

MALAYSIAN JOURNAL

on *Human Rights*

VOL. 3 NO. 1 2009

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RESERVATIONS TO CEDAW AND THE IMPLEMENTATION OF ISLAMIC FAMILY LAW: ISSUES AND CHALLENGES

BY ABDUL GHAFUR HAMID @ KHIN MAUNG SEIN*

The family laws in Islamic countries are primarily founded on Islamic law or Shari'ah. At the same time, many of these countries are parties to CEDAW and are in a position to make their family laws to be in line with the Convention. There are indeed areas where the two appear to be incompatible. The most popular way out of this dilemma has been to make reservations to CEDAW, in particular to its Article 16, which deals with marriage and family relations. After examining briefly the implementation of the Islamic family law in Muslim countries, and the reservations regime of CEDAW, the present paper analyses the reservations made by Islamic countries, objections to these reservations, and the pressure put by CEDAW Committee on the Islamic countries to withdraw these reservations or to reform their family laws to be in accord with the Convention. The paper finally concludes that it is an extremely difficult and sensitive issue and the solution will largely depend on to what extent CEDAW can accommodate Muslim countries to be able to comply with the most fundamental precepts of Shariah and to what extent Muslim countries are prepared to accept the liberal interpretation of the Islamic family law without affecting the most fundamental precepts of Shariah.

INTRODUCTION

Islamic family law is an integral part of the Islamic law (Shari'ah). Generally speaking, it is applied today in almost all predominantly Islamic countries, as well as among Islamic communities in secular states like India. In this sense,

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one can say that the broad principles of Islamic family law, and their basic assumptions and rationale, constitute the most widely applied system of family law in the world today. Nevertheless, when many Islamic countries have become parties to CEDAW, they are required to make their family laws to be in line with the Convention. There are indeed areas where the two appear to be incompatible. The most popular way out of this dilemma has been to formulate reservations to CEDAW, in particular to its Article 16, which deals with marriage and family affairs. The present paper, first of all, makes a brief survey of the implementation of Islamic family law in Muslim countries, and then examines the reservations regime of CEDAW and its weaknesses. After that it analyses the reservations made by Islamic countries, objections to these reservations, and the pressure put by CEDAW Committee on the Islamic countries to withdraw these reservations or to reform their family laws to be in accord with the Convention. Finally the paper concludes that it is an extremely difficult and sensitive situation which can only be settled by means of a good faith dialogue in order to reconcile the two important factors: the extent to which CEDAW can accommodate Muslim countries to be able to comply with the fundamental precepts of *Shariah*; and the extent to which Muslim countries are prepared to accept the liberal interpretation of the Islamic family law without affecting the fundamental precepts of *Shariah*.

A BRIEF SURVEY OF THE IMPLEMENTATION OF ISLAMIC FAMILY LAW IN MUSLIM COUNTRIES

In the past, the Islamic State applied *Shari'ah* or Islamic law in all aspects of the Muslims' life: public, private, and international relations. With colonization, Western countries imported their secular legal systems (common law or civil law) into Islamic countries. Even after independence, the Islamic countries continued to practise the legal systems of their colonial masters. However, as far as family or personal matters are concerned, most of the Islamic countries have applied Islamic family law.

1. What is Islamic family law?

Islamic family law (IFL) is an integral part of the Islamic law (*Shari'ah*). Generally speaking, IFL is applied today in almost all predominantly Islamic countries¹, as well as among Islamic communities in secular states like India. Even where IFL is not enforced by official state courts, its principles are formally observed by Muslims as a matter of religious obligation. Whether formally or informally, IFL governs matters of marriage, matrimonial relations and maintenance, divorce, paternity and custody of children, inheritance and related matters for more than

¹ There are 57 Organization of Islamic Conference (OIC) member countries (see <http://www.oicoci.org>).

a billion Muslims throughout the world.² We can proudly say that Islamic family law constitutes the most widely applied system of family law in the world today.³

In many Muslim countries, IFL was usually the only aspect of *Shari'ah* that has successfully resisted displacement by European codes during the colonial period, and survived various forms of secularization of the state and its institutions since independence.⁴ As such IFL has become the symbol of Islamic identity, the hard irreducible core of what it means to be a Muslim today. Consequently, IFL has become the contested ground between conservative and fundamentalist groups, on the one hand, and modernist and liberal groups, on the other. While the former group seek to entrench IFL as the embodiment of Islam itself, the latter criticize it as archaic, rigid and discriminatory against women and try to reform it so that it is in accord with modern developments.

2. Implementation of Islamic family law in Muslim countries

Even a cursory look at the administration of Islamic family law in Muslim countries reveals that there is lack of uniformity. The following is a brief survey of the implementation of Islamic family law in some Muslim countries, selected as a representative sample.

Saudi Arabia: Saudi Arabia can be placed in the category of a Muslim state that strictly follows the classical Islamic law. According to its Basic Law, "God's Book and the *Sunnah* of His Prophet, God's prayers and peace be upon him, are its constitution"⁵ and "the family is the kernel of Saudi society, and its members shall be brought up on the basis of Islamic faith, and loyalty and obedience to God..."⁶. There is no specific family law statute in Saudi Arabia and family law matters are governed by classical Islamic law, in particular standard Hanbali *fiqh*.⁷ We can find similar adherence to the classical Islamic law in countries like United Arab Emirates (UAE), where the *Shari'ah* courts apply classical personal

² It is quite difficult to know the exact number of world Muslim population, which is second only to Christian population. Commonly cited estimates of Muslim population today range between 900 million and 1.5 billion. Estimates of Islam by country based on U.S. State Department figures yield a total of 1.48 billion, while the Muslim delegation at the United Nations quoted 1.2 billion as the global Muslim population in September 2005; see <http://www.wikipedia.org/wiki/Islam> (last visited 18-12-2006). According to Adherents.com, the World Muslim population in the year 2005 is 1.3 billion; see http://www.adherents.com/Religions_By_Adherents.html (last visited 18-12-2006).

³ See "Islamic Family Law: Possibilities of Reform Through Internal Initiatives", Proposal as submitted to the Ford Foundation by the Law and Religion Programme, Emory University, January 7, 1998, available at <http://www.law.emory.edu/IFL/proposal.html>, (last visited 14-12-2006).

⁴ See Abdul Rahman I. Doi, *Shari'ah: The Islamic Law*, (London, 1984) (Printed in Malaysia by A.S. Noordeen, Kuala Lumpur, 1989), 450-51.

⁵ Basic Law of Government, 1993, (Saudi Arabia - Constitution), Article 1.

⁶ *Ibid.*, Article 9.

⁷ See <http://www.law.emory.edu/IFL/legal/saudi-arabia.htm>, (last visited 12-12-2006).

status law⁸, Yemen, where the 1991 Constitution⁹ declares that Islamic *shari'ah* shall be the source of all legislation¹⁰, and that women have rights and duties, which are guaranteed and assigned by *Shari'ah* and stipulated by law¹¹, and Oman, where the Basic Law (Constitution) of 1996 declares that Islam is the official state religion and *Shari'ah* is the basis for legislation.¹²

Most of the other Muslim countries either follow the classical Islamic law partially and reform the remaining portion or entirely reform Islamic family law on the basis of modernist interpretation of the Islamic sources.

