second periodic report submitted by Niger, UN Doc. CEDAW/C/NER/CO/2, 11 June 2007, para. 9 at p. 2.

more far-reaching effects than reservations to article 2. The Committee did not, however, address the issue of compatibility of this declaration. I think that it is the general attitude of this country and practical effects of its reservations as presented in the report, which persuaded the Committee that the declaration would not hinder the withdrawal of reservations and full implementation of the Convention in the near future.

Now it should be recalled that all States parties to the CEDAW – those whose reservations were qualified as incompatible as well as those whose reservations were not addressed as to their nature – should be aware of the Committee's opinion on reservations, their admissibility and compatibility, because the Committee expressed its view on reservations not only in relation to each particular State during the discussion of their periodic reports, but also in general on other occasions, independently of the consideration of States' reports.

B. *Other Statements on Reservations*

The Committee has been concerned with the issue of reservations from the very beginning of its activities. Already in 1987 this concern resulted in the General Recommendation N° 4, which inter alia suggested to all States parties to reconsider their reservations if they appear incompatible with the object and purpose of the Convention with a view to withdrawing them.[692] Preoccupied with a great number of reservations based on Islam the Committee took in the same year a decision to request

> *the United Nations system as a whole, in particular the specialized agencies of the United Nations, and the Commission on the Status of Women, to promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family on issues such as marriage, divorce, custody and property rights and their participation in public life of the society, taking into consideration the principle of El Ijtihad in Islam.*[693]

Unfortunately, this decision found no support and brought no results.

A further general recommendation on reservations was already adopted in 1992. In this recommendation the Committee suggested to States parties to

> *(a) Raise the question of the validity and the legal effect of reservations to the Convention in the context of reservations to other human rights treaties;*
> *(b) Reconsider such reservations with a view to strengthening the implementation of all human rights treaties;*
> *(c) Consider introducing a procedure on reservations to the Convention comparable with that of other human rights treaties.*[694]

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692 Report of the Committee to the General Assembly, 6th session, General Assembly Official Records, 42nd session, Supplement N° 38, 1987, UN Doc. A/42/38, para. 579.

693 Id., para. 580 at p. 80.

694 Report of the Committee to the General Assembly, 11th session, General Assembly Official Records, Supplement N° 38, 1992, UN Doc. A/47/38.

In 1994 a great number of reservations to article 16 led to the adoption of the General Recommendation N° 21 on equality in marriage and family relations, which includes a separate chapter on reservations.[695] This chapter on reservations was included in the statement on reservations adopted by the Committee as its contribution to the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights.[696] One of the most important determinations made by the Committee in this statement concerns reservations to article 2 and article 16:

> *16. The Committee holds the view that article 2 is central to the objects and purpose of the Convention. States parties which ratify the Convention do so because they agree that discrimination against women in all its forms should be condemned and that the strategies set out in article 2, subparagraphs (a) to (g), should be implemented by States parties to eliminate it.*
>
> *17. Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also remains convinced that reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.*[697]

The Committee, therefore, makes it clear that reservations to article 2 and article 16 are, in its view, incompatible with the object and purpose of the Convention.

Another interesting observation made by the Committee concerns the fact that a number of States entered reservations to some provisions of the Convention, although they did not enter reservations to analogous provisions of other human rights treaties. Others entered reservations to article 2 of the Convention despite the fact that their national Constitutions or laws prohibit discrimination.[698] Furthermore, the Committee emphasized the importance of objections of other States parties not only as a means of exerting pressure on reserving States, but also as a useful guide for the assessment of the permissibility of a reservation by the Committee itself.[699] It should be mentioned that on several occasions the Committee recalled in its statement reports of the Special Rapporteur of the International Law Commission on the law and practice relating to reservations to treaties. This was done in relation to such issues as options open to a State which entered reservations, the role of the Committee and of objections to reservations by other States parties.[700] The Committee agreed, in general, with views expressed by the Special Rapporteur. However, it drew the attention of States parties to its concern at the number and extent of impermissible reservations, thereby emphasizing its role in the review of reservations.[701]

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695 Report of the Committee to the General Assembly, 12th session, General Assembly Official Records, Supplement N° 38, 1994, UN Doc. A/49/38 at pp. vii–xvi.

696 Report of the Committee to the General Assembly, 19th session, General Assembly Official Records, 53rd session, Supplement N° 38, 1998, UN Doc. A/53/38/Rev.1, at pp. 47–50.

697 Id., at p. 49.

698 Id., para. 3 at p. 47.

699 Id., para. 21 at p. 49.

700 Id., paras. 18, 21, 24 at p. 49.

701 Id., para. 24 at p. 49.

C. *The Optional Protocol and the Issue of Reservations*

The purpose of the Optional Protocol is to establish procedures for the supervision of the implementation of and compliance with the CEDAW similar to those available under other human rights treaties.[702] Two procedures are established according to the Optional Protocol: an individual complaints procedure (article 2) and an inquiry procedure (article 8). All States parties to the Protocol submit themselves to the former, whereas the latter is an optional procedure and any State may, at the time of signature ratification or accession, declare that it does not recognize the competence of the Committee provided for in article 8 (inquiry procedure). Article 17 of the Optional Protocol states that no reservations to the Protocol shall be permitted. In this connection a number of States emphasized that their participation in the Optional Protocol and their acceptance of this provision should not create a precedent. They pointed out that rules on reservations of general international law are those codified in the Vienna Convention and that this regime is satisfactory for all international multilateral treaties, including human rights treaties.[703] The inclusion of this provision in the Optional Protocol was possible because the Protocol deals only with procedural questions, moreover it contains an opt out clause and leaves substantial reservations to the CEDAW unaffected.

However, as far as eventual future proceedings are concerned the following question arises: how will and shall the Committee deal with reservations entered by States to material provisions of the CEDAW? Will the Committee just refuse to consider any application concerning any reserved provision or will it as a preliminary step interpret and determine the extent and nature of a reservation before making any conclusions about the admissibility of an application? Some aspects of this issue were addressed during the preparatory stage of the Optional Protocol in the Working group as well as by States and organizations. One can find among views expressed by different bodies two opposite positions. One of them states that "it would be up to the Committee to examine the compatibility of (…) reservations with the Convention, and consequently,

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702 See the First Optional Protocol to the ICCPR; article 22 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Some proposals concerning the introduction of these procedures into the CEDAW were made already at the preparatory stage of the CEDAW itself, but did not find much support and had to be abandoned: see e.g. Sucharipa-Behrmann, Lilly. "An Optional Protocol to CEDAW: A Further Step Towards Strengthening of Women's Human Rights." In: G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann, K. Zemanek, eds. *Liber Amicorum Professor Seidl-Hohenveldern – in honor of his 80th birthday*, Hague, Boston, London: Kluwer Law International, 1998, pp. 683–698 with further references.

