Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations

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A thesis submitted for the degree of Doctor of Philosophy at the University of Otago, Dunedin New Zealand.

7th July 2008
To Mamma and Bappa

To the loving memory of Thittha

To Sany

With every end comes a new beginning
Abstract

This research is a critique of the universalist theory of international human rights treaty law through an analysis of Islamic reservations to four major human rights treaties i.e., Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (CAT).

Based on my analysis of international treaty law on reservations and State practice relating to reservations to human rights treaties, I have argued that universalist claims of human rights treaties are more of an idea than an established norm.

To this effect, I have examined the concept of reservations under international law as contained in the Vienna Convention on the Law of Treaties 1969 (VCLT) and evaluated its applicability to international human rights treaties. In Chapter Two I have contended, firstly, that the VCLT provides a flexible regime for making reservations to treaties and that it does not differentiate between contractual treaties and normative human rights treaties. Secondly, I have argued that the flexible nature of the VCLT regime confirms that international treaty law supports a diversity paradigm which brings together dissimilar consent, particularly in the case of human rights treaties.

In Chapter Three I have scrutinised the theoretical debate on the nature of human rights that centres on whether they are universal, relative or pluralist. I have shown that the natural law theories and other transcendentalist justifications of universality of human rights have no cross-cultural validity. I have also pointed out that a posteriori justifications such as minimalist universality, overlapping consensus and relative universality theories are impractical because they attempt to derive a
lowest common denominator which diminishes the efficacy of international human rights regimes. In comparison to such universalist theories, alternative human rights theories espouse more inclusive and cross-culturally legitimate approaches. However, I have submitted that theories of cultural relativism provide inadequate explanations of the pluralist State practice in the area of international human rights treaties. In particular, the thick relativist theories fail to explain the existing level of cultural participation in the international human rights regimes. In practice, States parties from different cultural-legal systems cooperate in international and regional human rights regimes through a diversity paradigm that offers pluralist consent on the various normative standards.

I have shown that the legitimacy of the diversity paradigm is evident from the State practice of making reservations to human rights treaties. My critique of the reservations made by Islamic States to CEDAW, CRC, ICCPR and CAT, identifies on the one hand, the particular normative conflicts between these regimes and Shari‘ah, and on the other hand, the connection between the issues raised in these reservations and the domestic laws of the reserving Islamic States. This examination is important for two reasons: firstly, it demonstrates the extent to which the Shari‘ah-based reservations are actually legitimate within the cultural-legal system of the reserving States, and secondly, it helps in understanding the level of juridical flexibility that is available in these reservations.

This thesis establishes that the practice of making reservations to international human rights regimes runs counter to theories of ontological universality of human rights. In the case of Shari‘ah-based reservations, it reveals that Islamic States are reluctant to forfeit or bargain on certain precepts of Islamic law that are perceived to contradict normative human rights such as absolute freedom of religion and same rights of married spouses. At the same time, it suggests that Islamic States accept the large majority of human rights norms, and make exceptions to only a few select human rights. In addition, the thesis also proposes that the flexible reservations regime of the VCLT provides an effective mechanism for the
Islamic States to engage and participate in international human rights treaties, in spite of the reservations.

The principal contribution of this study is that it provides a hermeneutic tool - the diversity paradigm - for understanding the plurality of human rights treaty law. I have established that international treaty law on reservations and State practice of making reservations to human rights treaties confirm the existence and validity of a diversity paradigm in the current human rights discourse. The diversity paradigm approach can play a constructive role in delineating the ontological or philosophical argument for the universality of human rights and the actual State practice of committing to and implementing human rights treaties. With the help of this hermeneutic tool I have established that a flexible, international treaty law based approach to human rights treaties is more effective in the propagation of human rights norms in diverse cultural-legal environments as noted in this case study of the reservations to human rights treaties made by Islamic States.
Preface

This research was inspired by my belief in the relevance of international human rights discourse to culturally-grounded lifeworlds.

As a South Asian student of political science in the mid-1990s, I was enthused by the “Asian values” debate that challenged universalist viewpoints in human rights discourse. I looked inwardly into the cultural-legal worldview of my home country - the Maldives - and realised that many fault-lines criss-crossed the interaction between Islamic States and international human rights laws. At the heart of this troubled relationship was a presumed incompatibility of human rights, and what believing Muslims considered as the foundation of their lifeworld - Shari`ah. As a Muslim, I wished to explore this question of incompatibility of my worldview and the ideals espoused in human rights discourse. My study of international law, in particular, international treaty, law became a means to examine this relationship.

I am obliged to the Faculty of Law of the University of Otago for providing me with the opportunity to undertake and complete this research. My work on this thesis has been supported by the University of Otago through an International PhD Scholarship and in part by a timely special grant from the Faculty of Law. I thank the University for considering me worthy of the prestigious scholarship for three years. I also extend my gratitude to the Dean of the Faculty of Law, Professor Mark Heneghan, for his unstinting confidence in my abilities to successfully complete this research.

As all doctoral students would know, PhD research does not take place in an isolated world away from the troubles of our daily lives. In my case, I have endured some very trying moments - family bereavement, a tsunami that devastated my home country and left me disoriented, and family emergencies that almost shook my commitment to continue with this research. I was spurred and encouraged to plod through these difficult times by the open-handed support extended to me by my
primary supervisor Professor Paul Roth, and Professor Mark Heneghan. I thank them both, for their generous support and understanding. In addition, I thank Paul for his skilful guidance and collegial supervision of my work over the course of the last four years. My co-supervisors Professor Rex Ahdar and Professor Kevin Dawkins have provided invaluable insights into my understanding of rights, religion and international law. I thank them both for the precious time they invested in meticulously going through my drafts and discussing them with me. I am indebted to my supervisory team. That said, the views expressed in this thesis along with any shortcomings therein, should solely be attributed to me. I also thank all the staff of Sir Robert Stout Law Library of the University of Otago for their promptness in assisting me to obtain various research materials.

I have come a long way from home to complete this study in Dunedin. Every day of the last four years, I have missed the company of my family - Bappa, Mamma, Dhombeybe’, Thittha (May Allah Bless her soul), Thuutton, Thitthibe’, Miru and Maai. I am forever obliged to Mamma and Bappa for their unconditional affection and for the enduring love for knowledge that they have nurtured in me. There is no worthier gift a parent can bequeath a child. My gratitude is boundless. I am also grateful to Dhombeybe’ for his unwavering support of my endeavours here. During the course of this research, I have also been continuously nourished by a fountain of affection from my endearing better-half - Sany. I cannot thank her enough for bearing with me (and my absence) all the way. A note of thanks is also due to my friends here in Dunedin who provided willing ears to listen through many of the ideas I have developed in the thesis.

Al ḥamd lillāh rabb al-ʿālamīn.
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Chapter One: Introduction

“For Muslims who take Islam seriously, the search for Islamic legitimacy of human rights and democracy is not a symptom of any deficiency.”
- Tore Lindholm

There is a commonly held myth that human rights treaties are ontologically universal\(^1\) and that Islamic law is in direct conflict with everything good in universal human rights, concluding thereby that Islamic law cannot be used in any constructive sense in the contemporary discourse on universal human rights.

This claim is defective on many counts. In the first instance, it rests on the flawed presumption that universality of human rights treaties is an ontological reality. Secondly, it wrongly presupposes that human rights and Islamic law are inherently incompatible and, more radically it dismissively concludes that there is no possibility for discourse between universal human rights law and Islamic law.

The present research aims to make a contribution towards dispelling this myth by looking into the status of the *universality* claim as purportedly represented,

\(^1\) Tore Lindholm, “Response to Reza Afshari on Islamic Cultural Relativism in Human Rights Discourse” (1994) 16 (4) *Human Rights Quarterly* 794.

\(^2\) In referring to “ontological universality” I borrow the definition given by Mark Goodale when he noted that the term defines human rights as being “possessed by each person who is, has ever been, and will ever be, a ‘human’, meaning a member of the class [of] homo sapiens; that these human rights exist objectively, irrespective of the entire range of the dependent conditions of human existence, such as culture, historical epoch, individual preference, and so on; that because human rights are embedded in each individual irrespective of all of the different normativities that are the contingent product of equally contingent and historically temporary cultural practice, they are quite literally pre-social or pre-cultural; yet because human rights are entailed by a person’s membership in the class of human beings, they cannot be said to stand apart from the individual whose rights they are, or to remain in existence after the individual has passed; and finally, human rights, though universal and objective, are necessarily *immanently universal*, meaning they do not transcend the different individuals in which they are embedded, but what makes them universal is precisely the fact that they are entailed by - or perhaps define - the very essence of humanness.” Mark Goodale “On Universality and the Transnational Validity of Human Rights” Reframing Human Rights I: The Berlin Roundtables on Transnationality 3-7 October 2005 (Berline: Irmgard Coninx Foundation). See online <http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/archive/026%20Goodale.pdf> [last visited: 18/10/2007]
firstly, in the international human rights treaty law, and secondly, in the State
practice of implementing human rights treaties. For this purpose, I have chosen to
examine the concept of reservations to human rights treaties, in particular the
reservations made by Islamic States based on Shari‘ah or Islamic law. The study
approaches Shari‘ah as both a cultural and religious category.

In general, the present research has adopted a multidisciplinary approach,
seeking methodological tools and sources from the fields of law, anthropology,
sociology and Islamic theology, with an eye to providing a holistic perspective on the
subject.

Reservations to human rights treaties have become controversial because it is
believed that they undermine the universal legitimacy of human rights law. As far as
the Shari‘ah-based reservations are concerned, two assumptions are widely narrated;
firstly, that Islamic law undercuts legitimate universal human rights and is therefore
not appropriate to be implemented in the reserving States, and secondly, that Islamic
countries use Shari‘ah-based reservations to opt-out of an otherwise universally
agreed set of normative regimes on human rights.

The present research seeks to disprove these two assumptions. To this effect,
Chapter Two analyses the international treaty law relating to reservations. It
examines the theory, jurisprudence and law on reservations to treaties, in particular
explores the manner in which the law on reservations has developed in connection to
general multilateral treaties and to normative human rights treaties. The Chapter
looks into the claim that normative human rights treaties require a separate
international treaty law regime, in the context of reservations and draws out
conclusions that the existing international law pursues no such bifurcation. It also
scrutinizes the definitions of reservations, the advisory opinion of the International
Court of Justice in the Genocide Convention case,³ and the flexibility regime of the VCLT. In examining Article 19 of the VCLT, I have aimed at locating a latent residuary right of States parties to make reservations. In the context of the effects of a reservation on treaty relations, Chapter Two investigates the “object and purpose” test of Article 19 paragraph (c) from the perspective of an emergent diversity paradigm implicit in the VCLT regime. The diversity paradigm is further explored in the context of reservations to human rights treaties and the existing VCLT law. I also look into the State practice of raising objections to substantive reservations and explore why objections to reservations have not, in any material sense, affected the treaty relations between reserving States and objecting States parties.

Taking cue from the diversity paradigm and the State practice of accommodating treaty relations in the presence of substantive reservations, in Chapter Three I reassess the nature of human rights treaties in the context of the ongoing debate on the universality versus relativism of human rights.

Chapter Three is divided into two parts. In the first part, the historical and philosophical antecedents of universal normativism are traced and the connection between the various schools of universal normativism and universal human rights are examined. The Chapter critiques the various foundations of universality, starting from the natural law school of thought, the self-evident rights explanations, and the appeal to religious and moral authority both within the Christian tradition and other religious traditions in what I have described as the theonomic approach to universality. These have been broadly classified into a general category of a priori justifications, i.e., explanations of universality through appeal to a priori or axiological arguments. This is followed by a critique of a posteriori justifications of universal human rights such as the theories that attribute universality to ratification of human rights treaties by States, minimalist universality, overlapping consensus among States about certain human rights norms, and the theory of relative

universalism recently postulated by Jack Donnelly. These theoretical expositions are assessed in the context of the reservations made by States parties to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in order to verify the extent to which (if at all) they reflect actual State practice of international human rights treaty law.

In the second part of Chapter Three, I survey the plausibility of the dominant alternative paradigm of cultural relativism with an eye to assess its relevance and applicability to the subject of human rights treaty law and in particular to the State practice of making reservations. In this connection, Chapter Three traces the reaction of anthropologists to the universalist theories in the early part of the twentieth century and looks into their arguments in the light of State practice in human rights treaties. While considering the various theories of cultural relativism, the Chapter also looks into the role of culture in norm creation by problematising the religio-cultural argument for human rights discourse. Following this discussion, I have attempted to analyse the various techniques used for integrating cultural particularities by the different regional human rights regimes. In this context, I have examined the jurisprudence of the European Convention on Human Rights and Fundamental Freedoms, in particular the doctrine of “margin of appreciation” developed by the European Court of Human Rights. The African Charter on Human and People’s Rights is discussed in the context of its emphasis on the sovereignty of member States and the role of duties, morals and traditional values of the community. I also discuss the contextual nature of the unique universalist position carved out by the American Convention on Human Rights as found in the evolving jurisprudence of the American Court of Human Rights. In the case of Asian approaches to human rights, I look into the heated rhetoric of the “Asian values” debate and locate the theoretical concerns that it seeks to address. I discuss the vigorous defence of cultural deference in the Asian conceptualisation of human rights and assess the contribution of Asian values debate to the wider discourse on alternative approaches to human rights legitimacy. Finally, the discussions on
regional regimes conclude with an assessment of Islamic exceptionalism to human rights, especially in the context of cultural particularism. I examine whether Islamic exceptionalism, premised on the non-derogability of certain normative standards of Shari`ah law, constitutes a cultural relativist position or whether it is more accurately represented as cultural particularism that overall posits a pluralist paradigm. The two principal Islamic declarations on human rights i.e., the Universal Islamic Declaration of Human Rights (UIDHR) and the Cairo Declaration of Human Rights (Cairo Declaration) are studied to locate their bases in Shari`ah law and to understand how far such representation of Shari`ah relates to non-derogable provisions. This discussion becomes particularly relevant to the detailed analysis of Shari`ah-based reservations undertaken in Chapter Four. In the light of the discussion of the two Islamic declarations and the evolving Islamic conventions on human rights, in Chapter Three I also attempt at finding out if there is in fact an emerging Islamic human rights regime, complete with constitutive declarations, mandatory conventions and an Islamic court of justice. The Chapter reviews the extent to which the universalist, the relativist, the Islamic exceptionalist or the pluralist theories of human rights are actually reflected in the real world environment of State practice in the implementation of human rights treaties. Chapter Three is concluded by assessing the connection between the various philosophical theories and approaches to human rights discourse and the extent in which these theories and approaches are reflected in the international human rights law treaties.

Chapter Four launches the detailed examination of the reservations made to human rights treaties by Islamic States. It is divided into two parts. The first part studies Shari`ah law as a theonomic concept that affects not only personal faith but also the orientation of political legitimacy in the Islamic States. It briefly examines the classical approach to Shari`ah, highlighting the different sources and the various methodological techniques advanced by jurists in developing the law. This is followed with a summary spotlight on the contemporary approaches to the development of Shari`ah, with a particular focus on ījtihād or independent juristic opinion method and context-based hermeneutic approaches that are increasingly being used to expand the classical exposition of law. In this connection, the approach
undertaken in Chapter Four is not to conceptualise Shari`ah as a monolithic code but a more vibrant and diverse code that embodies different vantage points, creating what one commentator has referred to as “unity in diversity”.\(^4\) The Chapter also examines the contribution of this diversity towards projecting a Shari`ah perspective in the context of the Islamic engagement with universal human rights discourse.

In the second part of Chapter Four, I carry out a detailed analyses of the Shari`ah-based reservations to four principal human rights treaties, i.e., CEDAW, CRC, ICCPR and CAT. The majority of the study is focused on CEDAW and CRC for two important reasons. Both CEDAW and CRC appear to have received almost universal ratification; the CEDAW having 185 and CRC having 193 ratifications respectively. Secondly, the majority of reservations by Islamic States are directed at these two treaties. For the purposes of brevity, the focus of the analysis of these two treaties in Chapter Four narrows down to consideration of reservations made to Articles 2 (general equality between sexes), 9 (nationality rights) and 16 (marital equality rights) of CEDAW and Article 14 (freedom of religion of the child) of CRC. The discussion on reservations to ICCPR will also focus on freedom of religion provided in Article 18 of the Covenant. In the case of CAT, the discussions will follow the normative standards of Shari`ah relating to crimes and punishments as contained in the *hudūd* laws and relate it to the definition of torture, cruel or inhuman treatment and punishment, particularly, contextualising the discussion in the light of the fundamental postulates of Islamic law on the subject.

In the last Chapter and as conclusion, the examination of the various theories of human rights, international law of treaties and the detailed analyses of State practice in making reservations are brought to a closure by positing that the preponderant evidence from State practice in the area of reservations to human rights treaties points out that the presumption of universality of human rights treaties is more a myth than a reality. It posits that, in practice, international human rights

treaties constitute a network of pluralistic treaty relations that actually evinces a pluralist or a diversity paradigm. Furthermore, it also concludes that Islamic law as implemented by States parties to human rights treaties is neither monolithic nor stagnant. Instead, there are clear indications demonstrating a vibrant and dynamic character inherent in Shari’ah law. At the same time, it also shows that not every normative standard in Shari’ah is compatible with every normative human rights standard. The practice of Islamic States parties in the field of treaty participation through reservations and in the area of implementation of Shari’ah, shows that there are points of convergences and points of divergences. This diversity of positions need not indicate a deficiency either in the human rights law or in Islamic law. Instead, it only enriches the discourse. Contrary to ideational universalist assumptions, the cascading and internalization processes of human rights treaty based-norms follow a pluralistic pattern that is realistic and practical. Such diversity provides legitimacy and a pluralist concordance with a cultural caveat, in the implementation of human rights based on international treaty law.
Chapter Two: International Law on Reservations and Human Rights Treaties

“A large number of reservations made by a great many States will turn human rights instruments into a moth-eaten guarantee”
- Liesbeth Lijnzaad

It is frequently claimed that reservations have the effect of weakening human rights obligations and therefore the practice of making reservations is not appropriate in the context of general human rights treaties. Closely associated with this claim is the contention that human rights treaties are not similar to general international treaties and consequently the obligations arising out of human rights treaties deserve a special status. This Chapter will explore these two claims and assess the applicability of and the limitations on the practice of making reservations to human rights treaties.

An important starting point to understand the current status of international law on reservations is to look into the conceptual background and the various legal definitions of reservations. This Chapter will examine the various definitions of the concept of reservations and draw out their peculiar features and implications both in the context of international treaty law (as reflected in the VCLT and in the practice of States) and in the more particular context of human rights treaties.

The discussions will be directed towards finding a best practice on making reservations to human rights treaties, keeping in view the continued State practice of reservations and the pluralistic realities of international relations. For this purpose, the reasons that induce States to formulate and retain reservations to human rights

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treaties will be evaluated. I will also explore how these reasons are connected (if at all) to the capacity of a State to undertake international legal obligations.

In conclusion, it will be argued that a flexible system of reservations (such as the VCLT regime) provides the best model system for making reservations to human rights treaties because it makes human rights treaties effectively functional within a pluralist paradigm. Two theoretical premises will guide the discussion in the Chapter; firstly, that the universal promotion of human rights treaties is not antithetical to the acceptance of a pluralistic character of human rights treaties; secondly, that universal human rights norms may be judiciously implemented (without having the effect of being watered down) through treaties that include a flexible reservations regime.

2.1 The changing definitions of reservation:

The making of reservations to treaties is not a new State practice in international law. Conceptually, reservations are closely connected to the power or ability of a State to give consent to a treaty. It is traditionally believed that the basis of a treaty is discoverable in the law of contract wherein consent of the parties decides the scope and nature of the treaty. Viewed from such a perspective, the process of treaty making involves three important components; sovereign States

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2 Frank Horn observes that the first notable reservation to a multilateral treaty was made to the Final Act of the Vienna Congress of 1815 by the Swedish-Norwegian plenipotentiary in the form of a statement added to the signature, saying that the Swedish government did not accept certain articles of the treaty. Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties (Amsterdam: Elsevier Science Publishers B.V, 1988) 7. Also see H.W. Malkin, “Reservations to Multipartite Conventions” (1926) 7 British Yearbook of International Law 140, for a discussion of the historical backdrop to the practice of reservations before the League of Nations.

3 In fact, the definition of treaties (with the exception of normative treaties) in international law largely follow this perspective as is seen in Article 2 (1) paragraph (a) of the VCLT which states that a treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever particular designation (emphasis added).” See generally A.D. McNair, The Law of Treaties (Oxford: Oxford University Press, 1961). Also see T.O. Elias, The Modern Law of Treaties (Leiden: Dobbs Ferry, 1974).
parties, consensual basis and reciprocity of obligations.\textsuperscript{4} G.G. Fitzmaurice describes contractual treaties as the class of treaties

the essence and operation of which involve the grant by each of the parties to each of the others of a number of reciprocal rights, benefits or privileges which the parties accord to, and receive from, one another inter se; in other words, Conventions under which each party is not merely bound to do, or abstain from doing, something in the abstract, but is bound to do, or abstain from doing, something to or for, or in relation to, the other parties, in return for similar treatment from them.\textsuperscript{5}

According to the contractual approach to treaty law, reciprocity of rights and obligations of States depends “ultimately on the sovereign right of States to control their own destinies unfettered by outside institutions or standards”.\textsuperscript{6} The emphasis is on the sovereign will of the contracting States to determine the rights and obligations. Reservation to treaties is also framed within this contractual perspective and this is mirrored in most of the definitions of reservation.

2.1.1 The “rigid approach”

Historically, reservations to treaties were considered as part of the contractual theory of international treaty law. As the name suggests, the contractual theory approaches the process of making treaties from the perspective of the law of contract. According to this theory, reservations conform to the contractual practice of proposing and accepting offers by independent States through the exercise of their

\textsuperscript{4} A notable exception to this would be the International Labour Organisation (ILO) conventions that have been given a special status among multilateral treaties. However, even in the case of ILO conventions, it is only independent States that become members, although non-States parties have an “unequalled” participation in putting together and in influencing the implementation of these treaties. The present discussion will not include the various ILO conventions. For more details on non-State participation in ILO conventions see, Virginia A. Leary, “The ILO: A Model for Non-State participation?” in The Legitimacy of the United Nations: Towards an enhanced legal status of non-State actors, SIM Special No: 19, 61-74 (The Netherlands Institute of Human Rights) <http://www.uu.nl/uupublish/content-cln/05Leary.pdf> [last visited: 18/05/2007]

\textsuperscript{5} G.G. Fitzmaurice, “Reservations to Multilateral Conventions” (1953) 2 (1) The International and Comparative Law Quarterly 14.

sovereign free will. The earliest theory of reservations emerged from this tradition and the present section will examine the development of the contractual definitions of reservations.

The contractual approach to reservations may be seen in one of the earliest attempts at drafting an international regime on reservations to treaties made by the Harvard Law School in 1935 in the form of its *Draft Convention on the Law of Treaties*. Article 13 of this Draft defines a reservation as

a formal declaration by which a State when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty.\(^7\)

The Harvard draft links the making of a reservation with the consent of the reserving State to join the treaty. This consent or the “willingness to become a party to the treaty” signifies the sovereign authority of a State to enter into treaty relations and it is through the exercise of the same authority that the reserving State seeks to limit the scope and nature of its treaty obligations.\(^8\) This definition explains a reservation merely in terms of a “declaration” made by the reserving State without specifying whether such a declaration requires the acceptance of the other contracting States parties. It promotes the idea that a reservation is a *unilateral* act of the reserving State requiring no response (be it in the form of acceptance or objection) from the other States parties. However, the Harvard draft accommodates a limited idea of (implied) acceptance by other States parties, when it posits that the

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\(^8\) This follows the contractual viewpoint on treaties that is categorically asserted in Article 1 paragraphs (a) and (c) of the *Harvard Draft*. Paragraph (a) defines a “treaty” as “a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves.” Paragraph (c) adds that, “the term ‘treaty’ does not include an instrument to which a person other than a State is or may be a party”. Harvard Law School (Research in International Law under the auspices of the Faculty of Harvard Law School) “Draft Convention on the Law of Treaties” (1935) 29 (Supplement), *American Journal of International Law* 657.
extent of treaty obligations subsequent to a reservation is determined by applying the principle of reciprocity.\textsuperscript{9} Even though it presumes a role for the other States parties in such reciprocity, for the most part, reciprocity is made dependent on the nature of reservations.\textsuperscript{10} The Harvard draft fails to include within the definition of a reservation, general declarations that are often made by States parties while ratifying treaties. Instead of considering them as limiting the scope and effect of a treaty, the Harvard definition actually regards general declarations as a \textit{rejection} of the treaty itself.\textsuperscript{11} This is an important contribution of the Harvard draft to the evolving definition of reservations in international law. The fact that general declarations were not included in the definition of valid reservations became a critical distinction (especially during the latter half of the 20\textsuperscript{th} Century) between an acceptable reservation and an objectionable reservation in the context of the development of the debate on reservations to human rights treaties. The Harvard draft was strongly influenced by an earlier work on reservations by the noted American lawyer, David Hunter Miller. He defined a reservation as

\begin{quote}

a formal declaration relating to the terms of the treaty made by one of the \textit{contracting} Powers and \textit{communicated} to the \textit{other contracting} Power or Powers at or prior to the delivery of the instrument of ratification of the declarant.\textsuperscript{12}
\end{quote}

According to Miller a reservation is a “declaration” made by a State that is \textit{contracting} a treaty. This “declaration” is in the nature of an \textit{offer} that must be “communicated” to the other parties. It is an offer because Miller believes that once

\textsuperscript{9} The Harvard Draft notes that, “as a general principle, a reservation to a treaty is to be regarded as reciprocally limiting the effect of the treaty in so far as it may apply in the relation of the State making the reservation with the other State or States which may be parties to the treaty.” Above n 8 867.

\textsuperscript{10} This is based on the claim in the Harvard Draft notes that the effect of a reservation “must depend in some degree upon the terms of the reservation itself” and that “if the reservation by its express terms is clearly intended to be non-reciprocal in application, and if it is thus accepted by the other States concerned, there is no evident reason why the general principle [of reciprocity] should apply.” Above n 8 868.

\textsuperscript{11} The Harvard draft cites David Hunter Miller to state that, “a declaration which is in substance a rejection of the treaty cannot be called a reservation”. David Hunter Miller, \textit{Reservations to Treaties: Their Effect, and the Procedure in Regard Thereto} (1919) 79 as cited in above n 8 863.

\textsuperscript{12} David Hunter Miller in his book, \textit{Reservations to Treaties: Their Effect, and the Procedure in Regard Thereto} (1919) 76 as cited in above n 8 846 (emphasis added).
this declaration is communicated, it receives implied acceptance from other States parties by virtue of the establishment of treaty relations. In other words, when the other States parties enter into treaty relations with the reserving State, it implies the completion of an offer and acceptance of a contract. Miller’s definition together with the Harvard draft establishes a crucial point, that a reservation is made by a State using the same sovereign authority that is needed to contract treaty relations with other States. The reserving State decides to effect limits on the nature and the extent of its treaty obligations by using this sovereign authority.

Sir Gerald Fitzmaurice appears to follow a similar line of thought in his definition of reservation. Like the previous two definitions, he also describes a reservation as a declaration that “purports to confine” the treaty obligations of the reserving State. However, unlike Miller and the Harvard draft, Fitzmaurice’s definition places a greater stress on the role of consent. As noted by him, “until a reservation is admitted and accepted, expressly or sub silentio, it is only a proposal and not a completed and operative reservation.” Furthermore, he makes a distinction in the nature of consent required for reservations made to bilateral and multilateral treaties. In the case of bilateral treaties, acceptance of a reservation becomes an absolute necessity for the completion of the contract of treaty while non-acceptance fatally undermines it. In multilateral treaties, he notes that there may be cases where the acceptance of a reservation by one or few States may suffice, while in other situations unanimous acceptance may become a necessity depending on the stipulations of the treaty. This distinction in the nature of consent required for


14 Sir Gerald Fitzmaurice’s definition states that, “a reservation might be said to be essentially a notice, statement, or a declaration by which a party purports to confine its obligations under the treaty to something less than the full extent of them as therein written, or to interpret or apply them in a particular way.” Sir Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points” (1957) 33 British Yearbook of International Law 273.

15 Above n 14 275 (emphasis added).

16 Above n 14 274.
bilateral and multilateral treaties illustrates the various combinations of formulas for making reservations. However, as a general rule, Fitzmaurice posits that

if a reservation meets with objection, and if the objection is maintained notwithstanding any explanations or assurances given by the reserving State, the latter cannot become, or rank as, a party to the treaty unless the reservation is withdrawn.\(^{17}\)

Fitzmaurice’s definition avoids an ambiguity contained in the previous definitions regarding the consent of the other States parties, by clearly specifying that a valid reservation needs the acceptance of other States parties and by noting that an objection raised against a reservation creates its own consequences such as the prevention of a reserving State from becoming a party to the treaty. The insistence on the requirement of unanimous consent is a characteristic feature of Fitzmaurice’s definition. However, prior to Fitzmaurice, Sir James Brierly had put forward the same idea in his definition of a reservation.\(^{18}\) Indeed, consent of the other States parties takes primacy of place in Brierly’s definition given in his 1950 Report to the International Law Commission. According to Brierly, a reservation is

a special stipulation which has been agreed upon, between the parties to a treaty, limiting or varying the effect to the treaty as it applies between a particular party and all or some of the remaining parties. It is not used to connote the mere proposal, by the State or the international organization interested, of such a stipulation. For it is clear that no such proposal is of any effect unless it is consented to, expressly or impliedly, by other States or organizations concerned.\(^{19}\)

Brierly seems to promote two important positions. Firstly, he asserts that a reservation is a “stipulation” or a condition that has the effect of materially changing the way a treaty is applied between reserving States and other States parties.


\(^{18}\) In fact, Brierly preceded Fitzmaurice as the Special Rapporteur of the International Law Commission on the Law of Treaties.

Secondly, and more importantly, he notes elsewhere in the same Report that such a stipulation turns into a valid reservation only when it is “consented to by all the parties to the treaty in respect of which it is proposed”.\textsuperscript{20}

Overall, the definitions provided by Brierly and Fitzmaurice may be said to foster what is referred to as the \textit{unanimous consent} rule that was earlier promoted by the Committee of Experts for the Progressive Codification of International Law (1926).\textsuperscript{21} A crucial effect of the \textit{unanimity rule} is that it prevents a reserving State from becoming a party to a treaty even if a single State party objects to the reservation. In this case, every State party has a veto right over the reserving State. This theory of reservations is considered to be a rigid approach that strictly follows the requirements of contractual law, whereby a reservation is simply viewed as a counter-offer that must be accepted by all the States parties in order to take effect.\textsuperscript{22}

Therefore, the notable features of this Rigid or Unanimity approach may be summed up as follows:

\begin{itemize}
\item[a.] It defines a reservation as a unilateral declaration made by a State with the purpose of altering treaty relations.
\item[b.] It requires the consent of all and objection from none of the States parties to the treaty.
\end{itemize}

\textsuperscript{20} Above n 19 241.

\textsuperscript{21} In fact, this was a position that was promoted earlier by the League of Nations under the aegis of The Committee of Experts for the Progressive Codification of International Law (1926). Also known as the League of Nations approach, it stipulated that a reservation “should be accepted by all the contracting parties, as would have been the case if it had 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.” J.M. Ruda, “Reservations to Treaties” (1975 III) 146 Recueil des Cours 114.

\textsuperscript{22} In fact, Lauterpacht commented that, “reservations raise an important question of principle because they modify the terms of the offer which a State in signing or ratifying or acceding to a treaty purports to accept. A reservation is upon analysis the refusal of an \textit{offer} and the making of a \textit{fresh offer}. Therefore, in principle it seems necessary that the other party should assent to the reservation either \textit{expressly or by implication}”. Hersch Lauterpacht (ed.) (Vol. I, 8\textsuperscript{th} Ed.,) \textit{Oppenheim’s International Law: A Treatise} (London: Longmans, Green, 1955) 914. William W. Bishop (Jr.) describes this approach as the introduction of the “Common Law’s thinking about contract” into the definition of reservation. William W. Bishop, Jr., “Reservation to Treaties” (1961 II) 103 Recueil des Cours 251.
According to the Unanimity approach, a reservation is similar to any other provision of a treaty to which every State party must agree and consequently “like the treaty, it must stand or fall as consent is or is not present”. As a result, the validity of reservations becomes entirely dependent on the acceptance by the other States parties and in the “absence of an agreement or the absence of consensus” it fails the test of reservations.

There are several problems associated with such a rigid approach to the subject of reservations in treaty law. For instance, because of its rigidity and excessive emphasis on unanimous consent, it limits the ability of a State to enter into a treaty and at the same time limits the capacity of a State to make reservations. By giving primacy to the views of the other States parties, it also undermines the contracting capacity of the reserving State and diminishes its sovereign significance in the treaty making process. Furthermore, this approach seems to disregard the principle of sovereign equality of States under international law by preferring the will of the vetoing State over those that accept the reservation, even though both these parties are supposed to be equal counterparts in the same treaty. It is for this reason that Frank Horn dismisses the claims that this approach is based on a contractual theoretical framework.

The main argument put forward in support of the unanimity rule is that it prevents the watering down of a treaty and that by subjecting a reservation to the acceptance of all States parties, it upholds the integrity and unity of the treaty. However, such an argument is propped up on the assumption that a reservation accepted by all the States parties will not undermine the integrity of the treaty. Or that a reservation that is not objected to by a State party conforms to the integrity and unity of the treaty. Such an assumption is untenable in cases where unanimous

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acceptance takes place by virtue of failure (for whatever reason) to raise objections or in cases where a reservation is accepted by States parties for reasons of political expediency, thereby creating unanimous acceptance by default.

Perhaps the most telling impact of this approach is felt on the reserving State; it leaves little room for reserving States to persist with a reservation that is objected to by a single State. As a result, the unanimity approach presents an ‘either/or’ conundrum to the reserving State. Either abandon the objectionable reservation and join the treaty or give up its attempt to join the treaty. Negotiating a middle ground becomes impossible due to the rigid insistence on unanimous consent.

2.1.2 The “flexibility approach”

While the unanimity approach was the predominant system in Europe, a more relaxed practice of reservations gained currency in the American countries. Under the Flexible approach (also called the Pan-American system) the acceptance of a reservation by a single State party was considered enough to give it validity.

The earliest exposition of this thesis may be linked to the Havana Convention on Treaties (1928) prepared by the International Commission of American Jurists. This Convention stipulated that a reservation merely requires the acceptance by another contracting State and makes no distinction whether such acceptance is categorical or implied. More importantly, the Havana Convention provided that the formulation of a reservation is an act “inherent in national sovereignty” and as such constitutes a legitimate “exercise of a right which violates no international stipulation or good form”. The formulation of reservations as a right of every sovereign State (although this merely reasserts what is already part of accepted international law)

underlines the legitimacy of the reserving State’s role in the process of making reservations and entering into treaties. In other words, it signals an attempt of making the position of the reserving State equal to that of the consenting States parties, thereby reaffirming, to a considerable degree, the principle of sovereign equality of all States. The basic principles of the Pan-American system contained in the Havana Convention may be summarized in the following manner:

(a) As between countries that have ratified (the treaty) without reservations, the treaty shall be in force in the form in which the original text was drafted and signed.
(b) As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.
(c) As between a State that has ratified with reservations and another State that has ratified and not accepted such reservations, the treaty shall not be in force.
(d) In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.27

The net result of these four principles is the creation of an “individualistic appraisal”28 scheme of reservations, whereby every State party decides on its own and by its own standards, whether or not to accept a reservation made to a treaty. This process determines the validity of the reservation as well as the membership of the reserving State in the treaty. For instance, the acceptance of a reservation by a single State party validates the reservation as between the accepting State and the reserving State while at the same time it entitles the reserving State to become a party to the treaty. As far as States parties that do not accept or object to the reservation, treaty relations are determined between them and the reserving State in accordance with their responses. Admittedly, this system creates a loose network of treaty


28 Above n 24 31.
relations, while attracting easy and universal participation of States in treaties. However, it has been criticized for being too flexible and, in particular, for not being appropriate for normative treaties such as human rights treaties.  

International law and State practice on reservations varied between these two approaches (i.e., the Unanimity approach and the Pan-American approach) during the early part of the 20th Century. While the Unanimity approach prevailed in Europe, the American countries largely followed the Pan-American system. There was a good deal of uncertainty surrounding the status of the law on reservations at the international level, given the divergence of State practice between these two contrasting approaches. This legal uncertainty was forced into international limelight in the landmark Genocide Convention Case.  

2.1.3 Genocide Convention Case  

The reservations made to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) presented the United Nations Secretary-General with some difficult questions regarding the effect of reservations. Doubts were raised whether reserving States may be counted within the stipulated number of ratifications required for the coming into effect of the Genocide Convention. From a legal point

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29 Normative or law-making treaties emphasize the norm-creating nature of international treaties. It is argued that such treaties legislate norms or general rules of international law that States parties to the treaty accept and implement. These general rules are universal norms applicable to a wide community of states. According to Fitzmaurice normative treaties have the following attributes:
(a) General and absolute in its application to all the states.
(b) Obligation arises by virtue of mere participation in the treaty.
(c) Operates for each party per se and not between states parties inter se.
(d) Rights and obligations are not conferred on the States qua States but are followed by all.


32 Article 13 of the Genocide Convention stipulates that, “On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a process-verbal and transmit a copy thereof to each Member of the United Nations and to each of the
of view, it was confusing particularly because the Genocide Convention did not contain a specific provision on reservations. For the purposes of the present examination, we shall look into the first two questions put before the ICJ for its Advisory Opinion:

(1.) 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?

(2.) If the answer to question 1 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?\(^{33}\)

The Opinion given by the Court was in some ways circuitous and illustrated the difficulties that the Court itself had to confront in laying down a uniform rule on reservations. To begin with, it was pointed out that any assessment of the validity of a reservation had to consider several important factors such as the “character of a multilateral convention, its purpose, provisions, the mode of preparation and adoption”.\(^{34}\) With these qualifying markers that set the tone for much of the Opinion of the Court, it responded to the first question by noting that

a state which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise that state cannot be regarded as being a party to the Convention.\(^{35}\)

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\(^{33}\) A third question that was also put to the ICJ by the UN Secretary-General was, “What would be legal effect as regards the answer to question 1, 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?” Above n 31.

\(^{34}\) Above n 30 22.

\(^{35}\) Above n 30 29 (emphasis added).
Even though the Opinion of the ICJ was sought concerning the reservations made only to the Genocide Convention,\textsuperscript{36} the Court laid a crucial general principle of law on reservations, that the test for the validity of a reservation is its compatibility with the object and purpose of the treaty.\textsuperscript{37}

In respect to the second question concerning the effect of a reservation the Court was of the view

(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.\textsuperscript{38}

\textit{2.1.3.1 “Object and purpose” formula of the Court}

These two responses of the ICJ lay down the basic parameters for assessing the legitimacy and effects of a reservation. It lays down a loose-knit and multi-focal understanding of the effects of a reservation. In the majority Opinion of the Court, the nature and scope of the effect of a reservation is ultimately to be determined by the subjective assessment of the reservation by the States parties. Each State party is free to assess the compatibility of a reservation with the “object and purpose” of the treaty and then to decide whether and to what extent it wants to establish treaty relations with the reserving State. Acceptance of or objection to a reservation does not automatically set in motion a pre-established formula on the nature and scope of treaty relationship. In fact, treaty relationship becomes a voluntary decision made by these other States parties subsequent to their own assessment of the validity of the reservation. Admittedly, this decision of whether or not to establish treaty relations

\textsuperscript{36} “…the replies which the Court is called upon to give to them [the three questions referred to by the UN General Assembly] are necessarily and strictly limited to that Convention.” Above n 30 20.

\textsuperscript{37} Also known as the “object and purpose” compatibility test.

\textsuperscript{38} Above n 30 29-30 (emphasis added).
with a reserving State is guided by the “common duty” of the States parties to test the validity of the reservation by the touchstone of the “object and purpose” of the treaty. 39

2.1.3.2 Criticism of the ICJ formula

The Advisory Opinion of the Court has been criticized for obfuscating the legal determination of the effects of reservations on treaty relations. The Court was criticized for failing to provide a conclusive outcome to fill in the legal lacuna on reservations and for putting in question “the method of judicial legislation which throws doubt upon what was widely believed to be the existing law without substituting in its place a working legal order.” 40 The noted Argentine jurist, Luis Podesta Costa, characterized the ICJ formulation of the “object and purpose” compatibility test as “obscure and inapplicable in practice” and criticized the test for its lack of “any judicial foundation and any antecedents in practice, jurisprudence and doctrine”. 41 George Schwarzenberger blames the Advisory Opinion for creating uncertainty in the law, especially as regards the identity of the parties to a treaty. He points out that by leaving the determination of the validity of a reservation to the decision of States parties, the ICJ formula creates different networks of treaty relations between the reserving and objecting States, the reserving and accepting States and between the objecting States themselves as against the reserving State. This creates unease and uncertainty regarding the exact nature of treaty obligations and the exact identity of States vis-à-vis the obligations contained in the treaties. 42 Such criticisms stem from a contractual ideology of treaty law that maintains unanimity of consent as the fundamental premise of treaties. The majority Opinion of the ICJ was not swayed by these arguments, even though the points were deliberated.


41 As cited in J.M. Ruda, “Reservations to Treaties” (1975 III) 146 Recueil des Cours 148.

In many ways, the Advisory Opinion of the ICJ rejects both the Rigid/Unanimity theory and the Flexible/Pan-American theory on reservations and instead devises a new method that is subjective and one that relies to a great deal on the sovereign authority of States parties to determine, on their own, the course of treaty relations. Having said that, it is clear that the Court did not subscribe to a “sovereign right” theory to making reservations in just the same way as it declined to be completely swayed by any theory on the absolute integrity of treaties. The “object and purpose” compatibility formula seems to be a compromise arrived at by the ICJ between these two contradictory theories. Even so, it has attracted criticism from many quarters, including some members of the bench in the Genocide Convention Case.

The criticisms of the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, were a strong reaffirmation of the contractual doctrine of treaty law that stipulates unanimous consent of all States parties as the basis for validating a reservation. As noted by these dissenting Judges, “the consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle.” The joint dissenting Judges seem to argue that the Court should have upheld the “existing law and the current practice” on reservations, assuming there existed a uniform general law on reservations. However, these dissenting judges fail to fully consider the fact that there was a significant divergence of law and State practice on reservations in international law, which was one of the reasons why the UN Secretary-General had found it difficult to

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43 In rejecting the Unanimity approach, the Court noted that, “it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if... the parties intended to derogate from the rule by admitting the faculty to make reservations thereto.” While rejecting the sovereignty model of the Pan American approach, the Court noted that, “it has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.” Above n 39 24.

decide the case of reservations to the Genocide Convention, causing him to refer the matter to the Opinion of the Court.\textsuperscript{45} Despite the objections raised in the Dissenting Opinions in the Genocide Convention Case, the Court’s formulation of the “object and purpose” compatibility test and the assertion that this test can only be administered by the subjective will of the various States parties laid the groundwork for the future development of an international regime on reservations under the VCLT.

2.1.3.3 Paradigm shift in the Genocide Convention Case

An important consequence of the Genocide Convention Case is a shift in the focus of the reservations debate. The previous approaches to reservations, which involved the absolute integrity of the Unanimity approach and the flexibility of the Pan-American system, focused on the discretionary authority of the States parties to a treaty, whereas the new approach stresses the content of the treaty as the point of reference to decide validity. In other words, it is the object and purpose contained in the treaty that acts as the touchstone to decide the validity of a reservation. The discretionary authority vested in States parties to accept or reject a reservation is made subservient to this basic requirement. There is an overriding assumption in this approach that every treaty will contain an identifiable and distinguishable core that the ICJ describes as the “object and purpose” of the treaty.

This paradigm shift in the approaches to reservation (from the consent-based paradigm to the object and purpose based paradigm) cannot be considered to have in any definitive sense resolved the complex issues surrounding the subject of reservations. In fact, the “object and purpose” compatibility test has a built-in problem that prevents it from being an effective test to determine the validity of reservations. It fails to address the key question as to how the “object and purpose” of the treaty can be determined? The Court failed to provide a workable method to

\textsuperscript{45} Above n 44 42. Besides the Joint Dissenting Judges, Justice Alvarez made his Individual Dissenting Opinion that was largely based on the argument that reservations cannot be allowed to special multilateral conventions having “universal character” such as the Genocide Convention. See the Individual Dissenting Opinion of Judge Alvarez, above n 44 49-55.
reasonably identify the “object and purpose” of treaties. As one commentator has noted, “the Court simply assumed that the treaty had an object and purpose”\(^{46}\) without working through the details of how to determine it.

The Advisory Opinion also seems to convey the idea that the “object and purpose” compatibility test was applicable even to normative treaties. According to the Court, treaties such as the Genocide Convention belonged to a special class with a special purpose and objective. Accordingly, such treaties are

...manifestly adopted for a purely humanitarian and civilising purpose... since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.\(^ {47}\)

These treaties have a normative object and purpose that are universally applicable, as against contractual treaties that bind States parties only to the extent of the mutually agreed conditions. Furthermore, such treaties of a “humanitarian and civilising” character do not provide any room for individual interests of States parties. Instead, all States parties are obligated by a common interest contained in the core of the treaties. The ICJ describes this “common interest” of States parties in mysterious and axiomatic terms.\(^ {48}\) Nevertheless, the Court was clear in discarding the notion of sovereign interests of States parties in this particular class of treaties when it noted that, “in a convention of this type, one cannot speak of individual advantages or disadvantages to a State, or of the maintenance of a perfect contractual balance between rights and duties.”\(^ {49}\) In saying so, the Court seems to have presaged the newly emerging class of normative treaties in international law that were founded on


\(^{48}\) The ICJ describes this “common interest” as the “accomplishment of those high purposes which are the raison d’être of the convention”. Above n 47.

\(^{49}\) Above n 47.
universal applicability and *erga omnes* provisions.\(^{50}\) By saying that certain types of treaties have a special character that shapes and determines their object and purpose, the ICJ was asserting that such treaties have a *non-derogable* core against which no State may be allowed to make reservations. In the same breath, the Court also suggests that *universal membership* was part of the driving purpose of these treaties since the objective of *civilizing* States according to this “high ideal” cannot be achieved otherwise. The “humanitarian and civilizing” purpose of the treaties, noted the Court, is inspired by the “high ideals” that “provide, by virtue of the common will of the parties, the foundation and measure of all its provisions”.\(^{51}\) In other words, the “high ideals” contained in such treaties create a common object and purpose that forecloses any possibility for make reservations. In doing so, the ICJ appears to introduce an all-encompassing concept of universality that is taken for granted. It is presumed that such a *civilizing and humanitarian* object and purpose of a treaty is automatically discernable through the collective consciousness of the world community. Therefore, the legitimacy of a reservation to a normative treaty may also be determined by reference to the “object and purpose” compatibility test.

According to the ICJ, the assessment of compatibility rests with the individual States parties to the Convention. “Each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it [State party] exercises this right individually and *from its own standpoint*.”\(^{52}\) This directive of the Court appears to create a potentially perilous trend of making the validity of reservations contingent upon the subjective decision of each of the other States parties. It is perilous because the Court does not place any restrictions that would

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\(^{50}\) In fact, Judge Alvarez, in his individual dissenting opinion to the *Genocide Convention Case*, describes normative treaties as having “a universal character; they are, in a sense, the *Constitution* of international society, the *new international constitutional law*. They are not established for the benefit of private interests but for that of the general interests; they impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties.” See Individual dissenting opinion of Judge Alvarez, above n 47 49-55.

\(^{51}\) Above n 47.

\(^{52}\) Above n 47  26 (emphasis added).
qualify the exercise of this discretion by the State parties. Instead, every State is free to assess compatibility based on whatever subjective criteria that it may individually deem appropriate. As a result, a State party may base the assessment on the peculiar necessities of its geopolitical alignments, political affiliations, economic alignments and various other overriding interests of its foreign policy.\textsuperscript{53} To an extent, the Court may be said to have attempted to address this problem by noting that objections to reservations must be guided by the “limits of the criterion of the object and purpose” of the treaty.\textsuperscript{54} However, this attempt of the Court is ineffective because it does not explain how the “object and purpose” may be gleaned from the contents of a treaty. Instead, it merely refers to the “object and purpose” formula as a self-evident abstract concept.\textsuperscript{55} Even though the ICJ Advisory Opinion created more problems than it helped to resolve, a major plus point that can be attributed to it is the construction of a new approach to looking into the issue of reservations, while at the same time holding firmly to the belief that States parties have an indispensable authority in deciding the outcomes of treaties.

The Genocide Convention Case set the stage for the future debate on reservations in international law and in doing so it contributed two important points to the ensuing debate. First, the Advisory Opinion links the reserving State’s membership to the treaty with the compatibility of its reservation to the object and purpose of the treaty. Secondly, the objecting State is given the discretion to decide whether it wants to establish treaty relations with the reserving State or not, that is

\textsuperscript{53} Jean Kyongun Koh noted this defect in the Advisory Opinion as a failure of the Court to harness the authority of a single arbiter to determine issues such as the validity of reservations. Koh criticised the Court for “leaving the judgment of compatibility to a number of independent arbiters, each with its own individual political considerations at stake, put the reserving states at the mercy of the calculations and legal agility of the other parties”. Above n 46 87.

\textsuperscript{54} Above n 47 26.

\textsuperscript{55} The “object and purpose” of a treaty as such can be abstract because it is not clearly laid down in the text of a treaty as to what part of it contains the object and purpose. Consequently, different States may interpret different aspects of the same treaty to be its object and purpose. Scholarly opinion has differed as to which part of a treaty should be looked into for ascertaining its object and purpose. Some like Isabelle Buffard and Karl Zemanek have suggested that it should be inferred from the title, preamble and the text of the treaty. Isabelle Buffard and Karl Zemanek, “The ‘object and purpose’ of a treaty: an enigma?” 1998 Austrian Review of International and European Law (A.R.I.E.L) 342.
objections do not preclude the automatic establishment of treaty relations. These two positions have left a deep and lasting influence on the formulation of the law on reservations in the VCLT.

2.1.4 VCLT Approach

The Advisory Opinion of the ICJ in the Genocide Convention Case and the International Law Commission (“ILC”) recommendations on the question of the scope and effect of reservations did not eliminate the confusion and the uncertainty in the law. The ILC proposal asserted that unanimous consent (be it express or implied) or the absence of objection to a reservation was a mandatory requirement in determining the scope and effect of a reservation. The Genocide Convention Case neither superseded the Pan-American approach nor the Unanimity approach. Nor was the “object and purpose” compatibility test of the ICJ helpful in settling the law on reservations. It was against this background that the need for a codified general regime on reservations to treaties became a necessity in international law. It was hoped that the VCLT would fill this lacuna and add certainty to a hitherto unsettled point in law. An examination of the VCLT provisions highlights the incorporation of

56 There is also a third position that is implicit in the Genocide Convention Case. As regards the possible effects of an acceptance of a reservation, the ICJ uses the same language as it used in respect of objections to reservation, i.e., it posts that even accepting States “can consider that the reserving State is a party” to the treaty. In doing so it raises the rather awkward possibility of an accepting State refusing to establish treaty relations with the reserving State. This possibility becomes accentuated in cases of implied acceptance where a State party that may not necessary wish to establish treaty relations with the reserving State, is nevertheless assumed to have accepted a reservation sub silentio.

57 It was noted by the ILC that, “a State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention,” “Report of the International Law Commission to the General Assembly Covering Work of its Third Session, 16 May – 27 July 1951, (A/1858)” (1951) Vol. II Yearbook of the International Law Commission 131 para.34(5)(b). Elsewhere in the same Report, it is argued by ILC that in the case of some multilateral treaties (presumably of the “law making” kind), “the integrity and the uniform application of the convention are more important considerations than its universality”. Ibid,128 para.22.

58 To add to this confusion, the United Nations General Assembly in 1951 decided that in relation to the Genocide Convention, the Advisory Opinion of the ICJ should be followed and that in respect of new conventions subsequently coming into force, each state was left on its own to draw whatever consequence that it may desire in relation to either a reservation made or an objection made to a reservation. See J.M. Ruda, “Reservations to Treaties” (1975 III) 146 Recueil des Cours 152.
many strands of thought in the development of the approaches to reservations that have been discussed so far.

The scope and effect of reservations under the VCLT regime may be gauged through an analysis of two main provisions, Article 2 (1) (d) and Article 19. Article 2 (1) (d) defines a reservation and limits the scope for a State to make reservations by stipulating three main characteristics:

1. That a reservation must be a unilateral statement.
2. That a State can make a reservation only while signing, ratifying, accepting, approving or acceding to a treaty.
3. That a reservation must exclude or modify the legal effect of a part of the treaty.

States parties also frequently attach to treaties unilateral statements that amount to only declarations, interpretative declarations, observations or explanatory statements without actually having the effect of modifying any provision of the treaty. These are often policy statements that indicate or emphasize a particular foreign policy directive of the States. Classic examples of declarations that do not amount to reservations are the statements made by many Islamic States while ratifying human rights treaties that express their refusal to accept treaty relations with the state of Israel. These declarations are of a political nature and do not in any manner modify any substantive content of the treaty concerned. States frequently disguise their reservations by referring to them as “declarations”. This is the case with many Shari‘ah-based statements made by Islamic States to the human rights treaties considered in this study. Therefore, as a guiding principle (any statement whether it is titled as a declaration or interpretative declaration), the effect of which would be to modify the treaty as noted in Article 2 paragraph (1)(d) of VCLT, will be treated as a reservation for the purposes of this study. Moreover, not all unilateral statements excluding or modifying the legal effects of a treaty can be treated as a reservation.

59 In fact, in the case of interpretative declarations, the provisions of Articles 31 paragraph (2) of the VCLT automatically comes into play. See Anthony Aust, Modern Treaty Law and Practice (Cambridge: Cambridge University Press, 2007) 126-131.
valid reservation. Article 19 of the VCLT stipulates the following three situations when a statement purporting to be a reservation is not recognized as valid:

a) It is prohibited by the treaty.

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

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

2.2 Does VCLT give States a right to make reservations?

The provisions of Article 19 implicitly recognize the right of every State to make reservations as long as they do not fall into any of the three excluded categories. In other words, every State entering into a treaty has a default or a residuary right to make reservation, while there is a “presumption of validity of reservations” as described by Alain Pellet. This presumption is important in the context of legalizing not only the authority of States to make reservations but also legalizing the reservation per se. This authority, or as Sir Humphrey Waldock described it, the “power to formulate reservations”, is inherent in every sovereign State.

This right of a State to make reservations is not absolute and Article 19 places limitations on it that influence both the scope and effect of reservations. However, the limitations included in the three provisions of Article 19 do not straitjacket the concept of reservations within a rigid system. Instead, the VCLT seems to incorporate a flexible policy directive on reservations as is evident from a reading of

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60 Alain Pellet, the current Special Rapporteur of ILC described that when Article 2 (1) (d) is read together with Article 19 of the VCLT it creates this presumption of validity, as long as the reservation in question does not fall into the exclusionary clauses mentioned in Article 19. “Tenth Report on Reservations to Treaties By Mr. Alain Pellet, Special Rapporteur, A/CN.4/558, 1 June 2005, para.10” United Nations General Assembly Official Records: Sixtieth Session, Supplement No.10 (A/60/10), (2 May – 3 June and 11 July – 5 August 2005) para.354.

Article 19 together with Article 2 (1) (d). A detailed examination of the three exclusionary clauses of Article 19 sheds light on the impact of this flexible policy directive of the VCLT upon the right of a State to make reservations and upon the scope and effect of reservations, especially in the context of normative treaties like the human rights treaties.

i. The first exclusionary clause provides that a State cannot make reservations to expressly prohibited parts of a treaty:

Article 19 (a) refers to treaties that specify parts of it to be beyond the purview of reservations and as a consequence restricts the right of a State to make reservations to those provisions. Sometimes treaties may place blanket prohibitions on making reservations to any part thereof. In the first case, the right of a State to make a reservation is limited only to those provisions that are not prohibited while in the latter case there is absolutely no right to make reservations of any degree. These two methods of restricting the right to make reservations are followed in contractual as well as normative treaties. Any reservation to a part of a treaty that is outside the purview of reservations, or to a treaty that prohibits reservations entirely, becomes invalid ab initio. This creates a presumption of invalidity that operates against purported reservations and other States parties are not required to respond to such

invalid reservations.\textsuperscript{63} Christian Tomuschat suggests that the scope of subparagraph (a) extends to both express and implied prohibitions in a treaty.\textsuperscript{64} Tomuschat’s viewpoint is rejected by Alain Pellet on the grounds that such an expansive reading would be contrary to a clear and pervading policy of flexibility that runs through all the VCLT provisions on reservations.\textsuperscript{65} Instead, Pellet argues that Article 19 (a) suggests only three limitations clauses on reservations, i.e., (i) clauses that prohibit any reservation to the treaty; (ii) clauses that prohibit reservations to specific parts of the treaty only; and (iii) clauses that prohibit certain categories of reservations.\textsuperscript{66}

\textbf{ii. The second exclusionary clause contained in Article 19 prohibits making a reservation to a part of a treaty that is not included in the expressly permitted reservations:}

When a treaty clearly stipulates that reservations to it can be made only in respect of specific provisions and the reservation in question relates to a provision not included in the specifically permitted reservations, subparagraph (b) of Article 19 strikes it down as invalid. This forecloses the right of a State to make reservations to any provision not permitted by the treaty itself.

\textsuperscript{63} Sir Humphrey Waldock argues that other States parties need not raise objections to the reservation because the objection is already included in the treaty by way of the prohibition placed on the making of such reservation. See above n 61.

\textsuperscript{64} Commenting on article 16 of the 1966 ILC Draft Articles on the Law of Treaties, Tomuschat notes that, “taking the text as the basis of interpretation … one will come to the conclusion that lit.(a) [Article 19 (a) equivalent] also provides for an implied or implicit prohibition. Where the draft fails to give any indication to the contrary, there is no doubt that the intentions of the parties to a treaty have to be elicited by all possible means of interpretation without any consideration of the form in which these intentions have been expressed, which is to say that respect must be given to implied as well as to express stipulations.” Christian Tomuschat, “Admissibility and Legal Effects of Reservations to Multilateral Treaties” (1967) 27 Zeitschrift Fuer Auslandisches Oeffentliches Recht und Voelkerrecht (Zaoerv) 469.

\textsuperscript{65} He describes it as the “great liberalism that pervades all the provisions of the Convention that deal with reservations” The Tenth Report notes that the “subparagraph (a) concerns only reservations expressly prohibited by the treaty”. See above n 60 para.366.

\textsuperscript{66} Draft Guideline of the ILC on Article 19 (a). See above n 60 para.365.
Consequently, the right of the reserving State is limited to the extent of the expressly permitted provisions of the treaty. The text of the treaty becomes the only deciding factor here and there is no significance attached to the reasons why a State makes a reservation. This rule seems to override any notion of an inherent sovereign right to make reservations since the scope and effect of the reservation is purely determined by the treaty. Apart from this, it also implies that the acceptance of reservations is inextricably linked to and determined by the terms of the treaty. As a result, States parties are not at liberty to accept a reservation that is made to a provision outside of the expressly authorized reservations. Therefore, Article 19 (b) refers the determination of both the scope and effect of a reservation to the enabling provisions of the treaty.

However, it is not always easy to identify the provisions of a treaty to which a reservation is specifically allowed, and this may complicate the legal effects arising from reservations to such treaties. This is particularly the case with treaties that specify only “in quite general terms” the provisions to which a reservation may be made. For instance, Article 12 (1) of the Geneva Convention on the Continental Shelf 1958 authorizes States to make reservations “other than to articles 1 to 3 inclusive”. It is implied here that States are free to make valid reservations outside the excluded provisions while at the same time leaving the other States parties free to decide what course of action to take in response to such a reservation. This can result in creating different sets of treaty relations between the reserving State and the objecting and accepting States parties. For this reason, Article 19 (b) is criticized for

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68 In fact, it was exactly this point of law that the ad hoc Court of Arbitration interpreted in the ruling relating to a French reservation under Article 12 (1) of the Geneva Convention on the Continental Shelf (1958). The United Kingdom objected to the French reservation. The Court ruled that “Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than, Articles 1, 2 and 3…Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty.” Furthermore, it was also ruled that “Article 12, as the practice of a number of States …confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation.” Above n 67.
creating uncertainty especially in cases where the acceptance of and objection to a reservation can be made by States parties at their discretion without regard to its validity.

Alain Pellet seeks to overcome this drawback by defining the term “specified reservations” as signifying “reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty”. Any reservation that is expressly not allowed is impliedly prohibited. Additionally, Pellet notes that any reservation that is made outside the specifically authorized ones must fulfill the requirements of the object and purpose compatibility test. In such cases, a reserving State cannot claim an unqualified right to make reservations to provisions that are not expressly authorized. It may even be suggested that by the operation of the rule *expressio unius est exclusio alterius* States are prohibited from making reservations outside the expressly authorized provisions. None of the main human rights treaties has adopted the reservations approaches provided in Article 19 (a) and (b), even though these two approaches may in theory be more conducive to protecting the normative standards of human rights treaties.

In fact, most human rights treaties with the exception, perhaps, of the International Covenant on Civil and Political Rights (“ICCPR”) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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69 Above n 67.


71 See Draft guideline 3.1.4 in above n 70 para.372.


73 For example it is the object and purpose compatibility test that is applicable to the determination of validity of reservations to CEDAW, CRC, CERD and ICESCR. When ICCPR and CAT are included in this list, it is clear that the prevailing approach to validating reservations is the default method provided in Article 19 paragraph (c) of the VCLT.
incorporate the object and purpose compatibility test in one form or another. Even the two exceptions, the ICCPR and CAT, cannot strictly be said to fall within the purview of subparagraphs (a) or (b) of Article 19 because these two treaties follow a combination of both the object and purpose test and the specific prohibition and permission approach on reservations.

For instance, Article 4 paragraph (2) of the ICCPR prohibits *derogations* from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.⁷⁴ Although Article 4 paragraph (2) of the ICCPR is not a reservations clause as such (particularly in the context of Article 19 subparagraph (a) of VCLT), for all practical purposes it excludes reservations derogating from the specified provisions. Furthermore, since the ICCPR has no clear-cut reservations provision, it is the default formula of the object and purpose compatibility test of the VCLT that becomes applicable.⁷⁵ The provisions to which a State may make a valid reservation are more explicitly noted in the CAT. For instance, under Article 28 of the CAT, States may make reservations refusing to recognize the competence of the Committee against Torture, while Article 30 permits States to make valid reservations to the arbitration process. However, it cannot be asserted that subparagraph (b) of Article 19 is the applicable test in the case of reservations to CAT because Articles 28 and 30 do not make any claims to being the “only” permitted reservations to the Convention.

The rules for making reservations provided under Article 19 (a) and (b) of the VCLT are evidently contrary to the traditional contractual understanding of treaties. These two provisions downgrade the role of consent by States and instead place greater emphasis on the integrity of the text of the treaty. On the face of it, such an approach is more suitable for human rights treaties because the drafters of a treaty are given the discretion to determine the nature and scope of any future reservations.

⁷⁴ Article 4 paragraph (2) of ICCPR states that, “No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”

This adds certainty to the treaty obligations and protects those human rights norms that the original States parties would deem indispensable.

Given such merit and suitability of the two approaches provided in subparagraphs (a) and (b) of Article 19, why have the main human rights treaties not adopted them? This question becomes vital when we consider the general direction of the international law of treaties (for both normative and non-normative types) concerning reservations. It is evident that the trend in the law is directed towards a flexibility model on reservations and the most prevalent approach seems to be the ‘object and purpose’ test as has been incorporated in Article 19 (c) and Articles 20 and 21 of the VCLT.

iii. The third exclusionary clause in Article 19 (c) lays down by far the most prevalent approach to reservations in international human rights treaties. It stipulates that any reservation made to a treaty that provides neither expressly permitted nor prohibited reservations, must necessarily comply with the “object and purpose” of the treaty. 76

Article 19 (c) deals with treaties that do not have any express provision on reservations and as such it acts as a residuary rule on reservations. The main human rights treaties that do not have a specific reservations provision include the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the International Covenant on Economic, Social and Cultural Rights 1966 (“ICESCR”) and the ICCPR. The case of the ICCPR is slightly different. Article 4 paragraph (2) of the ICCPR may be said to prohibit reservations to the non-derogable provisions i.e., Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18. If we follow the rule laid

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76 According to Bowett, “if the treaty merely provides that reservations (unspecified as to type or kind) may be made to particular articles of the treaty, this does not exclude the ‘incompatibility’ criterion in relation to such reservations.” D.W. Bowett, “Reservations to Non-Restricted Multilateral Treaties” (1976-77) XLVIII British Yearbook of International Law 71. It must also be noted that exceptions to Article 19 subparagraph (c) may be found in Article 20 paragraphs (2) and (3) of the VCLT. Paragraph (2) relates to treaties with limited membership where acceptance of all provisions is a mandatory stipulation, while paragraph (3) relates to treaties that are “constituent instruments of an international organisation”. In these cases, the reservation is governed more by the unanimous acceptance of all states parties than any other factor.
out in Article 19 of the VCLT, it is the “object and purpose” compatibility test that becomes applicable in determining the validity of reservations made to these three treaties with the exception, of course, of the provisions of Article 4 paragraph (2) of the ICCPR. The same “object and purpose” compatibility test is formally adopted in the text of some other human rights treaties. For example, in the case of the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) 1979 and the Convention on the Rights of the Child (“CRC”) 1989, Articles 28 and 51 respectively specify that any reservations made thereto must comply with the object and purpose test.77 The “object and purpose” compatibility test is also the residuary rule applicable to reservations made to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (“CAT”) even though Articles 20 and 30 (1) specifically permit reservations thereto. The same test is adopted in a slightly different manner in the Convention on the Elimination of All Forms of Racial Discrimination 1965 (“CERD”) which is the only main human rights treaty to have actually ventured into defining the process of determining the “object and purpose” of the treaty. According to Article 20 (1) of CERD “a reservation shall be considered incompatible or inhibitive if at least two thirds of the States parties to this Convention object to it”.

Under Article 19 (c) of the VCLT, the “object and purpose” compatibility rule is the final test to assess the validity of reservations to treaties. In addition, Bowett considers that even a “precise, specified reservation which is expressly permitted cannot be incompatible with the object and purpose of the treaty. That apart, any reservation which is not prohibited must satisfy the ‘compatibility’ criterion.”78 The ‘object and purpose’ test of the VCLT differs in an important way from the similar test laid down by the ICJ in the Genocide Convention case. The ICJ applied the test to assess the validity of reservations as well as objections to reservations. In comparison, the VCLT rule is limited only to the making of

77 Article 28 paragraph (2) of CEDAW and Article 51 paragraph (2) of the CRC states that “a reservation incompatible with the object and purpose of the present Convention shall not be permitted”.

78 Above n 76 74.
reservations because under Article 20 objections to a reservation are not required to comply with the “object and purpose” test.\(^{79}\)

Since most of the human rights treaties seem to follow the “object and purpose” compatibility test, it is crucial that we tackle two important questions relating to this test. Firstly, what exactly is the “object and purpose” of a treaty, and secondly who determines this compatibility?

### 2.3 What is the “object and purpose” of a treaty according to VCLT?

The “object and purpose” of a treaty has been described as a “unique and versatile criterion” but one without a definition in law.\(^{80}\) It has been variously referred to as the “raison d’être”\(^{81}\), “fundamental core”\(^{82}\) or “core obligations” of a treaty.\(^{83}\) However, these are merely vague descriptions that do little to explain or identify with any certitude what really constitutes the “object and purpose” of a treaty. Opinions differ among scholars and jurists when it comes to giving a concrete shape and context to the term. To some extent, this disagreement shows an intrinsic impossibility of defining with any certainty the “object and purpose” of a treaty. What is clear from State practice is that the expression is loosely understood and contextually determined.

\(^{79}\) Above n 70 para.371.


\(^{82}\) Statement by the representative of France to the Third Committee at the 11\(^{th}\) Session of the General Assembly, 703\(^{rd}\) meeting on 6 December 1956, quoted in above n 80 para.413.

According to Ulf Lindefalk, the “object” and “purpose” are two distinct concepts expressing the “normative content” and “telos” of the treaty. Alain Pellet dismisses this view and instead prefers to treat it as a single idea. His efforts at drawing a guideline definition of the “object and purpose” of a treaty shows the level of caution and minimalism required in any elucidation of the concept. However, Pellet’s assertion that it is the “raison d’être” of the treaty does not help to either identify the object and purpose or distinguish it from the rest of the treaty. What is clear from Article 19 (c) is that it gives a preeminent position to these “core obligations” that automatically become non-derogable, while permitting States to make qualifying reservations to all other provisions of the treaty. In other words, the “object and purpose” of a treaty contains the absolutely indispensable provisions of a treaty, as against ancillary provisions. This approach of dividing the treaty into the “irreducible minimum” and ancillary provisions is criticized by some scholars who argue that in the case of human rights treaties such bifurcation is simply not possible because all the “substantive provisions” of the treaty must be considered as forming part of the normative content of the “object and purpose”. The attempt to divide the contents of a treaty into essential and ancillary parts also runs the risk of presuming that the “object and purpose” are clearly identifiable in the essential


85 Draft guideline 3.1.5 states, “For the purposes of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its raison d’être”. Above n 80 para.375.

86 Above n 83.

87 This feature of Article 19 (c) becomes especially important when considering reservations to human rights treaties. It has been argued that the determination of the “object and purpose” is, as it stands, a difficult process and the thought that parts of the treaties that do not constitute the “object and purpose” can be dispensed with through valid reservations, places human rights regimes in a precarious position. See, Belinda Clark, “The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women” (1991) 85 American Journal of International Law 281.

provisions with the additional assumption that the *essential* or “core obligations” of a treaty are themselves identifiable. In some ways, this approach is circuitous since it seems to attempt to identify a vague concept by the use of non-defined tools such as “core obligations” or “raison d’être” or for that matter “essential provisions”.

2.3.1 Application to human rights treaties and State practice

Lack of clarity on what constitutes the “core” or the “object and purpose” of a treaty weakens the claim for maintaining the absolute integrity of the treaty. The argument that no reservation can be allowed to any of the “core” provisions of a treaty becomes problematic when there is confusion regarding what may be specifically identified as the “core” provisions.  

The idea that every treaty has a clear and distinct “object and purpose” involves for the most part an open-ended concept because it is left to be determined by individual States parties. There is no unanimity or consensus of opinion as to the exact contents of the object and purpose of every human rights treaty. For example, in the case of the ICCPR, Article 4 (2) may be taken as the only provision in the Covenant that restricts the making of a reservation. It may also be considered as listing the “essential provisions” of the treaty by virtue of the non-derogable rights to which it refers. Opinions vary on the question whether the rights specified in Article 4 (2) are the only rights coming within the object and purpose of the ICCPR. Some have suggested that Article 14 (1) (concerning public sentencing) and (2) (public trials), Article 23 (4) (equality of marital spouses), Article 14 (7) (prohibiting

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89 For example, the Joint Dissenting Opinion in *Genocide Convention* case noted that “integrity of the terms of the [treaty] is of greater importance than mere universality in its acceptance”. The Joint Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* (1951) International Court of Justice Reports, 46.


91 The Portuguese objection to Mauritanian reservation to Article 23 (4) states that the reservation “limits the scope of the Covenant on a unilateral basis and that is not authorized by the Covenant. This reservation creates doubts as to the commitment of the reserving State to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international law.” Similarly,
double jeopardy) and Article 22 (freedom of association)\textsuperscript{92} are included in the “object and purpose” of ICCPR. Such uncertainty in the exact determination of the “object and purpose” in human rights treaties is a factual issue as demonstrated by State practice.

Examination of State practice on reservations also shows that States do not always make an advance assessment of what constitutes the “object and purpose” of a treaty before formulating the reservation. This is generally the case with reservations to human rights treaties and is evident in particular in the case of Shar`iah-based reservations. The first and foremost consideration given in the formulation and making of reservations appears to be issues concerning national or domestic interests of the reserving States. In other words, reserving States do not seem to be moved by a need to find out the object and purpose of the treaty and to assess the compatibility of their reservations with the object and purpose of a treaty.

For example, most of the reservations that are submitted to human rights treaties, including Shar`iah-based reservations, are attempts by the reserving States to protect or safeguard domestic and national interests and these do not necessarily seem to be determined by any consideration of object and purpose. Most of the Shar`iah-based reservations to human rights treaties refer to domestic constitutional provisions or religious law of the Muslim populations. However, this is also the case with reservations made by other States and is not just a peculiar practice of Islamic

\textsuperscript{92} Netherlands objected to the same reservation by noting that reservation to Article 23 “raises concerns as to the commitment of Mauritania to the object and purpose of the Covenant…. a reservation which is incompatible with the object and purpose of a treaty shall not be permitted…The Government of the Netherlands therefore objects to the reservation made by Mauritania to the International Covenant on Civil and Political Rights.” See UNHCHR website at <http://www.unhchr.ch/html/menu3/b/treaty5.asp.htm> [last visited: 18.12.2007].
States. The American reservations to the ICCPR may be noted as one of the more prominent examples in this direction. The United States reservation to Article 7 of the ICCPR notes that “it is bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and or Fourteenth Amendments to the Constitution of the United States”. Reserving States rarely seem to be acting with the sole criterion of harmonising their reservations with the object and purpose of treaties and, in particular, this seems to be the case with reservations purportedly protecting aspects of vital national interests.

Another aspect of State practice that has an important bearing on the object and purpose test is the interpretation of the scope of provisions that may apparently constitute the object and purpose of a treaty. The lack of certainty in determining what constitutes the object and purpose also creates problems in the determination of the scope of the provisions that contain the object and purpose and expert opinions vary in different contexts. Sometimes, there are differences of opinion on the exact interpretation of what may otherwise be understood as the “core” of a treaty.

The case of “death row phenomenon” or incarceration pending capital punishment is a good illustration of this point. It is widely recognized that Article 7 of the ICCPR concerning the right against torture or cruel, inhuman or degrading treatment or punishment is part of the object and purpose of the treaty, especially given the fact that it comes within the non-derogable provisions set out in Article 4 (2). In 1992 in the case of Randolph Barrett and Clyde Sutcliffe v. Jamaica, the Human Rights Committee addressed the issue concerning the applicability of Article 7 of ICCPR in relation to death-row cases and opined that

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93 Among other examples of reservations based on a claim to protect the national constitutions and other domestic laws of the reserving States include the Indian reservation to Article 9 of ICCPR, Mexican reservation to Article 13 of ICCPR are based on Article 22 and Article 33 of their respective constitutions. Similarly, the Israeli acceptance of Article 7(b) and Article 16 of ICCPR are subject to reservations based on existing personal status laws (i.e., religious family laws).
prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they may be a source of mental strain and tension for detained persons...even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies. ⁹⁴

In contrast, the European Court of Human Rights was of the view that a “long period of time spent on death row...with the ever-present and mounting anguish of awaiting execution of the death penalty” breached Article 3 (equivalent to Article 7 of the ICCPR) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. ⁹⁵ Again, in 1995 the Human Rights Committee expressed a different opinion from that given in 1992, in Randolph Barrett and Clyde Sutcliffe v. Jamaica, when it noted during the examination of the periodic report of the United States that a long stay on death row may amount to a breach of Article 7 of the ICCPR. ⁹⁶

The actual assessment of a reservation becomes a difficult exercise, given the existence of such diversity of legal opinion on the exact interpretation of specific provisions that are regarded as embodying the “object and purpose” of a treaty. Thus, could it be said with certainty in such cases that the reservation in question fails the compatibility test when the subject of compatibility is itself not well settled in law? It is debatable whether there could be certainty in any absolute sense on the exact constituents and scope of the “object and purpose” of a treaty. Often, in practice, these two aspects are determined through a contextual analysis of the circumstances.

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⁹⁵ Soering v. United Kingdom (1989) 11 European Human Rights Reporter 439, para.111. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

and the idea that “object and purpose” could have any conceptual certitude appears to go contrary to the general trend in law.

In the case of human rights treaties, States may formulate reservations to specific parts of a right that has otherwise been accepted. Frequently, such partial reservations involve ascribing to the general right particular meanings or interpretations that are based on national laws. These partial reservations do not reject the significance or the applicability of the right in question. To the contrary, they actually involve acceptance of the applicability and significance of the right concerned, albeit to a certain degree that is determined through an interpretational process premised on domestic law. As a result, it is difficult to objectively decide that such reservations undermine the object and purpose of a treaty, more so when there is no certitude as to the contents of object and purpose.

The United States reservation to Article 7 of the ICCPR may be taken as an illustration of the possible complications involved in deciding what constitutes “object and purpose” in the case of partial reservations. Although on its face the American reservation may be considered per se invalid because it is made to a non-derogable provision of the ICCPR, a closer examination shows that the reservation does not amount to a complete derogation in the sense of a total rejection of the general right against “cruel, inhuman or degrading treatment or punishment”. Instead, the US reservation qualifies the said right by defining it within the national constitutional law and jurisprudence, i.e., the Fifth, Eighth and Fourteenth Amendments of the US Constitution.97 It is not easy to say that the United States practice of keeping death row prisoners in long waiting periods of incarceration can constitute a part of the right contained in Article 7 given the divergence, noted

97 Article 7 of the ICCPR states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” The Eighth Amendment of the United States Constitution is particularly relevant in the context of its reservation. The Eighth amendment prohibits “cruel and unusual” punishments and much of the American jurisprudence relating to torture, cruel and unusual punishment developed around this amendment. See Furman v. Georgia (1972) 408 United States Reports 238.
earlier, of juristic and scholarly opinion on the question of “death row phenomenon”. Furthermore, given this confusion over the scope of Article 7 (i.e., whether it is part of the “object and purpose” of the treaty) it cannot be said with certainty that the United States is in breach of a clearly identified “object and purpose” of the ICCPR.\textsuperscript{98}

The Indian reservation to Article 32 of the CRC is another example of a reservation that shows the difficulties of ascertaining what constitutes the object and purpose of a treaty and what is clearly not included therein.\textsuperscript{99} The Indian “declaration” defines the “right of the child to be protected from economic exploitation” by reference to the “national legislation and relevant international instruments”.\textsuperscript{100} While the Committee on the Rights of the Child has been unsuccessful in getting the reservation withdrawn, the Indian government continues

\textsuperscript{98} This analysis is limited only to the US reservation to Article 7 in the context of the “death row phenomenon”. It does not address other issues connected with the United States reservations such as capital punishment, extraterritorial rendition etc. In this connection, see “Concluding Observations of the Human Rights Committee: United States of America” (18 December 2006) United Nations Document CCPR/C/USA/CO/3/Rev.1.

\textsuperscript{99} Article 32 of the CRC states, “(1) States parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development. (2) States parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States parties shall in particular: (a) provide for a minimum age or minimum ages or admission to employment; (b) provide for appropriate regulation of the hours and conditions of employment; (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.”

\textsuperscript{100} The full reservation notes that “while fully subscribing to the objectives and purposes of the Convention, realizing that certain of the rights of child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognizing that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India – the Government of India undertakes to take measures to progressively implement the provisions of Article 32, particularly paragraph 2 (a) in accordance with its national legislation and relevant international instruments to which it is a State party.” Although the Indian reservation is labeled as a “declaration”, for all practical purposes it has been treated as a reservation and it is in this context that the illustration is used in the present instance. The periodic reports that India submitted to the Committee on the Rights of the Child also admit that this “declaration” amounts to a reservation. See for example “Second Periodic Reports of States parties due in 2000: India” (16 July 2003) United Nations Document CRC/C/93/Add.5, para.88.
to not only maintain but also defend it claiming that the peculiar “ground realities” requiring the reservation are still in existence.\textsuperscript{101} The Indian position appears to be that there are a wide range of legislative and other socio-economic measures that have been put in place in India to protect the child from economic exploitation. These measures ensure protection of the child from “economic exploitation” but not necessarily prevent “child labour”, as one of the purposes of the Indian reservation is to make a distinction between “economic exploitation” of a child and “child labour”.\textsuperscript{102} The term “economic exploitation” in relation to a child is not defined in the CRC. The efforts of the Committee to arrive at a conclusive definition of the term in 1993 ended in only creating a generic understanding of the term.\textsuperscript{103} The International Labour Organisation (ILO) has subsequently adopted two important Conventions that identify with greater clarity than the CRC what is referred to as the “worst forms of child labour”.\textsuperscript{104} Such efforts bring in a significant level of certainty to the concept in question (“worst forms of child labour” in the case of the ILO example) which is lacking in Article 32 of the CRC. While it must be admitted that the prevention of the economic exploitation of children is part of the “raison d’être” of the CRC, the question as to whether “child labour” is included in this is a

\textsuperscript{101} The first periodic report of India explains that “child labour persists in our country on account of socio-economic compulsions. On account of poverty, many parents send their children to work in order to supplement their income. The income derived from child labour, however meager, is essential to sustain the family.” “Initial Reports of States parties due in 1995: India” (7 July 1997) \textit{United Nations Document CRC/C/28/Add.10}, para.281.


\textsuperscript{104} The two ILO Conventions adopted in 1990 are on the Worst Forms of Child Labour Convention (No.C182) and Worst Forms of Child Labour Recommendations (No. C190). Out of these, Article 3 (a), (b) and (c) of Worst Forms of Child Labour Convention describes the particular types of worst forms of child labour, while paragraph (d) of Article 3 gives States parties the discretion to determine a country-based list of the worst forms of child labour.
relatively grey area.\textsuperscript{105} As a result of the lack of clarity in the exact connotation of this crucial term in Article 32 of the CRC, it becomes difficult to see how far the Indian reservation conflicts with the “object and purpose” of the CRC.

Some Islamic States also follow a similar practice of accepting partial obligations of a human rights treaty provision while \textit{qualifying} the rest through an interpretational process that weaves domestic nuances into the application of treaty provisions. For example, \textit{Shar’}iah-based reservations to Article 16 of CEDAW made by Egypt and Iraq attempt to modify the content of Article 16 by attaching a particular \textit{interpretation} of the concept of gender “equality”. According to both these reservations, the concept of “equality” is understood as constituting “equivalency of rights” directed at “ensuring a just balance” between husband and wife in a marriage. Similar to those of many other Islamic States, the country reports of Egypt and Iraq explain the detailed legal connotations of the concept of “equivalency of rights” and “just balance”.\textsuperscript{106} In response to these reservations, the States raising objections seem to argue the point that “equality” in Article 16 should be read together with Article 2 and since the latter provision is central to the entire rights regime of CEDAW, Article 16 must also be considered in the same light. Therefore, any reservation made to Article 16 should be held invalid in just the same way as a reservation to Article 2 becomes invalid.

However, (just as in the case of the Indian reservation to Article 32 of CRC and the US reservation to Article 7 of ICCPR) the Egyptian and Iraqi reservations as well as their respective country reports clearly acknowledge the principles of equality and non-discrimination contained in CEDAW and indicate the continued and


progressive work of these two States in implementing those standards. Nonetheless, their reservations interpret the concept of “equality” within Islamic or Shar`iah-based hermeneutics. As Mashood A. Baderin explained, this particular interpretation points out that “equality of women is recognized in Islam on the principle of ‘equal but not equivalent’”, meaning that Shar`iah does not recognize an identical or perfectly corresponding set of rights between women and men in the “same rights” model adopted under Article 16 of CEDAW. This is a well established position in Islamic law and cannot be taken as a mere political strategy for downplaying the significance of CEDAW. The two principal Islamic international human rights declarations adopted by Islamic States have also incorporated this theoretical perspective on gender equality by referring to canonical Islamic law requirements in certain matters relating to family law. Viewed from this perspective, it cannot be said with absolute certainty that the reservations by Egypt and Iraq reject the object and purpose of CEDAW because of their particular interpretations of Article 16. The progressive implementation of the CEDAW by these two Islamic States indicates a commitment to upholding gender equality and non-discrimination, albeit within an Islamic hermeneutic framework. To hold otherwise and simply assert that because there is a reservation made to Article 16 that qualifies the meaning of “equality” in marital rights, without engaging with the complete intent and significance of the reservation from the perspective of the reserving State, would be to take a narrow legalistic position. Besides, it may also be argued that in the case of human rights treaties, States ratifying without any reservations may still end up habitually breaching the provisions of the treaty.


It may be contested that none of these reservations are valid as they can be struck down for flouting a basic rule of international law - *States cannot be permitted to raise the defence of domestic law to evade international legal obligations* - which is also included in Article 27 of the VCLT.\textsuperscript{110} However, this rule applies only in cases where a State uses domestic law to avoid implementing a valid international obligation that it had *already accepted*. In international treaty law, States use ‘reservations’ to distinguish what they accept from what they do not accept in a treaty.\textsuperscript{111} A reserving State may therefore be said to be under no *obligation* to implement sections of a treaty to which it had in the first instance made a reservation. This rule, however, becomes a valid argument against a State if it refuses to implement a section of a treaty to which it had not made a reservation.

The absence of certainty in the determination of what constitutes the “object and purpose” of a treaty is an obvious and intrinsic feature of the compatibility test under Article 19 (c) of the VCLT. The only exception to this would be the case of treaties that clearly specify the provisions containing the ‘object and purpose’ and the various circumstances that may be included within the scope of these provisions. In practice, such treaties are non-existent and in the case of international human rights treaty law, it is also undesirable because of the impossibility of foreseeing all situations that may be included in the object and purpose of a treaty. In other words, it is not easy to give a definitive connotation to the constitutive provisions of a treaty and straitjacket it for all time to come. Perhaps it is for this reason that the object and purpose test was introduced into the VCLT in the first place. The “object and purpose” test was chosen by the ICJ in the *Genocide Convention Case* for reasons of flexibility and the International Law Commission in drafting the VCLT was well informed of this aspect of the compatibility test. Therefore, at a conceptual level, the “object and purpose” of a treaty can be characterized as a generic term the contents of which are only contextually determinable. This attribute of the compatibility test arguably sits well with the flexible policy directive of the VCLT that is also seen in

\textsuperscript{110} Article 27 of the VCLT states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

\textsuperscript{111} Article 19 of the VCLT.
the rest of the reservations regime under Articles 20 and 21. For instance, Article 20 (4) (c) of the VCLT allows a reserving State to become a party to a treaty on the strength of a single contracting State party accepting the reservation, notwithstanding any objection that might be raised on whatever grounds by any other State party. Similarly, Article 21 creates reciprocal treaty relations limited only by the “extent of the reservation” in question. These two provisions indicate that the VCLT approach to the process of determining the validity of reservations is flexible because this determination is ultimately left to the discretion of the various States parties.

2.4 Who determines the “object and purpose” of a treaty?

It is apparent from the above examination that States make reservations for a number of reasons and most of the time these are centered on matters of national significance. As a result, the reservations are not primarily formulated after making a self-assessment of the “object and purpose” of the treaty. Instead the precipitating considerations remain matters of domestic and national interest. The determination of the object and purpose of the treaty prior to the making of the reservation hardly appears to be a preoccupation of reserving States. In order to respond to the question who decides what is the object and purpose of a treaty, we need to look into Article 20 of the VCLT, which deals with the issues of acceptance of and objection to reservations.

Just as the ICJ did in the Genocide Convention Case, even the VCLT seems to advocate the position that the determination of “object and purpose” is primarily an onus placed on the other States parties. While Article 19 of the VCLT is concerned with the “making” of or the formulation of reservations, Article 20 deals mainly with the determination of the “compatibility” of the reservation through acceptance and/or objections. The VCLT does not explicitly state anywhere that the “object and purpose” of a treaty must be determined by the other States parties, but this inference is made from the duty of the other States parties to accept or object to a reservation. When a reservation is “expressly authorised by a treaty” Article 20 (1) of the VCLT places an onus on other States parties to accept the reservation, if and
when such acceptance is mandated by the treaty. Where the treaty is silent, no explicit acceptance is required. Again, under paragraph (2) of Article 20, the other States parties are obligated to act if the treaty requires all States parties to accept the reservation in question. The third scenario, envisaged by paragraph (3) to Article 20, deals with treaties that are the constituent instruments of international organisations, and (unless it otherwise stipulates) reservations made to such treaties must be accepted by the specific body of the organisation so empowered. It is paragraph (4) of Article 20 that links up with Article 19 (c) to create a methodology for going about testing the compatibility of reservations. As a residuary provision dealing with cases not covered elsewhere, Article 20 (4) states that unless otherwise specified by the treaty

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) 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;

(c) an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

Accordingly, States that are already parties to a treaty are presented with two possible responses to a reservation: either accept the reservation or reject the reservation. This raises the question whether or not the VCLT specifies the grounds on which a State party may accept or object to a reservation. The grounds for the acceptance of and objection to reservations are only based on compatibility of the reservation with the object and purpose of the treaty as noted in Article 19, while paragraph (4) of Article 20 leaves it open to States parties to assess subjectively whether a reservation is compatible with the object and purpose of the treaty. In other words, this assessment is conceived as a relative exercise with every State party having the discretion to give its own interpretation of what constitutes the object and purpose. The whole process appears to be founded on an assumption that the individual States parties would be guided in the correct determination of the “object
and purpose” of the treaty through some form of abstract “common duty” as the ICJ had described it in the Genocide Convention Case.\footnote{Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion (1951) International Court of Justice Reports, 26.}

Some commentators criticize this approach for creating an “unworkable criterion”\footnote{Liesbeth Lijnzaad, Reservations to UN-Human Rights Treaties (Dordrecht: Martinus Nijhoff Publishers, 1995) 40.} by leaving the determination of the “object and purpose” simply to the “intuition”\footnote{Isabelle Buffard and Karl Zemanek, “The ‘object and purpose’ of a treaty: an enigma?” (1998) Austrian Review of International and European Law, 319.} of the States parties.\footnote{See Gerard Teboul, “Remarques sur les Réserves aux Conventions de Codification” (1982) 86 Revue Générale de Droit International Public 679; Massimo Coccia, “Reservations to Multilateral Treaties on Human Rights” (1985) California Western International Law Journal 1; “Tenth Report on Reservations to Treaties By Mr. Alain Pellet, Special Rapporteur, A/CN.4/558/Add.1, 14 June 2005” United Nations General Assembly Official Records: Sixtieth Session, Supplement No.10 (A/60/10), para.413. See also above n 113.} Others have noted that the issue of determining the “object and purpose” of the treaty is an interpretational one and should be left to the jurisdiction of the Court.\footnote{According to Bowett, it “is eminently a legal question and entirely suitable for judicial determination”. D.W. Bowett, “Reservations to Non-Restricted Multilateral Treaties” (1976-77) XLVIII British Yearbook of International Law 81. Also see Massimo Coccia in above n 115 24.} In a similar tone, it has also been suggested that the regulatory bodies of the treaties (more so in the case of human rights treaties) should be entitled to exercise this interpretation function.\footnote{Jean Kyongun Koh, “Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision” (1982) 23 Harvard International Law Journal 98.}

Thus, three main proposals seem to emerge from the various opinions on who is to decide compatibility. The first proposal was initiated by the ICJ in the Genocide Convention Case and is also found in Articles 19 and 20 of the VCLT; this is to let States parties decide the matter. The second suggestion appears to assert that the matter can best be adjudicated by the International Court of Justice, while the third proposal places the task in the jurisdiction of treaty bodies. The fact that the VCLT did not include the last two proposals cannot be attributed to an oversight or
indeterminacy of the ILC. In fact, the subject was discussed during the plenary sessions of the UN Conference on the Law of Treaties. For instance, Sir Ian Sinclair hinted at this particular issue when he noted during the drafting stage that “there was an obvious need for some kind of machinery to ensure that the [compatibility] test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with the object and purpose of the treaty.”

The creation of such an institutional authority was opposed by some experts, including Sir Humphrey Waldock, the Expert Consultant and the Rapporteur to the International Law Commission. Arguing against the idea that a special institution should be given the discretion to decide the compatibility of a reservation, he observed that

…proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations.

Sir Humphrey’s rationale for arguing against letting a separate institution decide the compatibility test also indicates his preference for a more flexible reservations regime. This preference is also confirmed by the ILC, since it did not decide on any other approach, even when it had several models to select from, including the majoritarian approach set out under the CERD.

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2.4.1 Application to human rights treaties and State practice

The idea that the compatibility of a reservation with the object and purpose of a treaty should ultimately be decided by the relevant treaty body is an interesting development in the case of human rights treaties. The various committees set up under human rights regimes have increasingly engaged with the States parties on the question of reservations during the assessment of the periodic country reports. It must be noted that in the determination of the compatibility the VCLT does not specify any role for a collegiate or central body either within the treaty or external to it. The progress of the ILC debate on the question and its culmination in the VCLT, as noted above, illustrates this point. Furthermore, even the various human rights regimes that set up committees to monitor the implementation of treaty provisions do not give any decisive authority to these bodies to determine matters concerning reservations.\textsuperscript{120} In spite of this, the Human Rights Committee\textsuperscript{121} ("HRC") set up under the ICCPR, in its General Comment No.24, points out that the appropriate authority to determine the compatibility of reservations is not individual States parties as required under the VCLT, but the Committee itself. This is explained away mainly by giving human rights treaties a special status that is presumably not addressed in the VCLT.\textsuperscript{122} It must be noted here that General Comments of the HRC

\textsuperscript{120} For example, the ICESCR gives the function of vetting country reports to the United Nations Economic and Social Council and after 1985 the Committee on Economic, Social and Cultural Rights, neither of which has the function of determining the validity of reservations. The CESCR may at the most make General Comments on its interpretation of ICESCR; the Convention on the Elimination of All forms of Racial Discrimination ("CERD") under Article 8 sets up the Committee on the Elimination of Racial Discrimination with powers to make General Recommendations under Article 9 paragraph (2) of CERD; the Convention on the Elimination of All forms of Discrimination Against Women ("CEDAW") sets up the Committee on the Elimination of Discrimination Against Women under Article 17, which is empowered to make General Recommendations and suggestions under Article 21. There is a growing tendency within CEDAW to integrate the practice of treaty bodies on reservations, as suggested by CEDAW "General Recommendation No.20, (1992), Eleventh Session of the Committee on the Elimination of Discrimination Against Women" \textit{United Nations Document A/47/38}. This was an attempt by the Committee to apply the "General Recommendation No. 24" of the HRC to the CEDAW: Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") sets up the Committee Against Torture, and under Article 19 (3) it is empowered to make General Comments; Article 43 of Convention on the Rights of the Child ("CRC") sets up the Committee on the Rights of the Child; and under Article 45 (d) it is empowered to make suggestions and general recommendations.

\textsuperscript{121} Now it is the Human Rights Council, however, the usage of HRC in the present study will largely be held in accordance with the historical context.

\textsuperscript{122} The first treaty body of the international bill of rights, the Human Rights Committee ("HRC"), was set up under Article 28 of the ICCPR. The HRC does not have special powers to determine the
are not legally binding on States parties, though they carry considerable weight in the implementation of the treaty. Lisebeth Lijnzaad disagrees with this conclusion and posits that “it would seem to be completely in keeping with the Committee’s [HRC] tasks under the Covenant [ICCPR] that it should monitor not only the implementation but also the declarations influencing that implementation”, thereby suggesting that it is the role of the HRC to “ask the States Parties to reconsider their reservations with a view to withdrawal”. 123

That recommendatory power is, however, as far as it may go. The general practice and response of States Parties to such HRC recommendations demonstrates that few have taken it as a mandatory directive to comply. In fact, it is evident from State practice that withdrawals of reservations subsequent to the recommendations of the HRC have been the exception, rather than the norm. Be that as it may, the other treaty bodies have been more wary of arrogating such a power and have largely left the matter of the determination of compatibility of reservations to the discretion of the States parties. In other words, except for the HRC, most of the other treaty bodies have followed the VCLT rule on the question of who determines the compatibility of reservations.

The members of the ILC deliberated on this question of the role of treaty bodies during the forty-ninth session and the resulting Preliminary Conclusions noted that the “competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties”. 124 This is an

validity of reservations. Article 40 (4) of the ICCPR only empowers the HRC to “study the [periodic] reports submitted by the States Parties” and “transmit its reports, and such general comments as it may consider appropriate, to the States Parties”. However, the HRC asserts in General Comment 24 that it is a function of the HRC to determine compatibility of reservations. “General Comment No.24; Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations Article 41 of the Covenant,” ( 04/11/1994) “General Comment No.24” United Nations Document CCPR/C/21/Rev.1/Add.6.

123 Above n.113 294 para.4.3.
124 “Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties” para.6 Report of the International Law
affirmation of the VCLT regime almost seventeen years after it officially entered into force in 1980. This conclusion of the ILC, arrived at after a long debate and analyses of arguments on both the sides including that of the General Comment No. 24 of HRC, reflects two points: first, it reasserts that treaty bodies must necessarily function according to their delegated powers; and secondly, that it is the States parties who must decide whether to include or add enabling clauses to the various multilateral normative treaties to give competence to the treaty bodies in the matter of reservations. As the law stands at present, the position of the ILC is similar to that of the VCLT.

It is evident from the above discussion of the “object and purpose” compatibility test that the VCLT reservations regime is strongly based on the “flexibility” system initiated by ICJ in the Genocide Convention Case. The flexibility system is directed at promoting a “wider acceptance of conventions”, protecting the interests of the “out-voted minority” in the treaty making process, as well as safeguarding the “sovereign equality of States”. From such a reading, it may appear that the entire process of the determination of the compatibility of a reservation with the object and purpose of a treaty remains a subjective exercise left to the discretion of the States parties. Yet, as the ICJ had noted, this is an exercise that must be guided in good faith by what an individual State party considers to be the core of the treaty. In other words, the object and purpose of the treaty “limit both the freedom of making reservations and that of objecting to them”.


125 Above n 124 paras.7 and 9 126-127.


127 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion (1951) International Court of Justice Reports, 24. It must be conceded that such an approach gives a relativised perspective to the whole exercise of determining the compatibility of reservations. However, there is nothing in the Opinion of the Court nor in the deliberations of the ILC that suggest a relativist approach, though it may be abstracted. It can be safely assumed that the strong criticism of the VCLT regime in reference to human rights treaties crop up mainly because of an
There seems to be a yet another way of looking into the question of who determines the validity of reservations. According to Alain Pellet’s Guide to Practice draft guideline 3.2, compatibility may be determined by a plurality of sources, not just the States parties in their subjective capacity. Besides the other States parties, the determination can also be made by “dispute settlement bodies that may be competent to interpret or apply the treaty” and “treaty implementation monitoring bodies that may be established by the treaty”\(^\text{128}\). In other words, the Special Rapporteur seems to approve the empowerment of the treaty bodies, domestic courts of States parties, as well as arbitration bodies to determine whether a reservation is compatible with the object and purpose of a treaty.