Syria: The first attempt to reform the Islamic family law was made by Syria in 1953, followed by a number of other Islamic States. Syrian Law on Personal Status (Decree No. 59) of 1953 reads: "...the judge is empowered to refuse permission to a married man to marry another woman if it is established that he is not in a position to support two wives...".¹³ This is a clear restriction put on the institution of polygamy under the classical Islamic law. The reformed family law regards the equal treatment requirement as a legal condition precedent to the exercise of polygamy that can be enforced by the courts. However, it seems that financial ability appears to be the only criterion in Syria for polygamous marriages.¹⁴ Syrian Law on Personal Status allows unilateral divorce by husband (*Talaq*), and follows the classical law in respect of maintenance and obedience.

Tunisia: In Tunisia, polygamy was prohibited outright by its family law in 1957. The Tunisian Code of Personal Status, 1957, provides: "Polygamy is forbidden. Any person who, having entered into a bond of marriage, contracts another marriage before the dissolution of the preceding one, is liable to one year's imprisonment and to a fine...".¹⁵ Doi criticized the Tunisian law for completely prohibiting polygamy against explicit Quranic provision.¹⁶ According to Tunisian law, extra-judicial *talaq* has no effect; three divorces between a couple create a permanent prohibition on their remarriage. There is no provision at all about obedience and the law merely provides that the husband as head of the family is responsible for the maintenance of wife and children,

⁸ See <http://www.law.emory.edu/IFL/legal/uae.htm> (last visited 11-12-2006).

⁹ Constitution of Yemen of 16th May 1991, as amended on 29th September 1994.

¹⁰ *Ibid.* Article 3.

¹¹ *Ibid.*, Article 9.

¹² See the Basic Law (Constitution) of Oman of November 1996, Article 2.

¹³ Syrian Law on Personal Status, 1953 (Law no. 59/1953), Article 17.

¹⁴ David Pearl & Werner Menski, *Muslim Family Law*, London: Sweet & Maxwell, (1998), 241.

¹⁵ The Tunisian Code of Personal Status, 1957, Article 18.

¹⁶ Doi, above note 4, 149-50.

while the wife is to share in maintaining the family if she has means.¹⁷ Tunisian Code of Personal Status appears to go much further beyond the classical Islamic law.

Morocco: The Moroccan Code of Personal Status of 1957¹⁸ took a middle course between Syria and Tunisia and prohibited polygamy conditionally when there was any apprehension of unequal treatment. In other words, the initiative for challenging a polygamous arrangement comes not primarily from the court, but from the wife or wives concerned. The courts were only allowed to intervene by granting divorce on the ground of unequal treatment. Moroccan legislation allows unilateral divorce by husband (*Talaq*) but it must be registered at court, normally in the presence of wife. The law specifies maintenance as one of wife's rights, and obedience as one of husband's rights.

In October 2003, the King of Morocco announced proposed reforms to the Moroccan Code of Personal Status, also known as Mudawana, which the parliament subsequently ratified in January 2004.¹⁹ With the reformed code, polygamy is allowed only at the discretion of the judge and is in no case permitted where the wife has required that the husband not take another wife. The judges are required to apply strict legal conditions in assessing whether an "injustice" will result from the polygamous marriage. For example, the husband must prove the necessity of the second marriage, as well as demonstrate that he can provide adequate resources to fairly and equally support two households and then judge must be convinced of both.

Pakistan: In Pakistan, the Muslim Family Law Ordinance 1961 was an attempt to reform family laws. Section 6(1) of the ordinance appears to restrict polygamy by controlling the husband's discretion to take a second or further wife.²⁰ However, in practice, the requirement that prior permission for polygamous marriage be obtained from an Arbitration Council appears to be a formality rather than an effective deterrence and some husbands are contracting polygamous marriages ignoring the requirements of the law.²¹ Unilateral divorce by husband (*Talaq*) is

¹⁷ See <http://www.law.emory.edu/IFL/legal/syria.htm>.

¹⁸ Code of Personal Status of Morocco 1957-58 (Major amendments made by Law no. 1.93.347, 1993).

¹⁹ Laura A. Weingartner, "Family Law & Reform in Morocco - The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status", (2005) 82 U. Det. Mercy L. Rev. 687, at 687. The reformed code more closely aligns with modern views of women's rights. Feminists and women's rights activists across the Arab and Muslim world applauded the reforms as another significant step toward gender equality in an avowedly Muslim nation. On the other hand, Islamists brought hundreds of thousands of people out on to the streets to protest at any change to the mudawana. Islamist groups accused the King of bowing to pressure from Europe and the U.S. in even considering reforms to the Mudawana. See, Giles Tremlett, "Morocco Boosts Women's Rights", *The Guardian*, (Jan. 21, 2004), available at <http://www.guardian.co.uk/international/story/0,3604,1127437,00.html> (last visited 10-12-2006).

²⁰ Muslim Family Law Ordinance, 1961, of Pakistan, Section 6(1).

²¹ David Pearl & Werner Menski, *Muslim Family Law*, London: Sweet & Maxwell, (1998) 256, 267.

allowed in Pakistan and classical Islamic law applies to maintenance and obedience.

Malaysia: In Malaysia, the Islamic family law is administered by the *Shari'ah* Courts. The constitutional basis of this can be found in the Federal Constitution²² which gives power of legislation in respect of Islamic law and Islamic family law to the State Legislative Assemblies, except in respect of the Federal territories. Islamic family law enactments were passed in various states of Malaysia in 1983 (Kelantan, Negeri Sembilan, and Malacca), in 1984 (Selangor, Kedah, Perak, and Federal Territories), and in 1985 (Penang, Pahang, and Terengganu) respectively.

According to the Islamic Family Law (Federal Territories) Act 1984, no man, during the subsistence of a marriage, shall except with the permission in writing of the court, contract another marriage, and an application for permission to marry shall fulfill at least the following conditions: that the proposed marriage is "just and necessary"; that the applicant has the financial means to support his existing and future dependants; the consent of the existing wife; that the applicant would be able to accord equal treatment to his wives "as required by *Hukum Syara*"; and that the proposed marriage does not cause "*darar syar'i*" (harm under the *Shari'ah*) to the existing wife or wives.²³ Contravention of permission requirement is punishable by fine and/or imprisonment.²⁴ Tremlett, "Morocco Boosts Women's Rights", *The Guardian*, (Jan. 21, 2004), available at <http://www.guardian.co.uk/international/story/0,3604,1127437,00.html> (last visited 10-12-2006).

Before the coming into force of the Islamic Family Law Act and enactments, it was the practice for Muslim husbands to pronounce the *talaq* outside the court. According to the new legislation, all applications for *talaq* are to be made to the court and all *talaqs* are to be pronounced in court²⁵. However, "there are still many cases where the husbands exercise their rights, as they claim, to pronounce the *talaq* outside the court".²⁶ In respect of wife's right to maintenance is concerned, it is subject to classical definitions of obedience and wife's disobedience can result in restitution order or punishment of fine.²⁷

²² Federal Constitution of Malaysia, the *Ninth Schedule, List II State List*.

²³ Originally the Islamic Family Law (Federal Territory) Act 1984, Laws of Malaysia, Act 303, date of publication in the Gazette on 28 June 1984, date of coming into force on 29 April 1987, Section 23. By the Amendment Act of 1992 (Act A 828), in order to cover the new Federal Territory of Labuan, the title of the Act was amended to the Islamic Family Law (Federal Territories) Act 1984.

²⁴ See the Islamic Family Law (Federal Territories) Act 1984, Section 123, which provides: "Any man who...contracts another marriage without the prior permission of the court, shall be punished with a fine not exceeding one thousand Ringgit, or with imprisonment not exceeding six months or with both..."

²⁵ *Ibid.*, Section 47.

²⁶ Ahmad Mohamed Ibrahim, *The Administration of Islamic Law in Malaysia*, Institute of Islamic Understanding Malaysia (IKIM), Kuala Lumpur, (2000), 249.