703 See, in particular, views expressed by Algeria, China, Egypt, India, Israel, Jordan, the United States of America in their interpretative statements on the draft optional protocol to the CEDAW contained in: Report of the Commission on the Status of Women at its forty- third session, 1–12 March and 1 April 1999, UN Doc. E/1999/27, Annex II, para. 25.

the admissibility of communication."[704] The opposite view stresses that the Committee was not competent to take a position on the admissibility of reservations.[705] At the final analysis one has, however, the impression that the former view is prevailing, or at least that it would be at the Committee to find an appropriate attitude when faced with reservations.[706]

At the present stage, it is difficult to say definitely which of the two possibilities the Committee will choose. There are, however, some indications favoring the determination of the compatibility of reservations by the Committee. Not only views expressed by several States and international bodies during the preparation of the Optional Protocol, but also the attitude developed by the Committee towards the issue of reservations in its practice during the last decade and the position of States parties faced with this attitude make it difficult to imagine that after all these efforts the Committee will suddenly choose a passive position. Moreover, the assessment made by the Human Rights Committee as to its power to determine the nature of reservations in the General Comment N° 24 which had been recalled in connection with the elaboration of the Optional Protocol is a further argument in favor of the possibility and necessity for the Committee to consider the nature of reservations in connection with procedures established under the Optional Protocol.

D. *Conclusions*

The short overview of the Committee's activities with regard to reservations shows that the Committee is concerned with reservations and attempts by all appropriate means to improve the situation both through recommendations, suggestions and comments as well as clear determinations. The latter were regularly used in the last years. However, the Committee did not attempt till now to ascribe to itself or to exercise functions which could be interpreted as an imposition of the Committee's views on States. The ways and means chosen by the Committee to deal with the problem are rather traditional. The Committee has not yet gone so far as the Human Rights Committee with some ideas expressed in its General Comment N° 24. Nevertheless, this very careful and diplomatic attitude of the Committee towards reservations is, at

704 Para. 22 of Summary of exchange of views on elements contained in suggestion 7 held in the open-ended working group in 1966, contained in: Report of the Commission on the Status of Women at its fortieth session, 11–22 March 1996, UN Doc. E/1996/26, Annex III, paras. 9–113.

705 See, in particular, comment made by Mexico in: Report of the Secretary-General submitted to the Commission on the Status of Women at its forty-first session, 10–21 March 1997, UN Doc. E/CN.6/1997/5, para. 73.

706 See e.g. the following statement: "(…) any reservation would need to be made within the framework of article 28 (prohibiting incompatible reservations) of the above-mentioned Convention (CEDAW), and on this basis, the Committee should direct its attention towards the suggestion of a review of the compatibility of reservations with the Convention and, consequently, a review of the admissibility of a communication.": Id., para. 68.

the same time, a very active one and leads to significant improvements. It affirms the power of human rights treaty-monitoring bodies to determine the nature of reservations and shows the significance of the role which these bodies, even not vested with mandatory powers, can play in the improvement of States parties' commitments under the treaty.

IV. From Statement to Process?

The analysis of theoretical issues combined with developments in practice in the context of human rights treaties in general and of the CEDAW in particular shows us a very interesting change in the nature of reservations. The whole regime of reservations becomes more dynamic. The very notion of reservations, instead of being just a means of preserving position of a State in the context of a particular treaty, becomes a way, a procedure of adapting gradually a situation in a particular State to requirements of the treaty. This transformation from a static nature to dynamic process is particularly visible in the practice of modification of reservations. This procedure allows States to enter into a real dialogue on the exact content of reservations, meanings of terms of the treaty, relationship between reservations and treaty provisions etc. Moreover, it can lead to significant positive changes in the degree of participation of the reserving State in the treaty as well as help a treaty-monitoring body to influence directly legislative changes which could be taking place or even incite a State to introduce such changes.

The process-oriented nature of the regime of reservations in general and of the notion of reservations in particular is also emphasized by the practice of disregarding the time-limit rule. Some authors mentioned the importance of the time-limit rule as a means of clarifying a legal position of the States and thus, guaranteeing legal security. They found it necessary that at one point in time or another, one could definitely determine the nature of the relationship between States parties to a treaty. Unfortunately, Alain Pellet as a Special Rapporteur of the ILC also highly values this rule. Therefore, he prompted the introduction of a clear and unambiguous rule to this effect in the draft guidelines.[707] The process-oriented character of the regime of reservations, in particular as reflected by the practice of disregarding the time-limit rule, rejects this view. The dynamic process in this context means that one can determine the nature of the relationship between parties to a treaty at each particular moment, but parties to a treaty are free to modify their position, and therefore, the nature of their relationship using established procedures at any moment in the future. Such a situation does not necessarily lead to insecurity. Simply, more attention is required on the part of States, as well as other actors involved in the implementation and application of a treaty.

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707 See draft guideline 2.6.13. on time period for formulating objections and 2.6.15. on late objections in Eleventh report, UN Doc A/CN.4/574 at pp. 46 and 52. However, the real meaning and impact of these guidelines will become clear only after the consideration of the issue of effects of objections, an issue which is still to be discussed by the Special Rapporteur.

It should be emphasized at this stage that this continuous process of changing nature of reservations is limited primarily to incompatible reservations or reservations susceptible to be defined as incompatible. Usually all these issues will not arise in relation to ordinary, compatible reservations.