It must be noted here that by adding multiple sources, the draft guideline has not necessarily removed the primary ambiguity that lay inherent in the question in the first place. Instead, Pellet seems to be prompting a question of jurisdiction by proposing that even domestic courts can adjudicate on compatibility. Reservations *per se* are made by a State in order to modify the extent of treaty obligations that it primarily takes upon itself, and to suggest that the domestic court of another State should have the jurisdiction to decide the matter seems confounding, to say the least. It is difficult to accept that the domestic court of another State or an arbitration body will have the competence to interpret the validity of a treaty obligation of a reserving State. The idea behind proposals for an external source (be that a plurality of sources) to decide the validity seems to be generated by a concern over giving “objectivity” to the whole process. The VCLT does not provide a mechanism for such an objective determination of the core of treaties primarily because of the rigidity it would set into the reservations regime. Furthermore, as admitted by the Special Rapporteur in his Tenth Report, creating a plurality of decision-making bodies on the question creates the possibility of having contradictory multiple decisions on the validity of the same

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reservation. Which decision is to prevail may become an added poser. The way out of this conundrum, according to Alain Pellet, is (in addition to incorporating precise clauses on reservations) to grant the treaty bodies the authority to decide on reservations. Draft guideline 3.2.2 provides that,

States or international organizations should insert in treaties establishing bodies to monitor their application, clauses specifying the nature and, where appropriate, the limits of the competence of such bodies to assess the validity of reservations. Protocols to existing treaties could be adopted to the same ends.\textsuperscript{129}

Regardless of the above guideline, it may be noted that under existing human rights treaties, the discretionary authority to determine the compatibility or validity of a reservation is still directed by Articles 19 and 20 of the VCLT. The role of the treaty bodies continues to be recommendatory, even though there seems to be a growing assertiveness of the various committees following General Comment No.24.

### 2.5 Effects of a reservation depend on reaction of other States parties:

The rules concerning the effects produced by a reservation are perhaps the most important part of the law on reservations. The effects or the consequences that follow from the making of a reservation determine the nature and shape of the network of treaty relations that finally come into being between the reserving State and other States parties. The sequence of effects of a reservation starts with the response of States parties to a reservation and ends with the implications that result from such response. The reaction of a State party may take the form of either an acceptance of or objection to the reservation.

#### 2.5.1 Acceptance and implied acceptance theory

Article 20 (1) of the VCLT notes that “a reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides”. The stipulation that no acceptance is required for a

\textsuperscript{129} Above n 128 para.112.
reservation that is “expressly authorized” by the treaty is based on the presumption that the other States parties, by virtue of accepting the treaty itself, have already given their consent to the reservation in question.\textsuperscript{130} In other words, implied acceptance\textsuperscript{131} is given “\textit{ab initio at the conclusion of the treaty}” by the other States parties and it comes into operation automatically in respect of all authorized reservations.\textsuperscript{132}

The Inter-American Court of Human Rights (“IACHR”) has attempted to expand the scope of Article 20 (1) by reading it together with Article 19 (c). In the \textit{Effects of Reservations Case} (1982), the IACHR held that

Article 20 (1) [VCLT], in speaking of ‘a reservation expressly authorized by a treaty’, is not by its terms limited to specific reservations [i.e., to Article 19 (b)]. A treaty may expressly authorize one or more specific reservations or reservations in general. If it does the latter …, the resultant reservations, having been thus expressly authorized, need not be treated differently from expressly authorized specific reservations.\textsuperscript{133}

The IACHR is equating reservations that are \textit{compatible} with the object and purpose of a treaty with the class of reservations coming under Article 20 (1) and points out that such reservations do not require any acceptance. It is another way of

\textsuperscript{130} In fact, the 1962 draft Article 18 of Sir Humphrey Waldock is categorical in asserting that, “consent to a reservation shall also be held to have been given expressly where the treaty itself authorised the making of a particular reservation or category of reservations and the reservation falls within the terms of the authorisation.” Above n 126 61.

\textsuperscript{131} According to Fitzmaurice, when a reservation is “brought to the notice of another State [i.e., state party], either during the negotiation of the treaty or afterwards, its tacit acquiescence (or lack of actual objection) may, at any rate in the case of genera multilateral treaties, be inferred from silence, and this will suffice to constitute consent”. “Report on the Law of Treaties by G.G. Fitzmaurice, Special Rapporteur, UN Doc. A/CN.4/101, (14 March 1956), draft article 37, para.92” (1956) Vol. II Yearbook of the International Law Commission 126.


saying that when a reservation complies with the “object and purpose” of a treaty it requires no acceptance since it is already accepted by virtue of being “expressly authorized”, that is compatible reservations have *a priori* or *implied* acceptance.134

The theory of *implied acceptance* provokes the question: is it not possible to raise objections to reservations coming under Article 20 (1) even though there is a presumption of *a priori* acceptance? According to D.W. Bowett, the validity or “permissibility” of a reservation has nothing to do with the raising of objections to it. The latter connotes the ability of a State party to object to a reservation which, he believes, is not dependent on compatibility or any *a priori* acceptance. While permissibility is a matter for legal determination, the ability of a State party to object to a reservation is “a matter for a policy decision”135 that is dependent on the position taken by an objecting State party.

### 2.5.1.1 ‘Speak now or forever hold your peace’

According to paragraph (5) of Article 20, a State party is considered to have accepted a compatible reservation “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.” This provision applies to acceptances made under both the paragraphs (2) and (4) of Article 20 and constitutes the only specifically prescribed method for making acceptances to reservations in the VCLT. There is a conspicuous absence of any reference to paragraphs (1) and (3) of Article 20 because there is really no requirement for acceptance under paragraph (1), while under paragraph (3) it seems to be presumed that the competent organ of the international organization concerned would lay the procedural requirements of acceptance of reservations.

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134 According to Lijnzaad this reading of the IACHR is contrary to the “structure” of the types of reservations (i.e., authorized, prohibited and compatible) set out in the VCLT. Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties* (Dordrecht: Martinus Nijhoff Publishers, 1995) 46-47.

The more significant aspect of Article 20 (5) is to be found when we read it together with Article 19 (c) which concerns reservations requiring a compatibility assessment. Paragraph (5) seems to take the position that a State party’s silence on a reservation amounts to consent or acceptance. Therefore, it places a crucial burden of responsibility on States parties to act (within the stipulated twelve months) to assess the compatibility of the reservations and create the necessary consequences in terms of treaty relations in that time-frame. The inaction of the State party precludes it from making objections at a later date and is an automatic indicator of acceptance of the reservation.

2.5.1.2 Application to human rights treaties and State practice

An illustration of the application of the theory of implied acceptance in human rights treaties may be seen in the case of reservations made to the provisions on the referral of disputes to the ICJ.

For example, fifteen Islamic States made reservations in respect of Article 29 (1) of CEDAW that deals with the referral of disputes to the ICJ by a single State party.\(^\text{136}\) Similarly, Article 30 (1) of CAT provides for the referral of disputes to the ICJ and yet only four Islamic States parties have made reservations to this provision.\(^\text{137}\) Reservations to these provisions are authorized (without any other condition) by paragraphs (2) of Article 29 of CEDAW and Article 30 of CAT

\(^{136}\) Article 29 (1) states that “any dispute between two or more States parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.” The fifteen Islamic States are Algeria, Bahrain, Egypt, Indonesia, Iraq, Kuwait, Lebanon, Morocco, Niger, Pakistan, Saudi Arabia, Syria, Tunisia, Turkey and Yemen.

\(^{137}\) Article 30 (1) states that “any dispute between two or more States parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.” The four Islamic States that made reservations to this provision are Afghanistan, Bahrain, Indonesia and Kuwait.
respectively. Since these reservations are authorized by the treaty, they are also *impliedly accepted*.

A slightly different case is presented in the reservation made by Trinidad and Tobago that declines to recognize the competency of the HRC in death sentence cases under Article 1 of the ICCPR Optional Protocol (I). Although Trinidad and Tobago denounced the Optional Protocol (I) in June 2000, this reservation reveals the intricate issues involved in determining how the rule of *implied* acceptance may be applied. Trinidad and Tobago made a reservation to Article 1 of the Optional Protocol (I) stating that

> the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter 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.\(^{138}\)

Nominally, this reservation may appear similar to the Islamic reservations to CEDAW and CAT, discussed above, to the extent that it seeks to reject the competency of a dispute settlement authority. However, the Trinidadian reservation cannot be argued to have been accepted under the *implied* acceptance rule since the Optional Protocol does not have an enabling provision authorizing reservations such as Articles 29 and 20 of CEDAW and CAT respectively. Therefore, the applicable rule would not be Article 20 (5) but Article 19 (c). As a result, the Trinidadian reservation would need to comply with the object and purpose of the Optional Protocol. It is in this context that the HRC argued in the *Mr. Rawle Kennedy v. Trinidad and Tobago Case*\(^{139}\) that any reservation rejecting the competency of the HRC to decide individual cases referred to it under the Optional Protocol becomes invalid because of incompatibility with the object and purpose.

\(^{138}\) Reservation of Trinidad and Tobago to Optional Protocol of ICCPR. See online at: <http://www.ohchr.org/english/countries/ratification/5.htm> [last visited: 12/09/2006]

It may therefore be suggested that the *implied* acceptance theory demonstrates the applicability of Article 20(1) to all cases coming under Article 19(b) of the VCLT, since the latter contemplates treaty-authorized reservations.

2.5.2 Objections to reservations

The VCLT recognizes the *freedom* of States parties to object to reservations side-by-side with the *power* of a State to formulate reservations.\textsuperscript{140} An *objection* represents the formal expression of the rejection of a reservation by a State that is already a party to the treaty. The ILC draft guideline 2.6.1 defines an objection to a reservation as

\begin{quote}
a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.\textsuperscript{141}
\end{quote}

This guideline is actually a combination of several provisions of the VCLT aimed at creating a reverse definition of a reservation.\textsuperscript{142} Objections to reservations become an important aspect of reservations law because of the effects that they are aimed at producing i.e., either in nullifying the effect of a reservation or in excluding the reserving State from the treaty.


\textsuperscript{142} It combines elements of Articles 19-23 of the VCLT. See the Commentary on draft guideline 2.6.1 in Report of the International Law Commission, Fifty-seventh session, United Nations General Assembly Official Records: Sixtieth Session, Supplement No.10 (A/60/10), (2 May - 3 June and 11 July - 5 August 2005) 186-200.
Strictly speaking, the VCLT stipulates that an objection can be made either by a State party or by an international organization in their individual capacity and not in any collective or group form. It must (unless the treaty otherwise provides) be made within twelve months from the notification of the reservation or by the date on which it expressed consent to be bound by the treaty, whichever is later.¹⁴³

The VCLT rules on “objections” to reservations seem to be based on the contractual rule stipulating that no obligation may be imposed on a State party to which it did not consent. An objection to a reservation can be made only by a “contracting State” according to Article 20 because only a contracting State can produce the required effects of an objection, i.e., reject a reservation and accept or refuse treaty relations with the reserving State.¹⁴⁴ A contracting State or a State party is entitled to raise an objection when the reservation is prohibited by the treaty under Article 19 (a) (though not in the case of Article 19 (b)) or is incompatible with the object and purpose of the treaty as required by Article 19 (c). Nothing in the VCLT requires objecting States parties to specify or explain the reasons for raising the objection to the reservation in question. As a result, it may be presumed that States parties are free to raise objections to a reservation even if it is considered compatible with the ‘object and purpose’ requirement. The objecting State party also has the discretion to determine the effects that will be produced by the objection. There is no test on the validity of objections that a State party may raise. The objecting State seems to enjoy a sovereign freedom to raise objections and determine treaty relations

¹⁴³ See Article 20 (5) of VCLT. Nonetheless, as noted by Alain Pellet, State practice on objections seem to be evolving along similar lines to that of the progressive evolution seen in the State practice on reservations. For example, it is not new anymore to see States making late reservations and widening the scope of reservations after the signing, ratifying, accepting, approving, or acceding to the treaty, even though Article 2 (1)(d) stipulates that it must be made while signing, ratifying, accepting, approving, or acceding to the treaty, and in the case of Article 19 (b)) or is incompatible with the object and purpose of the treaty as required by Article 19 (c). Nothing in the VCLT requires objecting States parties to specify or explain the reasons for raising the objection to the reservation in question. As a result, it may be presumed that States parties are free to raise objections to a reservation even if it is considered compatible with the ‘object and purpose’ requirement. The objecting State party also has the discretion to determine the effects that will be produced by the objection. There is no test on the validity of objections that a State party may raise. The objecting State seems to enjoy a sovereign freedom to raise objections and determine treaty relations.

¹⁴⁴ Article 2 (1) (f) of the VCLT, defines a “contracting state” as “a State which has consented to be bound by the treaty, whether or not the treaty has entered into force”
that are not provided to the reserving States in equal measure when it comes to making reservations.

Bowett attempted to clarify this legal position in the circumstances when a State party may raise an objection by proposing two generic types of reservations, permissible and impermissible reservations. According to him a reservation is “permissible” when it is not expressly or impliedly prohibited and not incompatible with the object and purpose of the treaty. In other words, any reservation that fulfils the requirements of Article 19 of the VCLT is a permissible reservation, while the reverse constitutes an impermissible reservation. As long as the reservation is not specifically allowed by the treaty, States parties are free to raise objections to permissible reservations. By “specifically allowed”, Bowett implies not mere general permission but clear enunciation of the contents covered under a valid reservation. For instance, Article 4 of the ICCPR lists the Articles to which no derogation may be permitted.

Does this imply that the ICCPR expressly authorizes making reservations (compatible with object and purpose) to all other provisions? If we take Bowett’s approach, reservations to provisions other than those precluded by Article 4 of ICCPR will be generally permissible but States do not have a licence to make such reservations. Consequently, States parties are also permitted to object to reservations that are generally permissible under the treaty (including reservations that are

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145 It must be noted here that the ILC rejected the description of reservations as “permissible” and “impermissible”. Instead, the Special Rapporteur of ILC preferred to use “valid and “invalid” reservations. The present use of the terms “permissible” and “impermissible” is only to highlight the specific meaning attached to them by D.W. Bowett. However, in general the two terms will be used generically in proximity with the ILC usage. See above n 141 326-361.

146 D.W. Bowett, “Reservations to Non-Restricted Multilateral Treaties” (1976-77) XLVIII British Yearbook of International Law 89 and 82.

147 “Express authorization presupposes that the content of the reservation is known by the Parties in advance, so that they can be regarded as having already agreed to it.” Above n 146 85.

148 Article 4 (2) states, “no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15,16 and 18 may be made under this provision.”
compatible with object and purpose). A contrary view is expressed by Belinda Clarke when she posits that it could be argued that

there is nothing in the Vienna Convention that expressly permits the making of objections to reservations other than on the grounds of incompatibility since any that are expressly prohibited – the ground for objection cited the Vienna Convention in addition to incompatibility in Article 19 (a) – are necessarily incompatible.\textsuperscript{149}

Objections to impermissible reservations only reassert the provision of the invalidity of such reservation already contained in the treaty. By extension, could it also be inferred that a State party that consents to a treaty barring expressly or impliedly impermissible reservations, is also agreeing to object to such impermissible reservation at all times? Such a reading would suggest that States parties impliedly object to impermissible reservations automatically - in a way that replicates the “implied acceptance” of reservations under Article 20 (1) discussed above. However, Article 23 categorically requires an objection to a reservation to be in writing and communicated to other States.\textsuperscript{150} Therefore, it is clear that although the VCLT allows for implied acceptance of reservations, there is no corresponding implied objection to reservations, whether permissible or impermissible.

2.5.2.1 Application to human rights treaties and State practice

This State practice concerning reservations seems to suggest that there is an underlying pattern to what are perceived as “objectionable” reservations. Although States parties are free to unilaterally raise objections to a reservation, the absence of a test to distinguish a “valid” objection from an invalid or irrelevant one seems to create its own problems. Sometimes reservations are used to promote political posturing and foreign policy disputes, and States parties respond with objections to such reservations in equal manner.


\textsuperscript{150} Article 23 (1) of the VCLT states that, “A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.”
For example, Turkey made a reservation to the ICCPR noting that it “will implement the provisions of this Covenant [ICCPR] only to the States with which it has diplomatic relations”.\textsuperscript{151} The Cypriot objection to this declaration noted that it “creates uncertainty as to the States parties in respect of which Turkey is undertaking the obligations in the Covenant, and raises doubt as to the commitment of Turkey to the object and purpose of the said Covenant.”\textsuperscript{152} Greece raised a more substantive objection to the Turkish declaration noting that it is “incompatible with the principle that inter-State reciprocity has no place in the context of human rights treaties, which concern the endowment of individuals with rights. It is therefore contrary to the object and purpose of the Covenant.”\textsuperscript{153} It is apparent that the Turkish declaration is not related to any of the substantive provisions of ICCPR that would justify raising a question regarding compatibility with the object and purpose of the treaty. Yet, we see that both Cyprus and Greece raised objections against Turkey, claiming that the declaration undermines the object and purpose of the treaty.

The Iraqi and Libyan reservations to the CEDAW concerning non-recognition of the State of Israel and the Israeli objections thereto are further illustrations of reservations and objections that have no bearing on any substantive aspect of human rights treaties. At the centre of the Turkish as well as the Iraqi and Libyan reservations are issues of diplomatic and foreign policy decisions of the reserving States that have little bearing on the commitment of States parties to the substantive content of the human rights treaties. It may also be suggested that the Israeli objections to the Iraqi and Libyan reservations seem to prove Bowett’s proposition that objections are really independent of any a priori acceptance. The Israeli objection rightly notes that the Iraqi and Libyan reservations were “explicitly

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\item[151] See online at: \url{http://www.ohchr.org/english/countries/ratification/4_1.htm} [last visited: 11/09/2006]
\item[152] The objection raised by Cyprus to the declaration made by Turkey to ICCPR dated 26 November 2003. See online at \url{http://www.ohchr.org/english/countries/ratification/4_2.htm} [last visited: 11/09/2006]
\item[153] The objection raised by Greece to the declaration made by Turkey to ICCPR dated 11 October 2004. See online at \url{http://www.ohchr.org/english/countries/ratification/4_2.htm} [last visited: 11/09/2006]
\end{enumerate}
\end{footnotesize}
of a political character” and human rights treaties were “not the proper place for making such political pronouncements”. These reservations, though made by Islamic States, cannot be regarded as Shar`iah-based reservations or even Islamic reservations and they have no significant effect on the overall treaty regime. The objections to reservations made in respect of human rights treaties become crucial when we consider the effects intended and created by the objections made by States parties.

2.5.3 Effects produced by acceptance

The end result of a reservation is to either modify or exclude the legal effects of a treaty while the acceptance of or objection to a reservation charts out and determines the implications of this proposed change in the nature of the ensuing treaty relations. When a State party accepts a reservation, it is acknowledging the validity of the reservation. Consequently, the reservation becomes part of the treaty as between the reserving State and the accepting State party. The effects of acceptance operate between the reserving and the accepting States only in their individual relations.

2.5.3.1 Acceptance makes the reservation “effective”

The act of acceptance makes the reservation “effective” to the extent that it sets in motion the modification of the treaty as defined in Article 2 paragraph (1) (d). Furthermore, acceptance also effectively establishes treaty relations between the reserving State and the accepting State party.

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155 See below at 2.5.4 “Effects produced by Objection to a reservation”.

156 Article 2 (1) (d) of VCLT.

157 Thus, Article 20 (4) (c) notes that “an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation”.
2.5.3.2 Acceptance establishes treaty relations

Perhaps the most important effect of an acceptance of a reservation, whether it is an express or implied acceptance, is the effect it has on the reserving State. As a result of the reservation becoming effective due to acceptance, the treaty relations for the reserving State and the accepting State party are altered. According to Article 20 (4) (a) of the VCLT “acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States.” In other words, the effect on the reserving State is that it becomes a “contracting State” or a party to the treaty. For the accepting State party, the act of accepting the reservation makes the treaty enforceable between itself and the reserving State as treaty relations come into effect.

2.5.3.3 Effects of accepting invalid reservations

It is not entirely clear as to the scope of the effects of an acceptance of an invalid reservation. Pellet in his Tenth Report notes under draft guideline 3.3.2 that an incompatible reservation is “null and void” implying thereby that it creates no legal effect. Furthermore, draft guideline 3.3.3 states that, the “acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.”

Hence, the acceptance of an invalid reservation cannot be deemed to create any effect of modifying and excluding provisions of the treaty in terms of Article 2 (1) (d). The combined effect of this reading seems to suggest that no State can accept an incompatible reservation as creating any legal consequence. However, Pellet is of

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160 Above n 159 (emphasis added).
the view that the collective acceptance of an invalid reservation may create legal effects because such acceptance is treated as an amendment.\textsuperscript{161}

The position of the ILC that only the acceptance of a valid reservation can create the legal effects specified in Article 2 (1) (d) is not entirely settled law. In fact, even the ILC appears to defer the full deliberation of the issue to a future date.\textsuperscript{162} Moreover, there is nothing in Article 20 (4) (a) that makes acceptance conditional upon compatibility. It may be assumed that the issue of the determination of the effects of acceptance of an invalid reservation is ultimately left to the discretion of the States parties. By giving the States parties such discretion, the VCLT appears to be using the rule of reciprocity when it comes to the subject of the legal effects of acceptance of a reservation. This reciprocity rule is made even more obvious by Article 21, which establishes jural relationships pursuant to an acceptance of a reservation. According to Article 21 (1) of the VCLT, the acceptance of a reservation may create the following effects:

(a) For the reserving State, it modifies the provisions of the treaty with the accepting State party to the extent of the reservation.\textsuperscript{163}

(b) For the accepting State party, it “modifies those provisions [in respect of which the reservations were made] to the same extent for that other party [the accepting State party] in its relations with the reserving State.”\textsuperscript{164}

(c) The acceptance of a reservation by a State party creates no modification to the treaty for those other States parties which did not accept the reservation, either between themselves \textit{inter se} or between themselves and the reserving State, unless they express a will to the contrary.\textsuperscript{165} The latter case

\textsuperscript{161} Draft guideline 3.3.4 states that “what the contracting parties could not do unilaterally they might do collectively, provided they did it expressly, which would amount to an amendment of the treaty.” See above n 159 para.118.

\textsuperscript{162} The Special Rapporteur’s suggested that any decision on draft guidelines 3.3.1-3.3.4 should be deferred until the ILC considered the effect of objections to and acceptance of reservations, something that has not yet been undertaken. See above n 159 paras.139 and 157.

\textsuperscript{163} Article 21 (1) (a) of the VCLT.

\textsuperscript{164} Article 21 (1) (b) of the VCLT.

\textsuperscript{165} Article 21 (2) of the VCLT.
applies in situations where a State party objects to a reservation and yet expresses no opposition to the entry into force of the treaty between itself and the reserving State.166

An important theoretical underpinning of Article 21 (1) of the VCLT is that the acceptance and the effect of reservations are based on reciprocal relationships established between the reserving State and the other States parties. This reciprocal relationship recognizes the independent capacity of the reserving State and the other States parties to determine not only the scope of mutual application of the treaty but also the nature of the treaty relationship that they may decide to establish.

2.5.4 Effects produced by objection to a reservation

The VCLT spells out the effects of objections to a reservation in Article 20 (4) (b) and Article 21 (3). The first of these two provisions stipulates that objections do not per se stop States parties from establishing treaty relations with the reserving State. The second provision declares a rule of reciprocity when an objecting State party accepts treaty relations with a reserving State because it has the effect of modifying the treaty to the extent of the reservation.

2.5.4.1 Objection does not preclude treaty relations

According to Article 20 (4) (b), the mere fact of raising an objection 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”.

This provision becomes significant because it distinguishes the act of raising objections from the establishment of treaty relations. As a consequence, the States parties are given the freedom to determine the nature of the treaty relations that they desire to establish with the reserving State. Lijnzaad describes this provision as a

166 Article 21 (3) of the VCLT.
product of the “exigencies of multilateral treaty-making” because it favours the establishment of treaty relations in spite of reservations. Indeed, most States parties objecting to reservations make it a point to emphasize that their objections would not preclude treaty relations with the reserving State. This rule of separating the objection from the establishment of treaty relations induces States parties to construct objections on various grounds other than incompatibility. It has been suggested by Lijnzaad that this rule provides the objecting State with the discretion to interpret the “object and purpose” based on “points external to [the] treaty” such as reasons of political and economic expediency and the like.

How can a State party object to the reservation on grounds of incompatibility and still go on to accept treaty relations with such reserving State?

According to Bowett, after a State party raises an objection to a reservation on the grounds of incompatibility with the object and purpose, it cannot go on to establish treaty relations with the reserving State because of a contradiction of wills in these two acts. His theory of *contradictory wills* starts off with the assumption that when a State party objects to a reservation on the grounds of incompatibility it is in effect saying that the reserving State is refusing to accept what the objecting State regards as an integral part of the treaty. By establishing treaty relations thereafter with the reserving State, the objecting State is contradicting its own position on the integral nature of the provision in question, vis-à-vis the reserving State.

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168 Above n 167 40.

169 D.W. Bowett, “Reservations to Non-Restricted Multilateral Treaties” (1976-77) XLVIII *British Yearbook of International Law* 85. See also, Catherine Redgwell, “Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties” (1993) LXIV *British Yearbook of International Law*, 264.
Yet that is exactly what is apparently contemplated by Article 20 (4) (b) of the VCLT. It gives States parties the freedom to decide the question of establishing treaty relations outside of the compatibility test. The likely purposes of the VCLT sanctioning such freedom for the objecting State party may be to enhance the flexibility with which States may approach the various issues related to reservations, encourage wider participation in treaties, and at the same time recognize the various interests upon which States establish treaty relations. It might also be suggested that the provisions of Article 20 of the VCLT include an implied acknowledgement of the fact that States often enter into treaties to promote and protect sovereign interests.

2.5.4.2 Objections and reciprocity in treaty relations

When an objecting State party accepts treaty relations with the reserving State it creates a reciprocal modification of the treaty between the two States. Article 21 (3) of the VCLT provides that

when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.\textsuperscript{170}

In fact, an objection accompanied by an acceptance of treaty relations seems to have the same net effect as a proper acceptance of a reservation under Article 21 (1). Jean Kyongun Koh criticizes this provision because it “threatens to obliterate the difference between an accepted and an opposed reservation and renders the objection to the reservation a fruitless endeavour.”\textsuperscript{171}

There is a looming question in Article 21 (3): why would a State party that accepts treaty relations with the reserving State raise an objection when it clearly

\textsuperscript{170} Article 21 (3) of the VCLT.

\textsuperscript{171} Jean Kyongun Koh, “Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision” (1982) 23 Harvard International Law Journal 102. Ruda comments that in this case, “the objection has the same legal effect as the acceptance, and there is no difference, in this case, between the two”. J.M. Ruda, “Reservations to Treaties” (1975 III) 146 Recueil des Cours,199.
produces no legal effect? One response to the question would be to assert that such an objection is not really an objection but a “political declaration”.\(^\text{172}\) Then again, it may also be contended that this provision is not out of place when seen in the larger picture of the VCLT reservations regime. It is evident that the VCLT is promoting a flexible approach wherein objecting States are actually given a choice whether or not to establish treaty relations with the reserving State. It is a policy directive that is at once flexible and inclusive. Koh’s criticism is not completely justified since it does not take into consideration the reverse argument implicit in Article 21 (3) that a State objecting to a reservation has the right to oppose the entry into force of the treaty between itself and the reserving State and thereby give full value to its objection. The flexibility of the VCLT is such that it leaves to the full discretion of the States parties the choice of making an objection while accepting treaty relations or objecting without treaty relations. It may also be suggested that in doing so, the VCLT also recognizes that it is important not to foreclose all possibilities of treaty relations in any general regime on reservations. The VCLT is after all a residuary regime, and should States parties desire a more specific rule on reservations and objections, they remain free to do so in respect of the various human rights treaties. Yet, it is the case that none of the main human rights treaties provides a specific regime on reservations that stipulates that a mere objection forecloses treaty relations.

2.5.4.3 Application to human rights treaties and State practice

The rule of acceptance contained in Article 20 (5) (that absence of objection is deemed to be acceptance) seems to be the preferred way when it comes to acceptance of reservations made to human rights treaties, particularly because most of these treaties have adopted the object and purpose compatibility test \textit{vis-à-vis} reservations. Indeed, only a select number of States parties really appear to make an effort to scrutinize reservations and raise objections. For example, 57 out of the 185 States parties to the CEDAW have formulated reservations; only 13 States have

\(^{172}\) Above n 167 48.
raised objections to more than one of those reservations. In particular cases related to Shar‘iah-based reservations, it may be observed that State practice varies with the reserving States. In the case of the reservations to CEDAW made by the Kingdom of Bahrain (Articles 2, 16, 9 (2), 15 (4) and 29 (1)), only nine States parties (out of 185 members) raised objections as of 1 April 2006. In contrast, Algeria, which had also made the same reservations to CEDAW, attracted only six objections. If we apply Article 20 (5) of the VCLT, the large majority of States parties that did not raise objections to the Algerian and Bahraini reservations are clearly deemed to have accepted those reservations and consequently have established treaty relations.

There is an evident inconsistency in State practice when it comes to raising objections to similar types of reservations, as is revealed in the present case of Shar‘ia-based reservations. States parties appear to adopt a selective approach in deciding the reserving States against which to raise objections. The example of the objections to the Algerian and Bahraini reservations to CEDAW attests to this inconsistency. In respect of the Bahraini reservation, Austria, Finland, France, Greece and the United Kingdom objected on the basis that the reservations were incompatible with the object and purpose of the treaty. Yet none of these five States parties raised an objection to the Algerian reservations to CEDAW, even though Algeria and Bahrain made reservations on similar grounds to the same treaty provisions. This situation would have been aggravated had any of these States parties, following the rule contained in paragraph (5) of Article 20, actually refused

173 Altogether 23 States parties have raised objections to CEDAW as on 1 April 2006. Out of this 10 States parties raised only a single objection. The number of objections were raised in the following order: Netherlands 29; Sweden 28; Germany 23; Denmark 16; Finland 15; Norway 14; Mexico 13; Austria 10; Portugal 9; United Kingdom of Great Britain and Northern Ireland 7; France 6; Spain 4; Greece 3. See “Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, Fourteenth Meeting, New York 23 June 2006” (10 April 2006) United Nations Document CEDAW/SP/2006/2 Annex III.

174 The nine States parties are Austria, Denmark, Finland, France, Germany, Greece, Netherlands, Sweden and United Kingdom of Great Britain and Northern Ireland. See above n 173 Annex I.

175 The six States parties are Denmark, Germany, Netherlands, Norway, Portugal and Sweden. See above n 174.
to establish treaty relations with Bahrain. In the present case, however, that remains only a hypothetical situation.

The inconsistency in the objections policy of these five States parties also shows an interesting development endemic to State practice. In the case of Shar‘iah-based reservations, objections arguing incompatibility may be said to be the norm among the objecting States parties. Despite that, none of the objecting States parties to any of the Shar‘iah-based reservations to the main human rights treaties has gone so far as to preclude treaty relations. In other words, States parties have invariably objected to reservations on grounds of incompatibility while still maintaining treaty relations with the reserving State, thereby demonstrating what Bowett described as the interplay of contradictory wills.¹⁷⁶

Yet another type of raising objections seems to have developed in State practice that may not be strictly speaking sanctioned by the VCLT regime on objections discussed under paragraphs 2.5.2 and 2.5.4 above. An illustration of this peculiar type may be seen in the objections made to the United Arab Emirates’ (UAE) reservation to CEDAW. The UAE reservation is a Shar‘iah-based reservation and the objecting States parties, Finland, Netherlands and Norway were categorical in saying that although the objection does not preclude the entry into force of the treaty “in its entirety” between these States parties and the UAE, the objections would prevent the “UAE benefiting from its reservation”.¹⁷⁷ This is peculiar because such objections that involve establishing treaty relations and yet preventing the reserving State from benefiting from its reservation seem to override the express provisions of Article 21 (3) that states

when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the

¹⁷⁶ D.W. Bowett, “Reservations to Non-Restricted Multilateral Treaties” (1976-77) XLVIII British Yearbook of International Law 82-83.

¹⁷⁷ Objections raised by Finland, Netherlands and Norway to the United Arab Emirates’ reservation to CEDAW. See above n 174 para.D.
provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.\textsuperscript{178}

This rule in fact espouses a type of severance doctrine that allows for the excision of the provisions of the treaty related to the reservation from coming into effect between the reserving State and the objecting State party. It also promotes reciprocity between the two States despite the objection. However, instead of reciprocating, the type of objections that have been made by Finland, Netherlands and Norway imposes the position of the objecting States over the reserving State. As a result, it appears to give prominence to the will of the objecting State as against that of the reserving State in the creation of treaty relations. Furthermore, this practice also seems to suggest that the objecting State party can necessarily bind the reserving State to the reserved provisions regardless of the fact that the reserving State has declined to consider the reserved provisions as part of its treaty obligations. This is not sanctioned under Article 21 (3) of the present VCLT reservations regime even though the practice may prove more useful to overcome the position of contradictory wills that Bowett had speculated.

Belinda Clark seems to point out a different and yet equally important issue related to Article 21 (3). In her view, the reciprocity requirement of this provision creates impracticality in the context of reservations with “ill-defined scope” or ambiguity.\textsuperscript{179} She uses the example of Shar`iah-based reservations made to human rights treaties to illustrate the point. Clark notes that the reciprocity rule can only be applied to reservations that are clear as to the provisions that they seek to modify in the treaty. In such situations, it is not difficult to identify the parts of a treaty against which the reservation is made, and to exclude or modify such provisions in a reciprocal manner will not be complicated. However, in the case of general reservations such as the Shar`iah-based reservations, it is not easy to determine the

\begin{itemize}
  \item \textsuperscript{179} Belinda Clark “The Vienna Convention reservations regime and the Convention on Discrimination against Women” (1991) 85 American Journal of International Law, 310.
\end{itemize}
exact provisions of the treaty that are affected and the extent to which those provisions are modified by the reservation.\textsuperscript{180} For instance, the Saudi Arabian reservation to CEDAW states that

\begin{quote}
in case of contradiction between any term of the Convention and the norms of the Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.\textsuperscript{181}
\end{quote}

Similarly, the reservation submitted by Afghanistan to the CRC notes that

\begin{quote}
the Government of the Republic of Afghanistan reserves the right to express, upon ratifying the Convention, reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shar‘iah and the local legislation in effect.\textsuperscript{182}
\end{quote}

It is very difficult to understand the exact implication of these types of reservations because of the generality of their formulation. Clark is right to note that it would be impossible to interpret such reservations and that

\begin{quote}
only the reserving State knows what its reservation means. Other States parties can come to an understanding of it only as the reserving State’s implementation (or lack of implementation) of the Convention reveals what it considers to be the effect of its reservation.\textsuperscript{183}
\end{quote}

Even then, it would not be an easy task to pin down the exact connotation of the reservation unless it is explicitly stated by the reserving State. Thus, it must be assumed that Article 20 (3) actually places a positive requirement on the reserving States to be “reasonably specific”\textsuperscript{184} in formulating the reservations because only then can the other States parties reciprocate, either by accepting or by objecting to the reservation.

\textsuperscript{180} Above n 173 26.

\textsuperscript{181} See online at: \texttt{http://www.unhchr.ch/html/menu3/b/treaty15.asp.htm} [last visited: 26.11.2006]

\textsuperscript{182} See, online at: \texttt{http://www.unhchr.ch/html/menu3/b/treaty15.asp.htm} [last visited: 26.11.2006]

\textsuperscript{183} Above n 179 311.

\textsuperscript{184} Above n 179.
2.6 Is the VCLT regime appropriate for human rights treaties?\textsuperscript{185}

The appropriateness and relevance of the VCLT regime in connection with reservations to human rights treaties have been raised time and again, mainly by critics who advocate a special status for normative treaties.

2.6.1 The special features of universal human rights treaties

Human rights treaties are characterized as having a special attribute in the sense that they recognize the rights of individuals within States parties as opposed to that of the State itself. The case for special treatment of normative human rights treaties was made by the single Dissenting Opinion of Judge Alvarez in the \textit{Genocide Convention Case} when he classified them as the “new international constitutional law” that “impose obligations upon States without giving them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties”.\textsuperscript{186} This point was further emphasized by the Inter-American Court of Human Rights in \textit{The Effect of Reservations Case} when the Court held that modern human rights treaties in general… are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States.

In concluding these human rights treaties, the States can be deemed

\textsuperscript{185} The Second Report of Special Rapporteur Alain Pellet dedicated an entire chapter to the discussion of this distinction, especially in the context of the General Comment 24 of the Human Rights Commission relating to reservations to the ICCPR. The Special Rapporteur was of the view that the Human Rights Committee “did not focus its attention on the general rules of international law on reservations” in finding that the VCLT provisions on reservations did not apply to human rights treaties. See “Second Report on the Law of Treaties by Alain Pellet, Special Rapporteur, UN Doc A/CN.4/477/Add.1, (13 June 1996), Chapter II”, (1996) Vol. II Part One \textit{Yearbook of the International Law Commission}, para.62 (footnote 89). The ILC also formulated the question “does, or should, certain treaties escape application of the ‘Vienna regime’ by virtue of their object?” \textit{Ibid.}, para. 66. See also “General Comment No.24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant” (11 November 1994) \textit{United Nations Document CCPR/C/21/Rev.1/Add.6}.

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.\textsuperscript{187}

This is a radical departure from the traditional State-centered view of treaties according to the contractual approach. In practice, it is not easy to categorise treaties naturally as either normative or contractual. For this reason, some writers have questioned the practicality of such a categorization, noting that modern treaties incorporate both contractual and normative provisions.\textsuperscript{188} There have also been suggestions that it would be more appropriate to classify treaties as bilateral or multilateral instead of contractual and normative.\textsuperscript{189} It is noted that “in principle, all treaties are law-making inasmuch as they lay down rules of conduct which the parties are bound to observe as law”.\textsuperscript{190}

Although during the drafting process of the VCLT attempts were made to stay away from any doctrinaire entanglements based on the \textit{traités-contrats} and \textit{traités-lois} controversy, the final draft appears to have been primarily influenced by the first of these two categories.\textsuperscript{191} Consequently, the reservations regime of the VCLT is also constructed within this perspective.


\textsuperscript{189} Robert Jennings and Arthur Watts (eds.) (Vo. I, 9\textsuperscript{th} Ed., Parts 2 to 4) \textit{Oppenheim’s International Law} (London: Longman, 1992), 1204.

\textsuperscript{190} Above n 189.

\textsuperscript{191} For example, G.G Fitzmaurice notes in his 1956 Report, “there is no substantial difference between any of these classes of treaties [multilateral contractual and normative treaties] as regards the legal requirements governing their validity, interpretation and effect, since they are all based on agreement, and derive their legal force from its existence”. 
2.6.2 Human rights treaties and problems with the VCLT approach

The main contention raised against the VCLT regime relates to the flexible system of acceptance and objection to reservations that it provides. This system was adopted by the VCLT because it was believed to attract greater membership and participation in treaties.\(^{192}\) It is the same argument that swayed the Opinion of the ICJ in the *Genocide Convention Case* into admitting the “new need for flexibility in the operation of multilateral conventions”.\(^{193}\) While the adoption of the flexibility approach by the VCLT appears to facilitate universality of multilateral treaties, the advocates of normative human rights treaties condemn the same flexibility for undermining universality. Another argument directed against the adequacy of the VCLT regime in relation to human rights treaties is that the object and purpose compatibility test tends to fragment “multilateral agreements into a number of smaller multilateral or bilateral agreements”.\(^{194}\) As a result of this fragmentary tendency, the normative contents of human rights treaties are diluted, thereby undermining their universality and integrity. However, in practice such fragmentation rarely if at all causes the chaos that is prophesied. Belinda Clark admits to this in the context of the CEDAW reservations, mainly because “the different understandings pertain to the scope and nature of the obligations the reserving State has assumed *in respect of its own citizens*, rather than in respect of other States parties.”\(^{195}\)

What we have here are two different conceptualizations of *universality*. The VCLT’s approach is towards *universality in terms of numbers*, while the advocates of normative human rights treaties espouse *substantive universality* that includes both


\(^{195}\) Above n 179 297 (emphasis added).
“global adherence and integral acceptance”.\textsuperscript{196} In this context, the universality of multilateral treaties (including human rights treaties) seems to suggest universal acceptance, application and implementation of the treaty regimes in question, while the universality of human rights seems to indicate an ontological or philosophical universality of human rights.

The flexibility approach becomes problematic to normative treaties because it undermines the integrity of these treaties by allowing different States to take up different obligations under the same treaty through reservations. Without integrity, substantive universality of normative treaties cannot be realized. The Joint Dissenting Judges in the \textit{Genocide Convention Case} touched on this point when they noted that the first consideration in assessing reservations should not be “universality at any price. It is rather the acceptance of common obligations – keeping step with like-minded States – in order to attain a high objective for all humanity that is of paramount importance”.\textsuperscript{197} Indeed, the “integrity of the terms of the Convention is of greater importance than mere universality in its acceptance”.\textsuperscript{198}

### 2.6.3 New paradigm in the VCLT approach

The flexibility approach of the VCLT represents a combination of the Unanimity and \textit{Genocide Convention Case} approaches. For instance, the “object and purpose” compatibility test provided in Article 19 (c) of the VCLT appears to be aimed at preserving the \textit{integrity} of the treaty that is in particular relevant in the case of \textit{jus cogens} rights enumerated under the normative human rights treaties. It restricts

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\textsuperscript{197} In fact, the Judges further note that, “in the interests of the international community, it would be better to lose as a party to the Convention a State which insists in the face of objections on a modification of the terms of the Convention, than to permit it become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention”. The Joint Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo in the \textit{Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide}, Advisory Opinion, (1951) International Court of Justice Reports, 47.

\textsuperscript{198} Above n 197 46.
the formulation of reservations by mandating compatibility with the *raison d’être* of the treaty. The problem with the “object and purpose” test is not that it does not protect the integrity of a treaty, but that it is difficult to actually ascertain and implement the test in order to protect that integrity. A closer look at the reservations regime of the VCLT shows that there is in fact a new paradigm in operation. It is different from the pure unanimity and normative paradigms that have preoccupied most discussions on the “object and purpose” test. This new paradigm may be described as the *diversity paradigm*, and it is in effect a useful combination of the concerns of the unanimity and normative approaches.

The diversity paradigm may be characterized by its promotion of a middle ground between two interests - the sovereign will of States parties and the need for absolute integrity of the treaty. It attempts to accommodate the sovereign will and the integrity of the treaty in an effort that may at best be described as a concession to the actual realities of State practice in international treaty law. State practice shows that there is in fact a balancing act going in this direction, even as the law on reservations stands in its present form. Reservations act as the primary instrument for the realization of this paradigm shift. It recognizes that reservations, in whatever form, constitute a key element in treaty law. The contrary argument advanced in promoting a special case for human rights treaties calls for a radical overhaul of the contemporary basis of international treaty law as well as international relations.

Indeed, it has been argued that the claim for the special status of human rights treaties just because they are normative in character is rather overemphasized. In

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200 For example, Belinda Clarke notes that “these treaties [human rights treaties] are based on the public international law principle that individual have certain inalienable rights, which states cannot justify overriding by their imperatives of culture, tradition, expediency, economic advantage or such other factors.” Above n 179 286.
practice, many other forms of treaties such as environmental treaties and disarmament treaties may also be characterized as normative, thereby prompting the question – should these treaties also be given special status? By conferring a “special status” to these treaties, what is implied is that the standard principles of international treaty law are not immediately applicable to them. If such a theory is applied to the present context of reservations to human rights treaties, it will completely rule out the applicability of the VCLT regime on reservations. Neither State practice nor international legislation supports any warranting for setting aside the VCLT regime just for the purposes of asserting a particular interpretation of the normative superiority of human rights treaties. In fact, the Special Rapporteur Alain Pellet argues against such a notion of giving special status to human rights treaties simply because it would be more correct to talk of treaties with “normative clauses” rather than normative treaties *per se.*

Therefore, it is important to look into the adequacy with which the existing law on treaties responds to these normative clauses. Pellet notes four crucial points from his discussion of the question whether the VCLT regime should be applicable to all types of multilateral treaties:

i. The VCLT was designed “as being able to be, and being required to be, applied to all multilateral treaties”. The only two exceptions are those treaties with only a limited membership and those forming the constituent instruments of international organizations.

ii. The flexible nature of the VCLT regime makes it even “suitable to the particular characteristics of normative treaties”, including international human rights treaties.

iii. Reservations by character are in opposition to the idea of *absolute integrity* and yet, the VCLT through its commitment to the object and purpose compatibility test, preserves and guarantees the essential content of human rights treaties.

iv. The VCLT plays an adequate role as a residuary regime on reservations. Pellet leaves it ultimately to the discretion of the negotiating states to decide whether, how, and to what extent reservations may be permitted to a treaty. “If it was considered that they must be prohibited, the parties are entirely free to exclude them.

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201 Above n 199 para.86.
or limit them as necessary by including an express clause to this effect in the treaty.\textsuperscript{202}

The ILC appears to have come to the conclusion that the VCLT regime on reservations as contained in Articles 19-23 is “suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treat and universality of participation in the treaty”.\textsuperscript{203}

\textbf{2.7 Summary Conclusion:}

The definition of the concept of a reservation in international treaty law is still the same as that provided under Article 2 (1) (d). This is reaffirmed by the ongoing ILC work related to reservations.\textsuperscript{204} The compatibility test of the VCLT, which functions as a residuary test for checking the legality of reservations, has also been reaffirmed as being applicable to human rights treaties.\textsuperscript{205} The general direction of the VCLT reservations regime is undoubtedly towards the setting up of a flexible system for formulating and establishing reservations. It gives individual States parties two important functions that require judicious execution: the determination of the validity of a reservation and the establishment of treaty relations with a reserving State. Underlying this system of reservations is a distinct philosophy which recognizes that every State is invested with rights as well as obligations when it

\textsuperscript{202} Above n 199 para.163.


\textsuperscript{205} Above n 204 para.109.
comes to treaty making. All the functions associated with reservations (be it the assessment of the validity of a reservation, or the acceptance of or objection to a reservation, or the establishment of treaty relations with the reserving State) are also entrenched in this philosophical foundation. Taslim Olawale Elias is right in remarking that

the formulation of reservations, far from impairing the integrity of treaties, provides a satisfactory means of *eliminating avoidable difficulties* that might stand in the way of international co-operation. The right to formulate reservations is an expression of the sovereignty and freedom of States to regulate their differing interests.\(^\text{206}\)

The VCLT regime seems to recognize the significance of this approach. While, on the one hand, it recognizes the sovereign right of a reserving State to formulate a reservation, such right is subjected to reasonable regulation under Articles 19 and 20 of the VCLT to the extent that the object and purpose of the treaty is protected. Yet, at the same time, it also allows the reserving State to formulate its national concerns vis-à-vis the treaty provisions through reservations, and unless the specific treaty provides otherwise, reserving States are given the freedom and the right to formulate reservations even in cases of human rights treaties. Furthermore, it gives the States parties negotiating treaties the discretion to incorporate treaty-specific reservations clauses, thereby allowing greater treaty participation, especially in the case of difficult areas of international cooperation such as human rights issues.

Despite the argument to the contrary, that human rights treaties must be treated as a special category requiring special rules, the fact remains that none of the main human rights treaties (ICCPR, ICESCR, CERD, CEDAW, CAT, CRC) provides an alternative or a different mode for making or testing reservations. All of these treaties have invariably adopted the “object and purpose” compatibility test in one form or other. This is a sufficient indication that State practice is also directed towards the creation of a more accommodative system of reservations than one which is rigid and inflexible. Furthermore, the limited number of objections that have

been raised against the reservations made to human rights treaties also indicates that the VCLT continues to be accepted as a residuary law on reservations.

The overriding feature of the VCLT reservations regime is the compatibility test and the independent assessment of reservations by States parties. This creates a network of treaty relations that is primarily dependent on the will and intent of contracting States. The reservations regime contained in the VCLT chooses a middle path between the contractual approach to treaties where the sovereign will of the States parties is considered the essence of treaties, and the contrary approach that advocates treaties have a normative basis superseding the will of individual States.\textsuperscript{207} The benefits of such a flexible system cannot be discounted by simply arguing that it is not applicable to normative treaties. The prevailing law as well as the predominant State practice indicates a clear adoption of the VCLT regime on reservations. The issues that have been raised in connection with the integrity of human rights treaties need to be addressed at a different level, in a different platform and not through reservations. The effectiveness of the diversity paradigm of the VCLT is evident from the worldwide acceptance of human rights treaties regardless of the normative differences that separate the diverse States parties. The ideological trend in the diversity paradigm that has been discussed in this Chapter sheds light on an important reason behind the almost \textit{universal} acceptance of some human rights treaties such as the CRC, namely, that the reservations regime incorporated in these treaties steers towards the accommodation of diversity rather than the strict espousal of unanimous contractual consent.

This is an ideological trend that defines the diversity paradigm. The fact that only a few and limited objections have been raised to the vast number of reservations to human rights treaties also contributes in reaffirming this conclusion. Furthermore, looking at the few States parties that have been consistent in raising objections to

\textsuperscript{207} This “middle path” continues to the assertion that treaty law and reservations to treaties are strongly connected conceptually to the expression of sovereign will. Indeed, Ruda agrees on this when he stated, “the concept of sovereignty operates both for the State formulating the reservation and for the State accepting or rejecting it.” J.M. Ruda, “Reservations to Treaties” (1975 III) 146 \textit{Recueil des Cours}, 183.
culturally or religiously defined reservations such as the Shar’iah-based reservations suggests an important question. Why have the Asian and the African States parties not raised objections and only a select few Western European States parties (perhaps with the exception of Mexico) been concerned in objecting to these reservations? This leads to another discussion that is not yet conclusive – are human rights universal, or relative, or perhaps pluralistic? How are these philosophical conceptualizations of the nature of human rights relevant to the actual State practice of implementing human rights treaty obligations? How far are such foundational arguments relevant to the making and implementation of international human rights treaties? The ensuing Chapter will explore the extent to which actual State practice corresponds to these theoretical frameworks.
Chapter Three: Universalist, Cultural Relativist and the Diversity Paradigms in Human Rights Discourse

“For far too long, challenges to universality have been interpreted as rejections of human rights, cynical and self-interested invocations of ill-founded philosophical, cultural or political values. Perhaps one might instead welcome those challenges as presenting another historic opportunity: the opportunity to open up human rights discourse to those whose aspirations it has always been intended to embody, to incorporate and reflect the tremendous diversity within the international community.”

- Karin Mickelson

“Universality” is widely regarded as a quintessential feature of the discourse on international human rights. Critical evaluations of the universal character of human rights are often viewed with mistrust because of the belief that such evaluations would undermine the legitimacy of human rights norms. This line of thinking apparently seems to foster the idea that international human rights are by themselves an “unqualified good”, as observed by Makau Mutua. In the present Chapter I will examine the theoretical framework of universal human rights and assess the validity of the relativist and diversity/pluralist claims. Different facets of universality and cultural relativism and diversity/pluralism paradigms will be analyzed to bring out their respective validity claims in the context of State practice discoverable through reservations made to human rights treaties.

The Chapter will be subdivided into three sections. The first section will discuss the universality aspect of human rights, looking into the traditional definition of “universality” and the various nuances that have surrounded it. The second part of the Chapter will examine the arguments maintained in favour of a relativist understanding of human rights. It will follow the continuum of relativism, analyzing

1 Karin Mickelson “How Universal is the Universal Declaration” (1998) 47 University of New Brunswick Law Journal, 47.

the case for “thick” relativism and “thin” relativism. The “internal debate” validating the relativist understanding of human rights will be explored in order to assess the legitimacy of this point of view. The third part will explore the bases of human rights law within the rubric of international treaty law and the international legal order. The prevailing international law on human rights is largely determined by treaty provisions of human rights regimes, international judicial pronouncements and to an extent by the observations, reports and recommendations of treaty bodies and multilateral human rights forums. This Chapter will conclude by establishing that neither the universalist nor the relativist conception of human rights law corresponds with actual State practice in the implementation of international human rights treaties. The Chapter will also demonstrate that there is no general consensus regarding the absolute universalist or relativist nature of human rights law among States parties, international human rights forums or for that matter in the various international as well as regional judicial pronouncements on the nature and character of human rights. Any attempt to impose such philosophical theories into the human rights treaty making and implementation process is idealistic and counterproductive. Therefore the Chapter will posit that there is a clearly discernable pluralist paradigm infused in international treaty law on human rights that is also discoverable in State practice.

**PART I**

**3.1 What is the basis of Universality of Human Rights?**

Human rights are traditionally considered to be “universal” because they pertain to all people across racial, religious, gender or other distinguishing peculiarities. In other words, “universal human rights” signify that these rights belong to all human beings and are fundamentally applicable to all societies. This “presumption of universality” is characterized by “the belief that human rights exist independent of culture, ideology, and value systems.”

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legitimacy claim of human rights and as a result it is deemed by some to be an indispensable attribute of the contemporary discourse on human rights.

International human rights are often characterized in bipolar terms: at the one end are those who advocate universality, while at the opposing end are those who disagree with universality of human rights. The universalists draw the conclusion that human rights acquire legitimacy because of their universal character, while the non-universalists argue for dislodging the universality-centered legitimacy of human rights. By invalidating the universality claim, the Relativists and Pluralists attempt to establish that human rights are dependent on situations, cultures and a variety of other such relative factors. If universality of human rights is a legitimate claim, by extension it is also implied that international application of human rights is justifiable and legitimate. From this point of view, uncertainty over the universal character of human rights affects the uniform application of these rights throughout the international community of States. Hence, the Universalists argue that the affirmation of universality is a critical aspect to the survival of the whole human rights system. At the heart of this debate between the Universalists and the Relativists lies the core concern of legitimacy. As rightly noted by Amy Gutmann,

what is at stake in determining the foundations of human rights is often the very legitimacy of human rights talk in the international arena. If human rights necessarily rests on a moral or metaphysical foundation that is not in any meaningful sense universal or publicly defensible in the international arena, if human rights are based on exclusively Eurocentric ideas ... and these Eurocentric ideas are biased against non-Western countries and cultures, then the political legitimacy of human rights talk, human rights covenants, and human rights enforcement is called into question.4

“Legitimacy” herein implies the acceptance of or the compliance with the normative standards contained in the human rights laws by the people to whom they are addressed. In other words, the beneficiaries of universal human rights must be able to obey these standards with the conviction that the rights are valid and

appropriate. Such conviction may, at one level, emerge simply out of a positivist expression of the human right in the laws of the land. At a deeper level this conviction may be described as originating from the recognition of the human rights norms as part of the valid and applicable laws of the land. This prompts a more general question: what are the factors affecting validity and applicability of the laws of a State? For the purposes of the present examination, this conviction that a particular law is valid and legitimate rests partly in the “perception on the part of those to whom it is addressed that it has come into being in accordance with right process”.\(^5\) However, the observance of right process can only be an outward rationalization of the legitimacy. There are more profound reasons that contribute to the legitimization of norms. For instance, moral persuasion, customs and traditions and other societal values and mores make a substantial contribution to this process of legitimization. Hence, the theories on universality of human rights appeal to these different factors in various degrees.

In order to establish the ‘universal’ character of human rights, international human rights standards must be able to demonstrate a level of normative authority that surpasses mere political legitimacy. The normative standards of human rights must be able to command the obedience of everyone concerned and political authority alone cannot persuade such obedience. It requires not only political but also ethical or moral persuasiveness to validate such laws and achieve universal acceptance or obedience. Hence, the claim for the universal validity of human rights includes within it, not only a positivist legal directive (whether at the international or domestic level) but also a moral or metaphysical foundation in the nature of a higher law that commands universality.

Several theoretical formulations have been made in order to establish such a universal foundation of the human rights norms. Some of these theories attempt to establish universality of human rights as a self-evident, inherent and discoverable

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fact. Other theorists attempt to argue that universality is a reality of modern international human rights law because a large number of States actually accept and apply these normative standards; in other words, the wide and general ratification or acceptance of human rights treaties makes these standards universal.\(^6\) There are still others who argue that universalism of human rights is “not based upon the empirical existence of universal values [and] is not something inevitable or mystical, but rather a deliberate choice” made by States.\(^7\) In espousing the latter position, Eva Brems argues that there is no need to make any metaphysical claims to natural law or ‘self-evident’ truth because universal human rights emerged in the twentieth century through a deliberate choice of the States parties involved in making human rights treaties. From such a viewpoint, human rights universality is a positivist phenomenon and there is nothing \textit{a priori} about it.\(^8\)

Two broad approaches emerge out of these various theoretical assertions of universality of human rights:

i. A priori justifications (natural law, moral authority and self-evident truth)

ii. A posteriori justifications (ratification and modest universality)

3.1.1 A priori justifications

The a priori justifications (or transcendentalist approach) combine three schools of thought that appeal to an authority beyond positive law to validate the universality of human rights. These three schools are the Natural Law school, Moral

\(^6\) Universality of human rights is treated as a “settled norm” the justification of which is premised on the understanding that “any argument or action which appears to contravene it is widely regarded as requiring special justification.” As a consequence, there is a presumption of universality that may be rebuttable only through exceptional evidence. Chris Brown, “Universal Human Rights? An Analysis of the ‘Human-Rights Culture’ and its Critics” in Robert G. Patman (ed.) \textit{Universal Human Rights?} (London: Macmillan Press Ltd., 2000) 32.


\(^8\) Above n 7.
Universalism and those advocating universality based on self-evident truth justifications. The Natural Law school of thought appeals to non-empirical, a priori sources, while Moral Universalism largely appeals to a divine or mystical imperative. The school of thought advocating self-evident truth justifications proposes axiomatic arguments to support universality of human rights.

3.1.1.1 Natural Law and Natural Rights

By far, the most prolific justifications of the universality of human rights have come from the Natural Law school of thought. There is a close historical nexus between the development of the Natural Law stream of thought in European jurisprudence and the legitimacy claims of human rights universality premised in Natural Law. Indeed, in many ways the conceptual understanding of modern human rights standards are largely derived from the works of European Natural Law jurists like Socrates and Cicero, Thomas Aquinas and the Enlightenment scholars like John Locke and Immanuel Kant.

One of the principal contentions of the Natural Law school is that universality of human rights originates from Natural Law that is common to all humankind recognizable through human reason. It is surmised that Natural Law is deduced from human reason and is understood to be common to all humans. However, it must be noted that the idea of universal natural rights that the Greek and the Roman scholars of the classical period espoused had a limited connotation. Apart from being applicable only to the citizenry, their concept of rights has also been argued to be limited to objective rights and not to subjective rights contained in the current human

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9 “The Greek city-states and the vast Roman State were communities of citizens, run by citizens for the benefit of citizens. Everyone within the confines of a State owed obligations to it. But only adult male citizens enjoyed the full range of political and legal rights; their wives and children had such rights to a lesser degree, visitors, subject people and slaves had no guaranteed rights, only some degrees of protection at the discretion of the citizens.” P.J Rhodes “A Graeco-Roman Perspective” in F.E Dowrick (ed.) Human Rights: Problems, Perspectives and Texts (Westmead: Saxon House, 1979) 66.
It was not uncommon among Greek philosophers to promote the idea of the universe being governed by a particular, eternal and immutable law the aim of which was to establish the “good” of all human beings. Referring to this trend in Plato’s work, Paul E. Sigmund notes that it was believed that there is an order in nature and human nature which is universal, objective and harmonious, in which the soul is the most fundamental principle, possessing a threefold internal structure (reason, spirit and desire) which is the basis of moral obligation. Conformity to this order brings harmony, virtue and happiness. Violation of it results in disorder, evil and unhappiness.

Some Greek philosophers linked the man-made laws to a higher law of nature deemed to be better and universal. For example, Antiphon the Sophist declares that all humans are “by nature born the same in every respect, both barbarians and Greeks. And it is open to all men to observe the laws of nature, which are necessary.” Similarly, the Stoic philosophers of Greece believed that human reason was the basis of a universal system of law that recognized certain rights in every human being. To the Stoics, the true model for human existence was derived from reason considered inherent to the laws of nature. Richard A. Bauman comments that the Hellenistic world and the Romans were familiar with the concept of (subjective) human rights in a similar manner as have been formulated under the UDHR. According to him, the roots of much of the contemporary universal human

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10 Basically, “objective rights” refer to those rights that an individual has by virtue of a human or divine law or order, while “subjective rights” refer to those rights that an individual claims inherent to himself/herself. See Michael P. Zuckert, “‘Bringing Philosophy down from the Heavens’: Natural Right in the Roman Law” (1989) 51 (1) The Review of Politics, 70. Michael Freeman observes that according to the French historian Michel Villey, the “Roman law had no conception of subjective rights....The Romans, therefore, like the Greeks, had no concept of universal human rights”. Michael Freeman, Human Rights: An Interdisciplinary Approach (Cambridge: Polity Press, 2002) 17.

11 Paul E. Sigmund, Natural Law in Political Thought (Cambridge, Mass.,: Winthrop Publishers, 1971) 7

12 As quoted by P.J. Rhodes in above n 9 70. Rhodes also quotes, Euripides’ tragedy ‘Phoenician Women’ wherein Jocasta says, “This is better, my child, to honour equality, which always binds friends to friends, cities to cities and allies to allies; for the equal was made a lawful thing for men.” Ibid.

13 As observed by M.D.A Freeman to “the Stoics precepts of reason had universal force. They stressed the ideas of individual worth, moral duty and universal brotherhood” M.D.A Freeman, Lloyd’s Introduction to Jurisprudence, (London: Sweet & Maxwell, 2001) 94.
rights may be found in the Greek concept of *philanthropia* and the Roman formulation of the *humanitas Romana*.\(^{14}\) The universal virtues contained in *philanthropia* and *humanitas* are also reflected in the Roman Stoic school of thought. For example, Rhodes cites Cicero’s statement that the whole of this world is to be thought of as one common state of gods and men...Nothing is more certain than that it can be clearly perceived that we are born for justice, and that law is established not by opinion but by nature.\(^ {15}\)

In fact, in *De Re Publica* Cicero famously declares this idea of a universal law when he writes that true law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions... There will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times.\(^ {16}\)

These formulations of Natural Law outline the need to legitimate man-made laws by a higher law. The foundation of this type of a Universalist argument is contained in the twin concepts of *human dignity* and *human reason*.\(^ {17}\) However, none of these philosophical positions articulates in any form a categorical human rights law.\(^ {18}\) While the Stoics held on to the idea of a higher law creating normative standards that take precedence over ordinary man-made laws, later Roman law seems to create a different concept of Natural Law. For instance, David Boucher observes that the *Institutes* of Justinian and Ulpian *Digest* merely posited Natural Law as an idea that “established the inherent value and worth of law and of its equal

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15 Cicero, *De Legibus* as quoted by P.J Rhodes in above n 9 74.

16 Cicero (Clinton Walker Keyes, trans.) *De Re Publica: de Legibus*, (London: Heinemann, 1928) 211.


applicability to everyone” in contrast to a higher law. In other words, Natural Law provided a method of appealing to universal legal order to overrule arbitrary acts or laws of the State. The Natural Law school of the Greeks and the Romans merely provided a “transcendental ethical structure” by which man-made laws were to be judged and appealed against. Thus, Boucher suggests that it did not provide a tradition of Universalist (subjective) human rights in the modern sense of the term.

Nevertheless, it must be admitted that the philosophical traditions of the Natural Law school of this period did create a precedent in terms of creating a Universalist normative system. It was this meta-ethical conceptualization of a law above positivist prescriptions that became a potent legal theory in the hands of the Christian legal scholars of Europe through the middle ages to the Enlightenment period.

3.1.1.2 Moral/Religious Authority

(a) Christian Natural Law tradition

According to some scholars, there is nothing in the Judeo-Christian traditions that supports a concept similar to the modern human rights law. The Torah and the New Testament do not prescribe a theory of natural or human rights but are more in the nature of theonomous directives. This view has been supported by Brian Tierney and John Habgood. According to Tierney, the Ten Commandments of Moses was not a code of rights but Divine injunctions to the children of Israel. Similarly, Habgood observes that “it is a mistake to say that the Bible is about human rights, because that implies commitment to a concept and a way of thinking which did not then exist.”

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19 Above n 17 185.


Nevertheless, it has been claimed that St. Paul and (64 A.D) and St. Augustine (354-430 A.D) had also espoused a natural law stream of thought through their teachings. William Augustus Banner observes that the Augustinian enunciation of the concept of justice as “a reflection or transcript of the eternal law that ordains a natural order for all things” points towards a Natural Law line of thinking.

Natural Law acquired a distinctly Christian inflection in the hands of the Scholastics of medieval Europe (1100-1500 A.D). The Church used Natural Law to “proclaim the Christian doctrine of the personal Creator-God as the Author of the eternal law as well as of the natural moral law which is promulgated in the voice of conscience and in reason.” The works of the Scholastic theologians reinforced Natural Law by basing it in Christian ideas of Divine Reason, Divine Wisdom and God-given laws. Even though this may be noted as a continuation of the Hellenistic and Roman Natural Law tradition, the religious inflection given to natural law by the theologians may be described as an attempt to validate Christian morality within an already established line of thinking on universal laws. In many ways, the promotion of a Christian Natural Law was an attempt to stamp the authority of faith-based laws (in particular during the Protestant Christianity Reformation period (1517-1648) most of the advocates of Christian Natural law were Protestants) over secular laws of the different European States. Thomas Aquinas (1225-1274) described Natural Law as eternal in character and consisting of moral principles that were discoverable through human reason and Divine Wisdom. Aquinas noted that the “light of natural reason, whereby we discern what is good and what is evil, which is the function of

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25 Aquinas observes that “the whole community of the universe is governed by Divine Reason” St. Thomas Aquinas, excerpts from Question:91 of ‘Summa Theologica’ in Patrick Hayden (ed.) *The Philosophy of Human Rights* (St.Paul, MN, Paragon House, 2001) 44-45. It is argued by some that the idea of natural rights in European jurisprudence predates Aquinas.
the natural law, is nothing else than an imprint on us of the Divine light.” He contended that such an understanding of Natural Law restored “dignity” to the individual, delivered justice based on human reason and provided for the general “good” of mankind. Although Aquinas did not categorically propose a natural rights theory in the modern sense of the term implying subjective rights (i.e., entitlements or claims intrinsic to human beings) it has been suggested that he used the idea of justice synonymously with the concept of natural rights. According to Michel Villey, subjective rights in the Natural Law school of thought emerged from the works of William of Ockham (1288-1347). Villey posits that Ockham’s equation of *ius* with *potestas* (i.e., right and power) is directly related to the modern conceptualization of human rights where the sovereign authority of the State guarantees the rights to all individual subjects. The Dutch Protestant scholar Hugo Grotius (1583-1645) made significant contributions in the development of a natural rights theory from within the Natural Law tradition. Grotius’ idea of rights is clearly subjective in that he ascribes rights to man in a state of nature prior to the State. As noted by Richard Tuck, Grotius believed that “natural man was the subject of

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26 Above n 25.

27 This is also sometimes referred to as “Christian Natural Law theory”. For more details, see Heinrich Rommen in above n 24.

28 Above n 20 7. In contrast, “objective rights” implies ontological rights or “what is objectively right, that is, right insofar as it has been determined by law, nature, God, or simply by the universal demands of justice and/or fairness.” See Gary Bruce Herbert, *A Philosophical History of Rights* (New Brunswick, N.J.: Transaction Publishers, 2002) xiii and 71.


30 According to Tierney [citing from Michel Villey’s *La formation de la pensée juridique moderne. (4th Ed.)* (Paris, 1975)] Villey believed that Ockham equated *ius* and *potestas* and conceptualized a natural rights theory that was ideologically Christian. Since ‘right’ was equated to ‘power’ Ockham believed that God has absolute power and that God “confers power on men, primarily a power of appropriating external goods… and a power of instituting rulers. The ruler then has the power of legislation…From human laws come *dominium*, usufruct, right of use – subjective rights guaranteed by State authority. The rights are all absolute.” Above n 21 30.
In the Grotian state of nature, God gave all things to mankind and men enjoyed certain rights that were inalienable.\textsuperscript{31} Human beings were sociable by nature and all rights emerged out of this “sociability”. According to him, the purpose of “society is, that everyone should quietly enjoy his own [right]” with the help of the whole community. Thus, the right to enjoy “lives, limbs and liberties” cannot be invaded without causing manifest injury.\textsuperscript{33} Grotius suggests that Natural Law was inseparable from human nature and that the former would exist even if the hypothesis that God did not exist, was true.\textsuperscript{34} Despite this otherwise-called ‘impious hypothesis’, it is evident in the works of Grotius that according to him the original source of everything in nature was God. In \textit{De Jure Belli et Pacis}, Grotius notes that

> Natural law is a dictate of right reason indicating that an act, on account of its conformity or lack of conformity with rational nature, has in it a quality of moral turpitude or moral necessity, and that consequently such an act is either commanded or prohibited by God, the author of nature.\textsuperscript{35}

Perhaps the biggest contribution in the development of a Natural rights theory within the Natural Law tradition may be attributed to John Locke (1632-1704). He postulated the existence of man in the “state of nature” prior to the social contract that led to the creation of the State. In Locke’s “state of nature”, everyone lived in “a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the Law of Nature”.\textsuperscript{36} Locke devised a

\begin{itemize}
\item \textsuperscript{31} Richard Tuck, \textit{Natural Rights Theories: Their Origin and Development} (Cambridge: Cambridge University Press, 1979) 61.
\item \textsuperscript{32} Grotius considered certain categories of things to be by nature inalienable and others alienable. Inalienable things are “things which belong so essentially to one man that they could not belong to another, as a man’s life, body, freedom, honour”. However, he recognizes certain limitations on these rights that may be imposed by civil law. Above n 31 70.
\item \textsuperscript{33} Above n 31 73.
\item \textsuperscript{34} Oskar Köhler describes this as the “detheologisation of natural law” in Hubert Jedin & John Patrick Dolan (eds.) \textit{History of the Church, Vol.10 The Church in the Modern Age} (London: Burns & Oates, 1981) 319-320.
\item \textsuperscript{35} Hugo Grotius “De Jure Belli et Pacis” as quoted by Brian Tierney in above n 21 327.
\end{itemize}
rights theory that was still grounded in Christian theology as is evident from his explanation of the law of Nature. According to him,

the state of Nature has a law of Nature to govern it, which obliges everyone, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possession; for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into this world by His order and about His business; they are His property, whose workmanship they are made to last during His, not one another’s pleasure.  

The Lockean position on Natural Law suggests the existence of a priori and universal rights in man in the “state of Nature”. Michael Freeman considers this as an early dawn of the modern universal human rights theory. Locke’s emphasis on property rights and the liberty of man in the “state of Nature” further suggests the importance of the autonomy of the individual over the community. His concept of the autonomous individual as a rights-holder independent of the community seems to have deeply influenced the French Declaration of the Rights of Man and Citizens (1789) and the Bill of Rights in the American Constitution (1791), two important predecessors of the UDHR. For instance, Article 1 of the French Declaration states that “men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.” The Lockean influence of natural rights is even more explicitly incorporated in the American Declaration of Independence (1776) and in the Constitution of Virginia (June 29, 1776). For example, Section One of the Constitution of Virginia declares that,

37 Above n 36 72-73.


40 The preamble to the American Declaration of Independence (1776) states that “We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness...” “Declaration of Independence: July 4, 1776” The Avalon Project at Yale Law School, online at: <http://www.yale.edu/lawweb/avalon/declare.htm> [last visited: 23.09.2007]
“all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”\textsuperscript{41}

The Natural Law stream of thought included in Lockean thinking as well as in the American Declaration of Independence continues to be primarily Christian in concept. This is evident in the Jeffersonian inclusion of the phrase “the laws of nature and of nature’s God” in the Declaration of Independence (1776).\textsuperscript{42} This tradition of Natural law and Natural rights found a strong representation in the ideological development of constitutional law in many Western countries and also in the emergence of international law in the European context. In an editorial comment, Joseph L. Kunz had observed that “our [contemporary] international law is a creation of Christian Europe...based on the value system of the Occidental culture, on Christian, and often Catholic, values.”\textsuperscript{43}

(b) Universality derived from other religious traditions

Theocentric arguments to justify universal human rights have been put forward by advocates of religious traditions other than the Euro-centred Christianity. In fact, it has been aptly observed by Max L. Stackhouse that human rights as a “religious-ethical orientation” is universal because like human rights “various religious ethics identify certain ultimate meanings and certain relationships as holy or sacred.”\textsuperscript{44} According to this approach, universality of human rights is discoverable in

\textsuperscript{41}“The Constitution of Virginia; June 29, 1776” The Avalon Project at Yale Law School, online at: \texttt{<http://www.yale.edu/lawweb/avalon/states/va05.htm>} [last visited: 23.09.2007]

\textsuperscript{42}“Declaration of Independence: July 4, 1776” The Avalon Project at Yale Law School \texttt{http://www.yale.edu/lawweb/avalon/declare.htm} [last visited: 23.09.2007]

\textsuperscript{43}Joseph L. Kunz, “Pluralism of Legal and Value Systems and International Law” (1955) 49 American Journal of International Law 371.

\textsuperscript{44}Max L. Stackhouse, \textit{Creeds, Society, and Human Rights: A Study in Three Cultures} (Grand Rapids, Mich: William B. Eerdmans Publishing, 1984) 6. He further explains the religious basis of universal human rights by noting that “each view of human rights entails an ultimate metaphysical-moral vision about what is meaningful, about what relationships or memberships are sacrosanct, and what social
the normative standards found in the various religious laws. Such \textit{theonomic} \textsuperscript{45} legitimizations of universality, in effect, merely provide local justifications within different religious traditions to support an already presumed universality of human rights. For instance, Recep Senturk, a Turkish scholar, attempted to locate a universalist foundation of human rights within the Hanafi jurisprudence of Islamic Shari‘ah. \textsuperscript{46} In a slightly more scholastic tone, Riffat Hassan tries to establish that many of the human rights enumerated in the UDHR and other international human rights documents are discoverable in the “human rights granted to humankind by God” as enumerated in the Qur’an. \textsuperscript{47} In a similar manner, Kenneth K. Inada uses the twin concepts of “Dharma” and “Bodhisattva” to explain the pursuit of universal human rights within the Buddhist tradition. \textsuperscript{48} Many studies have also attempted to justify a similar universalist perspective of human rights from Hindu, Confucian and

\textsuperscript{45} In the present context, the term only signifies laws based on religious traditions or laws inspired by God, in general. It does not connote any peculiar conceptual understanding such as found in the Calvinist theonomic movement.

\textsuperscript{46} Recep Senturk, a Turkish scholar, argues that universalistic characteristics and an accommodationist policy towards human rights is found in the jurisprudence of the Hanafi school associated with Imam Abu Hanifa an-Nu‘man ibn Thabit, the oldest of the four Sunni schools of jurisprudence. See, Recep Senturk “Sociology of Rights: Human Rights in Islam between Communal and Universal Perspectives” (forthcoming book of the same title) draft project paper is found in Emory Law School’s Islam and Human Rights online at: \url{http://www.law.emory.edu/ihr/worddocs/recep3.doc} [last visited: 18/10/2007]

\textsuperscript{47} According to Riffat Hassan the Qur’an “contains references to more ‘rights’ than can be enumerated” and her main contention against the prevailing disdain for human rights in Islamic countries is the seemingly “irreconcilable gulf between Qur’anic ideals and the realities of Muslim living” – a gulf that she optimistically believes can be bridged. Among the specific rights found in the Qur’an, she lists the right to life; right to respect; right to justice; right to freedom; right to privacy; right to protection from slander, backbiting and ridicule; right to ‘the good life’ etc. See, Riffat Hassan, “On Human Rights and the Qur’anic Perspective” in Arlene Swidler (ed.) \textit{Human Rights in Religious Traditions} (New York: The Pilgrim Press, 1982), 64.

\textsuperscript{48} Professor Inada explains that “‘Bodhisattva’ means the enlightened being or the nature of a perfect being”, while “Dharma” stands for the “true norm of existence” that establishes the enlightened way of life. According to him, together these two concepts promote a universalistic understanding of human rights. Kenneth K. Inada, “The Buddhist Perspective on Human Rights” in Arlene Swidler (ed.) \textit{Human Rights in Religious Traditions} (New York: The Pilgrim Press, 1982), 71 and 74.
other religious traditions. Common to all these studies is the transcendental approach to justifying universality of human rights. Religious normative standards are used as a transcendental argument to validate universality.

However, such attempts to justify the universality of human rights through theonomic or religious normative standards are fundamentally problematic. Every religion proposes a set of universal laws that the faithful of that religion are required to follow in order to achieve the ultimate good, be it salvation or Bodhisattva, moksha or nirvana. Furthermore, religious normative structures are ordered along a hierarchy that attributes the “highest law” status to those found in sacred texts. Each of these sacred texts or highest laws has a universal validity to the believers or faithful of the respective religious tradition, which may not be shared with equal vigour by non-believers or outsiders to the faith. Consequently, every religion may be deemed to promote a claim for having espoused the original higher law.

Such multiplicity of “higher laws” and their diverse interpretations (even within the religious tradition in question) raises a difficult issue: which Divine law or which religious law contains the correct representation of universal rights? Contesting claims of universality emerging from different religious traditions do not help to remove the difficulty in deciding the correct “higher law”, especially when each religion emphatically argues for primacy. This is in particular the case with the Abrahamic religions of Judaism, Christianity and Islam. This approach also runs into the difficulty of having to contend with conflicting contents of the “higher law” discoverable in the different religious traditions. Moreover, as John Witte Jr. has

observed, “none of these religious traditions [Judaism, Christianity and Islam] speaks unequivocally about human rights, and none has amassed an exemplary human rights record over the centuries.”

It may, therefore, be noted that advocating universality of human rights only through theonomic arguments seems to be rather far-fetched.

3.1.1.3 Self-evident truth

Self-evident truth justifications of universality start from the premise that human rights are evident a priori from the mere fact that one believes them to be so, requiring no further proof. This is different from the Natural Law school of thought discussed above primarily because it poses no transcendental justification attributable to a higher law in order to validate universality. Nor does it posit a “state of nature” that supports a higher law position or natural rights point of view. The “self-evident truth” perspective is also different from the theonomic school of thought presented above because it does not attempt to support universality by relying on a religious tradition of any sort.

Simply put, it merely declares what is apparently evident and provides no reason to substantiate its claim of universality. In fact, it has been observed by Wouter H. Slob that it is “senseless” to argue for a self-evident truth thesis such as the universality of human rights “precisely because it is self evident...if argumentation is needed to such an end, this simply means that the matter in question is in fact not self-evident.”

The most famous self-evident advocacy of rights is

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found in the American Declaration of Independence pronouncement that equality and “unalienable rights” of “life, liberty and the pursuit of happiness” are self-evident truths.52

Some of the principal declarations of rights including the French Declaration of the Rights of Man and Citizens and the Universal Declaration of Human Rights (1948) may be placed within this tradition of self-evident truth justifications.53 The UDHR subscribes to a self-evident truth theory similar to the American Declaration of Independence, to the extent that both these documents appear to proclaim certain rights as evident by themselves, requiring no further justification. The UDHR talks about “inherent dignity” and “equal and inalienable rights of all” in a similar manner as the Jeffersonian Declaration holds the “self-evident truths”. Referring to the American Declaration, Michael P. Zuckert explains that self-evident truths, “bears the evidence for their truth in themselves. If one understands them properly, one sees that they must be true, and moreover, that there is no other way to establish their truth.”54 The Jeffersonian usage of the phrase in the American Declaration has also been associated with moral sense theory of ethics which asserts that ethical positions

52 According to Mahoney, the philosophical underpinning of this Jeffersonian turn of phrase is attributable to moral intuitionism. See Jack Mahoney, The Challenge of Human Rights: Origin, Development, and Significance (Malden: Blackwell Publishers, 2007) 122

53 The similarity in the formulation of these universalist rights declarations cannot be taken as a coincidence, more so in the context of the UDHR. As noted by Johanne Morsink, “on 10 December 1948 delegates made many favourable comparisons between the Universal Declaration they were about to adopt and the eighteenth century declarations, particularly the French Declaration of 1789. Thus, the similarity of the language between the Universal Declaration and the eighteenth century declarations of rights should not be taken too lightly.” Johannes Morsink, “The Philosophy of the Universal Declaration” (1984) 6 Human Rights Quarterly 309. Morsink also observes that the debates of the Third Committee of the United Nations that discussed the proposals made by the Commission of Human Rights (drafts of the Universal Declaration) were greatly moved by the members’ commitment to and belief in the Enlightenment philosophy of natural rights and liberalism.

54 Michael P. Zuckert, “Self-evident truth and the Declaration of Independence” (1987) 49 (3) The Review of Politics, 323. Zuckert is of the opinion that the “analysis of the language, the logic, and the historic connections of the text all point to the same conclusion: the truths announced in the Declaration are not in fact self-evident, nor are they pronounced to be.” Hence, the “truths” noted in the American Declaration are “to be held as if self-evident within the political community dedicated to making them effective.” Ibid., 329.
are simply intuited by men through a special ability or “moral sense”\textsuperscript{55}. It is a project that is critical of the Enlightenment morality. Similarly, the UDHR also appear to have influences of \textit{ethical intuitionism}. The “inherent” and “inalienable” rights proclaimed in the UDHR are validated almost intuitively, while the universality of these rights is automatically presumed by mere declaration or assertion. As noted by Frank Thilly, ethical intuitionism starts off with the premise that

\begin{quote}
we have somehow an intuitive knowledge of right and wrong. We do not first compare our acts with an external end or purpose, but pronounce judgment directly, because we have a conscience. This faculty is inborn; every human being possesses an innate knowledge of right and wrong, and does not first acquire that knowledge by reflecting upon the defects of acts.\textsuperscript{56}
\end{quote}

The basic argument underlying the “self-evident truth” approach to justifying universality of human rights is simple: knowledge of right and wrong is comprehended and comprehensible a priori to every individual by using an inborn conscience. By using this conscience people can judge the universality of human rights. Amitai Etzioni, the noted communitarian philosopher, describes this type of intuitionist self-evident truths as “compelling moral concepts”\textsuperscript{57} and argues that such notions exist across civilizations and religious traditions.\textsuperscript{58} He seems to suggest that universality of human rights such as the right to life and health are justified when examined by using “compelling moral notions”. However, it must be noted that the universal feature of the comprehensibility of Etzioni’s “compelling moral notions” is limited only to those who “are ready to discover universal moral truths”.\textsuperscript{59}


\textsuperscript{58} Above n 57 21.

\textsuperscript{59} In order to discover these moral truths one must heed the “inner moral sense, be able to examine freely its implications, and not be diverted by claims that there is nothing to look for, or that there are no shared and lasting moral truths whose validity holds beyond that of any culture, civilisation, or historical period.” Amitai Etzioni “Response” in Don Browning (ed.) \textit{Universalism vs. Relativism –
All of these attempts to use a “self-evident truth” approach to validate universality of human rights show an overarching transcendentality that is not explainable by any other means except through simple pronouncement. Hence, this approach fails to help us in assessing which “moral truth” prevails in a case of conflicting “moral truth” claim nor does it explain why the particular rights so selected, deserve to be considered as falling within the “universal moral truths”.

3.1.2 A posteriori justifications

A priori justifications of universality of human rights engage three major lines of arguments (i.e., universality based on ratification, overlapping consensus and political universalism). All the three arguments start off by making a radical departure from the above discussed theoretical bases that rely on some form of transcendental justification for the validity of universal human rights.

The basic premise of the a posteriori justifications stems from the understanding that universality of human rights is a determinate feature of international law, ascertainable from existing facts. One line of argument is that this determination is evident from the ratification of the international human rights treaties, while others offer as evidence the existence of an international consensus on universalism and still others consider it as part of the prevailing international political reality. No effort is made to bring in a transcendentalist argument to validate these claims.

In many respects, the a posteriori justifications bear the hallmark of legal positivism. Basically, it posits that universal human rights “stand and fall with

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60 Thilly notes this drawback in the intuitionist approach and comments that “to say that the adult civilised conscience is innate in the sense that it knows a priori, without experience and education, what particular acts are right and wrong, is equivalent to abandoning all explanation.” Above n 56, 493.
positive law guaranteeing them and giving an effective remedy against their violation in independent and impartial courts”.  

Such an approach, in the words of Tom D. Campbell, guards “against empty rhetoric and hopelessly fuzzy conceptual edges” that are predominant in the a priori justifications of universality.  

Campbell’s obvious reference is to the appeal to axiological explanations of the concept of natural and inherent rights in the Natural Law tradition. While most of the a posteriori justifications attempt to distinctly separate the ‘legal’ from the ‘moral’, some of the schools of thought within this tradition appear to incorporate traits of moral justifications of universality, in particular the “overlapping consensus” approach and the “relative universality” theory.

3.1.2.1 Universality through ratification of treaties or international human rights regimes

According to this line of reasoning, acceptance and ratification of normative international human rights regimes by States parties indicates an acknowledgment of universality. It promotes the idea that the vast array of international human rights declarations, treaties and conventions has created an international regime on human rights to which the majority of States have committed themselves, thereby creating what Louis Henkin referred to as “legal universality”. In other words, universality

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64 “The second half of this century [20th] has given the idea [human rights] legal universality as well. The concept of human rights has been enshrined in the UN Charter, to which virtually all States are parties. The Universal Declaration of Human Rights has been accepted by virtually all States. The international covenants and conventions on human rights have been widely adhered to, and there is a
of human rights is empirically established from States’ commitment and compliance with this human rights regime.

As noted above, this approach is reminiscent of legal positivism. In the words of Judge Alvarez, such human rights declarations and treaties are not only universal but are also “the Constitution of international society, the new international constitutional law.”65 Jack Donnelly calls this “international normative universality” of human rights in the sense that the norms included in the human rights regimes are “almost universally accepted” or have become “ideal standards”.66 There is no attempt to derive universal moral values or meta-ethical notions of universality of human rights. Instead, the international human rights regime is considered as a system of positivist normative standards that States parties have voluntarily accepted and ultimately followed by incorporating them in the domestic legal system.67

This “top-down” approach is hinged on the argument that human rights are universal because of a “deliberate choice” made by States. Eva Brems highlighted this point when she noted that the international human rights regime, starting off with the UDHR were drafted as

a catalogue of fundamental norms for all human beings everywhere.

The important question is not whether these norms could be found in all human societies, nor whether all societies were represented ... It

65 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, (1951) International Court of Justice Reports 15 (Individual Dissenting Opinion of Judge Alvarez), 49-55. Indeed, Kunz goes to the extent of describing the UDHR as a positivist exposition of law. See also above n 61. Elsewhere, the UDHR has also been described as the “fountainhead or constitution or grand statement of the human rights movement”. See also Henry J. Steiner and Philip Alston, International Human Rights in Context – Law, Politics, Morals (Oxford: Clarendon Press, 2008) 152.


67 Above n 61.
is clear that this was not the case. The significant fact is that a choice was made to give these norms [UDHR] universal validity.68

Two features of the “deliberate choice” justification are worthy of examination. Firstly, it defines “universal” in terms of numbers i.e., membership in the human rights regime. Consequently, the universalism that is posited is not ontological or transcendental universality but an “argument for universality”, given the fact that human rights are explained as universal ex post facto with the entry into force of the human rights treaties.69 The second aspect that is to be noted is that under the “deliberate choice” approach, universality as an attribute of human rights stems from a contractual basis i.e., from treaties (or other State practice in the case of custom). Although human rights treaties have been described as normative treaties by some scholars,70 the prevailing legal regime on treaties makes no such distinction, as is evident from the position of the ILC on the subject. Human rights treaties, although having “normative clauses”, are in the end contractual treaties entered into between sovereign and independent States parties.71 The international human rights

68 Eva Brems “Reconciling Universality and Diversity in International Human Rights Law” in András Sajó (ed.) Human Rights with Modesty: The Problem of Universalism (Leiden/Boston: Martinus Nijhoff Publishers, 2004), 216 (emphasis added). A similar position was espoused by Margaret McDonald in the late 1940s when she asserted that “value utterances [such as human rights] are more like records of decisions than propositions. To assert that ‘freedom is better than slavery’ or ‘all men are of equal worth’ is not to state a fact but to choose a side.” Margaret McDonald “Natural Rights” in Jeremy Waldron (ed.) Theories of Rights (Oxford: Oxford University Press, 1984) 35.

69 Mark Goodale “On Universality and the Transnational Validity of Human Rights” Reframing Human Rights I: The Berlin Roundtables on Transnationality 3-7 October 2005 (Berline: Irmgard Coninx Foundation). According to Goodale “ontological universality” defines human rights as being “possessed by each person who is, has ever been, and will ever be, a ‘human’, meaning a member of the class [of] homo sapiens; that these human rights exist objectively, irrespective of the entire range of the dependent conditions of human existence”. See online at: <http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/archive/026%20Goodale.pdf> [last visited: 18/10/2007]


regime may be described as consisting of the ICCPR, ICESCR, CERD, CAT, CEDAW, CRC, apart from the UDHR. Out of the 192 member States of the United Nations as on 14 July 2006 a total of 153 States were party to ICESCR, 156 to ICCPR, 170 to CERD, 141 to CAT, 183 to CEDAW and 192 to CRC. Going by the number of States parties, it is evident that some of these treaties have received almost universal participation. In fact, the CRC has been accepted by all the UN States parties and if one were to follow Henkin’s “legal universality” concept, this is one treaty that may be deemed to be universal. Similarly, with only nine UN members not having become States parties to CEDAW, it may be deemed to have received near-universal membership.

Although this positivist thesis explains what is empirically evident in international relations, it does not provide a foundational argument that can adequately promote universal legitimacy of human rights. For instance, mere ratification of human rights regimes does not establish the fact that the particular rights in the ratified treaties have gained universal acceptance and applicability through domestic laws. In fact, Oona A. Hathaway points out that sometimes States parties ratify treaties only in a nominal sense without effecting serious internal change to adopt the normative standards. Furthermore, as pointed out by Alison Dundes Renteln, promoting ratification as an argument for universality indicates a legalistic approach to universality. It is not infrequently that those who ratify treaties in a State are the “elites” whose views may not only be not representative but at


times even opposed to those of the citizens, and there may also be cases when “ratification may serve political and not humanitarian interests”.76 Political interests may range from demonstrating an avowed adherence to international human rights standards in the face of a domestic human rights crisis or it may even indicate an attempt to reintegrate with the international community “especially after a period of isolation, symbolizing a break with an authoritarian past”.77

Moreover, the wide practice of making substantive reservations to international human rights treaties posits a trumping argument against the “universal” acceptance thesis that is fundamental to this justification. For instance, the CRC that was ratified by all the 193 States of the UN has a long list of over 73 reservations, declarations or interpretative declarations attached to it, that qualify the consent given by these 193 States parties of the Convention. These 73 reservations and declarations at times represent strongly entrenched positions of States parties. So far, only four States parties have completely withdrawn their reservations to the CRC.78 Furthermore, the case of the Saudi Arabian abstention during the voting on the UDHR marked the beginning of a persistent practice of the formulation of Shari`ah-based reservations to human rights treaties by Islamic States. This abstention from voting for one of the basic documents of the international human rights regimes, that also constitutes the primary referral for almost all of the principal human rights treaties, significantly reminds one of the divergence of views on the universal legitimacy of the normative standards contained in the international human


78 Malta, Norway, Pakistan and Slovenia have completely withdrawn their reservations to CRC. For the list of declarations and reservations to the Convention see online at: [http://www.ohchr.org/english/bodies/ratification/11.htm#reservations](http://www.ohchr.org/english/bodies/ratification/11.htm#reservations) [last visited:18/10/2007].
rights regime. Further, the Shari`ah-based reservations argue against an ontological universality of some of the particular human rights.

In fact, the persistent practice of formulating reservations to human rights treaties by Islamic States may, to borrow the language of Eva Brems, arguably be viewed as a “deliberate choice” of these States not to accept the universality of the contentious human rights such as freedom of religion. Nevertheless, the argument for universality through ratification can be credited for devising a procedure for achieving universality as an ultimate goal of the human rights regime. It would not be entirely remiss to assert that in the process of constructing “universality” through proclamation, this approach hastily adopts a positivist stand and ignores the sociological diversity prevailing in the community of States. We may recall Hans Morgenthau’s criticism of positivism in international law as a pertinent observation in this context, i.e., when such ‘universalized’ human rights are schematically applied to societies that are clearly distinct in nature “this method was bound to produce entirely inadequate results”.

This inadequacy is evident in current disagreements over universality and the pluralist conceptualization of human rights, with the subject of reservations being a case in point.

### 3.1.2.2 Modest Universalities (Minimalist Universality, Consensus and Relative Universality)

While most of the justifications explained above have taken an absolute or thick universality stand (i.e., that human rights are universally valid without contest), contemporary accounts seem to take a more modest position. There seems to be an effort to recognize that divergences in theoretical and practical positions on universality are real and need to be taken into account in any assessment of universality claims. As a result, several modest concepts of universalist justifications of human rights have been put forward recently. Of these, the Minimalist

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Universality, the Consensus on Universality and the Relative Universality theories are noteworthy.

(a) Minimalist Universality

Proponents of Minimalist Universality start off with an acknowledgement of the existence of divergent foundational arguments for the universality of human rights. From here they proceed to argue that whichever foundational position one may take and no matter how far-reaching the differences are on particular human rights norms, there are some minimum human rights that people from across the spectrum will agree upon. Such a commonly agreed set of human rights norms are necessarily minimal and must constitute the basic or fundamental normative standards of universal validity or legality. Any violation of such basic, fundamental or minimal rights is deemed to be “insufferably, unarguably wrong”.  

This thin universalism is best described by Michael Ignatieff when he observed that

the universal commitments implied by human rights can be compatible with a wide variety of ways of living only if the universalism implied is self-consciously minimalist. Human rights can command universal assent only as a decidedly 'thin' theory of what is right, a definition of the minimum conditions for any kind of life at all.  

The Minimalist theory becomes a universalist one because it presumes that “universal assent” is an important requisite to the whole international human rights regime. In other words, it is the acceptability of the human rights by the pluralist international community that makes it truly universal and legitimate. Acceptability can only become a reality when the agreeable norms are minimalist in nature, thereby making pluralist differences negligible and, hence, tolerable. In the words of Joshua Cohen, this emphasis on tolerable universality ends in creating “a very thin

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81 Above n 80 56 (emphasis added).
set of normative principles” of human rights. In some ways, this approach is a reaction to the ongoing conflict between the absolute universalists and relativists and the notion that “anything desirable” can constitute a right, what Ignatieff refers to as the “rights inflation”. Hence, the Minimalist approach implies that the existing international human rights regime consisting of the UDHR and the various human rights treaties, besides contributing to an inflation of the rights content, are also too broad to create the necessary tolerability that would make them universal.

The difficulty with this approach is that while the Minimalists describe the need for a small core of human rights that is acceptable to all, they do not list the substantive contents of this minimum core. According to Ignatieff, the core rights are rights that create “negative liberty” or normative standards that “define and proscribe the ‘negative’, that is, those restraints and injustices that make any human life, however conceived, impossible; at the same time, it does not prescribe the ‘positive’ range of good lives that human beings can lead.” While Ignatieff notes personal security and bodily integrity rights such as freedom from torture, killing, assault and rape, Steven Lukes describes a different set of basic rights that can secure “agreement across the broad spectrum of contemporary political life”. Lukes’ selection of core “reasonably short and reasonably abstract” set of rights includes “basic civil and political rights, the rule of law, freedom of expression and association, equality of opportunity, and the right to some basic level of material

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83 Above n 80 90.

84 In fact, Maurice Cranston had earlier argued against the inclusion of the social and economic rights in the UDHR, since these were not “authentic human rights” that can be translated into real positive rights like the civil and political rights of ICCPR. See Maurice Cranston, What Are Human Rights? (New York: Taplinger Publ. Co., 1973) 68.

85 Above n 80 69.

86 Above n 80 75. Ignatieff identifies “torture, beatings, killings, rape, and assault and ... the security of ordinary people” as the key concerns of this minimalist human rights.” Ibid., 173.

well-being, but probably no more.”

It is, therefore, evident that the minimalist theory of universality looks at promoting a far smaller substantive content of human rights than are presently contained in the international human rights regime. Nevertheless, the thin universality that Ignatieff promotes is attractive because of the effort it makes to incorporate the pluralist interpretations of human rights.

(b) Consensus based Universality and Relative Universality

The idea that it is possible to discover an international consensus on certain human rights norms is largely premised on John Rawls’ theory of “overlapping consensus”. Rawls put forward the theory of Overlapping Consensus mainly to establish, in the context of constitutional democracies, “how a well-ordered society can be unified and stable” in spite of the existence of diverse religious, moral and philosophical traditions. He points out that what is needed is a regulative political conception of justice that can articulate and order in a principled way the political ideals and values of a democratic regime, thereby specifying the aims the constitution is to achieve and the limits it must respect. In addition, this political conception of justice needs to be such that there is some hope of its gaining the support of an overlapping consensus, that is, a consensus in which it is affirmed by the opposing religious, philosophical and moral doctrines likely to thrive over generations in a more or less just constitutional democracy, where the criterion of justice is that political conception itself.