²⁷ Islamic Family Law (Federal Territories) Act 1984, Section 59.

The adoption of the Islamic Family Law (Federal Territories) Act 1984 was generally regarded as a good step towards security of Muslim women's rights in Malaysia. A series of amendments were, however, made in 1994, which ostensibly meant to streamline the different versions of Islamic family laws in various states in Malaysia to ensure more effective application. However, the original spirit of the family law reforms of the early 1980s was largely eroded as a result of the amendments, which have either changed or deleted the required conditions for polygamy, generally leaving the *Syari'ah* court judge to use his own discretion to decide whether or not a husband is eligible to take another wife.²⁸ The Islamic Family Law (Federal Territories)(Amendment) Act, 1994, for example, amended Section 23 (1) of the 1984 Act, which in essence allows the *Syari'ah* court to approve a polygamous marriage, even when contracted without the court's permission, and order to be registered.²⁹ As a result of these amendments, applications for polygamy can go ahead without permission of the court and without the consent of the first wife. Although according to Section 123 of the 1984 Act, a man practicing polygamy without the court's permission can be penalized with imprisonment and fine, it is said that in practice the imprisonment was never imposed on a polygamous husband. Many have criticized these amendments as retrogressive.³⁰ The women's rights groups felt that these amendments rolled back several of Muslim women's rights and that Muslim women have since suffered greatly, whether due to the actual practice of Shari'ah judicial process or the substance of the law itself.³¹

What makes the matter worse is that the Malaysian Parliament passed the Islamic Family Law (Federal Territories) (Amendment) Bill 2005 on 22 December 2005.³² Dissatisfactions with the new Bill were voiced by Women's rights groups, claiming that it contained several provisions that adversely affect Muslim women, such as making polygamy easier for men.³³ The Government took the objections from the women seriously and decided that the Statute would not come into force or be implemented until further consultation and discussion were

²⁸ See Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Development*, Ilmiah Publishers, Kuala Lumpur, (2000), 66-67.

²⁹ The Islamic Family Law (Federal Territories) (Amendment) Act, 1994, Laws of Malaysia, Act A 902, date of publication in the gazette on 8 September 1994 and date of coming into operation on 9 September 1994, Section 9 (a).

³⁰ See Kamali, above note 28, 68, and 66 (stating that a total of 39 amendments were made as a result of coming into force of the IFL (Federal Territories) (Amendment) Act 1994).

³¹ See "Women Living under Muslim Laws" <http://www.wluml.org/english/actionsfulltxt.shtml> (last visited 7-12-2006).

³² The Bill was passed by Dewan Rakyat on 26 September 2005 and by Dewan Negara on 22 December 2005; See Attorney-General's Chambers, Drafting Division, available at <http://www.agc.gov.my/agc/agc/draf/act.htm> (last visited 21-12-2006).

³³ See, for example, Fatimah Ahmad, "Don't Gazette This Bill", *New Straits Times Online*, Letters, Tuesday 3 January 2006, available at http://www.nst.com.my/Current_News/nst/Tuesday/Letters/20060203 (last visited 12-12-2006).

completed.³⁴ The Islamic Family Law (Amendment) Act 2006 received the Royal assent on 11 January 2006³⁵ and was gazetted on 2 February 2006.³⁶ It is said that the necessary amendments to the new statute are being worked out by the Attorney-General's Chamber.³⁷

3. An analysis of the administration of Islamic family law

The very first comment that can be made is that the same IFL principles do not apply everywhere in the Muslim world. There are significant differences among various schools of Islamic jurisprudence which prevail in different Islamic countries. There are diverse historical, cultural, social, political and economic differences that clearly influence the implementation of Islamic family law among Islamic countries. Last but not least, there is the ideological divide between traditional scholars, on one side, and modernist or reformist scholars, on the other.

We have found many variants in the practice of Islamic countries in respect of Islamic family law. Nevertheless, there are indeed the most fundamental precepts of *Shari'ah* accepted by most of the Islamic countries, although there may be slight differences in the details. Despite Islamic family law reforms in a number of Muslim countries, they are not prepared to abolish these fundamental precepts of *Shari'ah* because they are firmly rooted in the *Qur'an* and the *Sunnah*, the two primary sources of the Islamic law.

Modern legislation on polygamy in the present-day Muslim countries has as a rule departed from the classical position that made polygamy a prerogative basically of the husband. The family law reforms made in these countries normally made polygamy conditional on a court order. The law has empowered the courts to refuse permission to intending polygamists who fail to fulfil certain requirements. The response of traditional ulema to this development has been typically unfavourable.³⁸ Some Muslim countries go so far as to prohibit

³⁴ Minister in the Prime Minister's Department Datuk Seri Nazri Aziz said that Cabinet meeting chaired by the Prime Minister wanted the objections voiced by various parties to be thoroughly discussed and that the new law was passed to honour the promise made at the Rulers Council to streamline the Islamic laws in the country"; the passing of the Act for the Federal Territories made it the 11th state in the country to adopt the law; see also "Cabinet puts on hold gazetting of controversial Islamic Family Law Act", *the Star Online*, Thursday, 12 January 2006, available at <http://thestar.com.my/news/story.asp?file=2006/1/12/nation/13087598&sec=nation> (last visited 13-12-2006).

³⁵ See The Attorney-General's Chambers of Malaysia, Drafting Division, above note 30.

³⁶ The Islamic Family Law (Federal Territories) (Amendment) Act 2006, Laws of Malaysia, Act 1261, available at http://www.lawnet.com.my/egazette/acta_new.nsf/ (last visited 21-12-2006).

³⁷ In respect of the proposed amendments to the recently passed the IFL (Federal Territories) (Amendment) Act, 2006, it was reported that at a press conference on 10 February 2006, the Attorney General of Malaysia stated that he had already met various experts, as well as women groups, three times for their input, that the AG's Chambers was working very hard on the new amendments and that the IFL Amendment Act had been gazetted but without an enforcement date; see <http://thestar.com.my/news/story.asp?file=2006/2/10/nation/13354018&sec=nation> (last visited 13-12-2006).

³⁸ Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Development*, Ilmiah Publishers, Kuala Lumpur, (2000), 62.

polygamy. Doi concluded that "it is my candid view that the countries which have prohibited polygamy by law have gone against the injunction of the Qur'an and the Sunnah of the Prophet and the practice of the *Tabi'un* and the *Tab' Tabi'un*".³⁹

This is in fact just the beginning of the problem and is merely reflective of the internal conflict between traditionalists and modernists and conflict between different practices among Muslim countries. The most crucial issue has come into being with the adoption of the Convention on the Elimination of Discrimination against Women (CEDAW), which is based on the idea of universality of women's rights. There are areas where the provisions of Women's rights are in conflict with certain basic norms of the Islamic family law. To avoid these conflicts, the Islamic countries made reservations when ratifying or acceding to the Convention. According to CEDAW Committee and the view of the Western countries, the reservations are not in accord with the object and purpose of the Convention. The main thrust of the present paper is to address issues and challenges arising out of this legal dilemma with which the Islamic countries are facing at present.

CEDAW AND ITS KEY PROVISIONS

The Convention on the Elimination of All Forms of Discrimination against Women⁴⁰ (CEDAW) was adopted by the United Nations General Assembly on 18 September 1979 and entered into force on 3 September 1981.⁴¹ To date CEDAW has 185 States parties,⁴² representing almost the entire international community. It is one of the most widely accepted human rights treaties.