The introduction of this continuous negotiative process into the regime of reservations is a response to gaps, ambiguities and contradictions of the rules codified in the Vienna Convention. This changing nature of reservations does not mean a creation of a new regime of reservations. In particular, since, as the analysis of the practice shows, all these developments deal with reservations that are either clearly incompatible with the object and purpose of the treaty or susceptible to be incompatible. All these developments took place, and continue to take place inside the reservations regime of the Vienna Convention and correspond to certain progressive views expressed in the doctrine. Moreover, such characteristics of this regime as fluidity and ambiguity even favored these developments. Thus, they can be seen as an attempt to create a clearer legal framework for reservations by means and inside of limits given by the existing general regime of reservations primarily through procedural means. It remains, however, to be seen whether, and to what extent, these solutions proposed in the context of human rights treaties are transmissible and acceptable to other international treaties. However, it is regrettable to mention that at least at present stage these developments find little if any support at official(ized) level in international law, in particular in the ILC.

For the purposes of further analysis it is important to emphasize a wider possibility of interaction and dialogue in the context of this developing negotiative process. The traditional vision of reservations as statements limits very significantly possibilities for interaction and further development, in particular as far as the position of reserving States is concerned. Dynamism, openness and a wider possibility for reaction for both reserving and objecting States, not only protect the integrity of a treaty, but also promote real, inclusive universality based on dialogue and mutual exchange.

In this context universality becomes not an imposition of values of a particular group of States, but a formulation of common, acceptable rules/values through this dynamic negotiative process.

IV

PROMOTING THE DIALOGUE

[W]ho pretends to be just by economizing on anxiety?

Derrida, Force of Law, p. 955

I. Approaching Conclusions

The analysis made above clearly demonstrated that introduction of laws based on Islam in relation to the status of women should not necessarily mean safeguarding and promotion of discriminatory practices and traditions. In particular in modern times, many Muslim scholars have developed new understandings and interpretations of Islam which, if translated into legislation, would produce rules beneficial to the promotion and respect of women, their interests and experiences. On the other hand, the realty in Muslim States reflects the conservative vision of the status of women in Islam, not only at the level of societal practices and attitudes, but also at the official, legislative level. Despite a few exceptions in certain areas and several limited improvements, the overall evaluation of the situation in Muslim States leaves an impression that modernist voices are not heard in Muslim States. As a consequence, the question about reasons for this exclusion of modernist voices from the official discourse in Muslim States arises. A detailed answer to this question goes beyond the scope of the present research. However, identification of some general tendencies and most important reasons is necessary.

Factors preventing wider dissemination and acceptance of modernist women-friendly understandings of Islam in Muslim States can be divided into two large groups. The first group encompasses the so-called internal factors which by definition originate in Muslim communities and States themselves. The second group includes external factors, including possible influences of international and more specifically human rights law. This latter group of factors relates to the question of the role of human rights law and international law more generally in the process of interaction between the CEDAW as the international instrument on women's rights and Islam and will therefore be discussed in more detail below using results of the analysis made in previous chapters.

A detailed analysis of the situation not only at the official level of governments and politics in Muslim States but also at the level of historical traditions and religious

activities is important for the determination of internal factors constituting an impediment to the further spread, development and acceptance of new visions of the status of women in Islam. The situation in each particular Muslim State represents, however, an individual complex web of various factors, so that it is very difficult to make some general conclusions or suggestions.[708] An analysis of the relevant literature suggests nevertheless that, firstly, the need to protect and promote Islamic beliefs and values is used as an argument by official (government) and unofficial (religious elite) power-holders as a tool for maintaining and improving their power-position.[709] Obviously, Islamic values are understood in this context as including a conservative vision of the status of women. Moreover, the inferior position of women, the conservative understanding of the proper "Islamic" status of women is often an ultimate proof of the "Islamic" character of power-holders. On the other hand, there is a quite wide-spread and strong sincere belief on the part of many Muslims including women that the conservative version of the status of women in Islam is **the only** authentically Islamic way of life (soft version of apologetic tradition). Finally, it is obvious that religion plays a significant role in the life of Muslims, individually, as members of a community as well as at the official level of a State. Taking these premises into account, one would suggest that in order for the idea of equality between men and women and advancement of women to become popular and effective in Muslim communities and States, it should first become an integral part of the Muslim identity. In other words, there is a need for work to be done by modernist Muslims themselves to persuade – or better to recall to – ordinary Muslims that diversity of opinions, new interpretations and constant change are integral parts of Islamic tradition; that therefore, new visions of the status of women can be not only brought from the outside, but also generated from within the Islamic tradition itself.[710] The requirement of this internal discourse does not mean that international law, human rights law or any other outside factors cannot influence this process. In contrast, the very purpose of this research is to show how rules and procedures of international law and human rights law more specifically intervene into this process, influence it and how a conscious use of certain tools of international law can bring positive changes or in contrast lead to reinforcement of conservative forces negatively influencing the situation of women.

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708 For an example of such a differentiated approach to the issues of status of women in modern Muslim States see KANDIYOTI, Deniz, ed. *Women, Islam and the State*. Philadelphia: Tample University Press, 1991.

709 For an example of how this conservative religious discourse is used by the unofficial patriarchal elite to maintain its authority and power even in violation of official legislation see PEREIRA, Faustina. "Fatwa in Bangladesh: Patriarchy's Latest Sport." In: Askin, Kelly D., Koenig, Dorean M., eds. *Women and International Human Rights Law*. Vol. II, Ardsley: Transnational Publishers Inc., 2000, pp. 653–668. For an analysis of use of religious discourse by official power-holders see MAYER, Ann Elizabeth. *Islam and Human Rights: Tradition and Politics*. Third edition, Boulder, London: Westview Press, 1999.

710 This internal discourse does not form the subject of the present research. Significant efforts have been made in this direction by some contemporary Muslim scholars. See in particular works of Abdullahi A. An-Na'im.

II. International Law and Municipal Legal Orders

A. *Some Theoretical Premises*

When the issue of the relationship and interaction between national legislation and international law arises, which is most commonly the case if there is a conflict between obligations derived from both systems for a single State, from the point of view of international law analysis, it is important to determine how the relationship between national and international legal order is perceived by each particular State.

