The implementation of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in Bangladesh

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The Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in Bangladesh

Paola Frassinetti Alves de Miranda

This thesis is presented in fulfilment of the requirements for the award of the Degree of Doctor of Philosophy of the University of Wollongong

February 2016
ABSTRACT

In this thesis I studied the effectiveness of CEDAW’s regime of reservations to protect treaty integrity. Specifically, I examined Bangladesh’s reservation to CEDAW to illustrate the effects of impermissible reservations to the Convention, in particular, regarding the implementation and monitoring process of CEDAW. To do this, I conducted a qualitative analysis of relevant documents on the monitoring and implementation process of CEDAW in Bangladesh. The analysis focused on the challenges faced by the CEDAW Committee in effectively discharging its mandate and the interpretation of the provisions of CEDAW, according to their relevance to the implementation of the ‘object and purpose’ of the Convention.

CEDAW is silent on two crucial issues that affect the monitoring process of the Convention: CEDAW does not provide the Committee with powers to determine the validity of reservations and it does not establish which provisions represent its ‘object and purpose’. The Committee is, thus, limited to only request state parties to withdraw reservations made to core provisions of the Convention, without the power to give legal effect to a reservation that affects the object and purpose of the Convention. These omissions make it difficult for the Committee to successfully address impermissible reservations to the Convention.

This thesis examined the issues described above. After studying the reservation regime, as applied by CEDAW, I examined and interpreted the Convention’s provisions. The study finds that Articles 1, 2, 3 and 24 of CEDAW express the ‘object and purpose’ of the Convention. Articles 5 to 16 do not express the ‘object and purpose’ but failure to comply with them might still undermine the implementation of the Convention. Accordingly, I have created a classification of the
Articles of CEDAW that distinguishes between Articles that express its ‘object and purpose’ from those that are less significant to the implementation of the Convention.

The findings of the study and the proposed classification of Articles add to existing discussions about the monitoring and implementation process of CEDAW in the reserving states. For example, Bangladesh’s reservation to Article 2 denies compliance with the object and purpose of the Convention due to an alleged conflict with the Muslim Personal Law. Although the reservation may affect the implementation of the entire Convention, in the review of Bangladesh’s periodic reports, the CEDAW Committee is limited to only address the impermissibility of the reservation and waits for an individual act of the state to withdraw the reservation and keep its obligation to the implementation of the Convention.

An examination of the effects of Bangladesh’s reservation to the implementation of CEDAW demonstrated that several obstacles imposed by religious personal laws to the achievement of substantive equality and non-discrimination have not been properly assessed by the CEDAW Committee. The examination also shows that existing practices and guidelines adopted by the Committee for the preparation and submission of reports by Non-Governmental Organizations (NGOs) and UN specialized agencies may affect the monitoring of CEDAW in the reserving states.

Against this background I discuss why the current format adopted for the submission of reports restricts the scope and quality of the information provided by NGOs and UN agencies. I also discuss why this can diminish the access of the Committee to information from which to formulate its questions and to identify areas where the state party is not complying with its obligations to CEDAW. In light of this discussion, the thesis proposes a new format for preparation and submission of
reports by NGOs and UN agencies, aiming to facilitate compliance with CEDAW and, in turn, strengthen the monitoring and implementation process of the Convention.

This thesis contributes to existing knowledge on the implementation and monitoring process of CEDAW in reserving states. It undertakes a detailed examination of the implementation of CEDAW in Bangladesh, develops a classification of the Articles of CEDAW according to their relevance to the implementation of the Convention, and proposes a new format for the preparation and submission of reports to enhance the effectiveness of the information submitted by NGOs and UN specialized agencies to the CEDAW Committee.
ACKNOWLEDGEMENTS

First and foremost I thank God for the wisdom and perseverance that He has bestowed upon me throughout my life and indeed during this research. ‘I can do everything through him who gives me strength.’(Philippians 4:13)

I would also like to thank my principal supervisor, Professor Luke McNamara, and my co-supervisor, Professor Vera Mackie, for their guidance, encouragement and enduring patience throughout this journey.

I am especially grateful to the University of Wollongong for providing scholarship funding. I would like to acknowledge the support I received from the Faculty of Law’s staff.

Finally, my deepest appreciation goes to my husband Magno Queiroz, my parents Iron and Auricelia, and my brother Igor. Without their continuous love, this journey would not have been as fulfilling.
DEDICATION

To my husband

For his unconditional love, guidance and support during this journey.

To my loving parents and beloved brother

For inspiring me to always go further and aim for the things that I love.