Article 2 represents what has been aptly described as the "core of the Convention". According to this Article, States parties condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. The article enshrines the following basic obligations of the states parties in implementing the Convention:

³⁹ Abdur Rahman I. Doi, *Women in Shariah (Islamic Law)*, Taha Publishing Ltd., London, (1989), 58.

⁴⁰ Convention on the Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly Resolution 34/180 on 18 December 1979, entered into force on 3 Sept. 1981, 1249 UNTS 13, (hereinafter CEDAW).

⁴¹ *CEDAW Convention: A Short History of the Convention*, United Nations Division for the Advancement of Women, U.N. Doc. A/CONF.177/7.

⁴² See status of multilateral treaties deposited with the Secretary General of the UN, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp> (last visited 10-12-2006). The United States is the only industrialized country that has not ratified CEDAW. By not ratifying, the US is in the company of countries like Iran, Sudan, and Somalia; See <http://hrw.org/campaigns/cedaw/> (last visited 11-12-2006).

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; ...
- (d) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.⁴³

One of the sensitive provisions of CEDAW is Article 5 (a), according to which States parties are obliged to take all appropriate measures to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."⁴⁴

The provision which appears to be the most sensitive and most relevant to the present analysis is Article 16, dealing with "marriage and family relations". The Article reads:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (a) The same right to enter into marriage;
 - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - (c) The same rights and responsibility during marriage and at its dissolution;

⁴³ Article 2, CEDAW, above note 40.

⁴⁴ Article 5(1), *Ibid.*

- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation, in all cases the interest of children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.⁴⁵

Article 17 of the Convention establishes the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) that oversees the implementation of the Convention provisions. Members of this committee are nominated and elected by the State parties to four-year terms and consist "of twenty-three experts of high moral standing and competence in the field covered by the Convention."⁴⁶

The major function of the Committee in its position as overseer is to review the reports which must be submitted by the State parties every four years.⁴⁷ These reports consist of the legislative, judicial, and administrative measures the State has taken during that time period in implementing the provisions mandated in the previous Articles of the Convention.⁴⁸ Once the Committee reviews the reports, they make recommendations and suggestions, which they must report to the General Assembly through the Economic and Social Council.⁴⁹ The Secretary-General then submits these reports to the Committee on the Status of Women to keep them abreast of the situations within each of the ratifying States.⁵⁰

⁴⁵ Article 16(1), *Ibid.*

⁴⁶ See United Nations Division for the Advancement of Women, available at <http://www.un.org/womenwatch/daw>.

⁴⁷ *Ibid.*

⁴⁸ Article 18, CEDAW, above note 40.

⁴⁹ Article 21, *Ibid.*

⁵⁰ Article 17, *Ibid.*

An Optional Protocol to the CEDAW⁵¹, authorizing communications from individuals or groups of individuals, was adopted by the General Assembly on 6 October 1999. It came into force on 22 December 2000, and there are 83 States parties to it. The Optional Protocol provides women whose rights are violated a way to seek an international remedy. It offers two mechanisms to hold governments accountable for their obligations under CEDAW: (1) a communications procedure, which provides individuals and groups the right to lodge complaints with the CEDAW Committee; and (2) an inquiry procedure, which enables the CEDAW Committee to conduct inquiries into serious and systematic abuses of women's rights. These mechanisms are only applicable in countries that are states parties to the Optional Protocol.

RESERVATIONS REGIME OF CEDAW

In international law, a reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in application to that State".⁵² Reservations allow a state to ratify an international treaty without obligating itself to provisions it does not wish to undertake.⁵³

1. International Law on Reservations to Treaties

The traditional treatment of reservations, otherwise known as the unanimity rule, required unanimous consent by each of the convention's member states before ratification approval.⁵⁴ The basis of this rule was the contractual model of multilateral treaties, whereby treaty provisions were assumed to be offers and reservations were counteroffers, which could be accepted or rejected by the contracting parties.⁵⁵

Under the unanimity rule, if one party objected to a state's reservation, the reserving state could only either ratify the treaty without the reservation or not become a party to the treaty. The purpose of requiring unanimous consent was to protect the integrity of the treaty. As the international arena changed and became more diversified as a result of decolonization by the Western powers, however, greater emphasis was placed on states consenting to the terms by which they would be bound.

⁵¹ Optional Protocol to the Convention on the Elimination of Discrimination against Women, adopted by the UN General Assembly Resolution A/RES/54/4 on 6 Oct. 1999, entered into force on 22 Dec. 2000, 2131 UNTS 83.

⁵² Vienna Convention on the Laws of Treaties, 23 May 1969 (entered into force on January 22, 1980) 1155 UNTS 331, Article 2 (1)(d).

⁵³ Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", 30 Va. J. Int'l L. 643, 650 (1990).

⁵⁴ Belinda Clerk, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women", 85 Am. J. Int'l L. 281, 317 (1991), at 289.

⁵⁵ *Ibid.*

The decision of the International Court of Justice (ICJ) in the advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*⁵⁶ (*Genocide Convention Case*) and the Vienna Convention on the Law of Treaties⁵⁷ comprise the current international approach to reservations.⁵⁸

The Genocide Convention case: The ICJ's advisory decision in the Genocide Convention case differed in two major ways from the unanimity rule. First, the ICJ no longer required that all state parties assent to each state's reservation, allowing a state to ratify the treaty even though some states objected to the reservation.⁵⁹ Second, the ICJ established the object and purpose test as a standard for evaluating reservations in order to prevent states from using their own criteria for compatibility.⁶⁰

The ICJ effectively established a two-tier test: first, the state party could object to a reservation but not necessarily find it incompatible with the treaty, allowing enforcement of the treaty between the two states, albeit as modified by the reservation. Alternatively, the state could go beyond simply objecting and hold that the reservation goes against the object and purpose of the treaty, precluding enforcement of the treaty between those two states.⁶¹ Ideally if a state made a reservation that was against the object and purpose of the treaty, the objecting state could also object to the reserving state's entry to the treaty.⁶²

A reservation in a one-tier regime can only be invalid if it is incompatible with the treaty.⁶³ Under the two-tier test, states can object to a reservation if it is incompatible or if it is impermissible. A reservation can be compatible and still be impermissible and vice versa. As a result, states in a two-tier system have four different ways they can approach reservations:

- (a) they can expressly accept the reservation;
- (b) they can impliedly accept the reservation;

⁵⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Rep 15, 21 (May 28) [hereinafter *Genocide Convention Case*].

⁵⁷ Vienna Convention on the Laws of Treaties, May 23, 1980, 1155 U.N.T.S. 331.

⁵⁸ Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 Berkeley J. Int'l L. 277, 287 (1999).

⁵⁹ *Genocide Convention Case*, 1951 ICJ Rep 15, at 21.

⁶⁰ *Ibid.*, at 24

⁶¹ Clerk, above note 54, at 303-04

⁶² *Ibid.* 304.

⁶³ Daniel N. Hylton, "Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations", 27 Vand. J. Transnat'l L. 419, 422 (1994), at 432.

- (c) they can object to the reservation; or
- (d) they can object to the reservation and preclude the treaty from coming into force between them and the reserving state.⁶⁴

The other important portion of the ICJ's holding constitutes the 'object and purpose test'. In analyzing the validity of reservations to the Genocide Convention, the ICJ concluded that the Genocide Convention meant to maximize state participation; therefore, minor reservations to the treaty should not prevent state ratification.⁶⁵ On the other hand, the ICJ did not want to promote universality to such an extreme level as to completely undermine the integrity of the treaty.⁶⁶ As a result, the ICJ devised the 'object and purpose test'. The ICJ seemed to imply that universality, however, was the greater goal, and restrictions on reservations were a threat to that goal.⁶⁷

The object and purpose test set forth in the ICJ's decision requires each state to individually determine whether it perceives a proposed reservation as being against the object and purpose of the treaty. The application of this supposedly objective test, however, remains quite subjective. The ICJ did not specify what criteria to consider in determining whether a reservation goes against the object and purpose of the treaty;⁶⁸ rather, the basis for this decision was left to each state's own perception of the treaty.⁶⁹ The ICJ remains the forum where disputes over a reservation's compatibility must be brought.