In the theory of international law the relationship between municipal and international legal orders is described in two different ways by two doctrines. The dualist doctrine views the two legal orders as essentially distinct and regulating different subject-matters and concludes therefore that they can never come into a conflict.[711] In contrast, according to the monist doctrine, municipal and international law are both parts of the same legal order. In this case one has to address the question of possible conflicts between obligations arising for a State from international law and its internal legal system.[712] International law doctrine also addresses the question whether the relationship between international law and municipal law is that of subordination or co-ordination, and in the former case which of them is subordinate to the other.[713] There is no unanimity among international law scholars on any of these issues. Moreover, in the contemporary doctrine of international law the opinion is often voiced that, especially the distinction between monist and dualist doctrines is artificial, superfluous and useless.[714] Nevertheless, all introductory manuals on international law continue to deal with these doctrines.[715]

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711 Leading dualists include Heinrich Triepel and Dionisiio Anzilotti: Triepel, Heinrich. *Völkerrecht und Landesrecht*, Leipzig: Hirschfeldt, 1899; Anzelotti, Dionisio. *Corso di diritto internazionale. Vol. I: Introduzione e teorie generali,* Roma: Athenaum, 3d edition, 1928. For a general presentation of monism and dualism see Starke, Joseph Gabriel. "Monism and Dualism in the Theory of International Law." 17 *BYbIL* 66 (1936).

712 Main representatives of this theory are Hans Kelsen, Alfred Verdross, Hirsch Lauterpacht: Kelsen, Hans. *General Theory of Law and State*. Cambridge: Harvard University Press 1945, pp. 363– 80; Verdross, Alfred. *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung.* Tühbingen: Mohr, 1923; Lauterpacht, Hirsch. *International law and Human Rights.* New York: Praeger, 1950.

713 For a presentation and analysis of the issue of relationship between international law and municipal legal orders see e.g. Fitzmaurice, Gerald G. "The General Principles of International Law Considered from the Standpoint of the Rule of Law." 92 *RdC* 1957 (II), pp. 70–80.

714 See e.g. Fitzmaurice, loc.cit. above fn. 713; Frowein, Joachim. "Treaty-Making Power in the Federal Republic of Germany." in:. Jacobs, Francis G., Roberts, Shelly, eds. *The Effect of Treaties in Domestic Law.* London: Sweet & Maxwell, 1987, at p. 63; Geiger, Rudolph. *Grundgesetz und Völkerrecht.* Munich: Beck, 2002, at p. 14.

715 See e.g. Brownlie, Ian. *Principles of Public International Law*. Oxford: Oxford University Press, 6th edition, 2003, chapter 2;. Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2002, chapter 8; Shaw, Malcolm. *International Law*. Cambridge: Cambridge University Press, 4th edition, 1997, chapter 4.

In this connection, from the point of view of international law, the central general principle is that a State may not invoke provisions of its internal law as a justification for its failure to comply with its international obligations.[716] Thus, once it is clearly established that a State has assumed a particular obligation under international law, the State theoretically cannot escape compliance with this obligation and has to introduce necessary changes into its municipal legal order. On the other hand, international law has very few means at its disposal not only to ensure compliance in case of breaches, but also to determine formally and unambiguously the existence of such a breach.

I will briefly recall the situation resulting from the participation of Muslim States in the CEDAW. By becoming parties to human rights treaty States by definition undertake an obligation to ensure a certain treatment of individuals in their internal legal orders. This may also require under certain circumstances to introduce a series of legislative changes. Muslim States whose participation in the CEDAW has been analyzed above however made their participation in the treaty subject to reservations. By a way of simplification one can say that reservations express the belief of governments of these States that national legislation based on Islam although sometimes appearing discriminatory against women is at the final analysis not contradictory to the requirements of the CEDAW because the relevant legislative provisions in their entirety strike the necessary equitable balance between different rights and obligations of men and women. The position of some States would go so far as to imply that even when certain contradictions between municipal law based on Islam and the CEDAW are present, the municipal law may not be modified because it is based on divine immutable and unchangeable injunctions. Rules of international law permit participation in a treaty with reservations. From a purely formal point of view and as a matter of general principle Muslim States, as all other States, are entitled to become parties to a treaty with reservations permitting them to disregard certain requirements of this treaty and thus protecting their legislation from some changes.

The principle embodied in article 27 of the Vienna Convention on the Law of Treaties prohibiting States from using their internal legislation as a justification for a failure to perform their international obligations refers to already existing obligations of a State. The practice of entering reservations occurs at the preliminary stage to the actual establishment of obligations with regard to the State and serves the purpose to exclude certain provisions from the set of obligations by which the State will become bound. On the other hand, since the very purpose of the CEDAW is modification of national legislation of States parties in a certain manner, the question of compatibility of reservations entered by Muslim States may arise, which is distinct from a simple prohibition to use municipal law as a justification for a failure to perform an already assumed obligation. In this sense

716 This principle is codified in article 27 of the Vienna Convention on the Law of Treaties. It is also reflected in article 13 of the Declaration on the Rights and Duties of States of 1949 (GA resolution 375 (IV)) and has been reaffirmed in jurisprudence: Alabama Claims Arbitration (1 International Arbitrations 1872, especially p. 656); Exchange of Greek and Turkish Populations Case, Advisory Opinion (P.C.I.J. Reports, Series B, N° 10, 1925, p. 20).

reference to the impossibility for a State to invoke its internal laws made in many objections to reservations of Muslim States is unjustified and misplaced.

Apart from the fact that, as has been shown above, it is not at all clear who and how is entitled in international law to determine the nature of reservations, the question of the consequences of such a determination is not at all clear. Should the existing international law procedures and mechanisms despite all deficiencies generate a determination of the nature of a reservation and its consequences, as for example in the case of an individual complaint against Trinidad and Tobago[717], what can international law do to ensure compliance with the determination? What means has international law at its disposal to deal, for example, with States parties to the CEDAW which do not comply with its reporting obligations and thus despite the existence of the formal act of adherence to the Convention actually remain outside of its regime? All these questions demonstrate in the first place the inability of traditional international law to resolve possible conflicts between municipal and international legal orders even at a purely theoretical level.

B. *Situation with the Municipal Law of Muslim States*

In practical terms, what is relevant in the case of conflicts between international obligations of a State and its national legislation, is on the one hand, the ways in which municipal law itself deals with such conflicts and, on the other hand, the ability of and means by which international law determines a breach and ensures compliance.