88 Above n 87.
89 However, this approach nurtures a cultural sensitivity that is absent in all the other universalist justifications examined so far. It is perhaps such cultural sensitivity of this approach that is appealing to theorists who are trying to find a medium way in the Universalism v. Relativism debate in human rights. In the context of Islamic reservations to human rights, some writers like Abdullahi An-Na’im seem to favour a minimalist approach. See, Abdullahi An-Na’im “Toward a Cross-Cultural Approach to Defining International Standards of Human Rights” in Abdullahi An-Na’im (ed.) Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (Philadelphia: University of Pennsylvania Press, 1992) 27.
To begin with, Rawls points out that the diversity in the religious, cultural, philosophical and moral traditions or what he calls “reasonable comprehensive doctrines” is a reality of modern democracies.\textsuperscript{91} Such pluralism is real and permanent.\textsuperscript{92} Rawls was of the view that a consensus on the liberal political conception of justice\textsuperscript{93} emerges from the divergent worldviews of these different reasonable comprehensive doctrines, without any one of them compromising on their respective doctrines.\textsuperscript{94} This overlapping consensus on a liberal political concept of justice is possible because adherents of all reasonable comprehensive doctrines find liberal concepts of justice to be reasonable.\textsuperscript{95} Such an overlapping consensus is derived from asserting “the least controversial form” of “the least that must be asserted” of the comprehensive doctrines.\textsuperscript{96} It is notable that the consensus that Rawls seeks to achieve from his theory is political as opposed to religious, moral or philosophical comprehensive doctrines; thus, his “political conception of justice is presented as a freestanding view.”\textsuperscript{97} While Rawls’ theory is concerned mainly with the pursuit of justice as a political concept in liberal constitutional democracies, the

\textsuperscript{91} He observes that “the diversity of comprehensive religious, philosophical and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy. Under the political and social conditions that the basic rights and liberties of free institutions secure, a diversity of conflicting and irreconcilable comprehensive doctrines will emerge, if such diversity does not already exist.” John Rawls “The Domain of the Political and Overlapping Consensus” in Derek Matravers & Jon Pike (eds.) \textit{Debates in Contemporary Political Philosophy} (London: Routledge, 2003) 161.

\textsuperscript{92} Above n 90 4 (footnote7).

\textsuperscript{93} According to Rawls there are three main characteristic contents of a liberal political conception of justice; “first, a specification of certain basic rights, liberties and opportunities (of a kind familiar from constitutional democratic regimes); second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to claims of the general good and of perfectionist values; and third, measures assuring to all citizens adequate all-purpose means to make effective use of their liberties and opportunities.” John Rawls \textit{Political Liberalism} (New York: Columbia University Press, 1993) 6.

\textsuperscript{94} Above n 93 147-148.

\textsuperscript{95} “For whether or not all reasonable citizens see liberal principles of justice as objective or true, all of them (even moral sceptics) should find liberal principles to be reasonable principles of justice for persons who conceive of themselves as free and equal moral persons.” Samuel Freeman \textit{Rawls} (London: Routledge, 2007) 368

\textsuperscript{96} Above n 90 8.

\textsuperscript{97} Above n 93 12.
theory has also been applied in arguing for a consensual universality of human rights.  

The significance of the Rawlsian theory for the contemporary debate on human rights has been highlighted by Heiner Bielefeldt when he described it as creating the possibility for the co-existence of “plurality of different worldviews, ideologies, religions, philosophical doctrines” while at the same time creating “limits of political tolerance in a liberal society”. This approach attempts to combine sympathetic aspects of universal human rights from various religious, philosophical or moral traditions (i.e., Rawls’ “reasonable comprehensive doctrine”) into a political and legal conceptualization of international human rights. The advantage of such an approach, according to Bielefeldt, is that it provides a method to “maintain the connection between human rights and religious or cultural tradition without getting trapped in the culturalist fallacy.”

While maintaining that the modern concept of universal human rights is a “Western” concept, Jack Donnelly observes that this universality is also affirmed through an “overlapping consensus” in the contemporary world. Donnelly argues that the various comprehensive doctrines in the different regions of the world “endorse the idea that every human being has certain equal and inalienable rights and is thus entitled to equal concern and respect from the State”. He is of the view that such a consensus is centered on the UDHR which becomes a referral point for

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100 Above n 99 114.


overlapping consensus. The consensus emerges out of a voluntary acceptance of the norms by people across the cultural spectrum. In fact, he argues that in general people do not conceive human rights in a “sophisticated sense” because there is general agreement that everyone is “entitled to equal treatment and certain basic goods, services, protections, and opportunities” such as those included in the UDHR. At a conceptual level, most of the religious traditions of the world indeed agree on the idea that human beings have special rights. It is plausible that the “ordinary” person (belonging to whichever religious tradition) shares the overlapping consensus noted by Donnelly and Bielefeldt simply because the UDHR norm resembles an internal cultural norm with which he is more familiar. At a basic level, perhaps certain cultural norms are shared by those who are able to arrive at a position of overlapping consensus. It is for this reason that the argument for developing cross-cultural consensus based on normative equivalents of human rights in other cultures needs to be taken more seriously. It yields dual advantages of acceptability based on familiarity and legitimacy based on acceptance. Furthermore, Donnelly is correct in noting that the advantage of adopting the Rawlsian theory of overlapping consensus in the human rights debate is that it eliminates the trouble of having to respond to arguments of ontological universality based on any particular comprehensive doctrine. In other words, when explained within the overlapping consensus theory, ontological universality is irrelevant since it allows us to circumvent “not merely inconclusive but often pointlessly divisive disputes over moral foundations.”

A matter of practical importance in the application of an overlapping consensus theory to justify universality is the issue of the scope of the deemed universality. Two rules that Donnelly posits to assess this scope are pertinent here. Firstly, he notes that if the agreement generated from the overlapping consensus is “generally consistent with the structure and overarching values of the Universal Declaration, we should be relatively tolerant of particular deviations.” In other

103 Above n 101 291.
104 Above n101 292.
105 Above n 101 293.
words, if a State party accepts and implements general human rights standards as are denoted in the UDHR, non-implementation of and/or objection to the implementation of specific parts of the UDHR should be tolerated. This accommodation is contingent on the second rule that is, if such an argument for deviation from the UDHR is “deeply embedded within or of unusually great significance to some significant group in society”, then there is a prima facie need to give it “sympathetic consideration”.106 It is the application of such a tolerance of certain deviations from the UDHR that characterizes Donnelly’s “(relatively) universal human rights”.107 In some ways, this theory is an acknowledgment of what Rawls observed in his The Law of Peoples when he said that “if all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways…of ordering society.”108

This raises the question, what defines the standard of “toleration”? In reference to conflicting comprehensive doctrines in liberal constitutional democracies, Rawls argued that these comprehensive doctrines must be reasonable and “must be pursued in ways compatible with a reasonable political conception of justice” and public reason.109

So what is Donnelly’s formulation of a “reasonable political conception of justice”? He suggests, at times, that the ruling guideline is the UDHR and yet, he also allows “sympathetic consideration” of deviations from the UDHR as, for instance, in his discussion of Article 18 and the Shari‘ah proscription on apostasy.110 Nevertheless, he seems to suggest that a baseline consideration is personal autonomy. Any deviation that involves the breach of personal autonomy through force does not

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106 Above n 101 300-301.

107 In fact, he points out that “some deviations from authoritative international human rights norms may be, all things considered, (not il)legitimate.” Above n 101 300.


109 Above n 108 60.

110 Above n 101 301.
deserve our toleration, even though it may be “strongly sanctioned” by a comprehensive doctrine. Donnelly’s “relative universality” does not reject the operating legitimacy of the existing international human rights regime. What Donnelly seems to suggest is that while the legitimacy of the universality of the existing human rights regime is acceptable as a starting premise (including its “Western” origin), whenever and wherever this is challenged by a conflicting norm so strongly as to constitute a significant opposition arising out of “deeply embedded” values of a society, and provided that the conflicting norm does not result in violence, it deserves a high degree of tolerance as alternatively or correspondingly legitimate human right. This is a pragmatic formulation of a defensible legitimacy of universality especially in “hard cases” where it is difficult to assert an existing “universal human right” without creating a coercive effect on opposing particularist positions.

The foregoing discussions of the two principal approaches (i.e., the a priori and the a posteriori approaches) may be said to broadly justify universal legitimacy of the existing regime on international human rights. In doing so, they appear to merely provide ex post facto justifications for the present system. At the same time, these justifications seem to fail in taking stock of the equally pressing reality of the normative diversity prevailing in the community of States. None of the positions espoused by these two approaches can truly be said to address the question of cross-cultural normative diversity that appears to afflict the contemporary international human rights discourse. All the justifications of universality of human rights, thus far considered, assume political liberalism as the only appropriate philosophical underpinning of human rights. Perhaps to a limited degree, Donnelly concedes

111 Above n 101 304.

112 The only exception to this, to some degree, is Donnelly’s theory of “relative universality” that argues for tolerance of some deviations from the existing regime on human rights.

113 Rawlsian understanding of the concept of “overlapping consensus” of plural comprehensive doctrines is possible only within a liberal political domain. Rawls asserts that “political liberalism is not, then, a view of the whole of life: it is not a (fully or partially) comprehensive doctrine.” See “The Domain of the Political and the Overlapping Consensus” in Samuel Freeman (ed.) Collected Papers - John Rawls (New Delhi: Oxford University Press, 1999) 481. According to Rawls, political liberalism “...steers a course between the Hobbesian strand in liberalism - liberalism as a modus vivendi secured
incorporating the problem of diversity in his “relative universality” theory; nevertheless, he is prescriptive in endorsing political liberalism as the foundational underpinning for the universality of the existing regime. In fact, along with Rhoda Howard-Haussman, Donnelly asserts that

internationally recognized human rights, which are based on a liberal conception of justice and human dignity, represent the only standard of political legitimacy that has both wide popular appeal (in the North, South, East and West alike) and a concrete record of delivering a life of dignity in modern social and political conditions.\(^{114}\)

The authors contend that the existing human rights regime, based as it is on liberal traditions, is universal and therefore applicable even cross-culturally. Donnelly’s views of what constitutes an acceptable deviation from the present regime is itself, like the Rawlsian “reasonable comprehensive doctrine”, framed within a liberal understanding of human rights.\(^{115}\)

Although he seems to take an accommodative position on pluralism, his “relative universality” theory is largely circumscribed by the liberalist rule of thumb that deviations from the existing regime are acceptable “so long as they operate largely within the constraints at the level of concepts established by functional,

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\(^{115}\) According to Donnelly, “liberalism give[s] central place political place to individual autonomy, rather than to the liberty of society, the State, or other corporate actors.” Liberals see individuals as entitled to ‘govern’ their lives, to make important life choices for themselves, within limits connected primarily with the mutual recognition of equal liberties and opportunities for others.” Jack Donnelly above n 102 47.
international legal and overlapping consensus universality.” The “functional, international legal and overlapping consensus universality” refers in point of fact only to the existing human rights regime. Donnelly’s reticence, in his tolerable deviation argument, to fully engage with diversity both at a conceptual and hermeneutic level becomes evident in hard cases. His illustration dealing with the apostasy law in Shari’ah satisfies neither the liberalist nor the conservative Muslim perspective as followed in, for example, Saudi Arabia. This inbuilt limitation of the “relative universality” theory is a setback to creating a genuine overlapping consensus in hard cases, should one decide to approach it from the viewpoint of a comprehensive doctrine that is not determined by liberalism. In effect, all the justifications for the legitimacy of universal human rights thus far examined shrink the acceptability or reasonableness of comprehensive doctrines to ‘liberal weltanschauung’. Whether it is the Natural Law, Minimalist, Ratification or the Consensus advocates, universality is in the end entrenched in liberalism.

The universality approaches that are dominant in contemporary international human rights discourse are not representative of actual State practice because they restrict human rights conceptually by limiting it only to the liberal tradition. Indeed, this liberal tradition is selective in its understanding of what constitutes tolerable human rights and is at the same time prescriptive in its approach to proselytize the normative standards found therein. The various universalist justifications examined above promote in varying degrees this form of liberalism. They recognize only a particular notion of what constitutes legitimate universal human rights and aim at promoting such a notion of the “good life” throughout the world. Richard A. Shweder calls it the doctrine of “imperial liberalism” according to which all social institutions and dimensions of social life (not just political but associational and family life as well) should be ruled by principles of autonomy, individualism, and equality – and by the

116 Jack Donnelly above n 101 303.

117 In fact, Donnelly seems to suggest (although in parenthesis) that his tolerable deviation principle as illustrated through the apostasy case in Islam, “accepts too great a relativism” to be in complete conformity with political liberalism that he espouses. Jack Donnelly above n 101 303.
particular ordering of values and ideals for gender identity, sexuality, work, reproduction, and family life embraced by liberal men and women.\textsuperscript{118}

Such a singular perspective on universality is seriously challenged by the existence of cross-cultural normative diversity. Interpreting universal human rights as a construct of “imperial liberalism” frustrates the project of internalizing the normative standards of human rights in different cultural zones. It may be recalled that the legitimacy of universality claims in the end rests on what the recipients of such rights consider as valid and applicable laws; validity being defined in terms of right procedure, moral persuasion, customs and traditions and other societal values and mores.\textsuperscript{119} The process of internalization of human rights norms by different States parties is essential to the legitimacy of the human rights regime and any definition of universality must incorporate this feature. If this is our starting point, then it is evident that the interpretation of human rights only from a liberal perspective is not adequate for the purposes of legitimizing those values, unless it also becomes an effort to impose an “imperial liberal” ideology. Indeed, Lisette Josephides makes an apt observation that as long as what is “tolerable” of diversity is pegged on a liberal philosophy, universality of human rights becomes “an agenda for the diffusion of a western-produced discourse for the benefit of humankind in general, on the basis of its presumed unique merits.”\textsuperscript{120}

The argument against a \textit{purely} liberal interpretation of human rights universality is proposed not because of any inherent deficit in the liberal perception. Liberalism provides a judicious interpretation of human rights from many


\textsuperscript{119} Thomas M. Franck “Legitimacy in the International System” (1988) 82 \textit{American Journal of International Law} 706.

perspectives, but to propose it as the only vista is not only unrealistic but imperialist. As noted by Adamantia Pollis

the passage of time has not diminished the salience of the...claim that in many societies – Asia, Africa, Eastern Europe (including Russia), and the Middle East – the liberal doctrine of human rights does not speak to the people’s world view. The ontological foundations of their cultures and society...differ in significant ways. Belief systems, values, and basic concepts, frequently articulated in nontranslatable words (hence, the concepts are nontransferable), were and remain markedly different from those in the West.121

It is this reluctance of liberal theoreticians to explore the validity of alternative interpretations of human rights that is strongly criticized by the dominant alternative paradigm of cultural relativism.

PART II

3.2 Cross-cultural normative diversity and human rights

Theories of universality of human rights in varying forms overlook and simplify the diversity underlying any cross-cultural normative discourse. The failure of the various universalist theories to recognize, accept and accommodate the validity of cross-cultural diversity is particularly apparent when it comes to normative regulation of the private or personal life of individuals. Regulating both the public as well as the private sphere has become a hallmark of the contemporary approach to universality of human rights. No more is it defined in terms only of restricting the State in the public domain. Included in the universality of rights are the private sphere of marital life between husband and wife, family planning, inheritance of property, bringing up of children, etc, as is evident from the CEDAW and the CRC. Equally evident from the persistent reservations to these human rights conventions is

the opposition to such universalist incursion into these areas that have been traditionally regulated according to normative standards derived from religious and cultural sources in some of the oldest and most populous communities of the world such as the African, Middle Eastern and Asian States. An appropriate case in point would be the Shari`ah-based reservations and the persistent objection to fully implement these ‘universalist’ standards by the majority of Muslim States. Cultural relativism reacts against this form of foundational universalism of human rights. Although, as an anthropological theory cultural relativism predates the present debate, it has nevertheless acquired the status of an alternative paradigm (vis-à-vis universalism) to analysing and engaging with the discourse on human rights. The stage was set for the debate between universalism and relativism by the American Anthropological Association’s 1947 Statement on Human Rights.

3.2.1 Cultural Relativism and Human Rights

Melville Herskovits, one of the main proponents of the theory of cultural relativism, states that members of one culture cannot ‘judge’ persons belonging to another culture because these “judgments are based on experience, and experience is interpreted by each individual in terms of his own enculturation.” In other words, the normative values of each culture are determined by experiences, values, ethics

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123 As an anthropological theory, cultural relativism developed initially as a reaction to theories of cultural evolution. It is in particular derived from the works in this direction by the American anthropologist Franz Boas who argued against the idea that “the course of historical changes in the cultural life of mankind follows definite laws which are applicable everywhere...[and is] the same among all races and all peoples”. Franz Boas “The Methods of Ethnology” (1920) 22 (4) American Anthropologist 311. See also Franz Boas The Mind of Primitive Man (New York: The Macmillan Company, 1948).


and morality peculiar to that culture.\textsuperscript{126} In a similar tone Elvin Hatch notes that cultural relativism refers to the idea that “the standards that can be applied in judging good and bad or right and wrong are relative to the cultural background of the person making the judgment.”\textsuperscript{127} According to this view of cultural relativism, which is also sometimes referred to as “thick” relativism, any attempt to make cross-cultural judgments are \textit{prima facie} flawed and hence, it rejects all propositions of overarching, universalist moral truths.\textsuperscript{128} This rejection of universal normative standards becomes problematic when we try to apply the theory to human rights discourse. Thus viewed, the whole project of universal human rights becomes flawed and the American Anthropological Associations’ (AAA) 1947 \textit{Statement on Human Rights} (Statement) was the first major proposition that signalled this apparent conflict.

\textit{3.2.1.1 Statement on Human Rights (1947) and the “classical” theory of relativism}

At the outset, the \textit{Statement} admonished against the imposition of a global charter of rights “conceived only in terms of the values prevalent in the countries of Western Europe and America”.\textsuperscript{129} It called for toleration and respect for cultural differences and asserted that any international statement of human rights “must take into full account the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behaviour, and with whose fate his own is thus inextricably linked.”\textsuperscript{130}

\textsuperscript{126} Herskovits was categorical in arguing that this enculturative process was far wider than the domain of only ethics or morals. He notes that “the force of enculturative experience channels all judgments. In fact, the need for a cultural relativist point of view has become apparent because of the realisation that there is no way to play this game of making judgments across cultures except with loaded dice.” Melville J. Herskovits “Some Further Comments on Cultural Relativism” (1958) 60 (2) \textit{American Anthropologist} 270.


\textsuperscript{128} Amitai Etzioni, “The End of Cross-Cultural Relativism” (1997) 22 \textit{Alternatives} 189.

\textsuperscript{129} Above n 124.

\textsuperscript{130} Above n 124.
In some ways, the *Statement* presages the cultural emancipation arguments presented in the Asian Values debate and post-colonial approaches to human rights research that took centre-stage in the latter half of the 20th Century. The *Statement’s* reference to the “white man’s burden” and the civilising missionary zeal of the Western colonial powers, suggests that it was driven by a consciousness to elevate the debate on human rights beyond a mere “Western” ideological contribution. In fact, during the early part of the 20th Century, the relativists in the AAA like Franz Boas, Melville Herskovits and Ruth Benedict, were seriously questioning the one-sided civilizational mission of colonialism. The theory of cultural relativism developed in part as a concomitant reaction against this dominant colonial policy of the time and relativists have developed a fondness in taking this position ever since the AAA asserted it in the *Statement*. This “colonial” or “neo-colonial” argument is frequently used by Asian countries to challenge universality of human rights in what has come to be called the *Asian values* argument. Elucidating on this point within the *Asian values* context, Onuma Yasuaki notes that

for those who have experienced colonial rule and interventions under such beautiful slogans as ‘humanity’ and ‘civilization’ the term ‘human rights’ looks like nothing more than another beautiful slogan by which great powers rationalise their interventionist policies.

In a similar tone, Makau Mutua insists that

the corpus [of universal human rights] falls within the historical continuum of the Eurocentric colonial project, in which actors are cast superior and subordinate positions. Precisely because of this

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131 Above n 124 541. These references to colonialism may be said to foreshadow the contemporary argument that universal human rights incorporate paternalising and infantilising colonised States by powerful Western States with the purpose of controlling and interfering in the affairs of vulnerable countries in the Third World.


cultural and historical context, the human rights movement’s basic claim of universality is undermined.\textsuperscript{134}

The \textit{Statement} laid down three important principles as a guide to formulating what it called a “bill of human rights”. Of these, the third principle is of particular relevance to the present study. It says

standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.\textsuperscript{135}

This principle categorically asserts that there can be no universal normative standard simply because value systems are relative to the different cultures from which they emerge. The AAA concluded that the flawed presumption of universality inherent in the UDHR would “lead to frustration, not realisation of the personalities of the vast number of human beings”.\textsuperscript{136} It is ironic, however, that while decrying the presumption of universality of the UDHR as flawed, the AAA was also asserting yet another \textit{universalist} norm of its own i.e., the rule that there can be \textit{no} cross-cultural normative judgment. In other words, it calls for replacing the universality of human rights by a universal norm of its own, that cultural differences must be tolerated and respected and that moral neutrality must be observed in cross-cultural conflicts. This is a significant inconsistency in the logic of cultural relativism as formulated by the AAA and is in many respects an inbuilt fallacy of the classical theory of cultural


\textsuperscript{135} The other two principles are (i) The individual realises his personality through his culture, hence respect for individual differences entails a respect for cultural differences; (ii) Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered. See above n 124 541-42.

\textsuperscript{136} The \textit{Statement} noted that “eternal verities only seem so because we have been taught to regard them as such; that every people, whether it expresses or not, lives in devotion to verities whose eternal nature is as real to them as are those of Euroamerican culture to EuroAmericans.” Above n 124 542.
While arguing against value judgments, AAA-type relativism “contains a more or less implicit value judgment in its call for tolerance: it asserts that we ought to respect other ways of life.”\textsuperscript{138} Besides this relativist fallacy, the \textit{Statement} and the AAA were widely criticised for promoting “nondebatable postulates” of moral ambiguity by asserting not only that cross-cultural judgments are not possible, but also that even cultures considered oppressive by others are still valid and legitimate to the believers of that particular culture. Indeed, as observed by Alison Dundes Renteln, such relativist tolerance “requires approval of all cultural practices, no matter how repulsive.”\textsuperscript{139}

Moreover, this formulation of cultural relativism also asserted that change in a given culture, be it oppressive or otherwise, must emanate from within the standards of that culture and it is not the prerogative of other cultures to impose themselves as a corrective on a people believing in a supposedly oppressive culture.\textsuperscript{140} Consequently, one of the most frequently made attacks against this type of relativism is that it takes beyond the pale of law, even authoritarian regimes such as the Nazis in Germany. When applied to international human rights law, it requires the suspension of judging the acts of other States, no matter how “oppressive” and “inhuman” these acts may be; that the community of States must remain morally neutral about the culturally determined acts of States, at all times. These two features of the \textit{Statement} (i.e., the relativist fallacy of asserting the universality of relativism and the latent moral ambiguity) are in fact fundamental failures inherent in the “classical” or “thick” theory of cultural relativism. Another problem in formulating a “thick” theory of cultural relativism to deal with the question of cross-cultural

\textsuperscript{137} For the purposes of the present study, “classical theory of cultural relativism” refers to the theoretical position that asserts (in absolute and non-negotiable terms) that no cross-cultural judgment or cross-cultural normative standard is possible.


\textsuperscript{139} Alison Dundes Renteln “The Unanswered Challenge of Relativism and the Consequences for Human Rights” (1985) \textit{Human Rights Quarterly} 521.

\textsuperscript{140} Edward A. Purcell \textit{The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value} (Lexington: Kentucky University Press, 1973) 72.
normative diversity is that it deals with “culture” as though constituting a clearly definable, static concept with impregnable walls that separate each culture from the other. This position adopted by the AAA amounts to a virtual rejection of the UDHR and its concept of universality of human rights. Subsequently, the Statement has become a source of embarrassment to the AAA, so much so that the AAA appears to have retracted the position taken in 1947 by coming up with a new Declaration on Anthropology and Human Rights (1999). Indeed, the AAA has taken an almost volte-face in this Declaration, recognising not only the UDHR but also the two Covenants, CAT, Genocide Convention and CEDAW besides “other treaties which bring basic human rights within the parameters of international written and customary law and practice.” It is a retreat that shows the inapplicability and the weakness of taking absolutist or thick positions in this normative debate on human rights.

3.2.1.2 Problematising “culture” in human rights discourse

The fact that culture shapes and determines social, legal and political dimensions of human existence is indisputable. This is intrinsic to the very idea of culture. As noted in the UNESCO Universal Declaration on Cultural Diversity, “culture” refers to

the set of distinctive spiritual, material, intellectual and emotional features of society or a social group...it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.


The constitutive elements of culture include the spiritual, material, intellectual values, and the peculiar ways and means in which these values are communicated through the experience of a group of people. Culture may be regarded as “a system of beliefs and practices in terms of which a group of human beings understand, regulate and structure their individual and collective lives.” It represents the very source of world-view both for individuals and communities. This is emphatically noted by Abdullahi An-Na’im when he said that culture provides both the individual and the community with the values and interests to be pursued in life, as well as the legitimate means for pursuing them. It stipulates the norms and values that contribute to people’s perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies.

Culture is often associated with the defining characteristics of individual identity in society. This adds a normative status to culture since culture provides a standard according to which individuals conduct and organise their lives in a particular way, in a given society or cultural zone. These normative standards that are culturally determined make people “think in traditionally preferred grooves, to congregate around certain constant, change-resistant themes, and to rebut, whether intentionally or unconsciously, contrary ideas intruding from without.”

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146 Charles Taylor highlights the connection between culture and individual identity as a “dialogical” process. He explains, “I can define by identity only against the background of things that matter. But to bracket out history, nature, society, the demands of solidarity, everything but what I find in myself would be to eliminate all candidates for what matters. Only if I exist in a world in which history, or the demands of nature, or the needs of my fellow human beings, or the duties of citizenship or the call of God, or something else of this order matters crucially, can I define an identity for myself that is not trivial.” Charles Taylor The Ethics of Authenticity (Cambridge, Mass.: Harvard University Press, 1992) 40-41.

3.2.1.2.1 Culture, law and human rights norms

The importance of *culture* as a norm-setter cannot be discounted because of the influence it wields in determining individual and community behaviour. Customs and traditions are commonly derived from the culture in which they are set and act as forceful determinants of law in many respects. For instance, the influence of common law in the jurisprudence of most of the English speaking world illustrates the influence of British culture on law. In a somewhat different sense, even the UDHR and much of the international human rights regime may be said to illustrate a close link between international human rights law and Western cultural elements.

In almost all the 58 Islamic States examined in the present study, Islamic law or *Shari`ah* act as a cultural determinant of the respective legal systems. The lives of over a billion people of the world are influenced almost on a daily basis by the tenets of Shari`ah in varying degrees. While some Islamic States have selectively incorporated the personal/family law norms of Shari`ah in their domestic legal systems, others have incorporated even the *hudūd* or criminal law norms. These various formulations of Shari`ah law in the Muslim countries may be grouped together and described as part of their cultural practices and traditions. Religiously determined values and norms remain only a part of what constitutes the much larger whole that is characterised as *culture*. While religion as a constitutive element of culture may have less significance in some societies, in others it may acquire far deeper levels of importance as a determinant of culture. Islamic States may be generally said to belong to the latter classification. The close nexus between religion and self-definition in these countries creates a strong allegiance to laws derived from and based in Shari`ah normative standards. Moreover, religiocultural factors not only affect the legal system but also permeate most other spheres of

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148 Some of the Islamic States that have incorporated Shari`ah-based family law include Egypt, Morocco, Libya, Algeria, Malaysia, Brunei, Pakistan and the Maldives. Shari`ah-based criminal law is implemented in relatively few Islamic States such as Saudi Arabia, Iran, Nigeria and Sudan.

149 For instance, Bassam Tibi writes about a “locally and socially” produced Islamic cultural identity peculiar to different Muslim societies. See Bassam Tibi, “The Iranian Revolution and the Arabs: The Quest for Islamic Identity and Search for an Islamic System of Government” (1986) 8 *Arab Studies Quarterly* 37.
community life. In this regard, Bozeman reminds us that even foreign relations of States are influenced by such cultural causal factors. The connection between the affairs of the State and religiocultural normative standards is also partly borne out by the sense of “loyalty to culture” that drives people’s attachment to their cultures.

The above discussion of culture and law is also helpful in assessing the importance of culture to the human rights discourse. The content of many international human rights treaties (for example, CEDAW and CRC) indicates a pervasive intervention into culturally regulated spheres of life.

This contact between human rights and cross-cultural normative standards is unavoidable in the modern world. As a result, the present debate is no longer about whether it is good or bad to have this contact; instead, central to the debate is how this contact may be mediated in order to ensure that justice is not only seen to be done but also felt to be done, not merely from a global perspective but also internally within the domestic cultural context. Foundationally universal conceptualising of human rights standards has, at times, failed to garner domestic legitimacy not merely in countries that may be labelled as having a Nazi-style authoritarian regime or an Al-Qaeda-style fundamentalist regime. Even in middle-of-the-road countries that have no political stick to wield in the international politics of war and peace, the domestic legitimacy of human rights must acquire an additionally warranted impetus to acceptability that is otherwise absent. The lowest common denominator in the Islamic countries have been Shari`ah-inspired laws that have for centuries provided a standard of legitimacy for positive law. When universalist human rights make incongruent contact with custom-based legal systems such as those found in some Islamic countries, the emergent dispute is inevitable.

150 “A given country’s conduct and organisation of its foreign relations is an organic aspect of the lifestyle that informs its inner order.” Above n 147 168.

151 Above n 14 158-162.
But is this a clash of civilisations? Not at all. The Rawlsian “overlapping consensus” and Donnelly’s “relative universality” attempt, in a limited sense, to address a mediation of the dispute ensuing from this contact between universal human rights and culture-based legal systems. Yet, the failings of these two approaches make the attempts ineffective in many ways. Hence, there is a need to attempt to find a more comprehensive and practical method of resolving this dispute of dissimilarity. To merely assert that universalism is the only right solution or that cultural relativism and the resultant moral indifference is the only right approach misses the point, i.e., that there are many ways of seeking the objective of human rights standards of securing justice and peace. This does not involve a rejection of the corpus of international human rights in existence.

Instead, any comprehensive approach must attempt to read the human rights standards in the context of the rules of international law agreed among the community of States. It must also take into consideration the fact that in reality, States parties approach international standards through a plurality of perspectives. After all, these standards are referred to and agreed among States as international laws and not universal laws of particular derivation. The fact that international human rights norms are worded in broad and conceptual language also supports the view that they require hermeneutic exercises in their application. Such interpretational exercises can only be done within a local context to achieve a local legitimacy.

In secular liberal democracies, the liberal constitutional provisions support the interpretation of the normative standards of human rights, and in pluralist societies, pluralist constitutional provisions lend support to them. Similarly, it cannot be denied that in religiocultural societies, religion and culture play a vital role in lending legitimacy to the manner in which human rights standards are interpreted. Abdullahi An-Na’im makes a pertinent observation regarding a necessity for

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maintaining this link between religiocultural standards and human rights norms when he noted that “the more religious perspectives are excluded from the conversation [about human rights], the less likely are religious adherents to accept the universality of human rights.”

It is this loyalty to deeply rooted moral commitments (a hallmark feature of religion and culture) that necessitates taking them seriously in any normative exercise. An-Na’im further elaborates on this point when he says that “human rights need religion to validate their moral foundation and to mobilize religious (the vast majority globally) in support of universal rights.”

Noting that religion and law are “interlocking systems of value and belief”, John Witte, Jr. observes that “human rights norms are, by design, abstract statements of individual and associational living that depend upon the religious visions of persons and communities to give them content and coherence.” He comes to the conclusion that “religion is an ineradicable condition of human lives and communities”, and hence, the necessary connection between law and religion cannot be taken out of any normative consideration.

The content, method and process of implementing international human rights treaties affects religiocultural rights, sometimes in a positive manner and at other times, negatively. Similarly, religiocultural rights also have positive and negative impacts on the content, method and process of implementing international human rights treaties. This dialogical relationship is a reality that is evident in State practice. Nevertheless, cultural relativists have traditionally argued against universal human rights by foreclosing all cross-cultural normative engagement on the grounds that “a transcultural normative-legal order can never adequately represent the diverse reality of our multicultural world.”

This form of thick relativism only emphasizes the


154 Above n 153 65.


negative impact of the encounter between international human rights and culture. Such an approach fails to consider the fact that in practice, States parties substantively agree and implement almost 80-90% of all human rights treaties.\textsuperscript{157} Also, this reality is evident in the way various regional human rights charters have negotiated the link between culture and human rights. The majority of these regional charters\textsuperscript{158} have incorporated most of the human rights norms found in the international bill of human rights. Nevertheless, there are clearly identifiable areas where these regional charters have allowed cultural particularities to be given eminence. Similarly, the implementation of most parts of international human rights treaties (even with the reservations) in most of the countries give credence to the argument that there is a substantive acceptance of human rights normative standards.

Neither universalist nor cultural relativist claims of international human rights treaties can be rejected completely, lest we throw the baby out with the bathwater.\textsuperscript{159} At the same time it may be noted these philosophical arguments in defence of universalism and relativism are not entirely representative of actual State practice in the implementation of human rights treaties. In fact States parties, while largely upholding the normative values espoused in the human rights treaties and respecting the higher-law zeal of these international treaties, still appear to engage in hermeneutic exercises revealing a pluralist understanding of the treaty provisions. International human rights treaty law, international and regional judicial precedents also appear to support the prevalence of such a pluralist position in actual State practice.


\textsuperscript{158} The regional charters examined in the present study include the European Convention on Human Rights and Fundamental Freedoms; African Charter on Human and Peoples’ Rights; American Convention on Human Rights; Universal Islamic Declaration of Human Rights and the Cairo Declaration of Islamic Human Rights.

The various philosophical theories on universalism and relativism of human rights norms do not represent the manner in which human rights are promoted and accepted within the international legal system that is premised on a diverse community of States. No doubt these theoretical frames of reference serve as a good indicator of the intellectual forces interacting in the formulation and critiquing of human rights regimes. Yet, it would be remiss to attribute the basis and nature of international law on human rights to these philosophical theories alone, without giving consideration to the manner in which the plurality of worldviews in the international community is addressed through a flexible interaction between States parties. An examination of the various regional human rights regimes also reveals the legal tools (and the limitations thereto) that have been developed at the respective regional levels to take into cognizance this diversity.

3.2.1.3 Cultural particularism and regional human rights charters

(a) European Convention on Human Rights and Fundamental Freedoms and the doctrine of “margin of appreciation”

The European Convention on Human Rights and Fundamental Freedoms (1953) [“ECHR”] pays homage to and incorporates the universal normative standards of human rights such as those found in the UDHR. At the same time, the ECHR allows legal plurality in its reservations regime under Article 57 paragraph (1) by permitting States parties to formulate reservations “to the extent that any law then in force in its territory is not in conformity” with the ECHR. Although the permitted reservations are limited through procedural means such as that found under paragraph (2) of Article 57, the point to be noted is that cultural differences not in

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160 Article 57 paragraph (1) states that “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.” “Convention for the Protection of Human Rights and Fundamental Freedoms” (September, 3 1953) 213 United Nations Treaty Series. 222 [as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.] Available online at: <http://www1.umn.edu/humanrts/instree/z17euroco.html#1>
conformity with the ECHR, but nevertheless incorporated in the domestic legal systems, are given a legitimate platform.

This is a structural design of the ECHR that provides States parties with the possibility to retain local particularities while at the same time implementing universal human rights standards. Accommodation of pluralist positions within the ECHR is also evident from the jurisprudence on the well-established principle of the “margin of appreciation” in the European Court of Human Rights [“ECtHR”].

The doctrine of “margin of appreciation” was most famously devised by the ECtHR in *Handyside v. United Kingdom* in 1976.161 It was here that the ECtHR declared that in cases where domestic moral values are in question, it must be implied that the ECHR grants States parties a margin of appreciation to decide the exact content and meaning of the morality in question. The ECHR permits deference to domestic moral values in such cases because there is no common or “uniform European conception of morals” that the ECtHR may tap into for interpreting a common morality. In other words, moral issues differ in content and interpretation in different European States and hence the State parties are in a better position than the ECtHR “to give an opinion on the exact content [of the local requirements of morals] as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them”.162

The ECtHR appears to have given deference to this doctrine in many subsequent cases. For instance, in *T. v. United Kingdom*, which concerned the determination of what is an acceptable lower age for criminal responsibility, the

161 *Handyside v. United Kingdom*, 7 December 1976, Series A. No.24, (1979-1980) 1 European Human Rights Report, 737. The ECtHR had to consider whether the banning of the publication of a book by the applicant on obscenity grounds, amounted a violation of the applicant’s freedom of expression under Article 10 of the Convention.

162 Above n 161 737. It must also be noted here that the concept of ‘margin of appreciation’ was circumscribed by the declaration of the Court that it gives no unlimited power to the domestic authorities. “The domestic margin of appreciation”, the Court noted, “thus goes hand in hand with a European supervision”. *Ibid.* para.40.
ECtHR held that the United Kingdom rule of 10 years for criminal responsibility did not violate Article 3 of the ECHR because at the time there was no “commonly accepted minimum age for the imposition of criminal responsibility in Europe.”

Again, in *Johnston and Others v. Ireland*, the ECtHR decided to respect the Irish claim that the sanctity of marriage and family under its legal system involved a proscription on divorce. The ECtHR declined to interpret Ireland’s prohibition on divorce as a breach of its obligations under Article 8 of the ECHR relating to the protection of the individual against arbitrary interference of the State. The Court declared that

having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s [Article 8] requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.

Although the doctrine of margin of appreciation is circumscribed by the overall schema of ECHR, it provides States parties with a platform to give legitimate voice to the different practices that prevail in the domestic legal systems. As far as moral and cultural differences are concerned, in cases where there is no common ground found throughout Europe, States parties have room to legitimately claim deference to their domestic particularities. This is a workable formula that the ECHR jurisprudence has evolved over the years to avoid a head-on collision between deeply embedded local norms and ECHR standards.

The doctrine of “margin of appreciation” and the above reading of the provisions of Article 57 of ECHR relating to reservations indicate that the general design of the ECHR is not towards establishing an absolute universalist position on

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165 Above n 164.
human rights. The recognition of diversity and particular practices and value systems of the different States parties is an important feature of the ECHR that emphasize the case for incorporating cultural considerations in the normative standards in human rights regimes.

The doctrine of margin of appreciation has also been applied as general international law by international courts and tribunals in many recent cases. Yuval Shany, an Israeli scholar, identifies two general rules implicit in the doctrine of margin of appreciation that has applicability in international law. First, it provides a degree of discretion or “judicial deference” to the domestic courts to interpret international obligations undertaken by the State party and secondly, the doctrine allows for “normative flexibility” i.e., international normative standards that are “subject to the doctrine have been characterized as open-ended or unsettled”.

(b) African Charter on Human and People’s Rights

The accommodation of local particularities is emphatic in the case of the African Charter on Human and People’s Rights (1981) [“ACHR”]. Through the

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inclusion of people’s rights and the duties of individuals, the 53 member Charter\footnote{List of Countries who have signed, ratified, adhered to the African Charter on Human and Peoples’ Rights (as on January 7, 2005” University of Minnesota Human Rights Library database. See online at: <http://www1.umn.edu/humanrts/instree/ratz1afchr.htm> [last visited: 18/11/2007].} is representative of a particularly African attempt at combining a universalist human rights regime with local community-oriented values and concerns. Although some scholars like Ali Mazrui, Mahmood Mamdani and Makau wa Mutua have raised doubts over the viability of setting up a human rights regime by African States that are still remnants of a colonial construction of the idea of a “State”, the ACHR continues to be the focal point for African conceptualisation of human rights language.\footnote{Mahmood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism (Princeton, NJ: Princeton University Press, 1996); Ali Al’Amin Mazrui, “The African State as a Political Refugee: Institutional Collapse and Human Displacement” (1995) (Special Issue) 7 International Journal of Refugee Law 21; Makau wa Mutua, “Why redraw the map of Africa: a moral and legal inquiry” (1995) 16 Michigan Journal of International Law 1113. Jack Donnelly also dismisses an inherent human rights tradition in African society, when he noted (citing Rhoda Howard-Haussman) that “recognition of human rights simply was not the way of traditional African, with obvious and important consequences for political practice.” Jack Donnelly, Universal Human Rights In Theory and Practice ( 2nd Ed.), (Ithaca and London: Cornell University Press, 2003) 79. See also Rhoda Howard-Haussman, Human Rights in Commonwealth Africa (Totawa, NJ: Rowman & Littlefield, 1986), Chapter II.} While the divergence of values between the UDHR and international bill of rights model on the one hand and the African concept of human rights on the other may be real, the ACHR has nevertheless provided a platform where the unique African particularities can be addressed with a significant level of local legitimacy that is not entirely present in the international human rights regime. For instance, the fifth recital to the ACHR states

> taking into consideration the virtues of their [African] historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples’ rights.\footnote{Above n 168.}

The recognition of the sovereignty of member States and the consequent non-intervention in domestic affairs of member States have been two principles
fundamental to the coming together of the African countries under the umbrella of
the African Union. The ACHR has been criticised for displaying indifference and
ineptitude in the face of genocide and other atrocities by giving deference to policies
of non-interference in the domestic affairs of member States.

However, the attribution of the violence of failed African States to the
particularist trends of the ACHR is, according to Mutua, a misreading of the general
direction in the ACHR. For instance, he dismisses the criticism that the “duties”
approach included in the ACHR promotes the violation of individual rights of
citizens by autocratic States by pointing out that

African States have not notoriously violated human rights because of
their adherence to the concept of duty. The disastrous human rights
performance of many African States has been triggered by insecure
regimes whose narrow political classes have no sense of national
interest and will stop at nothing, including murder, to retain
power.

This emphasis on “duties” and the central role of family as “the custodian of
morals and traditional values recognized by the community” are the two most
distinguishing particularist features of the ACHR. One of the important provisions

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173 For instance, the genocide in Rwanda, the deteriorating human rights conditions in Somalia, Sierra Leone, Democratic Republic of Chad, Darfur-crisis in Sudan etc. Above n 168 1222-23.


175 The ACHR places duties in both the State and the individuals constituting the State. For instance, Article 22 (2) makes it a duty of the State to “individually and collectively...ensure the exercise of the right to development”; Article 25 it is the duty of the States to teach and disseminate human rights contained in the ACHR; Article 26 makes it the duty of the State to “guarantee the independence of the Courts” and promote and protect rights of the Charter through national institutions; Articles 27, 28 and 29 place duties on the individual. Under Article 27 (1) “ every individual shall duties towards his family and society, the State and other legally recognized communities and the international community. (2) “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”; Article 28 “ every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain
in this connection is contained in Article 29 relating to the duties of the individual to
the family and the society. Article 29 of the ACHR declares that the individual shall
have the duty

1. to preserve the harmonious development of the family and to
work for the cohesion and respect of the family; to respect his
parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and
intellectual abilities at its service;
3. Not to compromise the security of the State whose national or
resident he is;
4. To preserve and strengthen social and national solidarity;
particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the
territorial integrity of his country and to contribute to its defence in
accordance with the law;
6. To work to the best of his abilities and competence, and to pay
taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his
relations with other members of the society, in the spirit of tolerance,
dialogue and consultation and, in general, to contribute to the
promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all
levels, to the promotion and achievement of African unity.176

From this long quotation of Article 29 of the ACHR it is quite evident that the
subjects of family and cultural values are taken very seriously in the overall design of
the African human rights system.177 Under Article 18(1), family is taken to constitute
the “natural unit and basis of society” and hence the deference to the family as the
core repository of morals. The extent to which the concept of “duties” has been
employed in formulating a particularist understanding of human rights in the African
context needs to be recognized as an attempt at developing a working formula that is
different from the dominant discourse on human rights in the “West”, i.e. the liberal
conceptualisation of universality discussed above. It is a determinate effort at taking

176 Above n 168.

177 See Ronald Thandabantu Nhlapo “International Protection of Human Rights and the Family:
the focus of rights discourse away from the *autonomous individual* and placing it in the context of the communitarian values of African societies. Mutua sums up this idea by observing that

the African Charter takes the view that individual rights cannot make sense in a social and political vacuum, unless they are coupled with duties on individuals. In other words, the Charter argues that the individual egoist is not the center of the moral universe. Thus it seeks to balance the rights of the individual with those of the community and political society through the imposition of duties on the individual.\[178]\\n
Elsewhere he describes evocatively this effort to install duties and family in the forefront of rights discourse as a “reconstruction of a new ethos and the restoration of confidence in the [African] continent’s cultural identity”.\[179] Responding to the criticism that the emphasis on duties and on family values is another way to enforce the traditional marginalisation of women and promote gender bias, Mutua is of the view that a “progressive and liberal construction” of the ACHR would allay such apprehensions. In fact, he goes on to explain that the reference to African culture and family values in the ACHR only implies “traditional values which enhanced the dignity of the individual and emphasized the dignity of motherhood and the importance of the female as the central link in the reproductive chain.”\[180] In effect, what Mutua is suggesting is that the meeting place of ‘Western’ liberal human rights and African conceptualisation of human rights necessitates a dialogue that requires a selective process of accommodating the best of both systems. If one were to take a “cynical misreading” of the process, it would be easy to imagine the erroneous conclusion of an ensuing conflict. However, such need not be the case because there are elements conducive to human rights intrinsic in every culture. Indeed, Mutua is right in observing that the

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180 Above n 174 9-10.
only hope for those who care about the adherence by all communities to human rights is the painstaking study of each culture to identify norms and ideals that are in consonance with universal standards. Only by locating the basis for the cultural legitimacy of certain human rights and mobilising social forces on that score can respect for universal standards be forged.\textsuperscript{181}

Such a perspective emphasizes the significance of the local cultural setting and the domestic value system to the human rights discourse and it infuses an immediate African legitimacy to the ACHR within African States.

The many violations of human rights taking place in the African States cannot be attributed to this process of localisation of human rights. African leaders may claim relativist positions and raise arguments of domestic jurisdiction and State sovereignty against external interference in human rights abuse cases. Such cases must not be held as an indication of the failure of an \textit{African} perspective on human rights. The political disposition of the ruling regimes play a significant role in some of these cases, be it the imprisonment of the British teacher in Sudan over the naming of a school teddy bear\textsuperscript{182} or genocide in Rwanda. Attributing the imprisonment of the British teacher to Shari`ah is clearly a far-fetched interpretation of the Islamic laws, and the ethnic cleansing and the consequent genocide in Rwanda are in the end political power struggles that ought to have been stopped before the conflagration. To epitomise these as failures attributable to a particularist conceptualisation of human rights will be an erroneous understanding of the approach.

In order to gain legitimacy, the international human rights legal system needs to adopt a culture-friendly approach that does not see cultural particularities as a hindrance to the improvement of the human condition. Instead, the indelible link

\textsuperscript{181} Above n 179 358.

\textsuperscript{182} In November 2007, a British teacher was arrested in Sudan amid complaints from parents that she allowed her students to name a teddy bear “Muhammad”, the name of the Prophet of Islam. See “‘Muhammad’ teddy teacher arrested” (26 November 2007) BBC News, online at: \texttt{<http://news.bbc.co.uk/2/hi/africa/7112929.stm>} [last visited: 28/01/2008].
between the improvement of the human condition and the culturally embedded nature of this human condition must be given due recognition. Such an infusion of culture into the human rights discourse “must be done with local initiative and involvement in a way that does not compromise the cultural integrity of the people. Local people and cultural communities must feel a sense of ownership of the process of change and adaptation.”

The development of the African human rights regime and its jurisprudence show less of an engagement with universalist or relativist positions in the philosophical sense discussed above. Instead, the approach adopted by the ACHR suggests a pluralist deference to regional specificities while at the same time espousing normative human rights through a treaty regime based on the African Convention.

(c) American Convention on Human Rights

The Inter-American human rights model is one of the oldest regional regimes, with the American Declaration of the Rights and Duties of Man (1948) predating the UDHR by almost eight months. This Declaration along with the Charter of the Organisation of American States (1948) [“OAS”] represented the regional law on human rights prior to 1978 when the American Convention on Human Rights (1969) [“AmCHR”] came into effect. According to David Forsythe, the South American elites entertained a notion of human rights as “abstract values” even in the 19th Century, noting in this context Simon Bolivar’s call for strengthening regional democracy and the 1940s Laretta Doctrine of democratic intervention. This

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185 David Forsythe, “Human Rights, the United States and the Organisation of American States” (1991) 13 Human Rights Quarterly 76. In support of this historical argument, Forsythe also notes the active role played by the South American States such as Panama, Uruguay, Brazil, Mexico, the Dominican Republic, Cuba and Venezuela in the establishment of the United Nations Charter as well as the subsequent UDHR. Ibid.
attitude of treating human rights as a *trendy* political idiom among the elites and leaders of the South American States may be seen to continue even into contemporary times.\textsuperscript{186} While on the one hand, pan-American human rights cooperation and norm setting were being organised and put into place, gross and serious violations of human rights in Argentina, Chile and other parts of the Western hemisphere continued. Military juntas and human rights talk existed side-by-side in the Americas.

The human rights regime of the OAS is ranked with the ECHR in terms of the human rights norms and functioning of the system.\textsuperscript{187} However, it has often faced the criticism of not having the “underlying political commitment”\textsuperscript{188} to effectively implement these rights. Unlike the African regime discussed above, there is a marked absence of emphasis on culture and tradition in the AmCHR. In many respects, the OAS regime appears to be concerned with creating legitimacy for human rights in the universalist traditions of the UDHR and other universalist international human rights laws. For instance, Article 17 of the Charter of the OAS declares that while “each State has the right to develop its cultural, political, and economic life freely and naturally.... the State shall respect the rights of the individual and the principles of universal morality.”\textsuperscript{189} Similar universalist proclamations and rights are also found in the Preamble to the Charter of the OAS.\textsuperscript{190} In fact, the Charter is categorical in


\textsuperscript{190} The fourth Preambular paragraph to the Charter of the OAS states that regional solidarity in the Americans “can only mean the consolidation in this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man.” Above n 189.
supporting a liberal view of human rights centred on the rights of the individual as may be seen from Article 3(l), which notes that the “American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex.” 191 This view is also strongly represented in the more recently concluded San José Declaration in the run up to the second World Conference on Human Rights. For instance, Article 1 of the San José Declaration states that the American States reaffirm the

commitment to promoting and guaranteeing the full observance of the human rights established in the Universal Declaration and in universal and regional human rights instruments through our [American States] own efforts and through broad-based, non-selective and non-discriminatory international cooperation. 192

Nevertheless, in Article 3(m) the Charter of the OAS alludes to a cultural position when it calls for “spiritual unity” and cooperation among member States based on respect for the cultural values of the continent. 193 Yet the Charter and the AmCHR are conspicuously silent in affirming any particularist position such as those we have seen under the ACHR in the previous section. Two provisions of the AmCHR outwardly indicate the inclusion of a cultural position specific to the American States. These are Article 4(1) of the AmCHR concerning the right to life and Article 32 relating to family. Chapter II, Article 4 of the AmCHR states that

(1) Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. 194

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191 Above n 189 (emphasis added).

192 “Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights (18-22 January 1993)” (11 February 1993) United Nations Document A/Conf.157/LACRM/15; A/Conf.157/PC/58. Also Article 3 of the San José Declaration states, “We [American States] hold that the interdependence and indivisibility of civil, political, economic, social and cultural rights are the basis for consideration of the question of human rights, and therefore the exercise of some cannot and must not be disallowed on the pretext that full enjoyment of the others has not yet been achieved.”

193 Article 3(m) states that the “spiritual unity of the continent is based on respect for the cultural values of the American countries and requires their cooperation for the purposes of civilisation.” Online at: http://www.oas.org/juridico/English/charter.html#ch3

194 Above n 189 (emphasis added).
The wording of Article 4(1) seemingly supports the idea that ‘life’ starts at the moment of conception and hence the right to life places a proscription on abortion. This appears to be in line with the anti-abortion stand of the Catholic Church, whose adherents are the predominant majority in Latin American States. In a case brought by Catholics for Christian Political Action against the United States and the Commonwealth of Massachusetts regarding the abortion of “Baby boy” in a Boston hospital, the Inter-American Commission on Human Rights decided that a historical reading of the drafting of the provision on right to life indicated that it was not the intention of the drafting States to place an absolute ban on abortion. Hence, when the laws of a member State allow abortion it is not considered as contravening the right to life under Article 4(1) of the AmCHR, even though such a law would conflict with the position of the Catholic Church as indicated in the Gaudium et Spes (1965).

The second important instance of a provision of the AmCHR that conflicted with a prevailing norm of member States in the region pertained once again to the right to life vis-à-vis abolition of capital punishment. Paragraph (1) of Article 4 of AmCHR proscribes arbitrary deprivation of life, while paragraph (2) provides that in States that already had laws dealing with capital punishment, it can be “imposed only

\footnote{It is estimated that as of 2002, out of the world Catholic population of 1.05 billion baptized Catholics, 49.4% lived in the Americas. See “Church Statistics” (April, 2002) Catholic Insight, 21. On the position of the Catholic Church on abortion, the Gaudium et Spes by Pope Paul VI equates abortion with murder and genocide and calls it the “supreme dishonour to the Creator”. Further, it proclaims that, “from the moment of its conception life must be guarded with the greatest care while abortion and infanticide are unspeakable crimes,” “Pastoral Constitution on the Church in the Modern World: Gaudium et Spes Promulgated by His Holiness, Pope Paul VI on December 7, 1965” paras. 27 and 51 respectively. Documents of the II Vatican Council. Online at: <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html> [last visited:13/12/ 2007]. See also Thomas Buergenthal, “The Evolving International Human Rights System” (2006) 100 No.4 The American Journal of International Law 796.}

for the most serious crimes” and prohibits the imposition of death penalty for “political offenses or related common crimes”.

In *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago* relating to the imposition of capital punishment under “Offences Against the Person Act of Trinidad and Tobago” the Inter-American Court of Human Rights came to the decision that the provisions of the Trinidadian law relating to mandatory death sentence contravened Article 4 of the AmCHR for its failure to differentiate between varying degrees of murder. The Trinidad and Tobago government objected to this approach of the Inter-American Court favouring a ban on capital punishment, insisting that death penalty has been made a human rights issue by certain institutions and European countries that believe the death penalty should not be carried out under any circumstances and have

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197 Article 4 of the AmCHR reads “(1) Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. (2) In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. (3) The death penalty shall not be re-established in States that have abolished it. (4) In no case shall capital punishment be inflicted for political offences or related common crimes. (5) Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women. (6) Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.” “American Convention on Human Rights” Organisation of American States Treaty Series No.36, 1144 United Nations Treaty Series 123 [entered into force July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)]. See online at: [http://www1.umn.edu/humanrts/oasinsr/zoas3con.htm](http://www1.umn.edu/humanrts/oasinsr/zoas3con.htm) [last visited: 18.11.2007]


199 The Court held that “the Offences Against the Person Act of 1925 of Trinidad and Tobago automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness...In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely, human life, and is arbitrary according to the terms of Article 4 (1) of the Convention.” *Case of Hilaire*, above n. 196. See also, Brian Angelini “Trinidad and Tobago’s Controversial Death Penalty Law: A Note on *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*” (2003-2004) 10 *Southwestern Journal of Law & Trade in the Americas* 363-64.
made opposition to it a part of their legal culture...It is wrong for any country or group of countries to transplant their legal culture into the Caribbean. We respect their laws of punishment, and they must respect ours. 200

The seriousness with which the subject of capital punishment was debated in the Inter-American Court during the late 1990s and early millennium may be seen from the withdrawal of Trinidad and Tobago from the AmCHR in 1999, and the withdrawal of Jamaica from the First Optional Protocol to the ICCPR in 1997. 201 In denouncing the AmCHR, Trinidad’s Ambassador to the Convention noted that the legality of death sentence “has already been decided by the people of Trinidad and Tobago” and yet “those who oppose the death penalty have sought to breach this domestic jurisdiction.” 202 The subject acquired a relativist connotation in view of this strong support for and endorsement of the Trinidadian law by the general populace. In spite of these arguments of domestic law, the Inter-American Court took a determinate stand against giving into particularism when it declared that “the American Convention establishes the general obligation of States parties to bring their domestic law into compliance with the norms of the Convention, in order to guarantee the rights set out therein.” 203

Hence, it is clear from the above discussion of the Inter-American Court of Human Rights decisions in the cases relating to right to life that the Court has taken a favourable stand towards extrapolating a universalist reading of human rights


201 Jamaica denounced the Optional Protocol-I to ICCPR on 23 October 1997; Trinidad and Tobago withdrew twice, first on 26 August 1998 (re-acceding with a reservation to Article 1, on 26 August 1998) and for the second time denounced on 27 June 2000; Guyana denounced on 5 January 1999 and re-acceded (with reservation to Article 6) on 5 April 1999. See “List of Ratifications of the Optional Protocol to ICCPR available online at: <http://www2.ohchr.org/english/bodies/ratification/5.htm> [last visited: 20.10.2007].


203 Case of Hilaire, above n 198 103, para.112.
standards contained in the AmCHR. The position of the Court can at best be described in the words of Laurence R. Helfer as “overlegalising” of human rights that does not augur well for the internalisation of human rights standards, especially given a persistent objection by the concerned States.\textsuperscript{204} The persistent objection of Jamaica and Trinidad and Tobago against abolition of capital punishment to the extent of actually withdrawing from the human rights regimes, indicates a serious gap between universalist enforcement of human rights treaties and the limits of internalization of human rights norms in these States. Not surprisingly, these Caribbean States continued to engage with, implement and internalize other international human rights treaty provisions that are less conflicting with the internal norm structures of the Caribbean States. The internalization of the validity or the cascading\textsuperscript{205} of certain universalist human rights norms (in this case the abolition of capital punishment) is counterweighed by strongly endorsed local normative standards.\textsuperscript{206}

Unlike the ECHR and the ACHR, the emerging jurisprudence of AmCHR appears to support a universalist position. The two judicial precedents relating to the right to life reveal the possible frictions that may result when a hard universalist position is taken in the implementation of human rights treaties. The withdrawal of Jamaica and Trinidad and Tobago from the First Optional Protocol to ICCPR and

\textsuperscript{204} According to Helfer, “‘overlegalisation’ exists where a treaty’s augmented legalisation levels require more extensive changes to national laws and practices than was the case when the State first ratified the treaty [in this case, the expansive and universalist reading of the AmCHR by the Inter-American Court], generating domestic opposition to compliance or pressure to revise or exit from the treaty.” Laurence R. Helfer “Overlegalising Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes” (Nov., 2002) 102 (7) Columbia Law Review 1854.


\textsuperscript{206} It may be alleged that the immediate reasons behind the Jamaican stand on the capital punishment cases was a localised need for controlling criminal activity fuelled by a burgeoning drug trade in the region. Nevertheless, that does not undercut my argument that this group of states were willing to forego their membership in an important human rights treaty when they are externally coerced to act against the dictates of a felt local interest represented in their respective laws authorising capital punishment. The analogy to Shari`ah reservations are drawn to the extent that some of the Islamic states are persistent in retaining their Shari`ah based laws that they perceive to be in conflict with human rights standards.
AmCHR respectively, is an alarming call to look for more pragmatic ways to deal with a pluralist understanding of human rights treaty provisions. It also indicates that the cascading effect of universalist human rights norms, as described by Cass Sunstein, does not take place automatically by the mere fact that the State party concerned ratified a human rights treaty. Instead, the cascading and internalization of human rights norms based in treaties require the active participation of States parties to the treaty in a process of continuous assessment of the compatibilities of local norm structures and universalist human rights norms.

(d) “Asian Values” argument

The problematisation of universalist human rights is most acutely noticeable in what has come to be called the “Asian values” argument. The strongest advocates of Asian exceptionalism of the 1990s were Singapore, Malaysia and Indonesia. Pitted against the implementation of all the universal international human rights standards in the Asian societies, the Asian values debate came to particular prominence during the run up to the World Conference on Human Rights in Vienna in 1993.

At the heart of the various arguments supporting Asian exceptionalism is the “desire to reconnect with their [Asian] historical past after this connection had been ruptured both by colonial rule and the subsequent domination of the globe by a Western Weltenschauung”. From this perspective, universal human rights are seen as a Western construct emerging from a political agenda of implanting American-style liberal democratic governments in Asian countries. This is considered as a new way of imposing the old colonial diktats of the West. Singapore’s former Prime


209 See above n 208. Bilahari Kausikan makes this point clear when he noted that “there is a general disquiet across the region, and not just among governments, with letting the West determine the international human rights agenda, as it has done for so long. Common sets of questions are being
Minister, Lee Kuan Yew, one of the prime architects of the Asian Values debate, explained this point succinctly when he observed that “the liberal, intellectual tradition that developed after World War II claimed that human beings had arrived at this perfect state where everybody would be better off if they were allowed to do their own thing and flourish. It has not worked out.”210 The advocates of Asian values argue that the economic development happening in East Asian countries has heralded, to use Kishore Mahbubani’s words, an “Asian renaissance” that sought inspiration for social, cultural and political progress from preponderantly Asian leitmotifs.211

Behind this Asian reawakening rhetoric, critics point out, lay a hidden agenda to promote and sustain authoritarian regimes at the cost of human rights and democratic representation. Indeed, Yash Ghai, the Indian academic, criticises the Asian values debate as a ploy used by authoritarian leaders to abuse the economic vulnerabilities of their countries and to foist upon them repressive systems of governments.212 This commonly and often cited criticism of the Asian values debate is perhaps too reductionist and dismissive of the real issues that the Asian countries seek to address by putting forward a serious argument against universalism. Randall Peerenboom is right in sounding words of caution against such reductionism when he noted that “it does a disservice to the difficulty of the issues and the increasingly sophisticated and nuanced views of those who are trying to take diversity seriously to simply dismiss them as apologists for dictators.”213

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210 Fareed Zakaria, “Culture is Destiny: A Conversation with Lee Kuan Yew” (1994) 73 (2) Foreign Affairs 109, 112.

211 Above n 208.


While taking the Asian Values debate seriously, it is also important to note that there are various interpretations of the argument. The more radical of these are the Chinese White Paper model and the classic positions espoused by Lee Kuan Yew and Mahathir Mohamed. The latter two propose a model that starts off with a strong critique of the Western approach to universal human rights, and develops an interpretation of human rights that takes into account the cultural diversity of Asian countries and gives prominence to economic and social-cultural rights in place of civil and political rights. Civil and political rights are associated with the Western focus on the liberties of the individual, which are believed to go contrary to the communitarian focus of Asian societies. The general direction of the Mahathir-Lee model is insistence on social order and internal stability, respect for authority and focus on economic development. Consequently, for the proponents of this model, restricting civil and political rights is permissible for the overall purpose of societal harmony and economic development.

The Chinese government appears to take an even thicker relativist position by arguing that

owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights... Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. Therefore, a country’s human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region. Such is the practical attitude, the attitude of seeking truth from facts.

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214 Lee famously noted that “the expansion of the right of the individual to behave or misbehave as he pleases has come [allusion to ‘Western’ view of liberal human rights] at the expense of orderly society. In the East the main object is to have a well-ordered society so that everybody can have maximum enjoyment of his freedoms. This freedom can only exist in an ordered State and not in a natural state of contention and anarchy.” Fareed Zakaria, “Culture is Destiny: A Conversation with Lee Kuan Yew” (1994) 73 (2) Foreign Affairs 109 at 111. See also Michael Freeman, “Human Rights, Democracy and ‘Asian Values’” (1996) 9 (3) The Pacific Review 355.

Such a formulation of human rights is problematic because of the generality in the conceptualisation of the challenge to universality. Ghai makes a scathing attack on this formulation of Asian values by pointing out that it represents “neither Asian culture nor Asian realities” because of its excessive focus on authoritarian governments and curtailment of individual freedoms. Furthermore, it fails to address the need for engaging internal debate to assess the content and the extent of the requirement for deference to Asianness in the human rights debate.

How does the Asian values argument affect universal human rights? Kausikan acknowledges the need to qualify the deference to sovereignty argument by pointing out that universal human rights must be prudently restricted to “gross and egregious violations of human rights, which clearly admit of no derogation on the grounds of national sovereignty.” One problem in such a narrow conceptualisation of human rights (i.e., limiting it to only gross and egregious violations) is its failure to comprehensively engage with all the human rights enumerated in the international regime on human rights. It may be noted that engagement with these rights in a comprehensive sense does not imply a singular understanding of them. To the contrary, constructive engagement of the complete set of human rights that is in circulation in the international human rights regime gives credence and legitimacy not only to these rights but also to the seriousness of the internal debate to define and delimit the exercise of power against the interests of the individual as well as the community.

In short, the whole argument for cultural deference becomes operative only in the formulation of the concrete norms, institutions and practices that will stand on their own, as alternatives to the existing human rights regime in the protection of the individual as well as society in a balanced and equitable manner. For instance, how do the Asian Values arguments affect the manner in which the rights of prisoners are implemented? What will be the content and direction of freedom of expression under

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216 Above n 212 342-343.

217 Above n 209 149.
the Asian Values model? How will it change types of family units and inter-personal legal relationships in the existing developmental models adopted by these Asian countries? According to Peerenboom, the present trend in the Asian Values debate appears to be moving towards the formulation of such concrete responses to the universalist challenge to human rights. Explaining this trend at work in the East Asian context, he comments that the debate in Asia has shifted from the Asian Values phase to

articulating Confucian or other Asian variants of capitalism, democracy, rule of law, and human rights, rather than radical alternatives to them. In the process, scholars have begun to pay greater attention to economic, political, and legal institutions and practices. With this shift toward more concrete situations, the futility of abstract discussions of universalism versus relativism has become even more apparent.\textsuperscript{218} (emphasis in original)

Although the Asian Values arguments were used to strongly challenge universality of human rights by the Asian countries during the Bangkok conference in 1993, in the end the Bangkok Declaration reached a more pragmatic compromise where the indivisibility of international human rights regime was acknowledged in the same breath as the acknowledgment of the need for cultural deference.\textsuperscript{219}

The Asian approach to universal human rights is different in a significant way from the European, African and American models considered above. Although there is a strong tradition of arguing for cultural deference, the Asian models of human rights have not been very cohesive and structured. The lack of a regional human rights charter and a human rights court is indicative of the disorganised nature of the

\textsuperscript{218} Above n 213 5.

\textsuperscript{219} For example, Article 10 of the Bangkok Declaration reaffirms “the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights.” “Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 29 March – 2 April 1993” (7 April 1993) UN Doc. A/Conf.157/ASRM/8; UN Doc. A/Conf.157/PC/59. Peerenbom describes this concession to universalism in the Bangkok Declaration as “a good example of what the Chinese call sleeping in the same bed but having different dreams...and of how an apparent consensus turns out to be chimerical once one probes beneath the surface.” The allusion is to the apparent understanding, according to him, among the Asian leaders that the concession to indivisibility and interdependence acted in strengthening the position of the Asian governments to include social and cultural rights at the same level as civil and political rights in the human rights agenda. See above n 213 37.
Asian approach to human rights. Although there is an Asian Human Rights Commission (1996), it is a non-governmental organisation with little juridical standing in the region. Despite the presence of deeply embedded cultural particularism and suspicion of universalist human rights, the Asian Values debate offers a unique perspective to a difficult marriage of liberal human rights values with communitarian Asian values. It matters not whether there is a “pluralism of Asian values”, they still remain particular and unique to the diverse landscape of Asia. The legitimacy of Asian Values is not diminished by the plurality of what constitutes Asian. Although there may be “many Asias” as Onuma Yasuaki observed, each of these Asias provides a particular view of what is culturally significant to their communities. The persistence of Asian countries in projecting these differences as legitimate claims for inclusion in the interpretation of international human rights sends a potent message. It is one that does not necessarily call for the radical overhaul of the existing system; instead, it calls for hermeneutic considerations of Asian perspectives and cultures.

Moreover, it may also be noted that the growing trend in Asian countries to participate in universal human rights regimes, despite the call for human rights exceptionalism, indicates a willingness not to be isolated in the human rights discourse. The important point that needs the attention of policy makers is not to stifle these voices by enforcing a singular interpretation of human rights. It will only rekindle the deep rooted suspicions and dislike of Western interference in the affairs of these States. It is in this context that a pluralist paradigm of international human rights treaty law becomes relevant and required in such a culturally diverse milieu of States. A flexible approach to the appreciation of the normative standards incorporated in the international human rights regimes will assist in the process of norm cascading and internalization process and will ultimately contribute towards

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gaining greater cultural legitimacy of international human rights norms in these countries. With this in view, we shall assess the reservations to human rights treaties made by Islamic States.

(e) Islamic regimes on human rights

Unlike the human rights regimes discussed above that are based on regional particularities, the Islamic declarations are shaped by a predominant influence of Shari‘ah-based norms and values. Hence, the rights and obligations under the Islamic regimes on human rights are conceived with a distinct religious inflection. There are two main Islamic declarations on human rights that are important for the purposes of examining the Islamic perspective: the Universal Islamic Declaration of Human Rights (1981) (UIDHR) and the Cairo Declaration of Human Rights in Islam (1990) (Cairo Declaration).222 Of these, the Cairo Declaration is also endorsed and included (along with the UN-initiated international human rights regime) in the more recently created Arab Charter on Human Rights (1997).223

(i) Universal Islamic Declaration of Human Rights

The UIDHR was formulated by the Islamic Council of Europe, a non-governmental organisation created under the auspices of the Muslim World League, the largest non-governmental organisation in the Islamic world.224 It is the first

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223 “Council of the League of Arab States, Arab Charter on Human Rights, September 15, 1994” (1997) 18 Human Rights Law Journal, 151 [hereinafter “Arab Charter”]. Although the Arab Charter is a regional regime, being created by the League of Arab States, for the purposes of the present study, it is subsumed under the general rubric of Islamic declarations.

224 For more on the background, see the Muslim World League official website is available at: <http://www.muslimworldleague.org/mwlwebsite_eng/index.htm> [last visited:18.12.2007].
attempt by the Muslim world to formulate a core document on modern human rights. One of the main structural weaknesses of the document is that it is the product of a non-governmental organisation and has less weight in the Muslim world in comparison to the Cairo Declaration. The UIDHR appears to support a universal concept of human rights that is essentially Islamic in content. In his Foreword to the UIDHR, Salim Azzam, the Secretary General of the Islamic Council of Europe, writes that “this Declaration of Human Rights [UIDHR] will give a powerful impetus to the Muslim peoples to stand firm and defend resolutely and courageously the rights conferred on them by God.” As implied in paragraphs three to five of the Preamble, the rights and duties enumerated in the UIDHR are derived from the Qur’an and the Sunnah. That Shari`ah is the source of the UIDHR is evident from the fifth preambular paragraph which notes that “by virtue of their Divine source and sanction these rights can neither be curtailed, abrogated or disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated”. 

The UIDHR appears to have attempted to merge the Shari`ah concepts of rights and obligations of the Muslim believers and the benevolent Islamic State with universalist normative standards of the contemporary human rights discourse. This may be seen in the structure of the UIDHR, which is closely based on the prominent rights schemes of international human rights regimes. For instance, the UIDHR makes provisions for the right to life (Article I), right to freedom (Article II), right to equality and prohibition against impermissible discrimination (Article III), right to fair trial (Article V), right to protection against torture (Article VII), right to asylum (Article IX), rights of minorities (Article X), right to freedom of belief, thought, and speech (Article XII), right to freedom of religion (Article XIII), right to free association (Article XIV), right to protection of property (Article XVI), right of

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225 Se UIDHR above n 222 (emphasis added).

226 Fifth paragraph of the Preamble to the UIDHR. The third paragraph reads, “Whereas Allah (God) has given mankind through His revelations in the Holy Qur’an and the Sunnah of His Blessed Prophet Muhammad an abiding legal and moral framework within which to establish and regulate human institutions and relationships”; while the fourth preambular paragraph reads, “whereas the human rights decreed by the Divine Law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice”. See UIDHR above n 222.
privacy (Article XXII), right to freedom of movement and residence (Article XIII) etc.

A cursory look into these rights may suggest that the UIDHR is a universalist declaration similar to the international human rights regimes. However, when one takes a closer look at the content, almost every right and obligation given in the UIDHR seems to be circumscribed by the applicable rules of Shari`ah “Law”. For instance, Article I, while guaranteeing human life as “sacred and inviolable”, also provides that “no one shall be exposed to injury or death, except under the authority of the Law”. Since the “Law” in this context is being read as Shari`ah, inroads into the right to life based on norms of Shari`ah are allowed as valid and permissible under UIDHR. Another illustration of the pervasive inclusion of Shari`ah in the UIDHR is seen in Article V (right to fair trial) paragraph (c), where it is provided that “punishment [decided by the courts of law] shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it is committed”. Paragraph (d) of the same Article also provides that “no act shall be considered a crime unless it is stipulated as such in the clear wording of the Law”. In other words, punishment for crimes as well as the definition of crimes are determined only by reference to Shari`ah, thereby endorsing the validity of ḥudūd.

The UIDHR may in fact be seen as a declaration of rights that primarily applies to Muslims and non-Muslims living in Islamic States. It does not seem to espouse universal rights in the tradition of the universalist international human rights regimes. Indeed, the UIDHR is clear in pointing out that it is made and affirmed by the “servants of Allah” and the members of “universal brotherhood of Islam” as “inviolable and inalienable human rights ...enjoined by Islam” unto believing

According to the “Explanatory Notes” attached to the English translation of the UIDHR, the term “Law” in the translated version of the document “denotes the Shari`ah, i.e., the totality of ordinances derived from the Qur’an and the Sunnah and any other laws that are deducted from these two sources by methods considered valid in Islamic jurisprudence.” See UIDHR above n 222.
Muslims. Also, it is noted in the Preamble that the declaration is made by “Muslims, who believe” in an

Islamic order...wherein the rulers and the ruled alike are subject to, and equal before, the Law...all public affairs shall be determined and conducted, and the authority to administer them shall be exercised after mutual consultation (Shura) between the believers qualified to contribute to a decision which would accord well with the Law and the public good.

Thus, it may be surmised that one of the purposes of the UIDHR is to create an Islam-centred declaration of rights as an *internally validated* response to the universalist human rights discourse. The drafters clearly seem to presume that the UIDHR is meant to be applied to Muslim as well as non-Muslim subjects in an Islamic State. This drift in the declaration is also rightly observed by Eva Brems when she commented that the UIDHR is designed with the underlying “working hypothesis...of an Islamic State”. Several provisions of the UIDHR lend support in this direction. For instance, Article X paragraph (b) of the UIDHR declares that “in a Muslim country, religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law [Shari`ah], or by their own laws”; the provisions allowing *ḥudūd* penal code of Shari`ah under Article V paragraphs (c) and (d), Article XV especially paragraphs (b) and (d) relating to economic order determined by Islam and *zakat* (obligatory charity for the poor under Shari`ah) indicate the classical understanding of the legal structure of an Islamic State where every aspect of the law is shaped by Islamic directives. There are several provisions of the UIDHR that specifically instruct believers to follow a certain course of conduct in terms of rights and obligations, while other provisions are differentiated in their address to “persons” or “every individual” in a generic

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228 Preamble to the UIDHR, see above n 222.

229 Sixth preambular paragraph, subparagraph (g) (v) and (ix), respectively. See above n 222.


The enumeration of rights in the UIDHR in a seemingly universal language does not conceal the fact that it is intrinsically “framed in an Islamic idiom” and that “it is also theocentric”.

The main drawbacks of the UIDHR include the many presumptions it makes in the process of enumerating the rights. To begin with, it is not clear how the presumption of universality (as suggested in the name of the declaration) can be substantiated given the fact that the UIDHR is based predominantly on Shari`ah. Another difficulty of the UIDHR is the presumption that the laws of Shari`ah as represented in the “Law” of the UIDHR are self-evident to all and that there exists clear consensus on all the norms of Shari`ah. Noting this weakness in the UIDHR, Ebrahim Moosa observes that

since Shari`ah law is not codified in the sense that we are accustomed to understand codification in modern law, such limitation clauses...introduce an element of arbitrariness to the declaration. There could be various interpretations of what the Shari`ah view is on a single matter. In the absence of an international Muslim synod or international Shari`ah court, it would be difficult to enforce uniform or consistent Shari`ah verdicts within national jurisdictions, let alone in the international domain.

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232 For instance, Article I [Right to Life] paragraph (a) states that “no one shall be exposed to injury or death...” while paragraph (b) of the same Article is more specific in noting that “it is the obligation of believers to see that a deceased person’s body is handled with due solemnity”, Article IX [Right to Asylum] paragraph (b) states that “Al Masjid al Haram (the sacred house of Allah) in Mecca is a sanctuary for all Muslims”, Article XII [Right to freedom of belief, thought and speech] paragraph (c) “It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the State”. Although it is not explicitly stated as such, Article XX [Rights of married women] outlines Shari`ah provisions relating to marriage and divorce; Article II [Right to Freedom] paragraph (b) states that “every individual and every people has the inalienable right to freedom in all its forms – physical, cultural, economic and political ...”; Article III [Right to equality and Prohibition against impermissible discrimination] paragraph (a) states that “all persons are equal before the Law and are entitled to equal opportunities...”; paragraph (b) states that “all persons shall be entitled to equal wage for equal work”. [Italics added]. See UIDHR, above n 222.


234 Above n 233 197.
This problem is further complicated by the fact that the UIDHR is a document compiled by a non-governmental organisation and has not been vetted by the representatives of the various Muslim States. The drafters of the UIDHR appear to have believed that the mere juxtaposition of universalist human rights with statements of Shari`ah law would provide an Islamic human rights declaration. To this extent, the UIDHR comes out as a superficial and benign declaration that neither proclaims international human rights as contrary to Shari`ah nor declares Shari`ah-based normative standards as contrary to international human rights.\(^{235}\) It fails to categorically enunciate the Shari`ah norms vis-à-vis universalist human rights norms on issues such as gender equality, freedom of religion (in particular relating to conversion/apostasy) and torture, cruel and unusual punishments.\(^{236}\)

These drawbacks only accentuate a badly constructed declaration that unsuccessfully attempts, through vague and ambiguous language, to bridge a normative-gap between universalist human rights law and Shari`ah-based rights. On the other hand, perhaps the critics of the UIDHR are barking up the wrong tree. After all, the UIDHR is only a document formulated by a non-governmental organisation, aimed at guiding Muslims in the debate on human rights, thereby having little strategic value in terms of State practice on human rights in the Islamic countries. As a scholarly contribution, it does not add more to enrich the debate on the Shari`ah and human rights by declaring canonical positions in clear and decisive terms nor does it provide a solution to the problems ensuing from the apparent conflict between two different normative systems.

Nevertheless, the UIDHR may be taken as a reaffirmation of the view that “human rights can be promoted in the name of Islam, yet they cannot have priority over Islamic rules.”\(^{237}\) Given that the UIDHR represents the first international (even

\(^{235}\) Eva Brems, above n 230 258.

\(^{236}\) Eva Brems, above n 230 254-256; See also, Ebrahim Moosa above n 233 200.

\(^{237}\) See Eva Brems, above n 230 254-258.
though not an intergovernmental) declaration on the Islamic position on human
rights, it is symbolically a small and a reluctant step to engage in the present
discourse on human rights and cultural particularities. All the same, the UIDHR has
notably and ardently asserted the Islamic aspiration to create a separate, if not a
parallel, conception of human rights. This is a position that the OIC and the Arab
League had been working towards and one that we find more succinctly asserted in
the Cairo Declaration of Human Rights in Islam (1990) and the Arab Charter on
Human Rights (1997), respectively.

(ii) Cairo Declaration on Human Rights in Islam (1990)\textsuperscript{238}

The Cairo Declaration was adopted by 45 member States of the OIC at the
Nineteenth Islamic Conference of Foreign Ministers in 1990\textsuperscript{239} and was presented as
the OIC contribution to the World Conference on Human Rights in 1993.\textsuperscript{240} The
Cairo Declaration was formulated by the OIC, an intergovernmental organisation
representing all the Muslim States, as a response of the Islamic States to the human
rights discourse and it is primarily meant to “serve as a general guidance for member
States in the field of human rights”.\textsuperscript{241} It is clear from the language of the enabling
resolution that the Cairo Declaration was merely intended to constitute a “document

\textsuperscript{238} “Cairo Declaration on Human Rights in Islam (Resolution No. 49/19-P of the Organisation of
Islamic Countries)” 5\textsuperscript{th} August 1990, United Nations General Assembly Official Records, World
Conference on Human Rights, 4\textsuperscript{th} Session, Agenda Item 5; (1993) United Nations Document
A/Conf.157/PC/62/Add.18. See online at: \textsuperscript{http://www.oicun.org/articles/54/1/Cairo-Declaration-on-
Human-Rights-in-Islam/1.html} [last visited: 22.12.2007].

\textsuperscript{239} “Final Communiqué - The Nineteenth Islamic Conference of Foreign Ministers (Session of Peace,
Interdependence and Development); Cairo, Arab Republic of Egypt, 9-14 Muharram 1411 (Anno
Hegirae), 31 July to 5 August 1990”. Available at the OIC official website:
\textsuperscript{http://www.oic-oci.org/oicnew/english/conf/fm/19/19%20icfm-final-en.htm}
[last visited: 22.12.2007]

\textsuperscript{240} It was included as “Cairo Declaration on Human Rights in Islam, 5 August 1990, U.N. General
Assembly Official Records, World Conference on Human Rights, 4\textsuperscript{th} Session, Agenda Item 5”. See
above n 238.

\textsuperscript{241} “Resolution No.49/19-P - The Nineteenth Islamic Conference of Foreign Ministers (Session of
Peace, Interdependence and Development); Cairo, Arab Republic of Egypt, 9-14 Muharram 1411
(Anno Hegirae), 31 July to 5 August 1990” available at the OIC official website:
\textsuperscript{http://www.oic-oci.org/oicnew/english/conf/fm/19/19%20icfm-final-en.htm}
[last visited: 22.12.2007]
on human rights in Islam” 242 and is not akin to the UDHR or the other various international human rights instruments.

At the same time, it may be noted that the twenty five articles of the Cairo Declaration, unlike the UIDHR, make no explicit address to “believers”, “Muslims” or to “non-Muslims”; instead, all the provisions of the Cairo Declaration are unwaveringly addressed in general to “everyone”, “all humans” or to “all individuals”. 243 Although this difference may appear minor at the outset, it indicates a desire of the framers of the Cairo Declaration to make it appear as more inclusive in its scope and hence, more representative of the domestic situations of the member States of the OIC than the UIDHR. 244 It is representative of the composite political and legal systems of the majority of modern Islamic countries where Common Law and Civil Law intermingle with Islamic Shari`ah and where religious plurality is a demographic reality. Instead of presuming an idealised “Islamic State”, the Cairo Declaration uses universalist language 245 to essentially address the contemporary Islamic States with their prevailing socio-political realities.

The constitutional protection given to Shari`ah in most of the Islamic States, to a great extent, explains why the Cairo Declaration also adopts Shari`ah as the only

242 Above n 241.

243 In contrast, the UIDHR addresses “believers” (thrice noted), “Muslims” (nine times) and “non-Muslims” (once).

244 The UIDHR seems to make the presumption that Islamic states in the contemporary world are (or ought to be) organised along the lines of the traditional model of the State set up by the Prophet Muhammad in Medina. This may be seen from its repeated references to the *Ummah* (concept of a pan-Islamic community) a presumption that is absent in the Cairo Declaration. For example, Article XIX paragraph (g) of the UIDHR states that “motherhood is entitled to special respect, care and assistance on the part of ... the public organs of the community (*Ummah*).” See Eva Brems above n 230 244-254. For the concept of model Islamic State formulated along the Constitution of Medina see Muhammad Hamidullah, *Muslim Conduct of State* (4th Ed.) (Lahore: Sh.Muhammad Ashraf, 1961); Muhammad Hamidullah, *The First Written-Constitution in the World* (2nd Ed.) (Lahore: Sh. Muhammad Ashraf, 1968).

245 The articles of the Cairo Declaration address “everyone”, “all individuals” or “all humans” in a manner that appears to indicate some similarity to the universalist regimes of international human rights law.
law circumscribing all the rights and obligations found under it.\textsuperscript{246} Hence, the confluence of universalist and Shari`ah-based rights and obligations under the Cairo Declaration comes about with the clear inference that Shari`ah takes precedence over other normative standards. This is an exceptionalist position that is largely in tandem with the State practice of most Islamic States as seen from the large number of Shari`ah-based reservations made to international human rights treaties. The rights and obligations enumerated in the Cairo Declaration (although bearing some similarities with other international human rights declarations) are infused with a “clear Islamic flavour”, as observed by Eva Brems.\textsuperscript{247}

For example, Article 1 of the Cairo Declaration, while guaranteeing that “all men are equal in terms of basic human dignity and basic obligations and responsibilities”, also asserts that “the true religion [Islam] is the guarantee for enhancing such dignity along the path to human integrity”. Paragraph (b) to Article 1 is explicit in announcing an Islamic consciousness when it asserts that “all human beings are Allah’s subjects, and the most loved by Him are those who are most beneficial to His subjects, and no one has superiority over another except on the basis of piety and good deeds”.\textsuperscript{248} Most of the provisions of the Cairo Declaration are

\textsuperscript{246} The limitation clauses of the Cairo Declaration are contained in Articles 24 and 25. Article 24 of the Cairo Declaration states that “all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari`ah”, while Article 25 states that, “Islamic Shari`ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration”. Shari`ah is given a predominant constitutional position in most Islamic States. While in some countries like Saudi Arabia, Shari`ah constitutes the basic law that precedes all other sources of law, in some other countries like Malaysia, Shari`ah is protected is the case of certain areas of law such as those enumerated in the Ninth Schedule, List II relating to legislative powers of State governments. However, in most Islamic States Shari`ah act as a limiting authority, in one form or the other, of governmental power. See, for a detailed examination of the position of Shari`ah in the constitutions of modern Islamic States, Tad Stahnke and Robert C. Blitt, “The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries” (Washington: United States Commission on International Religious Freedom, 2005) available online at: <www.uscirf.gov> [last visited: 18.12.2007]

\textsuperscript{247} Eva Brems, above n 230 260.

\textsuperscript{248} This provision corroborates what is already declared in the Qur`an [“verily, the most honoured of you in the sight of Allah is (he who is) the most righteous of you”] as well as noted in the Hadith of Prophet Muhammad [in his last sermon (khutbatul wadi`) Muhammad declares that “all mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white [person] has no superiority over a black [person] nor a black has any superiority over a white except by piety and good action.”]. See for the Qur`anic reference, verse
interlaced with such Islamic ethical and legal positions and universalist human rights concepts. Article 2 (right to life) paragraph (c) notes that “the preservation of human life throughout the term of time willed by Allah is a duty prescribed by Shari‘ah” and the right to life is protected, except where the Shari‘ah prescribes otherwise. Article 3 contains the Shari‘ah standards concerning the ethical conduct of war, Article 4 follows Islamic precepts in giving protection to the corpse and burial ground from desecration, and Article 5 declares the Islamic concept of family as the “foundation of society” and marriage as “the basis of making a family”. Notably, it does not use “religion” as a qualifier to the right to marry. Any expectation that this removes the Shari‘ah proscription on the marriage of Muslim women to non-Muslims may be cast aside when we read Article 5 together with Article 24 that subjects all rights and freedoms ultimately to Shari‘ah law. Again, Article 6 includes the Shari‘ah norm relating to the husband’s obligation to maintain the wife, while Article 7 recognizes the right and obligation of Muslim parents to educate their children “in accordance with ethical values and the principles of the Shari‘ah”.


249 Article 2 paragraph (d) of the Cairo Declaration states, “Safety from bodily harm is a guaranteed right. It is the duty of the State to safeguard it, and it is prohibited to breach it without a Shari‘ah-prescribed reason.”

250 It is closely based on the ethics of warfare declared by the first Caliph of Islam, Abu Bakr As-Siddique, as noted in Al Tabari’s “History of the World” as quoted in Akbar S. Ahmed, Discovering Islam: Making Sense of Muslim History and Society (New York: Routledge, 2002) 34. See also, Youssef H. Aboul-Enein and Sherifa Zuhur, Islamic Rulings on Warfare (Strategic Studies Institute: US Army War Co., 2004) 22 available online at: <http://books.google.com/books?id=5F-JEmNr9yUC&printsec=frontcover#PPR1,M1> [last visited: 22.01.2008].


252 In fact, this rule of Shari‘ah is reflected in almost all the family law or personal law codes of Islamic countries. See Jamal J. Nasir, The Status of Women Under Islamic Law and Under Modern Islamic Legislation (London: Graham & Trotman Ltd., 1994).

253 “Men are the protectors and maintainers of women, because Allah has given one more (strength) than the other, and because they [men] support them from their means.” Verse 4:34 The Holy Quran at above n 248 195.

254 Article 7 paragraph (b) of the Cairo Declaration. The Qur’anic authority on a positive duty of the parents to teach Islamic ethics to children arises from Verse 31:15, The Holy Quran above n 248
Article 7 also recognizes the Shari`ah rights of parents as against children, especially towards maintenance during old age. Article 9 guarantees the right to education to every human being, while placing upon the State, the positive obligation of providing “both religious and worldly education”. Article 11 bans all forms of slavery, asserting that “there can be no subjugation but to Allah the Almighty”. Article 13 guarantees everyone a right to work, placing a corresponding obligation on the State as well as society to ensure this guarantee. It also guarantees fair wages “without any discrimination between males and females”, indicating a clearly universalist position on the issue. Article 14 goes against monopolistic trade practices and declares the Shari`ah prohibition on usury or *riba*. Article 17 of the Cairo Declaration also includes a unique human right, that to “a clean environment”, which is combined along with the right to live in an environment “away from vice and moral corruption, that would favour a healthy ethical development” of persons. It reveals a concern to create and secure a virtuous and ethical social reality. Paragraphs (b) and (c) of Article 17 ensure a combination of several universalist human rights such as the “right to medical and social care”, and “decent living that may enable him to meet his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs”. Article 18 incorporates the right to privacy as well as the “right to live in security for himself, his religion, his dependents, his honour and his property”, while Article 19 espouses equality before law as well as rule of law. Curiously, just as in the case of the UIDHR (Article V paragraph (d) relating to Right to Fair Trial), Article 19 paragraph (d) of the Cairo Declaration declares that “there shall be no crime or punishment except as provided for in the Shari`ah”.

Neither the UIDHR nor the Cairo Declaration seems to recognize that modern criminal law surpasses the basic aspects of crimes and punishments referred to in the Qur’an and the Sunnah. For instance, it is difficult to imagine how digital crime may really come within the specific categories of crimes provided in the Qur’an and the Sunnah, unless jurists liberally use *ijtihād* to expand the law in this area. It is not

1037. See also Amjad Hussain, “Islamic Education: why is there a need for it?” (December 2004) 25 (3) Journal of Beliefs and Values 319.
clear from this limitation of the definition of both crime and punishment, whether Article 19 refers to the ḥudūd laws relating to adultery (zina), theft (sariqah), highway robbery or aggravated armed robbery (qat` at-tariq or ḥirābah), drinking alcohol (shurb al-khamr), false accusation of extramarital sex (qazf)\(^{255}\) only, or whether the provision envisions appending a more expansive definition of crimes and punishments under Shari`ah. It may be noted that in most of the member States of OIC, there are separate criminal codes that incorporate Shari`ah laws on crime and punishment, along with aspects of modern criminal codes. Therefore, it may be surmised that Article 19 of the Cairo Declaration fails to be applicable to the contemporary realities of modern Islamic States, especially since it is encased in a restrictive language that appears to foreclose any possibility for meaningful development of the law in the area.

A significant omission in the rights scheme of the Cairo Declaration is the right to freedom of religion. Unlike Articles XII and XIII of the UIDHR, Article 10 of the Cairo Declaration only states that “Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.” This, however, does not indicate any fundamental freedom of religion as is found in almost international human rights treaties.

According to Abdullah Saeed, Article 10 merely restates the Islamic position regarding the prohibition of forced conversions to Islam. He notes that Article 10 does “not add any new freedoms, or expand the scope of religious freedom implicit in pre-modern Islamic law”.\(^{256}\) Indeed, he contrasts this provision with Article 18 of

\(^{255}\) Even the modern ḥudūd codes of Islamic States such as the three Shari`ah criminal laws of Pakistan are based on these classic crimes and punishments, the evidence of which are derived from the two primary sources of Shari`ah. See “The Prohibition (Enforcement of Hadd) Order, 1979”, President’s Order No. 4 of 1979; “The Offence of Zina (Enforcement of Hudood) Ordinance, 1979” Ordinance No. VII of 1979; “The Offence of Qazf (Enforcement of Hadd) Ordinance 1979”, Ordinance No. VIII of 1979. Digital copies of the ordinances available online at: <http://www.pakistani.org/pakistan/legislation/hudood.html> [last visited: 23.12.2007].

the UDHR, implying thereby that the Cairo Declaration lacks any corresponding freedom of religion. The fact that the Cairo Declaration fails to comprehensively address the issue of freedom of religion, by asserting the Shari`ah position that is pertinent to the Islamic world, is a missed opportunity to settle much of the confusion surrounding this issue in the contemporary debate on human rights. Among other notable omissions in the Cairo Declaration is the right to freedom of assembly; while Article 12 guarantees freedom of movement, it makes no mention of a right to assemble freely. Again, while Article 20 prohibits “physical or psychological torture or ... any form of maltreatment, cruelty or indignity” and unconsented medical experimentation, it does not provide detainee rights such as those provided under Articles 9 and 10 of the ICCPR. These glaring omissions in the Cairo Declaration give the impression of a human rights declaration that has largely been constructed without taking into serious consideration the crucial issues that are in conflict between religiously determined value systems of Islamic law and the contemporary debate on human rights.

Although the Cairo Declaration makes an attempt to merge universalist provisions of international human rights with Shari`ah-based normative standards, it fails in the end to provide a comprehensive response to the present debate. It has not clarified the law on three important issues: the subjects of gender equality in marital and inheritance laws, freedom of religion, and more importantly, defining the principal limitations put on all the rights included in the Declaration, i.e., Shari`ah. While Articles 24 and 25 make it explicitly known (as do the numerous other limitations clauses attached to the various articles) that all rights and obligations are subject to Shari`ah, nowhere in the Declaration has any effort been made to elaborate on the definition of Shari`ah, and to specify if the rights and obligations are to be interpreted using any particular school of Islamic law. This is a significant drawback not only found in the Cairo Declaration, but also in the UIDHR. The latent ambiguity concerning the only law of reference, i.e., Shari`ah, makes the two Islamic declarations on human rights vague and leaves them open to justifiable criticism.
(f) Mushrooming of Shari`ah-based reservations post-Cairo Declaration

Contrary to Ann Elizabeth Mayer’s description, the two Islamic declarations discussed above do not constitute a “definitive Islamic counter-model[s] of human rights that Muslims should follow in lieu of the international formulas”. For instance, it is evident from the Preamble of the Cairo Declaration that it is meant to “serve as a general guidance for member States in the field of human rights”. Indeed, looking into the patterns of reservations made by Islamic States subsequent to the Cairo Declaration, it is quite likely to have acted only as a guideline towards State practice.

It is true that Islamic States were engaged with the international human rights regimes even before the Cairo Declaration came into being. For example, a look at the human rights regimes accepted by the 58 member States of OIC prior to the Cairo Declaration reveals that 24 Islamic States ratified the ICCPR, 25 ratified ICESCR, 19 ratified CEDAW, 8 States ratified the CRC, while 13 States ratified CAT during this period. While these figures represent the Islamic States that ratified the treaties prior to 1990, it is important to note that only a few of these States actually made a reservation while joining the respective regimes. In the case of


258 Fifth Preambular paragraph, Cairo Declaration of Human Rights in Islam.

259 It is an engagement that began right from the drafting stages of the UDHR. Indeed, the beginning of an Islamic exceptionism may be attributed to the Saudi Arabian abstention to the final vote on UDHR. Susan Marks notes that in addition to Saudi Arabia, some other Muslim countries (example, Egypt, Syria) also noted their apprehensions about certain provisions of the UDHR, in particular Articles 16 and 18, although it was only Saudi Arabia that did not cast the final vote for the UDHR. Susan Marks, “Universal Human Rights: The Contribution of Muslim States” (2004) 26 *Human Rights Quarterly* 817.

260 At present, there are a total of 48 Islamic States (OIC member) that have joined ICCPR.

261 At present, there are a total of 47 Islamic States (OIC member) that have joined ICESCR.

262 At present, there are a total of 53 Islamic States (OIC member) that have joined CEDAW.

263 At present, there are a total of 56 Islamic States (OIC member) that have joined CRC.

264 At present, there are a total of 45 Islamic States (OIC member) that have joined CAT.
the ICCPR, out of the 24 States only Algeria and Egypt formulated reservations based on Shari‘ah; Egypt also remained the only Islamic State to submit a Shari‘ah-based reservation to ICESCR prior to the Cairo Declaration. Again, out of the 19 Islamic States that ratified CEDAW, only six States formulated a Shari‘ah-based reservation and all of the remaining 13 States joined CEDAW without making any reservation, and out of the 9 that ratified the CRC, Egypt and Bangladesh formulated Islamic reservations.  