The Vienna Convention on the Law of Treaties: The Vienna Convention on the Law of Treaties codifies the ICJ's decision and makes a contracting party's silent response to a reservation tantamount to an acceptance.⁷⁰ The Vienna Convention, Article 19(c), firmly establishes the object and purpose test as the appropriate standard by which to judge reservations. The Vienna Convention also, like the Genocide Convention case, assumes that the treaty still exists between the parties, even in light of an objection, unless the objecting state expressly holds that the treaty is not in force between them.⁷¹ Parties to a treaty have twelve months to object to a state's reservation, or, if they fail to object, the Vienna Convention presumes that they have accepted the reservation (tacit acceptance).⁷² As one author has put it, when a state

⁶⁴ *Ibid.*

⁶⁵ Genocide Convention Case, 1951 ICJ Rep 15, at 24.

⁶⁶ *Ibid.* at 15.

⁶⁷ Clerk, above note 54, at 293.

⁶⁸ See Genocide Convention Case, 1951 ICJ Rep 15.

⁶⁹ *Ibid.*, at 26.

⁷⁰ Baylis, above note 58, at 291.

⁷¹ Vienna Convention on the Law of treaties, 1969, Article 20(4)(b)

⁷² *Ibid.*, Article 20(5).

fails to object, it has an "automatic legal effect" of "acceptance by acquiescence."⁷³

If the treaty contains specific criteria by which to judge the reservation's compatibility, the combination of the Vienna Convention and the treaty could yield an objective approach to evaluating reservations.⁷⁴ When the treaty is silent, however, as with CEDAW, each state party determines the object and purpose of the treaty on its own, allowing for much more subjectivity and vulnerability to outside influences and considerations.⁷⁵

The ILC's Draft Guidelines on 'Reservations to Treaties': The General Assembly on 9 December 1993 endorsed the decision of the International Law Commission to include in its agenda the topic "Reservations to Treaties".⁷⁶ The Commission in 1994 appointed Mr. Alain Pellet as the Special Rapporteur for the topic. The Special Rapporteur submitted his tenth Report to the Commission at its 57th Session in 2005 in the form of Draft Guidelines together with commentaries. The "Reservations to Treaties: Guide to Practice" is not meant to revise the reservations provisions of the Vienna Convention on the Law of Treaties but to clarify controversial areas. Its main objective is to provide states with coherent answers to the whole range of questions they might raise with regard to reservations.⁷⁷

The Draft Guidelines generally follow the provisions of the Vienna Convention relating to reservations. For the purpose of assessing the validity of reservations, the Draft Guidelines define 'the object and purpose' of the treaty as "the essential provisions of the treaty, which constitutes its *raison de'être*".⁷⁸ The learned Special Rapporteur acknowledged that the question that frequently arose, particularly in the field of human rights, concerned reservations formulated to safeguard the application of internal law and that it was impossible to deny a state the right to formulate a reservation in order to preserve the integrity of its internal law if the state did not undermine the object and purpose of the treaty.⁷⁹ Although the Draft Guidelines is

⁷³ Richard W. Edwards, Jr., "Reservations to Treaties", 10 *Mich. J. Int'l L.* 362, 372 (1989).

⁷⁴ Catherine Logan Piper, Note, "Reservations to Multilateral Treaties: The Goal of Universality", 71 *Iowa L. Rev.* 295, 306 (1985), at 318.

⁷⁵ *Ibid.*, at 318-19.

⁷⁶ Originally it was entitled "The Law and Practice Relating to Reservations to Treaties", but in 1995 at its 47th Session, the ILC decided to amend the title; see *Analytical Guide to the Work of the International Law Commission (1949-1997)*, "Reservations to Treaties", available at <http://www.ilc.org>.

⁷⁷ Report of the International Law Commission on the Work of Its Fifty-Seventh Session (2 May to 3 June and 11 July to 5 August 2005), GA Official Records, 60th. Session, Suppl. No.10 (A/60/10), Chapter X, Reservations to Treaties, paras. 427-28.

⁷⁸ Draft Guideline 3.1, the ILC's "Reservations to Treaties: Guide to Practice". *Raison d'être* means "the most important reason for the existence of something".

⁷⁹ See Draft Guideline 3.1.11, *ibid.*; see also Report of the ILC, above note 77, para. 383.

not yet approved by the General Assembly and it is not in the form of a convention that binds states parties, it can definitely assist States in addressing the issue of the validity of reservations.

2. Criticism of CEDAW 's Reservations Regime

CEDAW uses the Vienna Convention Article 19(c) approach to reservations, which allows reservations unless they are contrary to the 'object and purpose' of the treaty. Article 28 of CEDAW states that the Office of the Secretary-General will collect and circulate reservations to all member states of the Convention.⁸⁰ Article 28 goes on to repeat the ICJ/Vienna Convention test whereby reservations will be invalidated if they are against the object and purpose of the Convention. States can also remove reservations upon notification to the Secretary-General, who will notify the other member states. Disputes over the compatibility of reservations will be settled by arbitration or in proceedings before the ICJ if necessary;⁸¹ however, a member state has yet to pursue arbitration or an ICJ decision.

No Independent Adjudicative Body under CEDAW: The Convention "allows reservations that do not conflict with the 'object and purpose' of the treaty, but it contains no objective criteria to determine if this requirement has been met," nor does the Convention establish an independent committee to deal specifically with reservations. Because no independent body evaluates reservations, objections tend to be haphazard and subjective. Even when considering those states that have brought objections, therefore, one notices that the objections have been inconsistent. For example, "Canada objected to the Republic of Maldives' reservation to the Women's Convention, but took no action with respect to a subsequent and comparable reservation by Kuwait."⁸² Arguably, Canada, like many state parties, has a vested interest in protecting its relationship with an oil-producing country like Kuwait.

Inadequacy of the CEDAW Reporting System: Reservations are largely dealt with through the reporting system under Article 18 of the Convention, where the CEDAW Committee considers the progress and measures taken by the state parties to implement the treaty provisions. Article 18 requires all state parties to report within one year of their ratification of the Convention and every four years thereafter, or whenever the CEDAW Committee requests a report.

⁸⁰ CEDAW, Article 28.

⁸¹ *Ibid.*, Article 29.

⁸² See Multilateral Treaties Deposited with the Secretary-General, Part I, Chapter IV, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>.

The reporting system under CEDAW has largely failed to convince states to remove their reservations to CEDAW. The Committee lacks the power to interpret the substantive parts of the Convention. The Committee has no "quasi-judicial powers enabling it to pronounce a State Party in violation of the Convention and to order an appropriate remedy;" its function is limited to publicly reviewing country reports.