Thus, as a next step, it is necessary to inquire about ways used by municipal law to deal with a State's international treaty obligations and possible conflicts. A treaty becomes internationally binding on a State through one of the procedures described in articles 11-16 of the Vienna Convention on the Law of Treaties. The fact that a State is internationally bound by a treaty, more concretely a human rights treaty, does not necessarily mean at the same time that any individual feeling that his or her rights as guaranteed by this treaty are violated can invoke this treaty against the authorities of the State at a domestic level. In some States the simple fact that a treaty became binding internationally is not sufficient for provisions of this treaty to acquire domestic validity. National legislation of such States requires in addition the adoption of special legislation which will transform provisions of an international treaty into provisions of domestic law.[718] Furthermore, even in States where national law does not require adoption of special legislation these States have developed a concept of non-self-executing treaties. This concept describes treaties which despite the general rule about direct

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717 See the presentation and short analysis of this case above Chapter Two, III.C.1.b).

718 In international law literature States whose national laws require this "transformation" of provisions of international treaties into provisions of national law are known as dualist States. In contrast, those States were the simple fact of a treaty being internationally binding on a State is sufficient to make its provisions valid domestically are called monist States. See e.g. Jacobs, Francis G., Roberts, Shelly, eds. *The Effect of Treaties in Domestic Law.* London: Sweet & Maxwell, 1987 and the presentation of monist and dualist theories few paragraphs earlier. In this connection it is interesting to recall the following statement made by Judge Rosalyn Higgins in her famous book:

applicability of international treaties in domestic law require adoption of special measures in order for a treaty (or its provisions) to become applicable by domestic courts and executive agencies.[719] Thus, despite the fact that a State is bound by a treaty, individuals are not always able to invoke provisions of this treaty before domestic courts and other agencies. The effectiveness and protective force of human rights treaties may therefore be significantly reduced by various additional requirements of municipal legal orders.

Muslim States whose participation in the CEDAW was analyzed above often provide in their reports information about the place of international treaties in domestic law. The attitude of the legislator towards international treaty obligations is different from country to country.

Thus, Algeria stated in its initial report that international treaties, once ratified and published, become part of domestic law[720] and may be asserted by any Algerian citizen against domestic jurisdictions.[721] Moreover, according to article 123 of the Algerian Constitution international treaties prevail over domestic law.[722]

Very different is the situation in Bangladesh. The combined third and fourth periodic report contains the following statement: "Bangladesh has ratified the Convention

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"The domestic court may be faced with a difficult question, when the domestic law which is its day-to-day task to apply entails a violation of an international obligation. Domestic courts *do* address that problem differently. Leaving the theoretical aspects aside for a moment, it is as a practical matter difficult to persuade a nation court to apply international law, rather than the domestic, if there appears to be a clash between the two. But it is more possible in some quarters than in others. And, although I have sympathy with the view of those who think the monist-dualist debate is passé, I also think it right that the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach."
In: HIGGINS, Rosalyn. *Problems and Process – International Law and How We Use It*. Oxford: Clarendon, 1994, pp. 206–207.

719 For a detailed discussion of this concept see e. g. BUERGENTHAL, Thomas. "Self-Executing and Non-Self-Executing Treaties in National and International Law." 235 *RdC* 1992 (IV), pp. 307–400; IWASAWA, Yuji. "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis." in: 26 *VJIL* 1986, pp. 627–697.

720 In many other Muslim States the situation is similar: an international treaty becomes binding as part of national legislation of the country upon its ratification and official publication. See e.g. *Combined Fourth and Fifth periodic report of Egypt* submitted on 30 March 2000, UN Doc. CEDAW/C/EGY/4-5, p. 25; *Second periodic report of Jordan* submitted on 26 October 1999, UN Doc. CEDAW/C/JOR/2, para. 2, p. 5; *Second periodic report of Libya* submitted on 15 March 1999, CEDAW/C/LBY/2, p. 4. One should not however, overestimate the apparent simplicity and therefore quickness with which international obligations can be transformed into domestic laws. Thus, Jordan stated in its second periodic report the following: "It should be mentioned that as of the drafting of this report, the necessary formalities for the Convention's publication in the Official Gazette and for it to become legally binding had not all been completed." (*Second periodic report of Jordan* submitted on 26 October 1999, UN Doc. CEDAW/C/JOR/2, para. 2, p. 5).

721 *Initial Report of Algeria* submitted on 1 September 1998, UN Doc. CEDAW/C/DZA/1, para. 3.2, p. 8.

722 Id. This principle was also confirmed in a decision of Constitutional Council of 20 August 1989.

on the Elimination of All Forms of Discrimination against Women (CEDAW) with reservations and not accepted it as legally binding yet."[723] This statement is further explained as follows: Provisions of an international treaty can be invoked before a court of law only if they are transformed into national laws or administrative regulations. However, although most national laws are already in conformity with the CEDAW and certain modifications/reforms have been undertaken to bring the remaining legislation in conformity with the Convention, not all provisions of the CEDAW are transformed into national laws and not all existing laws are in conformity with the Convention yet.[724]

More complicated and interesting is the status of the provisions of the CEDAW in Egypt. As in Algeria an international treaty after being ratified and published in accordance with established procedures becomes an integral part of domestic laws. Provisions of such ratified and published international treaties are binding on all national authorities and can be invoked by individuals before domestic courts and other agencies.[725] However, provisions of international treaties, when becoming part of Egypt's domestic law, have the same force as ordinary laws which have to conform to the Egyptian Constitution. In its combined fourth and fifth periodic report Egypt emphasized that the principle of equality and non-discrimination between men and women is not only guaranteed by the CEDAW but also stipulated as constitutional principles in articles 11 and 40 of the Egyptian Constitution. Therefore, the report concludes, "the provisions of the Convention have the protection afforded to a fundamental constitutional principle with regard to any legislation that is enacted in contravention thereof."[726] To put it differently, any law adopted in Egypt shall be in conformity with the Egyptian Constitution. Since the principle of equality and non-discrimination which is protected by the CEDAW is also a constitutional principle of Egypt, the report submits that provisions of the Convention will have the same value as constitutional principles and any law which violates the provisions of the Convention will be either modified or abolished. It is however possible to imagine that the understanding of equality and non-discrimination by the CEDAW Committee can differ from the interpretation of constitutional principles of equality and non-discrimination by the Egyptian legislator. Which of two understandings will be then applied in Egypt? What solutions will be adopted by the Egyptian legislator, by Egyptian courts? These questions are not addressed by Egypt in its reports. There are however, significant doubts that possible contradictions will be resolved in favor of provisions of the CEDAW and their interpretation by the treaty-monitoring body. First of all, article 2 of the Egyptian Constitution stipulates that the principles of the Shari'a are the

723 *Combined Third and Fourth periodic report of Bangladesh* submitted on 1 April 1997, UN Doc. CEDAW/C/BGD/3-4, para. 2.1.2, p. 24.