Table 1: Islamic States that joined human rights treaties before the Cairo Declaration:

<table>
<thead>
<tr>
<th>Human Rights Treaty</th>
<th>Islamic States that joined before (5 August 1990)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICCPR</td>
<td>Afghanistan, Algeria, Cameroon, Egypt, Gabon, Gambia, Guinea, Guyana, Iran, Iraq, Jordan, Lebanon, Libya, Mali, Morocco, Niger, Senegal, Somalia, Sudan, Suriname, Syria, Togo, Tunisia, Yemen</td>
</tr>
<tr>
<td>ICESCR</td>
<td>Afghanistan, Algeria, Cameroon, Egypt, Gabon, Gambia, Guinea, Guyana, Iran, Iraq, Jordan, Lebanon, Libya, Mali, Morocco, Niger, Senegal, Somalia, Sudan, Suriname, Syria, Togo, Tunisia, Uganda, Yemen</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Bangladesh, Burkina Faso, Egypt, Gabon, Guinea, Guinea-Bissau, Guyana, Indonesia, Iraq, Libya, Mali, Nigeria, Senegal, Sierra Leone, Togo, Tunisia, Turkey, Uganda, Yemen</td>
</tr>
<tr>
<td>CRC</td>
<td>Bangladesh, Benin, Egypt, Guinea, Senegal, Sierra Leone, Sudan, Togo</td>
</tr>
<tr>
<td>CAT</td>
<td>Afghanistan, Algeria, Cameroon, Egypt, Guinea, Guyana, Libya, Senegal, Somalia, Togo, Tunisia, Turkey, Uganda</td>
</tr>
</tbody>
</table>

Historically, the Cairo Declaration emerges at the beginning of a landmark period in the participation of Islamic States in international human rights treaties. The 1990s saw a substantial increase in the participation of Islamic States in

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265 See for details, Appendix III Table of Shari‘ah-based Reservations to CEDAW; Appendix II Detailed List of Shari‘ah-based Reservations (with Objections) to ICCPR, CEDAW, CAT and CRC.
international human rights regimes. For example, after the Cairo Declaration, 24 out of the 58 OIC States\textsuperscript{266} ratified the ICCPR, 22 States ratified the ICESCR, 34 States ratified the CEDAW, 48 States ratified the CRC and 32 States ratified the CAT. A significant number of these Islamic States ratified subject to reservations. In the case of the ICCPR, Bahrain, Kuwait, Maldives and Mauritania made Shari`ah-based reservations, while none of the 58 OIC States made a Shari`ah-based reservation to the ICESCR. Indeed, the bulk of the Islamic reservations were directed at the CEDAW and the CRC. Out of the 34 States that ratified the CEDAW subsequent to the Cairo Declaration, 13 of them did so with Shari`ah-based reservations to significant aspects such as Article 2 (general equality between sexes) and Article 16 (same rights of marital spouses). Again, in the case of the CRC, out of the 48 States 20 ratified with Shari`ah-based reservations. In the case of the CAT, only Qatar made a general reservation linked to Shari`ah.\textsuperscript{267}

The patterns of post-Cairo Declaration reservations made by Islamic States indicate, on the one hand, an openness to participate in the universalist human rights regimes and, on the other hand, they reveal a persistent practice of making reservations to provisions of treaties that were seen to be problematic from an Islamic perspective. While it may be conceded that not all the Islamic States have been consistent in making the various Shari`ah-based reservations to the different international human rights treaties,\textsuperscript{268} the persistence of these States in maintaining

\textsuperscript{266} Including Palestine.

\textsuperscript{267} Appendix II Detailed List of Shari`ah-based Reservations (with Objections) to ICCPR, CEDAW, CAT and CRC.

\textsuperscript{268} In fact, sometimes even individual States demonstrate inconsistency in maintaining reservations based on Shari`ah to thematically similar rights embodied in different treaties. For example, Jordan is made a reservation to Article 14 of the CRC (relating freedom of religion of the child) and yet, even though Jordan actually ratified the ICCPR much before CRC, it made no reservation to Article 18 of the ICCPR that deals with the same right. This peculiar situation raises the interesting legal question: can a child, who is prevented from exercising her right to freedom of religion by virtue of the Jordanian reservation to Article 14 of the CRC, claim the same right through Article 18 of the ICCPR (to which regime Jordan is also a party against which provision Jordan has made no reservation? The answer to this question largely depends on the persistence of Jordan to retain the Shari`ah-based norm of religious freedom, in particular the apostasy law as applied in Jordan. This problem highlights on the one hand, inconsistent state practice in the matter of formulating reservations, perhaps attributable to oversight by inattentive foreign office staff or perhaps that the state presumes the particular Shari`ah norm is self-evident. Neither of these presumptions is adequate to resolve to the legal
the reservations indicates a determination to adhere to a religion-based particularist conception of human rights. The Cairo Declaration perhaps provided a moral impetus that guided Islamic States in continuing with the practice of making Shari’ah-based reservations to human rights treaties. However, the extent of legitimacy of the Cairo Declaration as a human rights scheme must not be overplayed, even though it was adopted by the consensus of the governments. The fact remains that the Cairo Declaration is, in the final analysis, a declaratory document that is not invested with any institutional legal authority. It may perhaps also be argued that the adoption of these normative directives of the Cairo Declaration by the Islamic States has given them the attributes of regional customary international law. The consistency with which the Islamic States parties have formulated Shari’ah-based reservations to human rights treaties are indicative of a regional (Pan-Islamic) consensus on giving primacy to certain rules derived from Islamic law. Therefore, it is not entirely implausible to claim regional customary international law status to these rules derived from Shari’ah.

(g) Is there an emerging Islamic human rights regime?

Unlike the ECHR and the ACHR, neither the UIDHR nor the Cairo Declaration creates a human rights system. However, the general trend in the OIC appears to suggest a steady progress towards the creation of an Islamic human rights scheme. Several developments in the OIC point to this direction.

problem. The Jordanian position needs to be further probed by the respective bodies in order to ascertain its exact scope and nature.

269 The concept of “regional customary international law” was most notably highlighted by the Inter-American Commission on Human Rights in its 1987 decision on the prohibition of capital punishment for children. The Commission declared that there was consensus among all the members of the OAS on the prohibition of capital punishment to children and that this prohibition, thereby, acquired the status of a regional customary international law. See Case of James Terry Roach and Jay Pinkerton (22 September 1987) Resolution 3/87, Case 9647, (1986-87) Annual Report of the Inter-American Commission on Human Rights (IACHR Annual Report) 147, para.56. Available online at: <http://www.cidh.org/annualrep/86.87eng/EUU9647.htm> [last visited: 26.01.2008]. This case lays down regional consensus as the test for “regional customary international law”.

The OIC submitted the Cairo Declaration to the World Conference on human rights in Vienna (1993), as the contribution of the Islamic world, and invited the member States to “coordinate their positions during the World Conference...on the basis of the guidelines” contained in it.\textsuperscript{270} The Cairo Declaration may be regarded as a first step in the progressive development of an Islamic international law on human rights. For instance, the OIC has already indicated the setting up of an “Islamic Charter on Human Rights”, the deliberations towards which are to take place over the course of 2007-2008.\textsuperscript{271} The OIC Intergovernmental Expert Group and its subcommittee in charge of formulating the Islamic Charter are also invested with the purpose of creating the “Covenant on the Rights of Women in Islam” and an “Islamic Covenant against Racial Discrimination” besides “studying the possibility of establishing an Independent Permanent Body to Promote Human Rights in the Member States”, i.e., an Islamic Human Rights Commission.\textsuperscript{272} The OIC has already adopted the Covenant on the Rights of the Child in Islam along the lines of the CRC and Islamic normative standards.\textsuperscript{273} Furthermore, the International Islamic Court of Justice (IICJ), with its proposed headquarters in Kuwait, is already in the pipeline.\textsuperscript{274} According to Article 1 of the Statute of the IICJ, it is

\begin{itemize}
\item \textsuperscript{274} The IICJ Statute was adopted by the OIC in 1987 at the Fifth Islamic Summit in Kuwait. See, “Resolution No. 13/5-P(IS) on the Establishment of the International Islamic Court of Justice”,
\end{itemize}
the principal judicial organ of the Organisation of the Islamic Conference, based on the principles of Islam and the sources of Islamic law and rules and works independently, in accordance with the provisions of the Charter of the Organisation of the Islamic Conference and the present Statute.\textsuperscript{275}

In declaring the governing law of the Court, Article 27 of the Statute of the IICJ states,

(a) Islamic Shari`ah shall be the main source of law behind the rulings of the International Islamic Court of Justice. (b) The Court can be guided by international law and international agreements, bilateral, multilateral or international conventions, international customary law in force or general principles of law or judgments of international courts.\textsuperscript{276}

The emerging trend towards greater faith-based cohesion within the Islamic world is clear when we view together the efforts of the OIC in setting up an Islamic Charter on Human Rights, Islamic covenants on human rights and the International Islamic Court of Justice. All the members of the OIC assert the significant role of Islamic law towards the development and progress of their domestic and international affairs. These efforts towards the creation of an Islamic human rights scheme are underlined by their adherence, on the one hand, to Islamic law and legal traditions while, on the other hand, they accept the legitimacy of the general principles of international law and international legal customs, as noted in Article 27 of the IICJ. This attempt to encase an Islamic human rights regime in both existing international law and Islamic Shari`ah, may be viewed with scepticism and mistrust by claiming that it creates an unnecessary splitting up of a universalist conception of international human rights law and particularisation that may only foment radical elements in gaining a stronghold. The sceptre of fear arising from a \textit{radical} or


\textsuperscript{275} Article 1 of the Statute of the IICJ (free translation from the original Arabic).

\textsuperscript{276} Article 27 of the Statute of the IICJ (free translation from the original Arabic).
fundamentalist interpretation of Islam can be used to forestall creative and effective engagement with an unfolding parallel international Islamic law.

Alternatively, these developments of Islamic jurisprudence on international law and human rights may be taken positively as enriching a participatory basis of international law. The ramifications of a developing Islamic human rights scheme to the present discourse on international human rights are equally significant. It provides an opportunity for adopting cross-cultural normative diversity as part of the universal human rights discourse with the result of creating not only greater participation, but effective internalisation of human rights norms. It invests human rights discourse with a moral placability that at once makes human rights both particular and universal. Consequently, it effectively replaces the theoretical quibbling over whether human rights are universalist or relativist, as indicated in the evolving coherent State practice of adopting diverse interpretations in the application of international human rights regimes as is the case in the regional human rights regimes discussed above.

In comparative terms, however, it may be posited that the European, African and the American divergences from the universalist paradigm are relatively less radical than the Islamic declarations examined above. This point bears merit to the extent that it explains the deeply entrenched nature of the fundamental postulates of Shari`ah in the Islamic States. Historically, there is a longer tradition of a coherent Islamic legal system than an African or an American system. Perhaps, one may also add to this historicity, the renewed interest within Islamic States of reasserting an Islamic political identity that had been subdued for the most part of the twentieth century. The Islamic State practice, coupled with the ongoing works of the OIC, lends credible support towards the conclusion that there is an emerging Islamic human rights regime that can be located within a developing international Islamic law in general. It will be wrong, at the same time, to denounce this development with the argument that it dilutes the normative standards of human rights because the preponderant evidence of State practice, in particular the Islamic State practice,
shows that the very idea of normative standards is conceived cross-culturally. Moreover, it may also be surmised that the manner in which the Islamic States have participated in the various international human rights treaty regimes provides an opportunity for effectively engaging these States parties (with their religio-cultural specificities) in the mainstream discourse on human rights.

Although, as cautioned by Oonay A. Hathaway, mere ratification of human rights treaties may not necessarily imply a strong commitment to the implementation of the human rights norms, it presents an opportunity to start the process of norm cascading in these countries. Such an approach will, of course, have to take into account that the propagation of human rights norms is a progressive process. In the case of the Islamic States, Hathaway’s observations may be partly right if one looks into the scale of human rights treaty implementation - at the same time, it also shows that these States have become party to international treaty regimes and thereby taken the first step towards the internalization of human rights norms. No doubt, the process poses significant domestic challenges arising from religio-cultural specificities. But the experience of most of the Islamic States examined in the present study reveals that there is an abiding will to engage in human rights discourse and discover tools for internalizing them. The various Islamic declarations on human rights examined above may fall short of the most desired standards in terms of international human rights - still, they provide an important process for initiating a legitimization process of human rights norms within Islamic States.

277 "...the focus on domestic legal incentives leads to a counterintuitive prediction: a state’s willingness to commit to a treaty will be influenced not simply by the amount by which its practices diverge from the standard of conduct outlined in the treaty but also by how likely domestic institutions are to require the government to change state practices to conform to the treaty requirements." Oona A. Hathaway, “Why Do Countries Commit to Human Rights Treaties?” (2007) 51 (4) Journal of Conflict Resolution 594.

278 In this context, it is also helpful to note Helfer’s observation on the domestic costs involved in the forced implementation of international human rights regimes in some States. He observes that “altering domestic policies to conform to international human rights standards is not costless. Such alterations impose external constraints on a government’s ability to respond to legitimate social problems by regulating the behaviour of individuals within its borders or by allocating resources to other areas of social policy - both traditional aspects of state sovereignty. States have differential preferences for committing themselves to these external constraints, which may vary based on their regime type, level of socioeconomic development, responsiveness to domestic civil society, or desire to impose human rights obligations on other states. As a result of these differing preferences, states
3.3 Diversity paradigm and international human rights treaty law:

It is evident from the above discussion that theoretical constructs of universalism or relativism or any other frame of reference is as yet not a settled territory in the human rights discourse. There is no consensus on the nature of human rights as an abstract concept. It is unlikely that such a consensus will ever emerge. In fact, such philosophical abstractions do not necessarily play a significant role in the practical implementation of international human rights treaty law. International human rights guarantees are based in international law and hence, these guarantees must also be derived from the sources of international law such as treaty law, customary international law and general principles of law recognised by civilised nations. Therefore, it is important that any comprehensive deliberation on international human rights law must delve into the contents of international human rights treaties and examine them within the guiding principles of international law of treaties.

Since human rights as a legal construct of international law primarily emerges from human rights treaty regimes it is necessary that discussions on international human rights law is guided by the provisions of international treaty law, i.e., the VCLT regime. As such, universalism or relativism or any other conceptualisation of the nature of human rights law must, like any other construct of international law, be assessed using the relevant doctrines of the international legal order, which in this case is the VCLT. While some commentators like Louis Henkin and Jack Donnelly propose foundationalist arguments that human rights are normatively universal on account of the ratification of these treaties by States across the globe, such

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positivist posturing does not adequately explain the prevalence of diverse approaches to the ratification and implementation of these human rights treaties by States parties. The inadequacy of these explanations demonstrates an inherent weakness in their considerations of State practice and an over reliance on foundationalist philosophical constructs.

The deference given by some commentators to the normative and transcendental nature of human rights are premised on a universalist philosophy advocating that human rights “are based on public international law principle that individuals have certain inalienable rights, which States cannot justify overriding by their imperatives of culture, tradition, expediency, economic advantage or such other factors.” 281 In contrast, G.G Fitzmaurice in his 1956 Report notes that

there is no substantial difference between any of these classes of treaties [multilateral contractual and normative treaties] as regards the legal requirements governing their validity, interpretation and effect, since they are all based on agreement, and derive their legal force from its existence282

Admittedly, the normative content of international human rights treaties posits an important consideration for the global or universal acceptance of these treaty provisions. In fact, some of these human rights provisions, i.e., rights against torture, have moved beyond just mere aspirations to become peremptory in nature. As a result, the legally binding nature of some human rights is more forceful than others. However, to assert that the normative character of international human rights treaties places them above the general principles of international law and international treaty law (as represented in VCLT) is more de lege ferenda than de lege lata. In practice, treaties based formally on consensus among States parties,


binding majority decision-making of treaty bodies, international judicial pronouncements and other institutionalised normative articulations continue existing side-by-side.\textsuperscript{283} The plurality of worldviews based on which States parties interact within international human rights treaty networks perforce requires a pluralistic appreciation of the law on human rights.

Without a doubt one of the principal objectives of universalising international human rights treaties is to spread the protective netting of human rights regimes globally. Nevertheless it is misleading to read into this exercise universalist or relativist presumptions that have little bearing on actual State practice. International human rights law is grounded firmly in international treaty law operative within a functional international legal order. This, however, in no way creates a “legal universality”\textsuperscript{284} that is also ontologically universal since the international legal order continues to be conditioned by the practices of participating sovereign States. In fact, sovereignty is an important feature of the process in which States parties implement human rights treaties. Explaining this defining characteristic of the international legal framework, Brad R. Roth notes that

Sovereignty entails three presumptions: (1) a State is presumed to be obligated only to the extent of its actual or constructive consent; (2) a State’s obligations, while fully binding internationally on the State as a corporative entity, are presumed to have direct legal effect within the State only to the extent that domestic law has incorporated them; and (3) the inviolability of a State’s territorial integrity and political independence, as against the threat or use of force or ‘extreme economic or political coercion’ is presumed to withstand even the State’s violation of international legal norms. All three presumptions are rebuttable, but nonetheless formidable. Sovereignty thus presents hurdles, both to the establishment of new international norms and to the implementation of existing norms.\textsuperscript{285}


Although sovereignty may be perceived as presenting hurdles to the full and comprehensive implementation of universalist human rights, the international legal order provides mechanisms for the effective mediation of the demands of sovereignty and normative human rights. The inherent pluralism and accommodative principles contained in international treaty law is evident in the VCLT provisions relating to reservations examined in Chapter Two above. Similarly, the principles of ‘margin of appreciation’ of the ECHR and the local community-oriented values and concerns incorporated in the ACHR support the existence of this pluralism in the international legal order.

The concept of reservations incorporated in the VCLT is an important component in this direction. As remarked by Paolo G. Carozza, through reservations States could tailor the details of the norms [of human rights treaties] to their particular needs, and in doing so would accept the central legal obligation of the treaty. The reservations arrangement announced by the ICJ [in Genocide Convention case] (and later codified in the Vienna Convention on the Law of Treaties) thus goes further than just making reservations permissible in the case of multilateral human rights treaties: it makes a certain amount of State discretion over the treaty norms central to the universal aspirations of that treaty. It derives the necessity for interpretive pluralism directly from the core purposes of the treaty.\(^{286}\)

The international legal order (inclusive of the international human rights system) is based on a consensus on pluralist positions among States parties. The diverse network of pluralist treaty relations evident from the reservations to human rights treaties demonstrates that for all practical purposes, it is not a universalist nor a relativist conceptualisation that States parties subscribe to - instead, it is a diversity paradigm that prevails. Within this diversity paradigm each individual State gets to participate in the international human rights system while at the same time retaining a level of hermeneutic discretion that allows it to progressively engage with the universal or global human rights regimes.

3.4 Summary Conclusion:

The foregoing examination of the theoretical underpinnings of modern human rights discourse reveals three main themes.

Firstly, it has illustrated that the philosophical discourse on human rights that emerged after World War II is historically founded in and contemporaneously promoted through a liberal worldview that insists on universality. Thus framed, human rights are expressed as normatively universal in themselves, as noted, for instance, in the UDHR. This understanding of universality has been justified through natural law and natural rights, moral and religious authorities of different traditions and at times asserted simply as self-evident. All these justifications that have largely been formulated within a local conceptual view, presume human rights to have global acceptability and legitimacy by virtue of an inherent good in what is included in those human rights. This presumption has, apparently, been rebutted through stringent criticism for being predominantly Western in tradition and as such unrepresentative of the contexts and conditions in the vast majority of new States that emerged in the African and Asian continents following the end of colonialism.

In more recent times, new justifications for the universality of human rights have been put forward with the objective of bolstering the philosophically universal basis of human rights. Among these we have discussed the Ratification Approach, Minimalist Universalism, Overlapping Consensus and Relative Universality. These theoretical approaches seem to accept that transcendentalist or axiological explications of universality are problematic for not casting the net wide enough to include all points of view, especially since all-inclusiveness is avowed in their respective formulations of human rights. As a result, these new approaches take a more pragmatic position towards justifying universality. The minimalists take a lowest common denominator approach of what is least controversial in human rights, while the overlapping consensus and the relative universality theories take the greatest possible consensus among the various contesting viewpoints to justify universality. However, the Minimalists and the Overlapping Consensus theories are
criticised for watering down the existing international human rights regime by focusing on the lowest common denominators. Similarly, relative universality theory admits that certain deviations from the existing human rights regimes are necessary in order to tolerate alternative viewpoints. Nevertheless, such soft tolerance of marginal areas of divergent views on universality fails to take into account hard cases like the apostasy law of Shari`ah and freedom of religion. As a result, these theoretical approaches that rely on liberal perspectives satisfy neither the universalists nor the relativists. In short, the denial of the validity of alternative interpretations of human rights in the existing theories of ontological universality fails to adequately explain the legitimacy of international human rights across diverse cultural milieus. Consequently, there is an irresolvable tension in the implementation of human rights in culturally unyielding environments. The persistent State practice of making reservations to human rights treaties based on cultural and religious factors illustrates the nature of this tension. Since ontological universality arguments fail to resolve this conflict in the implementation of human rights, it is not only inadequate but also unrealistic and unrepresentative of actual State practice, prompting thereby the need for looking into alternative paradigms.

The second theme to emerge out of the above discussion is that alternative paradigms of the legitimacy of human rights have been developed in order to make the discourse on rights inclusive, realistic and representative of State practice. In this context, we have looked into the development of the anthropological theory of cultural relativism as a response to universalist human rights. At the same time, it was also pointed out that extreme or thick relativism was counterproductive in the human rights discourse because of its tendency to absolutely relativise all normative derivations, thereby making it futile to argue for any form of cross-cultural normative standardisation.

The Chapter has examined the various abstract theories that have been formulated to buttress philosophical arguments on the nature of human rights. It has also analysed the strengths and weaknesses of these theories and the arguments built
upon these theories to support the different approaches to the internationalisation of human rights standards. No doubt one of the important objectives of the international human rights system is to propagate global acceptance of human rights standards and provide the people of all member States a protection of the guarantees contained in the various human rights regimes.

This Chapter contends that such an objective is not best served through the binary philosophical theories of transcendental universality and relativism. Instead, it proposes that a more appropriate theoretical frame of reference for the project of internationalisation of human rights is through an effective engagement of the international legal system. The Chapter points out the need for a pluralistic approach that is cognisant of the needs for maintaining a cross-cultural normative human rights system that also corresponds with the already established and accepted doctrines of international law.

In this context, the Chapter discussed the various regional human rights regimes with a view to understanding the extent to which these regimes have accommodated regional specificities in the process of internalization of human rights norms. The doctrine of the margin of appreciation evolved by the ECHR was discussed as an example of the available choices for generating a cross-cultural pluralism in human rights. The inclusion of pluralist positions in the ACHR and the strong arguments for Asian particularities during the 1990s underlines the viewpoint that there are unrelenting arguments for a pluralist formulation of human rights. Similarly, the examination of the particularist expression of human rights within the Islamic tradition (both in the UIDHR and the Cairo Declaration), makes a potent stand for value pluralism in human rights discourse. The progressive development of an Islamic human rights regime under the watchful eye of the OIC has the potential to secure a lasting legal framework for an alternative human rights perspective. It will be a misapprehension to hold the view that such alternative frameworks may dilute and ultimately reject the existing international human rights regime.
The third and final theme to come out of the discussions in the Chapter is that international law on human rights is not determined by philosophical formulations of human rights concepts. Instead, several variables interplay in constituting a viable and practical international human rights legal system. The two most important of these variables are the role of States parties in the legitimization of human rights norms and the role of the international law of treaties in setting up a system where sovereign States parties could engage in the progressive acceptance and implementation of human rights law.

Hence, what is required for the furtherance of a global system of human rights is not the adoption of either a universalist or a relativist philosophical theory of human rights. These foundationalist arguments do not contribute to the manner in which States parties decide to commit to or implement human rights norms. Instead, sovereign States decide to engage in human rights treaties through the international law of treaties that allows them to assess, weigh and decide the nature and scope of their commitment to human rights regimes. Again, the analysis of the various regional human rights charters shows that in order for these treaties to be effective and inclusive, there is a clear need to be accommodative of a diversity paradigm. However, the advocacy of a pluralist position does not contradict the human rights project. In fact, a closer look into all the regional human rights regimes, including the Islamic declarations and the emerging Islamic conventions, reasserts their allegiance to and commitment to the existing international human rights regimes. The locus standi of these regional regimes is partly derived from the international human rights treaties, acting as parental systems and in the other part, they are legitimated by the particularist traditions on which these regimes are based (in the case of Islamic declarations, it is Shari‘ah).

The vocabulary of rights consists of both the existing mould of international human rights and the particularist normative standards. It may be an uneasy marriage, riddled with conflicts and compromises, yet it is also a practical one that may in the long run prove more realistic in avoiding a clash of civilisations and the
effective dissemination of normative standards to protect human dignity. Hence, what is effectively required is a paradigm shift in approaching international human rights law. Instead of getting embroiled in dogmatic foundationalist approaches on the nature of human rights, there is a need to look into how human rights norms may be legitimised within a diverse community of sovereign States. The diversity paradigm built into the VCLT supports this legitimization and norm cascading process. The doctrine of reservations is crucial to this exercise.
Chapter Four: Shari`ah-based Reservations and Exceptionalist Islamic State Practice

“In the West, the idea of Shari`ah calls up all the darkest images of Islam: repression of women, physical punishments, stoning, and all other such things. It has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all their work by the mere mention of the word.”

- Tariq Ramadan

In contemporary human rights discourse, reminiscent of Jeremy Waldron’s first strategy in arguing for universal claims, Shari`ah is often inexorably used to shock and horrify readers and press home the message of the barbarity of Islam and underline the legitimacy of universalist human rights. Islamic law or Shari`ah is portrayed as a “stumbling block” to the establishment of universal human rights. As a result, a dual worldview is presented where international human rights occupy the moral high ground and Islamic law is relegated to the opposite end. This is a commonly held view among many academics in the West and has even found currency in European jurisprudence as is seen in the Refah Partisi case, when the European Court of Human Rights declared that

it is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on Shari`ah, which clearly diverges from the Convention [European Convention on Human Rights] values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and

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the way it intervenes in all spheres of private and public life in accordance with religious precepts…

Shari`ah is represented as anathema to democracy and human rights, while the implementation of Islamic law in Muslim countries is depicted as the “enforcement of religion and its use as a tool to legitimate abusive state power.”

In contrast, for believing Muslims Shari`ah is the divine law central to their belief and existence. It is the embodiment of rules of justice, the primary law that validates all other laws, both in the domestic and international spheres. Hence, the practice among Islamic States of accepting international human rights treaties (such as CEDAW and CRC), subject to reservations to provisions believed to be inconsistent with Shari`ah, needs to be placed in this context of the Islamic lifeworld or lebenswelt. These Shari`ah-based reservations have been criticized for promoting an Islamic exceptionalism that is incongruous to universal human rights. This chapter will attempt to establish whether the making of Shari`ah-based reservations really constitutes exceptionalism within a pluralist framework as has often been presumed.

The present chapter is divided into two sections. The first section will examine Shari`ah as a theonomic concept, its prominent features and the patterns of codification of Shari`ah, while also examining the diverse representations of Shari`ah in the Islamic countries. The second section will present a thematic analysis of the contentious areas of human rights treaties to which Islamic States have submitted reservations. In particular, it will focus on Shari`ah-based reservations made by Islamic States to four international human rights treaties, i.e., CEDAW, CRC, CAT and ICCPR. The analysis will mainly concentrate on the first two conventions as the major proportion of Shari`ah-based reservations have been made in respect of


CEDAW and CRC. The Shari`ah-based reservations made to ICCPR and CAT are relatively few, nevertheless, they will be examined to determine the extent to which such reservations are relevant to the debate about Islamic exceptionalism.

The purpose of this chapter is to determine whether the reservations made by Islamic States (to the four human rights treaties) are valid or legitimate from the internal perspective of Islamic law. The enquiry into the legitimacy claims of Shari`ah-based reservations will first assess the Islamic reservations against the basic Shari`ah norms to which they relate. Secondly, it will determine the correlations and conflicts (if any) between the Shari`ah-based reservations and the normative standards discoverable in the national laws of the reserving Islamic State. The study of the national laws is crucial to establish the prescriptive force of Islamic law in influencing the formulation of Shari`ah-based reservations. It is also important from the point of verifying the extent to which Islamic law is actually incorporated in the domestic legal system of the reserving State. This would help in assessing whether the Shari`ah-based reservations to these human rights treaties are merely “the products of the domestic politics of the countries involved” or whether they represent substantive limitations of capacity that Islamic States face in accepting international legal obligations contrary to Shari`ah.

PART 1

4.1 Shari`ah as a theonomic concept

Before starting the examination of Shari`ah-based reservations, two terms need clarification in the context of this study i.e., “Islamic State” and “Shari`ah”. In practice, these two terms are interconnected since Shari`ah plays an indispensable

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6 The term “Shari`ah” is used in the present research with the caveat that it refers to Islamic law in a generic sense (reference being primarily made to the rules derived from the Qur`an and the Sunnah of the Prophet Muhammad), so as to include the generally understood normative standards discoverable in practice in the laws of the Islamic States examined.

role in the conceptual framework of the Islamic State and society by setting normative standards based in religious law. The term “Islamic State” as presently used, is representative of the contemporary world and I will not attempt a discussion of the various theoretical models of an ideal Islamic State. This section will also look into the normative features of Shari‘ah and discuss the different methodologies developed to support the value system of Islamic law.

4.1.1 Meaning of Islamic State

There is extensive literature available on the theoretical accounts on the meaning of an “Islamic State”. However, there is no single, indisputable definition of an “Islamic State” in the modern usage of the term. In a loose sense, it refers to countries with an Islamic majority or dominant Islamic population or where the constitution provides or the government sponsors Islam as the state religion.

Among the 58 member countries of the Organisation of Islamic Conference (OIC), there are “Islamic States” with a minority of Muslims representing as little as one per cent or 20 per cent of the total population. In contrast, some countries like India (with a burgeoning Muslim population of over 13 per cent of 1.129 billion people), are not considered as Islamic States. Again, not all the Islamic States

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9 For instance, only 1% of the Gabonese population of 1,398,201 are Muslims. Yet it is a member of OIC and is generally listed as a Muslim State. See CIA World Factbook: Gabon, available online at: [http://www.cia.gov/cia/publications/factbook/geos/gb.html] [last visited: 04.01.2008]. In the same way, Cameroon with a population of 16,380,005 has a 20% Muslim population and is a member of OIC. See CIA World Factbook: Cameroon, available online at: [http://www.cia.gov/cia/publications/factbook/geos/cm.html#People] [last visited: 04.01.2008].

10 The case of India is striking in particular because of its long Islamic history and the continuing implementation of Muslim family law (largely) based on Shari‘ah in the country. See CIA World Factbook: India. Available online at: [https://www.cia.gov/library/publications/the-world-factbook/geos/in.html] [last visited: 04.01.2008].
recognize Shari`ah as the main source of their legal system. Some Islamic States include Shari`ah as “a” source of legislation, while others consider it as “the” primary source of legislation. In the radical case of Turkey, Islam is officially absent from the system of governance even though Turkey continues to follow several Islamic legal codes from the period of the Ottomans. Hence, the expression “Islamic State” is constitutive of a loose group of sovereign States that have recognized and incorporated Islamic law in varying degrees in their legal systems. For the purposes of the present study, the term Islamic State shall largely be used in reference to the 58 member States of the OIC.

4.1.2 Meaning of Shari`ah

The Arabic term “Shari`ah” refers to straight path or right way¹¹ based on Islamic faith. Majid Khadduri explains this point by noting that

Islamic law (Shari`ah) is closely intertwined with religion, and both are considered expressions of God’s will and justice, but whereas the aim of religion is to define and determine goals (justice or others) the function of law is to indicate the path (the term Shari`ah indeed bears this meaning) by virtue of which God’s justice and other goals are realized.¹²

How is the Shari`ah to be known?¹³ Shari`ah embodies the compendium of laws and norms that regulate the lives of all Muslims at all times. For Muslims, it provides the “comprehensive principle[s] of the total way of life.”¹⁴ These laws and norms are known or derived from the primary sources of the Qur`an (the holy scripture of Muslims, believed by Muslims as the divine revelation of God or Allah

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¹³ The question was famously framed by the Pakistani scholar, Fazlur Rahman in his Islam (London: Weidenfeld and Nicolson, 1966) 101.

¹⁴ Above n 13.
Almighty) and the Sunnah (Traditions or the way in which Prophet Muhammad did or did not do things in his life).\(^{15}\)

Muslims believe Qur’an to be the word of God and consider it a manifest guide. As commented by Mohammad Hashim Kamali, “the Qur’an consists of manifest revelation (waḥy ẓāhir), which is defined as communication from God to the Prophet Muhammad, conveyed by the angel Gabriel, in the very words of God.”\(^{16}\) The authenticity of the entire Qur’an as the revealed word of God to Prophet Muhammad is accepted universally among the faithful Muslims.\(^{17}\) Out of more than 6200 verses of the Qur’an dealing with diverse aspects of the life of the believer, only about 350 verses are related to the realm of the law. These verses, together with the Sunnah of the Prophet, may be described as representing the basic structure of Islamic law.\(^{18}\) Mashood A. Baderin compares the Qur’an to Hans Kelsen’s concept of grundnorm or the basic norm that validates all other norms in a society.\(^{19}\) However, it may be submitted that unlike the hypothetical construct of Kelsen’s theory, Muslims believe in the actuality of the Qur’an and its revealed character. The 350 or so Qur’anic verses deal directly with legal aspects that regulate tangible social

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\(^{15}\) Several Qur’anic injunctions enjoin on the believers to follow the path of Prophet Muhammad. For example, verse 33:36 declares that “It is not fitting for a Believer, man or woman, when a matter has been decided by Allah and His Messenger, to have any option about their decision: If anyone disobeys Allah and His Messenger, he is indeed on a clearly wrong path.” See for the Qur’anic injunctions, the verses 3:32, 4:80, 8:24, 33:21 and 33:36, The Holy Qur’an, above n 11 135,209-210, 419, 1062 and 1068 respectively.


\(^{17}\) Above n16 17.

\(^{18}\) Indeed, as Kamali rightly notes, “the Qur’an calls itself hudā, or guidance, not a code of law”. He outlines the thematic breakdown of the Qur’an as follows; “there are an estimated 140 āyāt [verses] in the Qur’an on devotional matters such as salah [prayers], legal alms (zakāh), siyam (fasting), the Pilgrimage of hajj, jihad, charities, the taking of oaths and penances (kaффārāt). Another seventy āyāt are devoted to marriage, divorce, the waiting period of ʿiddah, revocation (rijʿah), dower, maintenance, custody of children, fosterage, paternity, inheritance and bequest.” Again, there are ten āyāt relating to commercial transactions, thirty āyāt on criminal law, thirty āyāt on “justice, equality, evidence, consultation”, another ten on matters concerning rights of the poor and workers. Mohammad Hashim Kamali, above n 16 19-20.

issues such as marriage, inheritance, crimes, punishments, and lay down basic procedures for conducting economic affairs. As a result, whenever a legally ambiguous issue comes up before the judges, reference is made to these verses of the Qur’an dealing with the fundamental legal concepts. Should no direct rule be found therein, jurists look into the Sunnah of the Prophet and subsequently, to other sources of Shari`ah.

“Sunnah” in Arabic, refers to the “beaten track” or the normative traditions of predecessors. In the context of Shari`ah, the term signifies “all that is narrated from the Prophet, his acts, his sayings, and whatever he has tacitly approved”. In a classic exposition of the sources of Shari`ah, the Prophet Muhammad is reported to have questioned Mu`adh ibn Jabal (who was appointed as a judge to Yemen) about the sources of law upon which he would decide cases. Mu`adh replies that

‘I will judge with what is in the book of God (Qur’an)’. The Prophet then asked, ‘And if you do not find a clue in the book of God?’ Mu`adh answered, ‘Then with the Sunnah of the Messenger of God.’ The Prophet asked again, ‘And if you do not find a clue in that?’ Mu`adh replied, ‘I will exercise my own legal reasoning.’

Taken together, the Qur’an and the Sunnah are considered as sacred law governing both the spiritual and temporal affairs of Muslims. The significance of these two sources in the Islamic worldview is revealed from the words of the Prophet in his Last Sermon, when he declared, “I am leaving unto you two noble things: so long as ye will cling unto them, ye will not go astray: one of them is the Book of Allah and the other is the Tradition [Sunnah] of His Apostle.”

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20 Mohammad Hashim Kamali, above n 16 44. According to Nuh Ha Miim Keller, a contemporary Islamic scholar, “Sunnah simply means the Prophet’s way (Allah Bless him and give him peace),” and includes what the Prophet recommended, made obligatory (wājib), permissible (mubāh) or considered repulsive (makrūh) or unlawful (harām). This description considerably summarises the usage of the term Sunnah in Islamic law. Sheikhu Nuh Ha Mim Keller, “What is the Distinction between Hadith and Sunna”, online: <http://www.islamfortoday.com/keller05.htm> [last visited: 0704/2005].


In addition to these two primary sources, Shari`ah is also the product of usūl al-fiqh (Islamic jurisprudence) developed by Muslim jurists over the course of several centuries. Uṣūl al-fiqh, or the science and methodology of Islamic law, includes interpretations and judicial reasoning by Muslim jurists on positions of law that are not clearly enunciated in the Qur’an and the Sunnah. It also includes laws derived from customs (ʿurf) of Arabians as well as those of the Muslim converts of different regions during the first century of Islamic civilization. Rules of law are derived in the usul al-fiqh by means of several juristic tools including

i. Ijmāʾ (deriving rules from the consensus of the Muslim community)

ii. Qiyas (deriving rules from analogical reasoning)

iii. Ijtihād (deriving rules from juristic reasoning based on rules of Shari`ah)

iv. Istihsān (deriving rules based on equity)

v. Maṣlaḥah Mursalah (deriving rules by considering public interest)

vi. ʿUrūf (deriving rules from acceptable custom).

Unlike the Qur’an and the Sunnah, these juristic tools of fiqh command no divine sanctity or inviolability. They can best be described as subsidiary ways of deriving legal principles based on the juristic acumen of leading Companions of the

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23 By the 8th century a movement for systematising Shari`ah was developing, notably in the city of Medina (where the first Islamic legal digest was produced by Malik ibn-Anas) and at Kufa (under Abū Hanīfa and Muhammad ibn al-Hassan al-Shaybani). The first comprehensive codification of the methods of Islamic jurisprudence were also done during this period, when Abu Abdullah Muhammad ibn Idrīs al-Shāfiʿī (or Imam al-Shāfiʿī) compiled his Risālā. For details, see Joseph Schacht, An Introduction to Islamic Law (Oxford: Clarendon Press, 1964); Abdur Rahman, The Principles of Islamic Jurisprudence (New Delhi: Kitab Bhavan, 1994); Muhammad ibn Idrīs al-Shāfiʿī Al-Risālā fī Uṣūl al-Fiqh: Treatise on the Foundations of Islamic Jurisprudence (trans., Majid Khadduri) (Cambridge: Islamic Texts Society, 1997).

24 According to A.D Ajjola, these juristic tools “merely exhibit the methodology and the techniques by which the early jurists of Islam attempted to interpret and apply the Shari`ah to solve the problems of their day.” Al Hajj A.D Ajjola, What is Shariah (New Delhi: Adam Publishers, 2002) 159


26 C.G. Weeramantry, above n 22 39-45.
Prophet, early Muslim scholars, and learned jurists of later times. In fact, as Abdullahi An-Naim has aptly observed

the Shari`ah, as a body of positive law, was developed by Muslim jurists in the second and third centuries of Islam. The raw material out of which Shari`ah was constructed was not, therefore, the pure Qur’an and Sunnah, but rather the Qur’an and Sunnah as already understood and practised by generations of Muslims.27

Wael B. Hallaq describes this classical legal method followed in the *usūl al-fiqh* in the Common Law language of *precedents*. The ordering of the sources and juristic tools of *usūl al-fiqh*, Hallaq seems to indicate, provides a hierarchy of sources that the sitting judge refers to in deciding cases.28 Hence, the Qur’an and the Sunnah represent the highest constitutional sources of reference for legal authority followed by *Ijmāʿ* and the other secondary sources where judge looks for the *ratio legis* and the *ratio decidendi* for deciding the case. These juristic tools, however described, provided important dynamics to the progressive development of Islamic law since they sought to provide new rules to new contexts. Admittedly, such evolution of law in the context of Shari`ah has a different bearing than in the case of the development of law in other legal traditions. One such difference of Shari`ah is that every law or rule, derived through whichever methodological tool of the *usūl al-fiqh*, attains acceptability (or legitimacy) in the Muslim community only when it is evidently in consonance with the clear injunctions of the Qur’an and the Sunnah. Indeed, these two primary legal sources validate *usūl al-fiqh* as well as all other laws like custom (*ʿurf*), juristic opinions and even positive law including the international law

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27 Abdullahi A. An-Nai’m, “Religious Minorities Under Islamic Law and the Limits of Cultural Relativism” (1987) 9 *Human Rights Quarterly* 16. It may be presumed that what he implied by “Shari`ah’ in this context, refers to the derived body of rules and principles that were implemented by Muslim jurists through their interpretation of Qur’an and Sunnah. In fact, much earlier, Fazlur Rahman observed that in the initial development of Islamic legal thought, a distinction was made between the term Shari`ah and *usūl al-fiqh*, wherein the former was restricted to the Qur’anic injunctions, while the latter related to the works of Muslim jurists and scholars. Fazlur Rahman, *Islam* (London: Weidenfeld and Nicolson, 1966) 102.

accepted by Islamic States.\textsuperscript{29} In this respect, Shari`ah may be considered as the highest constitutive law or the “higher law” in the Corwinian sense.\textsuperscript{30} This is brought out aptly by Said Ramadan’s observation that

the basic rules of Islamic law are only those prescribed in the Shari`ah (Qur’an and Sunnah), which are few and limited. Whereas all juridical works during more than thirteen centuries are very rich and indispensable, they must always be subordinated to the Shari`ah and open to reconsideration.\textsuperscript{31}

Moreover, there are certain provisions of Shari`ah that are apparently peremptory, owing to the indubitable divine imperatives upon which they are premised. These peremptory norms of Shari`ah are very few in number and essentially constitute the core of Islamic penal law. Known as ḥudūd\textsuperscript{32} (sing. ḥadd, literally means, “limit, prescribed penalty”),\textsuperscript{33} these norms outline the limits set by Allah in the Qur’an on certain acts, the transgression of which are criminalised with clearly identified punishments.\textsuperscript{34} In addition to the ḥudūd crimes, certain other devotional matters (‘ibādāt) provide obligatory rules that are considered non-

\textsuperscript{29} In this context, Ajijola notes the usage of Shari`ah “as a standard of test of validity to all positive laws. The essence of advocating for the application of Shari`ah is its ethics, once these can be incorporated to any system of law, such law is Islamic law.” A.D Ajijola, above n 24 303.


\textsuperscript{32} Singularly known as ḥadd.


\textsuperscript{34} The ḥudūd limits set out in Shari`ah are for the following crimes; (a) unlawful intercourse (zинā); (b) false accusation of unlawful intercourse (kaddhf); (c) drinking intoxicants (shurb al-khamr); (d) theft (sarīkāh); (e) highway robbery (kaṭ’ al-jarīk). Joseph Schacht, \textit{An Introduction to Islamic Law} (Oxford: Oxford University Press, 1979) 175. Many jurists add a sixth category, i.e., (f) apostasy (riddah). See Mashhood A. Baderin, \textit{International Human Rights and Islamic Law} (Oxford: Oxford University Press, 2003) 79. See also Mohammad Hashim Kamali, \textit{Punishment in Islamic Law: An Enquiry into the Ḥudūd Bill of Kelantan} (Kuala Lumpur: Institute of Policy Research, 1995). See for a contrary view, Abdullah Saeed and Hassan Saeed, \textit{Freedom of Religion, Apostasy and Islam} (Aldershot: Ashgate Publishing Limited, 2004).
derogatory. Islamic jurists or fuqaha consider this body of core norms as of the highest order and, in the words of Joseph Schacht, they amount to “Allah’s ‘restrictive ordinances’ par excellence.” Both the rulers and the ruled are obligated to follow them. Consequently, derogation from these is tantamount to a violation of the “highest” constitutional or legitimizing law of the Islamic State.

4.1.3 Contemporary approaches to Shari`ah

The classical expositions (or what Hallaq prefers to describe as “pre-modern legal theory”) of Islamic law have been considered by many scholars to be too rigid and at times even inapplicable to contemporary realities. There is a growing discourse within Islamic States towards a contemporary appreciation of the laws of Shari`ah, usûl al-fiqh, and even the core peremptory norms. The classical expositions on Islamic law, in the words of Hallaq, are characterised by their “literal grip of the hermeneutic” (taklîd) that restrict juristic development and application of law to a tradition of interpretation of the sources based on the works of the early period of Islamic history. The most obvious reference of the restriction of the development of Islamic law is seen in the increasing limitations placed on the exercise of ijtihâd, particularly among the Sunni jurisconsults.

Joseph Schacht argues that the process of ijtihâd came to an end by about the middle of the third century after hijra (Islamic calendar, which is around ninth century A.D) when “the idea began to gain ground that only the great scholars of the past who could not be equalled, and not the epigones, had the right to ‘independent reasoning’.” Known as the “closing of the
gate of *ijtihād* (inside bāb al-ijtihād), this approach seems to posit that the development of Islamic legal doctrines had reached a mythical stage of completion, with the canonical works of the four jurisprudential schools (*madhabs*) coming to completion. Hence, these works were apparently required to be held in their purity, without any further exegesis on the original sources of Shari`ah, and all that the subsequent scholars and jurists and communities were expected to do was to accept and implement the way these doctrines of law were espoused by the four schools.

This approach, known as *taḵlīd*, is held with wide scepticism among many scholars of the contemporary Islamic law because of its restrictive nature. In fact, as noted by Hallaq, one of the characteristics of the contemporary development of

40 The argument that the gate of *ijtihād* got closed has been challenged by modern Islamic scholars. According to Wael Hallaq, Sunni scholars of Islamic theology have been continuously engaged in *ijtihād* throughout the ages and that the “continuity of *ijtihād* throughout Islamic history suggests that developments in positive law, legal theory, and the judiciary have indeed taken place, and only through a chronological study of the jurists’ writings is it possible to trace these developments.” Wael B. Hallaq, “Was the Gate of *Ijtihād* Closed?” (1984) 16 (1) *International Journal of Middle East Studies* 34.

41 The four schools of Islamic jurisprudence are (i) Ḥanāfi School (based on the teachings of Imam Abū Ḥanīfa,700-767 A.D), (ii) Mālikī School (based on the teachings of Imam Mālik ibn Anas, 710-795 A.D), (iii) Shāfiʿī School (based on the teachings of Imam Abu Abdullah Muhammad ibn Idrīs al-Shāfiʿī, 767-820), (iv) Hanbali School (based on the teachings of Imam Ahmad ibn Hanbal, 780-855). C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (London: The Macmillan Press, 1988) 46-54. The most important difference in Islamic law as applied in contemporary states may be noted in the *Sunni–Shi’a* sectarian divide. These two sects have various schools of interpretation of Shari`ah. For instance, followers of the four schools of Sunni jurisprudence are generally distributed in the following manner: Ḥanafi school followers may be found among Muslims in the Balkans, Caucasus, Afghanistan, Pakistan, Central Asia, India, China, Bangladesh, Turkey and the area of the Fertile Crescent. Mālikī school followers may be found in Upper Egypt, Mauretania, Nigeria, West Africa, Kuwait and Bahrain. Shāfiʿī school followers may be found in Indonesia, East Africa, Southern Arabia, South East Asia, Yemen, Malaysia, Maldives, Singapore, the Philippines, Somalia, Djibouti, Tanzania, Kenya and Uganda and Hanbali school followers may be found in Saudi Arabia, Qatar and the United Arab Emirates. See Abdur Rahman, *The Principles of Islamic Jurisprudence* (New Delhi: Kitab Bhavan, 1994). Among the Shi’a sect, there are several schools of jurisprudence, the most prominent among them being, the *Ja`fari* school or the “Twelvers” (Ithna Ash’ariyya) and the Zaidiyya schools. See Allamah Tabataba’i, *Shi`ite Islam* (trans.S. H. Nasr), (New York: State University of New York Press, 1975).

42 This approach developed partly due to the difficult qualificatory conditions required of the mujtahid (scholar/jurists able to develop law through the method of *Ijtihād*) under the early four *madhabs*. Wael B. Hallaq, above n 28 144-148. Moreover, as noted by Schacht, it was also widely held among Muslim scholars that “all essentials questions [of Shari`ah] had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law”. Joseph Schacht, above n 39 70-71.
Shari`ah is towards convergence of the four madhabs and providing jurists with discretion to select appropriate normative standards from different madhabs. He attributes the usage of this method of takhayyur to the legal reforms that resulted in the creation of the Ottoman Law of Family Rights (1917), the Egyptian Law of Testamentary Disposition (1946) and the Sudanese Judicial Circular Number 53. These laws moved away from the rigid position of any given school of jurisprudence and, instead, mixed and matched normative standards from different schools.

4.1.4 Ijtihād and internal reform in the contemporary Islamic world

The general belief among jurists and scholars of the twentieth century in the inadequacy of simply following taqlid may have prompted many modern scholars to relook into some of the positions of Shari`ah, as espoused in the canonical works. In the process, ijtihād became the inevitably favoured juristic tool and the supposedly “closed doors for juristic reasoning” were once again opened. In fact, some scholars like Hallaq maintain that the door of ijtihād was never closed and that there is a clearly perceptible continuity of practice in this methodology right from the second century of Islam onwards.

The results of this renewal of ijtihād in contemporary approaches to Shari`ah are visible in the many changes that have been brought about in the legal systems of Islamic States. This is most evident in the wide ranging reforms that have been brought about in the areas of family law in Islamic States. Rules of Shari`ah relating to the rights of women in marriage, in giving testimony and evidence in courts, in appointment to public offices, rights of children, custody of children, maintenance obligations of husbands etc..., continue to evolve in many Islamic States and the influence of international human rights law in this legal reform process cannot be

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43 This is referred to as takhayyur (the act of selecting). See Wael B. Hallaq, above n 28 210.

44 Wael B. Hallaq, above n 28 210.

45 Wael B. Hallaq, “Was the Gate of Ijtihād Closed?” (1984) 16 (1) International Journal of Middle East Studies 12-20. Elsewhere in the same work he observes that, “the methodology of Ijtihād continued to be employed but mostly without being recognized under its proper name.” Ibid. 32.
denied. As will be shown in the analysis of the Shari`ah-based reservations, these changes are being made using *ijtiḥād* approaches and illustrate the dynamic nature of Islamic law.

This trend has spawned a growth in the application of progressive hermeneutics in the development of Shari`ah. Islamic thinkers are crafting a contemporary approach to developing Shari`ah through *ijtiḥād*, and their works are being gradually adapted by the legislatures of Islamic States, as the trend gains momentum in the mainstream. One such scholar is Muhammad ʿAbduh, who is attributed with having revived the harmonisation of reason and revelation in hermeneutic exercises in original sources.\(^{46}\) The methodology and ideas of ʿAbduh were developed further by Rashīd Riḍa, who emphasized the principle of utility in the hermeneutics of Islamic law. Riḍa expanded the doctrine of *maṣlaḥah* (public interest) by devising the rule of “general spirit and intention of law (*maqāṣid al-sharīʿah)*”.\(^{47}\) Simply put, through *maqāṣid al-sharīʿah* the jurist is allowed to seek the intention of the law by using reason and taking into account the human interest involved in the norm in question and the necessity for the norm.

Hence, the conclusions derived from this pursuit of the intent of law, as long as it is not in conflict with a clear and specific verse of the Qurʾan or Sunnah, are valid and permissible. Fazlur Rahman, a more recent scholar, has attempted to provide an additional perspective on the developing hermeneutics of Shari`ah. His theory of combining the text with context in the interpretation of the sources of law brings the advantage of giving centre stage to the original text and the original context in conjunction with present realities. According to his famous “double movement theory”


\(^{47}\) Wael B. Hallaq, above n 46 218.
in the first movement, the socio-historical context of the Qur’an is considered in exploring specific Qur’anic cases in order to arrive at general principles such as justice or fairness... In the second movement, these general principles are used as a basis to formulate rules and laws relevant to the modern period.  

This methodology, as is evident, contributes in bringing the primary sources of Shari‘ah closer to the needs of the modern world and helps in responding to requirements of contemporary Islamic societies. For instance, one of the most difficult questions facing modern Islamic States is defining the scope of religious freedom - whether to follow the classical interpretation that Shari‘ah mandates the death penalty for apostasy or to accept Article 18 of the ICCPR and allow complete and unfettered freedom of religion. Abdullah Saeed uses the contextual methodology in rejecting the classical rule by revisiting the contextuality of the requirement for the death sentence and concluding that “such a punishment conflicts with the ethos of the Qur’an and the practice of the Prophet, as well as with the needs of the modern period.”

The various other legal reforms that are taking place in the Islamic world are also representative of an increasing usage of the methodologies of *ijtihād*, *maṣāliḥ mursalah* (public interest) and *maqāṣid al-shari‘ah* (intention of the law).

All these different streams of “Islamically committed” methodological advancements in the development of Shari‘ah in the mainstream Sunni Islam are still characterised by the limiting factors that are manifestly included in the Qur’an and the Sunnah. In other words, none of these theories calls for the relegation of the clear injunctions of the Qur’an and Sunnah quite simply because these two sources, and the normative standards that are evident therein, are non-derogable and still

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50 Wael B. Hallaq, above n 46 254.
constitute the key legitimising factors of law in Islamic States.\textsuperscript{51} Moreover, it may also be observed that the renewed vigour with which Muslim scholars within the Islamic world are engaged in relooking into the parameters of Shari`ah indicates possibilities for readjusting, if not expanding, the legitimising provisions of Islamic law. This process of \textit{internal dialogue} that Abdullahi An-Na’im alludes to and relies upon for the effective cultural legitimisation of human rights is an ongoing process and is vibrantly taking place in the Islamic world.\textsuperscript{52} The examination of Shari`ah-based reservations to the four human rights treaties that follows reveals how Islamic States are coming to grips with this readjustment of Shari`ah. It also demonstrates the limits of legitimacy within which this modern hermeneutic movement operates.

4.1.5 Diversity in the application of Shari`ah

Shari`ah is the foundation of the archetypal Islamic State\textsuperscript{53} and is one of the main rationales that validate the existence of such a State. It also forms an essential part of the moral laws binding on all Muslims and is an authenticating factor of the faith of believers. Viewed from this perspective, Shari`ah occupies a place of pre-eminence in an Islamic State. However, when we look into the existing situation in most Islamic States, it is seen that Shari`ah is applied in varying degrees and in different ways. While Shari`ah covers within its ambit matters relating to worship, inheritance law, commerce, property law, social welfare, politics, family law to criminal law, Islamic States differ in the degree to which these various manifestations of Shari`ah are applied. Some States interpret and apply them in a


\textsuperscript{53} “In principle, the main purpose of the Islamic State is to uphold the Shari`ah and the goal of government is to enable the individual believer to follow the good Muslim life”, Nawaf A. Salam, “The Emergence of Citizenship in Islamdom” (1997) 12 (2) \textit{Arab Law Quarterly} 132. See also Joseph Schacht, \textit{An Introduction to Islamic Law} (Oxford: Oxford University Press, 1979) 84. In contrast, some contemporary Islamic scholars like Muhammad S. Al-Ashmawi, oppose the concept of Islamic State “because [it] would only contribute to establishing totalitarian regimes.” Bassam Tibi, “Islamic Law/ Shari`a, Human Rights, Universal Morality and International Relations”, (1994) 16 \textit{Human Rights Quarterly} 279. See also Reza Afshari, “An Essay on Islamic Cultural Relativism in the Discourse of Human Rights” (1994) 16 \textit{Human Rights Quarterly} 235.
very broad and comprehensive sense. Others are content in selectively applying Shari`ah in their legal systems, while a few Islamic States have altogether relegated Shari`ah to the private domain and effectively disassociated Shari`ah from their formal legal systems. As a result, today only a few countries recognize the absolute supremacy of Shari`ah as the source of legislation. This diversity in the application of Shari`ah is evident in the legal systems of the Islamic countries whose reservations are under examination in this study.

Some Islamic States give Shari`ah a pre-eminent position within their legal systems. For instance, the Islamic Republic of Mauritania’s preamble to the Constitution (1991) declares “the precepts of Islam” as the “the sole source of law”. Similarly, the Islamic Republic of Iran’s Constitution (1979) declares that all laws and regulations, including the constitution itself, “must be based on Islamic criteria”. Libya also asserts that “The Holy Koran is the Constitution of the Socialist People’s Libyan Arab Jamahiriyya”. The Constitution of Saudi Arabia asserts that “God’s Book [Holy Qur’an] and the Sunnah of His Prophet … are its [Saudi Arabian] constitution”. Likewise, the Yemeni Constitution also proclaims that “Islamic Shari`ah is the source of all legislation”.

In contrast, Islamic countries like Algeria, Niger, Guinea, Guinea-Bissau, Tunisia, Mali, Senegal, Chad and Djibouti do not provide any constitutional role for Islam nor do they incorporate Shari`ah as a source of legislation. Nevertheless, it may be submitted that the personal laws or family laws in these countries are closely based on the principles of Shari`ah. There are also other Islamic countries, where the

54 Article 4 of the Constitution (1979) of the Islamic Republic of Iran.

55 Article 2 of the Declaration Proclaiming the Establishment of the People’s Authority (1977) of the Libyan Arab Jamahiriyya.


constitutions proclaim Islam as the state religion while their legal systems consist of a mix of inherited colonial legal heritage, and hybrid legal experimentation with select elements of Shari`ah thrown in. For example, Bahrain’s Constitution (1973) states that Shar’iah is merely “a principal source of legislation” even though it declares Islam as the state religion.\textsuperscript{58} The Bahraini legal system is a mix of Islamic Shari`ah and English common law. Shari`ah is not the primary law validating all other laws nor is it the principal residuary law, as in the case for instance in Saudi Arabia.\textsuperscript{59} Likewise, the Islamic Republic of Pakistan follows a combination of English common law traditions and Islamic law.\textsuperscript{60} Similarly, Egypt follows a combination of Islamic law and European civil law traditions even though Islam is the state religion and all laws are required to be harmonious with Shari`ah under Egyptian Constitution.\textsuperscript{61}

It is true that today few Islamic countries apply Shari`ah in its entirety. It is equally true that no Islamic country has rejected Shari`ah entirely.\textsuperscript{62} The continuing application of Shari`ah (though in varying degrees) in the legal systems of Islamic States indicates the pervasive authority and weight given to Shari`ah. Even in cases where a government or a particular model of state in an Islamic country does not


\textsuperscript{59} See “Islamic Family Law” project of Emory University available online at: \url{http://www.law.emory.edu/IFL/legal/bahrain.htm} [last visited: 18.09.2006]

\textsuperscript{60} E. Adamson Hoebel, “Fundamental Cultural Postulates and Judicial Lawmaking in Pakistan” (1965) 67 (6) Part: 2 The Ethnography of Law American Anthropologist 43. See also “Islamic Family Law” project at Emory Law School, available online at: \url{http://www.law.emory.edu/ifl/legal/pakistan.htm} [last visited: 18.09.2006].


\textsuperscript{62} Perhaps the only exception to this reality is Turkey. A country with an overwhelming majority of Muslim population, Turkey had definitively de-linked Islam from the state apparatus under the Kemalist political ideology in what is called the laiklik (secularism). Still, the personal laws of Turkey continue to retain significant traces of Shari`ah law. See Thomas Patrick Carroll, “Turkey’s Justice and Development Party: A model for Democratic Islam?” (2004) 6 Middle East Intelligence Bulletin 22.
recognize or apply Shari`ah or its principles, Shari`ah remains a fundamental guiding creed of all faithful Muslims. Indeed, this also explains to an extent why highly secular-oriented reformist governments in Islamic countries face significant obstacles in steamrolling advocates of Shari`ah. The post-Taliban Afghanistan constitution and the strong influence of Islamist leaders in the post-Saddam Iraq are good examples in this context. The concept of Shari`ah, as understood from an Islamic perspective is the “entirety of all regulations a Muslim needs to observe, if he wants to live up to the requirements of his faith”. It is not constrained by a positivistic understanding of law.

Does this imply that all these different Islamic approaches understand the same thing when they refer to Islamic law or Shari`ah (as for instance seen in the case of reservations to CEDAW)? According to one contemporary British Muslim scholar “…certainly the principles [of Shari`ah] are exactly the same in whatever country they are applied.” Even though Shari`ah may be interpreted from the perspectives of different juridical schools or from the Sunni or Shi`a points of views, there is enough consensus among Islamic jurists and the Muslim community at large to conclude that there exists a “unity in diversity”.

The fact that there exist diverse approaches to the application of Shari`ah in the Islamic States does not indicate that there is an absence of consensus on what constitutes Islamic law. Nor does it imply that Shari`ah is too fragmented to be seen as a cohesive system of law in the modern world. Even though various Islamic States approach Shari`ah differently, there are enough common factors that suggest respect for a cohesive body of values that constitute Islamic Shari`ah. Scholars have differed


in various ages on specific interpretations of it, yet they are united in respecting the clear injunctions of the Qur’an and the Sunnah as religiously binding obligations. Some prefer to call this pluralism in Shari`ah as “diversity within unity”65 and, as Mashood A. Baderin had observed, Shari`ah “jurisprudence accommodates a pluralistic interpretation of its sources”.66

PART II

4.2 Shari`ah-based reservations to human rights treaties

The expression “Shari`ah-based reservations” is used as a general term referring to the various reservations (and declarations amounting to reservations) made by Islamic States to international human rights treaties. Shari`ah-based reservations claim exception from the application of certain norms of human rights treaties that are believed to conflict with Islamic law.

The strength of this claim to Islamic exceptionalism lies in the perceived discord between the treaty provisions against which reservations are made and the norms of Islamic law as implemented in the reserving State. Hence, it is important to look into the nexus between the Shari`ah-based reservation and the domestic law of the reserving Islamic State to determine the extent to which such reservation is in fact based in Shari`ah and is representative of an exceptionalist claim.

The four international human rights treaties examined below, represent the core human rights regimes against which Islamic States have formulated Shari`ah-based reservations. Of these four, CEDAW and CRC may be noted for their boldness


in regulating interpersonal affairs of individuals, in contrast to the state-individual relationship that is included for the most part in ICCPR and CAT.

4.2.1 Shari`ah-based reservations to CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international human rights treaty that sets the standards for the protection of the human rights of women and the prevention of discrimination against women. Adopted by the United Nations General Assembly on 19 December 1979, CEDAW incorporates much groundbreaking conceptual advancements of human rights that had hitherto not been taken into the fold of international law.

CEDAW, with 185 States parties, legislates over the private space of family and interpersonal relationships that had long remained the domain of sovereign States. Several provisions of CEDAW, as we shall see in the following sections, mandate sovereign States to alter and change their domestic laws concerning the way the State may regulate the private affairs of its subjects. Not only are the normative standards of CEDAW related to a “state versus individual” account of regulative action but it also forces the State to ensure that it regulates and alters the interpersonal relationships between individuals. Consequently, the legal norms flowing from CEDAW modify almost every behavioural aspect of the subject States. CEDAW touches upon areas of law ranging from marriage, divorce, inheritance, children, to freedom of religion, citizenship, education, and political and legal relations. Admittedly, this intrusion into the exclusive sovereign domain and

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68 As on 20 July 2007, there are 185 states parties to CEDAW. See online at: <http://www2.ohchr.org/english/bodies/ratification/8.htm#declarations> [last visited: 10.01.2008].

69 For example, Article 1 of CEDAW states, “For the purposes of the present Convention, the term, ‘discrimination against women’ shall mean 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
private space is contextually bold and daring. It is borne out by a belief that
discrimination, as defined and supported by the CEDAW regime and existing in
whichever space and form, must be removed and gender disparities eliminated.

At first glance, this approach may appear as almost imperial in its disregard
for the particularities of the *other* since it seems to accept only one reality, i.e., that
of the CEDAW regime. This is evident in the normative as well as the operative
nature in which CEDAW has sought change in the legal systems of States parties.
Traditionally, most governments in Africa, Middle East and Asia have exercised
considerable restraint in entering into and interfering with the private domain of
interpersonal relationships. Even when they do intervene to legislate, it is more in the
nature of codifying existing personal laws of different communities and in a manner
that shows considerable reverence to the cultural, traditional and religious norms that
have historically held sway in this area.\(^{70}\) In contrast, under CEDAW States parties
are now confronted with the wholesale task of not only intruding into this domain but
also regulating these traditional normative models of living. For example, in no
uncertain terms the fourteenth preambular paragraph of CEDAW declares that “a
change in the traditional role of men as well as the role of women in society and in
the family is needed to achieve full equality between men and women.” This
approach of steamrolling domestic particularities in favour of redesigning the *local*
normative distinctions according to CEDAW standards has been famously
characterised by David M. Smolin as the creation of “totalitarian possibilities of
international human rights” amounting to “cultural genocide.”\(^{71}\) The numerous

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\(^{70}\) However, this is not without exception. Some countries have completely foregone customary or
religious personal laws and modeled their legislations on secularized European laws, for example the
Turkish Civil Code (1999). The case of the Uniform Civil Code (Constitution Amendment Bill -1996)
of India and the public outcry that followed with the introduction of the bill provides a striking
counter example of how the legislature in a multi-religious country can get embroiled in a complex
game of appeasing all communities. See “A Very Timely Reminder” [Editorial] (May 31, 1995) *India
Today*.

\(^{71}\) David M. Smolin, “Will International Human Rights Be Used as a Tool of Cultural Genocide? The
Interaction of Human Rights Norms, Religion, Culture and Gender” (1996) 12 *Journal of Law and
Religion* 143.
reservations to CEDAW made by States parties may be considered as an indication of the ensuing tension from this apparent collision of different normative points of view.

4.2.1.1 Nature of Shari`ah-based reservations to CEDAW

The reservations to CEDAW made by Islamic States reveal a mix of many sorts. While 21 Islamic States have submitted reservations to CEDAW, some have categorically specified the provisions of CEDAW that they believe to be contrary to Shari`ah, and others have made general reservations potentially applying to the entire Convention. It is clearly the case that the whole of CEDAW cannot be contrary to Shari`ah and hence such general reservations pose significant practical problems to any party entrusted with the task of assessing State compliance. Again, there are some other Islamic States that have made reservations to CEDAW where the connection between the reservation and Shari`ah is not particularly clear. Most reservations falling into this category refer either to the constitutional law of the reserving State or to other domestic laws such as the family law. However, a closer look into the domestic norms that are referred to reveal an underpinning connection with Islamic law.72

The human rights incorporated into CEDAW have come into apparent conflict with domestic laws in many countries because of the penetrative nature of these rights. The regulation of the personal lives of the subjects of States under the CEDAW regime is contrary to laws that are built on age-old traditional, customary and religious norms and is bound to create tensions. In fact, as noted above, the preamble to CEDAW refers to this reality and still persists in changing these norms.

72 The practice of raising domestic laws as grounds for making reservations to international law, as discussed in Chapter Two above, have been criticised for flouting the rule that states cannot raise defence of domestic law to evade international legal obligations. However, the rule provided in Article 27 of the VCLT may only be claimed where a state uses domestic law defence against a part of a treaty already accepted. In the case of reservations, from the very beginning the reserving provision is outside of the content of the treaty to which the reserving state has consented. Hence, such reservations to CEDAW cannot be contested under Article 27 of the VCLT. This is discussed further in Chapter Two above.
on the basis that gender equality as perceived in CEDAW trumps all other norms. However, the issue becomes all the more difficult when these cultures resist and pose alternative understandings of equality. It is in this context that Shari`ah-based reservations to CEDAW have become a particularly sensitive issue in the Islamic States. Many in the Muslim world appear to believe that certain provisions in CEDAW not only conflict with but, if accepted, have the potential to override and replace Islamic Shari`ah with a different normative standard. The various reservations and the country reports submitted to the CEDAW Committee by Islamic States invariably point in this direction. This aspect is further exacerbated by certain socio-political realities prevailing in contemporary Muslim countries. For instance, Islamic States like Mauritania, Lebanon and Malaysia straddle a difficult ethnic and religious balance in their populations and often apply a pluralistic legal system that combines Islamic laws with traditional customary and other religious and ethnic normative standards. An examination of the reservations and the country reports of these Islamic States reveals some apprehensions about a wholesale acceptance of all the provisions of CEDAW, presumably because it would amount to an artificial homogenizing of the normative standards in their legal systems that are least of all politically feasible.

However, it is a different case when we look into countries that are predominantly Islamic and socio-historically situated in more homogenous Islamic milieus like the countries in the Middle East and Africa or a hundred per cent Muslim country like the Maldives. The governments of these countries, (despite the projected secular claims of some of them like for instance Egypt or Ba`athist Syria), must necessarily comply with the religious legitimising force of Islam in order to gain and retain their internal political legality. The religious legitimising authority of Islam permeates both the public and private domain. As a result, there is no longer a necessity to separate the public and the private in these legal systems. For instance, in countries like Saudi Arabia, the Maldives, the Islamic Republic of Iran, Libya and Sudan, the concepts of sovereignty and independence are themselves founded on Islam. Public law as well as private law are determined through Shari`ah. The rules of recognition originating from the primacy given to Islam often determine the
legality of these States and their governments. The reservations to CEDAW made by these Islamic States in some senses illustrate this by pointing out the extent to which Islamic law functions as a legitimising force. It also throws light on how Shari`ah operates as a check on the authority of the Muslim State to take up international legal obligations. Indeed, any proposal to apply a normative standard contrary to or undermining the authority of Shari`ah is perceived as an intrusion into the sanctified jurisdiction of Shari`ah. The various Shari`ah-based reservations to CEDAW demonstrate the sway of Islamic law in the legal systems of these States. It was evident even in the drafting stages of the Convention that Islamic States would raise signification opposition to certain provisions of CEDAW. Most of the 32 abstentions in the final vote on Article 16 of CEDAW relating to marriage and divorce came from Islamic States. Another feature of such a highly calcified position of Shari`ah in some Islamic States is the potential for abusing religious authority for political purposes and festering gender disparities. As a result, we may see a facile use of Shari`ah as a ploy to get around human rights, even in cases where the two may not be in evident conflict.

4.2.1.2 Survey of the pattern of Shari`ah-based reservations made to CEDAW

A survey of the various Shari`ah-based reservations to CEDAW is noted below in order to assess the general direction in which Islamic States have exercised their right to formulate reservations. This broad overview of the Shari`ah-based reservations to CEDAW reveals that out of the 21 Islamic States that made reservations, 16 States made reservations to Article 16, 12 made reservations to Article 9 and nine States made reservations to Article 2. Since these three provisions have attracted the most number of reservations from Islamic States, the present analysis will mainly focus on them. Moreover, these three provisions also seem to have the most direct conflict with Islamic law.


74 Appendix II Detailed List of Shari`ah-based Reservations (with Objections) to ICCPR, CEDAW, CAT and CRC.
A survey of the Shari`ah-based reservations to CEDAW also shows that out of these 21 Islamic States making reservations, only six States have based their reservations exclusively on Shari`ah. In other words, Bahrain, Bangladesh, Egypt, Iraq, Libya, and Saudi Arabia specify only Islamic Shari`ah as the reason for making their reservations to CEDAW. Incidentally, the constitutions of all these six States include Islam as the state religion. With the exception of Saudi Arabia, the other five Islamic States have officially recognized religious minorities and their constitutional documents also accommodate these religious orders within the legal systems. Saudi Arabia is distinct in this group of six because it is the only official theocracy without a religious minority.\footnote{Maldives is the only other Muslim state (that is a party to CEDAW) without a religious minority. However, as discussed later, Maldivian reservation to CEDAW also makes reference to its Constitution.} The Saudi legal system is exclusively Islamic and based on Shari`ah.

Shari`ah and domestic laws were cited as the reasons for making reservations to CEDAW by 10 Islamic States.\footnote{Algeria (Algerian Family Code), Kuwait (Kuwaiti Electoral Act, Nationality Act and Shari`ah), Malaysia (Malaysian Federal Constitution and Shari`ah), Maldives (Constitution and Shari`ah), Mauritania (Constitution and Shari`ah), Morocco (Nationality Law, Code of Personal Status and Shari`ah), Niger (Customs and Practices), Pakistan (Constitution), Tunisia (Constitution, Nationality Code, Personal Status Code and Shari`ah), Turkey (Turkish Civil Code). Appendix III Table of Shari`ah-based Reservations to CEDAW; Appendix II Detailed List of Shari`ah-based Reservations (with Objections) to ICCPR, CEDAW, CAT and CRC.} Of these, Niger and Turkey do not recognize Shari`ah in their largely secular legal systems and their reservations are also reflective of this since there is no direct reference to Shari`ah. Furthermore, Niger’s Constitution (1990) gives no official status to Islam nor does it recognize Shari`ah as a source of law. Niger makes a reservation to Article 2 paragraphs (d) and (f), against abolishing customs and practices discriminating in respect of succession, while its reservation to Article 5 paragraph (a) indicates that it does not wish to make any effort towards modifying the “social and cultural patterns of conduct of men and women”. Niger’s reservation to Article 16 seems to indicate common concerns with the other Islamic States that have made reservations to the same provision based on
The main reason noted in the Nigerien reservation to CEDAW appears to be a reluctance to bring about any change in the established customs and traditions. In a region that is ridden with ethnic tensions, it is an understandable concern that Niger has to maintain a delicate ethnic balance between its almost seven principal ethnic groups. Although Muslims constitute almost 80 per cent of the Nigerien population, its reservation makes no apparent reference to any reason attributable to Islam. Therefore, it is highly probable that the principal reason behind the Nigerien reservation to CEDAW can be attributed to a policy interest in maintaining the ethnic balance and not upsetting the apple cart of customary and traditional normative standards of different groups that are woven into its legal system. Interestingly, it is evident from the Nigerien reservation that it tacitly concedes that these customs and traditions (to protect which apparently the reservation is made in the first instance) may, in fact, change “with the passage of time and the evolution of society.”

Like Niger, Turkey is another country with an overwhelming Muslim majority population that does not make any reference to Shari‘ah in its reservation to CEDAW. While Muslims constitute 99.8 per cent of Turkey’s population, it is still

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77 Niger’s reservation to Article 16 paragraph (1) (c)(e) and (g) states, “The Government of the Republic of the Niger expresses reservations concerning the above-referenced provisions of Article 16, particularly those concerning the same rights and responsibilities during marriage and at its dissolution, the same rights to decide freely and responsibly on the number and spacing of their children, and the right to choose a family name.” See online at: <http://www2.ohchr.org/english/bodies/ratification/8.htm#declarations> [last visited: 10.01.2008].

78 Failure to retain such a balance is fraught with the risk not only of civil unrest but also possible failure of the state itself, as may be seen in the recent histories of some multi-ethnic African and Asian states. Niger’s population is divided into the following seven main ethnic groups: Hausa 56% of the population, the Djerma 22%, the Fula 8.5%, the Tuareg 8%, the Beri Beri (Kanouri) 4.3% while Arab, Toubou and Gourmantche constitute 1.2%. See CIA World Factbook - Niger available online at: <http://www.cia.gov/cia/publications/factbook/geos/ng.html#People> [last visited.10.01.2008]

79 Niger’s reservation to Article 2 states, “The Government of the Republic of the Niger declares that the provisions of Article 2, paragraphs (d) and (f), Article 5, paragraphs (a) and (b), Article 15, paragraph (4), and Article 16, paragraph (1)(c)(e) and (g), concerning family relations, 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 (emphasis added).” See online at: <http://www2.ohchr.org/english/bodies/ratification/8.htm#declarations> [last visited: 10.01.2008]

a constitutionally secular democracy with the Kemalist emphasis on the separation of religion from all public spheres of life. The Preamble to the Constitution affirms the Kemalist doctrine that “there shall be no interference whatsoever by sacred religious feelings in state affairs and politics”, while Article 2 declares that “the Republic of Turkey is a democratic, secular and social state”. When acceding to CEDAW in 1985, Turkey made reservations to Articles 15(2)(4) and 16(1)(c)(d)(f) and (g) based on their apparent incompatibility with the provisions of the Turkish Civil Code. All these reservations were withdrawn in 1999. Neither the Turkish Constitution nor the Turkish legal system recognizes Islam as part of the state structure and Shari’ah remains (at the most) an extra-legal domain in Turkey. Therefore, it is not surprising that Turkey’s reservations to CEDAW had very little to do with any notion of irreconcilable differences between the Turkish people’s Islamic tradition and CEDAW. To the contrary, and as noted in successive country reports that it has submitted to the CEDAW Committee, Turkey’s reservations had more to do with its ‘archaic’ laws. Since making the reservations, Turkey has amended most of its Civil Code in order to comply with CEDAW. Furthermore, Turkey’s withdrawal of all the reservations indicates that it has unconditionally accepted CEDAW in its entirety.

The Algerian and Pakistani reservations to CEDAW also make no reference to Shari’ah, even though these two countries give a central position to Islam in their respective legal systems. These two Islamic States have sporadically experimented with Islamic regimes, only to be taken over by military juntas to restore secular

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81 The Constitution of Turkey (as amended on 10 May 2007) available online at: <http://www.servat.unibe.ch/law/ccl/tu00000_html> [last visited: 08.01.2008].


83 As noted in a recent study, the Turkish legal system is comprised in “large parts of the Swiss civil code …, traditional Shari’ah punishments were formally abolished (1854) and in 1924 [with the Kemalist revolution] the few remainders of Islamic law were removed.” Wendy Asbeek Brusse et al (eds.) The European Union, Turkey and Islam (The Amsterdam: AUP, 2004) (Netherlands Scientific Council for Government Policy, 2004) (Parenthesis added).

political regimes. Regardless of this political ping-pong with Islam, the inability of Algeria and Pakistan to remove the predominant influence of Shari`ah from their legal systems, to an extent, indicates the existence of a resilient centrality of Islam as an element of legitimization. Although the Algerian reservation is conspicuously silent on Shari`ah and instead refers only to the Algerian Family Code of 1984 (AFC), it may be presumed that at the heart of it lies an interest in not upsetting, if not protecting, principles of law derived from and based upon Shari`ah. This is evident from the fact that Article 222 of the AFC, to protect which the Algerian reservation is purportedly made, provides Shari`ah as the residuary source of law.\(^{85}\) It is a position further strengthened by the fact that Article 2 of the Algerian Constitution proclaims Islam as the official state religion.\(^{86}\) Therefore, the references to AFC in its reservations also amount to an indirect reference to Shari`ah.

In the case of Pakistan, the general declaration (rather than a reservation) made to CEDAW in 1996 refers to its Constitution and not Shari`ah.\(^{87}\) It may be noted that Article 2 of Pakistan’s Constitution makes Islam the state religion while Article 227 requires all domestic laws to be consistent with Islamic Shari`ah.\(^{88}\) Hence, it may be contended that Pakistan’s declaration indirectly refers to the

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\(^{85}\) For instance, Articles 8 and 46 of the Algerian Family Code. Available online at: <http://appelalgerie.africa-web.org/article.php3?id_article=78> [last visited: 07.04.2006]. See also the “Islamic Family Law” project at Emory Law School, available online at: <http://www.law.emory.edu/IFL/legal/Algeria.htm> [last visited: 25.08.05]


\(^{87}\) Pakistan made a General Declaration to CEDAW that is very wide in scope and for all practical purposes amounts to a reservation. Therefore, the Pakistani General Declaration is treated as a reservation for the purposes of this study. The declaration states that “the accession of the Government of the Islamic Republic of Pakistan to [CEDAW] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.” Pakistan’s General Declaration is available online at: <http://www2.ohchr.org/english/bodies/ratification/8_1.htm> [last visited: 10.01.2008].

\(^{88}\) Article 227 states “(1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.” While Shari`ah is applied to Muslim subjects, Article 227 paragraph (3) clearly states that nothing in Article 227 paragraph (1) “shall affect the personal laws of non-Muslim citizens or their status as citizens.” See online at: <http://www.pakistani.org/pakistan/constitution/part9.html> [last visited: 10.01.2008].
significant role of Shari`ah in its legal system. It may well be said that this declaration includes within its ambit not only Shari`ah but other customary and religious laws in practice in Pakistan. It is difficult to consider Pakistan’s declaration to CEDAW in greater detail because of its latent ambiguity. This declaration neither refers to Shari`ah nor to any particular provision of Pakistan’s Constitution that is presumed to conflict with CEDAW. The vagueness of the declaration adds further to the difficulty in understanding what interest Pakistan sought to protect by making it.

The only justification evident in the declaration is the need to protect its Constitution. But then again, Pakistan’s Constitution has been the subject of series of amendments by successive governments throughout the country’s history. It has the characteristic of being one thing at a certain point in time under one regime and a different thing at another time under a different regime. The transient nature of Pakistan’s constitutional history does not contribute any help in assessing the scope and direction of its declaration. Pakistan’s first ever country report submitted to the CEDAW Committee in 2007 tries to explain the reasons for making the declaration by noting that it “facilitated Pakistan’s accession to the Convention and represents the legal position on the matter”. More revealingly it adds that

the Declaration was carefully worded. 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.

89 There exists a lot of controversy regarding the personal laws of minorities in Pakistan. Although a concerted effort has been made to codify the personal laws relating to Muslim majority, little development appears to have taken in respect of the codification of the personal laws of the minority Hindu, Christian and Zoroastrian (Parsi) communities. See Peter Jacob, “Pakistan: Minorities under the law” Asian Human Rights Commission, available online at: <http://www.ahrchk.net/hrsolid/mainfile.php/1991vol01no01/1982/> [last visited: 10.01.2008]

90 “Combined Initial, Second and Third Periodic Reports of States Parties - Pakistan” Committee on the Elimination of Discrimination against Women, (3 August 2005), United Nations Document CEDAW/C/Pak/I-3, Chapter I, paras.2 and 3 (emphasis added).
This repeated emphasis on subjecting the application of the CEDAW to the Constitution and calling it a “sensible course of action” indicates the strong internal pressures (presumably Islamic opposition) that have persuaded the government to lodge an elusively worded declaration that practically amounts to a reservation, for the purposes of facilitating the very act of accession. It may, therefore, be presumed that the Pakistani declaration _qua_ reservation is in effect a Shari`ah-based reservation. It is a typical case of internal legitimizing factors premised in religious authority inducing a government to respond to international human rights regimes with constraint. Of course, this is even more evident in the case of the reservations made by Malaysia, the Maldives and Mauritania since they clearly refer to their respective constitutions and Shari`ah. Similarly, the reservations made by Kuwait, Morocco and Tunisia while referring to Shari`ah also mention other subordinate legislation.

In contrast to the above discussed reservations, there are some Islamic States whose reservations indicate no apparent reason or basis. In this category belong the reservations made by Indonesia, Jordan, Lebanon and Yemen.

Indonesia, with over 200 million Muslims constituting by far the largest Muslim population in the Islamic world,\(^9^1\) made only a single reservation concerning the jurisdiction of the International Court of Justice under Article 29. Since Indonesia made no reservation to any of the substantive provisions of CEDAW, does this imply that there is no apparent conflict between CEDAW and Islamic law in Indonesia? The country reports submitted by Indonesia suggest that its approach to women’s rights enumerated under CEDAW is secular in orientation and is indifferent to either Islamic or any other religious law. Such an approach is consistent with the doctrine of _Pancasila_,\(^9^2\) the founding principle of the Indonesian State, which gives absolute

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\(^9^2\) Article 29(1) of the Indonesia Constitution (1945) merely states that “the State is based upon the belief in the One, Supreme God” while Article 29(2) guarantees freedom of religion. Therefore, the
precedence to civil law over any notion of a faith-based order. Article 29 of the Indonesian Constitution underlines this policy directive when it merely declares that the “State is based upon the belief in the One, Supreme God” without espousing a particular religion. The silence of Indonesia regarding any possible impact that CEDAW may have on the religious traditions of its majority Muslim community reflects this particular national philosophy.

Unlike Indonesia, the two other Islamic States that have provided no justification for making their reservations, i.e., Jordan and Yemen, have distinct constitutional provisions that proclaim Islam as the State religion and incorporate Shari‘ah as a source of law. 93 It is befuddling that these two Islamic States with predominantly Muslim populations and deep historical foundations in Islam, do not refer to Shari‘ah in their reservations to CEDAW. 94 The Shari‘ah-based legislation in


effect in both Yemen and Jordan, and their respective country reports, belie this apparent silence of their reservations.

4.2.1.3 Summary of the survey of pattern of reservations

The above summary of the patterns of reservations based on Shari`ah made to CEDAW by Islamic States shows that some of the States appear to be quite open and unequivocal in their belief that certain provisions of CEDAW conflict with Shari`ah. The survey also reveals that, as far as Shari`ah is concerned, these States have taken a non-negotiable stand in relation to CEDAW. The first category of six States examined appears to subscribe to this viewpoint. Most of the other States parties appear to be reluctant to assert Shari`ah as the only ground of conflict with CEDAW. Some Islamic States have also categorically noted certain provisions of their domestic law in defence of their reservations.

A closer look into the constitutional provisions that are often cited in these reservations indicates an underlying connection between Islam and the domestic legal systems that may potentially be interpreted as a Shari`ah-based argument against human rights. A few other States like Turkey, Niger and Indonesia, while making no outward representation of a Shari`ah argument in their reservations and their country reports, nevertheless seem to attempt to be forging a secular yet “Islam-inclusive” approach in their engagement with the human rights covered under CEDAW. The depth of this engagement and the various nuances in this nexus between human rights and Shari`ah in the Islamic States can be assessed by a closer examination of the various country reports of these States.

4.2.1.4 Shari`ah-based reservations to Articles, 2, 9 and 16 of CEDAW

As already indicated above, most Islamic reservations have been made against Article 2 (relating to equality in general), Article 9 (relating to nationality rights) and Article 16 (relating to rights connected with marriage, divorce and family). All these rights may broadly be described as relationship rights dealing with
family and some of the issues that arise within the scope of these three provisions appear to be connected to the core values of the legal systems of the reserving States. This interconnectedness to core values is revealed from the examination of the Shari‘ah-based reservations in the context of the family laws, national constitutions and the country reports submitted to the CEDAW Committee by these reserving States.

4.2.2. Shari‘ah-based reservations to Article 2 of CEDAW

4.2.2.1 Scope of Article 2

Article 2 of CEDAW is a general equality provision that calls upon States parties to condemn and eliminate all forms of discrimination against women without delay. When Article 2 is read together with Article 1, the concept of “equality” is seen to be nothing short of absolute and identical gender equality. Under Article 1, “discrimination against women” means

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.

In short, the “discrimination against women” referred to in CEDAW applies to the “political, economic, social, cultural or any other field”, i.e., the entire socio-political fabric of a State. The ambiguous “any other field” also has the potential of covering the religious domain. It appears from the manner in which the CEDAW Committee has vetted the country reports that policing of religious norms and practices is also within the jurisdiction of “any other field” included in Article 1.  

95 Article 26 of the ICCPR also guarantees equality before law, thereby proscribing gender based discrimination as well. At the same time, a non-derogable provision of the Covenant, Article 18 declares that “(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice…. ” (emphasis added). This raises an interesting question – can a treaty obligation that is apparently contradictory to the religious scriptures of a believer and which prevents him/her from observing, practicing or teaching the

95 In
its pursuit of equality for women, the Convention cuts through all dimensions leaving no aspect untouched, thereby regulating all aspects of the life of a person – communal as well as private.

The working strategy for the implementation of the concept of equality envisioned under CEDAW is also laid down in Article 2. Accordingly, States parties are to implement their equal and same rights obligations by condemning and eliminating any and all discrimination, wherever it is manifest. Furthermore the Convention requires that States parties, if they are to achieve the elimination of discrimination against women, alter their constitutions, laws, traditions, customs and religious belief in order to comply with the normative standards enumerated in CEDAW. To this extent, CEDAW declares that in addition to changing their laws, States parties are also required to “modify the social and cultural patterns of conduct of men and women”.

In terms of the scope of what it seeks to achieve and what it obligates States parties to do, CEDAW may perhaps be regarded as one of the most robust and radical international instruments that have come out of the United Nations system. In fact, the Convention does not aim at the mere establishment of “gender-neutral laws”. Instead, it calls for the removal of “any difference in treatment on the grounds of gender” that disadvantages women (intentionally or unintentionally) and prevents society from recognizing women's rights or prevents women from exercising their human rights and fundamental freedoms. This formulation in the CEDAW appears to presume that virtually all distinctions based on gender would disadvantage women.

conflicting religious tenet, be held to be an impairment of a non-derogable freedom provided under ICCPR? At some level, the arguments made by the Islamic states that have submitted reservations to CEDAW appear to be on similar lines.

96 Article 5(a) of CEDAW

4.2.2.2 Concept of “equality” in Shari‘ah

The concept of “equality” in Islamic law is comparatively different from the provisions of Article 2 of CEDAW and the reservations made thereto by Islamic States in many respects reflect this difference in perception.\(^{98}\)

To begin with, Shari‘ah recognizes the legal status of women and men as being equal before Allah and the *Ummah* (Islamic community). This “equality” is, however, not conceived in an absolute sense. All persons are considered equal before Allah, with no distinction as to gender, language, race or religion. “Equality” is also a key principle that is respected even in all dealings between people (*mu‘amalāt*). Hashim Kamali calls it the recognition of “equality in the essence of humanity”.\(^{99}\) This view of equality of all human beings (*musāwāt*) is also an expression of the Shari‘ah concept of dignity (*karāmah*).\(^{100}\) It accepts the unity of mankind and the dignity of all human beings. This signification of equality is also included in Article 1 paragraph (a) of the Cairo Declaration when it states that

all human beings form one family whose members are united by their subordination to Allah and descent from Adam. All human beings are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations.\(^{101}\)

\(^{98}\) Some Islamic countries like Bahrain, Bangladesh, Libya, Mauritania, Morocco, Pakistan, Syria and Saudi Arabia made general reservations to the whole of Article 2, while a few countries like Iraq, Niger and Malaysia made specific reservations to different sections of Article 2.


However, *musāwāt* is not perceived as absolute equality nor does it denote the existence of uniformity of every aspect between everyone. Instead, there are several qualifying markers that are attached to the concept of *musāwāt* in Shari`ah. The first of these indicators that qualify equality is “moral excellence” or piety (*takwa*) and submission to God. This is construed from the following verse of the Qur’an

> O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you.

Age, gender and status are also markers that change the legal rights of persons under Shari`ah. For instance, a minor has qualified legal rights till the attainment of majority, while the status of being married creates different sets of rights on both the spouses. Similarly, parentage creates different rights and obligations on parents and the child. The rights and duties ensuing from each of these different capacities or correlates are neither equal nor the same. Instead it may be noted that the rights and obligations arising from each of the different correlates are qualified by their respective roles. Such “role differentiation” is also applied when it comes to the rights and obligations arising from the gender differences between men and women. The Islamic society that Shari`ah conceives creates different roles for men and women. *Differences in roles, however, do not signify discrimination or a superior-inferior relationship.* Mashood A. Baderin rightly notes this point when he observes that “equality of women is recognized in Islam on the principle of ‘equal but not equivalent’” meaning thereby that Shari`ah does not recognize an identical or perfectly corresponding set of rights between women and men. Islamic law recognizes and assigns different roles to each gender and ascribes different sets of rights to each of the roles, all the while upholding the principle of *musāwāt* or general equality of human beings.

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103 Above n 100 60.
The doctrine of role differentiation and *musāwāt*, operates with the ultimate Shari`ah objective (*makāsid al-shari`ah*) of establishing justice and fairness, taking into account the welfare of the community (*maṣāliḥ mursalah*). In other words, the concept of equality is associated with a network of principles in Shari`ah with the ultimate objective of maximizing the achievement of justice and fairness, not only for the individual but also for the community. This is the general conceptualization of “equality” (*musāwāt*) under Shari`ah that is widely recognized and accepted by Muslims in different parts of the world. It is also reflected in the direction given to the concept of equality under the Cairo Declaration. For example, Article 6 of Cairo Declaration reaffirms this formulation of “different but equal” rights of women and men, based on the different roles that each person assumes in the Islamic community. Article 6 of the Declaration states

(a) Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage. (b) The husband is responsible for the maintenance and welfare of the family.

Similarly, Article III of the UIDHR also states that

(a) All persons are equal before the Law [Shari`ah] and are entitled to equal opportunities and protection of the Law. (b) All persons shall be entitled to equal wage for equal work (c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.

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104 There is wide recognition of the need to address gender disparities and wrongs committed on women in the name of Shari`ah, in many Islamic states. In 2000 the OIC aimed to addressed the subject and consequently in the Rome Declaration on Human Rights in Islam (2000), the OIC appears to call for elimination of such discrimination against women. The Fifth Principle of the Declaration calls on Islamic states to “seek to secure ways and means that would help reject discrimination between members of the human society on the grounds of gender, colour, language, or national origin (emphasis added).” Rome Declaration on Human Rights in Islam (Rome: World Symposium on Human Rights in Islam, 2000).

105 Above n 101.

In addition to being built into international Islamic declarations such as the Cairo Declaration and the UIDHR, this notion of “gender equality” is also incorporated in the constitutional documents of Islamic States. The constitutions of some of the Islamic States that have submitted reservations to Article 2 contain elaborate provisions on equality of persons and equality before law, prohibition of distinctions based on race, caste, creed, sex, language, ethnicity etc. For instance, Bahrain entered a reservation to Article 2 “in order to ensure its implementation within the bounds of the provisions of the Islamic Shari`ah”.\textsuperscript{107} It is a general reservation covering the whole of Article 2. Notably, this reservation does not claim to exclude the whole of Article 2 and it is not a rejection of the equality provisions of CEDAW. Instead, it calls for the application of gender equality within a Shari`ah perspective. This is a legitimate interest protected and promoted by the Constitution of Bahrain (2002), Article 2 of which clearly mandates Islam as the State religion and makes Islamic Shari`ah a source of legislation.\textsuperscript{108} Furthermore, Article 18 of its Constitution (2002) declares equality in providing that people are equal in human dignity, and citizens are equal before the law in public rights and duties. There shall be no discrimination among them on the basis of sex, origin, language, religion or creed.\textsuperscript{109}

A more explicit Shari`ah-based reservation to Article 2 of CEDAW is made by Bangladesh. Its reservation is also based on the ground that Article 2 “conflict[s] with Shari`ah law based on Holy Qur`an and Sunnah”.\textsuperscript{110} Again, just as in the case of

\textsuperscript{107} Kingdom of Bahrain’s reservation to Article 2 of CEDAW. See online at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last visited 20.09.2005].

\textsuperscript{108} Article 2 of the Constitution states that, “the religion of the State is Islam. The Islamic Shari`ah is a principal source for legislation. The official language is Arabic.” Constitution of the Kingdom of Bahrain (as amended on 14 February 2002) available online at: <http://servat.unibe.ch/icl/ba00000_.html> [last visited: 10.01.2008].

\textsuperscript{109} Furthermore, Article 4 of the Constitution states that, “freedom, equality, security, trust, knowledge, social solidarity and equal opportunity for citizens are pillars of society guaranteed by the State.” Above n 108.

\textsuperscript{110} See online at: <http://www2.ohchr.org/english/bodies/ratification/8.htm> [last visited: 10.01.2008].
Bahrain, the Constitution of Bangladesh\textsuperscript{111} also guarantees gender equality to all its citizens, while also declaring that “the state religion of the Republic is Islam” with the proviso that “other religions may be practised in peace and harmony in the Republic.”\textsuperscript{112} The Constitution makes assertions of equality in Article 27 where it declares that “all citizens are equal before law and are entitled to equal protection of law”. Article 28 of the Constitution of Bangladesh is even more categorical in affirming gender equality

(1) The State shall not discriminate against any citizen on grounds only of religion, race, case, sex or place of birth. (2) Women shall have equal rights with men in all spheres of the State and of public life. (3) No citizen shall, on grounds only of religion, race, case, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution. (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.\textsuperscript{113}

In combination, Articles 27 and 28 of the Constitution appear to project a strong basis for complete gender equality, similar to the normative language of CEDAW. In fact, the CEDAW Committee, when examining the Initial Periodic Report of Bangladesh, noted its difficulty in understanding how Bangladesh could


\textsuperscript{112} Article 2A of the Constitution. Bangladesh adopted Islam as the state religion in 1988. Earlier to that, by the Proclamations Order No.1 of 1977, Article 12 of the Constitution establishing “Secularism and Freedom of Religion” was deleted and the present format was inserted under the Constitutional (Eight Amendment) Act, 1988. Although Islam is the state religion, the personal laws or family law matters of the Hindus, Christians and Buddhists in Bangladesh are largely based upon the normative standards derived from their respective religions. However, as indicated from its periodic Reports, several legislative measures are put in place now to ensure gender equality by a gradual process of reforming these personal laws. These include the Family Law Ordinance of 1961, Family Courts Ordinance of 1965, Dowry Prohibition Act of 1980, Child Marriage Restraint to Women (Deterrent Punishment) Ordinance of 1983, The Muslim Family Laws (Amendment) Ordinance of 1982 & 1985. See “Fifth Periodic Report of the States Parties – Bangladesh” (2003) \textit{United Nations Document CEDAW/C/BGD/5}, paras. 41-42.

\textsuperscript{113} Constitution of Bangladesh, above n 111.
maintain its reservations to Article 2 in the presence of such strong constitutional mandates for equality. The Committee went so far as to characterise this as an apparent contradiction in the Constitution: on the one hand it provided for equality but, on the other hand, it allowed certain groups to prevent the effective recognition of the rights of women, for example, in the Muslim population.

The CEDAW Committee, in its response to the Fifth Periodic Report of Bangladesh, further observed that “while the Constitution guarantees equal rights to men and women, the definition of discrimination in the State party’s legislation is not in line with the Convention”.

A similar trend may be observed in the other Shari`ah-based reservations to Article 2. For example, the reservation by the Libyan Arab Jamahiriyya (amended in 1995), states that Article 2 of CEDAW would be “implemented with due regard for the peremptory norms of Islamic Shari`ah relating to determination of the inheritance portions of the estate of the deceased.” On the face of it, this reservation appears to place a very specific limitation on the general equality clause of CEDAW. It may be presumed that the reference to the “peremptory norms of Islamic Shari`ah” implies the clear Qur’anic rule relating to the division of inheritance property that makes a distinction between men and women. Even though Libya makes a reservation to Article 2 of CEDAW as noted above, its constitutional documents and other laws appear abundantly to guarantee gender equality. For instance, Article 5 of Libya’s Constitutional Declaration (11 December 1969) states that “citizens are all equal

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before the law”.

Article 21 of the Great Green Charter for Human Rights in the Age of the Masses (another basic constitutional document), adopted by the Basic People’s Congresses on 12 June 1988, declares that “both men and women in Libyan Arab society are equal in all that is human and a differentiation of rights between men and women [is] a gross and unwarranted injustice.” Furthermore, a key human rights law of Libya, the Strengthening of Freedom Act Number 20 (1991), reaffirms equality of all male and female citizens.

The Second Periodic Report of Libya to the CEDAW Committee describes the Libyan understanding of the concept of “equality” as guaranteed in its constitutive principal laws on human rights as a Muslim society, the Libyan Arab Jamahiriya has the Holy Qur’an as its social code. As such, it is the Islamic faith which defines relationships and establishes rights, duties and the methods of interaction between individuals, both male and female, in every sphere of life.

Hence, the constitutional guarantees, as well as those contained in the other laws of Libya, appear to be interpreted within the understanding of the term “equality” in Shari‘ah.