Additionally, the CEDAW Committee lacks any mandate or authority to independently determine whether a reservation goes against the object and purpose of the treaty. General Assembly and the United Nations Economic and Social Council (ECOSOC) statements imply that the CEDAW Committee is discouraged from criticizing reservations.⁸³ Some states argue that CEDAW should be under an even lesser standard than the Vienna Convention because CEDAW contains culturally sensitive provisions.⁸⁴ Furthermore, the United Nations Legal Advisor gave an opinion "that neither the Secretary-General, as depositary, nor CEDAW has the power to determine the compatibility of reservations."⁸⁵

Improvement of the reservations regime of CEDAW alone cannot solve the problem: There have been suggestions to improve CEDAW's reservations regime. The first suggestion is to adopt an approach similar to the Human Rights Committee's General Comment 24, which would allow the CEDAW Committee to sever reservations that go against the treaty's object and purpose. The CEDAW Committee, however, would undoubtedly suffer criticism for exceeding its mandate and authority, and such action may induce states to leave the Convention altogether.

The second suggestion is to amend CEDAW to be able to implement reservation procedures similar to those found in the Convention on the Elimination of Racial Discrimination (CERD), which is considered "the most effective international human rights instrument in existence today."⁸⁶ Under CERD reservations can be deemed incompatible and rejected as invalid with a two-thirds vote by the state parties.⁸⁷ Following CERD, along with the recent adoption of the Optional Protocol, would give the Committee more power in terms of interpreting CEDAW and investigating state compliance by allowing individuals and groups to bring complaints to the CEDAW Committee.

⁸³ Clerk, above note 54, at 285-86.

⁸⁴ *Ibid.*

⁸⁵ See UN Doc. A/39/45, Report of CEDAW, 3d session, vol. II, Annex III at 55 (1984).

⁸⁶ Laura A. Donner, "Gender Bias in Drafting International Discrimination Conventions: The 1979 Women's Convention Compared with the 1965 Racial Convention", 24 Cal. W. Int'l L.J. 241 (1994), at 241.

⁸⁷ Clerk, above note 54, at 287.

Nevertheless, even if the reservations regime of CEDAW were improved as suggested above, the problem cannot be solved due to the unique character of CEDAW, which, unlike other human rights treaties, attracts issues that are not only culturally but also religiously sensitive. The most sensitive of them all is presumably the conflict of certain provisions of CEDAW with the Islamic law (*Shari'ah*) in general and Islamic family law in particular.

RESERVATIONS TO CEDAW MADE BY ISLAMIC COUNTRIES: AN APPRAISAL

CEDAW appears to be the most sensitive international human rights treaty ever adopted by the international community and attracts the highest number of reservations. Articles 2, 5, 7, and 16, along with several other articles, have been the subjects of the majority of reservations to CEDAW. These articles tend to address sensitive issues with regard to state sovereignty or cultural and religious practices. Many states have relied on Article 29(2), which expressly allows states to opt out of submitting disputes concerning the interpretation or implementation of CEDAW to arbitration or the ICJ.

Out of the 185 states parties to CEDAW, 57 States have currently reservations to CEDAW and interestingly enough and contrary to the popular understanding, the majority of them are non-Muslim countries.⁸⁸ There are only 24 Muslim countries that make reservations to CEDAW.

Reservations: A number of Islamic countries have made reservations to CEDAW primarily on the ground that certain provisions of CEDAW are contrary to *Shari'ah* (Islamic law)⁸⁹, which is believed by Muslims as the Divine Law. To give a few examples, Saudi Arabia's reservation to CEDAW is in these terms: "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 Kingdom of Bahrain made reservations "with respect to the following provisions of the Convention: ... Article 16, in so far as it is incompatible with the provisions of the Islamic *Shari'ah*".

Libya made a general reservation citing that CEDAW cannot conflict with Islamic laws having to do with "personal status derived from the Islamic *Shari'a*."⁹⁰ Bangladesh reserved on Articles 2, 13(a), and 16(1)(c) and (f)

⁸⁸ These include, for example, France - reservations to Arts. 16(1)(g) and 29; India - reservations to Arts. 5(a), 16 and 29(1); Israel - reservations to Art. 7(b) and Art. 16 (due to laws on personal status binding on the various religious communities); Singapore - reservations to Arts. 2, 16 and 29; and Thailand - reservations to Arts. 16 and 29 (1). It is noteworthy that the United States of America is not yet a party to CEDAW owing to Senate's rejection of the Convention.

⁸⁹ Bharathi Anandhi Venkatraman, "Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?", 44 *Am. U.L. Rev.* (1995), 1949, at 1951-52. Katarina Tomasevski, *Women and Human Rights* (1995) 124.

⁹⁰ Convention on the Elimination of All Forms of Discrimination Against Women, Libya Accession, May 16, 1989, 1527 U.N.T.S. 478.

because "they conflict with *Shari'a* law."⁹¹ Egypt also reserved on Articles 2 and 16 in regard to marriage and family relations in order that these provisions do not run counter to the Islamic *Shari'ah*.⁹² India (a non-Muslim country with a mixed population of Hindu Majority and Muslim minority) reserved on Articles 5(a) and 16, citing a policy of "noninterference in the personal affairs of any Community" and "[the country's] variety of customs [and] religions,"⁹³ while Iraq reserved on Article 2 (f) and (g) and Article 16, the application of which is without prejudice to the provisions of the Islamic *Shari'ah*.⁹⁴

The original reservations of Malaysia read as follows: "The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With respect 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."⁹⁵ On 6 February 1998, the Government of Malaysia notified the Secretary-General of a partial withdrawal as follows: "The Government of Malaysia withdraws its reservation in respect of articles 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h)." At present, therefore, the remaining Malaysian reservations cover articles 5(a), 7(b), 9(2), 16 (a), 16(c), 16(f), and 16 (g).⁹⁶

Objections to reservations: According to the Vienna Convention on the Law of Treaties, a state party may object to a reservation made by another state party within 12 months of the notification of the reservation.⁹⁷ There are indeed some objections to the reservations made by the Islamic countries to certain provisions of CEDAW. For example, the United Kingdom objected to the reservations made by Saudi Arabia in these terms: "The Government of the UK note that a reservation which contains 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 UK therefore object to the aforesaid reservation.... The objection shall not preclude the entry into force of the Convention between the UK and the Kingdom of Saudi Arabia." Similar objections were also made by the UK

⁹¹ Convention on the Elimination of All Forms of Discrimination Against Women, Bangladesh Accession, Dec. 6, 1984, 1379 U.N.T.S. 336; however, on 23 July 1997, the Government of Bangladesh notified the Secretary-General that it had decided to withdraw the reservation relating to Articles 13(a) and 16(1)(c) and (f).

⁹² Convention on the Elimination of All Forms of Discrimination Against Women, Egypt Ratification, July 16, 1981, 1249 U.N.T.S. 125.

⁹³ Convention on the Elimination of All Forms of Discrimination Against Women, India Ratification, July 30, 1980, 1249 U.N.T.S. 129.

⁹⁴ For an analysis of such reservations, see, Julie A. Minor, "An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women", 24 *Ga. J. Int'l & Comp. L.* 137, 144 (1994), at 144-45.

⁹⁵ See Multilateral Treaties Deposited with the Secretary-General, Part I, Chapter IV, Reservations made by the Government of Malaysia, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV,treaty10.asp>.

⁹⁶ *Ibid.*, Note 42.