724 Id., pp. 24–25.

725 *Combined Fourth and Fifth periodic report of Egypt* submitted on 30 March 2000, UN Doc. CEDAW/C/EGY/4-5, pp. 24.25.

726 *Combined Fourth and Fifth periodic report of Egypt* submitted on 30 March 2000, UN Doc. CEDAW/C/EGY/4-5, p. 25.

principal source of legislation.[727] It follows from this provision that any law which is not in conformity with the principles of the Shari'a can be declared null and void by the Constitutional Court.[728] Furthermore, reservations entered by Egypt to the CEDAW are aimed in the first place to preserve certain provisions of Egyptian family law based on Shari'a. It is therefore to a certain extent hypocritical to state that provisions of the Convention acquire the status of highest legal authority of the same level as the Constitution. At the final analysis, everything will depend on the attitude of judges of the Constitutional Court, on their openness to new interpretations and new visions of Islamic law.

Many States do not address the question of the relationship between national legislation and international treaty obligations at all, because for them it is simply impossible to envisage a possibility that some external, secular standards can take precedence over what they believe or assume to be religious precepts. However, some States express this idea openly.[729] Being framed in religious terms and being closely linked to the religious life of Muslim communities the issue of women's rights should be addressed as a religious one. It is counterproductive for the improvement of the situation of people who suffer from violations of their rights or do not have rights simply to insist on compliance with human rights standards without paying due attention to internal religious and other factors. Being faced with a pressure of unconditional and immediate compliance, many Muslim States will simply withdraw from participation in a particular human rights regime because national and religious considerations are more important to them than the immediate compliance with human rights standards. This withdrawal will not always be expressed in clear terms. A sign of such a withdrawal may also be the silence of the State ignoring all requirements of an international regime, either substantial or procedural. As a result, international law will lose all possibilities to influence the situation in the State and therefore also to help individuals living in inadequate conditions and suffering from the lack of human rights.

The analysis of the reservations regime and in particular of the practice developed in the context of reservations entered by Muslim States to the CEDAW has demonstrated this in the context of participation of States in human rights treaties. The first step,

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727 It should be mentioned that this provision of the Constitution was modified by an amendment on 22 May 1980. Before, the principles of the Shari'a were declared one of the principal sources of legislation and not the principal source.

728 Article 2 of the Egyptian Constitution is at the centre of analysis of the decision of the Egyptian Constitutional Court of 26 March 1994. This decision illustrates all implications of this provision for Egyptian legislation. For an analysis and text of this decision see Dupret, Baudouin. "A propos de la constitutionnalité de la shari'a: présentation et traduction de l'arrêt du 26 mars 1994 (14 Shawwal 1414) de la Haute Cour Constitutionnelle (al-mahkama al-dusturiyya al-'ulya) égyptienne." 4 *Islamic Law and Society* 1997, pp. 91–113 or Lombardi, Clark B., Brown, Nathan J. "Do Constitutions Requiring Adherence to Sharia Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law" 21 *American University International Law Review* 2006, pp. 379–435.

729 *Combined initial and second periodic report of Saudi Arabia* submitted on 29 March 2007, UN Doc. CEDAW/C/SAU/2, at p. 10.

namely the entering of reservations itself, is already a means for States to avoid possible conflicts and escape the claim of international law that national legislation should be brought in conformity with international standards. Despite a theoretical possibility that a reservation can be declared incompatible and the State will find itself bound by the entire treaty, the reservation is still the best way to protect domestic legislation from immediate and undesirable modifications. In such cases the treaty-monitoring body is not able not only to require States and pressure them to comply with the reserved provisions, but even its competence to make a definitive and mandatory determination of the nature of the reservation is not clearly established. There is no other agency or procedure which could realistically fulfill these functions. In the case of a too high pressure on a reserving State to withdraw the reservation and amend its legislation which can be exercised by other States parties or by the treaty-monitoring body the response is the withdrawal from the treaty regime. The best example in this connection is the situation which occurred around the proposed modification of the initial reservation by Malaysia.[730] After a period of silence during which no report was submitted – Malaysia acceded the CEDAW on 5 July 1995 – the government of Malaysia proposed a modification of its initial reservation on 6 February 1998. Although this new proposed text of the reservation demonstrated not only the willingness of this State to limit the scope of its initial reservation, but also to explain in more detail the reasons behind the remaining reservations, the modification was not formally accepted due to an objection and lack of clarity concerning exact rules applicable to such cases. This attempted modification was a clear sign from the State of its willingness to comply with reporting obligations and the fact that it takes its obligations under the CEDAW seriously. However, after the modification was rejected, the government of Malaysia again took its initial passive position expressed through silence and non-submission of periodic reports. A breakthrough was possible thanks to a change in the attitude of the CEDAW Committee who was able to demonstrate its recognition of the partial withdrawal despite possible theoretical impediments.

It should, however, be mentioned that no State party to the CEDAW formally terminated its participation in the Convention. Rather, this withdrawal from the treaty regime takes either a form of silent ignorance expressed in the first place through non-submission of periodic reports, as in the case of Malaysia, or through more indirect means of superficial reporting and avoiding of sensitive issues, as in the case of Saudi Arabia.

Thus, international and human rights law procedures and mechanisms are not able to resolve the conflicts existing in this area between international standards and internal law in a traditional legalistic way by simply choosing between "right" and "wrong" and forcing the "wrongdoer" to change his/her behavior. At the same time it should be noted that a simple imposition of a particular view of what is "right", "correct" or "good" on somebody who does not accept this vision of "right", "correct" or "good" would run against the ideas and principles of the human rights law itself.

730 Some legal aspects of this situation are presented and analyzed above in Chapter Three, I.A.1.(i).

Since, as has been stated above, the present research addresses in the first place the position of those who really believe that Islam, their religion requires them to behave in a certain way,[731] in order to be effective and persuasive on a long term human rights law, while looking for possibilities and ways of improving the situation of women, should respect their opinions and beliefs.