The Moroccan declaration to Article 2 also follows a similar line of reasoning as the reservations made by Bahrain, Bangladesh and Libya. The declaration, which for present purposes amounts to a reservation, states that


121 “Second Periodic Report of States Parties – Libyan Arab Jamahiriya” (15 March 1999), United Nations Document CEDAW/C/LBY/2, para. 2. Furthermore, Article 2 of the Libyan Constitutional Proclamation (1969) states that ‘Islam is the religion of the State and Arabic is its official Language. The state protects religious freedom in accordance with established customs.’ Similarly, Article 2 of the “Declaration Proclaiming the Establishment of the People’s Authority” (1977) states ‘The Holy Koran is the Constitution of the Socialist People’s Libyan Arab Jamahiriya.’
the Government of the Kingdom of Morocco expresses its readiness to apply the provisions of this Article [2] provided that – they are without prejudice to the Constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco; they do conflict with the provisions of the Islamic Shari`ah. It should be noted that certain provisions contained in the Moroccan Code of Personal Status according to women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shari`ah, which strives, among its other objects, to strike a balance between the spouses in order to preserve the coherence of family life.122

The Moroccan declaration is important for two reasons. Firstly, it shows that the rule of male hereditary succession to the throne is part of the structure of the Moroccan State as mandated by Article 20 of the Constitution (1996).123 Secondly, it specifies the non-derogability of Shari`ah as a basic constitutional principle of the Moroccan legal system. Indeed, the legal framework for women’s rights that is provided in the Moroccan Code of Personal Status124 is also premised on Shari`ah. These two doctrines i.e., the agnatic succession to the throne and the primacy of Shari`ah, are classified as non-derogable and unamendable under Article 106.125 Yet, we also see that Article 5 of the same Constitution guarantees to all Moroccans equality before the law and Article 8 recognize the equality of women in electoral and suffrage


123 Article 20 of the Constitution (1996) states that “the Crown of Morocco and its constitutional rights are hereditary ad transmitted from father to son to the male lineal descendants of His Majesty The King Hassan II, unless the King, during his lifetime designates among his sons a successor other than his eldest son. If there are no male lineal descendants, the Throne passes to the closest collateral male descendants under the same condition.” Available online at: <http://www.oefre.unibe.ch/law/icl/mo00000_.html> [last visited 06.10.2005].

124 The Personal Status Code or Moudawana regulates family relations between men and women and reference to women’s rights framework is made in this context, given the fact that there exists no specific legislation addressing women’s rights in particular. However, it must be pointed out that the Moudawana represents the most strongly criticized and most scrupulously revised law concerning women’s rights in Morocco. In fact, one commentator described it as “one of the most progressive laws on women’s and family rights in the Arab world”. Giles Tremlett, “Morocco Boosts Women’s Rights”, The Guardian (January 21, 2004), see online at: <http://www.guardian.co.uk/gender/story/0,11812,1127629,00.html> [last visited: 06.10.2005].

125 Article 106 states, “the monarchic form of the State as well as the provisions relating to the Islamic religion cannot be the object of a constitutional revision.” See online at: [http://www.oefre.unibe.ch/law/icl/mo00000_.html](http://www.oefre.unibe.ch/law/icl/mo00000_.html) [last visited 06.10.2005].
rights. In addition, Articles 10 and 12 guarantees personal liberty and access to public employment without discrimination, respectively.\textsuperscript{126}

Just as in the case with Libya and Bahrain, the concept of “equality” appears to bear a particularistic connotation in the Moroccan legal system, given that it is interpreted through a Shari’ah hermeneutics. This feature of the Moroccan understanding of “equality” is referred to in the Initial Periodic Report of Morocco submitted to the CEDAW Committee in 1994 (Initial Report), where it notes that “the Moroccan legal system is characterised by a legal pluralism in which the Islamic tradition coexists harmoniously with modern legislation.”\textsuperscript{127} Furthermore, the Initial Report outlines the Moroccan understanding of “equality” in the Islamic law

Islam has made a distinction between men and women only when it is dictated by considerations relating to the nature of each of the sexes, their responsibilities in life and what is most suited to them, as well as concern for the general interest and the good of the family and women.\textsuperscript{128}

The Moroccan report repeatedly emphasizes that Islam creates an equality between men and women “with respect to the right to education and culture”, “with regards to civil rights whether they are married or not”, and “with respect to the right to work” etc.\textsuperscript{129} It is this understanding of “equality” that is alluded to when the Initial Report notes that “equality between men and women is one of the chief goals of the State”

\textsuperscript{126} Article 5 states, “all Moroccans are equal before law”; Article 8 states, “(1) Men and women enjoy equal political rights. (2) All citizens of age of both sexes are electors, provided they enjoy their civil and political rights.”; Article 10 states that, “(1) No one can be arrested, detained, or punished except in the cases and forms provided by law. (2) The home is inviolable. There can be no searches or inspections except under the conditions and the forms provided by law.”; Article 12 states that, “all citizens have access, under equal conditions, to public functions and public employment.” Article 13 adds to this charter of equality by stating that, “All citizens have equal rights to education and to work.” See online at: \texttt{<http://www.oefre.unibe.ch/law/icl/mo000000.html>} (last visited 06.10.2005).


\textsuperscript{128} Above n 127 para.5, 4.

\textsuperscript{129} Above n 127 4-5.
and that “action adequate to achieving it must be based on the principles of Shari`ah and the legal instruments of the United Nations ratified by Morocco.”

With its accession to CEDAW, Morocco appears to straddle twin positions – on the one hand, it is bound by the constitutional requisite of conforming and validating its laws relating to women’s rights with the imperatives of Shari`ah, and on the other hand, international legal imperatives under CEDAW pressure Morocco to harmonise its laws to international human rights standards. In fact, this is a classic representation of the larger and the ongoing debate about human rights and Shari`ah within the community of Islamic States. The Moroccan government seems to have addressed this growing strain on its legal system when it finally initiated the wide-ranging reform of its Personal Status Code or the Moudawana. In guiding the revision of the Moudawana (which came into effect in 2004), King Mohamed VI of Morocco issued a standing instruction to the effect that the revised law should be faithful to the provisions of Sharia (religious law) and Islamic principles of tolerance and encourage the use of ijithād (juridical reasoning) to deduce laws and precepts, while taking into consideration the spirit of our modern era and the imperatives of development, in accordance with the Kingdom’ commitment to internationally recognized human rights.

The King’s instruction highlights the difficulties that most Islamic States face in their effort to comply with international human rights standards that provide only an “either/or” choice to States parties. At the same time, it indicates the general methodology adopted by Islamic States in engaging with human rights standards, i.e., harmonizing domestic legal standards with international human rights law by using the peculiar hermeneutic framework for change discoverable in Shari`ah.

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130 Above n 127 para.29, 7.

131 Preamble, Moudawana, Law n° 70.03, February 3, 2004 (English Translation by Global Rights, Available online at: <www.globalrights.org> [last visited 12.10.2005].
In summary, these reservations to Article 2 of CEDAW highlight two important features. Firstly, they show that there is a tangible difference in the conceptualization of gender equality (even in a non-specific sense) between CEDAW and Shari‘ah, as applied in the Islamic States. There is a well established body of Islamic jurisprudence founded on religiously sanctioned legal doctrines that define gender equality in a manner contrary to CEDAW in some ways, while it correlates in some other areas. In general, the concept of equality is perceived in the sense of *musāwāt* and *karāmah*. The idea of equality as an expression of human dignity and equality before law in a broad sense is common to both CEDAW and Shari‘ah. At the same time, there are areas such as inheritance, marriage and divorce, as we shall see later, where divergence is not of mere opinion but doctrinaire.

4.2.3. Shari‘ah-based reservations to Article 9 of CEDAW

4.2.3.1 Scope of Article 9

The principle of “elimination of all forms of discrimination against women” is extended to the area of nationality rights in Article 9 of CEDAW. Article 9 deals, firstly, with the nationality of married women and requires States parties to “grant women equal rights with men to acquire, change or retain their nationality.” It also protects the wife from statelessness or change of nationality on account of her marriage to an alien or when the husband changes nationality. In other words, States parties are required to ensure that women enjoy nationality rights independent of their marital status. Secondly, it also empowers mothers with equal rights as that of fathers in respect of children.\(^\text{132}\)

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132 Article 9 of CEDAW states, “(1) States parties shall grant women equal rights 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.”
4.2.3.2 Transmitting nationality in Islam

Twelve Islamic States submitted reservations to Article 9, mainly on the grounds that their nationality laws do not recognize equal rights of mothers to transmit nationality to their children, i.e., to Article 9 paragraph (2). These twelve reservations to Article 9 cannot be considered to be strictly based on Shari‘ah because nationality, quite simply, has little to do with religion. A Muslim from France would still be a Muslim if he naturalises and becomes a citizen of Saudi Arabia. Shari‘ah cannot be construed to formulate rules pertaining to citizenship laws of States. However, it may be contended that the subject of nationality falls within Shari‘ah jurisdiction when the question of nationality is associated with the domiciliary status of the husband and wife. Domiciliary status, in this case, refers to the Shari‘ah concept of the “common matrimonial home” of the spouses and the rights and obligations associated with it. According to Shari‘ah, it is the legal obligation of the husband to provide a private accommodation for his wife. This is elaborated in unusual detail by Justice Tanzilur Rahman of Pakistan when he observed that

in Shari‘ah it is the duty of husband to provide cooked food and stitched cloths to his wife. A wife cannot be compelled to cook food for herself, much less for the husband, nor is she to be compelled to stitch cloth. The husband is bound to provide her a separate portion of house which has an independent entrance and exit, although she can by her free will, live with the parents or other relatives of the husband.

133 Islamic states that made reservations to Article 9(2) of CEDAW are Algeria, Bahrain, Egypt, Iraq (general reservation), Jordan, Kuwait, Lebanon, Malaysia, Morocco, Saudi Arabia, Syria and Tunisia. See online at: [http://www2.ohchr.org/english/bodies/ratification/8.htm](http://www2.ohchr.org/english/bodies/ratification/8.htm) [last visited: 10.01.2008].

134 According to some commentators, historically Shari‘ah had devised a “religious citizenship” concept. “[A]s soon as a Muslim migrates from his non-Muslim home and comes to Islamic territory with the intention of residing there, he at once becomes a full-fledged Muslim citizen of the Muslim state; he has the same rights as the other Muslim citizens and the same obligations as they [have]”. M. Hamidullah, “The Muslim Conduct of State” (Lahore: Sh. Muhammad Ashraf, 1977) (7th Ed.), 110-111, as cited in Mashood A. Baderin, International Human Rights and Islamic Law (Oxford: Oxford University Press, 2003) 159.

135 Justice Tanzilur Rahman, “Maintenance of Wife in Islamic Law” (Lahore: All Pakistan Legal Decisions, 1968) as cited in Niaz A. Shah, Women, the Koran and International Human Rights Law: The Experience of Pakistan (Leiden: Martinus Nijhoff Publishers, 2006) 160. This doctrine of the maintenance of wife by the husband emanates from Verse 65:6 of the Qur’an, where it is stated with reference to the divorced wife (who is required to wait over Ḣudūd, i.e., three consecutive menstrual periods post-divorce), “let the women live (in Ḣudūd) in the same style as ye live, according to your means: annoy them not, so as to restrict them.” Verse 65:6 The Holy Qur’an – Text, Translation and
In the context of these normative values of Shari`ah, it may be posited that the equal nationality rights as envisioned in Article 9 may have the potential of upsetting a particular type of “just balance” of rights and obligations in the family that Shari`ah claims to promote. However, it may be rather far-fetched to argue such a contention, primarily because nationality does not automatically affect the domiciliary status of the wife nor for that matter does it *prima facie* affect the domiciliary status of the child.

All the specific reservations to Article 9 are directed to paragraph (2) concerning women’s equal right to pass nationality to children. From this, it may be gathered that these twelve Islamic States making reservations to Article 9 saw no conflict with the nationality rights of women *per se* that is provided under paragraph (1). The purpose of these reservations appear to have very little to do with Shari`ah. Instead, they appear to be aimed at shielding and maintaining the delicate balance between the various ethnic, linguistic, denominational and other groups that divide their population. In particular, this seems to be the case in the Jordanian and Lebanese reservations. Explaining its reservation to Article 9, Jordan noted in its Second Periodic Report that its “Nationality Code is determined by political circumstances” part of which includes the influx of refugees from Palestine and other Arab States to this small country following the Arab-Israeli wars. Lebanon was even more categorical in affirming this position. In its Second Periodic Report Lebanon explained that its nationality policy does not recognize the right of the mother to transmit her nationality to the child because it seeks to protect and maintain “a delicate denominational balance” in the country. While a precarious


Ethnically, 95 per cent of Lebanese are Arabs, 4 per cent Armenian and 1 per cent others. More diversity exists in the religious composition of Lebanese population, where over 18 religious communities and sects exist, ranging from the Sunni, Sh’ia Muslims, Alawites, Druzes, Maronite Christians, Armenian Orthodox Christians etc. CIA World Factbook – Lebanon available online at:
demographic political reality may be behind the reservations of Jordan and Lebanon to Article 9, Egypt appeals to customary practices as the reason for its reservations.\footnote{Discussing the development of citizenship law in Egypt, Amira El-Azhary Sonbol makes a general comment that the rule “woman follows the nationality of her husband” is a problem faced by Muslim women in Arabia “not due to traditions or to the peculiarities of Islam” but rather due to “modern-state building and the problems that presented themselves in such a process, led to building a patriarchal structure supported by the state and its laws”. Amira El-Azhary Sonbol, “‘The Woman Follows the Nationality of Her Husband’: Guardianship, Citizenship and Gender” (2003) 1 Hawwa, 115.}

It may therefore be submitted that since there are no obligatory norms derived from and based in the Qur’an and the Sunnah that negate a mother’s purported right to transmit her nationality to the child, the continuing refusal of these Islamic States to recognize this right is not based in Shari’ah. In fact, as will be discussed under reservations to Article 16, Shari’ah recognizes clear rights of the mother to the \(\text{ḥāḍānāh}\) or custody of the child based, of course, on the principle of the best interests of the child. Given that Shari’ah creates such a legal relationship between the mother and the child, it may safely be presumed that the reservations by the Islamic States to Article 9 are not validated in Shari’ah. In any case, the subject of domicile and residency is clearly dealt under Article 15(4), while related issues are addressed under Article 16 of CEDAW. If the reserving Islamic States were primarily concerned with the domiciliary status, it would have been more appropriate to raise such concerns under Article 15 paragraph (4) and 16 rather than Article 9.

Hence, any reservation to Article 9 paragraph (2) cannot be said to be founded in Shari’ah. They may very well be explained as expressions of the domestic policy choices of these twelve countries, primarily aimed at protecting various socio-political concerns not directly connected to or emanating from Shari’ah. Such domestic policies are based on the peculiar circumstances of each country and the need to retain these reservations must be subjected to close and vigorous scrutiny of the prevailing conditions. Furthermore, since these domestic policy issues do not
have any divine attributes or immutability in the context of Shari`ah, it may be argued that such reservations ought to be withdrawn in order to comply not only with CEDAW but also the positive directives regarding the rights of the mother under ḥaḍānah and the musāwāt. That is to say, the superior mandate of Shari`ah in these Islamic States may be utilized to override their reservations to Article 9. Such an argument may be advanced by using the Shari`ah rule of karamah (dignity) for promoting the close relationship between the mother and the child.

4.2.4. Shari`ah-based reservations to Article 16 of CEDAW

4.2.4.1 Scope of Article 16

Article 16 of CEDAW applies the principle of “elimination of discrimination against women” to the area of family and marriage. It deals with the following substantive rights:

(a) Same right to enter into marriage
(b) Same right to choose a spouse with free consent
(c) Same rights and responsibilities in marriage and divorce
(d) Same rights and responsibilities over children (irrespective of marriage)
(e) Same right to decide on the number of children
(f) Same rights to guardianship, wardship, trusteeship and adoption of children
(g) Same personal rights as husband and wife
(h) Same spousal rights to ownership, acquisition, management, administration, enjoyment and disposition of property
(i) Prohibition of child marriage and betrothals.

According to Rebecca J. Cook, a reservation to Article 16 of CEDAW by any State “would seem to leave its women in jeopardy of suffering discrimination in the most personal and pervasive aspects of their lives.”139 While there is little doubt that Article 16 constitutes one of the most important provisions in the overall framework

of the CEDAW, it is ironic that Article 16 also seems to have attracted the majority of reservations made to CEDAW. In fact, even among the Islamic states, 16 have submitted reservations to Article 16. Does this imply that women’s rights in these 16 Islamic States are so pervasively and personally deprived that women do not enjoy any of the several rights contained in Article 16? Not quite. At least, a detailed examination of the Shari`ah-based reservations made by Islamic States seems to indicate that this is not the case.

4.2.4.2. Article 16 and Shari`ah-based reservations

An examination of the first three paragraphs of Article 16(1) and the related provisions in the legal systems of these 16 reserving States reveals that they, in fact, guarantee and protect the rights contained in Article 16 paragraph (1)(a)(b) and (c), albeit in varying degrees. However, none of the Islamic States parties to CEDAW has guaranteed all the rights provided under Article 16 without reservation and in an absolute sense. This may be attributed to the existence of a range of strong injunctions of Shari`ah regarding marital relations, some of which are in fact arguably non-derogable owing to their basis in rules contained in the Qur’an and clear Sunnah.

Islamic law gives great importance to the regulation of marriage and family affairs of all Muslims. Family is the “basis of all social life” in an Islamic society and “marriage is the basis for making a family”. Hence, all the rights and duties of spouses and children are articulated under Shari`ah on a basic understanding of this nexus between marriage, family and society.

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140 Over twenty nine states parties to CEDAW had made reservations to Article 16. These states parties represent mix that cannot be identified in terms of any particular religious, cultural or geographical grouping. Some states parties that still maintain reservations to Article 16 include France, Switzerland, Saudi Arabia, India, Singapore, Israel, Maldives, Libya etc. See online at: <http://www2.ohchr.org/english/bodies/ratification/8.htm> [last visited: 10.01.2008].

141 Preamble g (iv) of the UIDHR states that, “the institution of family shall be preserved, protected and honoured as the basis of all social life.”

142 Article 5 paragraph (a) of the Cairo Declaration of Human Rights in Islam.
4.2.4.3 Article 16 paragraph (1)(a):

Article 16 paragraph (1)(a) of CEDAW requires States parties to guarantee to both men and women, on the basis of equality, the same right to marry. Included in the logic of the provision is a prohibition of polygamy or the practice of a man being simultaneously married to more than a single woman. Polygamy becomes a “discrimination against women” since it infringes the “equality” and “same right” requirements of Article 16 paragraph (1) (a). The CEDAW Committee has expressed its voice on the matter when it declared that

polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited.\(^\text{143}\)

Two substantive points of CEDAW jurisprudence related to Article 16 paragraph (1)(a) emerge from of this General Recommendation of the CEDAW Committee. Firstly, it asserts that every woman has an equal and same right to marry as every man, while age and consanguinity may act as “reasonable restrictions”.\(^\text{144}\) Secondly, polygamy is an infringement of the equal and same right of women to marry, unless polyandry is also given equal recognition.

4.2.4.3 (i) “Same right to marry” and Shari`ah

Three rules of Shari`ah relating to the “right to marry” may be noted as well established positions in all the Islamic States.

i. Firstly, Shari`ah recognizes, protects and promotes the right of both women and men to marry.

ii. Secondly, under Shari`ah, this right is qualified by two categories of prohibitions – permanent and temporary prohibitions to marriage, based primarily on degrees of kinship and marital status.


\(^{144}\) Above n 143 para.16.
iii. Thirdly, polygamy is permitted under Shari`ah, not as an absolute privilege of men but as a legal right exercisable under strict conditions of justice as required by Qur`an. Implicit in this, of course, is a prohibition of any corresponding right of polyandry.

Islamic law is clear on the subject that every man and woman has a right to marry. In fact, according to the Qur’an and the Sunnah, marriage is part of a Muslim’s devotional obligations (ibādāt) while celibacy and monasticism is renounced in Shari`ah.145 Marriage is obligatory on all believing men with the necessary means and resources to pay the dower (mahr), and the Islamic State is enjoined to support (through financial contributions) young people (both men and women) who do not have the wherewithal to get married.146

This concept of the right to marry may also be found in the two principal international Islamic declarations on human rights. Article 19 paragraph (a) of the UIDHR states that “[e]very person is entitled to marry, to found a family” while Article 5 paragraph (a) of the Cairo Declaration states that “men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from exercising this right.”

The right to marry under Shari`ah is not absolute as there are both permanent and temporary prohibitions on the full exercise of this right. Permanent prohibitions are placed on marriage between persons related to each other in certain degrees of


consanguinity, and on taking sisters as co-wives, while temporary prohibitions include marrying a woman who is already in a marriage and marrying a woman during her 'iddah. These two categories of restrictions on the right to marry may be characterized as belonging to a class of permissible limitations that the CEDAW Committee seems to accept as “reasonable restrictions” in General Comment 21.

Furthermore, the Shari`ah rule permitting a Muslim man to marry up to four wives simultaneously also has a direct bearing on the same right to marry provision of Article 16 paragraph (1)(a). The Shari`ah rule on this practice of polygamy is contained in the following verse of the Qur’an that enjoins Muslim men to “marry women of your choice, two, or three, or four, but if ye fear that ye shall not, be able to deal justly (with them), then only one”. However, it may be noted that this rule enabling polygamy is based on the precondition that the man who has more than one wife is “able to deal justly” between his wives. Justice becomes an indispensable requirement of this allowance. Elsewhere in the same sūrah (chapter) of the Qur’an, Allah admonishes believing Muslim men that “ye are never able, to be fair and just, as between women co-wives, even if it is, your ardent desire”.

147 This is based in the Qur’anic injunction commanding Muslims that “prohibited to you (for marriage) are your mothers; daughters; sisters; father’s sisters; mother’s sisters; brother’s daughters; sister’s daughters; foster-mothers (who gave suckle to you); foster sisters; your wives’ mothers; your step-daughters under your guardianship, born of your wives to whom ye have gone in – no prohibition if ye have not gone in; (those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time”. Verses 4:23, The Holy Qur’an – Text, Translation and Commentary, Abdullah Yusuf Ali (trans.), New Revised Edition, (Brentwood: Amana Corporation, 1989) 190. Also see verse 2:235 that lays down the norm regarding temporary prohibition based on 'iddah. Ibid., 96.

148 The term 'iddah refers to the period of time a wife has to wait before remarriage, following a divorce or bereavement. In general it is three menstrual cycles in the case of divorce without pregnancy (verse: 2:228 The Holy Qur’an above n 147 92), in case of pregnancy the period terminates upon delivery (verse: 65:4 The Holy Qur’an above n 147 1485) and four months and ten days in the case of a bereaved wife (verse: 2:234 The Holy Qur’an above n 147 96). The purpose of 'iddah is to ensure paternity of any child that the divorced woman carries with her at the termination of marriage.

149 General Recommendation 21 above n 143 para.16.

150 Verse:4:3 The Holy Qur’an above n 147 184 (parenthesis added).

These two verses of the Qur’an may be said to lay down the parameters within which the rule of polygamy operates in Islamic law. There is a consensus of opinion among the fiqhā that Qur’an permits polygamy and many are of the view that the ability of the husband to do “justice” between the wives is an indispensable precondition to this rule.\(^{152}\) However, opinion is divided as regards what constitutes doing “justice”. According to some commentators, the Qur’anic requirement to be “fair and just” as between co-wives refers to doing justice between co-wives both in emotional and material considerations. Since it is *humanly impossible to do such absolute justice*, one school of jurists views the requirement of doing justice as only a “moral exhortation” on the husband.\(^{153}\) Others like the Egyptian scholar Muhammad Abduh are of the view that the impossibility of doing such absolute justice and the Qur’anic admonition to this effect, read together, implies a prohibition on polygamy itself.\(^{154}\)

However, the preponderant opinion among Muslim jurists is that polygamy is permitted under Islam, provided the husband is able to do justice between co-wives. As regards the requirement of “justice”, Hammudah ‘Abd al ‘Ati believes that it means doing justice in every way that is humanly possible – be it in companionship, kindness or material provisions.\(^{155}\) There appears to be an emerging juristic consensus among contemporary Muslim scholars that sets a baseline on the subject i.e., that polygamy is *not an absolute right* vested in Muslim men. As Hammudah ‘Abd al ‘Ati has noted, what this implies is that polygamy “is not entirely a blessing for one sex and a curse for the other” under Shari`ah.\(^{156}\) It is likened to any other


\(^{153}\) This is the position taken by Imam Shāfi‘ī. See Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) 140.


\(^{156}\) Above n 155 126.
permissible act under law that becomes illegal when it infringes the enabling conditions.\textsuperscript{157}

Taking cue from this discussion and through the application of the method of \textit{maṣāliḥ mursalah}, some scholars advocate that the Shari‘ah requirement for doing justice between co-wives entails a judicial interest to supervise polygamous marriages to ensure they meet the standards of justice. In other words, there is an \textit{overwhelming interest of justice to protect the rights and affairs of women} in a polygamous marriage. Moreover, it is also the case that Shari‘ah allows women to make monogamy a precondition of their marriage contracts. Again, Islamic law on marriage also permits women to include, in the marital contract, an optional right of divorce in cases of a second marriage by the husband. All these provisions, taken together, appear to create a jurisdiction for the judges to intervene and ensure that the purpose of justice or \textit{maqāṣid al-sharī‘ah} is served in marital affairs, especially when it comes to polygamy. This seems to be the direction of the law in most of the codified Islamic family laws in countries like Morocco, Algeria, Egypt, Libya, Syria, Bangladesh, Pakistan, Malaysia and the Maldives.\textsuperscript{158}

4.2.4.3 (ii) Islamic States that have made reservations to Article 16 paragraph (1)(a)

Of the Islamic States examined, only Malaysia may be said to include a specific reservation to Article 16 paragraph (1)(a), while Algeria, Bahrain, Egypt, Iraq, the Maldives, Mauritania, Morocco, Pakistan (general declaration considered as a reservation) and Saudi Arabia have made general reservations covering the entire Convention.\textsuperscript{159} The Malaysian reservation to Article 16 paragraph (1)(a) is in

\textsuperscript{157} Majid Khadduri explains the rule on polygamy within the contextualist hermeneutics by saying that it was a historically contingent norm. Majid Khadduri, above n 154.
\textsuperscript{159} Eight other Islamic states that made reservations to other provisions of Article 16 did not include subparagraph (a) in their reservations. These eight states are Jordan [reservation made to Article 16(1)(c)(d)(g)], Kuwait [reservation made to Article 16(1)(f)], Lebanon [reservation made to Article
consonance with its position on the application of Islamic Shari`ah law to its Muslim citizens. In fact, the Islamic Family Law (Federal Territories) (1984) of Malaysia clearly recognizes the legitimacy of polygamy.\textsuperscript{160} The family laws in all these States are firmly based on Islamic Shari`ah and are categorical in upholding the rules of permanent and temporary prohibitions as well as the polygamy rule on marriage. However, many of these countries have attempted to control the flagrant abuse of polygamy by incorporating a supervisory role for the judiciary, thereby promoting the \textit{just balance} principle of Shari`ah.

This appears to be the case in Algeria where Article 8 of the Algerian Family Code (AFC) stipulates that a husband taking multiple wives must first get the consent of the current wife or wives, in addition to satisfying the court that he has a “justified” reason to take an additional wife. The law also requires the husband to “deal justly” between the wives, as required by Shari`ah.\textsuperscript{161}

Similar provisions also exist in the Egyptian law, although Egypt tried in 1979 under an executive decree (Decree Law No.44 of 1979) to circumvent the legal right of polygamy by creating a simultaneous right for an existing wife to divorce on the ground that the “the mere fact of taking a second wife” by the husband amounted

\textsuperscript{160} Section 23 of the Islamic Family Law (Federal Territory) 1984 recognizes polygamy in respect of Muslims, while several state family law enactments also guarantee and reinforce this position. Under the Law Reform (Marriage and Divorce) Act 1976, non-Muslim Malaysians do not have any corresponding rights. Mohammad Hashim Kamali, \textit{Islamic Law in Malaysia - Issues and Developments} (Kuala Lumpur: Ilmiah Publishers, 2000) 64-73.

\textsuperscript{161} Algerian Family Code, online at: \textless http://appelalgerie.africa-web.org/article.php3?id_article=78\textgreater [last visited: 07.04.2006]. See also the “Islamic Family Law” project at Emory Law School, available online at: \textless http://www.law.emory.edu/IFL/legal/Algeria.htm\textgreater [last visited: 25.08.05]
to “a de facto injury”. This presidential decree freed the courts from seeking any further evidence of proof of harm since all that it required was the mere fact of polygamy. However, this Decree (also known as Jihan’s Law) was struck down as unconstitutional by the High Constitutional Court of Egypt in 1985. It should be noted that this Decree did not try to make polygamy ineffective by appealing to a theory of “same rights” as found in CEDAW nor was it an attempt to challenge the legitimacy or authority of an explicit rule of Shari`ah. Instead, Jihan’s Law attempted to overcome the Shari`ah rule by creating an additional right to divorce linked to polygamy.

The Personal Status Code of Iraq also provides a supervisory role for the judiciary, in addition to creating penal provisions (including fines and imprisonment) for any violation of the limitations placed on polygamy. Legal recognition of polygamy is also found in the Maldivian Family Law (Section 7 of Law Number 4/2000) and in the Moroccan Moudawana (Articles 40). The Moroccan law makes the additional stipulation that polygamy may be authorized by the courts only in the presence of “compelling circumstances and stringent restrictions”.

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163 The High Constitutional Court Ruling of 4 May 1985 case, as noted by Oussama Arabi was not about the legitimacy of Decree Law No.44 of 1979 within Shari`ah law, but on a different constitutional point. See, Oussama Arabi, “The Dawning of the Third Millenium on Shari`ah: Egypt’s Law No.1 of 2000 or Women May Divorce at Will” (2001) Arab Law Quarterly 7.

164 Furthermore, it was a Presidential decree and not a law passed by parliament. One might speculate that this was a detour taken by the Egyptian President Anwar Sadat, in order to avoid entangling the law in a “for or against Shari`ah” debate within the parliament.


166 Preamble, Moudawana, Law Number 70.03, February 3, 2004 (English Translation by Global Rights) available online at: <www.globalrights.org> [last visited 12.10.2005]. Article 40 of the Moudawana allows polygamy except “when there is a risk of inequity between the wives” and “when the wife stipulates in the marriage contract that her husband will not take another wife”. Article 41, “the court will not authorize polygamy: if an exceptional and objective justification is not proven; if the man does not have sufficient resources to support the two families and guarantee all maintenance rights, accommodation and equality in all aspect of life.”
4.2.4.3 (iii) Islamic States that have not made a reservation to Article 16 paragraph (1)(a)

There is a marked absence of consistency in the State practice of formulating reservations based in Shari‘ah. Detailed study of the reservations made by Islamic States reveals many instances of such inconsistency. For example, six Islamic States (that have made reservations to various other provisions of Article 16) raised no voice of dissent (either as a declaration or as a reservation) to the “same right to marry” provided under Article 16 paragraph (1)(a). Yet, the constitutions of these six Islamic States (i.e., Jordan, Kuwait, Lebanon, Libya, Syria and Tunisia) declare Islam as the state religion and the personal status codes implemented in these States follow the Shari‘ah rule on polygamy (except Tunisia - Article 8 of its Personal Status Code (1956 as amended by Law No.74/1993) prohibits polygamy) and the rules relating to permanent and temporary prohibitions on the right to marry. Even though the national laws in these States are based on Shari‘ah, these six Islamic States have made no reservation to the CEDAW provision prohibiting polygamy. The presence of such apparent inconsistencies raises the question whether these Islamic States really believe there to be no conflict between Islamic Shari‘ah, their respective domestic laws and Article 16 paragraph (1)(a) of CEDAW.

It is difficult to accept that these States have not made reservations to this particular provision because they see no conflict as such, especially given the fact that the family laws in all these States have incorporated the Shari‘ah rules relating to the right to marry described above. For example, Jordan has gone on record in its First Periodic Report to admit the Shari‘ah-based legitimacy of polygamy in its Personal Status Act (Number 61/1976). Moreover, it has also acknowledged the evident conflict between the Jordanian law and the CEDAW provision. The Initial Report of Jordan clearly stated that “Article 16 paragraph (1)(a) of the Convention, concerning the same right to enter into marriage conflicts with religious directives. Islam gives men the right to take more than one wife, a right which cannot be given

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167 With the exception of Tunisia, where Article 8 of Tunisian Personal Status Code (1956, as amended by Law Number 74/1993) polygamy is not only prohibited but a criminal offence “liable to a penalty of one year’s imprisonment and/ or a fine of 240,000 francs”. Jamal J. Nasir, above n 165 66.
to women."168 The family law codes of Kuwait and Syria also allow a husband to have up to four wives at the same time, provided he is able to financially support, maintain and treat them equally.169 The Lebanese Law on the Rights of the Family (1962) also recognizes the legality of polygamy.170 In the case of Libya, Act Number 15 (1984) legitimizes polygamy with strict limitations such as requiring the express consent of existing wives and judicial authorization before taking additional wives.171 The practice of these six Islamic States in formulating reservations illustrates a substantive inconsistency in their claims for protecting Shari`ah-based interests through reservations.

This presents a peculiar legal situation where, on the one hand, the personal status codes of these six Islamic States contain Shari`ah rules that permit polygamy, while on the other hand, their failure to formulate reservations to Article 16 paragraph(1)(a) of CEDAW obligates them to prohibit polygamy.172 As a result, it may actually be presumed that these States parties are obligated to implement the requirements of Article 16 paragraph (1)(a) under the rule of *pacta sunt servanda*. It is a simple deduction that absence of a reservation is evidence of acceptance.

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172 Neither the VCLT nor the CEDAW provides any procedure to add any amendments to reservations that have already been made, though the VCLT makes provisions regarding the withdrawal of reservations.
Nevertheless, curiously enough, these Islamic countries have repeatedly stated in their country reports to the CEDAW Committee that they cannot prohibit polygamy because of its legality in Islamic Shari‘ah. Thus, these States have formulated a “Shari‘ah defence” i.e., that they are unable to override a Shari‘ah injunction regardless of any international obligation. In effect, this Shari‘ah defence is used to nullify their default consent to Article 16 paragraph(1)(a). The ineffectiveness of the CEDAW Committee to ensure the compliance of these Islamic States parties to Article 16 paragraph (1)(a) and the continuing extra-legal refusal of these six Islamic States to prohibit polygamy and comply with this provision of CEDAW creates a veritable impasse. This is a recurring feature in the case of many Islamic reservations. Some of these reservations may, in fact, be deemed to create more complications by not specifying what is included in their reservations than what has been specified therein.

4.2.4.4 Article 16 paragraph (1)(b):

Article 16 paragraph (1)(b) of CEDAW deals with the same rights of women and men to choose a spouse and marry with free and full consent. According to General Recommendation 21 of the CEDAW Committee, the purpose of subparagraph (b) is to prohibit any kind of forced marriage of women and to ensure that “a woman’s right to choose when, if, and whom she will marry” is protected and enforced by law.”\textsuperscript{173} It is a requirement that gives women complete authority to make the choice in the matter of marriage and removes all forms of coercion in this matter.

4.2.4.4 (i) Free consent in marriage and Shari‘ah

Islamic law considers marriage as a “solemn covenant” between men and women based on free and full consent.\textsuperscript{174} Any coercion negates this basic


\textsuperscript{174} Qur’anic verse 4:21 describes marriage in the context of a “solemn covenant and verse 2:232 describes divorced women’s remarriage based on mutual agreement. The Holy Qur’an – Text,
understanding of marriage in Shari`ah. Every eligible woman has the right not only to give her free and full consent to a marriage she desires but also to include conditions and stipulations to the marriage covenant, in order to ensure that her rights and privileges are protected.\textsuperscript{175}

It is true that there exists a generally accepted practice of wilāyat or guardianship of the father over the newly marrying woman, wherein the father gives consent to the marriage on behalf of his newly marrying daughter. Juristic opinion is divided as regards the status of a woman whose guardian can exercise this right i.e., whether it applies to a newly marrying woman or a minor daughter’s marriage. There is nothing in the Qur`an or in the Sunnah that gives an undisputed right to the wali (guardian) to coerce a woman under his guardianship into a marriage or to get her married to someone against her interests and consent.\textsuperscript{176} Guardians are required to act in the best interest of their wards at all times and arbitrariness on the part of the guardian undermines this rule of Shari`ah. A minor (under classical Islamic law marriage was based on the attainment of biological maturity) who is married by a guardian to someone against her will has the right to seek divorce upon attaining majority. As regards the guardian’s consent on marriage, the rule applies to minors of both genders and makes no discrimination in this context. The abuse of wilāyat is an abuse of the rule and if it is used to marry a woman against her will, she is entitled to have the marriage repudiated.\textsuperscript{177} The role of the guardian in the marriage of a woman


\textsuperscript{175} Except, of course, any illegal conditions such as a condition that stipulates a limited duration for marriage (the Sh`ia school accept temporary marriage called mut’a) or any other illegal act. A woman has the discretion to fix the amount of her mahr (marriage gift or dowry), conditions regarding polygamy with optional right to divorce on husband marrying a second wife etc. See Jamal J. Nasir, above n 165.

\textsuperscript{176} In fact, guardians are required to act in the best interest of their wards at all times. Arbitrariness by guardians undermines this requirement of Shari`ah. A minor who is married by her guardian to someone she does not desire to be married to, has the right to seek divorce upon attaining majority. As regards guardian’s consent to marriage, it is equally applicable to minors of both genders. The role of the guardian in the first marriage of a woman (whether minor or not) is more in the nature of ensuring that his ward’s interests and welfare would be taken care of by the prospective husband.

\textsuperscript{177} In a hadīth narrated from Abdullah ibn Abbas it is stated that “a virgin came to the Prophet (peace be upon him) and mentioned that her father had married her against her will, so the Prophet (peace be
(whether a minor or not) is more in the nature of ensuring that his ward’s interests and welfare are protected and taken care of by the prospective husband.\textsuperscript{178} In any case, the guardian cannot override the consent and the interest of the woman who is marrying.\textsuperscript{179} Hence, there appears to be no conflict between Shari‘ah and the free and full consent requirement to marriage under Article 16 paragraph (1) (b). This norm of Shari‘ah is also contained in Article 19 paragraph (1) of UIDHR which states that “no person may be married against his or her will, or lose or suffer diminution of legal personality on account of marriage.”

The second requirement of Article 16 paragraph (1)(b) relates to the same right to freely choose a spouse, which is closely connected with the free and full consent requirement.

There is a Shari‘ah limitation on the right to choose a marital partner that is mainly faith-based and is applicable to both men and women, although it is different for the two. Whereas a Muslim man may choose his marital spouse only from among Muslim women or from among the ahl al-kitāb or the People of the Book, a Muslim woman’s right to choose a marital spouse is limited to Muslim men. This is based on the following two injunctions from the Qur‘an

Do not marry unbelieving (literally “pagan”) women, until they believe. A slave woman who believes is better than an unbelieving (literally “pagan”) woman, even though she allure you. Nor marry upon him) allowed her to exercise her choice.” Abu Dawūd Sulayman ibn Ash‘ath al-Azadi al-Sijistani (Ahmad Hassan trans.), \textit{Sunan Abu Dawūd} (New Delhi: Kitab Bhavan, 2000) Ḥadīth Number 2091, Book 11, Marriage (Kitab al-nikāh).


\textsuperscript{179} This is evident from the Ḥadīth of the Prophet; “A matron should not be given in marriage except after consulting her; and a virgin should not be given in marriage except after her permission. The people asked, ‘O Allah's Apostle! How can we know her permission?’ He said, ‘Her silence (indicates her permission).’ ” Muhammad ibn Ismail Bukhari (Muhammad Muhsin Khan, trans.), \textit{Saḥīḥ Bukhari} (Alexandria, VA.,: Al Saadawi Publications, 1996), Ḥadīth Number 67, Book 62, Volume 7, Wedlock, Marriage (Nikāḥ). See also Muslim ibn al-Hajjaj (Nasiruddin al-Khattab, trans.), \textit{Saḥīḥ Muslim} (Riyadh: Darussalam, 2007), Ḥadīth Number 3307, Book 008, The Book of Marriage (Kitab al-Nikāh).
(your girls) to unbelievers until they believe. A man slave who
believes, is better than an unbeliever (literally “pagan”), even though
he allure you

O ye who believe! When believing women come to you as fugitives,
examine them. Allah is best aware of their faith. Then, if ye know
them for true believers, send them not back unto the infidels. They
are not lawful for the infidels nor are the infidels lawful for them.⁸⁰

Both Sunni and Sh’ia Muslim scholars are united on the position that Muslim
men can marry women from among the “people of the book” meaning Christians and
Jews, while Muslim women do not share the same right of choice in a spouse.⁸¹ As
this concept involves allowing men a degree of freedom (to marry non-Muslims) that
is not allowed to Muslim women, it conflicts with the concept of free choice of
spouses of Article 16 paragraph (1)(a).

4.2.4.4 (ii) Islamic States that have made reservations to Article 16 paragraph (1)(b)

Of the Islamic States that have made reservations to Article 16, none has
made a specific reservation to Article 16 paragraph (1)(b), though it may be deemed
to be covered in the general reservations made by Algeria, Bahrain, Egypt, Iraq, the
Maldives, Morocco, Pakistan (general declaration) and Saudi Arabia (general
reservation covering all provisions of CEDAW). The Shari`ah provision regarding
free choice of spouses, however, is included in the personal status codes of many
other Islamic States that have made reservations based on Shari`ah to other
provisions of CEDAW and failed to include subparagraph (b).

⁸⁰ Verse 2:221 and 60:10 The Holy Qur’an above n 174 89 and 1455 respectively. The People of the
Book or Scripture (ahl al-kitāb), are generally a collective term referred to in the Qur’an for
Christians, Jews and the Sabaeans. According to the Qur’an, Prophets with the message of Islamic
monotheism were sent to people of these communities.

The general reservations made by these eight States arguably also apply to the guardianship rule as well as to the free choice of spouse rule provided under Article 16 paragraph (1)(b). The relevant domestic laws of these countries (based as they are on Islamic Shari‘ah) require marriage to be based on the free consent of both women and men while at the same time these laws also recognize the right to free choice of spouses, within the Shari‘ah limitations. This is evident, for example, from the Algerian Family Code (that forms the basis of Algeria’s reservations to CEDAW). It is categorical in stating that marriage is a contract based on the free consent of both the parties. The AFC also reiterates the Shari‘ah rule governing the significance of the father’s supervisory role (wilāyāt) in the case of a newly marrying daughter. Article 12 of the AFC stipulates that a father’s supervisory role can be exercised only in the interest of his daughter, while Article 31 states that a Muslim woman cannot enter into a marriage with a non-Muslim. The Egyptian Civil Code is similar for the most part, except that in cases where a guardian arbitrarily refuses to give consent to his ward’s marriage the woman is given the right to seek redress from a judge. In the Maldives, Section 8 of the Family Law (Number 4/2000) prohibits the marriage of a Maldivian woman to a non-Muslim man while permitting a Maldivian man to marry a non-Muslim woman. Likewise, the family laws of Bahrain, Iraq, Morocco, Pakistan and Saudi Arabia also follow the same normative

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182 Bahrain and Saudi Arabia do not have family law codes. In Bahrain’s case, the rules of Shari‘ah as interpreted in the Ja‘fari school and the Sunni jurisprudence (both of which uphold the relevant rules noted above) are implemented. Saudi Arabia’s Constitution or Basic Law recognizes supremacy of Shari‘ah in all legislative spheres.


184 Article 31 states, “a Muslim woman cannot marry a non-Muslim” while Article 12 of the AFC states that, “the matrimonial tutor (wali) cannot prevent the person placed under his supervision to contract marriage to suit his wishes or if it is advantageous for him. In the event of such opposition from the matrimonial tutor, the judge can authorize the marriage... However, the father can oppose the marriage of his minor daughter if it is in the interest of the girl.” Le Code de Famille (1984). (free translation). Available online at: <http://appelalgerie.africa-web.org/article.php3?id_article=78> [last visited 11.02.2006].

185 Section 8 of the Maldivian Family Law (Number 4/2000) states that “(a) No Maldivian woman shall contract a marriage with a non-Muslim man. (b) Where a Maldivian man wishes to contract marriage with a non-Muslim female, that marriage may only be solemnised if that non-Muslim female is permitted by Islamic Shari‘ah to contract a marriage with a Muslim male.” Available online at: <http://www.agoffice.gov.mv/IndexEng.asp> [last visited: 10.01.2008].
provisions of Shari`ah. Since the national laws of these Islamic States incorporate Shari`ah rules relating to the spousal choice in marriage, the general reservations made by these States may be deemed to apply to Article 16 paragraph(1)(b).

4.2.4.4 (iii) Islamic States that have not made a reservation to Article 16 paragraph (1)(b)

With the exception of the eight Islamic States that have made general reservations as noted above, no other Islamic State has included Article 16 paragraph (1)(b) in its reservation, even though the personal status codes in most of the Islamic countries include Shari`ah rules relating to spousal choice.

Jordan, once again, is a case in point. Even though the Personal Status Code of Jordan declares the marriage of a woman to a non-Muslim as null and void \textit{ab initio},\footnote{Article 33 of the Personal Status Act of Jordan, as cited in “The Second Periodic Reports of States Parties - Jordan” (26 October 1999) \textit{United Nations Document CEDAW/C/JOR/2},64.} it has made no reservation to Article 16 paragraph (1)(b). The Shari`ah requirement of a guardian is also stipulated in the Kuwaiti Code of Personal Status, according to which a woman who is “a virgin between puberty and 25 years of age needs a marriage guardian” to validate her consent to complete the marriage contract.\footnote{Article 29 of the Kuwaiti Code of Personal Status. See Jamal J. Nasir, \textit{The Status of Women Under Islamic Law and Under Modern Islamic Legislation} (London: Graham & Trotman Ltd., 1994) 11.} In Malaysia, the Islamic Family Law (Federal Territory) Act 1984 lays down under Section 13 that a marriage contract is complete only with the free and full consent of the woman, while also including the Shari`ah stipulation regarding the consent of the guardian. Nevertheless, any attempt to coerce the woman into giving her consent is made a punishable offence.\footnote{“Women’s Rights Within Islamic Family Law in Southeast Asia”, \textit{KARAMAH –Muslim Women Lawyers for Human Rights}, available online at: \texttt{<http://www.karamah.org/docs/Womens_rights_%20SEA.pdf>} [last visited: 16.11.2005].}

Furthermore, the Syariah Court or the Shari`ah Court can dissolve a Muslim marriage when one of the spouses converts to another religion. The Syrian Law of
Personal Status (1953) under Article 48 paragraph (2) makes the marriage of a Muslim woman to a non-Muslim man “void unconditionally”, while allowing a Muslim man the right to marry a non-Muslim woman (ahlul kitābi). Even Tunisia, which is generally regarded as having the most “secularized” family law code among Islamic States, recognizes the Shari‘ah rules when it comes to spousal choice. Article 3 of the Tunisian Personal Status Code (1956) bases marriage “only” on the free consent of spouses, while the Code also states that a non-Muslim man must convert to Islam before marrying a Muslim woman. It also places certain additional limitations such as complete prohibition of remarriage between thrice divorced couples and setting the minimum age limits for marriage for both men and women at 18 years.\(^\text{189}\) In the case of marriage of women between the age of 17 and 20 years, Article 6 of the Tunisian Code requires the consent of the guardian or the mother.\(^\text{190}\)

4.2.4.5 Article 16 paragraph (1)(c):

Article 16 paragraph (1) (c) requires States parties to guarantee the “same rights and responsibilities” for both women and men during marriage and at its dissolution. The main aim of CEDAW under this section appears to be to remove all gender-based distinctions in the distribution of marital rights and responsibilities during marriage and at divorce. By eliminating such distinctions, both spouses are presumed to attain equality.

4.2.4.5 (i) Article 16 paragraph (1)(c) and Shari‘ah

Perhaps no other provision of CEDAW may appear to have created as deep a wedge between international human rights law and Islamic Shari‘ah as Article 16


\(^{190}\) According to Article 6 Tunisian Personal Status Code (1956 as amended by Law No.74/1993), “The marriage of a minor is subordinated to the consent of her guardian and mother. In case the guardian or mother withholds such consent in spite of persistence of minor for marriage, the judge decides. The order of judge authorising marriage is irrevocable.” Code du Statut Personnel – Livre Premier (free consent). See online at: <http://jurisitetunisie.com/tunisie/codes/csp/Csp1010.htm> [last visited: 10.01.2008].
paragraph (1)(c). It bears a significant impact on two areas of family law regulated by Shari`ah, i.e., role differential between spouses and the law of divorce.

(a) Role differentiation between spouses in marriage:

A hallmark of the Shari`ah rules on marital relationship is the assignment of different roles to each of the spouses along with the resultant different rights and duties. Conceptually, while under Shari`ah marriage is undoubtedly a covenant between two equal individuals, these two individuals are required to perform different obligations under it, and hence, are entitled to different sets of rights. The role of the Muslim husband is inextricably attached to the maintenance of the wife and children according to his financial and physical capabilities. The responsibility of providing accommodation, food and clothing and looking after the general wellbeing of the wife and children rests with the husband. It is a legal obligation that creates an equal right in the wife to claim such maintenance from the husband, and any failure to do so gives the wife a right to claim relief, including divorce according to some schools of jurisprudence. There is no similar legal responsibility placed on the wife in Islamic law, while the husband has no legal right to claim maintenance from his wife. The concept of role differentiation is laid down in the following verse of the Qur’an “and women shall have rights similar to the rights against them, according to what is equitable, but men have a degree (of advantage) over them”\(^1\)

The “degree of advantage” exists only because the Qur’an conceptualizes marriage through role differentiation, wherein the legal obligation to maintain the wife and children is vested in the husband. Hence, he has an added responsibility of protecting and maintaining his family. This, however, does not mean that the husband is elevated to a superior position while relegating the wife to a subordinate position. As noted by Hammudah ʿAbd al ʿAti

the verse declares that men are guardians, etc. of women.

Guardianship entails authority of the guardian over the person(s)

guarded. But authority is not the equivalent of power, much less of absolute power. Nor does it necessarily mean a dichotomous, absolute ascendance-submission relationship.  

Role differentiation in marital relations is based on the following verse from the Qur’an

Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they [men] support them from their means. Furthermore, the concept of maintenance entails providing for all the needs of his wife to the best of his abilities, as elaborated in the following verse of the Qur’an

Let the women live (in ’Iddah) in the same style as ye [the husband] live, according to your means; annoy them not, so as to restrict them...Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what he has given him.

The religious and legal obligation of the husband to maintain his wife, however, does not place any limitations on the rights of the wife to earn income and properties, independent of the husband. Nor does it give any right to the husband over the income and property of the wife, as a married woman carries with her all her proprietary rights under Shari`ah. Simultaneous to the responsibility of the husband to maintain, the Shari`ah also places a responsibility in the wife to guard and protect her husband’s property and to be truthful and honest, while maintaining mutual respect and harmony in marriage.

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193 The word used in the Qur’an is “qawâm”, that is translated by Abdullah Yusuf Ali as, “one who stands firm in another’s business, protect his interests and looks after his affairs; or it may be, standing firm in his own business, managing affairs, with a steady purpose”. Footnote 545 to Verse 4:34 The Holy Qur’an above n 191, 190.

194 Verse 4:34 The Holy Qur’an above n 191, 195.

195 Although this verse primarily refers to divorced women in their legal waiting period (’iddah) it is even more relevant and applicable to wives in continuing marriages. Verse 65:6-7 The Holy Qur’an above n 191, 1485-1486.
(b) Divorce:

Role differentiation is also a continuing feature of Shari`ah’s normative standards when it comes to the subject of divorce. Accordingly, Shari`ah places certain rights of divorce in the husband and in the wife as well as the judge and hence differs significantly from the “same rights” theory of Article 16 paragraph (1)(c) of CEDAW.

The Muslim husband has the unilateral right to divorce his wife. However, the dissolution of marriage without a just cause, and without exhausting all other means, is widely considered among the fuqaha as going against the standards of Shari`ah. A unilateral divorce by a husband becomes permissible “under unavoidable circumstances, when living together becomes a torture, mutual hatred is deep-seated”\(^\text{196}\) and it is impossible to live in harmony according to Islamic law. In fact, according to a well known hadīth of the Prophet, “Allah did not make anything lawful more abominable to Him than divorce”.\(^\text{197}\) Therefore, the Muslim husband’s right to divorce is not subject to arbitrary exercise, as has often been suggested.\(^\text{198}\) Instead, he is required to show just cause and Shari`ah entreats him to show “kindness” to his parting wife and be equitable in providing maintenance to her during her legal waiting period or ‘iddah.\(^\text{199}\) He is permitted to restore marital relations during the ‘iddah period of the wife, in his first and second divorces. After three separate divorces (each followed by ‘iddah), there is no restitution of marital relations nor are they allowed to remarry, except when the wife is divorced from

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\(^{197}\) Abu Dawūd Sulayman ibn Ash`ath al-Azadi al-Sijistani (Ahmad Hassan trans.), *Sunan Abu Dawūd* (New Delhi: Kitabh Bhavan, 2000), Hadīth Number 2172, Book 12, Divorce (Kitāb al-Talāq).


\(^{199}\) Verse 2:231 *The Holy Qur’an* above n 191, 94.
another man. These are limitations placed by the Qur’an and the Sunnah in clear terms, though the fuqaha differ on procedural aspects of the rules.

According to Shari`ah, a Muslim woman has the right to dissolve her marriage under various circumstances, when she has a just cause for divorce. For instance, she has a right to divorce when her husband is absent for a long time without contact, when she is deserted or mistreated by the husband, when the husband is impotent or has a serious and incurable communicable disease, or when he is financially incapable of supporting and maintaining her. She may also seek a khulʿa (a wife’s right to separation) by returning her marital gift or mahr to the husband.200 A wife may also get a “delegated” right to divorce, by making it a condition of her marriage contract that the husband agree to irrevocably transfer to her his right to divorce. He may also “delegate” to his wife such right to divorce executable by the woman only on the doing of specified act/s by the husband, as for example when he takes a second wife.201

The judge may also dissolve a marriage either on the application of both the parties to dissolve marriage through mutual consent, called mubara’ah, or through faskh where the court orders the dissolution of marriage when the marriage itself is declared void, as for instance, by reason of the conversion of a spouse to another religion or in a li`ān case.202

In summary, the Shari`ah encourages Muslims to marry but regulates it in a certain order based on a recognition of the different roles performed by the husband and wife. A Muslim man may do so only when he has the capacity to pay the marital

200 Verse 2:229 The Holy Qur’an above n 191, 93.

201 Hammudah ‘Abd al ‘Ati, above n 198, 243-244. See also Yusuf al-Qaradawi, above n 196, 218.

202 Li`ān divorce takes place in a court when the husband and wife accuse each other of adultery without evidence and takes oath to that effect while invoking the wrath of Allah on whoever is lying. See Hammudah ‘Abd al ‘Ati, above n 198, 244.
gift (mahr). Also called the dowry, mahr is given to the wife at the time of marriage as her sole possession and is meant to provide for her needs as and when she may so desire. Secondly, men are obligated to maintain their wives as a condition precedent. In fact, whosoever is not capable of doing so is entreated to fast and overcome his longing for a wife through praying.\footnote{Hadith of the Prophet reported through ‘Abdullah bin Mas‘ūd, “we were with the Prophet while we were young and had no wealth whatever. So Allah’s Apostle said, ‘O young people! Whoever among you can marry, should marry, because it helps him lower his gaze and guard his modesty (i.e. his private parts from committing illegal sexual intercourse etc.), and whoever is not able to marry, should fast, as fasting diminishes his sexual power” Muhammad ibn Ismail Bukhari (Muhammad Muhsin Khan, trans.), \textit{Sahih Bukhari} (Alexandria, VA.: Al Saadawi Publications, 1996), Hadith Number 4, Book 62, Volume 7, Wedlock, Marriage (Nikāh). See also Muslim ibn al-Hajjaj (Nasiruddin al-Khattab, trans.), \textit{Sahih Muslim} (Riyadh: Darussalam, 2007), Hadith Number 3231, Book 008, The Book of Marriage (Kitāb al-Nikāh).} Thirdly, Shari‘ah gives different sets of divorce rights to the husband and the wife, enjoining each of them to exercise their rights only in accordance with the standards of fairness and equity. Separate divorce rights are given to the spouses because Islamic law recognizes a role-differentiated family structure. These three provisions of Shari‘ah are quite clearly in conflict with the “same rights” approach to marital rights adopted by the CEDAW. Yet, the family codes of most of the Islamic States and the two Islamic declarations on human rights embody these rules as part of the established law of Muslims.\footnote{Article 6 paragraph (b) of the Cairo Declaration and Article 19 paragraph (c) (on maintenance rights) and Article 20 (on divorce rights) of the UIDHR.}

These six reservations are strongly connected to the Shari‘ah-based national laws prevailing in these Islamic States. The family laws of each of these six States have invariably adopted (in one form or the other) the above discussed Shari‘ah laws

\footnote{Bangladesh withdrew its reservation to subparagraph (c) of Article 16 in 1997.}
relating to role differentiation and separate sets of divorce rights for the spouses. For example, the Jordanian Personal Status Act incorporates separate sets of divorce rights of the wife (subject to a judicial decision) and of the husband, the latter being vested with a unilateral right of divorce without the requirement of a judicial decision. Jordanian law also recognizes *khulʿa*, being a divorce right of the wife.\(^{206}\) The Lebanese family law applicable to Muslims also provides similar provisions,\(^{207}\) while the Libyan law also follows suit and adheres to the Shari`ah in matters relating to the payment of the *mahr*, the husband’s obligation to provide the wife with accommodation and adequate maintenance, the wife’s right to non-interference in her private assets and the “right to have no material or moral harm inflicted on her.”\(^{208}\) One is hard pressed to find anything under Article 16 paragraph (1)(c) that is “prejudicial” to these rights of a wife.\(^{209}\)

However, a closer scrutiny of the law relating to divorce reveals a subtle yet clear divergence from the CEDAW standards. This is evident in the Libyan Marriage and Divorce Regulations Act (Number 10 of 1984) which recognizes a husband’s right to divorce while also providing the wife with a separate right to divorce in accordance with Islamic law. At the same time, it also entitles both spouses to exercise divorce through mutual consent and in all circumstances the wife is allowed to exercise her right to divorce through the courts.\(^{210}\) These provisions of the Libyan

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\(^{207}\) Jamal J. Nasir, above n 206.


\(^{209}\) As regards the responsibilities of a wife during marriage, the law may be said to follow the general standards of marital responsibilities of a wife under Shari`ah such as the responsibility to bring up children, fidelity, marital harmony etc. Article 21 of the Great Green Charter for Human Rights in the Age of the Masses (1988), one of the principle policy documents on human rights in Libya, interestingly notes in this connection, “The individual men and women in Libyan Arab society are equal in all matters human; *any distinction in rights between men and women is grossly unfair and has no justification*…(emphasis added).” as quoted in the Second Periodic Report of Libya, above n 208.

\(^{210}\) The law also requires that even the divorce made by the husband must be registered with the court in order to attach legal significance. See “Islamic Family Law” project of the University of Emory School of Law available online at: [http://www.law.emory.edu/IFL/legal/libya.htm](http://www.law.emory.edu/IFL/legal/libya.htm) [last visited:...
law conflict with the stipulations of Article 16 paragraph (1)(c) because they offer separate sets of divorce rights to the spouses, contrary to the “same rights” to divorce espoused in CEDAW. Once again, this difference shows how the Shari`ah promotes marital rights through the role differentiation paradigm.

The Malaysian reservation to Article 16 paragraph (1)(c) may also be understood in a similar way since its Islamic Family Law (Federal Territory) Act 1984 (as amended in 1994) provides two different sets of divorce rights for the husband and the wife. Section 55A of the Act recognizes the right of the husband to repudiate marriage, while section 52(1) of the same law gives a woman the right to divorce under certain specific circumstances such as when the husband goes missing for more than one year, fails to maintain her for more than three months, is imprisoned for more than three years, or is impotent or afflicted with insanity or leprosy.211

In addition to providing for separate divorce rights to each of the spouses, the Syrian Law of Personal Status (1953) also incorporates the Shari`ah rules relating to the husband’s obligation to maintain the wife and family during marriage and immediately after divorce. According to Article 65 of the Syrian Law of Personal Status, it is the legal duty of the husband to provide accommodation to the wife during marriage, while Article 72 paragraph (1) gives the wife a right to receive, and the husband the obligation to pay, marital maintenance. If the husband fails to provide marital maintenance, either due to poverty or for other reasons, the law

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makes it a debt that the husband owes to the wife. Moreover, Article 87 paragraph (2) of the Syrian law recognizes the unilateral right of the husband to divorce, while the wife may seek divorce through the court, in certain circumstances, such as where the husband is impotent, goes insane or fails to pay maintenance. Again, under Article 95 paragraph (1), the Syrian Law of Personal Status entitles the wife to khul’a separation.

The Tunisian Personal Status Code (1956) also follows the Shari`ah rules regarding the husband’s obligation to maintain the wife and family (Article 23 of the Code) in his capacity as the “chef de famille”. Article 23 also stipulates that the relationship between the couple should be one of cooperation “in managing the family’s affairs, the proper education of their children and the conduct of their affairs, including education, travel and financial transaction”. The notion of “head of family” included in the law appears to be only a nominal concession that would be replaced in due course. In the case of divorce, the Tunisian law-makers appear to have moved away from the above described rules of Shari`ah. In their place, the Code seems to have adopted a secular legal philosophy. For instance, it does not recognize the Shari`ah rule of the husband’s unilateral right of divorce but instead makes divorce an equal right of both spouses in much the same way as is provided under Article 16(1)(c). The first country report of Tunisia notes that Article 31 of the Tunisian Code establishes

212 Jamal J. Nasir, above n 206, 42, 64-65. It may also be noted here that under Shari`ah, as is also provided by the Syrian Law of Personal Status (1953 - as amended by Law No.34/1975), the husband is obligated to pay the dower (mahr) whereas the wife is not placed with a similar responsibility. Again, the Syrian law also requires the wife to be obedient to the husband in order to maintain marital harmony. In fact, failure of the wife to obey the husband (for instance working outside home without husband’s consent) entitles the husband to stop marital maintenance. This is in keeping with the Shari`ah rule of nushuz. See “Islamic Family Law” project of the University of Emory, School of Law, available online at: http://www.law.emory.edu/IFL/legal/syria.htm [last visited: 23/11/2005].

213 Jamal J. Nasir, above n 206, 64-65.

214 The Tunisian representative explained this during the presentation of its first report to the CEDAW Committee in the following words. “The legislation still preserved the husband as head of the family, but it was likely that as women gradually became more independent economically, the role of the husband as economic custodian would disappear.” Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Tunisia” (3 February 1995) United Nations Document A /50/38, para.249.
equality between men and women with respect to the dissolution of the matrimonial bond and the complete elimination of the masculine privilege of unilateral repudiation of the wife by her husband.\footnote{215} 

As a result, “Tunisian women may request divorce on the same basis as men and obtain it in the same conditions.”\footnote{216} This indicates a strong position taken by Tunisia in advancing gender equality in marital relations between the spouses, regardless of the Shari`ah norms on the subject. It is, in fact, a reassertion of the requirements set under Article 16(1)(c), thereby raising a question as to why Tunisia continues to maintain its reservation to this paragraph. Perhaps, it is because the Code still continues to include some “Shari`ah-inspired” provisions in matters relating to divorce that may still appear to be gender-based discrimination.

Apart from the six States discussed above, eight Islamic States have made general reservations covering paragraph (c) of Article 16(1): Algeria, Bahrain, Egypt, Iraq, the Maldives, Mauritania, Morocco and Saudi Arabia. As already noted, the constitutions and other domestic laws of these eight States are closely linked with and based in Islamic law. It is not surprising, therefore, that the general reservations made by these States have a Shari`ah interest to protect.

A good analogy is the correlation between the general reservation made by Algeria and the Algerian Family Code (AFC) provisions that have a direct bearing on the rights outlined under Article 16 paragraph (1)(c) of CEDAW. The AFC may be noted for promoting two characteristic features of the Shari`ah law on marital affairs. Under Article 39 of the AFC the husband is declared as the “chef de famille” or head of the family entrusted with the responsibility to maintain wife and children, thereby endorsing the Shari`ah role for the husband in marriage. On the subject of divorce, Article 53 of the AFC sets out the grounds on which a wife can seek divorce, such as the failure of the husband to provide for her, his impotence, his refusal to have sex


\footnote{216} Above n 215 (emphasis added).
with her for over four months, his condemnation to a dishonorable imprisonment of over a year's length or his absence for over a year without a good reason, or his failure to fulfill a husband’s legal duties towards her or on him being found guilty of grave immorality.\textsuperscript{217} Whereas Article 52 of the Code gives the husband a unilateral right to divorce, subject to the condition that a wife can claim for damages suffered if a court finds that the husband exercised divorce wrongly or without just cause.

The Egyptian reservation also may be understood in the context of the Shari‘ah-based interests promoted in its domestic laws. In fact, Egyptian laws clearly indicate that the marital rights advanced therein are not of the “identical” or “same” variety that is included in Article 16 paragraph (1)(c). As pointed out in the Egyptian reservation, under Egyptian law “women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them.”\textsuperscript{218}

The “just balance” and “equivalent” rights theory espoused in the Egyptian reservation is most obviously seen in the provisions of Egyptian law relating to divorce. The law gives the husband a certain set of rights to divorce, while the wife is also given a different set of rights to divorce her husband. Law Number 25/1929 on dissolution of marriage essentially recognized only two modes of divorce, namely the unilateral right to divorce vested in the husband and divorce by mutual consent. It also recognized the wife’s right to get a divorce (through a judicial intervention) on account of personal injury and harm done by the husband. The Decree Law Number 44 of 1979 was an attempt to widen the scope of this rule espoused by the Maliki school of jurisprudence.\textsuperscript{219}


\textsuperscript{218} Egyptian reservation to Article 16 of CEDAW (emphasis added). See online at: <http://www2.ohchr.org/english/bodies/ratification/8.htm> [last visited: 10.01.2008].

\textsuperscript{219} Oussama Arabi, “The Dawning of the Third Millenium on Shari‘ah: Egypt’s Law No.1 of 2000 or Women May Divorce at Will” (2001) Arab Law Quarterly 2-21. For a tabulation of the Egyptian personal status code provisions, see “Islamic Family Law” project of the University of Emory, School of Law, available online at: <http://www.law.emory.edu/IFL/legal/egypt.htm> [last visited: 5.11.2005].
With the coming into force of Law Number 1 of 2000, the modes of divorce have been expanded to include the unilateral divorce right of the husband, mutual divorce and unilateral divorce by the wife – a hitherto new category of divorce rights in the Egyptian legal system. The Egyptian reservation also highlights the disability of the State to make any law that contravenes the “sacrosanct nature of the religious beliefs which govern marital relations in Egypt”. Therefore, it may safely be concluded that the Egyptian reservation to CEDAW is firmly rooted in the idea that Shari`ah-based domestic legal provisions are beyond the ambit of change. In almost similar manner, the Iraqi reservation also expresses Iraq’s inability to change Shari`ah rules on marital rights that guarantee “women rights equivalent to the rights of their spouses so as to ensure a just balance” though not in the manner advocated by CEDAW. As far as divorce is concerned, the Personal Status Code of Iraq enumerates three forms of dissolution of marriage, namely, talāq (repudiation of marriage by husband), judicial separation and khul`a (release at the instance of the wife). Furthermore, Article 39 of the Code (amended 51/1985) provides that if a court finds the husband to have arbitrarily divorced his wife, it can award her financial compensation, while the Divorced Women’s Right to Housing Law (77/1983) enjoins the husband to provide accommodation to the divorced wife till she is able to find appropriate housing.

In the case of the Maldives, incidentally ranked highest in the world for the number of divorces (a fact that is generally attributed to slack legal provisions enabling the husband to unilaterally divorce), significant changes have been

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220 Egyptian reservation to Article 16 of CEDAW, see online at: <http://www2.ohchr.org/english/bodies/ratification/8.htm> [last visited: 10.01.2008].


223 According to one study, the Maldives divorce rate stands at 10.97 per 1000 marriages, making it the highest divorce rate recorded in any country. The second highest rate is 4.63 in the case of Belarus. See online at: Gulnar Nugman, World Divorce Rates, (World Heritage Foundation, 2002), (online at: http://www.divorcereform.org/gul.html [last visited: 22/9/2006].
brought about to tighten divorce law by increasing the role of the family court. The Maldivian Family Law (Number 4/2000) (MFL) controls the husband’s right to divorce by subjecting it to stringent judicial supervision. Thus, a husband can divorce his wife only with the agreement of his wife and that of the court. At the same time, the MFL also recognizes a wife’s right to khul’a divorce and to seek judicial separation or faskh on grounds such as the husband’s prolonged absence, failure to pay maintenance or insanity. Still, it is clear that these provisions of the MFL do not promote a “same rights” model of marital rights. Instead, it is also structured on the role differentiation model with the law laying greater emphasis on the duties of the husband to provide and maintain the wife and family.

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224 The first two provisions of Section 23 of the Maldivian Family Law (Number 4/2000) states that “(a) where a husband is desirous of divorcing his wife, he shall do so only with the approval of the Judge after the husband has made an application to the competent court containing particulars as may be required by regulations made under this Act. (b) Where an application is made to the Court in accordance with subsection (a) of this section by a husband who is desirous of divorcing his wife, and where both parties been summoned thereafter to the Court and the wife has expressed her no objection to being divorced, then, with the approval of the Judge, the husband may divorce his wife.” See online at: [http://www.agoffice.gov.mv/IndexEng.asp](http://www.agoffice.gov.mv/IndexEng.asp) [last visited: 14.01.2008].

225 Section 27 states that “This Act does not prohibit the effecting of a khul’a divorce by application made to the Court where the parties to the marriage agree that the wife may seek a divorce from her husband by making a payment to him or giving him a thing of monetary value.” See online at: [http://www.agoffice.gov.mv/IndexEng.asp](http://www.agoffice.gov.mv/IndexEng.asp) [last visited: 14.01.2008].

226 Section 28 states that “Where a woman makes an application to the Court for divorce on account of any of the following grounds, the Court shall without transmitting that matter to the Conciliation Division for Family Matters mentioned in section 25 of this Act, annul the marriage: (a) Lapse of a period exceeding one year without knowing the whereabouts of the husband. (b) Failure on the part of the husband to provide payment of maintenance for a period exceeding three consecutive months, and the matter has been filed with the Court twice and order for payment of maintenance has been made each such time and the husband continues to be in default of each of that order. (c) Ignorance on the part of the wife at the time of marriage that the husband suffered from impotence and satisfaction by the Court that sufficient evidence exists as to the impotence of the husband subsequent to the claim made by wife after contracting that marriage. (d) Insanity of the husband for a period of exceeding 2 years. (e) Continued suffering of the husband from a communicable and serious disease for which a cure is yet to be found. (f) Occurrence of any other event which will permit the marriage to be annulled under Shari`ah by faskh.” See online at: [http://www.agoffice.gov.mv/IndexEng.asp](http://www.agoffice.gov.mv/IndexEng.asp) [last visited: 14.01.2008].

227 In fact, Section 35 of the Maldivian Family Law (Number 4/2000) empowers the court to make the husband pay for the maintenance of the wife, children and divorced wife in accordance with the regulations set under it. See online at: [http://www.agoffice.gov.mv/IndexEng.asp](http://www.agoffice.gov.mv/IndexEng.asp) [last visited: 14.01.2008].
Like the Maldives, the Moroccan *Moudawana* has also increased the role of the courts in the matter of divorce by subjecting a husband’s unilateral right to divorce to judicial authorization.\(^{228}\) The *Moudawana* also gives the wife a right to divorce when the husband has “assigned” (*tamlīk*) this right to the wife under the marriage contract,\(^{229}\) on account of certain circumstances such as a “latent defect” in the husband or “long absence” or “harm” caused by the husband or his failure to pay for maintenance abstinence, abandonment\(^ {230}\) and when the wife initiates divorce by offering the husband compensation (*khul’a*).\(^ {231}\) In general, the new *Moudawana* attempts to “make divorce…, a prerogative that may be exercised as much by the husband as by the wife”.\(^ {232}\) Separate sets of divorce laws for the husband and wife are also provided in the laws of the remaining three States that have made general reservations, i.e., Bahrain, Mauritania and Saudi Arabia. It may, therefore, be observed that the relationship between the general reservations of these three States and their respective positions on Article 16 paragraph (1)(c) is also rooted in the Shari`ah laws on marriage.

4.2.4.5 (iii) Islamic States that have not made reservations to Article 16 paragraph (1)(c)

Four Islamic States have not made any reservation to Article 16(1)(c): Bangladesh, Kuwait, Turkey and Yemen. Of these, Bangladesh and Turkey withdrew their initial reservations, while Yemen did not make any reservation to CEDAW except to Article 29.

\(^{228}\) Article 78 of the *Moudawana*. In addition to being subject to judicial authorisation and efforts of reconciliation initiated by the court, Article 87 provides that the husband can complete a legal divorce only after depositing with the court enough funds for the maintenance of the wife and children after divorce. See online at: [http://www.hrea.org/moudawana.html](http://www.hrea.org/moudawana.html) [last visited: 10.01.2008].

\(^{229}\) Article 89 of the *Moudawana* above n 228.

\(^{230}\) Article 98 of the *Moudawana* above n 228.

\(^{231}\) Article 116 of the *Moudawana* above n 228.

Although Kuwait has not made any reservation to Article 16(1)(c), the Kuwaiti law is categorical in espousing the rules of Shari`ah relating to marital rights and duties. Under Article 104 of Kuwait’s Code of Personal Status (No.51/1984) a husband has a unilateral right of divorce. Article 112 of the Code gives a woman the right of khulʿa divorce, while under Articles 122 and 136-142 a wife can seek judicial separation on the well established grounds enumerated under Shari`ah.233

4.2.5 Shari`ah-based reservations to CRC

The United Nations Convention on the Rights of the Child (1989)234 (CRC) contains the prevailing international human rights law concerning the general rights of children. With 193 States parties, the CRC is the most widely ratified UN human rights regime.235

Like CEDAW, the CRC also aims at regulating the ways in which individual subjects of States parties live and organise interpersonal relationships in the family. While the CEDAW is focused on women, the CRC, as the title itself suggests, is directed at the role of children in family and society. A child, according to Article 1 of the CRC, is “any human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.” All States parties are loftily required to guarantee the various rights set forth under it without discrimination of any kind, irrespective of the child’s or his or her parents’ or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.236

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235 The detailed list of the states that have ratified the CRC as on 13 July 2007 is available online: http://www2.ohchr.org/english/bodies/ratification/11.htm [last visited: 16.06.2008]

236 Article 2 paragraph (1) of CRC.
Whereas the CEDAW creates a unique protection for the rights of women against traditions of family, society and religion, the CRC seems to espouse a similar cause while “taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.”  

If CEDAW may be described as being divisive on account of its rigid call for the alteration of domestic and local specificities, the CRC is sometimes referred to as a more inclusive international human rights regime because the “credibility of the CRC as a universal instrument is predicated on the debating opportunities it offered and its final adoption by consensus.” In fact the barrage of reservations formulated against CEDAW may well have signalled to the drafters of the CRC the importance of “consensus” in such wide-spectrum human rights regimes. Even though the CRC was adopted by a consensus, the rights included in it have not been accepted unconditionally by all the member States.

An examination of the long list of reservations submitted to the CRC reveals that the consensus achieved at the drafting and adoption stages of the treaty is in effect qualified consent on the part of many States. Even though CRC is the only international human rights treaty to have been ratified by all the member States of the United Nations, of the 193 States parties (including the Holy See), up to 73 States parties have made reservations, declarations or interpretive declarations that qualify, in one form or the other, their consent to the application of the Convention. That these reservations and declarations represent strongly entrenched positions of States

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237 The twelfth preambular paragraph of the CRC above n 234.

parties is evident from the fact that, so far, only a handful of States parties has completely withdrawn their reservations to the CRC.239

4.2.5.1 Survey of the pattern of Shari`ah-based reservations made to CRC

Table 1: Overview of Islamic Reservations to CRC (as on 13 July 2007)

<table>
<thead>
<tr>
<th>Islamic States making Specific Reservations</th>
<th>Reserving Article</th>
<th>Islamic States that have made General Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria (constitution, local laws)</td>
<td>13, 14(1)(2), 16, 17</td>
<td>1 Afghanistan (Shari`ah)</td>
</tr>
<tr>
<td>Bangladesh (existing laws &amp; practices)</td>
<td>14(1), 21</td>
<td>2 Djibouti (religion, tradition)</td>
</tr>
<tr>
<td>Bosnia and Herzegovina (local laws)</td>
<td>9(1)</td>
<td>3 Islamic Republic of Iran (Shari`ah)</td>
</tr>
<tr>
<td>Brunei Darussalam (constitution, Islam)</td>
<td>14, 20, 21</td>
<td>4 Kuwait (Shari`ah, local laws)</td>
</tr>
<tr>
<td>Egypt (Shari`ah, local laws)</td>
<td>20,21(withdrawn)</td>
<td>5 Mauritania (Shari`ah)</td>
</tr>
<tr>
<td>Indonesia (constitution)</td>
<td>1, 14, 16, 21, 22,29(withdrawn)</td>
<td>6 Pakistan (Shari`ah) (withdrawn)</td>
</tr>
<tr>
<td>Iraq (Shari`ah)</td>
<td>14(1)</td>
<td>7 Qatar (Shari`ah)</td>
</tr>
<tr>
<td>Jordan (Shari`ah)</td>
<td>14, 20, 21</td>
<td>8 Kingdom of Saudi Arabia (Shari`ah)</td>
</tr>
<tr>
<td>Malaysia (constitution, local laws, national policies)</td>
<td>1, 2, 7, 13, 14, 15 28(1)(a), 37</td>
<td>9 Tunisia (constitution)</td>
</tr>
<tr>
<td>Maldives (constitution, local laws)</td>
<td>14(1), 20, 21</td>
<td></td>
</tr>
<tr>
<td>Morocco (constitution, Islam)</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>Oman (Shari`ah, local laws)</td>
<td>7, 39(4), 14, 21, 30</td>
<td></td>
</tr>
<tr>
<td>Syrian Arab Republic (Shari`ah, local laws)</td>
<td>14, 20, 21</td>
<td></td>
</tr>
<tr>
<td>Turkey (constitution)</td>
<td>17, 29, 30</td>
<td></td>
</tr>
<tr>
<td>United Arab Emirates (Shari`ah, local laws)</td>
<td>7, 14,17,21</td>
<td></td>
</tr>
</tbody>
</table>

239 The States parties that have completely withdrawn their reservations include Egypt, Malta, Myanmar, Norway, Pakistan and Slovenia. For the complete list of declarations and reservations to the Convention see above n 235.
As shown in Table 1 above, 15 Islamic States have made specific reservations to different provisions of CRC, while nine States have formulated general reservations. The majority of the specific reservations made by the 15 Islamic States appear to be directed at two areas of the CRC that have a strong impact on Shari`ah-based rules. The first of these is the provision of CRC relating to freedom of religion of the child contained in Article 14 to which 12 Islamic States (the exceptions being Bosnia and Herzegovina, Egypt and Turkey) have formulated specific reservations. The second area relates to the provisions of the CRC dealing with adoption contained in Articles 20 and 21 to which nine States (the exceptions being, Algeria, Bosnia and Herzegovina, Iraq, Malaysia, Morocco and Turkey) have formulated specific reservations covering one or the other of these two articles. Once again, just as in the case of CEDAW, we see that Shari`ah occupies a central position in the legal systems of all these Islamic States, with the exceptions of Turkey and Indonesia. Therefore, it is not surprising that the rest of the 13 States have referred either to the Shari`ah in categorical terms or indicated their constitution as the basis for their respective reservations. All the nine States that have made general reservations (with the exception of Djibouti and Tunisia) invariably refer to Islamic law as the basis for their reservations.

As far as all the other reservations made by Islamic States are concerned, they represent an eclectic selection of CRC provisions that may not be described as having a direct connection with Islamic law. For instance, the reservations made to Article 17 by Algeria, Indonesia, Turkey and the UAE cannot be considered as having a direct bearing on Islamic law and they certainly may not be considered as being linked to non-derogable provisions of Shari`ah. Article 17 of the CRC essentially requires States to encourage the role of the mass media in the dissemination of material that contributes towards the promotion of a child’s “social, spiritual and moral well-being and physical and mental health”. In stating the reasons for formulating the exception, Algeria points out that its reservation to Article 17 is intended to protect “the interest of the child and the need to safeguard

240 Article 17 of the CRC.
its [child’s] physical and mental integrity". To this effect, it identifies two statutory provisions i.e., provisions of the Algerian Penal Code “relating to breaches of public order, to public decency and to the incitement of minors to immorality and debauchery”, and Article 24 of the Algerian Information Code (Law number 90-07 of 3 April 1990) requiring that the editorial body of any children’s publication “must be assisted by an educational advisory body”. In short, these two references seem only to indicate that the reservation to Article 17 is based on an Algerian concern over the abuse of mass media that may detrimentally affect the child in any sense, such as for instance promotion of child pornography. This point is specifically noted as a probable explanation of the Indonesian reservation to Article 17, when it stated that “to protect children against hazardous information which is incompatible with the national philosophy and ideology, the Law of Publication restricts certain reading materials, videos and cassettes, particularly pornography.” The protection of “national philosophy and ideology” is also a recurring theme in the Indonesian Constitution as seen, for instance, in the constitutional directive for protecting and promoting the “national culture” through the national educational policy. In its Second Periodic Report, Indonesia admits that there is no manifest conflict between Indonesian laws and Article 17, except that the national laws protect the child within an Indonesian “national culture” or “national philosophy”. In other words, Indonesia appears to advance the argument that the right stipulated under Article 17 of CRC is protected in Indonesia within a framework that allows deference to what it has variously described as “national philosophy and ideology” “national culture” and “moral and ethical values”. To this effect, the Report cited Article 60 paragraph (2) of the law Concerning Human Rights (Act Number 39 of 1999) which states that

241 See online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 16.06.2008]

242 “Initial Reports of States Parties due in 1992 – Indonesia, Addendum” (14 January 1993) United Nations Document CRC/C/3/Add.10, para.54 (emphasis added). The discussion on the Indonesian reservation is taken up only to illustrate the issues involved in it since for all practical purposes the Indonesian reservation is irrelevant at present because of their withdrawal in February 2005.

243 Article 31 and Article 32 read with Chapter XIII explanatory note, in the Indonesian Constitution. See online at: <http://inic.utexas.edu/asnic/countries/indonesia/ConstIndonesia.html> [last visited: 10.01.2008].

244 “Second Periodic Reports of States Parties due in 1997 – Indonesia” (7 July 2003) United Nations Document CRC/C/65/Add.23, para.120.
“every child has the right to seek, receive, and impart information as befits his intellectual capacity and age in the interests of his own development, insofar as this is in accordance with moral and ethical values.”\textsuperscript{245} The reservations to Article 17 shows a cautionary approach taken by the States parties over possible concerns that they may be required to allow unrestricted freedom to the mass media to the detriment of the interests of the child. This is seen, for instance, in the explanation provided by Turkey for its reservation to Article 17. The Initial Report of Turkey to the CRC Committee justified its reservation by referring to Law Number 1117 on the Protection of Minors against Dangerous Publications that restricts publication of materials “which are capable of having nefarious effects on the morals of persons under 18 years of age”. The Report also cited Article 4(m) Part 2 of Law Number 3984 on the Establishment and Broadcast of Radio and Television Facilities that bans “broadcasts likely to exert an unfavourable influence on the physical, mental, psychic and moral development of minors.”\textsuperscript{246} A similar line of reasoning has been adopted by the UAE to argue that its reservation is directed at protecting the child’s mental and spiritual development from undesirable influences.\textsuperscript{247}

Consequently, these four reservations to Article 17 are born out of a concern for protecting the child from “harmful” publications and have little to do with Islamic law per se. Curiously these reservations do not appear to make a substantive legal case, particularly since Article 17 paragraph (e) of CRC is precisely directed at addressing these concerns of protecting the child against harmful interests. In fact, paragraph (e) may be interpreted as giving States parties the discretion to formulate their own national policies when it comes to protecting the child from “information and material injurious to his or her well-being”.\textsuperscript{248} Another provision of the CRC that

\textsuperscript{245} Above n 244 (emphasis added).


\textsuperscript{248} According to Article 17 paragraph (e) states parties shall “encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or
is closely connected in subject matter to Article 17 is Article 13 relating to freedom of expression of the child. Yet, of these four States that have made reservations to Article 17, only Algeria has formulated a reservation to Article 13. Malaysia is the only other Islamic State party to have formulated a specific reservation to Article 13 even though it had not made a reservation to Article 17. Interestingly, the first country report of Malaysia is quite categorical in stating that

Article 10(1) of the Federal Constitution provides for the freedom of speech and expression as long as it does not jeopardise the national security, public order and morality. This right shall include freedom to seek, receive and impart information and ideas. The provision is clearly in tandem with Article 13 of the CRC.\textsuperscript{249}

The admission that the Malaysian Constitution conforms to Article 13 makes redundant its reservation to the same provision based on “conformity with the Constitution, national laws and national policies”.

It may be argued that the reservations to Article 17 and 13 of CRC by Islamic States are indirectly aimed at protecting Shari‘ah-associated concerns over the publication and dissemination of information directed at children that may have a religious bearing, especially given the issue of religious sensitivities. Thus, one way of looking at these reservations is to note the cautionary approach taken by these States in asserting that their national constitutions and domestic laws do not permit them to promote dissemination of information contrary to the normative and ethical standards of Shari‘ah. This becomes even more obvious when we analyse the Shari‘ah-based reservations to Article 14 of the CRC.

\footnotesize{her well-being, bearing in mind the provisions of Articles 13 [freedom of expression] and 18 [best interests of the child and parental responsibilities].”}

4.2.5.2 Detailed analysis of Shari`ah-based reservations to CRC

4.2.5.2 (i) Shar`iah-based reservations to Article 14 of CRC

Altogether 24 Islamic States have submitted reservations to CRC and half of these States parties have made reservations to Article 14, while nine States have made general reservations that cover the entire Convention. These reservations are directed at Article 14 mainly because it appears to advance the freedom of religion of the child at the cost of any institutional role of the parents or the family. This perception of Article 14 is widely seen in the content of most of the reservations made by Islamic States.

(a) Focus of rights shift from the parents to the child:

In general, international human rights law does not prescribe an age criterion for the enjoyment of fundamental human rights. Most of the general human rights norms contained in legal regimes such as the ICCPR and ICESCR are applicable to “all human beings”. However, the CRC makes this general norm more child-specific in order to give special recognition and status to the rights of the child under international law. It is in keeping with this approach of giving special recognition to the right to freedom of religion of the child that Article 14 of CRC states:

(1) States parties shall respect the right of the child to freedom of thought, conscience and religion.
(2) States parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
(3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to

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250 The following number of Islamic states made reservations to CRC: 12 reservations to Article 14; 10 reservations to Article 21; 5 reservations to Article 7; 4 reservations to Article 17 and 9 general reservations.

251 For instance, Article 18 of ICCPR, Article 14 of the ICESCR and Article 18 of UDHR. This is also contained in Article 5 of the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (GA Resolution 36/55 on 25th November 1981). See Geraldine Van Bueren, The International Law on the Rights of the Child (Dordrecht: Martinus Nijhoff Publishers, 1995) 151.
protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Here, the CRC makes a radical departure from the conventional “parent-centred” approach of international law. Instead of acknowledging any right of the parents in this matter, Article 14 makes children the repository of the right to freedom of thought, conscience and religion. In comparison, it may be seen that both ICCPR and ICESCR give due deference to the role and rights of parents in the matter of freedom of religion of the child. Article 13 paragraph (3) of the ICESCR states

the States parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Similarly, Article 18 paragraph (4) of ICCPR states

the States parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Again, Article 5 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief adopted by the UN General Assembly in 1981, states

(1) The parents or, as the case may be, the legal guardians of the child have the right to organise the life within the family in

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252 Article 1 of the CRC defines a child as “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”

253 Geraldine Van Bueren, above n 251, 159.

254 Article 13(3) of ICESCR (emphasis added).

255 Article 18(4) of ICCPR (emphasis added).
accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

(2) Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interest of the child being the guiding principle.

(5) Practices of a religion or beliefs in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.  

What is evident from these international human rights regimes made prior to CRC is that there is a clear emphasis on the “rights and responsibilities of parents, without appearing to consider a balance between the parental rights and the rights of the child.” As opposed to the parental “liberty” to educate and bring up the child in accordance with their religious convictions, Article 14 of CRC requires States Parties to ensure that parents educate and bring up the child in accordance with the religious conviction of the child. Dominic McGoldrick suggests that such a formulation of the right under Article 14 of CRC presupposes an effective change in the rights holder, i.e., from the parents to the child.

Under Article 14 paragraph (2) of CRC, the parental right is limited merely to providing “direction” to the child according to his/her “evolving capacities”. Although, paragraph (2) of Article 14 refers to the “rights and duties of the parents”, a closer examination reveals that it contains more of a “duty” or a “responsibility” than a “right”. Moreover, the “rights and duties of the parents” contained therein

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257 Geraldine Van Bueren, above n 251, 151.

become operative on a diminishing scale as the child matures. Article 14 of the CRC employs this sliding scale to determine the extent of the parental control over a child’s religion and the autonomy of the child to make decisions on his/her own. The concept of “evolving capacities” of the child is also contained in Article 5 of the CRC, while Article 12 paragraph (1) uses the phrase “due weight in accordance with the age and maturity of the child”. Even though Article 1 of the CRC sets 18 years as the age of majority for all practical purposes, the details of this sliding scale of maturity are left open to interpretation.

The parental rights and duties to “provide direction” to the child under Article 14 paragraph (2) of the CRC are also closely connected with the right to education of the child. International standards had traditionally emphasized the right of the parents to direct the child’s education according to parental religious convictions and culture. To this effect, Article 26 paragraph (3) of the UDHR states that “parents have a prior right to choose the kind of education that shall be given to their children.” Similarly, Article 18 paragraph (4) of ICCPR, Article 13 paragraph (3) of ICESCR and Article 5 paragraphs (1) and (2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief also reaffirm the “liberty” of the parents to educate their children according to

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259 Geraldine Van Bueren, above n 251, 152.

260 Article 5 of CRC states, “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

261 Article 1 of CRC sets majority at 18 years of age “unless, under the applicable law to the child, majority is attained earlier”. Hence, it is finally up to the states parties to decide according to domestic laws, the particular age when a child has ‘evolved’ so as to be free from parental direction. See Sharon Detrick A Commentary on the United Nations Convention on the Rights of the Child (The Hague: Martinus Nijhoff Publishers, 1999) 57-59.

262 Articles 28 and 29 of CRC deal with the right to education of the child. Paragraph 1(c) of Article 29 requires that States Parties guarantee that the right to education of the child is directed to “the development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own”.

parental religious convictions. During the drafting process of the CRC, the subject of parental rights over the child under Article 14 (draft Article 7) led to a heated debate in the Working Group with some delegates emphasizing the right of parents to ensure educating children according to parental religious convictions. It was questioned whether it should be the responsibility of the State to ensure that the child has the right to freedom of thought, conscience and religion. In many countries, it was noted, a child follows the religion of his parents and does not generally make a choice of his own.

In 1984 the Working Group adopted a draft of the article that attempted to strike a compromise between the freedom of religion of the child and the right of parents to educate children according to parental religious convictions by combining these two positions in the following formula:

the States Parties shall equally respect the liberty of the child and his parents and where applicable, legal guardians, to ensure the religious and moral education of the child in conformity with convictions of their choice.

However, the Working Group was not able to arrive at a consensus on this paragraph and it was dropped in the final draft of the article adopted in 1989. The difficulty of the Working Group in reaching a consensus on this paragraph in many respects heralded the many reservations subsequently made to Article 14 of CRC.

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(b) Freedom of thought, conscience and religion in Article 14 of CRC and Article 18 of ICCPR:

Article 14 of CRC is also closely based on the text and philosophy contained in Article 18 of ICCPR. In fact, the Committee on the Rights of the Child has often relied on the general comments and observations of the Human Rights Committee (HRC) in developing the jurisprudence concerning the right to freedom of religion under Article 14 of the CRC. Referring to Article 18 of ICCPR, the HRC has noted that the right to freedom of thought, conscience and religion is far-reaching and profound; it encompasses freedom of thought on all matters; personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.

As may be seen, the conceptualization of this freedom under Article 18 of the ICCPR is very wide in scope. In comparison, the CRC does not envisage such a broad canvass for the right contained under Article 14.

In fact, there are significant differences between Article 14 of CRC and Article 18 of ICCPR. For instance, the right to freedom of thought, conscience and religion under the CRC is limited to children only, whereas Article 18 of ICCPR applies to “everyone”. Article 18 of ICCPR includes the freedom to “adopt” a religion of one’s choice that is not provided in Article 14 of CRC, even though it may be argued that the right to “adopt” a religion is included under the general right to freedom of thought, conscience and religion. More importantly, Article 18 of ICCPR is non-derogable by virtue of Article 4 paragraph (2) of ICCPR. As emphasized in the General Comment 22, “the fundamental character of these

268 However, there are some differences between Article 14 of CRC and Article 18 of ICCPR. According to Sharon Detrick, Article 14 of CRC is not as wide in scope as Article 18 of ICCPR. For instance, in addition to what is included in Article 14(1) of CRC, Article 18 also provides for the “freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”. Sharon Detrick, above n 261, 246.

freedoms [Article 18 of ICCPR] is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency”. The CRC does not contain any non-derogable provision; one explanation for this difference, perhaps, is that because the CRC rights relate to children, there is a need to have them moderated through the intervention of the State and parents.

In spite of these differences, the Committee on the Rights of the Child has used the jurisprudence developed by the HRC (relating to Article 18 of ICCPR) in evolving the law on Article 14. This is reflected, for example, in the consistent practice of the Committee in referring States parties making reservations to Article 14 to the requirements of General Comment 22 of the HRC. It must be noted that any reading of Article 14 of CRC in the same light as Article 18 of ICCPR (as found in General Comment 22), has the potential of expanding the scope of the right in Article 14 of CRC. Indeed, many States, including the two Muslim States parties to the Working Group, had opposed attempts to superimpose the broader ICCPR right on CRC. The opposition from the Islamic States was mainly directed against the inclusion of a child’s freedom to change religion. Hence, it became evident even at the drafting stage that Article 14 represented a conflict-zone of strongly entrenched and opposing views. Commenting on the inclusion of Article 14 in the CRC, Van Bueren notes that

270 Above n 268.

271 Hereinafter referred to as the “Committee”.


273 For instance, Bangladesh and Morocco, two Muslim states parties that were members of the Working Group on the Question of a Convention on the Rights of the Child opposed to an unqualified borrowing from Article 18 of ICCPR. Of course, their particular opposition to incorporating a right of the child to change religion did not find its way in the final draft of Article 14 of CRC. See Geraldine Van Bueren, The International Law on the Rights of the Child (Dordrecht: Martinus Nijhoff Publishers, 1995) 157.
the right of a child to freedom of religion was so contentious an issue that disagreement over the extent of the right, as applicable to children, risked obstructing the drafting and adoption of the entire Convention on the Rights of the Child.\textsuperscript{274}

The present form of Article 14 creates a semblance of balance between the interests of the parents and those of the child, even though it vests the actual right with the child, and parents are reduced to mere care-takers of the right. In this regard, Sylvie Langlaude makes an apt observation when she notes that “a new model of the family is emerging, according to which parents’ rights, prerogatives and interests must generally give way to the child’s if there is a conflict.”\textsuperscript{275}

The CRC fails to clearly establish the point in time when a child “evolves” and is actually “mature” to claim the rights under Article 14, independent of parental direction. This is ultimately left to the “best interest” principle that runs through most of the provisions of the Convention. Moreover, it shows deference to domestic specificities, in particular because domestic law relating to the age of maturity for a child is well established in most countries. While the CRC advocates the “best interest of the child” under Article 3, the “evolving capacities of the child” under Article 5 and the “rights and duties of parents” to provide “direction to the child” in the exercise of freedom of thought, conscience and religion under Article 14, the overall structure of the Convention does not indicate a hierarchy for any of these provisions. As a result, it is not clear whether Article 13 will in effect trump Article 18 paragraph (4) of ICCPR in cases where parents ensure that the religious and moral education of their children are in conformity with parental convictions.

\textsuperscript{274} Geraldine Van Bueren, above n 273, 155.

(c) Permissible Limitations to Article 14 of CRC:

Unlike the ICCPR the CRC does not contain any specific non-derogable set of rights. Whereas Article 4 of the ICCPR clearly states that the right to freedom of thought, conscience and religion (Article 18) is non-derogable, there is a noticeable absence of any corresponding provision in the CRC.

However, Article 14 paragraph (3) of the CRC sets out four categories of limitations on the right of the child to freedom of thought, conscience and religion that are similar to the limitations contained in Article 18 paragraph (3) of ICCPR. According to Article 14 paragraph (3) of CRC, any restriction on the child’s right to freedom of thought, conscience and religion must be “prescribed by law” and “necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”

Of course, these limitations work in tandem with the stipulations set out under Articles 6 paragraph (2) and 24 paragraph (3) of the CRC requiring States parties to ensure “to the maximum extent possible the survival and development of the child” and to abolish “traditional practices prejudicial to the health of children”, respectively.

From the above discussion it may be argued that there are serious issues, and as yet unresolved, concerning the scope of Article 14. The comparative examination of Article 14 of CRC and Article 18 of ICCPR reveals some of these issues while, more importantly, there are substantive issues that challenge the conventional understanding of the right to freedom of religion within the family context. The various reservations made to Article 14 of the CRC illustrate these issues. The pervasive nature of some of these reservations (including those which literally amount to the exclusion of Article 14 entirely) pose difficult problems about the

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276 Article 14(3) CRC (emphasis added).
extent to which the right to freedom of thought, conscience and religion of the child may in reality be enforceable according to the stipulations of Article 14.