⁹⁷ The Vienna Convention on the Law of Treaties, 1969, Art. 20(4) and (5).

against reservations formulated by Syria, Bahrain and UAE. The other Western countries that made more or less similar objections to reservations formulated by these Arab countries include Austria, Denmark, Finland, France, Germany, Greece⁹⁸, Norway, Portugal, Spain, Sweden, and the UK.⁹⁹

The following is the objections made by Netherlands against Malaysia's reservations to CEDAW: "The Government of the Kingdom of the Netherlands considers... that such reservations, which seeks to limit the responsibilities of the reserving state under the Convention by invoking the general principles of national law and the Constitution, may raise doubts as to the commitment of this state to the object and purpose of the Convention... The Government of Netherlands further considers that the reservations made by Malaysia regarding article 2 (f), article 5(a), article 9 and article 16 of the Convention are incompatible with the object and purpose of the Convention. The Government of Netherlands therefore objects to the above mentions reservations. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Malaysia".¹⁰⁰ Similar objections were also made by Finland and Norway.¹⁰¹

An analytical evaluation of these objections leads to the following conclusions:

- (1) all the objecting states are Western or rather European countries¹⁰², and none of them are from Asia, Africa or Latin America (it appears to demonstrate the truthfulness of the accusations made by Islamic or Asian and African countries that many of the so-called fundamental human rights are Western in origin or based on Western philosophies or way of life and also the intolerance of the Western countries towards religious and cultural practices of Islamic or Asia and Africa);
- (2) The reason for the total absence of objections from Asian, African and Latin American countries may be either because they themselves are committed to the same religious and cultural practices or they feel that certain human rights cannot be universal and thus prepared to tolerate the religious and cultural practices of other states;
- (3) Although there were objections, in each case the objecting state declared that the objection did not preclude the entry into force of the Convention between it and the reserving state¹⁰³.

⁹⁸ Greece objected only to reservations made by Bahrain, Syria and UAE and not against Saudi Arabia although Saudi reservation has far-reaching effect.

⁹⁹ See Multilateral Treaties Deposited with the Secretary-General, Part I, Chapter IV, objections made by Austria, Denmark, Finland, France, Germany, Greece, Norway, Portugal, Spain, Sweden, and the UK, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV,treaty10.asp>

¹⁰⁰ See *ibid.*, objections made by Netherlands.

¹⁰¹ See *ibid.*, objections made by Finland and Norway.

¹⁰² All are European countries except Mexico which is from North America.

¹⁰³ See Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press (2000), 122.

CEDAW Committee's pressure: Although CEDAW Committee has no power to determine that a reservation is incompatible and thus declares null and void the inconsistent reservation, its reporting system is a way of scrutiny and public censure and states making reservations, especially Islamic countries, are under constant pressure to withdraw or amend the incompatible laws and practices.

The situation can be best illustrated by the CEDAW Committee's harsh criticism on Malaysia's "Combined Initial and Second Period Report of State Parties" submitted to the Committee, as required under Article 18 of CEDAW. The Committee considered Malaysia's Report on 24 May 2006. After deliberating Malaysia's responses to the Committee's list of issues and questions, the Committee made the following concluding comments:

The Committee is concerned that the Convention is not yet part of Malaysian law and thus its provision are not enforceable in domestic courts. While appreciating that the State party amended Article 8(2) of the Federal Constitution in 2001 to prohibit discrimination on the basis of gender, the Committee is concerned about the narrow interpretation given to this article by Malaysian courts...¹⁰⁴

While welcoming the State party's assurances that it is reviewing reservations to articles 5(a) and 7(b) with a view to removing them, the Committee is concerned that the State party is not ready to similarly review and remove reservations to articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f), 16(1)(g) and 16(2). The Committee is particularly concerned at the State party's position that laws based on Syariah interpretation cannot be reformed.¹⁰⁵

The Committee urges the State party to review all its remaining reservations with a view to withdrawing them, and especially reservations to article 16, which are contrary to the object and purpose of the Convention.¹⁰⁶

The Committee urges the State party to undertake a process of law reform to remove inconsistencies between civil law and Syariah law.... Encourages the State party to obtain information on comparative jurisprudence and legislation, where more progressive interpretations of Islamic law have been codified in legislative reforms....¹⁰⁷

¹⁰⁴ Concluding Remarks of the Committee on the Elimination of Discrimination against Women: Malaysia, CEDAW Committee 35th Session, 15 May -2 June 2006, CEDAW/C/MYS/CO/2, para. 7.

¹⁰⁵ *Ibid.*, para. 9.

¹⁰⁶ *Ibid.*, para. 10.

¹⁰⁷ *Ibid.*, para. 14.

The Malaysian case is a good example of how CEDAW Committee, by means of the reporting technique, can push a state party to withdraw the reservations or to make the national laws to be in line with CEDAW. Even though the recommendations of the CEDAW Committee are not legally binding on a state party, the heat of the pressure could be felt. A very difficult question that arises is: Is there any other option for the Government of a state party apart from the following two unpleasant situations: to strictly comply with the Convention and forget about *Shariah* or Islamic law; or to maintain *status quo* with *Shariah* or Islamic law and forget about CEDAW?

ISLAMIC COUNTRIES: ON THE HORNS OF A LEGAL DILEMMA

Islamic countries, most of them are parties to CEDAW, are now on the horns of a legal dilemma: the conflict between the provisions of CEDAW on one hand and the Islamic family law principles that are rooted in Islamic Shari'ah on the other. It is an extremely difficult and sensitive situation and cannot be solved by coercive means like severing the reservations or resorting to courts to determine whether the reservations are valid or not. Such measures may lead to withdrawals from the Convention that can seriously affect the underlying objective of the universality of the Convention. This is the reason why the drafters of CEDAW, quite contrary to those who drafted CERD, omitted strong enforcement machinery against inconsistent reservations.

1. Limitations to Islamic family law reforms

According to the view of the traditional Islamic scholars, all the so-called human and women's rights were created by human philosophers and thus they are man-made.¹⁰⁸ The human being does not know everything because Allah has prevented him from knowing everything¹⁰⁹. Human wisdom is limited compared to the All-Encompassing Wisdom of God Al-Mighty. Traditional Islamic scholars refer to the social ills caused by excessive freedoms in the name of human rights in Western societies¹¹⁰. They, therefore, conclude that it is not at all right to even think about assessing the correctness of the norms and values set by Allah, Omniscient-All Knowing, by man-made human rights standards. They reject the idea of reforming (or rather revising) Islamic family law

¹⁰⁸ There are a number of Islamic scholars who argue that the Universal Declaration of Human Rights (UDHR), the corner stone of all human rights concepts and ideologies, was founded on Western philosophy. See, for example, S.A. Farrar, "Revelation, Philosophy and International Human Rights: Reconciling the Irreconcilable?", (2005) IIUM Law Journal vol. 13, No. 2, 259, at 264. Another Islamic scholar aptly stated: "The so-called 'modern', 'progressive' and 'enlightened' man-made laws of the Western world have only led to increases in crime-rate, in broken-homes, in mental diseases, in chaos and confusion"; Doi, above note 4, 450.

¹⁰⁹ Allah says in Al-Qur'an, *Surah An-Naml, Ayat 65*: "Say (O' Muhammad): 'None among the creation (in the skies and the earth) knows the entirety of what is hidden except Allah'".

¹¹⁰ See, for example, C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, (London: Macmillan Press Ltd, 1988), 123, where the learned former Judge of the International Court of Justice rightly highlights the fact that "some of the inadequacies of current human rights doctrine result from overemphasis on unbridled individualism, which Islamic law has sought to avoid.

principles, which are based on Shari'ah, for the simple reason that these principles need to be in conformity with the modern human rights principles.¹¹¹ There are indeed strong adherents to the ideas of traditional Islamic scholars in Muslim countries. A Muslim country that wants to reform its Islamic family law, in order that it be in accord with modern human rights principles, has first of all to face with the strong opposition of traditionalists and their many followers.