In the light of the above-made remarks, what methods should human rights law choose, what attitudes should be adopted in order to address effectively such conflicts and resolve them in a way most favorable to the improvement of the situation of victims, of those who suffer?

III. Suggestions

A. *Summary of the Analysis*

My suggestions are based on the above made analysis of the nature and structure of human rights law, of the articulation and formulation of women's interests by women themselves, and of the nature and internal possibilities of reformation of Islam. The last two, namely women's interests and Islam are regarded in this research as two forces, actors which come into contact in the area of human rights of women, an area which forms part of general international law. Both have certain interests and claims, partially contradictory and competing in the same area of human rights. International law in general and human rights law in particular appears to be an arena for the discussion and negotiation of these claims. This negotiation in the arena of human rights law is not a completely spontaneous and free process but is subject to certain rules and limitations formalized in first place by general international law. In order to make valuable and effective suggestions for the improvement of the interaction of these three elements, their peculiarities and individual possibilities shall be taken into account.

As far as women's interests are concerned, the analysis demonstrated their multifaceted diversity and constant development. Although some common general characteristics can be identified, the growing diversity and dynamic change are more and more visible particularly at the procedural level. To put it differently, each category or group of women has its own experience and conditions of life. In order to respond adequately to their interests any change should be undertaken with particular attention to their personal, specific experiences and conditions. In relation to human rights law this requires, as feminist authors stressed, a great margin of flexibility of human rights law norms and procedures. From this point of view feminist scholars would require the formulation of rather open-ended rules, in order to be able to take into account specific circumstances of new cases. For a positivist lawyer this would raise the question of predictability which from the positivist point of view is one of the central characteristics of a legal system. However, human rights law itself developed

731 It should always be kept in mind that among these Muslims who believe in the Islamic character of certain discriminatory practices are not only men, but also many women.

various concepts allowing different interpretations of the same rule in different circumstances. In the context of treaty law the margin of appreciation doctrine and the concept of dynamic interpretation are the best examples. Developed primarily in the context of the EuCHR, they became applicable to human rights treaties in general.

Thus, the principal characteristic of the feminist approach is the emphasis placed on contestability and contextuality, and as a consequence preference for negotiation rather than imposition of values.

The analysis of Islam and Islamic law made above has demonstrated that dynamism and diversity of views/opinions also characterizes Islamic law. However, at present times, and at the level of official discourses these characteristics of Islamic law are often hidden or forgotten, so that many Muslims believe that certain practices discriminatory against women are inherently and truly Islamic and not subject to any discussion or contestation. On the other hand, the analysis of the modern Muslim scholarship has clearly demonstrated that other readings/interpretations of sources are possible and actually exist. While I submit that a significant amount of internal work by Muslim scholars themselves is needed in order to make the diversity of views and a new vision of the status of women according to Islam an integral part of Muslim tradition, I also insist on the active role which international law, and human rights law more precisely, should play in this context.

The closest contact between women's interests and Islam, as far as the international law level is concerned, occurs in the context of participation of Muslim States in the CEDAW. The reservations practice is an expression of conflicting and contradictory claims made by these two forces. At the same time, analysis of the reservations regime of international law and its practical application reveals the nature, problems, and contradictions of international law itself; it helps to clarify conditions under which possible interactions could take place and sometimes are taking place. This analysis of the reservations regime demonstrates that the functioning of human rights law is still largely influenced by a general contradiction between the nature of international law as a system of contractual obligations between independent States and the fact that human rights law creates no direct profits for States assuming human rights obligations. In contrast, as has been stated above, human rights law is in itself an expression of the paradox that those against whom individuals should be protected by human rights law are also those who assume principal responsibility for the protection of human rights. In the context of reservations this is especially expressed in the inadequate reactions or complete lack of any reactions of other States to reservations. Moreover, the significant number of reservations entered to human rights treaties and their extensive effects are in itself also an expression of this paradox.

However, not everything in the practice of human rights treaties leaves a pessimistic or negative impression. As has been demonstrated in the context of the reservations regime some developments are taking place, which can have a positive influence on the improvement of the situation regarding the respect by States of their human rights treaty obligations. In particular, the traditional mechanisms oriented toward the final determination of the situation are modified to open the way for a continuous process of re-negotiation allowing accommodation of new experiences and situations. Possible reasons for this change in the context of reservations to human rights treaties can be

seen in the different attitudes of States parties which are modified by the distinct character of human rights obligations – the absence of reciprocity – and the regime of human rights treaties as a whole. An important factor which should be recalled again is the specific nature of many human rights treaty obligations. These obligations have been described above as "soft" obligations of means. In relation to the provisions of the CEDAW they are marked by the requirement to take "all appropriate measures" in order to achieve certain goals without identifying what this appropriateness should mean. This leaves a significant freedom to States themselves in their appreciation of what is appropriate. On the other hand, a treaty-monitoring body can directly influence the process of progressive adjustment of the situation in a particular State to the requirements of the human rights treaty. This also gives the possibility to negotiate the best possible solution for each particular State, a solution which takes into account peculiarities of the situation in this State.

Furthermore, it should also be recalled that provisions of human rights treaties are not fixed by the meaning originally attributed to them by States parties, but evolve over time.

In the context of the reservations' practice this orientation towards an evolving negotiative process and dynamic change instead of insistence on alleged ultimate authentic truth reveals its effectiveness in achieving improvement of the situation with human rights in individual States.

B. *Proposals*

It is on the basis of these general conclusions derived from the above-made analysis that I formulate some suggestions for the improvement of the effectiveness of the work of treaty-monitoring bodies and human rights law in general. Before I come to the presentation of these proposals, I would like to emphasize that the effectiveness of human rights law is understood here as an improvement of the situation of ordinary individuals, as a development beneficial to victims. By victims I mean here persons who suffer as a result of lack of or insufficiency in protection of their human rights. The criminal law approach which often dominates the human rights law discourse and is associated with the necessity to identify cases of human rights violations and those responsible for such violations is rejected as counterproductive.