4.2.5.3 (ii) Article 14 of CRC and Shi‘ah

There is an evidently troubled relationship between Article 14 of the CRC and Shi‘ah. In fact, the most stringent criticism of Article 14 has so far come from the Islamic States, 12 of which have made Shi‘ah-based reservations to it. This troubled relationship started at the drafting stage as is seen from the following comment made by the Bangladeshi delegate who pointed out that Article 14 clearly

appears to run counter to the traditions of the major religious systems of the world and in particular to Islam. It appears to infringe upon the sanctioned practice of a child being reared in the religion of his parents. We believe that the Article as presently drafted will give rise to considerable difficulties in application.\footnote{\textsuperscript{277} “Paper submitted by the Permanent Representative of Bangladesh E/CN.4/1986/39, Annex IV p2” in Sharon Detrick (compiled and edited) \textit{The United Nations Convention on the Rights of the Child – A Guide to the “Travaux Preparatoires”} (Dordrecht: Martinus Nijhoff Publishers, 1992) 244 (emphasis added).}

Twelve Islamic States have formulated specific reservations to Article 14 of the CRC. In many respects these reservations reflect the sentiments noted by Bangladesh in the Working Group.\footnote{\textsuperscript{278} See above n 277.} In this context, it is important to examine the position of Islamic law on the particular principle enumerated in Article 14.

(a) Shi‘ah viewpoint on the child’s right to freedom of religion:

From the point of view of Islamic law, two critical issues are involved as regards Article 14. The first issue concerns the freedom of the child to adopt a different religion through the exercise of his or her right to freedom of thought, conscience and religion, while the second issue relates to the right of the parents to educate the child in accordance with Islamic law. The freedom of the child to adopt a different religion from that of his or her parents may be compared to the far wider
concept of the freedom of religion, conversion and apostasy since these issues involve the Shari’a law proscribing conversion from Islam.

There is a strong connection between the status, education and the religious faith of the child under Shar’iah. These three elements are woven together into the moral and normative social structure of the Islamic State. The rights and duties of the child and parents and family and society evolve from this moral and normative social structure that is perceived under Shar’iah. It is cohesive in its religious bent in ideology and is, at the same time, distinct from a secular system. From the viewpoint of most Islamic States, education of the child is inevitably framed within a tangible “matrix of parents, religious community and society”. It is a matrix that defines not merely a theoretical context, but a factual Muslim “lebenswelt” or lifeworld. In this context, it is crucial to understand the fundamental features of Shari’a related to the legal status of a “child”, the role of parents in educating and bringing up the child according to culture-specific moral standards, and the meaning attached to the concept of religious freedom in Shari’a.

(b) The status of the child in Islamic law:

Every child, according to the hadīth (Tradition) of the Prophet, is born in the natural state of Islam and it is the upbringing given to the child by the parents that makes the child a person of another faith. A minor child has a limited legal

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279 Sylvie Langlaude, above n 275 91.

280 Hadīth narrated by Abu Huraira, “Allah's Apostle said, ‘No child is born but has the Islamic Faith, but its parents turn it into a Jew or a Christian. It is as you help the animals give birth. Do you find among their offspring a mutilated one before you mutilate them yourself?’ The people said, ’O Allah's Apostle! What do you think about those (of them) who die young?’ The Prophet said ‘Allah knows what they would have done (were they to live).’ Muhammad ibn Ismail Bukhari (Muhammad Muhsin Khan, trans.), Sahīḥ Bukhari (Alexandria, VA.,: Al Saadawi Publications, 1996) Hadīth Number 597, Book 77, Volume 8. The same hadīth is also cited in Sahīḥ Muslim as follows: “There is none born but is created to his true nature (Islam). It is his parents who make him a Jew or a Christian or a Magian quite as beasts produce their young with their limbs perfect. Do you see anything deficient in them? Then he quoted the Qur’an. The nature made by Allah in which He has created men there is no altering of Allah's creation; that is the right religion (xxx. 33)”. Muslim ibn al-Hajjaj (Nasiruddin al-Khattab, trans.), Sahīḥ Muslim (Riyadh: Darussalam, 2007), Hadīth Number 6423, Book 033. It is for this reason that when a person of another faith converts to Islam, he or she is said to have “reverted” (and not “converted”) to the original faith, Islam.
personality in Shar`iah. Islamic law places no legal obligation on the child until such time as he or she becomes a bāligh (adult or mature).\textsuperscript{281} Contrary to the requirements of Article 14 of the CRC, a minor child\textsuperscript{282} has no legal personality in Shar`iah and, consequently, he or she has no legal right to freedom of religion.\textsuperscript{283} However, the child has a right to claim parental care and guidance with a corresponding duty/responsibility on the parents or guardians to bring up the child according to Islamic traditions, while taking into account the best interests of the child. This parental responsibility (wilāyat) over the child applies not only to his/her education according to Islamic traditions, but also to his/her material needs and requirements.\textsuperscript{284} This status of the child as a minor automatically dissolves upon the child becoming a bāligh. Juristic opinion differs on the exact age of taklīf (legal responsibility under Shar`iah), depending on the school of jurisprudence or mazhab.

As noted by Thomas Patrick Hughes:

\begin{quote}
the puberty [bulūghiyat] of a boy is established as soon as the usual signs of manhood are known to exist; but if none of these signs exist, his puberty is not clearly established until he has completed his eighteenth year. The puberty [bulūghiyat] of a girl is established in the same way; but if the usual signs of womanhood are known not to exist, her puberty is not established until her seventeenth year has been completed. This is according to the teaching of the Imam Abu Hanīfah. But his two disciples maintain that upon either a boy or girl completing the fifteenth year, they are to be declared adult. The Imam ash-Shāfi`ī concurs in this opinion, and it is said there is also a
\end{quote}

\textsuperscript{281} A hadith of the Prophet narrated by Ali Bin Abi Tālib (Prophet Muhammad’s cousin) notes that “The Pen that records the deeds has been lifted from three people: the insane person, until he recovers; the sleeping person, until he wakes up; and the minor, until he dreams (i.e., has wet dreams.)” Ahmed Tajuddin B. Shu`aib, Essentials of Ramadan, The Fasting Month (Los Angeles: Da`awah Enterprises International, Inc, 1991) 39.


\textsuperscript{283} As noted by Abdullah Saeed, “[t]here is unanimous agreement among the jurists that the apostasy of a minor who does not comprehend the meaning of apostasy is not valid.” Abdullah Saeed and Hassan Saeed, Freedom of Religion, Apostasy and Islam (Aldershot: Ashgate Publishing Limited, 2004) 52.

\textsuperscript{284} For instance, the parents or guardians of the minor child have a religious obligation to take care of his or her property in the best interest of the child (wilāyat alal maal) and any misappropriation of such property is censured. See, Jamal J. Nasir, The Status of Women Under Islamic Law and Under Modern Islamic Legislation (London: Graham & Trotman Ltd., 1994).
report of Abu Ḥanīfah to the same effect. The earliest period of puberty with respect to a boy is twelve years, and with respect to a girl nine years. 285

The principle resorted to by all the jurisprudential schools is that a minor becomes a bāligh on attaining enough maturity of the mind and body to understand the consequences of his/her actions. The formulation of the “evolving capacities” of the child under the CRC appears to be in very close consonance with the concept of bulūghiyat in Shar`iah.

(c) Parental obligation to educate the child according to Islam:

According to Shari`ah, a child has the duty to obey his/her parents (a normative virtue that is repeatedly extolled in the Qur’an), as long as the parents direct his/her education within the Islamic tradition. The Qur’anic injunction to this effect states that

if they [parents] strive to make thee join in worship with Me things of which thou hast no knowledge, obey them not; yet bear them company in this life with justice (and consideration) and follow the way of those who turn to Me (in love). 286

Parents therefore have the legal responsibility or duty to educate the child according to Islamic traditions under Shar`iah. 287 The bringing up of children in an Islamic environment and teaching children the basic rules and tenets of Islam (according to the Qur’anic directives) is a characteristic feature of all Islamic

285 Thomas Patrick Hughes, A Dictionary of Islam: being a cyclopaedia of the doctrines, rites, ceremonies, and customs, together with the technical and theological terms, of the Muhammadan religion (London: W.H.Allen, 1935) 476 (parenthesis added).


287 Amjad Hussain sees this Shar`iah approach to the education of the child as part of a much wider “Islamic way of life” when he noted that “a theological understanding of why there is a need for Islamic education transfers the perspective of the modern-day debate to the root understanding of Islam as ‘a way of life’.” Amjad Hussain, “Islamic Education: why is there a need for it?” (December 2004) 25 (3) Journal of Beliefs and Values 319.
In this context, parents and the wider Muslim community play an integral role in the formulation of a child’s worldview. In fact, this role is observed not merely as a normative religious obligation but also as part of the natural transmission of cultural continuity. This was described by Bangladesh’s delegation to the Working Group as “the sanctioned practice of a child being reared in the religion of his parents”. Marie-Parker Jenkins emphasizes this “transmission of cultural continuity” feature when she observes that for the large majority of Muslims education begins in the home, before formal education in school and parents see their role in this matter as one of duty and privilege to ensure their children develop an Islamic consciousness. The demands of imams, and parents to schools are seen as a crucial attempt to ensure that their religious identity is not undermined and that Islamic values are fostered among the young.

The question of a child’s right to choose the kind of religious education that he/she wants is not only not raised but legally not recognized in Shar`iah. Until the minor child attains the age of taklif, it is the parents/guardians who protect the best interests of the child, according to Islamic law. This practice emphasizes the duty of the parents to instruct the child according to parental religious convictions and not the freedom of the child to choose a religion. Such an approach to the education of the child goes contrary to the requirements of Article 14 of the CRC.

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(d) Freedom of religion of the child:

The third important aspect of Shar`iah that comes into conflict with Article 14 of CRC is the freedom of religion of the child. Article 14 of the CRC gives the child freedom to change his/her religion. It is in this context that the conflict between Article 14 of CRC and Shar`iah spills over to the much wider concept of the freedom of religion in general. As Abdullah Saeed has pointed out, the apostasy of a minor is generally not accepted owing to his/her lack of legal personality in Shar`iah. It is only the reconfirmation of the change of religion upon reaching the age of maturity that invites legal consequences.\(^{292}\) The *opinio juris* of the Muslim *fuqaha* is divided on the subject of freedom of religion under Shar`iah. The traditional *fuqaha* are of the opinion that the Shar`iah does not recognize the freedom of a Muslim to convert to another religion, even though there is no coercion in religion.\(^ {293}\) The advocates of this view argue that Shar`iah prescribes capital punishment to apostates.\(^ {294}\) In contrast, “modern” Islamic scholars challenge the rigid formulation of apostasy law under Shar`iah. It is argued that there is no textual authority for capital punishment for apostasy in Islam, since the Qur`an does not prescribe the death penalty for apostates.\(^ {295}\)

It is clear from the literature that there is a significant difference of opinion among Muslim scholars as regards the exact Shar`iah principle relating to the punishment for apostasy. At the same time, it is equally clear that all schools of thought converge on the point that there is no *absolute* freedom of religion in

\(^{292}\) Abdullah Saeed and Hassan Saeed, above n 283.

\(^{293}\) Verse: 2: 256 *The Holy Qur`an* above n 286,106.

\(^{294}\) See Abdullah Saeed and Hassan Saeed, above n 283.

\(^{295}\) See Abdullah Saeed and Hassan Saeed, above n 283. The principal authority on capital punishment for apostasy is derived from the Hadith of the Prophet. Saeed argues that this hadith must be read in the light of the particular historical context and that in the modern context, the principle advocated is not applicable. Furthermore, he is also of the view that since capital punishment for apostasy is not part of the *hadd* punishments, it falls under the jurisdiction of *ta`zir* (discretionary) punishment. Therefore, the judges have the discretion to decide what sort of punishment should be prescribed for apostasy. He also makes a distinction between simple apostasy and apostasy amounting to “high treason”, a distinction that he believes is germane to the creation of discretionary authority in the judge to decide what punishment must be prescribed for apostasy. *Ibid.*, 19
The recognition of a right to change religion under a religiously determined legal system would in many ways be self-contradictory. Ontologically, the Islamic religious system (like all other Abrahamic religious traditions) justifies its existence on the argument that it is the only valid truth and, in the process, rejects all other religions as faulty or defective. Hence, giving the right to someone to choose what is faulty negates this argument.

Thus, freedom of religion of the child in Shar`iah is firstly limited by the absence of legal personality in the minor child. Secondly, the legal duty of Muslim parents to educate the child within the Islamic religion (sanctioned by the Shar`iah) restricts the freedom of the child. Thirdly and perhaps more conclusively, the concept of freedom of religion in general is qualified by the limitations on apostasy under Shar`iah.

This perspective is also reflected in the provisions relating to freedom of religion in the two main Islamic human rights declarations. Articles 12 and 13 of the UIDHR guarantee the rights to express “thoughts and beliefs” and “freedom of conscience and worship” respectively. In the UIDHR these two rights are qualified by the “limits prescribed by the Law”, i.e., the limits of Shar`iah discussed above. The Cairo Declaration does not contain any specific right to freedom of religion. Instead, it addresses the subject by proscribing coercion or enticement to change religion. Furthermore, Articles 7(b) and 9(a) of the Cairo Declaration also

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296 Abdullah Saeed sums up the prevailing position in most Islamic States when he noted that, “while there is general consensus that coercion should not be used to convert someone to any religion, including Islam, the right of religious freedom is not extended to a Muslim who wants to change his or her religion to another.” Abdullah Saeed and Hassan Saeed, Freedom of Religion, Apostasy and Islam (Aldershot: Ashgate Publishing Limited, 2004) 19. From a practical standpoint, some Islamic states appear to adopt alternative measures such as re-educating and re-inviting the convert back to Islam.

297 The two relevant provisions of the UIDHR are Article 12(a) “Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law” and Article 13 states “Every person has the right to freedom of conscience and worship in accordance with his religious beliefs.”

298 Article 10 of the Cairo Declaration on Human Rights in Islam (1990) states, “Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.”
emphasize the parental role in imparting Islamic education to the children “in accordance with ethical values and the principles of the Shar’iah”.

The above discussion of the Shari’ah position on the various questions arising from the right to freedom of religion under Article 14 highlights two principal points. Firstly, there is an evident conflict between the Shari’ah and the CRC provision in relation to the rights of the parents against those of the child in respect of the freedom of religion. This conflict becomes evident only when we read the right of the child as preceding those of the parents. However, it may be submitted that the “liberty of parents” guaranteed under the non-derogable provision of Article 18 of ICCPR takes precedence over Article 14 of CRC in this particular case concerning the right to freedom of religion. By virtue of making Article 18 of ICCPR non-derogable, the international human rights regime has created an order of precedence and, in this case, it must be given due consideration before concluding that parents have only a “duty” or a “responsibility” rather than a “liberty” in the matter of educating the child in accordance with their religious convictions.

Such a reading of the law, it may be submitted, does not necessarily conflict with the normative direction in the rules of Shari’ah on the subject. The second point to be noted from the above discussion is that the general right to freedom of religion and conversion is a contentious subject in the Islamic world. As far as the existing law is concerned, there is a conflict between the laws of most of the Islamic States and this freedom in CRC.

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299 Article 7(b) of the Cairo Declaration states, “Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shar’iah.” Article 9(a) states that, “The seeking of knowledge is an obligation and provision of education is the duty of the society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee its diversity in the interests of the society so as to enable man to be acquainted with the religion of Islam and uncover the secrets of the Universe for the benefit of mankind.”
These conflicts are reflected in the Shari`ah-based reservations made to Article 14 by Algeria, Bangladesh, Brunei Darussalam, Indonesia, Iraq, Jordan, Malaysia, the Maldives, Morocco, Oman, Syria and the UAE. The eight general reservations made by Afghanistan, Djibouti, Iran, Kuwait, Mauritania, Qatar, Saudi Arabia and Tunisia, with their unambiguous Shari`ah inflections, must also be considered in this context.

4.2.5.3 (iii) Islamic States that have made specific reservations to Article 14

Twelve Islamic States have lodged specific reservations to Article 14 concerning religious freedom of the child. These reservations typically refer to provisions of either the constitutional or a national law that demonstrate a strongly entrenched Shari`ah rule on the matter.

To this extent, Algeria notes in its declaration (treated as a reservation for the purposes of the present study) that it accepts the provisions of Article 14 paragraphs (1) and (2) with the proviso that they will be applied in “compliance with the basic foundations of the Algerian legal system”. The “basic foundations”, in this context, refer to Articles 2 and 36 of the Algerian Constitution 1996 and Law Number 84-11 of 9 June 1984 containing the Algerian Family Code (AFC).

Article 2 of the Algerian Constitution declares Islam as the state religion, while under Article 36 it declares that “freedom of creed and opinion is inviolable”.

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300 Some of which are made as declarations, nevertheless, on account of their scope for altering the content of the treaty provisions in its application, these declarations have been treated as reservations for the present study.

301 Algeria’s reservation to CRC, available online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 10.01.2008].

302 The actual text of the reservation refers to Article 35 however, the 1996 revised Constitution contains the same provision in Article 36. See the text of Algeria’s reservation to CRC, available online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 10.01.2008]. See also, Article 36 of the Constitution of Algeria (as amended on 28 November 1996). See online at: <http://www.servat.unibe.ch/law/icl/ag00000_.html> [last visited: 10.01.2008].
Importantly, Article 178 paragraph (3) makes Article 2 of the Constitution an unamendable provision. Together, these provisions assert the centrality of Islamic law in the Algerian legal system. The reference in the Algerian reservation to Article 36 of its Constitution implies that “freedom of thought, conscience and religion”, as guaranteed under Article 14 (1) of the CRC, is problematic if the right to change religion is read into it. This is apparent from the fact that Article 36 of the Constitution, though it guarantees freedom of conviction and opinion, does not contain any right to change religion. In fact, a combined reading of Articles 2 and 36 of the Algerian Constitution provides an interpretation of the “freedom of religion” that is strikingly similar to the corresponding right contained in the UIDHR and the Cairo Declaration.

As far as the education of the child is concerned, the Algerian reservation is categorical in stating that the “child’s education is to take place in accordance with the religion of its father” as provided under the AFC. 303 This rule (Article 62 of AFC) is derived from the Shar‘iah rule on marriage proscribing the marriage of a Muslim woman to a non-Muslim man. 304 One of the consequences of this rule is that the father of the child always remains a Muslim, at least for official purposes. The inclusion of this rule in Article 62 of AFC underlines the emphasis in the Algerian law on the religious education of the child in accordance with the rules of Islamic law. The Second Periodic Report of Algeria drives home the point when it explains that the rule in Article 62 applies specifically in relation to the Muslim population and not to people of other faiths. 305

303 Article 62 of the AFC states, “Le droit de garde (hadana) consiste en l'entretien, la scolarisation et l'éducation de l’enfant dans la religion de son père ainsi qu'en la sauvegarde de sa santé physique et morale. Le titulaire de ce droit doit être apte à en assurer la charge.” See online at: <http://appelalgerie.africa-web.org/article.php3?id_article=78> [last visited: 18.06.2006].

304 Article 32 of the AFC states, “Le mariage est déclaré nul si l'un de ses éléments constitutifs est vicié ou s’il comporte un empêchement, une clause contraire à l'objet du contrat ou si l’aïpostasie du conjoint est établie.” See above n 302.

These provisions of the Algerian legal system - in effect based on Shar`iah - conflict with Article 14 of the CRC. The CRC Committee has taken a combative response to these claims made by Algeria and has time and again brought it to the notice of the Algerian delegation, presenting the periodic reports, that it must change these conflicting provisions in the domestic law and harmonise them with the provisions of the CRC.  

However, Algeria has not withdrawn its reservation to Article 14 in spite of the repeated recommendations of the CRC Committee, nor has it complied with the Committee’s requirement for changing its domestic laws based on Shari`ah. To the contrary, Algeria has resisted these demands to change what it regards as the “basic foundations of the Algerian legal system”. Interestingly, Article 132 of the Algerian Constitution gives international treaties ratified by the President a “superior” status over ordinary domestic law. But this constitutional provision can be effective only to the extent a treaty is accepted by Algeria, i.e., after taking into account any reservations or other qualificatory declaration that it makes to treaties. Hence, as long as Algeria considers the Shari`ah-based laws referred to in its reservation as part of the “basic foundations” of its legal system, Article 132 of its Constitution provides an implied reason to persistently maintain its reservation to Article 14 of CRC.

Bangladesh was one of the first Islamic States to voice opposition to the provisions of Article 14 of CRC. Its reservation to Article 14 paragraph (1) appears to be premised on a perceived conflict between the right to freedom of religion and


307 Above n 301.

308 Article 132 of the Algerian Constitution states, “Treaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law.” See, <http://www.oefre.unibe.ch/law/icl/ag00000_html> [last visited: 18.06.06]
Islamic law, particularly when we assess the reservation in the light of the sentiments expressed by the Bangladeshi delegation at the Working Group during the drafting process.\textsuperscript{309}

However, there is nothing in the text of the reservation nor in the country reports of Bangladesh that categorically links its reservation to Shari`ah.\textsuperscript{310} In fact, the Initial Report of Bangladesh describes its reservation merely as an “observation”.\textsuperscript{311} Moreover, the Report explains that “Bangladesh recognizes the right of the child to freedom of thought, conscience and religious practice” and appears to claim that its reservation is based on society’s belief that a child is “immature by definition” and hence is “not in a position to consider such complex issues” as the right to freedom of religion on his/her own.\textsuperscript{312} The Second Periodic Report of Bangladesh also fails to further explain the basis of its reservation to Article 14 paragraph (1) and does not shed any light on how this affects the domestic legal system. The Second Periodic Report of Bangladesh, nonetheless, explains its reservation in the context of various domestic laws that stipulate a mix of pluralist and Shari`ah-based rules ranging from the freedom of parents to let children get religious education according to their respective religious convictions, the tolerance of religious differences, penalization of religious intolerance manifested through hate crimes, and the constitutional recognition of the “right to profess, practice or propagate any religion”.\textsuperscript{313} In response to a question raised by the CRC Committee


\textsuperscript{310} See Bangladesh’s reservation online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 10.01.2008].


\textsuperscript{312} Above n 311.

\textsuperscript{313} See “Second Periodic Reports of States Parties due in 1997 – Bangladesh” (14 March 2003) United Nations Document CRC/C/65/Add.22, paras.89-92. Article 2A of the Constitution of Bangladesh declares Islam as the state religion, while “other religions may be practiced in peace and harmony”. Article 39 guarantees freedom of thought and conscience and speech” while Article 41 protects the “right to profess, practice or propagate any religion”. See online at: <http://www.pmo.gov.bd/constitution/index.htm> [last visited: 10.01.2008].
regarding Bangladesh’s reservation to Article 14 paragraph (1) during the consideration of its Second Periodic Report, the delegate from Bangladesh explained that “with regard to the freedom of religion, since children were expected to follow the religion of their parents, it had been necessary for the State to make reservations on the issue.”

Perhaps, the clearest admission of a Shari`ah-based explanation of Bangladesh’s reservation to Article 14 paragraph (1) is made in its Initial Report which (cautiously) states that if a child is given the right to freedom of religion, he or she is “likely to act in such cases under the influence, or even pressure, of others, neither of which is conducive to its normal, natural and healthy growth.” In addition, the Initial Report also states that “children are expected to follow the religion of their parents”.

These explanations appear to indirectly assert that Bangladesh’s reservation is formulated and maintained in the interest of protecting Shar`iah-based normative standards of the vast majority of the Bangladeshi population. Still, there is no categorical assertion of this position in Bangladesh’s reservation or in its country reports. In many ways, the apparent silence in the two periodic reports of Bangladesh to directly link its reservation to Article 14 paragraph (1) with Shari`ah reflects a controversial aspect of domestic law - maintaining a balance between its avowed commitment to a pluralist state and appeasing the majority Muslim population by implementing Shari`ah-based normative standards. This is apparent, for example, in the assertion in the Constitution of Bangladesh to the effect that Islam is the state religion while also recognising the right of minorities to practise their religions “in peace and harmony”.

Article 41 paragraph (1)(a) further guarantees every citizen the right to “profess, practice or propagate any religion”. However, these guarantees are regulated through several domestic laws. A case in point is Section 295 (A) of the

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316 Article 2A of the Constitution of Bangladesh.
Bangladeshi Penal Code that regulates these freedoms by prohibiting any act (including exercise of the freedom of religion) that may be seen to be a deliberate and malicious act to outrage the “religious feelings of any class by insulting its religion or religious feelings”. This illustration of the constitutional guarantees and the criminal code provision regarding religious freedom offers a glimpse of the precarious balance that the law maintains between affirming Islamic rules and assuaging the concerns of the non-Muslim population in the area of freedom of religion.

With almost 88 per cent of the population of Bangladesh being Muslims, successive governments in power have often deferred to the political power of this majority constituency. Issues concerning blasphemy, proselytising and apostasy are staunchly vocalised by the representatives of the majority Muslim population to such an extent that at times the government has been elbowed into acceding to their demands. This was clearly demonstrated in the government’s reaction to the public outcry of opposition and condemnation following the publication of the book Lajja by Taslima Nasrin in 1994. The government was compelled to file a criminal case against the author for inciting religious hatred and for banning her book. In such cases, the constitutional guarantees on freedom of religion (such as Article 41 paragraph (1)(a)) have limited scope, especially since the permissible limitations provision of Article 41 paragraph (1)(a) (“law, public order and morality”) protect the claw-back clauses of laws such as Section 295 (A) of the Penal Code. Thus, it may be argued that in spite of the Constitution guarantees of freedom of religion, it is in effect only a qualified right. Even though Bangladesh appears to be unable to accept all the provisions of Article 14 of CRC on account of clear and present domestic political and religious concerns, the delegation presenting Bangladesh’s

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317 Section 295(A) of Bangladesh Penal Code.

318 For example, the case of Taslima Nasreen and also the banning of Ahmadiyya Sect

Second Report informed the Committee that a motion to withdraw the reservations to the CRC is under consideration with the Bangladesh government.  

In comparison, the reservation to Article 14 of the CRC formulated by Brunei Darussalam is more lucid in asserting the apparent conflict between the freedom of religion of the child and Islamic law. Brunei made a general reservation to Article 14 of the CRC, indicating that it believed the provisions of the article “may be” contrary to its Constitution and the “beliefs and principles of Islam”.  

The Constitution of Brunei does not contain a fundamental rights chapter and does not have a specific provision on the right to freedom of religion. Instead, Article 3 paragraph (1) of the Constitution states that the religion of Brunei Darussalam shall be the Muslim Religion according to the Shafeite sect of that religion; Provided that all other religions may be practiced in peace and harmony by the person professing them in any part of Brunei.  

While the Constitution impliedly guarantees freedom of religion, it does not include the right to proselytize. Moreover, there are two fundamental limitations on the freedom, i.e., the Shafi`i jurisprudence of Shar`iah and the national philosophy of Melayu Islam Beraja (Malay Islamic Monarchy). According to the Shafi`i school of Fiqh, Brunei is required to comply with the provisions of the said Convention, and the reservations made by Brunei are subject to this requirement. 

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321 The text of Brunei’s reservation states, “The Government of Brunei Darussalam expresses its reservations on the provisions of the said Convention which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State, religion, and without prejudice to the generality of the said reservations, in particular expresses its reservation on articles 14, 20 and 21 of the Convention.” See online at: http://www2.ohchr.org/english/bodies/ratification/11.htm [last visited: 10/01/2008].  
of Islamic law, the conversion of a child from Islam to another religion is legally invalid because of the incapacity of the minor.\textsuperscript{324} The Initial Report of Brunei explains that

Section 166 of the Religious Council and Kadi’s Court provides that no person under the age of 14 years, 7 months, shall be registered as a convert to the Islamic religion. Section 167 further provides if a person is under the age of 14 years, 7 months, applies to convert to Islam, the kadi shall cause him to be returned to his lawful guardian and he shall be deemed not to have converted to the Islamic religion. However, this shall not affect the right of a child to convert if he/she is above the age.\textsuperscript{325}

Furthermore, under the Islamic Monarchy model of government established in Brunei, Shar’iah applies only to Muslim citizens. Consequently, the freedom of religion of believers of other faiths is protected by the State, subject to the exception of proselytizing.\textsuperscript{326} The reservation of Brunei to Article 14 of the CRC reflects these two pivotal positions of its domestic legal system. Therefore, it may plausibly be argued that Brunei’s reluctance to withdraw its reservation is partly based on the fact that such a withdrawal would contravene these basic features of its legal system and would become fundamentally extra-legal.

Unlike Brunei Darussalam, the reservation to Article 14 made by its neighbour, Indonesia, does not make any reference to Islamic law. Its reservation to Article 14 and six other provisions of the CRC refers only to the Constitution, noting that

the ratification of the Convention on the Rights of the Child by the Republic of Indonesia does not imply the acceptance of obligations going beyond the Constitutional limits nor the acceptance of any


\textsuperscript{326} \textit{International Religious Freedom Report - Brunei} above n 323. Also see the Government of Brunei Darussalam Official Website on Melayu Islam Beraja available online at: <http://www.brunei.govt.bn/government/mib.htm> [last visited: 28.06.06].
obligation to introduce any right beyond those prescribed under the Constitution.\textsuperscript{327}

The analysis of the Indonesian reservation in the context of freedom of religion would not be comprehensive without consideration of the guiding doctrine of the Constitution of Indonesia - \textit{Pancasila}. This doctrine does not endorse any particular religion - not even Islam, the religion of the overwhelming majority of its population.\textsuperscript{328} Under the \textit{Pancasila} doctrine, the State recognizes only monotheistic religions, thereby in principle not recognising polytheistic religions (for example Hinduism) and atheistic beliefs. The reference to “constitutional limits” in the Indonesia reservation may be broadly understood to imply this national ideology of \textit{Pancasila}. In many ways, it is an ideology that demonstrates an inevitable willingness to assimilate into the Indonesian legal system the laws of the four main religions, i.e., Islam, Christianity, Buddhism and Balinese Hinduism.\textsuperscript{329} The Initial Report of Indonesia to the CRC Committee reveals this view with the explanation that

because of the cultural, religious and environmental backgrounds, the implementation [of the CRC] will be in accordance with the national laws, both written and unwritten, and based on the community values and socio-psychological factors prevailing.\textsuperscript{330}

Furthermore, the Report adds that the reservation “indicates that the Government of Indonesia \textit{[gives] high assurance on freedom to manifest religion as prescribed by

\textsuperscript{327} For the text of the Indonesian reservation to CRC see online at: \texttt{http://www2.ohchr.org/english/bodies/ratification/11.htm#N20} [last visited: 10.01.2008].

\textsuperscript{328} Article 29(1) of the Indonesia Constitution (1945) merely states that “the State is based upon the belief in the One, Supreme God” while Article 29(2) guarantees freedom of religion. For \textit{Pancasila} doctrine see François Raillon, “The New Order and Islam, or the Imbroglio of Faith and Politics” (1993) 57 \textit{Archipel Indonesia} 197. The Initial Report of Indonesia also notes that “although more than 90 per cent of Indonesia citizens are Muslim, Indonesia does not accept a minority or majority concept. Every citizen has the right and freedom to practise any religion according to their faith.” “Initial Reports of States Parties due in 1992 - Indonesia, Addendum” (14 January 1993) \textit{United Nations Document CRC/C/3/Add.10}, para.56.


law, namely Muslim, Christian, Catholic, Buddhist and Hindu Bali.” In other words, it implies the guaranteeing of religious freedom to the Muslims, Christian, Catholic, Buddhist and Hindu Bali citizens as per their respective religious laws. Thus, Philip J. Eldridge aptly notes that even though the Constitution guarantees freedom of religion, citizens are required to “choose between five officially sanctioned religions – Islam, Catholic or Protestant Christianity, Buddhism and Hinduism. Confucianism has been added by President Wahid, with freedom for Chinese to openly display their language and culture”. Guided by this general principle of Pancasila, Article 29 of the Indonesian Constitution guarantees to “all persons the freedom of worship, each according to his/her own religion or belief.”

In principle, the constitutional guarantee also extends to protecting the freedom of religion of the child. However, the protection of freedom of religion seems to be interpreted mainly in the context of shielding believers from missionary activities or proselytizing. To this effect may be cited the Indonesian Child Protection Act (Law Number 23/ 2002), Article 86 of which provides that any conversion of a child to another religion, through the use of “deception, lies or enticement”, is an offence punishable with five years imprisonment and a fine. In a recent case concerning “enticement” to convert Muslim children to Christianity, the Indonesian Supreme Court upheld this law as consistent with the constitutional guarantees on religious freedom.

331 “The Government of Indonesia basically has no different opinion about article 14 as a whole. The declaration indicates that the Government of Indonesia gave high assurance on freedom to manifest religion as prescribed by law, namely Muslim, Christian, Catholic, Buddhist and Hindu Bali.” “Initial Reports of States Parties due in 1992 - Indonesia, Addendum” (8 March 1994) United Nations Document CRC/C/3/Add.26, para.3 (emphasis added).


There is an underlying subtle connection between the Indonesian reservation and Article 14 paragraph (2) of the CRC, especially when we consider it in the light of parental responsibilities under Indonesian law. For instance, the Marriage Act 1974 entrusts both parents/guardians of children with the obligation to “take care of and educate their children to the best of their ability”.\textsuperscript{335} This legal requirement, according to the Initial Report, is based on the explanation that a child by nature is “innocent and heavily dependent, particularly on his/her parents”.\textsuperscript{336}

A similar association of the parental responsibilities and obligations over the child in the area of religion and education is also evident in the new law on human rights. The new Human Rights Act (law number 39/1999) of Indonesia appears to closely follow the CRC as it guarantees the right of the child to “practise his religion and to think and express himself as befits his intellectual capacity and age” though it also stipulates that this guarantee is to be ensured “under the guidance of a parent or guardian.”\textsuperscript{337} By adding the requirement of parental guidance, the Indonesian law is in effect playing a balancing act in qualifying the religious freedom of the child in the area of education through parental guidance while at the same time recognizing the general freedom of everyone “to hold, impart and publicize his beliefs, orally or in writing, through printed or electronic media, taking into consideration religious values, morals, law and order, the public interest, and national unity.”\textsuperscript{338}

It is therefore evident that though “religious values and morals” play an integral part in limiting the right to freedom of religion, it nevertheless concedes


\textsuperscript{336} Above n 335.


\textsuperscript{338} Article 23(2) of the Human Rights Act (Law No.39/1999), above n 337 (emphasis added).
room for broader interpretation of this right. Such an interpretation, perhaps, must also concede that the various religious laws (including Islamic law) have an indispensable background role in the functioning of the Indonesian legal system. In the context of the Indonesian reservation to Article 14, this is made evident by the manner in which the National Education Law 2003, the Child Protection Act (law number 23/2002), the Marriage Law 1974, and the Human Rights Act (law number 39/1999) have approached the question of freedom of religion as discussed above. Furthermore, the Indonesian judiciary also appears to endorse such a qualified yet open approach to the interpretation of the constitutional guarantee of freedom of religion. The Second Periodic Report of Indonesia notes that a move to reviewing the reservation is pending with the government. It is not surprising, therefore, that in 2005 Indonesia informed the Secretary-General of the United Nations of its decision to withdraw the reservation made to CRC.

Perhaps the most direct reference to a perceived conflict between the “right of the child to freedom of thought, conscience and religion” and Shari`ah is noticeable in the Iraqi reservation to Article 14. It specifically refers to Article 14 paragraph (1) and states that “the child’s freedom of religion, as allowing a child to change his or her religion runs counter to the provisions of the Islamic Shari`ah.” The Initial Report of Iraq elaborates this claim by explaining that Iraq is “an Islamic State and its Constitution, as well as the legislation in force in its territory, are largely based on the Islamic Shari`ah”. Indeed, the Saddam-era Constitution 1970 guarantees “freedom of religion and belief and freedom of religious observance” provided that such freedoms are not exercised contrary to “the provisions of the Constitution and


340 See online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm#N20> [last visited: 10.01.2008].

341 For the text of Iraqi reservation see above n 340 (emphasis added).

legislation and are not incompatible with public order and morals.”343 Here, the reference to “legislation” may be understood in the context of the special status attributed to Shari`ah in the Iraqi legal system. Moreover, the restriction on the right to freedom of expression of children may also be viewed from the Shari`ah-based rule concerning bulūghiyat and the “minority status” of children.344 As a result, parents have “absolute freedom to provide their children with direction in their religion and the practise of its observance”.345 Under the Saddam-era Constitution, religious education was included in the public school curricula whereby Muslim children were taught Islam, while children from Christian families (constituting 25 per cent of the student population) were taught the Christian faith.346

The same basic principles are also followed even in the post-Saddam era Constitution of Iraq - Islam is still the state religion and Shari`ah retains its status as a source of legislation. At the same time, Articles 40 and 41 of the new Constitution guarantee religious freedom.347 The 2005 Constitution also gives voice to the peculiar demographic realities of the new Iraq when it espouses a religious plurality policy by declaring under Article 2 that “this Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians,


344 See Thomas Patrick Hughes, A Dictionary of Islam: being a cyclopaedia of the doctrines, rites, ceremonies, and customs, together with the technical and theological terms, of the Muhammadan religion (London: W.H.Allen, 1935) 476.


346 Above n 345 para.45.

347 Article 2 paragraph (1) of the Constitution of Iraq (October, 2005) states, “Islam is the official religion of the State and it is a fundamental source of legislation: (a) No law that contradicts the established provisions of Islam may be established. (b) No law that contradicts the principles of democracy may be established. (c) No law that contradicts the rights and basic freedom stipulated in this constitution may be established.” Freedom of religion and freedom of religions worship are guaranteed under Articles 40 and 41, respectively. See Constitution of Iraq (October, 2005) Full text of Iraq Constitution (Associated Press, 16 October 2005) available online at: http://www.msnbc.msn.com/id/9719734/ [last visited:11.07.06].
The Constitution also appears to promote a national policy on family relations as Article 29 describes family as an entity with “religious, moral and patriotic values”, indicating the religion-based family structure that exists in Iraq. This provision promotes a Shari`ah-based “rights and duties” approach to human rights issues - for instance, Article 29 paragraph (1)(a) declares that children have “rights over their parents to upbringing, care and education” while also stating that children have a duty towards parents “to respect and care especially in times of need, disability and old age”. Although the new Constitution is significantly different from the 1970 Constitution (it provides an ample bill of rights, adopts a “pluralistic system” and a “culture of diversity” as noted in the preamble), it is still strongly embedded in Islamic legal traditions and espouses an Islamic lifeworld. Nevertheless, the exact impact of the new Constitution on the Iraqi reservation to the CRC can only be assessed from the next periodic report.

The Jordanian reservation also provides another illustration of a clearly perceived conflict between Article 14 of CRC and Islamic law. The reservation states that since Article 14 grants “children the right to freedom of choice of religion” it is “at variance with the precepts of the tolerant Islamic Shariah.” Such a Shari`ah-defence has deep rooted constitutional foundations in Jordan. To begin with, Article 2 of the Jordanian Constitution 1952 proclaims Islam as the state religion while Article 14 claims to “safeguard the free exercise of all forms of worship and religious rites in accordance with the customs observed in the Kingdom, unless such is

\[348\] Article 2 paragraph (2) of the Constitution of Iraq (October, 2005) above n 347 (emphasis added).


\[351\] Iraq has not submitted its Second Periodic Report that was due on 14 July 2001, while the Third Periodic Report is due on 14 July 2006.

\[352\] Available online at: \[http://www2.ohchr.org/english/bodies/ratification/11.htm#N20\] [last visited: 10.01.2008] (emphasis added).
The Initial Report of Jordan explains its reservation in the context of this rubric - guaranteeing freedom of religion within the peculiar customs and traditions of the country. The Report affirms that the Jordanian legal system “meticulously safeguards the rights of religious communities and groups” in an “equitable manner”. This approach is viewed as a “safeguard” directed not at removing religious differences from the legal system but at creating a “spirit of religious tolerance and harmonious coexistence”. Whilst the Constitution provides these safeguards that protect both Shari`ah-based legal imperatives and other religious traditions, a similar policy directive appears to be in place even in the case of domestic laws relating to family issues. The personal status laws of Jordan resolutely promote Islamic legal precepts (based on the Ḥanafī school of jurisprudence) as far as Muslim subjects are concerned, while Jordanian Christians are allowed to follow the religious laws pertaining to their various denominations. Again, there are Shar`i`ah courts of laws to deal with Muslims, while the Ecclesiastical Courts under the Personal Status of Jordanian Christian Communities Act deal with the cases concerning Christian citizens.

The Jordanian law defines the religious rights of children within this pluralist system. Accordingly, the law places a strong emphasis on the role of parents in educating children according to parental religious convictions. The law regulating national education (Education Act, Number 27 of 1988) sets up the religious education curricula for Christian and Muslim students by incorporating the edicts of

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353 See, Article 2 and Article 14 of the Constitution of the Hashemite Kingdom of Jordan (1952) (emphasis added).


355 Above n 354 para.38.


357 Above n 354 para.30-34.
their respective religious laws.\textsuperscript{358} The Initial Report explains that families are entitled to regulate their lives (including that of the child’s) according to their religion, as stipulated by the Muslim and Christian Personal Status Act. The Report adds that every child has the right to receive religious instructions in accordance with the wishes of its parents or legal guardians and the Jordanian law prohibits the provision of religious instruction in a manner contrary to the wishes of the parents.\textsuperscript{359}

Since Shar’iah governs all the personal status matters relating to Muslim citizens, the conversion of Muslims from Islam to another religion also falls within the purview of Islamic law. Hence, the Shar’iah courts decide cases of Muslims converting from Islam to another religion under the apostasy rules of the Ḥanafī school of jurisprudence. Noticeably, even though Shar’iah prescribes the death penalty for Muslims who convert to another religion, “such punishment has never been applied” in Jordan.\textsuperscript{360} Instead, it appears that under the Jordanian law Muslim converts lose certain civil and property rights through the application of the Shari`ah rule on apostasy. As a result, apostates lose the right to inherit from Muslim relatives and the Shar`iah court may annul their marriages to Muslims. The apostate also loses the custody of his or her children. These rules of Shari`ah prevail not only because of the constitutional mandates behind them, but also because of staunch popular belief in them. As a recent report on religious freedom in Jordan has noted, “the majority of the indigenous population view religion as central to one’s personal identity…..Muslims who convert to other religions often face social ostracism, threats, and abuse from their families and Muslim religious leaders.”\textsuperscript{361}

The law concerning apostasy of Muslims has also been endorsed by the Jordanian judiciary. One such instance is the Siham Qandah case before the Shar`iah


\textsuperscript{359} Above n 354 para.34.

\textsuperscript{360} Above n 356.

\textsuperscript{361} Above n 356.
Court of Appeal in Amman. A Christian widow filed a suit for custody of her two children after it was contended by the Muslim maternal uncle of the children that she was raising the Muslim children in the Christian faith. The uncle claimed that the late (Christian) husband of Siham Qandah had converted to Islam before he died and hence the children were to be raised as Muslims. The Sharī`ah court of first instance decided that, under the rules of Shari`ah, children of a Muslim father were recognized as Muslims and hence the children were required to be raised in that faith. However, the appellate court decided in favour of Siham Qandah and awarded her the custody of her two children. This case brought to centre stage the conflict of laws between the faiths on the issue of the custody of children. The widow was alleged to have contravened the religious education policy that required children to be educated according to the father’s religious convictions. The appellate court finally decided the case in favour of awarding the custody to the mother, not by referring to the issue of the religion of parents or the children, but on certain factual bases such as the proven pilferage of the trust funds of the children by their Muslim uncle and insufficiency of evidence of the conversion of the father to Islam. As far as the freedom of religion of the children is concerned, the Court seems to have left the matter in suspension, to be decided by the children on reaching the age of 18 years. In many ways, the case demonstrates the local constraints pressuring not only the executive authorities in making their decisions, but also the difficult onus on the judiciary to maintain a delicate balance between different religions with deep rooted precepts of legality.

Malaysia is another example of an Islamic State that has made a reservation to Article 14 on account of its perceived conflict with Islamic law on freedom of religion. Malaysia’s reservation to Article 14 of the CRC does not categorically refer to Islamic law. But such an argument may be indirectly attributed to the reservation.


363 Above n 361.
particularly since it stipulates that Malaysia would apply Article 14 only if it is “in conformity with the Constitution, national laws and national policies of the Government of Malaysia”. This reservation may be noted for its ambiguity as it does not explain which provisions of the Constitution, national laws and national policies conflict with which aspect of Article 14. Furthermore, the reference to “national policies” appears to introduce an uncertain and extra-legal element into the determination of the scope of Malaysian reservation, with the possible effects of subjecting the application of the Convention to the vagaries of domestic politics. How far can it be said, therefore, that the Malaysian reservation to Article 14 of CRC is also Shari`ah-based?

A comprehensive response to the above question would only be possible by analysing the Malaysian reservation in the context of its peculiar constitutional and legal system. Although the Federal Constitution of Malaysia declares that Islam is the religion of the Federation, at the same time it also establishes several guarantees of freedom of religion. For instance, Article 3 paragraph (1) of the Constitution proclaims that “other religions may be practised in peace and harmony in any part of the Federation.” Article 8 paragraph (2) proscribes discrimination on the grounds of religion in matters relating to property and employment, while a similar proscription relating to the education of children is made under Article 12 of the Constitution. Furthermore, Article 11 paragraph (1) recognizes the right to profess,

364 See online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 10.01.2008].

365 Article 3(1) of the Federal Constitution of Malaysia. Available online at: <http://www.pogar.org/publications/other constitutions/malaysia-e.pdf> [last visited: 18.07.06]. In a recent case, Meor Atiqulrahman Bin Ishak Dan Lain-Lain v. Fatima Bte Sihi Dan Lain-Lain (2000) 5 Malayan Law Journal 375 decided by the High Court of Negeri Sembilan State, it was held that Article 3 of the Constitution provided more than symbolic and ritualised understanding of religion and stated that Islam has a position of primacy among religions in Malaysia.

366 Article 8 paragraph (2) prohibits “discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment”, while paragraph (5) of the same Article excludes from its ambit “(a) any provision regulating personal law; (b) any provision or practice restricting office or employment connected with the affairs of any religion, or of any institution managed by a group professing any religion, to persons professing that religion.”. Again, Article 12 prohibits discrimination between citizens based on “religion, race, descent or place of birth” in the field of administering and funding public education “whether or not maintained by a public authority and whether within or outside the Federation.” At the same time, it
practise and propagate religion subject to laws made by the state legislatures (except Kuala Lumpur and Lubuan, where the Federal legislature regulates Islam). According to the exceptions clause to this provision contained in paragraph (4) of Article 11, the state and federal legislatures “may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.”\(^{367}\) This appears to be a special status awarded to the Muslim citizens,\(^{368}\) based on the Shar`iah rule against conversion that has been discussed above. The proscription on religious propagation among Muslim citizens is presumably aimed at preventing Muslims from converting to other religions. Furthermore, Hassan Saeed notes that such proscription is not only directed against the propagation of “other religions” but also restricts and prohibits the “propagation of false doctrines” and deviant interpretations of Islam among Muslims. Saeed is of the opinion that the objectives of these restrictions appear to be threefold: first, to prevent the spread of religions other than Islam; second, to ensure the government’s hegemony over religion and religious institutions; and third, to maintain the purity of the government-sanctioned version of Islam, which is a version of Sunni Islam.\(^{369}\)

The Malaysian Constitution also specifically deals with the freedom of religion of the child under Article 12 paragraph (4) where it declares that “the religion of a person under the age of eighteen years shall be decided by his parent or guardian.”\(^{370}\) At the same time, paragraph (3) of the same article states that “no person shall be required to receive instruction in or take part in any ceremony or act

\(^{367}\) Above n 365 (emphasis added).


\(^{370}\) Above n 365 (emphasis added).
of worship of a religion other than his own”. This provision lays down two basic principles - the parental right to decide the religious convictions of children and the freedom to provide and receive religious education according to the faith of each individual.

The Malaysian judiciary has upheld these principles in various cases. In the *Noorliyana Yasira* case, the national education curriculum provisions requiring children from Islamic families to mandatorily undertake “Islamic studies” and “moral classes” for children from families practising other religions was upheld by the High Court decision.\textsuperscript{371} In another recent case Article 3 of the Malaysian Constitution was interpreted expansively by the High Court of Negeri Sembilan. According to the Court, the reference to “Islam” in Article 3 encompasses Islam as a way of life consisting of more than mere ceremonies and ethical rules.\textsuperscript{372} Earlier, the Malaysian Supreme Court had reiterated that it was the right of parents or guardians to decide the religion of all persons under the age of 18 years.\textsuperscript{373} The “special status” of Islam in the Malaysian legal system was again highlighted in another recent case relating to the conversion of minors. A Hindu husband converted to Islam and also converted his two minor children to Islam. His Hindu wife contended that she had an equal right to decide on the conversion of children under Article 12 paragraph (4) of


\textsuperscript{372} *Meor Atiqulrahman* case above n 365, 82.

\textsuperscript{373} *Teoh Eng Huat v. Kadhi, Pasir Mas & Anor* (1990) 2 Malayan Law Journal, 300. A 17 year old daughter of a Buddhist converted to Islam. The father contended that only he had the right to decide her religion under Article 12(4). By the time the Supreme Court decided the case, the defendant was of age and thus, the judgement was considered as merely academic. Also see, *Chang Ah Mee v. Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Others*, (2003) 5 Malayan Law Journal at106 decided by the High Court of Kota Kinabalu state. A Hindu husband converted to Islam and also converted his infant child to Islam. The Hindu mother filed for custody and was granted custody. She also filed to declare void the infant’s conversion. The High Court declared that she had a right to custody of the infant and that custodial right included the right to decide on the religious education of the child; *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor* (2004) 2 Malayan Law Journal 648, decided by the High Court of Kuala Lumpur. A Hindu husband converted to Islam and converted his two children to Islam. The wife contended that she had an equal right to decide the religion of the children. The Court held that the consent of a single parent enough under Article 12(4) of the Constitution.
the Constitution. As the Malaysian Constitution empowers only the state Syariah Courts (Shar`iah courts) to decide cases pertaining to Islam, the Supreme Court declared that it had no jurisdiction to decide on the conversion since the matter fell under Islamic law. More importantly, Justice Faiza Tamby Chik opined that since the husband is a “muallaf” i.e., a Muslim convert, he had the right to convert his children to Islam.374

The above discussion sheds some light on the special relationship that exists between the Malaysian legal system and Islamic law in the area of freedom of religion. Hence, the Malaysian reservation to Article 14 may be held to be considerably shaped and supported by the special position enjoyed by Shari`ah in the Malaysian legal system. This feature of the Malaysian reservation has also been acknowledged in a recent report produced by SUHAKAM the Malaysian human rights commission when it stated that

the probable concerns in Malaysia as to reservations are due to the differences in religion, race and birth status between Muslims and Non-Muslims. Muslim children are governed by a different law in some cases (for example, inheritance and custody cases) and there are certain implications and discrepancies between the Islamic law and the CRC which may also pose complications.375

The Maldivian reservation to Article 14 paragraph (1) of the CRC may also be considered as a Shari`ah-based reservation. The Maldivian reservation quite clearly points out that “the Constitution and the Laws of the Republic of Maldives stipulate that all Maldivians should be Muslims” and, therefore, it is presumed that paragraph (1) conflicts with this constitution.376 However, such a conclusion may only be derived if we consider that Article 14 paragraph (1) promotes the freedom of

374 Shamala Sathiyaseelan case above n 373.


376 See online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 10.01.2008].
a child to convert. In this regard, the Maldivian reservation may be construed as advancing the position that the Maldivian legal system does not guarantee complete freedom of religion. This may be attributed to the primacy given to Islamic law in the Maldivian Constitution. In fact, Article 1 of which declares that the Maldives is a “sovereign, independent, democratic republic based on the principles of Islam”377 and that Islam is the state religion378. Islamic Sharʿiah is also specifically incorporated into the legal system of the Maldives under Article 156 of the Constitution, which states

in this Constitution the word “law” also includes the norms and provisions of Sharʿiah established by the Noble Qurʿan and the traditions of the Noble Prophet, and the rules derived there from.379

The “freedom of education” and “freedom of expression” rights (two rights pertinent to the implementation of Article 14) embedded in the Constitution also have claw-back clauses that are based in Sharʿiah law. For instance, Article 19 guarantees everyone freedom of education “provided that such acquisition and imparting of knowledge does not contravene law.”380 Article 25 states that freedom of expression may be prohibited to fit the need “of protecting the basic tenets of Islam.”381 Consequently, the combined effect of Articles 1, 7, 19, 25 and 156 of the Maldivian Constitution is that Sharʿiah trumps all other rights within the domestic legal system. The Constitution does not provide any separate “freedom of religion” in the fundamental rights chapter.382


378 Article 7 of the Maldivian Constitution above n 377.

379 Article 156 of the Maldivian Constitution above n 377.

380 Article 19 of the Maldivian Constitution (1997) above n 375. In fact, “law” in this instance can only be interpreted according to the Sharʿiah-specific definition provided under Article 156 of the Constitution (emphasis added).

381 Above n 377 (emphasis added).

The Maldivian reservation also refers to other laws that “stipulate that all Maldivians should be Muslims” thereby implying a legal nexus between Maldivian citizenship and the status of being a Muslim. In fact, in outlining the basic requirements for acquiring Maldivian citizenship, Article 5 paragraphs (a) and (b) of the Constitution declares that every child born to a Maldivian parent naturally becomes a citizen, and paragraph (c) stipulates that naturalisation of foreigners is subject to the relevant law. The law dealing with naturalisation is the Maldivian Citizenship Law (Law Number 4/69 J), Section 2 paragraph (a) of which requires that every foreign applicant wishing to apply for citizenship must be a Muslim. The law is, however, not categorical as regards natural born Maldivians who may convert from Islam to another religion. There appears to be an underlying presumption, when Article 5 of the Constitution and the Maldivian Citizenship Law are read together, that every natural-born Maldivian is a Muslim. There is no other domestic legislation that deals particularly with religious freedom. That said, the Law on the Protection of the Religious Unity of Maldivian Citizens (Law Number 6/94), Section 1 states

whereas the citizens of Maldives belong to the noble religion of Islam and in principle practise a single mazhab [Shar‘i ah school of jurisprudence] and belong to a single nation, it is obligatory upon the state to preserve the historic religious unity of Maldivians for the protection of the independence and sovereignty of the Maldives and maintenance of peace and public order. 383

The main legislation dealing with children’s rights, the Law on the Protection of the Rights of Children (Law Number 9/91), is to similar effect in declaring that

it shall be the duty of the Maldivian Government, Parents and the General Public to bring up Maldivian children as healthy and patriotic persons who follow Islam. 384


Given this position, it is not entirely clear as to why the Maldivian reservation is limited only to paragraph (1) of Article 14 of the CRC, especially since the Constitution and the same laws that mandate Maldivian citizens to be Muslims also grant parents the freedom to educate their children according to Islam. Indeed, the concept of the parent-child relationship provided in the Maldivian laws is largely based on the Shar`iah tradition. Thus, Sections 5 and 15 of the Law Number 9//91 make it obligatory for parents to ensure that children get the “requisite religious education”, implying thereby basic education in Islamic faith.\footnote{\textit{Section 5 of the Law on the Protection of the Rights of Children (Law No. 9/91) states, “Education and upbringing of children shall be facilitated and provided for in every inhabited island of the Maldives, as may be appropriate, subject to the economic situation and the availability of resources to the Government. In particular, provision must be made to enable every child to learn the essential requirements of the religion [Islam]. . .” [parenthesis added]. Section 15 states, “Parents shall, to the best of their ability and within the means available to them, take appropriate measures to ensure the proper upbringing and well being of their children, and to facilitate their education to a reasonable standard and their requisite religious education.” Above n 384.}} Again, the Maldivian Family Law (Law Number 4/2000) stipulates Islam as a precondition of the custody/guardianship of children and provides that the custodians/guardians of children lose their standing in law upon conversion from Islam to another religion.\footnote{\textit{Section 41 paragraphs (a) and (d) of the Maldivian Family Law (Law No.4/2000) requires that a person to whom the custody of a child is entrusted must be a Muslim and that he/she “shall not be involved in the commission of vice acts prohibited in Shar`iah”, respectively. Section 42(d) of the law states that the right to custody is lost if the person to whom the custody of the child is entrusted renounces Islam, while Article 49(1) requires that a court appointed guardian of a child must be a Muslim. See online at: http://www.agoffice.gov.mv/pdf/sublawe/238.pdf [last visited: 27/07/06].}} It is clear that these laws not only infringe the commitments provided in Article 14 paragraph (1) but also those included under paragraph (2). Since the provisions of the Maldivian law (based as they are in Shari`ah) contradict both paragraphs (1) and (2) of Article 14 of CRC, it is rather difficult to interpret whether or not the Maldivian reservation (which specifically refers only to paragraph (1) of Article 14) implicitly applies to paragraph (2) of Article 14 as well. As the Shari`ah and the Constitution seem to restrict the mandate of the Maldivian government to undertake international obligations contrary to Shari`ah and domestic law,\footnote{\textit{The latest report of Maldives to the CRC Committee notes that, “in the case of any conflict between the Convention and domestic law, domestic legislation will be followed”. “Second and Third Periodic Reports of States Parties due in 1998 and 2003 – Maldives” (10 April 2006) \textit{United Nations Document CRC/C/MDV/3}, para. 36.}} the extent to which the State may apply Article 14 paragraph (2) is unclear. Moreover, the President of the
The Maldivian legal system is shaped by and subject to the overarching standard of international legitimacy. The Maldivian reservation to the CRC is also shaped by and subject to this standard. Morocco is another Islamic State that qualifies the acceptance of Article 14 paragraph (1) of the CRC by formulating a reservation that refers to constitutional


390 Text of the Maldivian reservation, above n 376.

stipulations concerning Islam. In more than one way, the reference to Islam in the Moroccan reservation describes an important feature of its legal system, i.e., the strong nexus that exists between Islamic law and traditions and the Moroccan State itself. Article 6 of the Moroccan Constitution (1996) declares that “Islam shall be the state religion. The State shall guarantee freedom of worship for all.” Moreover, under Article 106, this is an unamendable part of the Constitution, making Article 6 in effect a non-derogable norm in the Moroccan legal system. Freedom of religion, as contained in the “freedom of worship” guarantee, is circumscribed by the application of the right only to “monotheistic religions.”

Youri Kolosov from the Committee on the Rights of the Child has expressed concern that “there was nothing in the Moroccan Constitution that guaranteed freedom to choose one’s religion” since Article 6 of the Constitution mentions only Islam alongside the guarantee of freedom of worship. However, it would be simplistic to reduce Article 6 of the Constitution to a reading that applies only to the Muslim population. Although demographically Muslims constitute the overwhelming majority, the minority of Christians and Jews are nevertheless protected under different legal regimes. The reference to Islam only suggests the preponderant direction of the legal system of the State. Christians and Jews are allowed to manage their personal status affairs according to their respective religious laws, while the Moudawana or the personal status code of Morocco, which is largely based on principles of law derived from Shar‘iah, applies to the Muslim population.

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393 Article 106 of the Constitution: “Neither the State system of monarchy nor the prescriptions related to the religion of Islam may be subject to a constitutional revision.” Above n 392.


396 According to the CIA World Factbook, 98.7 per cent of the Moroccan population are Muslims, while Christians and Jews constitute 1.1 per cent and 0.2 per cent of the population, respectively. See CIA World Factbook – Morocco available online at: <https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html>[last visited:17.01.2008].
The Initial Report goes on to state that “Muslim religious values are incorporated in Moroccan society and are naturally followed by the Government in its activities and by the people.”

Although the Constitution guarantees “freedom of worship”, it is apparently understood to signify that the Shari‘ah rule inherent in this right “does not affect the right of followers of other religions to freedom of thought, conscience, and religion.” The inference appears to be that the freedom of worship guaranteed by the Constitution is limited by the rules of Shar‘iah concerning apostasy and conversion from Islam to another religion. This is also contained in Section 220 of the Moroccan Penal Code which makes it an offence to incite anyone “to undermine the faith of a Muslim or to convert him or her to another religion”.

There is also a strong undercurrent of societal resistance to public efforts at proselytising, and conversion is viewed with repugnance.

According to the Moroccan family law or Moudawana, the religious status of the child is determined by the principle that “a legitimate child of a Muslim father is of the Muslim faith”. The parents are also entrusted with the duty to provide the child with “religious guidance” and “proper education on sound principles”. Such religious guidance, of course, pertains to instilling “Islamic values and morals, with

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397 Above n 394, para.98.


399 Above n 394, para.99.

400 Indeed, the Religious Freedom Report notes that “although free expression of Islamic faith and free academic and theological discussion of non-Islamic religions are accepted on television and radio, society discourages public efforts to proselytise. Most citizens view such public acts as provocative threats to law and order in an overwhelmingly Muslim country. In addition, society expects public respect for the institutions and mores of Islam, although private behaviour and beliefs are unregulated and unmonitored.” International Religious Freedom Report 2005 – Morocco (Bureau of Democracy, Human Rights, and Labour, U.S.A, 2005), available online at: [http://www.state.gov/g/drl/rls/irf/2005/51606.htm](http://www.state.gov/g/drl/rls/irf/2005/51606.htm) [last visited: 04.08.06].

401 Above n 394, para.98. See also Article 145 of Moudawana, (Law Number 70.03, 2004). It may also be noted that since a Muslim woman can marry only a Muslim man under Shar‘iah (Article 39 paragraph (4) of Moudawana), what in effect Article 145 of Moudawana does is to attribute the religion of the Muslim father to the child, available online at: [http://www.hrea.org/moudawana.html#31](http://www.hrea.org/moudawana.html#31) [last visited:08.08.06].

402 Article 54 paragraph (6) of Moudawana above n 401.
due respect to the other religions and creeds”.

After considering the Initial Report of Morocco, the CRC Committee recommended that Morocco withdraw its reservation to Article 14(1). Morocco’s refusal to comply with this recommendation highlights the inability of the Moroccan government to counter the fundamental connection between its acceptance of international human rights obligations and the Islamic traditions of Morocco.

This is a position that Morocco has maintained in respect of all treaties that it has accepted, whenever any provisions of a treaty conflict with Islam.

In the case of Oman’s reservation to CRC, two points need to be underlined. Firstly, in its general reservation Oman has stated that it would not implement any “provisions of the Convention that do not accord with Islamic law or the legislation in force in the Sultanate.” Secondly, it has made a specific reservation to Article 14 and 30 without specifying any apparent reason for the reservations. In fact, when the CRC Committee met to consider the Initial Report of Oman, it sought clarification regarding the exact scope of the reservation, given that Oman made both a specific as well as a general reservation covering the whole Convention. In response, Oman explained that Article 14 paragraph (1) concerning freedom of religion of the child and Article 21 concerning “adoption” conflicted with “Islamic Law and the Omani legislation”. The Omani delegation also added that the reservation to Article 14 paragraph (1) was based on

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403 Second Periodic Reports of Morocco, above n 398 para.457.


Islamic Law, which considers the child before reaching puberty/adulthood and acquiring the required reasoning abilities unqualified to make judgements on religion. The child is considered to be dependent on his/her parents’ judgement/choice on such matters.\textsuperscript{407}

The constitution or the Basic Law declares that Oman is an Islamic State and Islamic Shar‘iah is the basis of its laws.\textsuperscript{408} At the same time, Article 17 of the Basic Law declares equality of all citizens and guarantees non-discrimination on grounds inclusive of religion.\textsuperscript{409} Article 28 of the same Law defines religious freedom as “freedom to practise religious rites” with the proviso that “it does not disrupt public order or conflict with accepted standards of behaviour.”\textsuperscript{410}

When the Omani reservation to Article 14 is examined within this peculiar legal framework, it may be observed that the principle of law that is applied in this connection is the Shar‘iah rule that negates the conversion of a child to another religion due to incapacity, as noted in the above response of Oman to the CRC Committee. Again, in common with all the other Islamic States discussed above, there is a guarantee of worship that allows people of various faiths in Oman to


\textsuperscript{408} Article 1 of the Basic Law (1996) of Oman states, “The Sultanate of Oman is an independent, Arab, Islamic, fully sovereign state with Muscat as its capital.” Article 2 states, “The religion of the State is Islam and the Islamic Shar‘iah is the basis of legislation.” See online at: <http://www.psr.keele.ac.uk/docs/basiclaw_e.htm> [last visited: 14.08.2006].

\textsuperscript{409} Article 17 of the Basic Law (1996) of Oman states, “All citizens are equal before the Law and they are equal in public rights and duties. There shall be no discrimination between them on grounds of gender, origin, colour, language, religion, sect, domicile or social status.” Above n 408.

\textsuperscript{410} Article 28 of the Basic Law (1996) of Oman states, “The freedom to practise religious rites in accordance with recognized customs is guaranteed provided that it does not disrupt public order or conflict with accepted standards of behaviour.” Article 72 of the Basic Law provides an interesting aside when it states that, “The application of this Basic Law shall not infringe the treaties and agreements concluded between the Sultanate of Oman and other States and international bodies and organisations.” In effect, it provides supremacy of status to international treaties ratified by Oman, over the Basic Law. However, Oman has been consistent in making reservations to exclude provisions of international human rights treaties that it deems to conflict with Shar‘iah, as seen in the case of the CRC and the CEDAW. Above n 408.
practise their religion.\textsuperscript{411} This guarantee is also given to children as noted in the
Second Periodic Report of Oman

there is nothing in law to prevent the right of children of any religion
to learn about their religion, perform acts of worship or express the
opinions and beliefs that pass through their thought or conscience,
provided that they engage in activity in that connection if their
opinions or beliefs are not such as to violate public order or
morals.\textsuperscript{412}

The limitations placed on the right to worship appear to be public order and
morality and accepted standards of behaviour. Thus, it may be assumed that any
claim of freedom of religion that includes freedom of conversion/apostasy falls
within these limitation clauses, given the status of Shar`iah in the legal system of
Oman and the fact that Oman considers Article 14 paragraph (1) to be contrary to
Shar`iah.

This understanding of the constitutional guarantee of freedom of worship also
shapes the education policy of Oman. While the government schools include Islamic
education as part of the curricula for Muslim students, non-Muslim students are
exempted from attending such classes and religious observances. Foreign community
schools directed at the expatriate population are not required to teach any religious
studies due to the “mix of different nationalities and religious faiths”.\textsuperscript{413} Oman has
consistently declined the recommendations of the Committee to withdraw the
reservation to Article 14 paragraph (1), citing the inconsistency of the CRC provision
with Shar`iah.\textsuperscript{414}

\textsuperscript{411} In fact, the International Religious Freedom Report notes that “[s]ome non-Muslims worship at
churches and temples built on land donated by the Sultan, including two Catholic, two Protestant, and
two Hindu complexes.” \textit{International Religious Freedom Report 2005 - Oman} (Bureau of Democracy,
Human Rights, and Labour, U.S.A, 2005) See online at:
\url{http://www.state.gov/g/drl/rls/irf/2005/51607.htm} [last visited: 16.08.2006].

Document CRC/C/OMN/2}, para.165.

\textsuperscript{413} Second Periodic Report of Oman, above n 412 paras.390-391.

CRC/C/78/Add.1} at para.88 and Second Periodic Report above n 412 para.40.
The Syrian reservation to Article 14 of the CRC also declares that a child’s right to freedom of religion conflicts with Islamic Shar‘iah. Once again, this appeal to Islamic Shar‘iah indicates the deep rooted Islamic legal traditions in the Syrian legal system. This is evident from Article 3 paragraph (2) of the Syrian Constitution (1973) which makes Islamic jurisprudence “a main source of legislation”. At the same time, the Constitution also guarantees freedom of religion requiring the State to “respect all religions”. The only constitutional limitation placed on this right relates to cases of “public order”. According to the International Religious Freedom Report (2005), although public proselytising is not illegal in Syria, the practice is discouraged by the State by resorting to the argument that it poses a “threat to the relations among religious groups”. Such a policy against proselytising presumably falls within the purview of the constitutional limitation of “public order”. The Baa‘ath party ideology of the Syrian regime is centred more in projecting a secular public image that focuses on the ideals of socialism than theological foundations. As a result there is a strict de facto separation of church and state. Religious groups tend to avoid any involvement in internal political affairs. The Government, in turn, generally refrains from becoming involved in strictly religious matters.

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415 “The Syrian Arab Republic has reservations on the Convention’s provisions which are not in conformity with the Syrian Arab legislations and with the Islamic Shar‘iah’s principles, in particular the content of article (14) related to the Right of the Child to the freedom of religion, and articles 2 and 21 concerning the adoption.” For the text of Syrian reservation see online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 10.01.2008].

416 Article 35 of the Syrian Constitution (1973) states, “(1) The freedom of faith is guaranteed. The state shall respect all religions. (2) The state guarantees the freedom to hold any religious rites, provided they do not disturb the public order.” See online at: <http://www.servat.unibe.ch/icl/sy00000_.html> [last visited: 10.01.2008].


418 A notable absence of any reference to Islam or religion in the Constitution of the Baath Arab Socialist Part (1947) also highlights the secular stance of the Syrian state. See online at: <http://www.baath-party.org/eng/constitution1.htm> [last visited: 20.08.2006].

419 Above n 417.
Unlike many other Arab countries, Islam is not adopted as the State religion. However, Shar`iah-based personal status law is applied to all Muslims (comprising up to 90 percent of the population), while the Druze, Christian and Jewish personal laws are applied in regard to the affairs of these communities.\footnote{See J.N.D Anderson, “The Syrian Law of Personal Status” Bulletin of the School of Oriental and African Studies, University of London (1955) 17 (1) 34.} In other words, Syria recognizes the various religions existing in the State on the understanding that each community is governed by its respective religiously determined laws in personal status matters. Although the State remains aloof in this area, it nevertheless upholds the legality of these religious laws and refrains from undermining their jurisdiction.

In the context of the freedom of religion of the child, the Initial Report of Syria points out that the “prevailing principle in Syria is that children are brought up in the religion of their fathers.” This accords with the Shar`iah rule explained above. The Report further explains that the main objective behind this rule is to establish “harmony and spiritual cohesion of the family” which is “necessary to avoid any discord in religious belief between the head of the family and his children as long as the latter are below the age of maturity.”\footnote{“Initial Reports of States Parties due in 1995 - Syrian Arab Republic” (14 February 1996) United Nations Document CRC/C/28/Add.2, para.82.} The Syrian country reports also explain its reservation by arguing that children lack the capacity to exercise this freedom. Once again, it can be seen that the general direction of this claim is towards the Shar`iah rule on the incapacity of minors to renounce Islam.\footnote{Initial Reports of Syria above n 421. Also see “Periodic Reports of States Parties due in 2000 – Syrian Arab Republic” (18 October 2002) United Nations Document CRC/C/93/Add.2, para.11. Syria also made a reservation to Article 2 of the CRC on the general equality clause. The Second Report of Syria explains that it refers to the “right of inheritance and marriageable age, which matters are regulated by the Personal Status Code on the basis of the authoritative texts of the Islamic Shar`iah and Islamic Jurisprudence (Fiqh) in their capacity as the principle sources of law”. Ibid., para.35.}

The only remaining Islamic State that has made a specific reservation to Article 14 of CRC is the United Arab Emirates (UAE). In fact, the reservation made
by UAE covers Articles 7, 14, 17 and 21 of the CRC. In its reservation to Article 14, the UAE states that it “shall be bound by the tenor of this article to the extent that it does not conflict with the principles and provisions of Islamic law.”

In common with most of the Islamic States considered above, Islamic law occupies a fundamental place in the hierarchy of laws under the UAE Constitution. Article 7 of the Constitution declares that “Islam is the official religion of the Union. The Islamic Shar`iah shall be a main source of legislation in the Union.” The fact that Shar`iah is mentioned as “a” main source of law in the Constitution has generated much debate, especially given the ambiguity in the language. Does it mean that Shar`iah is one of many “main sources” of legislation or does it amount to declaring the paramountcy of Islamic law within the constitutional framework of UAE? The Supreme Court of UAE has responded to this in two landmark cases that appear to establish an unusual interpretation of the rule of constitutional supremacy.

The first case concerned the legitimacy of bank interest. Under Shar`iah, ribā or interest on monies is prohibited, being declared as harām (forbidden) in the Qur’an. However, the Abu Dhabi Law of Civil Procedures (Local Law No.3/1970) allowed commercial banks to charge interest. In the first case filed by Junatta Bank, the First Instance Court of Abu Dhabi declared the charging of bank interest as ribā, and hence prohibited by Shar`iah, falling within the protection offered under Article 7 of the Constitution. On appeal, the matter came before the Federal Supreme Court which upheld the constitutionality of the law permitting the charging of bank interest on the basis that the law in question (Article 61 and 62 of the Abu Dhabi Law (Local Law No. 3/1970)) was protected under Article 148 of the Constitution which validated all laws promulgated previous to the coming into effect of the Constitution (unless a new law changes the status of the pre-Constitution law). Furthermore, the Supreme Court declared that the conformity or otherwise of laws to Shar`iah was “a

423 See online at http://www2.ohchr.org/english/bodies/ratification/11.htm [last visited: 10/01/2008].

matter of policy” that was not for the judiciary to decide. In effect, what the Supreme Court did was to avoid a battle on the constitutionality of a Shar‘iah-based claim on bank interest and, instead, used a legal technicality to by-pass a decision on the compatibility of the law on interest with Shari‘ah. Nevertheless, it set a bold judicial precedent in terms of using the courts to sidestep matters regulated by religious law, without actually overriding a rule based in Shari‘ah.

The second case took a more acute form since it dealt with the criminal law of Shar‘iah concerning the hudūd (penal limitations of Shar‘iah) punishment on alcohol consumption. Under Shar‘iah, consumption of alcohol is once again harām and attracts hudūd punishment of 80 lashes. The Abu Dhabi Alcoholic Drinks Law (Local Law No.8/1976) prescribed imprisonment and fines as a punishment for alcohol consumption instead of the hudūd punishment. In a surprising twist compared to the Junatta Bank case, the Supreme Court declared that the Abu Dhabi law on drinking did not violate the Shar‘iah law concerning hudūd punishment. At the same time, it was noted that the law did not infringe Article 7 of the Constitution since it merely prescribed a ta‘zīr punishment (discretionary punishments under Shar‘iah) and it was within the powers of the legislature to determine the nature of ta‘zīr punishment. Hence, there was nothing that prevented the State from applying a Shar‘iah punishment. More importantly, the Court declared in no uncertain terms that Article 7 of the Constitution, when read with Article 75 of the Federal Law No. 10/1973 (the law setting up the Federal Supreme Court), gives Shar‘iah a “paramount position that makes it prevail over other sources of law.”

Referring to Article 75 of the Federal Law No. 10/1973, W.M Ballantyne observes that

425 “Application for the Federal Supreme Court Interpretation No. 14 Year 9, decided on 28/6/1981” (Junatta Bank Case) above n 424, 237.


although we here have a Constitution which recognized the Shar`iah as a principal source of law, we have a Law setting up the Supreme Court of the land which appears to be providing that the Shar`iah shall be the principal source, because by its terms any measures which are contrary to the Shar`iah would seem by express provision to be invalid.\footnote{WM Ballantyne, “The States of the GCC: Sources of Law, the Shari`a and the extent to which it applies” (1985-1986) 1 Arab Law Quarterly 11-12.}

In any other country, the Federal Law would have plainly been declared to be \textit{ultra vires} the Constitution as it mandates the Supreme Court to refer only to Shar`iah as the highest law, when the Constitution makes Shar`iah merely \textit{one} of the many “main sources” of law. However, it is a peculiar legal tradition of the Arab and Muslim world that often such constitutional principles have a delicate, nuanced application that is carefully crafted in order not to infringe a clear Shar`iah jurisdiction. Al-Muhairi describes them as the peculiar “general principles of Arab jurisprudence”. As he explains

Arab jurisprudence classifies legislation into several types, such as the Constitution, ordinary laws, laws by decrees and decrees. As such, making the Shar`iah a main source of legislation implies that all legislation including the Constitution itself shall conform to the dictates of Shar`iah, failure to do rendering any legislation null and void.\footnote{Butti Sultan Butti Ali Al-Muhairi above n 424, 230.}

Thus, it may be noted that the paramount position of Shari`ah in the federal system of the UAE is firmly established. As a result, it is not surprising that Islamic law plays a central role in the affairs of the UAE, including its international obligations.

The UAE Constitution also follows the general rules of Shari`ah when it comes to the issue of freedom of religion. Article 32 of the Constitution guarantees “freedom to exercise religious worship”\footnote{See Dr. Mohamed A. Al Roken “Human Rights Under the Constitution of the United Arab Emirates: Guarantees and Restrictions” (1997) 12 Arab Law Quarterly 91.} subject to public order and public
morality. These two limitations are often interpreted as legislative checks “to protect society against ideas incompatible with Islam”.431 This aspect is further reinforced by the Federal Penal Code (1987), Article 1 of which creates a clear mandate for the application of Shar`iah in matters of ḥudūd - apostasy being one of the offences that come within ḥudūd.432 At the same time, Article 317 of the Code makes it a criminal offence to proselytise and attempt to convert Muslims.433

The impact of this policy is also manifested in the education system. All schools in the UAE are required to provide Islamic studies to Muslim students, while non-Muslim children are exempt from attending these classes. As observed by the International Religious Freedom Report

religious instruction in non-Muslim religions is not permitted in public schools; however, religious groups may conduct religious instruction for their members on their religious compounds. According to the law, private schools found teaching subjects that contravene Islam, defame any religion, or contravene the nation’s ethics and beliefs may face penalties, including closure.434

Thus, it is evident that through the use of twin policies - separate religious education and proscription on proselytising - the UAE has effectively institutionalised the parental obligation to education Muslim children according to Islam and redefined “freedom of religion” of the child within distinct Islamic traditions. Although such limitations may be deemed to go against the principles enshrined in Article 14 of the CRC, they seem to find abundant legitimacy in the


432 Article 1 of the Federal Penal Code states, “In crimes of doctrinal Punishment (Hudud), Retaliation (Qisas), and blood money (Diya), the provisions of Islamic Shari`a shall be applied. The crimes and disciplinary punishments (Ta`azir) shall be determined according to the provisions of this Code and other criminal statutes.”, Butti Sultan Butti Ali Al-Muhairi, “The Incompatibility of the Penal Code with Shari`a” (1997) 12 Arab Law Quarterly 307.

433 Dr. Mohamed A. Al Roken above n 431, 97.

UAE legal system because of their strong basis in Islamic law. The legality of these laws is reaffirmed by the golden thread of Shar`iah that runs through all legislation. It may therefore be noted that the UAE reservation to Article 14, just as all the other Shari`ah-based reservations to Article 14 considered above, advances the Shari`ah-defence in order to redefine, though not to deny, a child’s freedom of religion.435

4.2.5.3 (iv) Islamic States that have made general reservations to CRC

Besides the category of specific Shari`ah-based reservations, eight Islamic States - Afghanistan, Djibouti, the Islamic Republic of Iran, Kuwait, Mauritania, Pakistan, Qatar, Saudi Arabia and Tunisia - have formulated general reservations that seemingly apply to all the provisions of the Convention. It may be observed at the outset that the generality of these reservations creates an inbuilt ambiguity making it difficult to locate their scope and effect with any sense of precision. Therefore, for the present purposes, the examination of these eight reservations will be confined to a study of their scope and effect in the context of Article 14 of the CRC.

A classic example of a Shari`ah-based general reservation is that formulated by Afghanistan. From the text of the reservation it is clear that the Afghan reservation is made to protect a Shari`ah interest. Afghanistan’s reservation applies to “all provisions of the Convention that are incompatible with the laws of Islamic Shar`iah and the local legislation in effect.”436 This statement, although to an extent self-explanatory, does not help in elucidating what provisions of the CRC are considered to be in conflict with which aspects of Islamic law as applied in Afghanistan.


436 See online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm>[last visited: 10.01.2008].
Consequently, it gives rise to considerable ambiguity both as to the scope of the reservation itself and the extent to which the CRC may be implemented in the country. This ambiguity is further exacerbated by the fact that to date Afghanistan has not submitted a country report that might perhaps explain these lacunae. Nevertheless, in order to understand this reservation and its possible impacts on the right to freedom of religion of the child under Article 14 of CRC, I will examine it in the context of the associated principles in the new Afghan constitution and the prevailing laws that are applicable in the area.

Like most Islamic States examined in the present study, the Afghan Constitution also recognizes in Article 2 paragraph (1) that “the religion of the State... is the sacred religion of Islam”. The same article also guarantees that the “followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law”. Under Article 6 of the Afghan Constitution, the State is obligated to protect human dignity and human rights while Article 7 declares that the “State shall abide by the United Nations Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of human rights.”

A cursory reading of Article 2 and Article 7 paragraph (1) and the Afghan reservation suggests an apparent conflict arising from the Constitution itself, as far as Article 14 of the CRC and Islamic law are concerned. This conflict is even more glaring in the light of Article 3 of the Afghan Constitution which proclaims that “no law can be contrary to the beliefs and provisions of the sacred religion of Islam”.

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438 Above n 437.

439 Article 6 and Article 7 paragraph (1), respectively, of Constitution of Afghanistan above n 437. In the context of Article 18 ICCPR (which is in many respects a precursor to Article 14 of CRC), it may be noted that Afghanistan ratified it in 1983 without a reservation.
If we start from the premise that freedom of religion (as in Article 14 paragraph (1) in particular) is incompatible with the classic Shari‘ah rule on apostasy, then we are indeed faced with a distinct constitutional problem: on the one hand, the Shari‘ah position is protected by Article 3 of the Constitution which stipulates that *no law* can be contrary to Islamic law while, on the other, the right to freedom of religion is equally protected, one may presume, under Article 7 of the Constitution. In effect, a combined reading of Articles 2 and 3 alongside Article 7 paragraph (1) of the Afghan Constitution seems to present a unique illustration of two opposing strands of thought being *somehow* glued together, revealing the strong pressures (from the West, in particular, via think-tanks such as the RAND Corporation of the United States and the Muslim clerics in the Constitutional Loya Jirga) that went into the making of the Constitution.440

It may be posited that since Article 7 of the Constitution obligates the State to abide by all international treaties it has ratified and to follow the UN Charter and the UDHR, there can be no real conflict with Article 14 of CRC, since freedom of religion is already included in Article 1 paragraph (3) of the UN Charter, Article 18 of the UDHR and Article 18 of ICCPR, the latter having been ratified by Afghanistan without a reservation in 1983. However, to get a clearer picture of what the constitutional design really adds up to in the context of freedom of religion, we need to read Articles 2, 3, 121, 130 and 149 together with Article 7 of the Afghan Constitution. Under Article 121, the Supreme Court can interpret all laws, including international treaties ratified by Afghanistan, in accordance with the “law”, thereby suggesting that the judges may use Article 3 as a claw-back clause even in relation to international treaties. Moreover, under Article 149 all constitutional provisions relating to “fundamentals of the sacred law of Islam” are unamendable. It is left to the discretion of the judges to decide what constitutes these fundamentals, since the

Constitution does not define them. Therefore, it may be submitted that such a combined reading of Articles 3, 7, 121, 130 paragraph (1) and Article 149 fortifies the position of Shar’iah throughout the domestic legal structure. These provisions have the overall effect of establishing the supremacy of Islamic law in Afghanistan.

When we apply this peculiar constitutional position to Afghan practice vis-à-vis international human rights treaties, Article 7 of the Constitution may suggest that it is obligatory on the State to “abide” by the UDHR and any other international treaties to which Afghanistan has become a party, thereby making it mandatory on the State to give full recognition to the right to freedom of religion. Both the UDHR and the ICCPR clearly espouse freedom of religion, including not just the right to free exercise of faith and to perform religious rites as provided by Article 2 of the Afghan Constitution, but also the right to proselytise and the right to choose a religion. The fact that Afghanistan did not submit any reservation to Article 18 of the ICCPR dealing with freedom of religion makes it even more incumbent on Afghanistan to recognize this right in equal measure in the domestic legal system. This would require that the freedom of worship included in Article 2 of the Constitution must be read harmoniously with these international human rights obligations.

This is the interpretation of the constitutional position when Articles 6 and 7 are read in isolation from the rest of the constitutional design. However, when we

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441 Article 121 of the Afghanistan Constitution states that, “the Supreme Court upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law.” Article 130 paragraph (1) states that “when there is no provision in the Constitution or other laws regarding ruling on an issue, the courts’ decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.” Article 149 paragraph (1) states that, “the provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended.”

442 As a caveat, it may be noted here that Afghanistan ratified ICCPR in 1983, during the Soviet occupation and the regime that ratified ICCPR is widely held to be unrepresentative of the Afghan people. The significance of this aspect is brought to light by the inclusion of the provisions on Islamic law in the new Afghan Constitution and in the Afghan reservation submitted to CRC that is also based on Shar’iah. In some ways, this indicates a change of policy direction that has taken shape in Afghanistan since its liberation from Soviet occupation.
add Article 3 to this interpretation, it becomes quite clear that Islamic law is supreme in all cases. This policy feature of the Afghanistan Constitution was revealed in the recent controversial apostasy case relating to the conversion to Christianity of Abdul Rahman. There is no provision in the penal code of Afghanistan dealing with apostasy nor is it included in any other legislation as a crime. Yet the courts are empowered under Article 130 of the Constitution to refer to the Hanafi jurisprudence as a residuary law. Abdul Rahman was charged and was tried by the courts in pursuance of the inherent powers derived under Article 130 of the Constitution. Although the case did not result in a judgment, it nonetheless brought to the forefront of legal debate the position of the constitutional guarantee of freedom of worship.

Hence, it may be surmised that the supremacy of Islamic law in the Afghan legal system will inevitably play a strong role in any interpretation of its general reservation to CRC. Although the reservation was formulated almost ten years before the new Constitution came into being, the design of this new Constitution not only appears to support the reservation but also reinforces the policy of the supremacy of Shari`ah, even in the case of international treaties.

Furthermore, it is worth noting that the general reservation of Afghanistan also affects paragraph (2) of Article 14 of CRC. The educational policy of Afghanistan is deeply rooted in inculcating Islamic education to all the children, an aspect that is constitutionally mandated to be incorporated in the school curricula. Article 45 of the Constitution declares that

the state shall devise and implement a unified educational curriculum based on the provisions of the sacred religion of Islam, national culture, and in accordance with academic principles, and develops the curriculum of religious subjects on the basis of the Islamic sects existing in Afghanistan.\footnote{Also see Article 17 of the Constitution, “The state shall adopt necessary measures for promotion of education in all levels, development of religious education, organizing and improving the conditions of mosques, madrasas and religious centers.”}

The Constitution also requires the State to support the development of the Afghan family in accordance with Islamic principles.\footnote{Article 54 states, “Family is a fundamental unit of society and is supported by the state. The state adopts necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing of children and elimination of traditions contrary to the principles of sacred religion of Islam.”} In short, therefore, the right of the child to freedom of religion is circumscribed by clear constitutional provisions that uphold the supremacy of Islamic law in the area of freedom of religion. In this respect, the general reservation of Afghanistan may also be deemed to apply to Article 21 of the CRC concerning adoption. Since adoption does not have any legal status in Islamic law, to that extent the Afghan reservation may be held to be applicable to Article 21. However, this would not clarify the Afghan position on the system of kafālah that is implemented as an alternative mechanism in many other Islamic countries.

The Djiboutian reservation\footnote{It is formally described by Djibouti as a “declaration”, though, for the present purposes it shall be treated as a reservation. See online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 10.01.2008].} presents a different type of a Shari`ah-based general reservation that does not make any particular reference to Islam. The reservation asserts that the State of Djibouti will not be “bound by any provisions or articles that are incompatible with its religion and its traditional values”.\footnote{Above n 446. Since the general direction of this “declaration” is for all practical purposes, to modify the content of CRC by not accepting to implement any provision of the Convention that is “incompatible” with the religion and traditions of Djibouti, it will be treated in the category of a general reservation, for the purposes of the present study.} So it is clear from the Djiboutian reservation is that it does not accept any provision of the
CRC that conflicts with Djibouti’s “religion” and “traditional values”. However, it is not clear which provisions of the CRC are incompatible with which religious principles and traditional values of Djibouti. Moreover, the reservation merely refers to the “religion” of Djibouti without specifying any particular religion. Over 94 per cent of the Djiboutian population are Muslims, while six per cent are Christians.\footnote{Djibouti-The CIA World Factbook. Available online at: \url{https://www.cia.gov/cia/publications/factbook/geos/dj.html} [last visited: 08/09/2006].} The text of the reservation does not indicate whether the reference is to Christianity or Islam or to both these religions.

It may be \textit{assumed} that “religion” in this context refers to Islam given the fact that the very first sentence of the Preamble of the Djiboutian Constitution 1992 declares Islam as the religion of the State.\footnote{Constitution of Djibouti 1992 see online at: \url{http://www.presidence.dj/page611.html} [last visited: 08.09.2006].} However, the same Preamble also makes the human rights contained in the UDHR and the African Charter on Human and Peoples’ Rights integral parts of the Constitution. This is in many respects similar to Article 7 of the Afghan Constitution, in the sense that both these provisions aim at combining Islamic particularism and universal human rights. The specific inclusion of the UDHR may be considered significant for present purposes, bearing in mind the connection between Article 18 of the UDHR and Article 14 paragraph (1) of CRC. Article 1 of the Constitution guarantees “equality of all citizens before the law, without distinction as to origin, race, sex or religion”.\footnote{Article 1 of the Constitution states, “L’État de Djibouti est une République démocratique, souveraine, une et indivisible. Il assure à tous l’égalité devant la loi sans distinction de langue, d’origine, de race, de sexe ou de religion. Il respecte toutes les croyances. Sa devise est “Unité-Egalité-Paix”. Son principe est le gouvernement du peuple, par le peuple et pour le peuple. Ses langues officielles sont: l’arabe et le français (emphasis added).” See online at: \url{http://www.presidence.dj/page611.html} [last visited: 08.09.2006].} At the same time, Article 11 of the Constitution declares that “everyone shall have the right to freedom
of thought conscience, religion, worship and opinion in conformity with the order established by law and the regulations”.

The inclusion of the UDHR and the African Charter seems to provide a wide range of human rights in the Djiboutian constitutional context. However, the claw-back clause of Article 11 potentially contradicts such a reading. It is questionable whether the “order established by law and regulations” (Article 11) also limits universal human rights norms that are made an integral part of the Constitution. In other words, can an “integral” part of the Constitution (such as Article 18 of the UDHR by virtue of the preambular declaration) be restricted by “laws” that derive their authority from the Constitution?

The general reservation made by Djibouti is merely premised on perceived incompatibilities between CRC and Djiboutian religion and traditional values while making no reference to the constitutional limitations allowed on this right. Since universal human rights (i.e., UDHR) are considered an integral part of the Constitution, and at the same time, Islam is declared the State religion, the constitutional design appears to suggest that it gives equal consideration to the rules of Islamic law and the norms of universal human rights. Moreover, unlike the constitutions of many Islamic States such as Afghanistan, the Constitution of Djibouti is silent on the issue of Islamic law - Shari`ah has no constitutional role in the legal system of Djibouti.

Since there is no constitutional status for Shari`ah and in the light of the constitutional recognition and guarantees of universal human rights, how can the

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451 Article 11 of the Constitution states, “Toute personne a droit à la liberté de pensée, de conscience, de religion, de culte et d'opinion dans le respect de l'ordre établi par la loi et les règlements.” Above n 450.

452 A similar norm is included in Article 8 of the African Charter on Human and Peoples’ Rights (1981) that states, “Freedom of conscience, the profession and free practice of religion, shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms (emphasis added).”
Djiboutian reservation be considered as Shari`ah-based? The Preamble of the Constitution does not specify which provisions of the UDHR are integral to it. In the absence of such a qualifying limitation in the Constitution, can we then take it for granted that the Djiboutian Constitution in fact accepts all the universal human right in the UDHR including, of course, Article 18 of UDHR on freedom of religion? If that is the case, the Djiboutian reservation itself may be considered unconstitutional since it restricts UDHR-based rights.

The Initial Report of Djibouti to the CRC Committee perhaps gives some insight into resolving this particular problem. The Report explains that “…almost the whole population of the country [Djibouti] is made up of Muslims. Therefore Muslim religious values are integral to public policy in Djibouti and must be respected by both Government and citizens.”\(^\text{453}\) The underlying argument is that the government and the citizens are, in the first instance, subject to the principles of Islamic law – indicating thereby that the Constitution itself is subject to such an interpretation. In many respects, this is reminiscent of what Al-Muhairei has noted as the peculiar “general principles of Arab jurisprudence”.\(^\text{454}\) In effect, this means that there are two different and conflicting readings on the position of Shar`iah within the Djiboutian legal system. On the one hand, as represented in a literal interpretation of the text of the Constitution, principles of Islam appear to stand on an equal footing with universal norms of human rights, without any perceived incompatibility. The fact that Djibouti does not have legislation that particularly proscribes proselytising and, as noted by the International Religious Freedom Report, the Government of Djibouti’s apparent laissez-faire approach to matters of religion indicate this stance.\(^\text{455}\) On the other hand, the Djiboutian reservation to CRC takes a different


\(^{454}\) If one were to apply the doctrine of “general principles of Arab jurisprudence” that Al-Muhairei refers to, Shar`iah trumps any and all provisions of constitutional law. See Butti Sultan Butti Ali Al-Muhairei above n 424, 230.

position by apparently positing that Islamic rules and traditional values actually trump human rights norms, even though such norms may have constitutional protection. The Initial Report of Djibouti seems to support the latter position.

These two conflicting positions become even more complex to understand in view of the fact that Djibouti acceded to the ICCPR in 2002 without any reservations, even though Article 18 of ICCPR contains a right to freedom of religion that is far wider in scope than Article 14 of CRC. It is difficult to trace a cohesive State policy on reservations or, for that matter, on the issue of Shar‘iah compatibility or otherwise as a qualifying standard in matters related to Djibouti’s international treaty practice. Still, the Initial Report of Djibouti argues for an exceptionist position by citing

the Code of Personal Status [which] contains the principle that any legitimate child of a Muslim father belongs to the Muslim religion. Mindful of the inherent physical and moral vulnerability of children, the Government recalls these principles to protect children against forms of indoctrination.456

Indeed, the Family Code457 of Djibouti, which is predominantly derived from and based on principles of Islamic law, provides that the child is recognized by the faith of his/her father.458 This is certainly contrary to the freedom of religion requirement not only of Article 14 of CRC but also the far wider right included under Article 18 of ICCPR.

A possible interpretation is that the Djiboutian reservation applies not only to Article 14 of CRC but also to Article 21. The Initial Report actually discussed the

456 Initial Report of Djibouti above n 450, para.44 (parenthesis added).
457 Code de la Famille (Law Number 152/AN/02/4eme L) came into effect in 2004. See online at: <http://www.presidence.dj/LES%20TEXTES/loi152.02.htm> [last visited: 08.09.2006]
458 See Article 23 (provides that a Muslim woman can marry only a Muslim man); Article 69 (a legal guardian in charge of child custody cannot impose a religion on the child that is different from the religion of his/her father) and Article 171 (limits the freedoms of the child to the rights of the parents). Code de la Famille (Law Number 152/AN/02/4eme L) above n 454.
question of adoption and explains the Djiboutian position in a distinctly Islamic framework. The Report noted that

full adoption, where links of filiation with the adoptive family are created by placing the adopted child in the same legal situation as a legitimate child, does not exist in Djibouti. This institution is not, in fact, permitted by Muslim law.459

It may, therefore, be concluded that the Djiboutian claim of excluding provisions that are incompatible with its “religion and traditional values” is in effect a reference to excluding Articles 14 and 21 of the CRC. In both these provisions, the reasons for the incompatibility can be be traced to Islamic law. Nevertheless, both the text of the reservation and the Initial Report seem to suggest an element of reluctance on the part of Djibouti to clearly identify this incompatibility claim to a conflict between the CRC and Islamic law. The fact that Djibouti did not submit any reservation to ICCPR, which it ratified in 2002 almost twelve years after its accession to CRC, lends more credence to this particular feature of its foreign policy. Djibouti acceded to CRC during the regime of President Hassan Gouled Aptidon, who had maintained a single party authoritarian State since independence. The different directions in the reservations policy of Djibouti from that of 1990, when it acceded to CRC, and 2002 when it acceded to both the ICCPR and ICESCR without any reservations, may partly be explained by the changes in domestic politics. The new President Ismail Omar Guelleh opened up the Djiboutian political system by creating more space for opposition parties to integrate and voice opinions. The new regime consisted largely of “younger technocrats, most of whom [were] educated in France since independence [in 1977]”.460 Added to this, the close nexus that Djibouti has established with the United States in the form of a strategic alliance under the “war on terrorism” policy may also suggest this change in direction of its foreign policy. The sudden accession to ICCPR and ICESCR in 2002, without any reservation, may perhaps be linked to an effort to project a human rights friendly outlook in the face of the close ties that were established with the United States.

459 Above n 453 para.62.

President Guelleh’s efforts to thwart the growth of “Islamist” opposition in the country may also be seen as a concerted policy effort in this direction. The combined effect of all these factors, perhaps, is to downgrade the political significance of Islamic law in foreign policy on the one hand, while retaining the primacy of Islamic law in matters relating to personal law as seen in the case of the Family Code.

This change in direction of government policy may also be evident in the response given by the Djiboutian delegate to the CRC Committee’s question regarding the withdrawal of the reservation. The Djiboutian delegate explained that his country’s “declaration” to CRC was of a “much softer tone than that of [a] reservation statement”, and more strikingly, went on to state that, despite the reservation, Djibouti “did not support traditional or religious values which were not consistent with the Convention”. The delegate also added that the matter of withdrawal of the Djiboutian reservation would be submitted to the government for consideration. As things stand, Djibouti applies a two-pronged policy in relation to Islamic law and reservations to human rights treaties. In the case of domestic law such as the Family Code, Islamic law seems to trump even though there are strong indications, including the constitutional provisions noted above, that universal human rights occupy a prominent position in its legal system and foreign policy.