On the other hand, there are also strong adherents to Islamic reformists¹¹² and modernists in Muslim countries. As a result of the support of the reformist scholars, Many Islamic countries are in favour of law reforms. They want to be modern and they want to be part and parcel of the mainstream legal development. They are prepared to reform those parts of the family law that are merely based on social or racial customs and practices, which have nothing to do with Islam, or which do not infringe the fundamental precepts of *Shari'ah*. They can also reform those parts of the family law in respect of which there are two or more different interpretations by different schools of Islamic jurisprudence and one interpretation is more flexible and liberal. It can be possible on the basis of the doctrine of '*takhayur*'.¹¹³

It is true that the practice of Islamic countries with respect to the implementation of Islamic family law is varied. Tunisia, for example, belongs to one extreme by, among others, totally abolishing the controversial regime of polygamy. Saudi Arabia and a few other Islamic countries belong to another extreme by entirely subjecting the family law matters to the classical Islamic law. In between the two lie the moderate Islamic countries, which have made comprehensive reforms to their Islamic family laws, for example, by subjecting the husband's right of limited polygamy to court order, and by protecting and improving the rights of Muslim women to the extent that it is possible by means of a liberal interpretation of the Islamic sources. These countries appear to form the majority.

Nevertheless, it would be extremely difficult even for a moderate Islamic country to go against the most fundamental precepts of *Shari'ah*, which are founded on clear and unambiguous *Qur'anic* injunctions. What are the most fundamental precepts of *Shari'ah* in the area of

¹¹¹ For example, the Rome Declaration on Human Rights in Islam made by the Islamic Educational, Scientific, and Cultural Organization (ISESCO), on 27 February 2000 reads: "We cannot, in all objectivity, set the Universal Declaration [of] Human Rights, a man-made product, to judge Islam, which is a divine revelation"; available at <http://www.isesco.org.ma>.

¹¹² For a detailed study of reformism, see Hamid M. Khan, "Nothing is Written: Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law", (2002) 24 *Mich.J.Int'l L.* 273.

¹¹³ "According to this doctrine, in drafting a Code for a certain country that adhere to the views of a major school of jurisprudence, a jurist is permitted to abandon the jurisprudence of that school on a particular matter and adopt a competing point of view offered by another major school, if he deemed the latter point of view superior for one reason or another"; see Azizah al-Hibri, "Islam, Law and Custom: Redefining Muslim Women's Rights", (1997) 12 *Am. U.J. In'l L. & Pol'y* 1, at 9.

family law, which are founded on clear and unambiguous *Qur'anic* injunctions? This is to be explored and determined by learned Islamic law scholars, not individually, but collectively.¹¹⁴ It is submitted that although there are different schools of Islamic jurisprudence and Islamic countries as a general rule follow the school which is predominant in their country for the purpose of administering Islamic family law, Islamic law scholars should strive for a common stand in this respect, given the gravity of issues and challenges posed by CEDAW. Even if Governments of Islamic countries, for political and other reasons, made new legislation to reform or amend certain provisions of the Islamic family law, which are based on clear and unambiguous *Qur'anic* injunctions, these reformed or amended laws would be purely man-made, like other ordinary domestic law, and would definitely be at odds with true believers of the Islamic faith.

2. CEDAW Committee and the need to allow leeway for Muslim countries

The Western countries rely on two major grounds to object to the reservations made by Islamic countries, namely: (1) Islamic *Shari'ah* is a domestic law and a state party to a convention cannot rely on its own domestic law as an excuse for non-compliance with the convention; and (2) reservations based on Islamic *Shari'ah* are contrary to the object and purpose of CEDAW and therefore not permissible. With regard to the first argument, the CEDAW Committee and the Western countries need to have a clear understanding of the unique nature of Islamic law as the Divine law. *Shari'ah* is an Arabic word meaning 'the path to be followed'. It is believed by all Muslims to be the path shown by Allah, the Creator Himself through His Messenger, Prophet Muhammad (S.A.W). In Islam, Allah alone is the Sovereign and it is He who has the right to ordain a path for the guidance of mankind. *Shari'ah* or Islamic law is unlike more familiar systems of law for the simple fact that its benefits and burdens are not confined to the present world. Islamic law focuses on how conduct in day-to-day activities affects a person's fate in the Hereafter. Thus, the scope of Islamic law is much wider, as it regulates humanity's relationship not only with his fellow human beings and with the State, which is the limit of most other legal systems, but also with its Creator.¹¹⁵ Therefore, Islamic countries are not making reservations on the basis of a domestic or national law of a particular country but relying on a Divine law, which is binding spiritually on all Muslims in the world and believed by Muslims as superior to any manmade law.

¹¹⁴ Although the idea of unification and standardization of laws of different countries has now become so popular in secular legal systems, this is entirely alien to Islamic jurisprudence. Due to globalization and various challenges targeted against Islamic jurisprudence, it is high time for Islamic countries to strive for a common stand.

¹¹⁵ David A. Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order", 33 *Va. J. Int'l L.* 819, 825 (1993).

In respect of the second argument, the ILC's Draft Guidelines on 'Reservations to treaties' define 'the object and purpose' of the treaty as "the essential provisions of the treaty, which constitutes its *raison de'tre*". The clear *raison 'detre* of CEDAW is 'nondiscrimination against women', which in turn can be said as its 'object and purpose'. Therefore, from purely international law perspective, reservations made by Islamic countries to those CEDAW provisions, which demand the same rights to men and women, can be said as contrary to 'object and purpose' of CEDAW. However, from the point of view of Islamic countries, they believe that they are complying with the Divine law, which is obligatory for all Muslims and as important as 'life and death' for them for this world as well as for the Hereafter. Even though Islamic countries can reform certain areas of the Islamic family law by means of liberal interpretation of the Islamic sources, they cannot compromise on norms that are rooted in clear and unambiguous *Qur'anic* injunctions.

Therefore, it is submitted that the only solution for this difficult and sensitive issue is a good faith dialogue between the CEDAW Committee and Islamic countries in the light of the correct understanding of the unique nature of Islamic *Shari'ah*. The CEDAW Committee can ask those Islamic countries whose reservations are too broad and general to redefine their reservations by referring to specific provisions of CEDAW. The Committee can maintain *status quo* and tolerate the well-defined reservations made by Islamic countries.

CONCLUSION

Islamic family law was usually the only aspect of *Shari'ah* that has successfully resisted displacement by European codes during the colonial period, and survived various degrees or forms of secularization of the state and its institutions since independence. As such Islamic family law has become the symbol of Islamic identity, the hard irreducible core of what it means to be a Muslim today.

There are diverse historical, cultural, social, political and economic differences that clearly influence the implementation of Islamic family law among Islamic countries. There is also the ideological divide between traditional scholars, on one side, and modernist or reformist scholars, on the other. We can find many variants in the practice of Islamic countries in respect of Islamic family law. Nevertheless, there are certain fundamental precepts of Islamic family law, founded on clear and unambiguous *Qur'anic* injunctions, and generally accepted by most of the Islamic countries.

The hard-core problem in this respect has started with the adoption of the Convention on the Elimination of Discrimination against Women (CEDAW),

which is based on the idea of universality of women's rights. There are areas where the provisions of Women's rights are in conflict with certain basic norms of the Islamic family law. To avoid these conflicts, the Islamic countries formulated reservations when ratifying or acceding to the Convention. Many Western countries made objections and CEDAW Committee also censured the Islamic countries for these reservations and recommended to withdraw them. Islamic countries are being caught on the horns of a legal dilemma. The problem can only be solved by tolerance on the part of CEDAW in order to accommodate Muslim countries to be able to comply with the most fundamental precepts of *Shriah* and readiness on the part of Islamic countries to accept the liberal interpretation of the Islamic family law without affecting the most fundamental precepts of *Shariah*.