Treaty-monitoring bodies established under various human rights treaties can play the central role in the achievement of the effectiveness of human rights law. In this connection particular attention should be paid to the safeguard of their independence, impartiality, and competence. A treaty-monitoring body should not necessarily have power to take binding decisions; it should not become another dictator and colonizer. More important is its ability to provide States and other concerned bodies with a possibility for discussion, its ability to open a space for a dialogue. In fulfilling this function the independent body – in the context of treaties it would be a treaty monitoring body – should attempt to provide the widest possible palette of views by inviting NGOs, international organizations and individuals to give their opinions on issues under consideration. Such a procedure, if organized adequately, can provide international bodies as well as States and other actors with a unique opportunity to negotiate their claims. In order to fulfill this function effectively the body shall take into account several considerations.

First of all, its working methods should be oriented towards questioning, inquiry rather than teaching and imposition of its own views and interpretations.

The widest possible range of actors should be invited to give their opinions and included into the dialogue. In this process the inclusion of voices of victims and other affected persons, communities, entities is crucial. Therefore, any work on human rights issues should not be a domain reserved almost exclusively to lawyers. In order to fully understand the widest possible range of implications and factors the qualification and knowledge of specialists from other fields should also be implicated.

The work of treaty-monitoring bodies should not be isolated. Other measures should also be taken simultaneously at international and national levels.

In particular, interdependence of rights should become not only a slogan in international documents and a subject for scholarly research, but a part of the daily work of human rights bodies.

In sum, human rights law and international law in general should be more process oriented than rule centered. Human rights are only an ideal; nobody respects all human rights everywhere. And how can we be sure that what is defined as human rights in modern treaties is really the best way of life for everybody and everywhere? Rules, provisions of treaties – at least most of them – should be regarded as goals and law be seen as a process which regulates the move towards these goals, providing the space for negotiation and dialogue. The effectiveness of this process-oriented approach has been proven in the context of the reservations practice to the CEDAW.

It is important that both the feminist scholarship and a significant part of Islamic tradition also advocate this process-oriented vision of law which, although having some basic substantial rules, is not limited by those rules. Rules are rather regarded as an expression of fundamental principles and goals, as an orientation. The ultimate goal for both is to find the best solution in each concrete situation. What they are looking for, is the closest possible approximation of justice in each concrete case. Rules are there to orient this search for best possible solutions. In contrast, international lawyers in their traditional work are concerned with rules, objectivity, security of law, but much less with justice. In the context of human rights treaties the situation is slightly different. Thus, in the context of practice of reservations to the CEDAW based on Islam, the orientation towards a negotiative process is also intuitively chosen as a response to ambiguities and arising conflicts of interests in the context of the reservations regime. Is it because of the interaction of both actors which have tradition of such process-oriented approach to law? Can we seriously expect that human rights law will choose this negotiative process as an integral working method? No clear answer to this latter question can be given today.[732] However, it will to a very great extent depend on general international law.

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732 In the area of human rights law one also can find examples of attitudes which demonstrate preference for formalism and dogmatism even at the expense of coherence and promotion of human rights. The most striking example from an area which again brings women and Islam together is consideration by the EuCtHR of various cases related to the issue of Islamic veil. It is impossible to go here into detail of these cases and of the question of veiling. However, the attitude of the Court when it simply attributes to the practice

The above-described changes in human rights law have to be taken seriously by international law and should be accompanied by parallel changes in international law. The reason for this is that human rights law is already viewed by traditional international lawyers as half a law – or not a law at all – and lawyers engaged in human rights law are not taken seriously. Should human rights law go even further without corresponding support from international law it can reach a stage where the credibility of human rights law as law will be lost at the expense of interests of ordinary individuals, of victims.

Thus, it is important to argue for and advocate a change able to accommodate difference not simply at the level of human rights law, but at the level of international law more generally. Human rights law within the limits imposed on it by general international law is quite attentive to different voices, diversity of views, interests of victims etc. Real problems arise when human rights law encounters limits (formal regulations, rules) imposed on it by general international law. The concept and regime of reservations which was developed and is regulated by general international law illustrates this very clearly. All attempts by human rights law to introduce certain modifications or clarifications into the reservations regime in order to adapt it to particular needs of human rights law are blocked by general international law, or more concretely by traditionalist international lawyers bound and constrained by alleged inviolable rules/norms of international law. It is surprising to mention that even the "States' practice" is often more innovative and open to new developments than these lawyers. The best example is the practice developed by objecting States in the context of reservations to the CEDAW based on Islam which is not reflected in any manner, for example, in the work of the Special Rapporteur on reservations to treaties, Alain Pellet. One might expect that he will address certain aspects of it later when dealing with such issues as effects of objections and incompatible reservations. However, in the context of the issue of modification of reservations which forms the subject of his seventh report, the possibility of objections to modified reservations which has been used by States in the context of the CEDAW is simply rejected without any reference to the existing practice.

It is important to emphasize at this point, that there is no necessity for a complete redefinition of international law. On the contrary, the study of the reservations regime has demonstrated that within many of these apparently conservative traditional mechanisms lies a great potential for renewal. The problem is rather related to the conservatism and inflexibility of people making this law, who are reluctant to accept these new tendencies and developments, and instead of promoting them, suppress any new idea as being contrary to international law. International lawyers are very concerned with rules, and often forget reality, practice. In their attempt to have clear

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of veiling the significance of a practice discriminatory against women and associates it with religious fundamentalism despite the great variety of reasons which can motivate this practice as well as despite affirmations of women involved that they choose to practice veiling freely is in itself in direct contradiction with several human rights principles including the principle of equality of sexes. For more detail see *Dahlab v. Switzerland*, no. 42393/98, decision of 15 February 2001 and *Leyla Sahin v. Turkey*, [GC], no. 44774/98, Judgment of 10 November 2005, in particular Dissenting Opinion of Judge Tulkens attached to the judgment. All available at the web-page of the Court: http://www.echr.coe.int.

rules, they would rather adjust reality to imagined rules, in order to prove that the rule is still valid, than to adjust rules to reality in order to make the rule more adequate and able to respond to the needs of reality. While studying international law, one often has the impression to be in a science-fiction story, where fiction dominates science; that international lawyers are those who define international law and not the "practice of States". In their fanatic defense of allegedly inviolable rules of international law, international lawyers are very similar to traditionalist Muslim authors, who prevent by all available means the spread of new ideas and developments.

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