The general reservation to CRC formulated by the Islamic Republic of Iran offers far more clarity as regards its connection to Shari`ah as implemented in the domestic legal system. According to the Iranian reservation, it “reserves the right not to apply any provisions or articles of the Convention that are incompatible with


Islamic Laws and the international legislation in effect.” Understandably, the reference to “Islamic law” is made in the context of apparent conflicts between certain provisions of the CRC and Shari`ah. But the reference to “international legislation in effect” in the reservation is difficult to understand. Which “international legislation” might be regarded as incompatible with the CRC? It gets even harder to comprehend when we consider that Iran had ratified both the ICCPR and ICESCR in June 1975 (prior to the Islamic Revolution) without any reservations. These two international human rights instruments have made crucial contributions to the development of many of the rights included in the CRC. By virtue of Iran’s ratification of the two Covenants without a reservation, it is bound to implement all the rights contained in them. Therefore, it may be argued that the CRC rights are perfectly in line with the international human rights obligations already undertaken by Iran. That being the case, does the reference to “international legislation in effect” include these two human rights regimes? Iranian country reports do not clarify this vague reservation, casting a long shadow of uncertainty over the scope and impact of its reservation - unless of course “international legislation in effect” is a reference to the two Islamic human rights declarations i.e., UIDHR and the Cairo Declaration. However, such a presumption would seem to be wide of the mark since the two Covenants cited above are, in every sense, “international legislation in effect” in Iran.

The underlying justification of the Iranian reservation, of course, is the perceived incompatibility of the CRC and Islamic law. By the same token, it is also a reflection of the preeminent position given to Shari`ah in the legal system of the Islamic Republic. This is emphasized in the first sentence of the Preamble to the Iranian Constitution (1979) when it proclaims that the Constitution of the Islamic Republic of Iran “advances cultural, social, political, and economic institutions of Iranian society based on Islamic principles and norms.” The lengthy Preamble also explains that “legislation setting forth regulations for the administration of

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463 See online at: [http://www2.ohchr.org/english/bodies/ratification/11.htm#N13](http://www2.ohchr.org/english/bodies/ratification/11.htm#N13) [last visited: 18/01/2008].

society will revolve around the Koran and the Sunnah." Thus, all spheres of the State are bound by Islamic laws, be it the executive, the judiciary or the legislature. This principle is established in Article 4 of the Constitution

all civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the wise persons of the Guardian Council are judges in this matter.officially, Iran is a Shi’a Islamic State and the legislative powers of the Islamic Consultative Assembly (parliament) are circumscribed by this particular understanding of Islamic law. Article 72 of the Constitution declares that “the Islamic Consultative Assembly cannot enact laws contrary to the official religion of the country or to the Constitution.” In consequence all laws, including international laws, implemented in Iran are filtered to make them compliant with the “official religion”.

Although the Iranian reservation does not indicate any specific provision of the CRC that it believes to possibly contradict a rule of Islamic law, for the purposes of the present examination of Article 14 of the CRC I shall place it in the context of the freedom of religion of the child. As far as Article 14 is concerned, the Iranian Constitution and the other domestic laws protect the state religion of Islam. There is no explicit right to freedom of religion in the Iranian Constitution. Regarding

465 Above n 464 (emphasis added).

466 Above n 464 (emphasis added).

467 It may also be recalled that the Iranian Islam is the Shi’a Islam as opposed to Sunni Islam in most of the Islamic states discussed above. Article 12 of the Iranian Constitution proclaims that “the official religion of Iran is Islam and the Twelver Ja’farī School, and this principle will remain eternally immutable. Other Islamic schools are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites.” See Constitution of Iran above n 464.

468 Treaties signed by the President (under Article 125 of the Constitution) require acceptance by parliament in order to become law. Article 77 states that, “International treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly.”
freedom of belief, Article 23 of the Constitution states that “the investigation of individuals’ beliefs is forbidden, and no one may be molested or taken to task simply for holding a certain belief”. The Constitution recognizes as minorities, only Zoroastrian, Jewish and Christian Iranians. Article 13 gives these three religious minorities the freedom to “perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education” within the limits of the law. This concept of religious freedom is framed within the larger obligation of the Iranian State to “treat non-Muslims in conformity with ethical norms and principles of Islamic justice and equity, and to respect their human rights.”

The main limitation placed on this freedom (the Iranian version of freedom of religion) is contained in the phrase “ethical norms and principles of Islamic justice and equity”. This is similar to Article 4 of the Constitution requiring all laws to be consistent with “Islamic criteria”. Furthermore, according to Article 14 of the Constitution, only persons (of the three official minorities) who “refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran” are entitled to the freedom to perform religious rites and ceremonies.

In many ways, Article 14 of the Iranian Constitution is based on the Shari`ah rules on capital punishment for apostasy. The Shari`ah concept of dhimmīs (rules concerning the protection of non-Muslims in an Islamic State) - developed in the

469 Article 14 of the Constitution of Iran states that, “Article 14 outlines the rights of non-Muslims, “In accordance with the sacred verse “God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes” [60:8], the government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and principles of Islamic justice and equity, and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran.” (emphasis added) For specific illustrations of the freedom to practice religion enjoyed by minorities in Iran see “Second Periodic Reports of States Parties due in 2001 – Islamic Republic of Iran” (1 December 2003) United Nations Document CRC/C/104/Add.3, paras.238 and 239.

470 It may be recalled that under the classic position of fiqh explained above, capital punishment is justified for apostasy on the argument that apostates conspire against the Islamic state. See Abdullah Saeed and Hassan Saeed, Freedom of Religion, Apostasy and Islam (Aldershot: Ashgate Publishing Limited, 2004) 51.
early Muslim communities - also appears to bear its mark in the manner in which freedom of religion is designed in Iranian constitutional policy. Indeed, even the selection of Christianity, Judaism and Zoroastrians as the officially recognized and protected minority religions is reminiscent of the Qur’anic recognition of the same three faiths as belonging to the Abrahamic monotheistic traditions. Such aspects of the Iranian legal system make it abundantly clear that the “freedom to perform religious rites and ceremonies” or the Iranian version of freedom of religion, is guided by and based on rules derived from Shar‘iah. Such a predominant position of Islamic law within the Iranian constitutional system is fortified by the permanent prohibition placed by the Constitution on any move to amend constitutional provisions relating to the “Islamic character of the political system” and the “rules and regulations [made] according to Islamic criteria”.

The Iranian law on freedom of religion of the child is also guided by these policy directives. According to the Iranian Civil Code, children take on the religion of their father while the Code makes it unlawful for Iranian Muslim women to marry non-Muslim men. These two aspects of the Iranian law (also two distinct features of the Shar‘iah-based personal law) move in tandem to ensure that every child born

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471 Dhimmīs denote all non-Muslims who live at peace with the Muslim state. According to the rules of Shar‘iah (mostly based on Sunnah derived from the ‘Constitution of Medina’) non-Muslims who wish to live in a Muslim state must pay jizya or a special tax that exempts them from military service. In return the Muslim state is obligated to protect the rights of the non-Muslim be it in matters of property, religious practice or other personal matters as long as there is no violation of a Shar‘iah law. See C.G. Weeramantry Islamic Jurisprudence: An International Perspective (London: The Macmillan Press, 1988) 86-88 and 90-91.

472 There is no consensus on the exact identity of the reference to Qur’anic term “Sabeans”. Some (as in the case of Iran) have associated them with Zoroastrians, while there are also suggestions that they may be Mandeans. See The Holy Qur’an – Text, Translation and Commentary Abdullah Yusuf Ali (trans.), New Revised Edition, (Brentwood: Amana Corporation, 1989) 33.

473 Article 177(5) of the Constitution of Iran states, “The contents of the articles of the Constitution related to the Islamic character of the political system; the basis of all the rules and regulations according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran; the democratic character of the government; the holy principle; the Imamate of Ummah; and the administration of the affairs of the country based on national referenda, official religion of Iran and the religious school are unalterable (emphasis added).”

to a Muslim father remains a Muslim, at least before the law. Thus the religion of the 
minor child is *predetermined by reference to the religion of the father* prior to any 
other consideration. Although the Civil Code is silent on the issue of apostasy, the 
Iranian judiciary appears to have adopted the Shar’i ah rule on capital punishment.475

However, recent amendments to the Penal Code have resulted in improving the 
position of capital punishment for minors by raising the age limit, even though the 
new age specified for capital punishment is still below the age of majority prescribed 
by CRC.476

There is little doubt that the Iranian law relating to freedom of religion of the 
child is contrary to the provisions of Article 14 paragraph (3) of CRC. The CRC 
Committee has repeatedly pointed out this contradiction477 recommending that

the State party make every effort to enact or rescind, where

necessary, legislation to prohibit any such discrimination, and take

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and Labour, U.S.A. 2005) online at: <http://www.state.gov/g/drl/rls/irf/2005/51599.htm> [last 
visited: 18.09.2006].

476 See “Committee on the Rights of the Child - Thirty-eighth session; Summary Record of the 1016th 
para.58.

477 For example, in the Concluding Observations to the Initial Report of Iran, the Committee noted its 
concern “at the restrictions on the freed of religion, and that restrictions on the freedom to manifest 
one’s religion do not comply with the requirements outlined in article 14, paragraph 3.” “Concluding 
Observations of the Committee on the Rights of the Child: Islamic Republic of Iran” (28 June 2000) 
*United Nations Document CRC/C/15/Add.123*, para.35. Also referring to the Second Periodic Report 
of Iran, the Committee recommended that, “the State party take effective measures, including enacting 
or rescinding legislation, to prevent and eliminate discrimination on the grounds of religion or belief 
and ensure that members of minority religions are not imprisoned or otherwise ill-treated on account 
of their religion and that access to education for their children is provided on an equal footing with 
others.” “Concluding Observations of the Committee on the Rights of the Child: Islamic Republic of 
Iran” (31 March 2005) *United Nations Document CRC/C/15/Add.254*, para.42. The main concern of 
the Committee appears to be the freedom of religion of the unrecognized minorities, in particular the 
situation of the Baha’i community. The Iranian law does not recognize Baha’is as a religion and 
instead it is classified as a political movement loyal to the Shah’s regime. However, this has been 
condemned by most international human rights treaties bodies to which Iran has submitted country 
reports. It is also noted in the Report of the Special Rapporteur on Religious Freedom which has 
recommended the recognition of Baha’i as a religious community with the full constitutional rights 
etitled thereto. See, “Implementation of the Declaration on the Elimination of All Forms of 
Intolerance and of Discrimination based on Religion or Belief – Report submitted by Mr. Abdelfattah 
Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1995/23; 
Addendum – Visit by the Special Rapporteur to the Islamic Republic of Iran” *United Nations 
all appropriate measures, including public education campaigns, to combat intolerance on the grounds of religion or other belief. 478

Implementation of this recommendation will require amendment of the existing Iranian law on religious freedom. Such a project may be constitutionally unachievable since Articles 177(5) and 72 of the Iranian Constitution proscribe any amendment of the constitutional provisions relating to its “Islamic character” and “Islamic criteria”. The legislative ability of the Islamic Consultative Assembly (Iranian legislature) is also restricted when it comes making laws contrary to the “official religion” of the country.

The Committee has attributed this contradiction to “narrow interpretations of Islamic texts by State authorities” which impede the enjoyment of the rights protected under the CRC. 479 It has rightly pointed out that the “vaguely worded limitation clauses” of the Iranian reservation and the law (e.g., the proviso, “in accordance with Islamic criteria” in Article 4 of the Constitution which applies literally to every single Iranian law) have the potential for being misused with impunity and create opportunities for exceeding the permitted restrictions on CRC rights. 480 The main difficulty noted in the Committee recommendation is the interpretation of the phrase “Islamic criteria”. Neither the Iranian Constitution nor the country reports submitted to the Committee defines this phrase. There is an immediate necessity to clarify the legal parameters within which this phrase operates. The Committee has further recommended that, “the State party establish clear criteria to assess whether a given action or expression is in accordance with interpretations of Islamic texts.” 481 In its observations on the Initial Report of Iran, the Committee


479 Above n 478 para.6.

480 Above n 478 para.33. This has also been referred to in the Concluding Observations to the Second Report of Iran. See “Concluding Observations of the Committee on the Rights of the Child: Islamic Republic of Iran” (31 March 2005) CRC/C/15/Add.254, paras.39-40.

481 Above n 478 para.34 (emphasis added).
further suggested that Iran should “consider the practices of other States that have been successful in reconciling fundamental rights with Islamic texts”.  

While it is clear that the Iranian position on freedom of religion of the child is contrary to the stipulations of Article 14 of CRC, State practice in this area shows some level of mobility in accommodating CRC concerns. An indication is the introduction of the new Bill on the Establishment of Juvenile Courts that aims to abolish the death penalty for persons younger than 18 years. Will such accommodation extend to hard cases such as the laws concerning freedom of religion? It is difficult to imagine a complete overhaul of any strongly Shari`ah-entrenched rule just to accommodate an international human rights obligation - one to which the State has even made a reservation.

As has been seen from the general practice of Islamic States when it comes to issues related to Shar`iah, any review or revision may be best achieved through an internal process and not one dictated from outside. It is also important to understand that demands for harmonising CRC rights and Iranian law must take into consideration the fact that normative standards clearly based in the Qur`an and the Sunnah can only accommodate a certain threshold of hermeneutic change (e.g., it is unrealistic to presume that the adoption of children, inheritance and absolute freedom of religion of the child could simply be incorporated into the law). It is plausible to think that the official recognition of minority religions may change to add others (for instance, Baha`is) since such an endeavour would not go against the fundamental tenets of Shar`iah. However, it is quite improbable to expect the Islamic Republic to

482 Above n 478 para.22. The meaning and import of this particular reference is not clear from the Concluding Observations of the Committee. It is largely seen that most Islamic countries have raised objections through reservations, for instance, to Article 14 of the CRC. Does the suggestion of the Committee to Iran take into consideration these reservations on Article 14? However, the suggestion may be deemed to cover the issues pertaining to, for instance “adoption” under Article21 of CRC, where even the Islamic states that made a reservation, have developed the kaf‘alah system, to which the Committee also refers. Indeed, in its Second Periodic Report, Iran had mentioned the development of a similar system of adoption that is currently being implemented. Other examples of the issues that the suggestion may refer to may be Article 2 on equality and Article 9 on nationality.

483 Above n 480 para.8.
accept an absolute freedom of religion, unless a doctrinal resolution of the subject of apostasy is brought about through *ijtihād*. Be it freedom of religion under Article 14 of CRC or the case of adoption under Article 21, there is little doubt that Islamic law forms an indispensable element in the Iranian legal system. Consequently, any attempt to navigate human rights issues must necessarily come to terms with the rules of Sharʿiah. A dialogue between the two becomes indispensable. A starting point, in the case of CRC, would be a clarification and narrowing down of the general reservation submitted by Iran, followed by an explanation of the key phrase “Islamic criteria” and identification of the exact contradictions between particular rules of Sharʿiah and the relevant part of the Convention.

The general reservation submitted by Kuwait specifically applies to “all provisions of the Convention that are incompatible with the laws of Islamic Shariʿah and the local statutes in effect.” It is not clear whether this general reservation is modified by the two declarations that were added by Kuwait upon ratification. The first of these declarations refers to Article 7 of CRC dealing mainly with the nationality law of Kuwait, while the second declaration pertains to Article 21 and the Sharʿiah prohibition on adoption. Although the Initial Report of Kuwait refers to these two declarations as “reservations”, the CRC Committee seems to prefer to call them “declarations”. In scope and effect, the two declarations may at best be described as a particularisation of the general reservation made by Kuwait. Either way, these declarations are tantamount to reservations and shall be so treated for the purposes of the present study. However, calling it either a “reservation” or a

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484 See online at: [http://www2.ohchr.org/english/bodies/ratification/11.htm#N13](http://www2.ohchr.org/english/bodies/ratification/11.htm#N13) [last visited: 18.01.2008].

485 Declaration relating to Article 7 reads, “the State of Kuwait understands the concepts of this article to signify the right of the child who was born in Kuwait and whose parents are unknown (parentless) to be granted the Kuwaiti nationality as stipulated by the Kuwaiti Nationality Laws.” Declaration relating to Article 21 states that, “The State of Kuwait, as it adheres to the provisions of the Islamic Sharʿiah as the main source of legislation, strictly bans abandoning the Islamic religion and does not therefore approve adoption.” Above n 484.

“declaration” will have significantly different implications. For instance, if we presume the Kuwaiti reservation submitted at the time of signing the Convention to be still in place, by implication it would be applicable to all provisions of CRC, including Article 14. Alternatively, if we are to presume that the two declarations have the effect of modifying the original Kuwaiti reservation (made at the time of signing) and treat it as a replacement of the general reservation made by Kuwait, then such a change would exclude from the Kuwaiti reservation one of the most controversial areas of Shar`iah-based reservations to CRC, i.e., the freedom of religion of the child. This is perhaps one reason why the Initial Report of Kuwait has decided to treat the two “declarations” as reservations i.e., to retain its wider reservation in order to include even Article 14.

A close examination of the Kuwaiti legal system suggests the existence of several features that are similar to those found in most Islamic States. Like most Islamic States under study, the Kuwaiti Constitution also declares that the “religion of the State is Islam”. Islamic Shar’iah is “a main source of legislation.” On the point of freedom of religion, the Constitution declares in Article 35 that freedom of belief is absolute. The State protects the freedom of practising religion in accordance with established customs, provided that it does not conflict with public policy or morals.

Although freedom of belief is “absolute”, there are two important limitations placed on it, namely, “established customs” and “public policy or morals”. These limitations no doubt, refer to the Islamic way of life and Arabic customs. The Ministry of Justice of Kuwait has clarified the scope of Article 35 of the Constitution in a recent report

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487 Constitution of Kuwait (1962) online at: <http://www.oefre.unibe.ch/law/icl/ku00000_.html> [Last visited: 05.11.2006]. For an elaboration on the peculiar “general principles of Arab jurisprudence” wherein Shar’iah is treated as the highest law (higher than the constitution itself) of the land even when it is only “a” source of law see Butti Sultan Butti Ali Al-Muhairi, “The Position of Shari’a within the UAE Constitution and the Federal Supreme Court’s Application of the Constitutional Clause Concerning Shari’a” (1996) 11 Arab Law Quarterly 230.

488 Above n 487 (emphasis added).
when it [freedom of belief] goes outside the boundaries of inner feelings, the state protects the freedom of practising religion in accordance with established customs, provided that it does not conflict with public policy or morals. Religions mentioned here indicate the three divine religions: Islam, Christianity, and Judaism.\textsuperscript{489}

This explanation of freedom of belief closely follows the traditional exposition of the concept in Shar`iah. The two limitations that are mentioned in Article 35 may also be deemed to be a reference to the Islamic traditions of the Kuwaiti State and the status given to Shar`iah under Article 2 of its Constitution.\textsuperscript{490} As far as freedom of belief is concerned, “established customs” may well include the Shar`iah prohibition on proselytising by non-Muslims and its related concerns about apostasy. In fact, the Nationality Law (1959) of Kuwait is explicit on this point when it stipulates the following two indispensable requirements for acquiring nationality, namely, that

he [the candidate applying for naturalization] be an original Muslim by birth, or that he has converted according to the prescribed rules and procedures and that a period of at least five years has passed since he embraced Islam before the grant of naturalization.\textsuperscript{491}

Besides requiring that every applicant for naturalization be a Muslim, the law also entitles the State to \textit{denaturalize} the applicant on apostasy. It provides that

nationality thus acquired is ipso fact lost and the Decree of naturalization rendered void ab initio if the naturalized person expressly renounces Islam or if he behaves in such a manner as


\textsuperscript{490} Article 49 of the Constitution of Kuwait also makes compliance with similar limitations clause a national duty incumbent on every Kuwaiti resident. Article 49 declares that, “observance of public order and respect for public morals are a duty incumbent upon all inhabitants of Kuwait (emphasis added).”

clearly indicates his intention to abandon Islam. In any such case, the
nationality of any dependent of the apostate who had acquired it
upon naturalization of the apostate is also rendered void.492

Consequently, the “established customs” and “public policy”, in the context of
freedom of belief, are firmly based on Islamic legal traditions that interlink various
elements of the Kuwaiti legal system. Indeed, Islamic beliefs and principles of
Islamic Shar’iah have been characterised as “the primary source of legislation in the
State of Kuwait”. The Ministry of Justice of Kuwait explains that this feature of
Kuwaiti legal system “must be respected as a religious prerogative of Kuwait” and
adds that “under no circumstances it is acceptable to raise comments on its
provisions.” 493

The implications of such a legal framework for the freedom of religion of the
child under Article 14 of the CRC may, therefore, be seen in two important facets.
Firstly, it indicates that the legal recognition of freedom of religion is circumscribed
by limitations that are based on Shar’iah, by virtue of which the child may be
deemed to be incapable of exercising any right to change religion. Conversion or
apostasy of the minor would therefore be null and void. Secondly, the application of
Shar’iah law in personal law matters implies that the child retains the religion of the
Muslim father. Normative standards of Shari`ah relating to family are also
safeguarded in the Kuwaiti Personal Status Code (Law Number 51, 1984). Indeed,
Shari`ah-based family norms also appear to be protected in Article 9 of the
Constitution which declares “the family is the corner-stone of society. It is founded

492 Above n 491. These provisions of the Kuwaiti Nationality Law are held legal in spite of the
equality guarantees given in the Constitution under Article 29 paragraph (1) that says, “All people are
equal in human dignity and in public rights and duties before the law, without distinction to race,
origin, language or religion.”

Released by Democracy, Human Rights and Labour Office” (Kuwait: Ministry of Justice, The
Committee formed by Ministerial Resolution Number 93 of 2005 for Reviewing the Human Rights
Reports Released by the International Organisations and Agencies, 28 February 2005) 5 (emphasis
added). See online at: http://www.moj.gov.kw/HumanRights/Human%20Rights%20EN.pdf [last
visited:28/11/2006]
on religion, morality and patriotism.” The Family Fostering Act Number 82 of 1977 is another instance of the law protecting Islamic identity, when it declares that the Ministry of Social Affairs and Labour can give children in custody through fosterage only to Kuwaiti Muslim families.

The general reservation to CRC made by the Islamic Republic of Mauritania, excludes all "articles or provisions [of CRC] which may be contrary to the beliefs and values of Islam, the religion of the Mauritanian People and State." Just as in the case of Djibouti, the Mauritanian Constitution incorporates the UDHR and the ACHR while at the same time being "respectful of the precepts of Islam, the sole source of law." Officially, the Mauritanian population is 100 per cent Muslim - a fact that finds representation even in the Constitution since Article 5 declares that "Islam shall be the religion of the people and of the State." In addition, the preamble to the Constitution proclaims "the inalienable guarantee” of the “rights attached to the family, the basic unit of Islamic society”. The Mauritanian

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494 The exhortation to protect the moral and spiritual wellbeing of the child under Article 10 of the Constitution may also be read as part of the state policy directed at safeguarding Islamic identity of Kuwaiti nationals. Article 10 states that, "the State cares for the young and protects them from exploitation and from moral, physical and spiritual neglect".

495 "Family fostering, as defined in Article 1 of this Act [Family Fostering Act No.82 of 1977], means ‘placement of one or more children from the children’s home run by the Ministry of Social Affairs and Labour in the custody of Muslim Kuwaiti families willing to provide them with shelter and care and to assume responsibility for their upbringing, on behalf of the State, in accordance with the procedures and conditions set forth in this Act’. “Initial Report of States Parties due in 1993–Kuwait” (09 December 1996) United Nations Document CRC/C/8/Add.35, para.22(c).

496 See online at: [http://www2.ohchr.org/english/bodies/ratification/11.htm][last visited: 18.01.2008] (parenthesis added).


499 Preamble of the Constitution of Mauritania above n 497.
reservation emerges from this backdrop of a legal system solidly founded in Shari`ah.

The Mauritanian Constitution does not have a separate freedom of religion clause in the sense espoused under Article 18 of ICCPR or Article 14 of CRC. The closest it comes to guaranteeing freedom of religion is found in the commitment to “freedom of opinion and thought” contained in Article 10 of the Constitution. According to Mauritania’s Initial Report, this provision is a concession to “non-Muslim aliens”. The Report further adds that non-Muslim foreigners are free to practise their religion under “Islam’s tradition of tolerance”. This “tradition of tolerance”, perhaps, explains why the Shari`ah law on apostasy has not been enforced in Mauritania even though Article 306 of its Code Pénal 1984 explicitly incorporates the classical Shari`ah law on apostasy, including provisions on capital punishment for apostates. In fact, even the “small numbers of known converts from Islam” have apparently “suffered no social ostracism” and international human rights monitors have not reported any case of government punishment of converts in Mauritania. 500

However, in the context of freedom of religion of children provided in Article 14 of CRC, the normative standards of Islam occupy a firm place in the legal system of Mauritania. Article 1 of Act Number 75-023 (20 January 1975) declares that one of the basic aims of the law on education is to “ensure that Mauritanian children are brought up in devotion to and respect for the spiritual values of orthodox Islam.” 501

Another law (Act Number 97-021 of 16 July 1997) governing “the organisation and development of physical education and sports in Mauritania” regulates the promotion


and practise of physical education for children “in keeping with Islamic values”. These legal provisions leave little room to doubt that the Mauritanian reservation is formulated to protect Shari‘ah-based laws that have a fundamental status in Mauritania’s legal system.

The general reservation made by Qatar also advances a Shari‘ah-based incompatibility claim against CRC. It is not clear from the text of the reservation which provisions of the CRC are perceived as incompatible with Islamic law. Once again, for the present purposes, I will examine Qatar’s general reservation in the light of its laws concerning freedom of religion, in particular as provided in Article 14 of CRC.

The centrality of Islam in Qatar’s legal system is affirmed by Article 1 of the Constitution 2003 when it proclaims that Islam is the State religion and makes Shari‘ah a main source of law. Article 35 of the Constitution prohibits discrimination on religious grounds while Article 50 declares that “freedom to practise religious rites shall be guaranteed to all persons in accordance with the law and the requirements of the maintenance of public order and morality.” Notably, the Qatari concept of freedom of religion is narrower than the rights contained in Article 14 of the CRC and Article 18 of ICCPR. In the context of Article 14 of CRC, the Initial Report of Qatar explains that the right to freedom of religion of children is largely determined by the rules of Islamic Shari‘ah that establish “rights and duties of parents towards their children” while guaranteeing “a tranquil and happy life in which children are aware of their rights vis-à-vis their parents and parents are aware of their duties towards their children.”

502 Above n 501 para. 272.
503 See online at: http://www2.ohchr.org/english/bodies/ratification/11.htm [last visited: 18/01/2008].
freedom of religion of the child is guaranteed subject to “limits of the law and the regulations, statutes and ordinances promulgated” by the State.\textsuperscript{506} Freedom of religion of children, the Initial Report states, is exercisable only “in a manner consistent with their [children’s] evolving capacities, as required by the Islamic Shari`ah.”\textsuperscript{507}

According to \textit{bulūghiyyat} or the Shari`ah rule on the evolving capacities of the child, a minor child automatically acquires the religion of the father. From this examination of the Qatari law on freedom of religion, it may safely be concluded that its general reservation is also specifically applicable to Article 14 of CRC.\textsuperscript{508}

The compelling influence of Shari`ah is perhaps most palpable in the Saudi Arabian reservation to CRC. The general reservation formulated by Saudi Arabia is unambiguous in asserting that “all such Articles as are in conflict with the provisions of Islamic law”\textsuperscript{509} are unacceptable. It is not a surprising position since the Saudi Constitution is categorical in proclaiming that Islam is “its religion, God’s Book [Qur’an] and the Sunnah of His Prophet, God’s prayers and peace be upon him, are its constitution.”\textsuperscript{510} Moreover, Article 9 of the Constitution declares that family is the kernel of Saudi society, and its members shall be \textit{brought up on the basis of the Islamic faith, and loyalty and obedience to God, His Messenger, and to guardians, respect for and implementation of the law, and love of and pride in the homeland and its glorious history as the Islamic faith stipulates.}\textsuperscript{511}

\textsuperscript{506} Above n 505 para.46.

\textsuperscript{507} Above n 505 (parenthesis added).

\textsuperscript{508} The Initial Report of Qatar sheds further light on the specific areas of connection between Qatari general reservation and CRC, when it notes objection to implementation of Articles 20 and 21 because “Qatar does not recognize the system of adoption... as it is contrary to the provisions of the Islamic Shari`ah.” Above n 504 para.76. See also A Nizar Hamzeh, “Qatar: The Duality of the Legal System” (1994) 30 (1) \textit{Middle Eastern Studies} 79.

\textsuperscript{509} See online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 10.01.2008].

\textsuperscript{510} Constitution of Saudi Arabia, see online at: <http://servat.unibe.ch/icl/sa00000__html> [last visited.10.01.2008].

\textsuperscript{511} Above n 510 (emphasis added).
Article 9 suggests that bringing up children in the Islamic faith is part of a constitutional obligation of the parents and the family. This precept is also fostered in the national education policy, one of the goals of which is “instilling the Islamic faith in the younger generation”.

There is no stand-alone right to freedom of religion in the Saudi Arabian legal system. However, the national policy on human rights is outlined in Article 26 of the Constitution, according to which “the State protects human rights in accordance with the Islamic Shari’ah.” Shari’ah therefore functions as a master-key in matters relating to human rights - including the right to freedom of religion of the child covered in Article 14 of CRC. The country reports submitted to the CRC Committee by Saudi Arabia reveal the pervasive nature of this “master-key” approach in the context of Saudi laws dealing with children’s issues. The Saudi Arabian context vis-à-vis almost every provision of the Convention is explained by reference to Shari‘ah-based laws implemented in the State. In the particular case concerning the rights under Article 14, the Initial Report of Saudi Arabia explains that since Islamic law guarantees the right of the children to protection, and as children normally follow their father’s religion, parents have the primary responsibility for the welfare, development and protection of their children, especially in the light of their physical and mental immaturity.

Moreover, while acknowledging that Saudi Arabia respects the “right of non-Muslim residents to their religious beliefs”, the Initial Report cites Article 7 paragraph (b) of the Cairo Declaration to support the Saudi position concerning the right of the parents “to choose the form of upbringing they want for their children in a manner consistent with their interests and their future in the light of moral values

512 Articles 10 and 11 of the Constitution above n 510.
and the regulations of Islamic law.” It is obvious, therefore, that the Shari`ah basis of the Saudi Arabian reservation is substantively supported by national laws rooted in Islam.

The last Islamic State to have formulated a general reservation to CRC is Tunisia. Tunisia has also made specific reservations to Articles 2 and 7 and a specific “declaration” to Article 6 of the CRC that, for all practical purposes, amounts to a reservation. Its general reservation (formally described as “declaration”) states that the “Government of the Republic of Tunisia declares that it shall not, in implementation of this Convention adopt any legislative or statutory decision that conflicts with the Tunisian Constitution.” This carefully drafted reservation effectively modifies the scope of the CRC to the extent that there may be any conflict with the Tunisian Constitution. Implicit in this reservation is an apprehension that certain provisions of the CRC are incompatible with the Tunisian Constitution.

However, neither of the two country reports submitted by Tunisia seems to highlight any conflict between CRC and the Tunisian Constitution. To the contrary, almost every explanation of the Tunisian context vis-à-vis CRC seems to be supported by provisions from the Constitution, and the general trend in the reporting seems to suggest that the Constitution is in fact complementary to the Convention. This is also the case with Article 14 guarantees on freedom of religion. As the Initial Report of Tunisia explains:

Tunisia, a republic whose national language is Arabic and religion Islam...recognizes and guarantees the principles and rules set forth in Article 14 of the Convention, which is supported by its age old tradition of tolerance and friendship among peoples of different religions and by the laws that the State has promulgated.

515 Initial Report of Saudi Arabia above n 514 para. 121.

516 See online at: <http://www2.ohchr.org/english/bodies/ratification/11.htm> [last visited: 18.01.2008].

The Second Report of Tunisia further expands on this theme by citing Article 5 of the Constitution\textsuperscript{518} which states that “the Tunisian Republic guarantees the integrity of the individual and his or her freedom of belief and protects the free exercise of religious worship, provided it does not oppose public order.”\textsuperscript{519} There is no indication anywhere that the reference to Islam as the State religion in Article 1 of the Constitution places restrictions on the freedom of religion as, for instance, in the case of Saudi Arabia or in most of the other Islamic States discussed above. Instead, the repeated explanations of the Tunisian position on freedom of religion seem to point towards a pluralist understanding of religious freedom within the legal system. As such, the two reports cite the 1964 Convention between the Vatican and Tunisia as a result of which Catholics in Tunisia are guaranteed freedom of worship and the freedom to run Catholic educational institutions for Christian students. Similar guarantees are also provided to the Jewish community in Tunisia, while Muslim students are given equal protection in respect of Islamic studies in schools.\textsuperscript{520}

In short, these Tunisian laws have devised a religion-specific educational system for each of the three main religions in the State. This appears to be the general formulation of freedom of religion within the Tunisian legal system. Therefore, the declaration \textit{qua} general reservation made by Tunisia does not sit comfortably with such explanations of actual harmony between the CRC and the Constitution provided in the country reports.\textsuperscript{521} It is perhaps for this reason that,

\begin{itemize}
  \item Article 5 of the Constitution states “the Tunisian Republic guarantees the inviolability of the human person and freedom of conscience, and protects the free exercise of beliefs, with reservation that they do not disturb the public order.” See online at: 
  \url{http://www.servat.unibe.ch/icl/ts00000_.html} [last visited: 18.01.2008].
  \item The Tunisian delegate presenting the Initial Report to the Committee had, in one of the responses to the Committee’s queries concerning withdrawal of reservations, noted that Tunisian reservations and declarations were never formulated to contravene CRC requirements, and did not prevent Tunisia from harmonising its domestic law with the principles and values of CRC. See, “Réponses du Gouvernement Tunisien aux points soulevés par le groupe de travail du Comité des Droits de L’Enfant, en prévision de l’examen et de la discussion du Rapport Initial de la Tunisie en application de l’article de Convention sur les Droits de L’Enfant” (1-2 June 1995). See online at: 
  \url{http://www.unhchr.ch/dbs/doc.nsf/(Symbol)/3138776093d909ec9c12563640047d548?Opendocument} [last visited: 18.01.2008].
\end{itemize}
subsequent to its Second Report, Tunisia has indicated its decision to review these declarations with the objective of final withdrawal.\textsuperscript{522}

4.2.6 Shari’ah-based reservations to ICCPR and CAT

In many respects the ICCPR\textsuperscript{523} along with ICESCR\textsuperscript{524} set the ball rolling in the area of creating enforceable human rights regimes based on the UDHR. Outlining the “object and purpose” of ICCPR, in General Comment 24 the Human Rights Committee declared

the object and purpose of the Covenant is to create legally binding standards of human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.\textsuperscript{525}

The Covenant recognizes and promotes “the inherent dignity” and the “inalienable rights of all members of the human family” on the “foundation of freedom, justice and peace in the world”\textsuperscript{526} and, for these purposes, it seeks to declare and enforce civil and political rights of the individual in every State party. As on 20 July 2007, 160 States have become parties to the ICCPR with over 43 States submitting reservations of varying degrees to different provisions of the treaty.\textsuperscript{527}

\textsuperscript{522} “Written Reply of the Government of Tunisia Concerning the List of Issues to be taken up by the Committee on the Rights of the Child in connection with the consideration of the Second Periodic Report of Tunisia” (1 May 2002) United Nations Document CRC/C/RESP/4, 24.


\textsuperscript{525} “General Comment Number 24 (52)” adopted by the Human Rights Committee at its 1382\textsuperscript{nd} meeting (52\textsuperscript{nd}) on 2 November 1994, United Nations Document CCPR/C/21/Rev.1/Add.6; (1995)34 International Legal Materials 842, para.7 (emphasis added).

\textsuperscript{526} First preambular paragraph of ICCPR.

\textsuperscript{527} For a detailed list of states parties and reserving states to ICCPR see online: <http://www2.ohchr.org/english/bodies/ratification/4.htm> [last visited: 11.01.2008].
Even though the ICCPR included a specific provision on the prohibition of torture, cruel, inhuman or degrading treatment or punishment (Article 7), almost 18 years after ICCPR was created a separate international regime against torture was adopted under CAT.\textsuperscript{528} It is based on the primary objective of ensuring that States parties promote, respect and preserve the inherent dignity of the human being through “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”\textsuperscript{529} As on 2 October 2007, there were 145 States parties to CAT\textsuperscript{530} with over 34 States making reservations and declarations restricting the effect of the treaty.\textsuperscript{531}

The definition of “torture” in Article 1 of CAT is

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 16 expands on this definition by including

other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.\textsuperscript{532}


\textsuperscript{529} Article 2 of CAT.

\textsuperscript{530} See online: \url{http://www2.ohchr.org/english/bodies/ratification/9.htm} [last visited: 10/01/2008]

\textsuperscript{531} See online: \url{http://www2.ohchr.org/english/bodies/ratification/9.htm} [last visited: 10/01/2008]

\textsuperscript{532} Above n 528 (emphasis added).
For the purposes of the present analysis, two core features of CAT are important - firstly, the definition of “torture” and other cruel, inhuman or degrading treatment or punishment is not exhaustive and lawful punishment is left outside the scope of “torture”; and secondly, the attention of the regime is directed only at the relationship between the State (acting in its official capacity) and individual subjects.

Both ICCPR and CAT are different from the two other human rights regimes so far examined. In fact, these two treaties fall within the category of human rights treaties that has been described as advocating “first generation human rights” concerned mainly with civil and political liberties attributable to individuals and claimable against the State.

4.2.6.1 ICCPR, CAT and Shari‘ah

Of the various rights provided in ICCPR, two provisions are noteworthy for their perceived inconsistency with Islamic law - gender equality provisions, in particular, equality of spouses as to marriage, during marriage and at its dissolution contained in Article 23 paragraph (4), and the general freedom of religion contained in Article 18. As has already been considered above, gender equality provisions and the equality of spouses in all aspects of married life appear to be at odds with the normative standards laid down in Islamic family law. This point has been clearly illustrated in the analysis of family law codes of the various Islamic States that have made reservations to CEDAW.

533 Article 1 paragraph (2) and Article 16 paragraph (2) of CAT, respectively.

534 Article 1 paragraph (1) of CAT states that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.

The right to freedom of religion contained in Article 18 of ICCPR presents more formidable challenges vis-à-vis Shari‘ah. Although the discussion on Article 14 of the CRC has dealt, to some extent, with the conflict between the right to freedom of religion and Islamic law, I will examine below in greater detail the tensions arising from Article 18 in the context of the hudūd law on punishments. I will also touch upon the troubled relationship that may be deemed to exist between the hudūd law on punishments and the concept of “cruel, inhuman or degrading treatment or punishment” provided in Article 7 of ICCPR and, more scrupulously, in Article 1 and 16 of CAT.

In the case of gender equality, Islamic States appear to reject the notion of absolute equality or the “same” rights concept of equality between sexes. This rejection, though, does not amount to a complete denial of the rights of women. Instead, these States argue that according to Shari‘ah equality is based on the principle of role differentiation between sexes and between married spouses. The gender-specific role assignment provisions of Shari‘ah are widely adopted by most of the Islamic States. In addition, this rule is also strongly entrenched in the constitutional documents as well as the personal status codes of almost all the Islamic States. Hence, there is a high level of consistency in State practice when it comes to advancing a particularist interpretation of gender “equality” in the community of Islamic States. This said, the Shari‘ah concept of equality or musāwāt presents a strong argument for advancing equality of men and women in civil and political spheres in the Islamic States.

4.2.6.1 (i) ICCPR, CAT and the Ḣudūd laws of punishment

Islamic criminal laws are often identified with severe capital punishments and have been decried as a cruel and inhuman system. Yet capital punishment is just a small part of a much broader system of criminal law under Shari‘ah. Briefly, the

536 See generally Cheri Bassiouni (ed.) The Islamic Criminal Justice System (New York: Oceana Publications, 1982).
Shari‘ah rules on crime and punishment may be described as falling into the following three categories:

(a) *ḥudūd* crimes and punishments - *ḥudūd* crimes are clearly identified in the Qur’an and the Sunnah of the Prophet, and the punishments as well as the strict standards of evidence required to established these crimes are also laid down in obligatory terms in these two primary sources of Islamic law. A *ḥudūd* offence is interpreted as a breach of the ordained limits of God.\(^{537}\) Offences falling into this category are adultery (*zina*), theft (*sariqah*), highway robbery or aggravated armed robbery (*qat‘ at-tariq* or *ḥirābah*), drinking alcohol (*shurb al-khamr*) and false accusations of extramarital sex (*qazf*).\(^{538}\)

(b) *qiṣas* crimes and punishments - *qiṣas* crimes are related to crimes committed against the person such as voluntary and involuntary homicide and other voluntary and involuntary injuries upon the person such as battery. Neither the Qur’an nor Sunnah provide obligatory injunctions relating to crimes and punishments that may be included in this category. Instead, *qiṣas* crimes and punishments have traditionally been determined by the *fuqaha*, and in the modern context, by the legislatures of Islamic States.\(^{539}\) That said, the punishments for *qiṣas* crimes are mainly guided by the Qur’anic directives outlining compensation for victims known as *diyyah*.\(^{540}\)

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\(^{537}\) Mohammad Hashim Kamali, “Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia” (1998) 13 (3) *Arab Law Quarterly* 204. See also Cherif Bassiouni above n 536.

\(^{538}\) Even the modern *hudūd* codes of Islamic States such as the three Shari‘ah criminal laws of Pakistan are based on these classic crimes and punishments, the evidence of which are derived from the two primary sources of Shari‘ah. See “The Prohibition (Enforcement of Hadd) Order, 1979”, *President’s Order No. 4 of 1979*; “The Offence of Zina (Enforcement of Hudood) Ordinance, 1979” *Ordinance No. VII of 1979*; “The Offence of Qazf (Enforcement of Hadd) Ordinance 1979”, *Ordinance No. VIII of 1979*. Digital copies of the ordinances available online at: <http://www.pakistani.org/pakistan/legislation/hudood.html> [last visited: 23.12.2007].

\(^{539}\) Cherif Bassiouni “Crimes and the Criminal Process” (1997) 12 (3) *Arab Law Quarterly* 269-270.

\(^{540}\) Above n 539, 270.
(c) taʿzīr crimes and punishments - all offences that do not belong to the above categories are included as taʿzīr crimes. They are generally crimes that “result in tangible or intangible individual or social harm and for which the purpose of the penalty is to be corrective”.⁵⁴¹ Punishments for taʿzīr crimes may include imprisonment, physical punishments such as lashing, payment of punitive fines and rehabilitatory punishments. An important distinction between ḥudūd and taʿzīr crimes is that punishment for ḥudūd crimes is mandatory as provided in the Qurʾān and Sunnah while in the case of taʿzīr offences the judiciary is vested with complete discretion to decide the level and type of punishment to be imposed.

Not all Islamic States have incorporated all the ḥudūd laws into their criminal codes. While some Islamic States like Sudan, Iran and Saudi Arabia enforce almost all the ḥudūd punishments, others have resorted to a pick-and-choose policy. Most Islamic States appear to implement ḥudūd punishments, with the exception of capital punishments for adultery, apostasy, and the punishments related to theft and highway robbery. Instead, these areas of ḥudūd appear to be moderated by incorporating them as taʿzīr crimes. This predisposition to adopt taʿzīr punishments in Islamic States may be attributed partly to the considerable procedural restrictions that are required to be observed before a ḥudūd punishment may be applied.⁵⁴² There is also growing scholarly opinion on the approach to ḥudūd as the absolute “upper limit” of punishment and resort to other discretionary provisions of Shariʿah law on punishments, including the adoption of modern criminal law.⁵⁴³

⁵⁴¹ Above n 539.


Shari’a also places strict prohibitions on torture and cruelty in punishments, though the Islamic legal injunctions to this effect may be interpreted as falling behind the liberal standards espoused in the ICCPR, CAT and other universal human rights regimes. Highlighting the Shari’a perspective on this issue, Bassiouni emphasizes that there are over 290 references in the Qur’an prohibiting torture and cruel treatment of human beings. In combination, the emphasis on human dignity in Islamic law and the procedural limitations on capital punishments suggest an intrinsic prohibition of torture and cruel punishments. To this effect, both the declarations of human rights in Islam guarantee freedom from torture. Thus, Article VII of the UIDHR states

no person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to act which is injurious to his interests.

Similarly, Article 20 of the Cairo Declaration states

it is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.  


These two provisions embody the Islamic proscription on torture and punishment and protection of the individual from arbitrary interference of mind or body. Nevertheless, while this protection is circumscribed by the norms of ḥudūd in Shari‘ah as applied in most Islamic States, the degree of application of Shari‘ah rules on ḥudūd punishments varies between states, suggesting an increasing preference for using ta‘zīr in this area.

4.2.6.1 (ii) Detailed Analysis of Shari‘ah-based reservations to ICCPR and CAT

While 49 Islamic States have ratified CAT, only the general reservation formulated by Qatar appears to be categorically based on Shari‘ah.

Qatar’s reservation to CAT takes an exceptionist stand on any provision of the Convention that may be interpreted as “incompatible with the precepts of Islamic law and the Islamic religion.” Interestingly, Article 36 of the Constitution of Qatar declares that “no one shall be subjected to torture or humiliating treatment. Torture is considered a crime and shall be punished by the law.” This constitutional requirement may, on the face of it, contradict any inclusion of Shari‘ah criminal rules in the domestic law, particularly if the Shari‘ah rules of punishment related to ḥudūd crimes are considered to be cruel and inhuman within the meaning ascribed to the term under ICCPR and CAT.

In fact, during consideration of the Initial Report of Qatar, the Committee against Torture appeared to question the Qatari delegate about the legitimacy of the

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546 The forty nine Islamic states that have ratified CAT are: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Chad, Comoros, Côte d’Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriyya, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Uzbekistan and Yemen. See online at:  [http://www2.ohchr.org/english/bodies/ratification/9.htm]  [last visited: 22.01.2008].

547 See online at:  [http://www2.ohchr.org/english/bodies/ratification/9.htm]  [last visited: 22.01.2008].

548 Article 36 of the Constitution of Qatar.
application of *ḥadd* punishments such as lapidation, flogging and amputation. In response, the State delegate explained that under Article 1 of Qatar’s Penal Code, *ḥudūd* punishments are applicable to the crimes of theft, highway robbery, illicit sex, apostasy and consumption of alcohol. The delegate also explained that these punishments were applicable only in respect of such crimes committed by Muslim subjects, adding further that *ḥadd* punishments were rarely implemented. The Qatari delegate argued that the legitimacy of these punishments could not be questioned since Article 5 paragraph (3) of CAT excludes from the purview of Article 1 and 16 “any criminal jurisdiction exercised in accordance with internal law.” As a matter of fact, it is not just Article 5 paragraph (3) that provides an exclusionary clause for lawful punishments. Article 1 paragraph (1) of CAT also excludes “pain or suffering arising only from, inherent in or incidental to lawful sanctions”. Although Saudi Arabia and Yemen also apply all the *ḥudūd* punishments, neither of these two Islamic States has made a reservation to these provisions of CAT. The fact that many Islamic States which apply *ḥudūd* punishments in varying degrees have not made Shari‘ah-based reservations to CAT may partly be attributed to these claw-back provisions that allow for legitimate punishments to be excluded from the domain of torture.

Of the 45 Islamic States which have ratified the ICCPR, 13 States have formulated reservations. However, in the stricter sense, only six of these reservations may be considered to be Shari‘ah-based:

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550 Above n 549 para.19.


552 Forty five Islamic states that ratified the ICCPR are; Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Chad, Côte d’Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriyya, Maldives, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sudan, Somalia, Suriname, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, Uganda, Uzbekistan and Yemen. See for the complete list of reservations online at:
(a) Algeria: a reservation to Article 23 paragraph (4) (on equality of rights and responsibilities of married spouses);

(b) Bahrain: a reservation to Article 3 (equality of men and women in civil and political rights), Article 18 (freedom of religion) and Article 23 (family and marital rights);

(c) Bangladesh: a peculiar statement of general character, the effect of which is difficult to ascertain on account of its ambiguity. Bangladesh’s reservation does not assert any exclusion or modification or interpretation of ICCPR provisions according to Shari`ah. The only certainty in the statement is that Bangladesh accepts the ICCPR “taking into consideration the provisions of Islamic Shari`ah” and “the fact that they [ICCPR and Shari`ah] do not conflict”;

(d) Kuwait: a reservation to Article 2 paragraph (1) (guarantee of all rights in the Covenant without discrimination of any kind), Article 3 (equality of men and women in civil and political rights), Article 23 (equal rights and responsibilities of marital spouses), Article 25 paragraph (b) (universal suffrage). This last reservation is not based on Shari`ah since it refers only to the elections law of Kuwait restricting suffrage to male citizens;

(e) Maldives: a reservation to Article 18 (freedom of religion);

(f) Mauritania: a reservation to Article 18 (freedom of religion) and Article 23 paragraph (4) (equal rights and responsibilities of marital spouses).

Four of the above Islamic States have made reservations to equality provisions contained in Article 23 of ICCPR. It may be recalled that these four States

\[\text{[http://www2.ohchr.org/english/bodies/ratification/4.htm](http://www2.ohchr.org/english/bodies/ratification/4.htm)}\] [last visited: 22.01.2008].

\[553\] See online at: \[http://www2.ohchr.org/english/bodies/ratification/4.htm\] [last visited: 22/01/2008]. The rest of the reservations formulated by the Islamic states variously refer to the non-recognition of Israel as a state party and to self-determination provisions of the Covenant and may be said to be of very little practical or substantive significance.
Algeria, Bahrain, Kuwait and Mauritania - have also made similar reservations to the corresponding equality provisions of CEDAW in Articles 2 and 16.

Only Bahrain and Kuwait have made reservations to the equality provisions concerning civil and political rights. However, the denial of civil and political rights to women has no foundation in Islamic Shari`ah. Civil and political rights such as those contained in Article 3 and Article 25 paragraph (b) of the ICCPR do not appear to contradict any of the fundamental injunctions on gender relations that may be found in the Qur`an and Sunnah. Civil and political rights such as universal suffrage (Article 25 paragraph (b)) are modern political developments and do not have any corresponding analogy in the primary sources of Shari`ah. Denial of a woman’s right to vote or to drive a car is far from being founded in Shari`ah. Islamic law recognizes the fundamental equality of all human beings (musāwāt) and espouses human dignity (karâmah) and the qualifying markers of musāwāt are based on role differentiation concerning limited aspects of family and marital relations. Hence, women are “equally entitled to the rights and liberties of today’s world, subject to respect for the principles of public morality as applicable to both men and women under Islamic law.”

According to Baderin, the issue of a perceived conflict between Islamic law and women’s participation in public life is partly generated by “patriarchal conservatism, illiteracy, and poverty” prevailing in many Islamic States. Tuhan Faisal, one of the female candidates who contested the Jordanian parliamentary elections in 1989 and 1993, makes this point when she observes that “it is not legislation that discriminates against us [women], but social backwardness”.


555 Above n 554, 65.


There is an ongoing debate in the Islamic States on addressing this type of gender asymmetry in the civil and political field. This debate, however, does not appear to be directed at altering or revising Shari‘ah to accommodate universal human rights standards. Instead, it seems to be aimed at reviewing the normative standards of Shari‘ah within the hermeneutic possibilities available in Islamic jurisprudence. The focus is on changing the prevailing human condition (such as patriarchy, tribalism, illiteracy and poverty) through policies that have legitimacy in Shari‘ah. Most Islamic States have already adopted universal adult suffrage and political participation of women has increasingly gained mainstream acceptance. The recent decision by the Saudi Arabian authorities to allow driving licenses for women, and to permit single women to rent out hotel rooms without a chaperone, are clear indications that the patriarchal aspects of certain traditions that do not have a fundamental basis in normative standards of Shari‘ah, are giving way to greater openness.

The question of appointing women to judicial positions in Islamic States is yet another issue that is currently being debated. Some Islamic States have acknowledged gender disparity in this area as an injustice to the dignity and equal status given to women in Islam. To this effect, States have even taken affirmative action as is seen in the case of Egypt where, in 2007, the Supreme Judicial Council appointed 31 female judges to the bench. Similarly, for the first time in the history of the Maldives, in 2007, women were appointed as judges and heads of provinces or atolls.


560 Jaufar Rasheed, “Quadhī kamah kurimathi lumuge furusathu anhenunnah ves hulhuvaa laifi” [Women are eligible to seek the position of judgeship] (1 August 2005) Aafathis News available online at: [http://www.aafathisnews.com.mv/di/stories/?section=6&story=1300] [last visited:
There is little doubt that patriarchal traditions have a wide prevalence in many Islamic States. Often these restrictive traditions are justified under the guise of Islamic law. The current debate about improving the condition of women in Islamic States has provided an opportunity to address this problem. Many of these States are duty-bound to remove such inequities not merely by virtue of their ratification of human rights regimes, but also by the imperatives of Shari`ah. On such instance is the recent vote in 2005 in the Kuwaiti Parliament to grant women the right to participate in the democratic political process. There is no mandatory norm of Islamic law that places restrictions on the rights of women to participate in the governmental process. The kind of equality that is protected and promoted in Shari`ah may well be used to enforce the participation of women in state affairs. It may be recalled that in 1996 Kuwait made a reservation to Article 3 of ICCPR refusing this right to women.

Bahrain is another Islamic State that has made a reservation to Article 3 of ICCPR. However, significant changes in Bahrain’s legal system over the past few years have produced substantive improvements in the participation of women in civil and political life. Just as in the case of Kuwait and Egypt discussed above, Bahrain also appears to have taken affirmative action to remove gender asymmetry. In May 2000, for example, the Prime Minister of Bahrain announced the decision of the King to allow women to become members of the Consultative Council or the upper house of the legislature. Furthermore, in 2006 alone, the King appointed 10 women to the 40-member Consultative Council, while also allowing women to contest general elections and to run for office. Women have also held ministerial positions in the

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government and in 2007 a woman was also appointed as a judge of the Constitutional Court.  

From this perspective, the reservations to Article 3 made by Bahrain and Kuwait are largely superseded by recent developments in their respective legal systems. Nevertheless, it is interesting that these legal changes in the Islamic States are firmly based in the Shari‘ah rules concerning legitimacy. States appear to be cautious not to sidestep the legitimacy derived from Shari‘ah by contravening a normative standard that is clearly established in the Qur’an and the Sunnah. As rightly observed by Fadia Faqir, “men and women’s political involvement [in Islamic States] tends to parallel sex-role difference learned in the family” and the process of legal change seem to follow the same model of role differentiation that we have observed in the case of family law reform in the Islamic States.  

Participation of women in politics and the judiciary are just two illustrations of how the internal debate in Islamic States is creating room (through *ijtihad*) for expanding the scope of interpreting normative standards of Shari‘ah in order to remove patriarchal traditions. Nonetheless, the fundamentals of legitimacy, in this debate, continue to be determined by Shari‘ah.

### 4.3 Summary Conclusion:

I have examined the conceptual framework of Islamic law, the sources and legal methodology for asserting legitimacy, and changes in legitimacy of normative values of Shari‘ah. In this context, the examination has established that there is considerable diversity in the understanding of Islamic law, from the differences between the Sunni and Shi‘a sects to the divergences between the various jurisprudential schools within these two sects. To the untrained eye, the diversity of Islamic law may suggest an open field for interpretation and a lack of cohesiveness of claims made on the basis of Shari‘ah.

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563 Fadia Faqir above n 557, 172.
However, I have shown that, methodologically, the interpretations of Shari`ah have followed various levels of openness and cohesiveness. On the one hand, the traditionalists adhere to taklīd (blind belief and following legal norms developed earlier) and insist on the correctness of their understanding of jurisprudence as provided by the masters of Islamic law in classical topes on fiqh. On the other hand, there is an emerging tendency to move away from the taklīd approach by using ijtihād (independent juridical reasoning) and maṣāliḥ mursalah (public interest principles) along with the maqāṣid al-Shari`ah (interests of Shari`ah as in the dispensation of justice, equity and welfare of the community of believers). These hermeneutic tools or methods are being increasingly used to forge an understanding of Islamic law that does not reflect a radical dissonance from the realities of the prevailing human condition. When these developments in Islamic legal theory are taken together, it may be safely concluded that Shari`ah as a discipline is not only an integral part of the modern Islamic polity but is also a vibrant and dynamic point of reference in the lives of believing Muslims. Most of the Islamic States examined above have incorporated Shari`ah from their different vantage points and in different degrees. These variances, however, do not deny the significant legitimising authority of Shari`ah in their legal systems.

The reservations made by Islamic States to CEDAW, CRC, ICCPR and CAT have demonstrated the nexus between Islamic law and the capacity of these States to implement international obligations with their domestic systems. In the case of CEDAW, we have seen that nine Islamic States have made reservations to Article 2, 12 States have made reservations to Article 9 while 16 have made reservations to Article 16. A detailed examination of these reservations has revealed a clear connection between the provisions of these three articles and the personal status laws of the Islamic States based on norms of Shari`ah regulating family life.

A similar trend is discernible in the case of CRC where 12 Islamic States have made Shari`ah-based reservations to Article 14 dealing with freedom of religion of the child and nine Islamic States have made reservations to the provisions relating
to adoption contained in Articles 20 and 21. Through these reservations States have raised incompatibility concerns regarding the CRC provision on adoption of children and Shari’ah proscription of adoption. However, country reports of States parties seem to indicate progressive developments in this area, especially the incorporation of *kafālah* system for orphans and developing other methods within civil law that do not counter the proscription of Shari’ah concerning automatic inheritance through adoption. Furthermore, we have seen that nine Islamic States have made general reservations that potentially apply to the entire CRC. When we combine these nine general reservations and the 12 specific reservations made to Article 14, it may be concluded that most of these reservations are premised on a perceived conflict between Shari’ah law on the role of parent to educate their Muslim children in the Islamic faith and the CRC provision that may be interpreted as giving the minor the freedom to convert from Islam. As has emerged from the analysis, the concerns raised by most of these Islamic States show that there is an increasing reluctance to grant this guarantee given the operating constraints of Islamic law relating to apostasy rules. Shari’ah-based reservations have also been made to provisions concerning gender equality, family rights and freedom of religion contained in Articles 3, 23 and 18 of the ICCPR. I have further established that Islamic States’ reservations to ICCPR and CAT also show a clear nexus between Islamic law and the reasons behind the reservations.

An important conclusion that is established from the above survey of the reservations made by Islamic States, along with the reading of their constitutional provisions and other fundamental laws relating to personal status and criminal laws, is that these reservations are largely internally validated through a consistent reference to Islamic law, as applied in the legal systems of these States parties. The preeminent position of normative standards of Shari’ah - in particular those pertaining to the rights and responsibilities of marital spouses, children and the State vis-à-vis freedom of religion - are well established in the legal systems of all the States examined. The examination has also shown that these norms are deeply entrenched not only in the legal fabric but also in the social structure of Islamic States.
Superficially, these norms of Shari`ah are not in tandem with the liberal interpretation of universal human rights. Nevertheless, I have shown that the normative positions of Shari`ah have a latent dynamic of mobility that is being increasingly used by Islamic States to reform their laws. Closer examination of such use of *ijtihād* also reveals that the impetus and legitimacy of such reform is not directly premised on creating harmony with universalist interpretations of human rights. Instead, the internal debate that is ongoing in the Islamic States is producing more contemporaneous interpretations of the law while being legitimated by Shari`ah. Still, one cannot deny the important role that international human rights treaties are also playing in generating an impetus for these Islamic States to revisit their legal systems with a view to contextualising the normative standards of Shari`ah for the purposes of improving their effectiveness and contemporary application.

The discussion of the reservations made to the four human rights treaties also reveals that there is an inherent predisposition on the part of Islamic States to look into Shari`ah for legitimising normative standards that affect rights and responsibilities of Muslims. It has established that States parties use Shari`ah as a cultural touchstone that lends authority to laws affecting the rights and responsibilities of individual Muslims as well as the Islamic State as a whole. As a result, Islamic States are significantly constrained in undertaking legal obligations by the religious pressures within their socio-political and legal systems.
Chapter Five: Conclusion

The creation of international law through treaty making is largely determined by pragmatic considerations, where independent States are still the primary actors. Sovereign equality of all States continues to be the organising principle of international cooperation and inter-state conduct. The protection, promotion and advancement of the “self-interest” of States even now probably provide the “best explanation for when and why States comply with international law”. The standards of treaty law are built around this premise. In this context the Vienna Convention on the Law of Treaties brought together, for the most part, the existing State practice and customary international law on the subject of treaty making. The law on reservations to treaties contained the Articles 2 paragraph (1) (d) and Articles 19 to 23 of VCLT are also infused by this guiding premise.

There is a tendency to assume that there exists a separate international treaty law in respect of multilateral treaties dealing with human rights. This tendency appears to be determined for the most part by an absolutist understanding of normative universality of human rights. It is seemingly driven by a belief that the legitimacy of human rights is possible only when such rights are interpreted in a given manner. This approach challenges the VCLT regime on reservations as being weak and inadequate.

My study has followed the development of the concept of reservations to human rights treaties within the framework of existing international treaty law. It has sought to straddle twin positions: firstly, it has considered the normative approaches to the subject of treaty making, especially with reference to the evolving debate on normative human rights treaties; and secondly and more importantly, it has

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1 Article 2 paragraph (1) of the Charter of the United Nations.

scrutinised the existing law of reservations as practised by States parties for the purposes of assessing how the law interacts with normative treaties. This is important in order to understand the presumed dissimilarity between ordinary multilateral treaties and normative treaties that frequently overshadows most discussions of reservations to human rights treaties.

My examination of State practice in the area of reservations, in particular Shari`ah-based reservations, dispels the claim for ontological universality of human rights. It also dismisses, on the basis of State practice, the argument that normative human rights treaties are given a special status in international treaty law. The study demonstrates that States parties continue to make use of the existing VCLT regime on reservations, thereby underscoring its legitimacy even in the case of the vast majority of human rights treaties. It has shown that the VCLT regime on reservations has also received endorsement and reaffirmation in the recent work on treaty law by the ILC. The Special Rapporteur Alain Pellet’s reports correspond to the existing use of the definition of reservations and the compatibility test of reservations provided by the VCLT. They also confirm the applicability of this regime even to human rights treaties.³

I have also shown that the VCLT creates a flexible system for formulating reservations by giving every State party the discretion to determine the validity of a reservation and to establish treaty relations with a reserving State. This is particularly evident from the fact that it is ultimately the States parties that decide whether a reservation is compatible with the object and purpose of the treaty. In the context of Shari`ah-based reservations to CEDAW and CRC, the study has shown that the flexibility of the VCLT regime has positively contributed in garnering ratification of human rights treaties by the Islamic States. It is perhaps plausible, given the

persistence of Islamic States in maintaining these Shari‘ah-based reservations, that an inflexible reservations regime may have deterred many Islamic States from ratifying these two conventions.

Chapter two has shown that the VCLT supports a philosophy recognising the rights and obligations of sovereign States in all matters related to reservations to treaties. It recognizes that sovereign and independent States have a right to formulate reservations within the parameters set out in Article 2 paragraph (1)(d) and Articles 19 and 20. Furthermore, it also grants an indispensable role (or a right) to States parties in the process of determining the validity or otherwise of reservations made to treaties. To a certain degree, this is an unmistakable re-assertion of the consensual basis of treaty law making. Of course, such a reliance on State consent suggests an element of the “paradox of consensualism”. By making State consent the ultimate deciding factor in the validation of reservations, the VCLT may be criticised for facilitating such a paradox. Nonetheless, consensualism is a strong characteristic feature of international treaty law. In fact, a close scrutiny of reservations law and State practice shows that treaty law, in particular human rights treaty law, is based on a consensus of pluralist positions among States parties. The effect is the creation of a diverse network of pluralist treaty relations that brings together dissimilar consent on normative standards of State conduct. This is what I have referred to as the diversity paradigm of reservations law.

It is clear from the scrutiny of the VCLT regime that the law supports and incorporates a diversity paradigm. It recognizes the sovereign right of a reserving State to formulate a reservation subject to reasonable limitations under Articles 19 and 20 of the VCLT and compatibility with the object and purpose of the treaty. Thus, subject to the object and purpose test and unless a treaty otherwise specifies,

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4 The authors Elias and Lim describe this paradox of international treaty law based on consent on the fact “that consent is both essential and doubly problematic. It provides the essential concreteness to the form and content of the law, while at the same time allowing for neither the resolution of disagreement nor a sensible description of the character of dispute resolution.” O.A Elias and C.L. Lim, The Paradox of Consensualism in International Law (The Hague: Kluwer Law International, 1998) 202.
States are free to formulate reservations to protect their national interests. The VCLT regime creates a loose network of treaty relations by giving States parties the discretion to decide object and purpose compatibility and the authority to establish treaty relations vis-à-vis the reserving State. This provides States with wide latitude for formulating reservations and encourages treaty participation from States that may otherwise wish to remain outside the treaty in order to protect their deeply entrenched cultural-legal postulates. Rigidity in the reservations law removes an important outlet for States to accommodate pressing domestic concerns while at the same time participating in international treaties. It promotes what Helfer describes as “overlegalisation” in international law, a pertinent example of which can be seen in the denunciation of Optional Protocol-I of the ICCPR by Trinidad and Tobago over its refusal to abolish capital punishment laws.

Despite the argument that human rights treaties must be treated as a special category requiring special rules the fact remains that none of the main human rights treaties (i.e., ICCPR, ICESCR, CERD, CEDAW, CAT and CRC) provides an alternative or a different method for making or testing reservations. All these treaties have invariably adopted the “object and purpose” compatibility test in one form or another, thereby indicating that State practice is supportive of a flexible rather than a rigid system of reservations. This is further evident from the limited number of objections that have been raised against the reservations made to human rights treaties. In addition, I have shown that the reservations regime contained in the VCLT steers a middle path between the contractual approach to treaties, where the sovereign will of the States parties is considered essential, and the contrary approach that ascribes to treaties a normative basis transcending the will of individual States. The benefits of such a flexible system cannot be discounted by simply arguing that it is not applicable to normative treaties.


On the evidence of my examination, it may also be surmised that the issue of separate treatment of human rights treaties is not representative of international law, at least as demonstrated by the reservations made by Islamic States. Moreover, the study has also shown that the diversity paradigm of the VCLT functions as an effective inclusion strategy for bringing States with divergent cultural-legal systems within the fold of human rights regimes. One of the main contributions of the diversity paradigm to normative human rights treaties is that it offers the possibility of closing a democracy deficit in universal human rights claims by generating pluralist consent. This is an ideological theme of the VCLT that is also evident in the State practice of making objections to reservations to human rights treaties. To illustrate the point further, it may be noted that none of the objecting States to Shari`ah-based reservations has refused to establish treaty relations with the Islamic States on account of the purported incompatibility of their reservations. The objection raised by the Netherlands to the Shari`ah-based reservation made by the Maldives to the CEDAW is a typical example where a State objects to the reservation but at the same time notes that the objection does not preclude treaty relations with the reserving State. This is exactly what the VCLT regime on reservations aims to promote. It allows for the creation of treaty relationships by bringing together dissimilar consent.

The cultural-legal divergences that exist between States parties to human rights treaties indicate the need for a pluralist interpretation of the normative content of these treaties. It is clear from my study that only a few Western States (mainly Western European states, Canada and Mexico) are consistent in raising objections to Shari`ah-based reservations, prompting the question whether the absence of any African and Asian objections to Shari`ah-based reservation indicates a cultural divide.

My study has also revealed that there is a different understanding of human rights, at least among the Islamic States participating in these treaties. This difference is not necessarily a negation of human rights altogether, nor does it create a complete
distortion of human rights law. Taking such an absolutist or essentialist universality position on human rights is perhaps theoretically appealing, but fundamentally misplaced in the practice of States parties. For instance, the majority of Islamic States that have ratified CAT have not formulated Shari`ah-based reservations. Similarly, in the case of ICCPR, the evidence indicates that most Islamic States have regarded only the right to convert from Islam (the right to have or to adopt a religion of choice provided under Article 18(1) of ICCPR) to be incompatible with Shari`ah. All the other rights and freedoms included in the Covenant have been accepted without a reservation by most Islamic States. This proves the cross-cultural validity of most of these rights and freedoms within the cultural-legal system of Islamic States. However, when it comes to Article 18 and in particular paragraph (1), there is stiff resistance. Similar concerns are also seen in the case of Article 14 of CRC, once again relating to freedom of religion of the child. Thus, when it comes to certain provisions of human rights treaties - what Eva Brems described as “thorny issues”\footnote{Eva Brems, Human Rights: Universality and Diversity (The Hague: Kluwer International, 2001) 191.} - Islamic States are still persistent with their reservations. These thorny issues (e.g., the *hudūd* cases, same rights between sexes) constitute the fundamental postulates of the Islamic legal system, being deeply rooted in the legitimacy derived from the primary sources of the Qur`an and the Sunnah. In many respects, these represent Rawlsian comprehensive doctrines of Islamic States. The mere fact of the existence of “thorny issues” does not indicate a negation of or for that matter a disengagement from the human rights concerned. Oftentimes, as seen in the manner in which Islamic States have committed to CEDAW, CRC, ICCPR and CAT, these “thorny issues” offer hermeneutic opportunities for alternative elaborations of the respective human rights. For example, this is evident in the approach of Islamic States to CEDAW-based rights concerning marital equality - where equal rights is given a Shari`ah-specific interpretation, while not denying the right itself. Similarly, the right to freedom of religion is conceded by most of the Islamic States and the Islamic human rights declarations, albeit with a Shari`ah-specific interpretation that excludes the absolute right to convert out of the fold of Islam. Moreover, these “thorny issues” do not affect the acceptance by the Islamic States of the rest of the wide gamut of human rights included in these international human rights treaties.
In Chapter Three I discussed the significance and the relevance of the universality versus relativism debate to the international human rights treaty law. Universality of human rights has been justified on various philosophical grounds ranging from natural law, moral and religious authority, as self-evident truths and at times as discernable through cultural traditions (e.g., Western, African and Asian contexts analysed above). These justifications are often formulated as locally conceived universalist views that presume human rights acquire acceptability and legitimacy by virtue of an inherent good. I have rebutted this presumption as being essentialist and predominantly West-centric in orientation and largely unrepresentative of the contexts and conditions in the vast majority of African, Asian and Islamic States. While many of the universalist rights are in a generic sense represented in different cultural and religious contexts, the specific interpretations attributed to these generic rights often times do not reflect the regional specificities.

I have also discussed contemporary theories on universality, including the ratification approach, minimalist universalism, overlapping consensus and the relative universality approach. These theoretical approaches accept that transcendentalist or axiological explications of universality are problematic for not casting the net wide enough to include all points of view, especially since all-inclusiveness is avowed in their respective formulations of human rights. Furthermore, they also appear to take a rather impractical position in justifying universality. For example, the minimalists take a lowest denominator approach of what is least controversial in human rights, while the overlapping consensus and the relative universality theories take the greatest possible consensus among the various contesting viewpoints to justify universality. However, the minimalists and the overlapping consensus theories weaken the existing international human rights regime by focusing on the lowest denominators. Similarly, the relative universality theory admits that certain deviations from the existing human rights regimes are necessary in order to tolerate alternative viewpoints. Nevertheless, such soft tolerance of marginal areas of divergent views on universality fails to take into account hard cases like the apostasy law of Shari`ah. As a result, in relying on liberal
perspectives, these theoretical approaches satisfy neither the universalists nor the relativists.

The short point is that the denial of the validity of alternative interpretations of human rights in existing theories of ontological universality fails to adequately explain the legitimacy of international human rights law across diverse cultural milieus. Consequently, there is an irresolvable tension in the implementation of human rights law in culturally unyielding environments. It fails to explain how States continue to accept human rights standards while, at the same time, they give these standards a local legitimacy through pluralistic hermeneutics. The persistent State practice of making reservations to human rights treaties based on cultural and religious factors illustrates the nature of this tension. Since ontological universality fails to resolve this conflict in the implementation of human rights law, it is not only inadequate but also unrealistic and unrepresentative of actual State practice, prompting a search for alternative paradigms.

Chapter Three has also established that alternative paradigms of the legitimacy of human rights have been developed in order make the discourse on rights inclusive, realistic and representative of State practice. In this context, I have examined the development of the anthropological theory of cultural relativism as a response to universalist human rights. Extreme or thick relativism, as advocated by the American Anthropological Association’s Statement, is counterproductive in the human rights discourse because of its tendency to absolutely relativise all normative derivations. In fact, my study reveals that State practice in the commitment and implementation of human rights treaties does not support a thick relativism approach. States actually agree across cultures on the majority of normative standards contained in these treaties, as shown in the discussion of Islamic reservations to ICCPR and CAT. Thus, a pluralist approach is more in line with State practice and is, at the same time, focused on the need to maintain a cross-cultural normative human rights system. The doctrine of the margin of appreciation evolved by the European Court of Human Rights is an example of the available choices for
generating such cross-cultural pluralism in human rights. The inclusion of pluralist positions in the African Charter on Human and People’s Rights and the strong arguments for Asian particularities during the 1990s underline the viewpoint that there are unrelenting arguments for pluralist formulation of human rights.

The extrapolation of human rights within the Islamic tradition (both in the Universal Islamic Declaration of Human Rights and the Cairo Declaration) makes a potent stand for value pluralism in the human rights discourse. The progressive development of an Islamic human rights regime under the watchful eye of the Organisation of the Islamic Conference has the potential to secure a legal framework for a parallel human rights perspective. It would be a misapprehension to hold the view that such parallel frameworks will weaken and perhaps even reject the existing international human rights regime. What exists - as is evident at least from the human rights treaties discussed - is not a universal human rights regime but an international human rights regime, one that is agreed to between States in accordance with the prevailing international law on cooperation between States. Close examination of all the regional human rights regimes, including the Islamic declarations and the emerging Islamic conventions, reveals their repeated allegiance and commitment to the existing international human rights regimes. The locus standi of these regional regimes is partly derived from the international human rights treaties, acting as parental systems and partly legitimated by the particularist traditions on which these regimes are based (in the case of Islamic declarations, it is Shari‘ah). The vocabulary of rights consists of both the existing mould of international human rights and particularist normative standards. Though it may be an uneasy marriage, riddled with conflicts and compromises, at the same time it is also a practical one that may in the long run prove more realistic in avoiding a clash of civilisations and the effective dissemination of normative standards to protect human dignity.

Furthermore, in Chapter Three I have established that international law on human rights is not shaped and determined by philosophical formulations of human rights concepts. Instead, several variables interplay in constituting a viable and
practical international human rights legal system. The two most important of these variables are the role of States parties in the legitimization of human rights norms and the role of the international law of treaties in setting up a system where sovereign States parties could engage in the progressive acceptance and implementation of human rights law. Such an understanding requires approaching human rights as a discipline of the international law of treaties that operates within a culturally and legally diverse community of States.

Through Chapters Three and Four, I have argued that the adoption of a diversity paradigm does not necessarily imply the negation of human rights norms and replacing them with a different normative structure. Instead, I have pointed out that by adopting a paradigm shift the protection of the normative standards of human rights is more effectively achieved through a process of pluralistic consent. To further establish this position, in Chapter Four I have examined the case of reservations to human rights treaties made by Islamic States.

In one of the most scathing attacks on Islamic engagement with human rights, Reza Afshari has criticised any effort “to advance human rights by locating Islamic cultural roots for them” as the most perplexing paradox. In his attack on Islamic understanding of human rights, Afshari rebuffs “the sacral nature of Shari`ah” and “the patriarchal values and practices enshrined in the sacred text” as an attempt to add “a veneer of modern respectability to the discourse of the holy text and religious conservatism.”

This line of thought, however, is not representative of the actual practice of Islamic States in the context of ratification and implementation of human rights treaties. Equally importantly, as Tore Lindholm observes, it fails to account for the “causal significance” and the “normative pertinence” of Shari`ah in the compliance of human rights treaties by Islamic States. In fact, as considered in Chapter Four, the conceptual framework of Islamic law, the sources and legal

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methodology for asserting legitimacy and changes in the legitimacy of normative values of Islamic law, support and lend credence to this normative pertinence argument.

Admittedly, there is considerable diversity in the understanding of Islamic law as evidenced by the split between the Sunni and Shi’a sects and the schism in the various jurisprudential schools within these two sects. Methodologically, some scholars prefer to cling to traditionalist taklīd (blind belief and following of legal norms developed earlier) approach and to resist any change in the rules of Shari’ah that have been provided by the masters of Islamic jurisprudence in the classical topes on fiqh. In contrasts, many contemporary Islamic jurists have shifted away from the taklīd approach by adopting the method of ijtihād (independent juridical reasoning) and maṣāliḥ al-mursalah (public interest principles) along with maqāṣid al-Shari`ah (interests of Shari`ah as in the dispensation of justice, equity and welfare of the community of believers). This approach can be seen in the ongoing revision of the personal status codes of many Islamic States (e.g., the Moroccan Moudawana) wherein gender justice is given greater prominence by using Shari`ah-based normative standards.

From the analysis of the constitutions, personal status codes and the individual country reports of Islamic States, I have shown that Shari`ah is not just a legal theory or discipline but, instead, an integral part of modern Islamic polity, a vibrant and dynamic point of reference in the lives of believing Muslims. I have also argued that the determined resistance of Islamic States to withdrawing Shari`ah-based reservations - even when treaty bodies such as the CEDAW and CRC Committees have consistently recommended withdrawal - demonstrates that certain normative standards of Shari`ah are outside the purview of negotiation for Islamic States. Substantively, these non-negotiable areas of Shari`ah appear to be very limited, consisting primarily of rules of Shari`ah related to apostasy, equality of rights in marital relations, and in some instances, ḥudūd punishments. The responses of Islamic States to human rights issues related to these Shari`ah rules show an
entrenched belief in the centrality of their legitimacy and an unwillingness to renounce them.

My survey of the reservations made by Islamic States to CEDAW, CRC, ICCPR and CAT has also exposed a strong nexus between Islamic law and the capacity of these States to undertake international obligations with domestic legitimacy. In the case of CEDAW, nine Islamic states have formulated reservations to Article 2, 12 have made reservations to Article 9, and 16 have made reservations to Article 16. A detailed examination of these reservations has established a fundamental connection between the provisions of these three articles and the personal status laws of the Islamic States that are based on norms of Shari`ah regulating family life. A similar trend can be detected in the case of reservations made to CRC, where 12 Islamic states have made Shari`ah-based reservations to Article 14 of CRC dealing with freedom of religion of the child, while have made reservations to the provisions relating to adoption contained in Articles 20 and 21 of CRC. Although concerns about the adoption of minors have been raised in the reservations, the country reports seem to indicate progressive developments in this area, especially through the implementation of *kafālah* (contract-based undertakings to provide care and support to orphaned minors in Shari`ah) for orphans and developing other methods on civil law grounds that do not counter the proscription of Shari`ah concerning automatic inheritance through adoption. Furthermore, nine Islamic States have made general reservations that may potentially apply to the entire CRC. A combined reading of these nine general reservations and the 12 specific reservations made to Article 14 indicate that the Islamic States are concerned that the Shari`ah law on the role of parents in educating their Muslim children in the Islamic faith is undermined by the CRC provisions guaranteeing minors the freedom to convert from Islam. The analysis in Chapter Four indicates that these concerns are linked to a persistent reluctance on the part of the Islamic States to concede this guarantee because of the constraints imposed by Islamic law relating to apostasy rules. It is precisely these areas of the law concerning gender equality, family rights and freedom of religion contained in Articles 3, 23 and 18 of the ICCPR that have also attracted most of the Shari`ah-based reservations.
The examination of the Shari`ah-based reservations and the study of the constitutional provisions and other fundamental laws of Islamic States relating to personal status and criminal laws confirms that these reservations are largely internally validated through a consistent reference to Islamic law, as applied in the legal systems of these States parties. The preeminent position of normative standards of Shari`ah, particularly those pertaining to the rights and responsibilities of marital spouses, children and the State (vis-à-vis freedom of religion), are well established norms in the legal systems of all the Islamic States examined.

All the same, the opportunity to engage in the mainstream human rights discourse has provided Islamic States with a basis for reviewing their legal systems in order to contextualise the effectiveness and the contemporary relevance of Shari`ah-based normative standards. This is an ongoing debate and the basic rules of legitimacy in this internal debate continue to be derived from Shari`ah.

Overall, my research on Shari`ah-based reservations to human rights treaties has reaffirmed that reservations in international treaty law are “a real phenomenon” based on the interplay of several factors such as power politics and social engineering. Moreover, detailed analysis of Shari`ah-based reservations indicates that reservations function as an indispensable treaty law principle allowing States parties such as the Islamic States to mediate between international obligations they are able to implement and the international obligations they in fact undertake. In theoretical terms, my study reveals that consistent reference to Shari`ah in the reservations made by Islamic States does not espouse a thick relativist position. Rather, it asserts that theories of ontological universality of human rights are an idealisation that is not evident in State practice, at least in the case of the Islamic States examined. My study also establishes that, in the operative domain of international treaty law, both human rights and contractual treaties occupy a position of parity that remains anchored in the foundational basis of State consent. Islamic

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States’ practice in formulating reservations to human rights treaties demonstrates that the discourse on human rights is not typecast into a universality-versus-relativism frame of reference.

In summation, the thesis establishes that binary (universalist and relativist) approaches to human rights law do not provide any overriding advantage to the project of internationalisation of human rights norms. Since the principal objective of international human rights law is the protection of the human rights of peoples across the globe, the most productive approach to successfully achieving this objective is through the adoption of a diversity paradigm that allows States parties to effectively commit to and engage with the international human rights law system. This is established by illustrating that the human rights law as a system has been and is functioning within the larger rubric of the community of States regulated by well-recognised doctrines of international law. One such doctrine is found in the international law of treaties as defined in the VCLT. Human rights treaties are also operative within the parameters of this doctrine and hence, the promotion of an effective human rights system must perforce focus on treaty law provisions. VCLT law concerning reservations is an essential component of international treaty law that plays a crucial role in the wider dissemination of human rights norms within diverse communities. State participation in the human rights discourse, through treaty ratification subject to reservations, posits the existence of a diversity paradigm that endorses a “soft” law approach to promoting human rights standards in the international legal system. This approach has the twin advantages of being pragmatic and of eliminating persistent conflict in human rights discourse. In the process, the diversity paradigm offers the opportunity for opening up possibilities for positive engagement and pluralist consent on human rights. It also contributes to the progressive development of not only the normative standards of human rights but also the internal legitimating factors of the States parties concerned, while at the same time encouraging the advancement of a culturally sensitive human rights discourse.
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Nations Document CRC/C/3/Add.6  

Nations Document CRC/C/3/Add.10  

Nations Document CRC/C/3/Add.26  

Document CRC/C/3/Add.53  

Document CRC/C/8/Add.39  

Nations Document CRC/C/8/Add.4  

Nations Document CRC/C/8/Add.35  

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[https://www.cia.gov/library/publications/the-world-factbook/geos/jo.html]

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[https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html]

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[http://www.cia.gov/cia/publications/factbook/geos/ng.html#People]
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<http://www2.ohchr.org/english/bodies/ratification/11.htm#N6>
## APPENDICES

**APPENDIX I: LIST OF ORGANISATION OF ISLAMIC CONFERENCE MEMBERS**

<table>
<thead>
<tr>
<th>State</th>
<th>Year of accession</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>1969</td>
</tr>
<tr>
<td>Albania, Republic of</td>
<td>1992</td>
</tr>
<tr>
<td>Algeria, People's Democratic Republic of</td>
<td>1969</td>
</tr>
<tr>
<td>Azerbaijan, Republic of</td>
<td>1991</td>
</tr>
<tr>
<td>Bahrain, State of</td>
<td>1970</td>
</tr>
<tr>
<td>Bangladesh, People's Republic of</td>
<td>1974</td>
</tr>
<tr>
<td>Benin, Republic of</td>
<td>1982</td>
</tr>
<tr>
<td>Brunei Dar-us-Salaam, Sultanate of</td>
<td>1984</td>
</tr>
<tr>
<td>Burkina Faso</td>
<td>1975</td>
</tr>
<tr>
<td>Cameroon, Republic of</td>
<td>1975</td>
</tr>
<tr>
<td>Chad, Republic of</td>
<td>1969</td>
</tr>
<tr>
<td>Comoros, Federal Islamic Republic of the</td>
<td>1976</td>
</tr>
<tr>
<td>Cote d'Ivoire, Republic of</td>
<td>2001</td>
</tr>
<tr>
<td>Djibouti, Republic of</td>
<td>1978</td>
</tr>
<tr>
<td>Egypt, Arab Republic of</td>
<td>1969</td>
</tr>
<tr>
<td>Gabon, Republic of</td>
<td>1974</td>
</tr>
<tr>
<td>Gambia, Republic of the</td>
<td>1974</td>
</tr>
<tr>
<td>Guinea, Republic of</td>
<td>1969</td>
</tr>
<tr>
<td>Guinea-Bissau, Republic of</td>
<td>1974</td>
</tr>
<tr>
<td>Guyana, Republic of</td>
<td>1998</td>
</tr>
<tr>
<td>Indonesia, Republic of</td>
<td>1969</td>
</tr>
<tr>
<td>Iran, Islamic Republic of</td>
<td>1969</td>
</tr>
<tr>
<td>Iraq, Republic of</td>
<td>1976</td>
</tr>
<tr>
<td>Jordan, Hashemite Kingdom of</td>
<td>1969</td>
</tr>
<tr>
<td>Kazakhstan, Republic of</td>
<td>1995</td>
</tr>
<tr>
<td>Kuwait, State of</td>
<td>1969</td>
</tr>
<tr>
<td>Kyrgyzstan, Republic of</td>
<td>1992</td>
</tr>
<tr>
<td>Lebanon, Republic of</td>
<td>1969</td>
</tr>
</tbody>
</table>
OIC Observer States

- Bosnia and Herzegovina, Republic of
- Central African Republic
- Kingdom of Thailand

Source: OIC Official website at: <http://www.oic-un.org/about/members.htm>
APPENDIX II: DETAILED LIST OF SHARI`AH-BASED RESERVATIONS
(WITH OBJECTIONS) TO ICCPR, CEDAW, CAT and CRC

1. Afghanistan

<table>
<thead>
<tr>
<th>Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ICCPR</strong></td>
</tr>
<tr>
<td>Article 48(d) “The presiding body of the Revolutionary Council of the Democratic Republic of Afghanistan declares that the provisions of paragraphs 1 and 3 of article 48 of the International Covenant on Civil and Political Rights and provisions of paragraphs 1 and 3 of article 26 of the International Covenant on Economic, Social and Cultural Rights, according to which some countries cannot join the aforesaid Covenants, contradicts the international character of the aforesaid Treaties. Therefore, according to the equal rights of all States to sovereignty, both Covenants should be left open for the purpose of the participation of all States.”</td>
</tr>
</tbody>
</table>

| **CEDAW**   |
| No reservation |

| **CAT** |
| Articles 20(d) & 30(d) “While ratifying the above-mentioned Convention, the Democratic Republic of Afghanistan, invoking paragraph 1 of article 28, of the Convention, does not recognize the authority of the Committee as foreseen in article 20 of the Convention. Also according to paragraph 2 of article 30, the Democratic Republic of Afghanistan will not be bound to honour the provision of paragraph 1 of the same article since according to that paragraph the compulsory submission of disputes in connection with interpretation or the implementation of the provisions of this Convention by one of the parties concerned to the International Court of Justice is deemed possible. Concerning this matter, it declares that the settlement of disputes between the States parties may be referred to arbitration or to the International Court of Justice with the consent of all the parties concerned and not by one of the parties.” |

| **CRC** |
| Article 51 “The Government of the Republic of Afghanistan reserves the right to express, upon ratifying the Convention, reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shariah and the local legislation in effect.” |

2. Albania

<table>
<thead>
<tr>
<th>Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ICCPR</strong></td>
</tr>
<tr>
<td>No reservation</td>
</tr>
</tbody>
</table>

| **CEDAW**   |
| No reservation |

| **CAT** |
| No reservation |

| **CRC** |
| No reservation |

3. Algeria

<table>
<thead>
<tr>
<th>Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ICCPR</strong></td>
</tr>
<tr>
<td>Articles 1, 22(d) &amp; 23(d)</td>
</tr>
</tbody>
</table>

| **CEDAW** |
| Article 2 “The Government of the People's Democratic 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.”  
  Article 9 paragraph 2 “The Government of the People's Democratic Republic of Algeria wishes to express its reservations concerning the provisions of article 9, paragraph 2, which are incompatible with the provisions of the Algerian Nationality code and the Algerian Family Code.  
  The Algerian Nationality code allows a child to take the nationality of the mother only when:  
  - the father is either unknown or stateless;  
  - the child is born in Algeria to an Algerian mother and a foreign father who was born in Algeria;  
  - moreover, a child born in Algeria to an Algerian mother and a foreign father who was not born on Algerian territory may, under article 26 of the Algerian Nationality Code, acquire the nationality of the mother providing the Ministry of Justice does not object.” |
Article 41 of the Algerian Family Code states that a child is affiliated to its father through legal marriage.

Article 43 of that Code states that "the child is affiliated to its father if it is born in the 10 months following the date of separation or death."

Article 15, paragraph 4 "The Government of the People's Democratic Republic of Algeria declares that the provisions of article 15, paragraph 4, 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."

Article 16 "The Government of the People's Democratic Republic of Algeria declares that the provisions 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."

Article 29 "The Government of the People's Democratic Republic of Algeria does not consider itself bound by article 29, paragraph 1, which states that any dispute between two or more Parties concerning the interpretation or application of the Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration or to the International Court of Justice. The Government of the People's Democratic Republic of Algeria holds that no such dispute can be submitted to arbitration or to the Court of International Justice except with the consent of all the parties to the dispute."

CAT

Article 21 "The Algerian Government declares, pursuant to article 21 of the Convention, that it recognizes the competence of the Committee Against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22 "The Algerian Government declares, pursuant to article 22 of the Convention, that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

CRC

Articles 2 & 14 "The provisions of paragraphs 1 and 2 of article 14 shall be interpreted by the Algerian Government in compliance with the basic foundations of the Algerian legal system, in particular:

- With the Constitution, which stipulates in its article 2 that Islam is the State religion and in its article 35 that "there shall be no infringement of the inviolability of the freedom of conviction and the inviolability of the freedom of opinion";
- With Law No. 84-11 of 9 June 1984, comprising the Family Code, which stipulates that a child's education is to take place in accordance with the religion of its father.

Articles 13, 16 and 17 shall be applied while taking account of the interest of the child and the need to safeguard its physical and mental integrity. In this framework, the Algerian Government shall interpret the provisions of these articles while taking account of:

- The provisions of the Penal Code, in particular those sections relating to breaches of public order, to public decency and to the incitement of minors to immorality and debauchery;
- The provisions of Law No. 90-07 of 3 April 1990, comprising the Information Code, and particularly its article 24 stipulating that "the director of a publication destined for children must be assisted by an educational advisory body";
- Article 26 of the same Code, which provides that "national and foreign periodicals and specialized publications, whatever their nature or purpose, must not contain any illustration, narrative, information or insertion contrary to Islamic morality, national values or human rights or advocate racism, fanaticism and treason. Further, such publications must contain no publicity or advertising that may promote violence and delinquency."

Article 13(d), 14(d), 16(d) & 17(d)
<table>
<thead>
<tr>
<th>4. <strong>Azerbaijan</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Reservations</strong></td>
</tr>
<tr>
<td>Articles 1 &amp; 2 “The Republic of Azerbaijan, adopting the [said Protocol], in exceptional cases, adopting the special law, allows the application of death penalty for the grave crimes, committed during the war or in condition of the threat of war.”</td>
</tr>
<tr>
<td><strong>Objections</strong></td>
</tr>
<tr>
<td>FINLAND</td>
</tr>
<tr>
<td>“The Government of Finland notes that, according to Article 2 of the Second Optional Protocol, a reservation other than the kind referred to in the same Article is not acceptable. The reservation made by the Government of Azerbaijan is partly in contradiction with Article 2 as it does not limit the application of death penalty to the most serious crimes of a military nature committed during the time of war. The Government of Finland therefore objects to the reservation made by the Government of Azerbaijan to the said Protocol. This objection does not preclude the entry into force of the Second Optional Protocol between Azerbaijan and Finland. The Optional Protocol will thus become operative between the two states without Azerbaijan benefitting from the reservation.”</td>
</tr>
<tr>
<td>NETHERLANDS</td>
</tr>
<tr>
<td>“The Government of the Kingdom of the Netherlands notes that, according to Article 2 of the Second Optional Protocol, a reservation other than the kind referred to in the same Article is not acceptable. The reservation made by the Government of Azerbaijan is in contradiction with Article 2 as it does not limit the application of death penalty to the most serious crimes of a military nature committed during the time of war. The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Government of Azerbaijan. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Azerbaijan.”</td>
</tr>
<tr>
<td>GERMANY</td>
</tr>
<tr>
<td>“The reservation allows the application of the death penalty for grave crimes committed during war ‘or in condition of the threat of war’. Thus the reservation is partly in contradiction of article 2 of the Protocol since it does not limit the application of the death penalty to the most serious crimes of a military nature committed during the time of war. The Government of the Federal Republic of Germany therefore objects to the reservation by the Government of Azerbaijan. This objection does not preclude the entry into force of the Protocol between Azerbaijan and Germany.”</td>
</tr>
<tr>
<td>SWEDEN</td>
</tr>
<tr>
<td>“The Government of Sweden recalls that reservations other than the kind referred to in Article 2 of the Protocol are not permitted. The reservation made by the Government of Azerbaijan goes beyond the limit of Article 2 of the Protocol, as it does not limit the application of the death penalty to the most serious crimes of a military nature committed during the time of war. The Government of Sweden therefore objects to the aforesaid reservation made by the Government of Azerbaijan to the Second Optional Protocol to the International Covenant on Civil and Political Rights. This shall not preclude the entry into force of the Second Optional Protocol to the International Covenant on Civil and Political Rights between the Republic of Azerbaijan and the Kingdom of Sweden, without Azerbaijan benefitting from the reservation.”</td>
</tr>
<tr>
<td><strong>CEDAW</strong></td>
</tr>
<tr>
<td>No reservation</td>
</tr>
<tr>
<td><strong>CAT</strong></td>
</tr>
<tr>
<td>Article 22 (d) “… the Government of the Republic of Azerbaijan declares that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.”</td>
</tr>
<tr>
<td><strong>CRC</strong></td>
</tr>
<tr>
<td>Article 3(d) “Pursuant to Article 3 of the protocol, the Republic of Azerbaijan declares that in accordance with the Law of the Republic of Azerbaijan on the...”</td>
</tr>
</tbody>
</table>
military service of 3 November 1992, the citizens of the Republic of Azerbaijan and other persons, who are meeting the defined requirements of the military service, may voluntarily enter and be admitted in age of 17 the active military service of the cadets military school. The legislation of the Republic of Azerbaijan guarantees that this service shall not be forced or coerced, shall be realized on the basis of deliberative consent of the parents and the legal representatives of those persons, that those persons shall be provided with the full information of the duties regarding this service, and that the documents certifying their age shall be required before the admission to the service in the national armed forces.”

5. Bahrain

| ICCPR   | Articles 2, 9, 15, 16, 29 “...the Kingdom of Bahrain makes reservations with respect to the following provisions of the Convention:  
- Article 2, in order to ensure its implementation within the bounds of the provisions of the Islamic Shariah;  
- Article 9, paragraph 2  
- Article 15, paragraph 4  
- Article 16, in so far as it is incompatible with the provisions of the Islamic Shariah  
- Article 29, paragraph 1”

<table>
<thead>
<tr>
<th>Objections</th>
</tr>
</thead>
</table>
| “The Government of Austria has examined the reservation to the Convention on the Elimination of all forms of Discrimination against Women made by the Government of the Kingdom of Bahrain in its note to the Secretary-General of 18 June 2002, regarding articles 2, 9(2), 15(4) and 16. The reservation to articles 9(2) and 15(4), if put into practice, would inevitably result in discrimination against women on the basis of sex. This is contrary to the object and purpose of the Convention. The Government of Austria further considers that, in the absence of further clarification, the reservation to articles 2 and 16 which does not clearly specify the extent of Bahrain's derogation from the provisions in question raises doubts as to the degree of commitment assumed by Bahrain in becoming a party to the Convention since it refers to the contents of Islamic Sharia. The Government of Austria would like to recall that, according to art. 28(2) of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. For these reasons, the Government of Austria objects to this reservation made by the Government of Bahrain. This position, however, does not preclude the entry into force in its entirety of the Convention between Bahrain and Austria.”

| CEDAW   | Article 30 “The State of Bahrain does not consider itself bound by paragraph 1 of article 30 of the Convention.”

| CRC      | No Reservation

6. Bangladesh

| ICCPR   | Articles 10(d) “So far as the first part of paragraph 3 of Article 10 relating to reformation and social rehabilitation of prisoners is concerned, Bangladesh does not have any facility to this effect on account of financial constraints and for lack of proper logistics support. The last part of this paragraph relating to segregation of juvenile offenders from adults is a legal obligation under
Bangladesh law and is followed accordingly.”

Article 11(d) “Article 11 providing that “no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation,” is generally in conformity with the Constitutional and legal provisions in Bangladesh, except in some very exceptional circumstances, where the law provides for civil imprisonment in case of willful default in complying with a decree. The Government of People's Republic of Bangladesh will apply this article in accordance with its existing municipal law.”

Article 14 “So far as the provision of legal assistance in paragraph 3(d) of Article 14 is concerned, a person charged with criminal offences is statutorily entitled to legal assistance if he does not have the means to procure such assistance. The Government of the People's Republic of Bangladesh, notwithstanding its acceptance of the principle of compensation for miscarriage of justice, as stipulated in Article 14, paragraph 6, is not in a position to guarantee a comprehensive implementation of this provision for the time being. However, the aggrieved has the right to realize compensation for miscarriage of justice by separate proceedings and in some cases, the court suo moto grants compensation to victims of miscarriage of justice. Bangladesh, however, intends to ensure full implementation of this provision in the near future.

The Government of the People's Republic of Bangladesh reserves the right not to apply paragraph 3 (d) of Article 14 in view of the fact, that, while the existing laws of Bangladesh provide that, in the ordinary course a person, shall be entitled to be tried in his presence, it also provides for a trial to be held in his absence if he is a fugitive offender, or is a person, who being required to appear before a court, fails to present himself or to explain the reasons for non-appearance to the satisfaction of the court.”

CEDAW

Articles 2 & 16 “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) and [.....] as they conflict with Sharia law based on Holy Quran and Sunna.”

Articles 8(d) & 9(d) “The Government of the People's Republic of Bangladesh declares in accordance with Article 10 (1) thereof, that it would not undertake the obligations arising out of Articles 8 and 9 of the said Optional Protocol.”

CAT

Article 14(d) “The Government of the People's Republic of Bangladesh will apply article 14 para 1 in consonance with the existing laws and legislation in the country.”

CRC

Articles 14 & 21 “The Government of the People's Republic of Bangladesh ratifies the Convention with a reservation to article 14, paragraph 1.”

Also article 21 would apply subject to the existing laws and practices in Bangladesh.”

**Objections**

IRELAND - The Government of Ireland consider that such reservations, which seek to limit the responsibilities of the reserving State under the Convention, by invoking general principles of national law, may create doubts as to the commitment of those States to the object and purpose of the Convention. This objection shall not constitute an obstacle to the entry into force of the Convention between Ireland and the aforementioned States.

PORTUGAL: The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations. This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Bangladesh.

Article 3(d) “In accordance with Article 3 (2) of [the Optional Protocol], the Government of the People's Republic of Bangladesh declares that the minimum age at which it permits voluntary recruitment into its national Armed Forces is sixteen years for non-commissioned soldiers and seventeen years for
commissioned officers, with informed consent of parents or legal guardian, without any exception.

The Government of the People's Republic of Bangladesh further provides hereunder a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced:

The process of recruitment in the national Armed Forces is initiated through advertisement in the national press and the media for officers and other ranks without exception. The first induction of new recruits is conducted invariably in a public place such as a national park, school ground or a similar place. Public participation is welcomed in such programmes.

Before a recruit presents himself he has to submit a written declaration from his parents or legal guardians consenting to his recruitment. If the parent or legal guardian is illiterate the declaration is verified and counter signed by the Chairmain of the Union Parishad.

The recruit is required to present birth certificate, matriculation certificate and full school records. All recruits whether officers or other ranks have to undergo rigorous medical examination including checks for puberty. A recruit found to be pre-pubescent is automatically rejected.

Officers and other ranks without exception are required to undergo two years of compulsory training. This ensures that they are not assigned to combat units before the age of 18. All officers and other ranks are carefully screened before being assigned to combat units. These tests include tests of psychological maturity including an understanding of the elements of international law of armed conflict inculcated at all levels.

The Government of the People's Republic of Bangladesh declares that stringent checks in accordance with the obligations assumed under the Optional Protocol will continue to be applied without exception.

7. Benin

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8. Bosnia and Herzegovina

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| CRC    | Article 9 “The Republic of Bosnia and Herzegovina reserves the right not to apply paragraph 1 of article 9 of the Convention since the internal legislation of the Republic of Bosnia and Herzegovina provides for the right of competent authorities (guardianship authorities) to determine on separation of a child from his/her parents without a previous judicial review.”

General Declaration “The State of Bosnia and Herzegovina will not permit voluntary recruitment into its national armed forces of any person under age of 18. Such provision is incorporated into the Law on Defense of Federation of Bosnia and Herzegovina (“Official Gazette of Federation of Bosnia and Herzegovina” No. 15/96, 23/02, 18/03) and Law on Army of Republika Srpska (“Official gazette of Republika Srpska” No 31/96, 96/01), and is in compliance with Optional Protocol to the Convention on the Rights of the Child that was ratified by Bosnia and Herzegovina.”

9. Brunei Darussalam

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**General Reservation & Articles 14, 20, 21** “The Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam expresses its reservations on the provisions of the said Convention which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State religion, and without prejudice to the generality of the said reservations, in particular expresses its reservations on articles 14, 20 and 21 of the Convention.”

**Objections**

DENMARK “The Government of Denmark finds that the general reservation with reference to the Constitution of Brunei Darussalam and to the beliefs and principles of Islamic law is of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purposes of the Convention and accordingly inadmissible and without effect under international law. Furthermore, it is a general principle of international law that national law may not be invoked as justification for failure to perform treaty obligations.

The Convention remains in force in its entirety between Brunei Darussalam and Denmark.

It is the opinion of the Government of Denmark that no time limit applies to objections against reservations, which are inadmissible under international law. The Government of Denmark recommends the Government of Brunei Darussalam to reconsider its reservation to the Convention on the Rights of the Child.

AUSTRIA “Under article 19 of the Vienna Convention on the Law of Treaties which is reflected in article 51 of the [Convention] a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Brunei Darussalam to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law cannot be made without further clarification.

Until the scope of the legal effects of this reservation is sufficiently specified by Brunei Darussalam, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question if the application of this reservation negatively affects the compliance of Brunei Darussalam ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Brunei Darussalam ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties unless Brunei Darussalam ... , by providing additional information or through subsequent practice to ensure [s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].”

GERMANY “The Government of the Federal Republic of Germany considers that such a reservation, which seeks to limit the responsibilities of Brunei Darussalam under the Convention by invoking general principles of national law, may raise doubts as to the commitment of Brunei Darussalam to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is the 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. The Government of the Federal Republic of Germany therefore objects to the said reservation.

This objection does not constitute an obstacle to the entry into force of the Convention between the Federal Republic of Germany and Brunei Darussalam.”
ITALY “The Government of the Italian Republic considers that such a reservation, which seeks to limit the responsibilities of Brunei Darussalam under the Convention by invoking general principles of national law, may raise doubts as to the commitment of Brunei Darussalam to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is common interest of States that treaties to which they have chosen to become Parties should be respected, as to the objects and the purpose, by all Parties. The Government of the Italian Republic therefore objects to this reservation. This objection does not constitute an obstacle to the entry into force of the Convention between the Government of the Italian Republic and the State of Brunei Darussalam.”

NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. the Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.”

NORWAY “The Government of Norway considers that the reservation made by the State of Brunei Darussalam, due to its unlimited scope and undefined character, is inadmissible under international law. For that reason, the Government of Norway objects to the reservation made by the State of Brunei Darussalam. The Government of Norway does not consider this objection to preclude the entry into force of the Convention between the Kingdom of Norway and the State of Brunei Darussalam.”

PORTUGAL “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations. This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Brunei Darussalam.”

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<th>10. Burkina Faso</th>
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### 13. Comoros

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### 14. Cote D’Ivoire

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### 15. Djibouti

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<td>CAT</td>
<td>No reservation</td>
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<tr>
<td>CRC</td>
<td>General Reservation “[The Government of the Republic of Djibouti] shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values.”</td>
</tr>
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</table>

#### Objections

**IRELAND** “The Government of Ireland consider that such reservations, which seek to limit the responsibilities of the reserving State under the Convention, by invoking general principles of national law, may create doubts as to the commitment of those States to the object and purpose of the Convention. This objection shall not constitute an obstacle to the entry into force of the Convention between Ireland and the aforementioned States.

**NETHERLANDS** “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. the Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.

**NORWAY** “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may create doubts about the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Norway, therefore, objects to this reservation. This objection shall not constitute an obstacle to the entry into force of the Convention between Norway and the Republic of Djibouti.”

**PORTUGAL** “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts about the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations. This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Djibouti.”
### 16. Egypt

**Reservations**

<table>
<thead>
<tr>
<th>Convention</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>ICCPR</td>
<td>General Reservation “... taking into consideration the provisions of the Islamic shariah and the fact that they do not conflict with the text annexed to the instrument ... we accept, support and ratify it ...”</td>
</tr>
<tr>
<td>ICESCR</td>
<td>Articles 2, 9, 16 &amp; 29 “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.”</td>
</tr>
<tr>
<td>CEDAW</td>
<td>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 so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridalmoney to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no such restriction is laid down in the case of the husband. The Egyptian delegation also maintains the reservation contained in article 29, paragraph 2, concerning the right of a State signatory to the Convention to declare that it does not consider itself bound by paragraph 1 of that article concerning the submission to an arbitral body of any dispute which may arise between States concerning the interpretation or application of the Convention. This is in order to avoid being bound by the system of arbitration in this field. General Reservation on Article 2 “The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Sharia.”</td>
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<td>CAT</td>
<td>No reservation</td>
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<tr>
<td>CRC</td>
<td>Articles 20 &amp; 21 “The Arab Republic of Egypt, Considering that the Islamic Shariah is the fundamental sources of legislation in Egyptian positive law and that, under the said Shariah, it is obligatory to provide all means of protection and care to children by diverse ways and means, not including, however, the system of adoption established in certain other bodies of positive law, Expresses its reservation with respect to all the clauses and provisions relating to adoption in this Convention, and in particular to those parts of articles 20 and 21 of the Convention which concern adoption.”</td>
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### 17. Gabon

**Reservations**

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<th>Convention</th>
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<td>18. Gambian</td>
<td><strong>Reservations</strong></td>
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<tr>
<td>ICCPR</td>
<td>Article 14 “For financial reasons free legal assistance for accused persons is limited in our constitution to persons charged with capital offences only. The Government of the Gambia therefore wishes to enter a reservation in respect of article 14 (3) (d) of the Covenant in question.”</td>
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<th>19. Guinea</th>
<th><strong>Reservations</strong></th>
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<tr>
<td>ICCPR</td>
<td>Article 48 “In accordance with the principle whereby all States whose policies are guided by the purposes and principles of the Charter of the United Nations are entitled to become parties to covenants affecting the interests of the international community, the Government of the Republic of Guinea considers that the provisions of article 48, paragraph 1, of the International Covenant on Civil and Political Rights are contrary to the principle of the universality of international treaties and the democratization of international relations.”</td>
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<th>21. Guyana</th>
<th><strong>Reservations</strong></th>
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<tr>
<td>ICCPR</td>
<td>Article 6 “[...] Guyana re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 6 thereof with the result that the Human Rights Committee shall not be competent to receive and consider communications from any persons who is under sentence of death for the offences of murder and treason in respect of any matter relating to his prosecution, detention, trial, conviction, sentence or execution of the death sentence and any matter connected therewith. Accepting the principle that States cannot generally use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Guyana stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Guyana and subject to its jurisdiction the rights recognised in the Covenant (in so far as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof.”</td>
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<tr>
<td>Articles 6,14 of Optional Protocol [as above]</td>
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</table>
Objections

FINLAND “The Government of Finland is of the view that denying the rights recognised in the Optional Protocol from individuals under the most severe sentence is in contradiction with the object and purpose of the said Protocol. Furthermore, the Government of Finland wishes to express its serious concern as to the procedure followed by Guyana, of denouncing the Optional Protocol (to which it did not have any reservations) followed by an immediate re-accession with a reservation. The Government of Finland is of the view that such a procedure is highly undesirable as circumventing the rule of the law of treaties that prohibits the formulation of reservations after accession. The Government of Finland therefore objects to the reservation made by the Government of Guyana to the said Protocol. This objection does not preclude the entry into force of the Optional Protocol between Guyana and Finland. The Optional Protocol will thus become operative between the two states without Guyana benefitting from the reservation.”

POLAND “The Government of the Republic of Poland believes that this reservation seeks to deny the benefits of the Optional Protocol towards a group of individuals under the sentence of death. This reservation is contrary to the object and purpose of the Protocol which is to strengthen the position of individuals in respect of the human rights protected by the Covenant. Furthermore the Government of the Republic of Poland considers the procedure followed by the Government of the Republic of Guyana in the denunciation of the Optional Protocol, and its subsequent re-accession with reservation as not consistent with the law of treaties and clearly undermining the Protocol. The Government of the Republic of Poland therefore objects to the above mentioned reservation made by the Government of the Republic of Guyana. This objection does not preclude the entry into force of the Optional Protocol between the Republic of Poland and the Republic of Guyana.”

SWEDEN “The Government of Sweden has examined the reservation to article 1 made by the Government of Guyana at the time of its re-accession to the Optional Protocol. The Government of Sweden notes that the Government of Guyana accepts the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, and that it stresses that its reservation in no way detracts from its obligations and engagements under the Covenant. Nevertheless, the Government of Sweden has serious doubts as to the propriety of the procedure followed by the Government of Guyana. While article 12, paragraph 1 of the Protocol provides that any State Party may denounce the Protocol "at any time", the denunciation may in no case be used by a State Party for the sole purpose of formulating reservations to that instrument after having re-acceded to it. Such a practice would constitute a misuse of the procedure and would be manifestly contrary to the principle of good faith. It further contravenes the rule of pacta sunt servanda. As such, it undermines the basis of international treaty law and the protection of human rights. The Government of Sweden therefore wishes to declare its grave concern over this method of proceeding. Furthermore, the reservation seeks to limit the international obligations of Guyana towards individuals under sentence of death. The Government of Sweden is of the view that the right to life is fundamental and that the death penalty cannot be accepted. It is therefore of utmost importance that states that persist in this practice refrain from further weakening the position of that group of individuals.”

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<th>Treaty</th>
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### Indonesia

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<th>Reservations</th>
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<td><strong>ICCPR</strong></td>
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<td>Article 29 “The Government of the Republic of Indonesia does not consider itself bound by the provisions of article 29, paragraph 1 of this Convention and takes the position that any dispute relating to the interpretation or application of the Convention may only be submitted to arbitration or to the International Court of Justice with the agreement of all the parties to the dispute.”</td>
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| **CEDAW** |
| Article 20(D) “The Government of the Republic of Indonesia declares that the provisions of paragraphs 1, 2, and 3 of article 20 of the Convention will have to be implemented in strict compliance with the principles of the sovereignty and territorial integrity of States.” |
| Article 30 “The Government of the Republic of Indonesia does not consider itself bound by the provision of article 30, paragraph 1, and takes the position that disputes relating to the interpretation and application of the Convention which cannot be settled through the channel provided for in paragraph 1 of the said article, may be referred to the International Court of Justice only with the consent of all parties to the disputes.” |

| **CAT** |
| General Reservation “The 1945 Constitution of the Republic of Indonesia guarantees the fundamental rights of the child irrespective of their sex, ethnicity or race. The Constitution prescribes those rights to be implemented by national laws and regulations. The ratification of the Convention on the Rights of the Child by the Republic of Indonesia does not imply the acceptance of obligations going beyond the Constitutional limits nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution. With reference to the provisions of articles 1, 14, 16, 17, 21, 22 and 29 of this Convention, the Government of the Republic of Indonesia declares that it will apply these articles in conformity with its Constitution.” |

| **Objections** |
| FINLAND “In the view of the Government of Finland 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. For the above reason the Government of Finland objects to the said reservation. However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the said Convention between Finland and the Republic of Indonesia.” |
| IRELAND “The Government of Ireland consider that such reservations, which seek to limit the responsibilities of the reserving State under the Convention, by invoking general principles of national law, may create doubts as to the commitment of those States to the object and purpose of the Convention. This objection shall not constitute an obstacle to the entry into force of the Convention between Ireland and the aforementioned States.” |
| NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. the Government of the Kingdom of the Netherlands therefore objects to these reservations. This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.” |
| NORWAY “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may create doubts about |
the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Norway, therefore, objects to this reservation. This objection shall not constitute an obstacle to the entry into force of the Convention between Norway and Indonesia.”

PORTUGAL “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations. This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Indonesia.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Sweden therefore objects to the reservations. This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and the Republic of Indonesia.”

<table>
<thead>
<tr>
<th>23. Iran</th>
<th>Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICCPR</td>
<td>No reservation</td>
</tr>
<tr>
<td>CEDAW</td>
<td>-</td>
</tr>
<tr>
<td>CAT</td>
<td>-</td>
</tr>
<tr>
<td>CRC</td>
<td>General Reservation “The Islamic Republic of Iran is making reservation to the articles and provisions which may be contrary to the Islamic Shariah, and preserves the right to make such particular declaration, upon its ratification.” General Reservation “The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect.”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Objections</th>
</tr>
</thead>
<tbody>
<tr>
<td>FINLAND “In the view of the Government of Finland 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. For the above reason the Government of Finland objects to the said reservation. However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the said Convention between Finland and the Islamic Republic of Iran.”</td>
</tr>
<tr>
<td>GERMANY “This reservation, owing to its indefinite nature, does not meet the requirements of international law. The Government of the Federal Republic of Germany therefore objects to the reservation made by Iran. This objection shall not preclude the entry into force of the Convention as between Iran and the Federal Republic of Germany.”</td>
</tr>
<tr>
<td>IRELAND “The reservation poses difficulties for the States Parties to the Convention in identifying the provisions of the Convention which the Islamic Government of Iran does not intend to apply and consequently makes it difficult for States Parties to the Convention to determine the extent of their treaty relations with the reserving State. The Government of Ireland hereby formally makes objection to the reservation by the Islamic Republic of Iran.”</td>
</tr>
</tbody>
</table>
NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. The Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforesaid States.”

NORWAY “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Norway, therefore, objects to this reservation.

This objection shall not constitute an obstacle to the entry into force of the Convention between Norway and Iran.”

PORTUGAL “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations.

This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Iran.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Sweden therefore objects to the reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and Iran.”

24. Iraq

<table>
<thead>
<tr>
<th>ICCPR</th>
<th>General reservation</th>
</tr>
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<tbody>
<tr>
<td>CEDAW</td>
<td>Articles 2,9,16 &amp; 29 “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. The reservation to this last-mentioned article shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them. Iraq also enters a reservation to article 29, paragraph 1, of this Convention with regard to the principle of international arbitration in connection with the interpretation or application of this Convention. This approval in no way implies recognition of or entry into any relations with Israel.”</td>
</tr>
<tr>
<td>CAT</td>
<td>-</td>
</tr>
<tr>
<td>CRC</td>
<td>Article 14 “[Iraq] ha[s] seen fit to accept it [the Convention] ... subject to a reservation in respect of article 14, paragraph 1, concerning the child’s freedom of religion, as allowing a child to change his or her religion runs counter to the provisions of the Islamic Shariah.”</td>
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</table>
25. Jordan

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<thead>
<tr>
<th>Country</th>
<th>Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICCPR</td>
<td>No reservation</td>
</tr>
</tbody>
</table>
| CEDAW   | Articles 9(d), 15(d) & 16(d) “Jordan does not consider itself bound by the following provisions:  
  - Article 9, paragraph 2;  
  - Article 15, paragraph 4 (a wife's residence is with her husband);  
  - Article 16, paragraph (1) (c), relating to the rights arising upon the dissolution of marriage with regard to maintenance and compensation;  
  - Article 16, paragraph (1) (d) and (g).” |
| CAT     | No reservation |
| CRC     | Articles 14, 20 & 21 “The Hashemite Kingdom of Jordan expresses its reservation and does not consider itself bound by articles 14, 20 and 21 of the Convention, which grant the child the right to freedom of choice of religion and concern the question of adoption, since they are at variance with the precepts of the tolerant Islamic Shariah.” |

**Objections**

IRELAND “The Government of Ireland consider that such reservations, which seek to limit the responsibilities of the reserving State under the Convention, by invoking general principles of national law, may create doubts as to the commitment of those States to the object and purpose of the Convention. This objection shall not constitute an obstacle to the entry into force of the Convention between Ireland and the aforementioned States.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Sweden therefore objects to the reservations. This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and Jordan.”

26. Kazakhstan

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<thead>
<tr>
<th>Country</th>
<th>Reservations</th>
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<tbody>
<tr>
<td>ICCPR</td>
<td>No reservation</td>
</tr>
<tr>
<td>CEDAW</td>
<td>No reservation</td>
</tr>
<tr>
<td>CAT</td>
<td>No reservation</td>
</tr>
</tbody>
</table>
| CRC     | Article 3(d) “Pursuant to article 3, paragraph 2, of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts, the Republic of Kazakhstan hereby declares:  
  In accordance with the Military Service on Contract Basis Act No. 167-II 3PK of March 20, 2001:  
  1. Military Service on Contract Basis grounded on the principles of legitimacy, voluntary recruitment, professionalism and competency, social security and protection of rights of military servants.  
  2. Every military servant is entitled in full equality in his or her rights. No one shall be limited in his or her rights or attain any advantages realising the rights with regard to sex, age, race, nationality, language, religion, official capacity and social status.  
  3. Article 17, paragraph 1 permits voluntary recruitment at the minimum age of 19.  
  4. According to the article 14, paragraph 1 a contract should obligatory include description of the identification document, number and date of issue of the document, number of social individual code and tax-payer's registration number.” |
<table>
<thead>
<tr>
<th>27. Kuwait</th>
<th>Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICCPR</td>
<td>Articles 2(d), 3(d) &amp; 23(d) “Interpretative declaration regarding article 2, paragraph 1, and article 3: Although the Government of Kuwait endorses the worthy principles embodied in these two articles as consistent with the provisions of the Kuwait Constitution in general and of its article 29 in particular, the rights to which the articles refer must be exercised within the limits set by Kuwaiti law. Interpretative Declaration Article 23 “The Government of Kuwait declares that the matters addressed by article 23 are governed by personal-status law, which is based on Islamic law. Where the provisions of that article conflict with Kuwaiti law, Kuwait will apply its national law.” Article 25 “Reservations concerning article 25 (b): The Government of Kuwait wishes to formulate a reservation with regard to article 25(b). The provisions of this paragraph conflict with the Kuwaiti electoral law, which restricts the right to stand and vote in elections to males. It further declares that the provisions of the article shall not apply to members of the armed forces or the police.”</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Article 7 “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.” Article 9 “The Government of Kuwait reserves its right not to implement the provision contained in article 9, paragraph 2, of the Convention, inasmuch as it runs counter to the Kuwaiti Nationality Act, which stipulates that a child's nationality shall be determined by that of his father.” Article 16 “The Government of the State of Kuwait declares that it does not consider itself bound by the provision contained in article 16 (f) inasmuch as it conflicts with the provisions of the Islamic Shariah, Islam being the official religion of the State.” Article 29 “The Government of Kuwait declares that it is not bound by the provision contained in article 29, paragraph 1.”</td>
</tr>
<tr>
<td>CAT</td>
<td>Articles 20 &amp; 30 The instrument of accession was accompanied by the following reservations: “With reservations as to article 20 and the provision of paragraph 1 of article 30 of the Convention.”</td>
</tr>
<tr>
<td>CRC</td>
<td>General reservation “[Kuwait expresses] reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shari'a and the local statutes in effect.” Article 7 “The State of Kuwait understands the concepts of this article to signify the right of the child who was born in Kuwait and whose parents are unknown (parentless) to be granted the Kuwaiti nationality as stipulated by the Kuwaiti Nationality Laws.” Article 21 “With respect to article 21 the State of Kuwait, as it adheres to the provisions of the Islamic shariah as the main source of legislation, strictly bans abandoning the Islamic religion and does not therefore approve adoption.”</td>
</tr>
</tbody>
</table>

**Objections**

IRELAND “The Government of Ireland consider that such reservations, which seek to limit the responsibilities of the reserving State under the Convention, by invoking general principles of national law, may create doubts as to the commitment of those States to the object and purpose of the Convention. This objection shall not constitute an obstacle to the entry into force of the Convention between Ireland and the aforementioned States.”

PORTUGAL “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations. This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Kuwait.”
28. Kyrgyzstan

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Reservations</th>
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<tbody>
<tr>
<td>ICCPR</td>
<td>No reservation</td>
</tr>
<tr>
<td>CEDAW</td>
<td>No reservation</td>
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<tr>
<td>CAT</td>
<td>No reservation</td>
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<tr>
<td>CRC</td>
<td>No reservation</td>
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29. Lebanon

<table>
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<tr>
<th>Treaty</th>
<th>Reservations</th>
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<tbody>
<tr>
<td>ICCPR</td>
<td>No reservation</td>
</tr>
</tbody>
</table>
| CEDAW    | Articles 9,16 & 29 “The Government of the Lebanese Republic enters reservations regarding article 9 (2), and article 16 (1) (c) (d) (f) and (g) (regarding the right to choose a family name).
In accordance with paragraph 2 of article 29, the Government of the Lebanese Republic declares that it does not consider itself bound by the provisions of paragraph 1 of that article.” |
| CAT      | No reservation    |
| CRC      | No reservation    |

30. Libya

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICCPR</td>
<td>Articles 2 &amp; 16 “Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic Shariah relating to determination of the inheritance portions of the estate of a deceased person, whether female or male. 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.”</td>
</tr>
<tr>
<td>CEDAW</td>
<td>No reservation</td>
</tr>
<tr>
<td>CAT</td>
<td>No reservation</td>
</tr>
<tr>
<td>CRC</td>
<td>No reservation</td>
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</table>

31. Malaysia

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<thead>
<tr>
<th>Treaty</th>
<th>Reservations</th>
</tr>
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</table>
| ICCPR    | Articles 2,5,7,9,11 & 16 “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 Shariah 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.
In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.
Withdrawal of Reservations to Articles 2,9 & 16 “The Government of Malaysia withdraws its reservation in respect of article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h)” |
| CEDAW    | Article 28 “With respect to article 28 paragraph 1 (a), the Government of Malaysia wishes to declare that in Malaysia, even though primary education is not compulsory and available free to all, primary education is available to everybody and Malaysia has achieved a high rate of enrolment for primary education i.e. at the rate of 98 percent enrolment.” Articles 1, 2, 7, 13, 14, 15, 28, 37, 40, 44 & 45 “The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 1, 2, 7, 13, 14, 15, 22, 28, 37, 40 paragraphs 3 and 4, 44 and 45 of the Convention and declares that the said provisions shall be |
| CAT      | No reservation    |
| CRC      | No reservation    |
applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.”

Objections

AUSTRIA “Under article 19 of the Vienna Convention on the Law of Treaties which is reflected in article 51 of the [Convention] a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law cannot be made without further clarification.

Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question if the application of this reservation negatively affects the compliance of Malaysia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties unless Malaysia ... , by providing additional information or through subsequent practice to ensure [s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].”

FINLAND “The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.

The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of states that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.

In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland objects to such reservation. The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.

The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention].”

GERMANY “The Government of the Federal Republic of Germany considers that such a reservation, which seeks to limit the responsibilities of Malaysia under the Convention by invoking general principles of national law, may raise doubts as to the commitment of Malaysia to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is the 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. The Government of the Federal Republic of Germany therefore objects to the said reservation.
This objection does not constitute an obstacle to the entry into force of the Convention between the Federal Republic of Germany and Malaysia.”

IRELAND “Ireland considers that this reservation is incompatible with the object and purpose of the Convention and is therefore prohibited by article 51 (2) of the Convention. The Government of Ireland also considers that it contributes to undermining the basis of international treaty law. The Government of Ireland therefore objects to the said reservation.”

NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. the Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforesaid States.”

NORWAY “The Government of Norway considers that the reservation made by the Government of Malaysia, due to its very broad scope and undefined character, is incompatible with the object and purpose of the Convention, and thus not permitted under article 51, paragraph 2, of the Convention. Moreover, the Government of Norway considers that the monitoring system established under the Convention is not optional and that, accordingly, reservations with respect to articles 44 and 45 of the Convention are not permissible. For these reasons, the Government of Norway objects to the reservation made by the Government of Malaysia.

The Government of Norway does not consider this objection to preclude the entry into force of the Convention between the Kingdom of Norway and Malaysia.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Sweden therefore objects to the reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and Malaysia.”

PORTUGAL “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations.

This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Malaysia.”

32. Maldives

Reservations

ICCPR

The application of the principles set out in Article 18 of the Covenant shall be without prejudice to the Constitution of the Republic of Maldives.”

Objections

AUSTRALIA “The Government of Australia considers that the reservation with respect to article 18 of the Covenant is a reservation incompatible with the object and purpose of the Covenant. The Government of the Australia recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty is not
permitted. It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. Furthermore, the Government of Australia considers that the Republic of Maldives, through this reservation, is purporting to make the application of the International Covenant on Civil and Political Rights subject to the provisions of constitutional law in force in the Republic of Maldives. As a result, it is unclear to what extent the Republic of Maldives considers itself bound by the obligations of the Covenant and therefore raises concerns as to the commitment of the Republic of Maldives to the object and purpose of the Covenant.

The Government of Australia considers that the reservation with respect to article 18 of the Covenant is subject to the general principle of treaty interpretation, pursuant to Article 27 of the Vienna Convention on the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Further, the Government of Australia recalls that according to article 4 (2) of the Covenant, no derogation of article 18 is permitted. For the above reasons, the Government of Australia objects to the aforesaid reservation made by the Republic of Maldives to the International Covenant on Civil and Political Rights and expresses the hope that the Republic of Maldives will soon be able to withdraw its reservation in light of the ongoing process of a revision of the Maldivian Constitution.

This objection shall not preclude the entry into force of the Covenant between Australia and the Republic of Maldives.”


The Government of Austria is of the opinion that reservations which consist in a general reference to a system of norms (like the constitution of the legal order of the reserving State) without specifying the contents thereof leave it uncertain to which extent that State accepts to be bound by the obligations under the treaty. Moreover, those norms may be subject to changes.

The reservation made by the Republic of Maldives is therefore not sufficiently precise to make it possible to determine the restrictions that are introduced into the agreement. The Government of Austria is therefore of the opinion that the reservation is capable of contravening the object and purpose of the Covenant.

The Government of Austria therefore regards the above-mentioned reservation incompatible with the object and purpose of the Covenant. This objection shall not preclude the entry into force of the Covenant between the Republic of Austria and the Republic of Maldives.”

CANADA “The Government of Canada has carefully examined the reservation made by the Government of the Maldives upon acceding to the International Covenant on Civil and Political Rights, in accordance with which the “application of the principles set out in Article 18 of the Covenant shall be without prejudice to the Constitution of the Republic of Maldives”.

The Government of Canada considers that a reservation which consists of a general reference to national law constitutes, in reality, a reservation with a general, indeterminate scope, such that it makes it impossible to identify the modifications to obligations under the Covenant, which it purports to introduce and it does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Covenant.

The Government of Canada notes that the reservation made by the Government of the Maldives which addresses one of the most essential provisions of the Covenant, to which no derogation is allowed according to article 4 of the Covenant, is in contradiction with the object and purpose of the Covenant. The Government of Canada therefore objects to the aforesaid reservation made by the Government of the Maldives.

This objection does not preclude the entry into force in its entirety of the Covenant between Canada and the Maldives.”
CZECH REPUBLIC “The Government of the Czech Republic has carefully examined the contents of the reservation made by the Republic of Maldives upon accession to the International Covenant on Civil and Political Rights, adopted on 16 December 1966, in respect of Article 18 thereof.

The Government of the Czech Republic is of the opinion that the aforementioned reservation is in contradiction with the general principle of treaty interpretation according to which a State party to a treaty may not invoke the provisions of its internal law as justification for failure to perform according to the obligations set out by the treaty. Furthermore, the reservation consists of a general reference to the Constitution without specifying its content and as such does not clearly define to other Parties to the Covenant the extent to which the reserving State commits itself to the Covenant.

The Government of the Czech Republic recalls that it is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Czech Republic therefore objects to the aforesaid reservation made by the Republic of Maldives to the Covenant. This objection shall not preclude the entry into force of the Covenant between the Czech Republic and the Republic of Maldives, without the Republic of Maldives benefitting from its reservation.”

ESTONIA “The Government of Estonia has carefully examined the reservation made by the Republic of Maldives to Article 18 of the International Covenant on Civil and Political Rights. The Government of Estonia considers the reservation to be incompatible with the object and purpose of the Covenant as with this reservation the application of the International Covenant on Civil and Political Rights is made subject to the provisions of constitutional law. The Government of Estonia is of the view that the reservation makes it unclear to what extent the Republic of Maldives considers itself bound by the obligations of the Covenant and therefore raises concerns as to the commitment of the Republic of Maldives to the object and purpose of the Covenant.

The Government of Estonia therefore objects to the reservation made by the Republic of Maldives to Article 18 of the International Covenant on Civil and Political Rights and expresses the hope that the Republic of Maldives will soon be able to withdraw its reservation in light of the ongoing process of the revision of the Maldivian Constitution.

This objection shall not preclude the entry into force of the International Covenant on Civil and Political Rights between Estonia and the Republic of Maldives.”

FINLAND “The Government of Finland has examined the reservation made by the Republic of Maldives to the International Covenant on Civil and Political Rights. The Government of Finland notes that the Republic of Maldives reserves the right to interpret and apply the provisions of Article 18 of the Covenant in accordance with the related provisions and rules of the Constitution of the Republic of Maldives.

The Government of Finland notes that a reservation which consists of a general reference to national law without specifying its contents does not clearly define to other Parties to the Covenant the extent to which the reserving State commits itself to the Covenant and creates serious doubts as to the commitment of the receiving State to fulfil its obligations under the Covenant. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

Furthermore, the Government of Finland emphasises the great importance of the right to freedom of thought, conscience and religion which is provided for in Article 18 of the International Covenant on Civil and Political Rights. 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 of freedom of
thought, conscience and religion recognised in the Covenant and will do its utmost to bring its national legislation into compliance with the obligations under the Covenant with a view to withdrawing the reservation.

This declaration does not preclude the entry into force of the Covenant between the Republic of Maldives and Finland. The Covenant will thus become operative between the two states without the Republic of Maldives benefitting from its reservation.”

FRANCE “The Government of the French Republic has reviewed the reservation made by the Republic of Maldives at the time of its accession to the International Covenant on Civil and Political Rights of 16 December 1966 to the effect that the Republic of Maldives intends to apply the principles relating to freedom of thought, conscience and religion set out in article 18 of the Covenant without prejudice to its own Constitution.

The French Republic considers that by subordinating the general application of a right set out in the Covenant to its internal law, the Republic of Maldives is formulating a reservation that is likely to deprive a provision of the Covenant of any effect and makes it impossible for other States Parties to know the extent of its commitment.

The Government of the French Republic considers the reservation as contrary to the object and purpose of the Covenant. It therefore objects to that reservation. This objection does not prevent the entry into force of the Covenant between the French Republic and the Republic of Maldives.”


The Government of the Federal Republic of Germany is of the opinion that reservations which consist in a general reference to a system of norms (like the constitution or the legal order of the reserving State) without specifying the contents thereof leave it uncertain to which extent that State accepts to be bound by the obligations under the treaty. Moreover, those norms may be subject to changes.

The reservation made by the Republic of Maldives is therefore not sufficiently precise to make it possible to determine the restrictions that are introduced into the agreement. The Government of the Federal Republic of Germany is therefore of the opinion that the reservation is capable of contravening the object and purpose of the Covenant.

The Government of the Federal Republic of Germany therefore regards the above-mentioned reservation incompatible with the object and purpose of the Covenant. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Republic of Maldives.”

HUNGARY “The Government of the Republic of Hungary has examined the reservation made by the Republic of Maldives on 19 September 2006 upon accession to the International Convention on Civil and Political Rights of 16 December 1966. The reservation states that the application of the principles set out in Article 18 of the Covenant shall be without prejudice to the Constitution of the Republic of Maldives.

The Government of the Republic of Hungary is of the opinion that the reservation to Article 18 will unavoidably result in a legal situation in respect of the Republic of Maldives, which is incompatible with the object and purpose of the Convention. Namely the reservation makes it unclear to what extent the Republic of Maldives considers itself bound by the obligations of the Covenant thus raising concerns as to its commitment to the object and purpose of the Covenant.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

According to Article 19 point (c) of the Vienna Convention on the Law of Treaties of 1969, a State may formulate a reservation unless it is incompatible with the object and purpose of the treaty.
The Government of the Republic of Hungary therefore objects to the above-mentioned reservation. This objection shall not preclude the entry into force of the Convention between the Republic of Hungary and the Republic of Maldives."

The Government of Ireland is of the view that a reservation which consists of a general reference to the Constitution of the reserving State and which does not clearly specify the extent of the derogation from the provision of the Covenant may cast doubts on the commitment of the reserving state to fulfil its obligations under the Covenant.
The Government of Ireland is furthermore of the view that such a reservation may undermine the basis of international treaty law and is incompatible with the object and purpose of the Covenant.
The Government of Ireland therefore objects to the aforesaid reservation made by the Republic of Maldives to Article 18 of the International Covenant on Civil and Political Rights.
This objection shall not preclude the entry into force of the Covenant between Ireland and the Republic of Maldives.”

LATVIA “The Government of the Republic of Latvia has carefully examined the reservation made by the Republic of Maldives to the International Covenant on Civil and Political Rights upon accession.
The Government of the Republic of Latvia considers that the said reservation makes the constitutive provisions of International Covenant subject to the national law (the Constitution) of the Republic of Maldives.
The Government of the Republic of Latvia recalls that customary international law as codified by Vienna Convention on the Law of Treaties, and in particular Article 19 (c), sets out that reservations that are incompatible with the object and purpose of a treaty are not permissible.
The Government of the Republic of Latvia, therefore, objects to the aforesaid reservations made by the Republic of Maldives to the International Covenant on Civil and Political Rights.
However, this objection shall not preclude the entry into force of the International Covenant between the Republic of Latvia and the Republic of Maldives. Thus, the International Covenant will become operative without the Republic of Maldives benefiting from its reservation."

NETHERLANDS “The Government of the Kingdom of the Netherlands has examined the reservation made by the Republic of Maldives to the International Covenant on Civil and Political Rights. The Government of the Kingdom of the Netherlands considers that the reservation with respect to article 18 of the Covenant is a reservation incompatible with the object and purpose of the Covenant.
Furthermore, the Government of the Kingdom of the Netherlands considers that with this reservation the application of the International Covenant on Civil and Political Rights is made subject to the provisions of constitutional law in force in the Republic of Maldives. This makes it unclear to what extent the Republic of Maldives considers itself bound by the obligations of the Covenant and therefore raises concerns as to the commitment of the Republic of Maldives to the object and purpose of the Covenant.
The Government of the Kingdom of the Netherlands recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty is not permitted.
It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.
The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Republic of Maldives to the International Covenant on Civil and Political Rights and expresses the hope that the Republic of
Maldives will soon be able to withdraw its reservation in light of the ongoing process of a revision of the Maldivian Constitution.

This objection shall not preclude the entry into force of the Covenant between the Kingdom of the Netherlands and the Republic of Maldives.”

PORTUGAL “The Government of the Portuguese Republic has carefully examined the reservation made by the Republic of Maldives to the International Covenant on Civil and Political Rights (ICCPR).

According to the reservation, the application of the principles set out in Article 18 of the Covenant shall be without prejudice to the Constitution of the Republic of Maldives. Portugal considers that this article is a fundamental provision of the Covenant and the reservation makes it unclear to what extent the Republic of Maldives considers itself bound by the obligations of the Covenant, raises concerns as to its commitment to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of international law. It is in the common interest of all States that treaties to which they have chosen to become parties are respected as to their object and purpose by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties. The Government of the Portuguese Republic, therefore, objects to the above mentioned reservation made by the Republic of Maldives to the ICCPR. This objection shall not preclude the entry into force of the Convention between Portugal and the Maldives.”

SPAIN “The Government of the Kingdom of Spain has reviewed the reservation made by the Republic of Maldives on 19 September 2006, at the time of its accession to the International Covenant on Civil and Political Rights of 16 December 1966. The Government of the Kingdom of Spain observes that the broad formulation of the reservation, which makes the application of article 18 of the International Covenant on Civil and Political Rights conditional on its conformity with the Constitution of Maldives without specifying the content thereof, renders it impossible to ascertain to what extent the Republic of Maldives has accepted the obligations arising from that provision of the Covenant and, in consequence, raises doubts about its commitment to the object and purpose of the treaty.

The Government of the Kingdom of Spain considers the reservation of the Republic of Maldives to the International Covenant on Civil and Political Rights as incompatible with the object and purpose of the Covenant.

The Government of the Kingdom of Spain recalls that, under customary international law as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty are not permitted. Accordingly, the Government of Spain objects to the reservation made by the Republic of Maldives to the International Covenant on Civil and Political Rights.

This objection does not prevent the entry into force of the International Covenant on Civil and Political Rights between the Kingdom of Spain and the Republic of Maldives.”

SWEDEN “...the Government of Sweden has examined the reservation made by the Government of the Republic of Maldives on 19 September 2006 to the International Covenant on Civil and Political Rights.

The Government of Sweden notes that the Maldives gives precedence to its Constitution over the application of article 18 of the Covenant. The Government of Sweden is of the view that this reservation, which does not clearly specify the extent of the Maldives' derogation from the provision in question, raises serious doubt as to the commitment of the Maldives to the object and purpose of the Covenant.

According to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation made by the Republic of Maldives to the International Covenant on Civil and Political Rights.
and considers the reservation null and void. This objection shall not preclude the entry into force of the Covenant between the Maldives and Sweden. The Covenant enters into force in its entirety between the Maldives and Sweden, without the Maldives benefiting from its reservation.”

UNITED KINGDOM OF GREAT BRITAIN “The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations presents its compliments to the Secretary-General and has the honour to refer to the reservation made by the Government of the Maldives to the International Covenant on Civil and Political Rights, which reads:

‘The application of the principles set out in Article 18 [freedom of thought, conscience and religion] of the Covenant shall be without prejudice to the Constitution of the Republic of the Maldives.’

In the view of the United Kingdom a reservation should clearly define for the other States Parties to the Covenant the extent to which the reserving State has accepted the obligations of the Covenant. A reservation which consists of a general reference to a constitutional provision without specifying its implications does not do so. The Government of the United Kingdom therefore object to the reservation made by the Government of the Maldives.

This objection shall not preclude the entry into force of the Covenant between the United Kingdom and the Maldives.”

ITALY “The Government of Italy has examined the reservation made by the Republic of Maldives with respect to Article 18 of the International Covenant on Civil and Political Rights.

The Government of Italy considers that, by providing that the application of Article 18 is without prejudice to the Constitution of the Republic of Maldives, the reservation does not clearly define the extent to which the reserving State has accepted the obligation under that Article. This reservation raises serious doubts about the real extent of the commitment undertaken by the Republic of Maldives and is capable of contravening the object and purpose of the Covenant.

The Government of Italy therefore objects to the above-mentioned reservation made by the Republic of Maldives.

This objection, however, shall not preclude the entry into force of the Covenant between the Government of Italy and the Republic of Maldives.”

FINLAND “The Government of Finland objected in 1994 to the reservations made by the Government of Maldives upon accession to the Convention on the Elimination of All Forms of Discrimination against Women. The Government of Finland has now examined the contents of the modified reservation made by the Government of the Republic of Maldives to the said Convention.

The Government of Finland welcomes with satisfaction that the Government of the Republic of Maldives has specified the reservations made at the time of its accession to the Convention. However, the reservations to Article 7 (a) and Article 16 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 recognised 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. This declaration does not
The modification does not constitute a withdrawal or a partial withdrawal of the original reservations to the Convention by the Republic of the Maldives. Instead the modification constitutes a new reservation to articles 7a (right of women to vote in all elections and public referenda and be eligible for elections to all publicly elected bodies) and 16 (elimination of discrimination against women in all matters relating to marriage and family relations) of the Convention extending and reinforcing the original reservations.

The Government of the Federal Republic of Germany notes that reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law it can no longer submit new reservations 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 the Maldives with its modification.

The Government of the Federal Republic of Germany objects to the modification of the reservations.

Austria "The reservation made by the Maldives is incompatible with the object and purpose of the Convention and is therefore inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties and shall not be permitted, in accordance with article 28 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women. Austria therefore states that this reservation cannot alter or modify in any respect the obligations arising from the Convention for any State Party thereto."

Canada "In the view of the Government of Canada, this reservation is incompatible with the object and purpose of the Convention (article 28, paragraph 2). The Government of Canada therefore enters its formal objection to this reservation. This objection shall not preclude the entry into force of the Convention as between Canada and the Republic of Maldives."

Finland "In the view of the Government of Finland, the unlimited and undefined character of the said reservations create serious doubts about the commitment of the reserving State to fulfil its obligations under the Convention. In their extensive formulation, they are clearly contrary to the object and purpose of the Convention. Therefore, the Government of Finland objects to such reservations.

The Government of Finland also recalls that the said reservations are subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as a justification for failure to perform its treaty obligations.

The Government of Finland does not, however, consider that this objection constitutes an obstacle to the entry into force of the Convention between Finland and Maldives."

Germany "The Federal Republic of Germany considers that the reservations made by Egypt regarding article 2, article 9, paragraph 2, and article 16, by Bangladesh regarding article 2, article 13 (a) and article 16, paragraph 1 (c), and (f), by Brazil regarding article 15, paragraph 4, and article 16, paragraph 1 (a), (c), (g) and (h), by Jamaica regarding article 9, paragraph 2, by the Republic of Korea regarding article 9 and article 16, paragraph 1 (c), (d), (f) and (g), and by Mauritius regarding article 11, paragraph 1 (b) and (d), and article 16, paragraph 1 (g), are incompatible with the object and purpose of the Convention (article 28, paragraph 2) and therefore objects to them. In relation to the Federal Republic of Germany, they 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 shall not preclude the entry into force of the Convention as between Egypt, Bangladesh, Brazil, Jamaica, the Republic of Korea, Mauritius and the Federal Republic of Germany."

Netherlands "The Government of the Kingdom of the Netherlands considers that the declarations made by India regarding article 5 (a) and article 16, paragraph 1, of the Convention are reservations incompatible with the object and purpose of the
The Government of the Kingdom of the Netherlands considers that the declaration made by India regarding article 16, paragraph 2, of the Convention is a reservation incompatible with the object and purpose of the Convention (article 28, para. 2).

The Government of the Kingdom of the Netherlands considers that the declaration made by Morocco expressing the readiness of Morocco to apply the provisions of article 2 provided that they do not conflict with the provisions of the Islamic Shariah, is a reservation incompatible with the object and purpose of the Convention (article 28, paragraph 2).

The Government of the Kingdom of the Netherlands considers that the declaration made by Morocco regarding article 15, paragraph 4, of the Convention is a reservation incompatible with the object and purpose of the Convention (article 28, paragraph 2).

The Government of the Kingdom of the Netherlands considers that the reservations made by Morocco regarding article 9, paragraph 2, and article 16 of the Convention are reservations incompatible with the object and purpose of the Convention (article 28, paragraph 2).

The Government of the Kingdom of the Netherlands has examined the reservations made by the Maldives [...]. The Government of the Kingdom of the Netherlands considers the said reservations incompatible with the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands objects to the above-mentioned declarations and reservations.

These objections shall not preclude the entry into force of the Convention as between India, Morocco, the Maldives and the Kingdom of the Netherlands."

NORWAY "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 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. Furthermore, under well established international treaty law, a State is not permitted to invoke internal law as justification for its failure to perform its treaty obligations. For these reasons, the Government of Norway objects to Maldives reservations.

The Government of Norway does not consider this objection to constitute an obstacle to the entry into force of the above-stated Convention between the Kingdom of Norway and the Republic of Maldives."

PORTUGAL "The Government of Portugal considers that the reservations formulated by the Maldives are incompatible with the object and purpose of the Convention and they are inadmissible under article19 (c) of the Vienna Convention on the Law of Treaties.

Furthermore, the Government of Portugal considers that these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto."

SWEDEN "The Government of Sweden considers that [the following reservations] are incompatible with the object and purpose of the Convention (article 28, paragraph 2) and therefore objects to them:..."Indeed the reservations in question, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to everything the Convention stands for. It should also be borne in mind that the principles of the equal rights of men and women and of non-discrimination on the basis of sex 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, to which Thailand, Tunisia and Bangladesh are parties...."In this context the Government of Sweden wishes to take this opportunity to make the observation that the reason why reservations incompatible with the object and purpose of a treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless.
Incompatible reservations, made in respect of the Convention on the elimination of all forms of discrimination against women, do not only cast doubts on the commitments of the reserving states to the objects and purpose of this Convention, but moreover, contribute to undermine the basis of international contractual law. 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.”

The Government of Sweden also stated that: “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.”

33. Mali

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34. Mauritania

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The Government of Austria considers that, in the absence of further clarification, this reservation raises doubts as to the degree of commitment assumed by Mauritania in becoming a party to the Convention since it refers to the contents of Islamic Sharia and to existing national legislation in Mauritania. The Government of Austria would like to recall that, according to art. 28 (2) of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

For these reasons, the Government of Austria objects to this reservation made by the Government of Mauritania.

This position, however, does not preclude the entry into force in its entirety of the Convention between Mauritania and Austria.”

PORTUGAL “The Government of the Portuguese Republic has examined the reservation made by the Government of the Islamic Republic of Mauritania to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) on 10 May 2001 in respect of any interpretation of the provisions of the Convention that it is incompatible with the precept of Islamic law and its Constitution.

The Government of the Portuguese Republic is of the view that the said reservation refers in a general manner to national law, failing to specify clearly its content and, therefore, leaving the other State parties with doubts as to the real extent of the Islamic Republic of Mauritania's commitment to the Convention.

Furthermore it also considers the reservation made by the Government of the Islamic Republic of Mauritania incompatible with the objective and purpose of the aforesaid Convention, and it seriously limits or even excludes its application on a vaguely defined basis, such as the global reference to the Islamic law.

The Government of the Portuguese Republic therefore objects to the reservation made by the Government of the Islamic Republic of Mauritania to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Portuguese Republic and the Islamic Republic of Mauritania.”

GERMANY “The Government of the Federal Republic of Germany has examined the reservation to the Convention on the Elimination of all Forms of Discrimination against Women made by the Government of Mauritania at the time of its accession to the Convention. The Government of the Federal Republic of Germany is of the view that the reservation with regard to the compatibility of the rules of the Convention with the precepts of Islamic Sharia and the Constitution of Mauritania raises doubts as to the commitment of Mauritania to fulfil its obligations under the Convention.

The Government of the Federal Republic of Germany considers this reservation to be incompatible with the object and purpose of the Convention. Therefore the Government of the Federal Republic of Germany objects to the aforesaid reservation made by the Government of Mauritania to the Convention. This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and Mauritania.”

FINLAND “The Government of Finland has carefully examined the contents of the reservation made by the Government of Mauritania to the Convention on the Elimination of all Forms of Discrimination Against Women.

The Government of Finland notes that a reservation which consists of a general reference to religious or other national law without specifying its contents does not clearly define to other Parties to the Convention the extent to which the reserving
State commits itself to the Convention and therefore creates serious doubts as to the commitment of the reserving State to fulfil its obligations under the Convention. Furthermore, reservations are subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations. The Government of Finland recalls Part VI, Article 28 of the Convention according to which reservations incompatible with the object and purpose of the Convention are not permitted. The Government of Finland therefore objects to the above-mentioned reservation made by the Government of Mauritania to the Convention.”

NORWAY “The Government of Norway has examined the contents of the reservation made by the Government of Mauritania upon accession to the Convention on the Elimination of all Forms of Discrimination against Women. The reservation consists of a general reference to national law and does not clearly define to what extent Mauritania has accepted the obligations under the Convention. The Government of Norway therefore objects to the reservation, as it is contrary to the object and purpose of the Convention and thus impermissible according to Article 28 of the Convention. This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and Mauritania. The Convention thus becomes operative between Norway and Mauritania without Mauritania benefiting from the reservation.”

IRELAND “The Government of Ireland [has] examined the reservation made by Mauritania upon its accession to the Convention on the Elimination of All Forms of Racial Discrimination against Women. The Government of Ireland [is] of the view that a reservation which consists of a general reference to religious law and to the Constitution of the reserving State and which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, may cast doubts on the commitment of the reserving State to fulfil its obligations under the Convention. The Government of Ireland [is] furthermore of the view that such a general reservation may undermine the basis of international treaty law. The Government of Ireland [recalls] that article 28, paragraph 2 of the Convention provides that a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Ireland therefore [objects] to the reservation made by Mauritania to the Convention on the Elimination of All Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention between Ireland and Mauritania.”

DENMARK “The Government of Denmark has examined the reservations made by the Government of Mauritania upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women as to any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law and the Constitution in Mauritania. The Government of Denmark finds that the general reservation with reference to the provisions of Islamic law and the Constitution are of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law. The Government of Denmark therefore objects to the aforesaid reservation made by the Government of Mauritania to the Convention on the Elimination of all Forms of Discrimination against Women. This shall not preclude the entry into force of the Convention in its entirety between Mauritania and Denmark. The Government of Denmark recommends the Government of Mauritania to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination against Women.”

CAT -

CRC General Reservation “In signing this important Convention, the Islamic Republic of
Mauritania is making reservations to articles or provisions which may be contrary to the beliefs and values of Islam, the religion of the Mauritania People and State.”

### Morocco

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| Article 2(d) & 15(d) “1. With regard to article 2: The Government of the Kingdom of Morocco expresses its readiness to apply the provisions of this article provided that:  
- They are without prejudice to the constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco;  
- They do not conflict with the provisions of the Islamic Shariah. It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.  
2. With regard to article 15, paragraph 4: The Government of the Kingdom of Morocco declares that it can only be bound by the provisions of this paragraph, in particular those relating to the right of women to choose their residence and domicile, to the extent that they are not incompatible with articles 34 and 36 of the Moroccan Code of Personal Status.” |
| CEDAW | Article 20(d) “In accordance with article 28, paragraph 1, the Government of the Kingdom of Morocco declares that it does not recognize the competence of the Committee provided for in article 20.  
In accordance with article 30, paragraph 2, the Government of the Kingdom of |
Morocco declares further that it does not consider itself bound by paragraph 1 of the same article.

Article 14 “The Kingdom of Morocco, whose Constitution guarantees to all the freedom to pursue his religious affairs, makes a reservation to the provisions of article 14, which accords children freedom of religion, in view of the fact that Islam is the State religion.”

36. Mozambique

Reservations

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37. Niger

Reservations

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| CEDAW | Article 5(d) “The Government of the Republic of the Niger declares that the term “family education” which appears in article 5, paragraph (b), of the Convention should be interpreted as referring to public education concerning the family, and that in any event, article 5 would be applied in compliance with article 17 of the International Covenant on Civil and Political Rights.”
|       | Article 2, paragraphs (d) and (f) “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.”
|       | Article 5, paragraph (a) “The Government of the Republic of the Niger expresses reservations with regard to the modification of social and cultural patterns of conduct of men and women.”
|       | Article 15, paragraph 4 “The Government of the Republic of the Niger declares that it can be bound by the provisions of this paragraph, particularly those concerning the right of women to choose their residence and domicile, only to the extent that these provisions refer only to unmarried women.”
|       | Article 16, paragraph 1 (c), (e) and (g) “The Government of the Republic of the Niger expresses reservations concerning the above-referenced provisions of article 16, particularly those concerning the same rights and responsibilities during marriage and at its dissolution, the same rights to decide freely and responsibly on the number and spacing of their children, and the right to choose a family name. The Government of the Republic of the Niger declares that the provisions of article 2, paragraphs (d) and (f), article 5, paragraphs (a) and (b), article 15, paragraph 4, and article 16, paragraph 1 (c), (e) and (g), concerning family relations, 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.”
|       | Article 29 “The Government of the Republic of the Niger expresses a reservation concerning article 29, paragraph 1, which provides that any dispute between two or more States concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. In the view of the Government of the Niger, a dispute of this nature can be submitted to arbitration only with the consent of all the parties to the dispute.”
| CAT   | No reservation |
| CRC   | No reservation |
38. Nigeria

<table>
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<tr>
<th>ICCPR</th>
<th>No reservation</th>
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<tr>
<td>CEDAW</td>
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<td>CAT</td>
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39. Oman

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<td>CEDAW</td>
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<td>CAT</td>
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<tr>
<td>CRC</td>
<td>General reservation “A reservation is entered to all the provisions of the Convention that do not accord with Islamic law or the legislation in force in the Sultanate and, in particular, to the provisions relating to adoption set forth in its article 21.”</td>
</tr>
</tbody>
</table>

Objections

FINLAND “The reservations made in paragraphs 2 and 3 by Oman, consisting of a general reference to national law without stating unequivocally the provisions the legal effect of which may be excluded or modified, do not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore create doubts about the commitment of the reserving State to fulfil its obligations under the said Convention. Reservations of such unspecified nature may contribute to undermining the basis of international human rights treaties. The Government of Finland also recalls that these reservations of Oman are subject to the general principle of observance of treaties according to which a party may not invoke the provisions of its internal law as justification for failure to perform its treaty obligations. It is in the common interest of States that Parties to international treaties are prepared to take the necessary legislative changes in order to fulfil the object and purpose of the treaty. The Government of Finland considers that in their present formulation these reservations made by Oman are incompatible with the object and purpose of the said Convention and therefore, inadmissible under article 51, paragraph 2, of the said Convention. In view of the above, the Government of Finland objects to these reservations and notes that they are devoid of legal effect.”

GERMANY “The Government of the Federal Republic of Germany considers that such a reservation, which seeks to limit the responsibilities of Oman under the Convention by invoking general principles of national law, may raise doubts as to the commitment of Oman to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is the 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. The Government of the Federal Republic of Germany therefore objects to the said reservation. This objection does not constitute an obstacle to the entry into force of the Convention between the Federal Republic of Germany and Oman.”

NETHERLANDS “The Government of the Kingdom of the Netherlands considers
that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. The Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.”

NORWAY “The Government of Norway considers that reservation (3) made by Oman, due to its unlimited scope and undefined character, is contrary to the object and purpose of the Convention, and thus impermissible under article 51, paragraph 2, of the Convention.

For these reasons, the Government of Norway objects to the said reservations made by Oman.

The Government of Norway does not consider this objection to preclude the entry into force of the Convention between the Kingdom of Norway and Oman.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Sweden therefore objects to the reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and Oman.”

### 40. Pakistan

**Reservations**

<table>
<thead>
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<tbody>
<tr>
<td>CEDAW</td>
<td>Article 29 “The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention.”</td>
</tr>
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<td></td>
<td>12/03/96 By Accession</td>
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<tr>
<td>CAT</td>
<td>General reservation “Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values.”</td>
</tr>
<tr>
<td></td>
<td><strong>Objections</strong></td>
</tr>
<tr>
<td></td>
<td>FINLAND “In the view of the Government of Finland 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. For the above reason the Government of Finland objects to the said reservation. However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the said Convention between Finland and Pakistan.”</td>
</tr>
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<td></td>
<td>IRELAND “The Government of Ireland consider that such reservations, which seek to limit the responsibilities of the reserving State under the Convention, by invoking general principles of national law, may create doubts as to the commitment of those States to the object and purpose of the Convention. This objection shall not constitute an obstacle to the entry into force of the Convention between Ireland and the aforementioned States.”</td>
</tr>
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<td></td>
<td>NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention.”</td>
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</tbody>
</table>
Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. The Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.”

NORWAY “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may create doubts about the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Norway, therefore, objects to this reservation.

This objection shall not constitute an obstacle to the entry into force of the Convention between Norway and Pakistan.”

PORTUGAL “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations.

This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Pakistan.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Sweden therefore objects to the reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and Pakistan.”

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<th>Reservations</th>
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<td>ICCPR</td>
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<td>CEDAW</td>
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<tr>
<td>CAT</td>
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<td>CRC</td>
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</tbody>
</table>

41. Palestine

Articles 21 & 22 “(a) Any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion; and (b) The competence of the Committee as indicated in articles 21 and 22 of the Convention.”

42. Qatar

<table>
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<th>Reservations</th>
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<tr>
<td>ICCPR</td>
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<tr>
<td>CEDAW</td>
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<td>CAT</td>
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</table>

Articles 21 & 22 “(a) Any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion; and (b) The competence of the Committee as indicated in articles 21 and 22 of the Convention.”

Objections

PORTUGAL “The Government of the Portuguese Republic has examined the reservation made by the Government of Qatar to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), whereby it excludes any interpretation of the said Convention which would be incompatible with the precepts of Islamic Law and the Islamic Religion.

The Government of the Portuguese Republic is of the view that this reservation goes against the general principle of treaty interpretation according to which a State party
to a treaty may not invoke the provisions of its internal law as justification for failure to perform according to the obligations set out by the said treaty, creating legitimate doubts on its commitment to the Convention and, moreover, contribute to undermine the basis of International Law. Furthermore, the said reservation is incompatible with the object and purpose of the Convention. The Government of the Portuguese Republic wishes, therefore, to express its disagreement with the reservation made by the Government of Qatar.”

General reservation “[The State of Qatar] enter(s) a general reservation by the State of Qatar concerning provisions incompatible with Islamic Law, concerning any provisions in the protocol that are in conflict with the Islamic Shariah.”

**Objections:**

FINLAND “The reservation made by Qatar covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Qatar commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties. The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation. In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland objects to such reservation. The Government of Finland further notes that the reservation made by the Government of Qatar is devoid of legal effect. The Government of Finland recommends the Government of Qatar to reconsider its reservation to the [said Convention].”

GERMANY “The Government of the Federal Republic of Germany considers that such a reservation, which seeks to limit the responsibilities of Qatar under the Convention by invoking general principles of national law, may raise doubts as to the commitment of Qatar to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is the 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. The Government of the Federal Republic of Germany therefore objects to this reservation. This objection does not constitute an obstacle to the entry into force of the Convention between the Federal Republic of Germany and Qatar.”

ITALY “The Government of the Italian Republic considers that such a reservation, which seeks to limit the responsibilities of Qatar under the Convention by invoking general principles of national law, may raise doubts as to the commitment of Qatar to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is the common interest of States that treaties to which they have chosen to become Parties should be respected, as to the objects and the purpose, by all Parties. The Government of the Italian Republic therefore objects to this reservation. This objection does not constitute an obstacle to the entry into force of the Convention between the Government of the Italian Republic and the State of Qatar.”

NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the
Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. The Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.”

NORWAY “The Government of Norway considers that the reservation made by the State of Qatar, due to its unlimited scope and undefined character, is inadmissible under international law. For that reason, the Government of Norway objects to the reservation made by the State of Qatar.

The Government of Norway does not consider this objection to preclude the entry into force of the Convention between the Kingdom of Norway and the State of Qatar.”

SLOVAKIA “The Slovak Republic regards the general reservation made by the State of Qatar upon signature of the Convention as incompatible with the object and purpose of the said Convention as well as in contradiction with the well established principle of the Law of Treaties according to which a State cannot invoke the provisions of its internal law as justification for its failure to perform a treaty. Therefore, the Slovak Republic objects to the said general reservation.”

PORTUGAL “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations.

This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Qatar.”

Reservation to Optional Protocol

Article 3(d) “The State of Qatar declares that recruitment to its armed forces and other regular forces is voluntary and is for those who have attained the age of 18 years and that it takes account of the safeguards set forth in paragraph 3 of the same article.”

In making this declaration, the State of Qatar affirms that its national legislation makes no provision for any form of compulsory or coercive recruitment.”

OP-SC: 14/12/2001 By Accession

General Reservations “[Implementation of the Protocol is].....subject to a general reservation concerning any provisions in the protocol that are in conflict with the Islamic Shariah.”

Objections


This objection does not preclude the entry into force of the Optional Protocol between the Federal Republic of Germany and Qatar.”

SPAIN “The Government of the Kingdom of Spain has examined the reservation made by the Government of the State of Qatar on 14 December 2001 to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child
prostitution and child pornography, concerning any provisions in the protocol that are in conflict with the Islamic Shariah.

The Government of the Kingdom of Spain considers that this reservation, which refers in a general way to Islamic law without specifying its content, creates doubts among the other States parties about the extent to which the State of Qatar commits itself to comply with the Optional Protocol.

The Government of the Kingdom of Spain is of the view that the reservation by the Government of the State of Qatar is incompatible with the object and purpose of the said Optional Protocol, since it refers to the Protocol as a whole and could seriously restrict or even exclude its application on a basis as ill-defined as the general reference to the Islamic Shariah.

Therefore, the Government of the Kingdom of Spain objects to the above-mentioned reservation by the Government of the State of Qatar to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

This objection shall not preclude the entry into force of the said Optional Protocol between the Kingdom of Spain and the State of Qatar.”


The Government of Austria are of the view that since this reservation refers in a general manner to the Islamic law without precising its content it leaves other state parties in doubt as to the real extent of the state of Qatar’s commitment to the Optional Protocol. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative change necessary to comply with their obligations under the treaties.

For these reasons, the Government of Austria objects to this reservation made by the Government of Qatar.

This position, however, does not preclude the entry into force in its entirety of the Optional Protocol between Qatar and Austria.”

NORWAY

### Reservations

<table>
<thead>
<tr>
<th>ICCPR</th>
<th>General reservation “1. 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. 2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.”</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEDAW</td>
<td><strong>FRANCE</strong> “The Government of the French Republic has examined the reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women, adopted in New York on 18 December 1979. By stating that in case of contradiction between any term of the Convention and the norms of Islamic law, it is not under obligation to observe the terms of the Convention, the Kingdom of Saudi Arabia formulates a reservation of general, indeterminate scope that gives the other States parties absolutely no idea which provisions of the Convention are affected or might be affected in future. The Government of the French Republic believes that the reservation could make the provisions of the Convention completely ineffective and therefore objects to it. The second reservation, concerning article 9, paragraph 2, rules out equality of rights between men and women with respect to the nationality of their children and the Government of the French Republic therefore objects to it. These objections do not preclude the Convention’s entry into force between Saudi Arabia and France. The reservation rejecting the means of dispute settlement”</td>
</tr>
</tbody>
</table>
provided for in article 29, paragraph 1, of the Convention is in conformity with the provisions of article 29, paragraph 2.”

SWEDEN “The Government of Sweden has examined the reservation made by the Government of the Kingdom of Saudi Arabia at the time of its ratification of the Convention on the Elimination of All Forms of Discrimination against Women, as to any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law.

The Government of Sweden is of the view that this general reservation, which does not clearly specify the provisions of the convention to which it applies and the extent of the derogation therefrom, raises doubts as to the object and purpose of the Convention.

It is in the common interest of States that treaties to which they have been chosen to become parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to customary law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Sweden therefore objects to the aforesaid general reservation made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women.

This shall not preclude the entry into force of the Convention between the Kingdom of Saudi Arabia and the Kingdom of Sweden, without the Kingdom of Saudi Arabia benefiting from the said reservation.”

SPAIN “The Government of the Kingdom of Spain has examined the reservation made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women on [7] September 2000, regarding any interpretation of the Convention that may be incompatible with the norms of Islamic law and regarding article 9, paragraph 2.

The Government of the Kingdom of Spain considers that the general reference to Islamic law, without specifying its content, creates doubts among the other States parties about the extent to which the Kingdom of Saudi Arabia commits itself to fulfil its obligations under the Convention.

The Government of the Kingdom of Spain is of the view that such a reservation by the Government of the Kingdom of Saudi Arabia is incompatible with the object and purpose of the Convention, since it refers to the Convention as a whole and seriously restricts or even excludes its application on a basis as ill-defined as the general reference to Islamic law.

Furthermore, the reservation to article 9, paragraph 2, aims at excluding one of the obligations concerning non-discrimination, which is the ultimate goal of the Convention.

The Government of the Kingdom of Spain recalls that according to article 28, paragraph 2, of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

Therefore, the Government of the Kingdom of Spain objects to the said reservations by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the Kingdom of Saudi Arabia.”

PORTUGAL “The Government of the Portuguese Republic has examined the reservation made on 7 September by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), regarding any interpretation of the provisions of the Convention that is incompatible with the precept of Islamic law and the Islamic religion. It has also examined the reservation to article 9.2 of the Convention.

The Government of the Portuguese Republic is of the view that the first reservation refers in general terms to the Islamic law, failing to specify clearly its content and, therefore, leaving the other State parties with doubts as to the real extent of the
Kingdom of Saudi Arabia's commitment to the Convention.
Furthermore, it also considers the reservation made by the Government of the Kingdom of Saudi Arabia incompatible with the objective and purpose of the aforesaid Convention, for it refers to the whole of the Convention, and it seriously limits or even excludes its application on a vaguely defined basis, such as the global reference to the Islamic law.

Regarding the reservation to article 9.2, the Government of the Portuguese Republic is of the view that the said reservation intends to exclude one of the obligations of non-discrimination, which is the essence of the Convention.

Therefore, the Government of the Portuguese Republic objects to the aforementioned reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention between the Portuguese Republic and the Kingdom of Saudi Arabia."

DENMARK “The Government of Denmark has examined the reservations made by the Government of Saudi Arabia upon ratification of the Convention on the Elimination of All Forms of Discrimination Against Women as to any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law.
The Government of Denmark finds that the general reservation with reference to the provisions of Islamic law are of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservations as being incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.
The Government of Denmark furthermore notes that the reservation to paragraph 2 of article 9 of the Convention aims to exclude one obligation of non-discrimination which is the aim of the Convention and therefore renders this reservation contrary to the essence of the Convention.
The Government of Denmark therefore objects to the aforesaid reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on Elimination of All Forms of Discrimination against Women. These objections shall not preclude the entry into force of the Convention in its entirety between Saudi Arabia and Denmark.”

AUSTRIA “Austria has examined the reservations to the Convention on the Elimination of All Forms of Discrimination against Women made by the Government of the Kingdom of Saudi Arabia in its note to the Secretary-General of 7 September 2000.
The fact that the reservation concerning any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom raises doubts as to the commitment of the Kingdom of Saudi Arabia to the Convention.
Given the general character of this reservation a final assessment as to its admissibility under international law cannot be made without further clarification. Until the scope of the legal effects of this reservation is sufficiently specified by the Government of Saudi Arabia, Austria considers the reservation as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the Convention. In Austria's view, however, the reservation in question is inadmissible to the extent that its application negatively affects the compliance by Saudi Arabia with its obligations under the Convention essential for the fulfilment of its object and purpose. Austria does not consider the reservation made by the Government of Saudi Arabia as admissible unless the Government of Saudi Arabia, by providing additional information or through subsequent practice, ensures that the reservation is compatible with the provisions essential for the implementation of the object and purpose of the Convention.
As to the reservation to Paragraph 2 of Article 9 of the Convention Austria is of the view that the exclusion of such an important provision of non-discrimination is not compatible with object and purpose of the Convention. Austria therefore objects to
this reservation.

This position, however, does not preclude the entry into force in its entirety of the Convention between Saudi Arabia and Austria.”

NETHERLANDS “The Government of the Kingdom of the Netherlands has examined the reservations made by the Government of Saudi Arabia at the time of its [ratification of] the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of the Kingdom of the Netherlands considers that the reservation concerning the national law of Saudi Arabia, which seeks to limit the responsibilities of the reserving State under the Convention by invoking national law, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.

The Government of the Kingdom of the Netherlands furthermore considers that the reservation made by Saudi Arabia regarding article 9, paragraph 2, of the Convention is incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands recalls that according to paragraph 2 of Article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party should be respected, as to object and purpose, by all parties. The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the Government of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Saudi Arabia.”

UNITED KINGDOM “The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the reservation made on 7 September 2000 by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination Against Women, done at New York on 18 December 1979, which reads as follows:

“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.”

The Government of the United Kingdom notes that a reservation which consists of a general reference to national law without specifying its contents does not clearly define for other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore objects to the aforesaid reservation made by the Government [of] the Kingdom of the Saudi Arabia.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Saudi Arabia.”

FINLAND “The Government of Finland has examined the contents of the reservations made by the Government of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination Against Women.

The Government of Finland recalls that by acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

A reservation which consists of a general reference to religious law and national law without specifying its contents, as the first part of the reservation made by Saudi Arabia, does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and therefore creates serious doubts as to the commitment of the reserving State to fulfil its obligations under the Convention.

Furthermore, reservations are subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as
justification for a failure to perform its treaty obligations.

As the reservation to Paragraph 2 of Article 9 aims to exclude one of the fundamental obligations under the Convention, it is the view of the Government of Finland that the reservation is not compatible with the object and purpose of the Convention. The Government of Finland also recalls Part VI, Article 28 of the Convention according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the above-mentioned reservations made by the Government of Saudi Arabia to the Convention. This objection does not preclude the entry into force of the Convention between Saudi Arabia and Finland. The Convention will thus become operative between the two States without Saudi Arabia benefiting from the reservations.”

IRELAND “The Government of Ireland has examined the reservation made, on 7 September 2000, by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination Against Women, in respect of any divergence between the terms of the Convention and the norms of Islamic law. It has also examined the reservation made on the same date by the Government of the Kingdom of Saudi Arabia to Article 9, paragraph 2 of the Convention concerning the granting to women of equal rights with men with respect to the nationality of their children.

As to the former of the aforesaid reservations, the Government of Ireland is of the view that a reservation which consists of a general reference to religious law without specifying the content thereof and which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, may cast doubts on the commitment of the reserving State to fulfil its obligations under the Convention. The Government of Ireland is furthermore of the view that such a general reservation may undermine the basis of international treaty law.

As to the reservation to Article 9, paragraph 2 of the Convention, the Government of Ireland considers that such a reservation aims to exclude one obligation of non-discrimination which is so important in the context of the Convention on the Elimination of All Forms of Discrimination Against Women as to render this reservation contrary to the essence of the Convention. The Government of Ireland notes in this connection that Article 28, paragraph 2 of the Convention provides that a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Ireland moreover recalls that by ratifying the Convention, a State commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

The Government of Ireland therefore objects to the aforesaid reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination Against Women. This objection shall not preclude the entry into force of the Convention between Ireland and the Kingdom of Saudi Arabia.”

NORWAY “The Government of Norway has examined the contents of the reservation made by the Government of the Kingdom of Saudi Arabia upon ratification of the Convention on the Elimination of All Forms of Discrimination Against Women.

According to paragraph 1 of the reservation, the norms of Islamic Law shall prevail in the event of conflict with the provisions of the Convention. It is the position of the Government of Norway that, due to its unlimited scope and undefined character, this part of the reservation is contrary to object and purpose of the Convention. Further, the reservation to Article 9, paragraph 2, concerns one of the core provisions of the Convention, and which aims at eliminating discrimination against women. The reservation is thus incompatible with the object and purpose of the Convention. For these reasons, the Government of Norway objects to paragraph 1 and the first part of paragraph 2 of the reservation made by Saudi Arabia, as they are impermissible according to Article 28, paragraph 2 of the Convention. This objection does not preclude the entry into force in its entirety of the Convention.
between the Kingdom of Norway and the Kingdom of Saudi Arabia. The Convention thus becomes operative between Norway and Saudi Arabia without Saudi Arabia benefiting from the said parts of the reservation.”

**CAT**

Articles 20 & 30 “The Kingdom of Saudi Arabia does not recognize the authority of the Committee as stipulated in article 20 of this Convention. The Kingdom of Saudi Arabia will not be bound to honour the provision of paragraph (1) of article 30 of this Convention.”

**General Reservation** “[The Government of Saudi Arabia enters] reservations with respect to all such articles as are in conflict with the provisions of Islamic law.”

**Objections**

**DENMARK** “The Government of Denmark finds that the general reservation with reference to Saudi Arabia and to provisions of Islamic law is of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purposes of the Convention and accordingly inadmissible and without effect under international law. Furthermore, it is a general principle of international law that national law may not be invoked as justification for failure to perform treaty obligations. The Convention remains in force in its entirety between Saudi Arabia and Denmark. It is the opinion of the Government of Denmark, that no time limit applies to objections against reservations, which are inadmissible under international law. The Government of Denmark recommends the Government of Saudi Arabia to reconsider its reservation to the Convention on the Rights of the Child.”

**AUSTRIA** “Under article 19 of the Vienna Convention on the Law of Treaties which is reflected in article 51 of the [Convention] a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose. The Government of Austria has examined the reservation made by Saudi Arabia to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law cannot be made without further clarification.

Until the scope of the legal effects of this reservation is sufficiently specified by Saudi Arabia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention]. Austria, however, objects to the admissibility of the reservations in question if the application of this reservation negatively affects the compliance of Saudi Arabia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Saudi Arabia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties unless Saudi Arabia ..., by providing additional information or through subsequent practice to ensure [s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].”

**GERMANY** “The Government of the Federal Republic of Germany considers that such a reservation, which seeks to limit the responsibilities of Saudi Arabia under the Convention by invoking general principles of national law, may raise doubts as to the commitment of Saudi Arabia to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is the 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. The Government of the Federal Republic of Germany therefore objects to the said reservation. This objection does not constitute an obstacle to the entry into force of the Convention between the Federal Republic of Germany and Saudi Arabia.”

**IRELAND** “Ireland considers that this reservation is incompatible with the object
and purpose of the Convention and is therefore prohibited by article 51 (2) of the Convention. The Government of Ireland also considers that it contributes to undermining the basis of international treaty law. The Government of Ireland therefore objects to the said reservation.”

NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. The Government of the Kingdom of the Netherlands therefore objects to these reservations. This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.”

NORWAY “The Government of Norway considers that the reservation made by the Government of Saudi Arabia, due to its very broad scope and undefined character, is incompatible with the object and purpose of the Convention, and thus not permitted under article 51, paragraph 2, of the Convention. For these reasons, the Government of Norway objects to the reservation made by the Government of Saudi Arabia. The Government of Norway does not consider this objection to preclude the entry into force of the Convention between the Kingdom of Norway and Saudi Arabia.”

PORTUGAL “The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National Law may create doubts on the commitment of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations. This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Saudi Arabia.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Sweden therefore objects to the reservations. This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and Saudi Arabia.”

44. Senegal

Reservations

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<tr>
<th>Convention</th>
<th>Reservations</th>
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<tr>
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45. Sierra Leone

Reservations

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<td>CAT</td>
<td>No reservation</td>
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<tr>
<td>CRC</td>
<td>Article 3(d) “With regard to article 3, paragraph 2, of the Optional Protocol to the Convention on the Rights of the Child on the participation of Children in Armed Conflict, the Government of the Republic of Sierra Leone declares that: 1. The minimum age for voluntary recruitment into the Armed Forces is 18 years; 2. There is no compulsory, forced or coerced recruitment into the National Armed Forces; 3. Recruitment is exclusively on a voluntary base.”</td>
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46. Somalia

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47. Sudan

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48. Suriname

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49. Syria

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Objections

FINLAND “In the view of the Government of Finland 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. For the above reason the Government of Finland objects to the said reservation. However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the said Convention between Finland and the Syrian Arab Republic.”

GERMANY “This reservation, owing to its indefinite nature, does not meet the
requirements of international law. The Government of the Federal Republic of Germany therefore objects to the reservation made by the Syrian Arab Republic. This objection shall not preclude the entry into force of the Convention as between the Syrian Arab Republic and the Federal Republic of Germany.

ITALY “This reservation is too comprehensive and too general as to be compatible with the object and purpose of the Convention. The Government of Italy therefore objects to the reservation made by the Syrian Arab Republic. This objection shall not preclude the entry into force of the Convention as between the Syrian Arab Republic and Italy.”

NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. The Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.”

NORWAY “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may create doubts about the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Norway, therefore, objects to this reservation. This objection shall not constitute an obstacle to the entry into force of the Convention between Norway and the Syrian Arab Republic.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Sweden therefore objects to the reservations. This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and the Syrian Arab Republic.”

GERMANY “With regard to the reservation made by the Syrian Arab Republic upon ratification:

This reservation, owing to its indefinite nature, does not meet the requirements of international law. The Government of the Federal Republic of Germany therefore objects to the reservation made by the Syrian Arab Republic. This objection shall not preclude the entry into force of the Convention as between the Syrian Arab Republic and the Federal Republic of Germany.”

NORWAY “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may create doubts about the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Norway, therefore, objects to this reservation. This objection does not constitute an obstacle to the entry into force of the Convention between Norway and the [Syrian Arab Republic].”

FINLAND “In the view of the Government of Finland 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. For the above reason the Government of Finland objects to the said reservation.
However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the said Convention between Finland and the [Syrian Arab Republic].

NETHERLANDS “The Government of the Kingdom of the Netherlands considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking general principles of national law, may raise doubts as to the commitment of these States to the object and purpose of the Convention and moreover, contribute to undermining the basis of international treaty law. It is in the 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. the Government of the Kingdom of the Netherlands therefore objects to these reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the aforementioned States.”

ITAY “With regard to the reservations made by the Syrian Arab Republic upon ratification:

This reservation is too comprehensive and too general as to be compatible with the object and purpose of the Convention. The Government of Italy therefore objects to the reservation made by the Syrian Arab Republic.

This objection shall not preclude the entry into force of the Convention as between the Syrian Arab Republic and Italy.”

DENMARK “Because of their unlimited scope and undefined character these reservations are incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law. Therefore, the Government of Denmark objects to these reservations. The Convention remains in force in its entirety between Djibouti, the Islamic Republic of Iran, Pakistan, the Syrian Arab Republic respectively and Denmark.

It is the opinion of the Government of Denmark that no time limit applies to objections against reservations, which are inadmissible under international law.

The Government of Denmark recommends the Governments of Djibouti, the Islamic Republic of Iran, Pakistan and the Syrian Arab Republic to reconsider their reservations to the Convention on the Rights of the Child.”

SWEDEN “A reservation by which a State party limits its responsibilities under the Convention by invoking general principles of national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. 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 all parties. The Government of Sweden therefore objects to the reservations.

This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and the [Syrian Arab Republic].”

Declaration to Optional Protocol “Ratification of the two Optional Protocols by the Syrian Arab Republic shall not in any event imply recognition of Israel and shall not lead to entry into any dealings with Israel in the matters governed by the provisions of the Protocols.

The Syrian Arab Republic declares that the statutes in force and the legislation applicable to the Ministry of Defence of the Syrian Arab Republic do not permit any person under 18 years of age to join the active armed forces or the reserve bodies or formations and do not permit the enlistment of any person under that age.”

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<tr>
<th>50. Tajikistan</th>
<th>Reservations</th>
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<tr>
<td>ICCPR</td>
<td>No reservation</td>
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<tr>
<td>CEDAW</td>
<td>No reservation</td>
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<tr>
<td>CAT</td>
<td>No reservation</td>
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<tr>
<td>CRC</td>
<td>Article 3 “On behalf of the Republic of Tajikistan, the Ministry of Foreign Affairs has the honor to declare that, in accordance with [paragraph] 2 of article 3 of the Optional Protocol to the Convention on the Rights of a Child with respect to</td>
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participation of children in military conflicts, the voluntarily recruitment of those under age of 18 to the armed forces of the Republic of Tajikistan shall be prohibited.”

Declaration to Optional Protocol Article 3

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<thead>
<tr>
<th>51. Togo</th>
<th>Reservations</th>
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<tbody>
<tr>
<td>ICCPR</td>
<td>No reservation</td>
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<tr>
<td>CEDAW</td>
<td>General reservation “The Government of the Togolese Republic reserves the right to formulate, upon ratifying the Convention, any reservations or declarations which it might consider necessary.”</td>
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<td>CAT</td>
<td>No reservation</td>
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<tr>
<th>52. Tunisia</th>
<th>Reservations</th>
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<tbody>
<tr>
<td>ICCPR</td>
<td>Article 15(d) “The Tunisian Government declares that it 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. In accordance with the provisions of the Vienna Convention on the Law of Treaties, dated 23 May 1969, the Tunisian Government emphasizes that the requirements of article 15, paragraph 4, of the Convention on the Elimination of All Forms of Discrimination against Women, and particularly that part relating to the right of women to choose their residence and domicile, must not be interpreted in a manner which conflicts with the provisions of the Personal Status Code on this subject, as set forth in chapters 23 and 61 of the Code.</td>
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<tr>
<td>CEDAW</td>
<td>Articles 9, 16 &amp; 29 “Reservation concerning article 9, paragraph 2: The Tunisian Government expresses its reservation with regard to the provisions in article 9, paragraph 2 of the Convention, which must not conflict with the provisions of chapter VI of the Tunisian Nationality Code. Reservation concerning article 16, paragraphs (c), (d), (f), (g) and (h): The Tunisian Government considers itself not bound by article 16, paragraphs (c), (d) and (f) of the Convention and declares that paragraphs (g) and (h) of that article must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance. Reservation concerning article 29, paragraph 1: The Tunisian Government declares, in conformity with the requirements of article 29, paragraph 2 of the Convention, that it shall not be bound by the provisions of paragraph 1 of that article which specify that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall be referred to the International Court of Justice at the request of any one of those parties. The Tunisian Government considers that such disputes should be submitted for arbitration or consideration by the International Court of Justice only with the consent of all parties to the dispute.”</td>
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<tr>
<td>CAT</td>
<td>Articles 20 &amp; 21 “The Government of Tunisia reserves the right to make at some later stage any reservation or declaration which it deems necessary, in particular with regard to articles 20 and 21 of the said Convention”</td>
</tr>
</tbody>
</table>
| CRC         | Article 6(d) “The Government of the Republic of Tunisia declares that the Preamble to and the provisions of the Convention, in particular article 6, shall not be interpreted in such a way as to impede the application of Tunisian legislation concerning voluntary termination of pregnancy.” Article 40(d) “The Government of the Republic of Tunisia regards the provisions of article 40, paragraph 2 (b) (v), as representing a general principle to which exceptions may be made under national legislation, as is the case for some offences on which final judgement is rendered by cantonal or criminal courts without prejudice to the right of appeal in their regard to the Court of Cassation entrusted with ensuring the
implementation of the law.”

Article 7(d) “The Government of the Republic of Tunisia considers that article 7 of the Convention cannot be interpreted as prohibiting implementation of the provisions of national legislation relating to nationality and, in particular, to cases in which it is forfeited.”

Global Declaration “The Government of the Republic of Tunisia declares that it shall not, in implementation of this Convention, adopt any legislative or statutory decision that conflicts with the Tunisian Constitution.

The Government of the Republic of Tunisia declares that its undertaking to implement the provisions of this Convention shall be limited by the means at its disposal.”

Article 2 “The Government of the Republic of Tunisia enters a reservation with regard to the provisions of article 2 of the convention, which may not impede implementation of the provisions of its national legislation concerning personal status, particularly in relation to marriage and inheritance rights.”

Objection

GERMANY “The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence of article 4 to the effect that any national legislative or statutory decisions adopted to implement the Convention may not conflict with the Tunisian Constitution. Owing to the very general wording of this passage the Government of the Federal Republic of Germany is unable to perceive which provisions of the Convention are covered, or may be covered at some time in the future, by the reservation and in what manner. There is a similar lack of clarity with regard to the reservation relating to article 2.

The Government of the Federal Republic of Germany therefore objects to both these reservations. This objection does not prevent the Convention from entering into force as between the Federal Republic of Germany and the Republic of Tunisia.

IRELAND “The Government of Ireland consider that such reservations, which seek to limit the responsibilities of the reserving State under the Convention, by invoking general principles of national law, may create doubts as to the commitment of those States to the object and purpose of the Convention.

This objection shall not constitute an obstacle to the entry into force of the Convention between Ireland and the aforementioned States.”

53. Turkey

Reservations

ICCPR

Article 27 “The Republic of Turkey declares that; it will implement its obligations under the Covenant in accordance to the obligations under the Charter of the United Nations (especially Article 1 and 2 thereof). The Republic of Turkey declares that it will implement the provisions of this Covenant only to the States with which it has diplomatic relations. The Republic of Turkey declares that this Convention is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied. The Republic of Turkey reserves the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes.”

Objections

CYPRUS “The Government of the Republic of Cyprus has examined the declaration made by the Government of the Republic of Turkey to the International Covenant on Civil and Political Rights (New York, 16 December 1966) on 23 September 2003, in respect of the implementation of the provisions of the Convention only to the States Parties which it recognizes and with which it has diplomatic relations. In the view of the Government of the Republic of Cyprus, this declaration amounts to a reservation. This reservation creates uncertainty as to the States Parties in respect of
which Turkey is undertaking the obligations in the Covenant, and raises doubt as to
the commitment of Turkey to the object and purpose of the said Covenant. The
Government of the Republic of Cyprus therefore objects to the reservation made by
the Government of the Republic of Turkey to the International Covenant on Civil and
Political Rights.
This reservation or the objection to it shall not preclude the entry into force of the
Covenant between the Republic of Cyprus and the Republic of Turkey.”

| CEDAW | Article 9 “Article 9, paragraph 1 of the Convention is not in conflict with the
provisions of article 5, paragraph 1, and article 15 and 17 of the Turkish Law on
Nationality, relating to the acquisition of citizenship, since the intent of those
provisions regulating acquisition of citizenship through marriage is to prevent
statelessness.” Articles 15 & 16 “Reservations of the Government of the Republic of Turkey with
regard to the articles of the Convention dealing with family relations which are not
completely compatible with the provisions of the Turkish Civil Code, in particular,
article 15, paragraphs 2 and 4, and article 16, paragraphs 1 (c), (d), (f) and (g), as
well as with respect to article 29, paragraph 1.” Article 29 “In pursuance of article 29, paragraph 2 of the Convention, the
Government of the Republic of Turkey declares that it does not consider itself bound
by paragraph 1 of this article.” |
|---|---|
| CAT | Article 30 “The Government of Turkey declares in accordance with article 30,
paragraph 2, of the Convention that it does not consider itself bound by the
provisions of paragraph 1 of this article.” |
| CRC | General Reservation
Articles 17, 29 & 30 “The Republic of Turkey reserves the right to interpret and
apply the provisions of articles 17, 29 and 30 of the United Nations Convention on
the Rights of the Child according to the letter and the spirit of the Constitution of the
Republic of Turkey and those of the Treaty of Lausanne of 24 July 1923.”

**Objections**

IRELAND “The Government of Ireland consider that such reservations, which seek
to limit the responsibilities of the reserving State under the Convention, by invoking
general principles of national law, may create doubts as to the commitment of those
States to the object and purpose of the Convention.
This objection shall not constitute an obstacle to the entry into force of the
Convention between Ireland and the aforementioned States.”

NETHERLANDS “The Government of the Kingdom of the Netherlands considers
that such reservations, which seek to limit the responsibilities of the reserving State
under the Convention by invoking general principles of national law, may raise
doubts as to the commitment of these States to the object and purpose of the
Convention and moreover, contribute to undermining the basis of international treaty
law. It is in the 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. the
Government of the Kingdom of the Netherlands therefore objects to these
reservations.
This objection does not constitute an obstacle to the entry into force of the
Convention between the Kingdom of the Netherlands and the aforementioned States.”

PORTUGAL “The Government of Portugal considers that reservations by which a
State limits its responsibilities under the Convention by invoking general principles
of National Law may create doubts on the commitments of the reserving State to the
object and purpose of the Convention and, moreover, contribute to undermining the
basis of International Law. 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 all parties. The Government of Portugal therefore objects to the reservations.
This objection shall not constitute an obstacle to the entry into force of the
Convention between Portugal and Turkey.”

Declaration to Optional Protocol “The Republic of Turkey declares that it will
implement the provisions of the existing Optional Protocol only to the States Parties
which it recognizes and with which it has diplomatic relations.”
54. Turkmenistan

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55. Uganda

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<tr>
<td>ICCPR</td>
<td>Article 5 “The Republic of Uganda does not accept the competence of the Human Rights Committee to consider a communication under the provisions of article 5 paragraph 2 from an individual if the matter in question has already been considered under another procedure of international investigation or settlement.” Declaration to the Optional Protocol: Article 5 “The Republic of Uganda does not accept the competence of the Human Rights Committee to consider a communication under the provisions of article 5 paragraph 2 from an individual if the matter in question has already been considered under another procedure of international investigation or settlement.”</td>
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56. United Arab Emirates

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<td>CRC</td>
<td>Article 7 “The United Arab Emirates is of the view that the acquisition of nationality is an internal matter and one that is regulated and whose terms and conditions are established by national legislation.” Article 14 “The United Arab Emirates shall be bound by the tenor of this article to the extent that it does not conflict with the principles and provisions of Islamic law.” Article 21 “Since, given its commitment to the principles of Islamic law, the United Arab Emirates does not permit the system of adoption, it has reservations with respect to this article and does not deem it necessary to be bound by its provisions.” Article 17 “While the United Arab Emirates appreciates and respects the functions assigned to the mass media by the article, it shall be bound by its provisions in the light of the requirements of domestic statues and laws and, in accordance with the recognition accorded them in the preamble to the Convention, such a manner that the country's traditions and cultural values are not violated.”</td>
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Objections
ITALY “The Government of the Italian Republic considers that such a reservation, which seeks to limit the responsibilities of the United Arab Emirates under the Convention by invoking general principles of national law, may raise doubts as to the commitment of the United Arab Emirates to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international treaty law. It is common interest of States that treaties to which they have chosen to become Parties should be respected, as to the objects and the purpose, by all Parties. The Government of the Italian Republic therefore objects to this reservation. This objection does not constitute an obstacle to the entry into force of the Convention between the Government of the Italian Republic and the United Arab Emirates.”

NETHERLANDS “The Government of the Kingdom of the Netherlands assumes that the United Arab Emirates shall ensure the implementation of the rights mentioned in article 7, first paragraph, of [the Convention] not only in accordance with its national law but also with its obligations under the relevant international instrument in this field.”
57. Uzbekistan

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<tr>
<td>ICCPR</td>
<td>No reservation</td>
</tr>
<tr>
<td>CEDAW</td>
<td>No reservation</td>
</tr>
<tr>
<td>CAT</td>
<td>No reservation</td>
</tr>
<tr>
<td>CRC</td>
<td>No reservation</td>
</tr>
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</table>

58. Yemen

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICCPR</td>
<td>No reservation</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Article 29 “The Government of the People's Democratic Republic of Yemen declares that it does not consider itself bound by article 29, paragraph 1, of the said Convention, relating to the settlement of disputes which may arise concerning the application or interpretation of the Convention.”</td>
</tr>
<tr>
<td>CAT</td>
<td>No reservation</td>
</tr>
<tr>
<td>CRC</td>
<td>No reservation</td>
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</tbody>
</table>

Source: United Nations High Commission for Human Rights website


## APPENDIX III: TABLE OF SHARI`AH-BASED RESERVATIONS TO CEDAW

<table>
<thead>
<tr>
<th>Islamic States</th>
<th>CEDAW Articles to which Islamic States have made reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>G  2  5  7  9  11  13  15  16</td>
</tr>
<tr>
<td>Algeria</td>
<td>R 9(2) 15(4) R</td>
</tr>
<tr>
<td>Bahrain</td>
<td>R 9(2) R 15(4) R</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>R [w13(a)] [w16(1)(c),(f)]</td>
</tr>
<tr>
<td>Egypt</td>
<td>R R R</td>
</tr>
<tr>
<td>Indonesia</td>
<td></td>
</tr>
<tr>
<td>Iraq</td>
<td>R 2(f),(g) R</td>
</tr>
<tr>
<td>Jordan</td>
<td>R 9(2) R 15(4) R 16(1)(c),(d),(g)</td>
</tr>
<tr>
<td>Kuwait</td>
<td>R 7(a) R 9(2)</td>
</tr>
<tr>
<td>Lebanon</td>
<td>R 9(2) R 16(1)(c),(d),(f),(g)</td>
</tr>
<tr>
<td>Libya</td>
<td>R R 16(c),(d)</td>
</tr>
<tr>
<td>Malaysia</td>
<td>R [w2(f)] R 5(a) R 9(2) R 15(4) R 16(a),(c),(f),(g) [w16(b),(d),(e),(h)]</td>
</tr>
<tr>
<td>Maldives</td>
<td>R R 7(a) R</td>
</tr>
<tr>
<td>Mauritania</td>
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<tr>
<td>Morocco</td>
<td>R R 9(2) R 15(4) R</td>
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<tr>
<td>Niger</td>
<td>R 2(d),(f) R 5(a) R 15(4) R 16(1)(c),(c),(g)</td>
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<tr>
<td>Pakistan</td>
<td>R</td>
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<tr>
<td>Saudi Arabia</td>
<td>R R 9(2) R</td>
</tr>
<tr>
<td>Syria</td>
<td>R R 9(2) R 15(4) R 16(1)(c),(d),(f),(g) &amp; 16(2)</td>
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<tr>
<td>Tunisia</td>
<td>R R 9(2) R 15(4) R 16(c),(d),(f),(g),(h)</td>
</tr>
<tr>
<td>Turkey</td>
<td>R R [w15(2),(4)] R [w16(1)(c),(d),(f),(g)]</td>
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<tr>
<td>Yemen</td>
<td></td>
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</tbody>
</table>

*Indicators:*

- **R** = Reservation applies to the entire Article
- **R + Articles** = Provisions of the Article to which the reservation applies
- **[w( )]** = Reservations to the Articles mentioned in parenthesis have been withdrawn
APPENDIX IV: TABLE OF SHARI`AH-BASED RESERVATIONS TO CRC

<table>
<thead>
<tr>
<th>Islamic State</th>
<th>CRC Articles to which Islamic States have made reservations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Afghanistan</td>
<td>G 1 2 6 7 9 13 14 15 16 17 20 21 22 28 29 30 37</td>
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<tr>
<td>2 Algeria</td>
<td>G 1 2 6 7 9 13 14(1)(2) PC &amp; IC 14(1)(2) PC &amp; IC 16 PC &amp; IC 17 PC &amp; IC</td>
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<tr>
<td>3 Bangladesh</td>
<td>G 1 2 6 7 9(1) DL 14(1) DLP 21 DLP</td>
</tr>
<tr>
<td>4 Bosnia &amp; Herzegovina</td>
<td>G 1 2 6 7 9(1) DL 14(1) DLP 21 DLP</td>
</tr>
<tr>
<td>5 Brunei Darussalam</td>
<td>G 1 2 6 7 9(1) DL 14(1) DLP 21 DLP</td>
</tr>
<tr>
<td>6 Djibouti</td>
<td>G 1 2 6 7 9(1) DL 14(1) DLP 21 DLP</td>
</tr>
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<td>7 Egypt</td>
<td>G 1 2 6 7 9(1) DL 14(1) DLP 21 DLP</td>
</tr>
<tr>
<td>8 Indonesia</td>
<td>G 1 2 6 7 9(1) DL 14(1) DLP 21 DLP</td>
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<tr>
<td></td>
<td>G 1 2 6 7 9(1) DL 14(1) DLP 21 DLP</td>
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<tr>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>9 Iran</td>
<td>GR</td>
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<tr>
<td>10 Iraq</td>
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<td>11 Jordan</td>
<td></td>
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<td>12 Kuwait</td>
<td>GR</td>
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<tr>
<td>13 Malaysia</td>
<td>1 C, NLP</td>
</tr>
<tr>
<td>14 Maldives</td>
<td>GR adoption</td>
</tr>
<tr>
<td>15 Mali</td>
<td></td>
</tr>
<tr>
<td>16 Mauritania</td>
<td>GR</td>
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<tr>
<td>17 Morocco</td>
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<tr>
<td>18 Oman</td>
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</tr>
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<td>19 Pakistan</td>
<td>GR (w)</td>
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<td>Islamic State</td>
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<td>--------------------</td>
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<td>20 Qatar</td>
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<td>21 Saudi Arabia</td>
<td>GR Islam</td>
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<td>22 Syrian Arab Republic</td>
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<td>23 Tunisia</td>
<td>GR C</td>
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<tr>
<td>24 Turkey</td>
<td></td>
</tr>
<tr>
<td>25 UAE</td>
<td></td>
</tr>
</tbody>
</table>

*Indicators:*
- GR : General reservation
- TL : Treaty of Lausanne
- NL : Nationality law
- PSC : Personal status code
- DL : Domestic law
- C : Constitution
- IC : Information code
- PC : Family code
- DLP : Domestic laws and practice
- P : Policy
- R&T : Religion and traditions
- (w) : Withdrawn