And

To Apollo

For being there when I needed him.
TABLE OF CONTENTS

ABSTRACT .......................................................................................................................... i
THESIS CERTIFICATION ................................................................................................. iv
ACKNOWLEDGEMENTS ..................................................................................................... v
DEDICATION ..................................................................................................................... vi
TABLE OF CONTENTS .................................................................................................. vii
LIST OF ACRONYMS ........................................................................................................ x
1. INTRODUCTION ......................................................................................................... 1
   1.1. Problem .................................................................................................................... 1
   1.2. Significance ............................................................................................................. 10
   1.3. Research questions and objectives ........................................................................ 17
   1.4. Research design and methodology ...................................................................... 18
       1.4.1. The 1969 Vienna Convention regime of reservations and human rights treaties .......................................................................................................................... 23
       1.4.2. Interpreting the ‘object and purpose’ of CEDAW ........................................ 27
       1.4.3. The monitoring and implementation process of CEDAW: A conversation ................................................................. 29
           1.4.3.1. Monitoring the implementation of CEDAW in Bangladesh .......... 30
           1.4.3.2. The implementation process of CEDAW .................................. 31
   1.5. Limitations of the research data ........................................................................... 34
2. INVALID RESERVATIONS AND HUMAN RIGHTS TREATIES ...................... 37
   2.1. Background history of the ‘object and purpose’ test in the 1969 Vienna Convention .......................................................................................................................... 45
   2.2. The VCLT regime of reservations and human rights treaties .......................... 52
       2.2.1. The role of treaty bodies in interpreting reservations to human rights treaties .......................................................................................................................... 64
   2.3. Concurrent competence to decide on the validity of reservations ................... 74
3. INTERPRETATION OF CEDAW ........................................................................... 80
   3.1. The origins of CEDAW ......................................................................................... 87
   3.2. The CEDAW Committee ...................................................................................... 90
       3.2.1. The work of the Committee with reservations ........................................ 92
3.3. Equality, non-discrimination and state obligation: Guiding the interpretation and implementation of CEDAW ................................................................. 99

3.3.1. The principle of state obligation .............................................. 101
3.3.1.1. State parties’ obligations under CEDAW: Discussing Article 2 of the Convention ......................................................................................... 103

3.3.2. The principle of equality ....................................................... 108
3.3.2.1. Equality of opportunity, equality of access to opportunity and equality of results ......................................................................................... 110

3.3.3. The principle of non-discrimination .................................... 115

3.4. Interpreting CEDAW and discriminating between the Convention’s Articles .............................................................................................................. 128

4. THE MONITORING PROCESS OF CEDAW IN BANGLADESH ............ 132

4.1. Outlining the challenges with the treaty body system ............ 136

4.2. Engaging in a conversation: Bangladesh and the CEDAW Committee discuss the reservation ......................................................................................... 141

4.3. Acceptance of (and objections to) Bangladesh’s reservation to CEDAW: When ‘object’ means to ‘accept’ ........................................................................... 155

4.4. NGOs in Bangladesh: ‘Empowering’ women and debating the reservation to CEDAW .............................................................................................................. 162
4.4.1. NGO participation in the monitoring process of CEDAW .......... 167

4.5. Bangladesh’s reservation and the commitment to CEDAW ........ 171

5. RELIGIOUS PERSONAL LAWS AND THE IMPLEMENTATION OF CEDAW IN BANGLADESH ................................................................. 173

5.1. Overview of ‘Islamic-based’ reservations to CEDAW ............... 177

5.2. Bangladesh’s legal framework and religious personal laws: Compromising the achievement of substantive equality and non-discrimination ..................... 186
5.2.1. Religious personal laws in Bangladesh .................................... 193
5.2.1.1. Muslim Personal Law and gender equality in Bangladesh .... 196

5.3. Restriction of information and the effectiveness of the CEDAW Committee. ......................................................................................................................... 205
5.3.1. NGO reports: objectivity versus relevance of information......... 207
5.3.2. UN specialised agencies and the CEDAW Committee .......... 211
5.4. Improving the quality of information through greater focus and substance .............................. 214

6. CONCLUSION ........................................................................................................... 218

6.1. Findings and contributions to the field ........................................................................ 220

6.2. Summary of recommendations ................................................................................. 231

6.3. Concluding remarks and future direction .................................................................... 232

BIBLIOGRAPHY .......................................................................................................... 234
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
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<td>ASK</td>
<td>Ain O Salish Kendra</td>
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<td>BMP</td>
<td>Bangladesh Mahila Parishad</td>
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<td>BRAC</td>
<td>Bangladesh Rural Advancement Committee</td>
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<td>CAT</td>
<td>The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment</td>
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<td>CED</td>
<td>Convention on Enforced Disappearances</td>
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<td>CEDAW</td>
<td>The Convention on the Elimination of all forms of Discrimination Against Women</td>
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<td>CIB</td>
<td>Citizen’s Initiative of Bangladesh</td>
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<td>CRC</td>
<td>The Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>The Convention on the Rights of Persons with Disabilities</td>
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<td>CSW</td>
<td>Commission on the Status of Women</td>
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<td>DC</td>
<td>District of Columbia</td>
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<td>FAO</td>
<td>Food and Agriculture Organization of the UN</td>
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<td>HRC</td>
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<td>ICAO</td>
<td>International Civil Aviation Organization</td>
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<td>International Covenant on Civil and Political Rights</td>
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<td>ICERD</td>
<td>The International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICESCR</td>
<td>The International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRMW</td>
<td>The International Convention on the Protection of the Rights of all Migrant Workers and members of their families</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>International Women’s Rights Action Watch</td>
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<td>MFA</td>
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<td>NGOs</td>
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<td>NPAW</td>
<td>National Policy for the Advancement of Women</td>
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<td>NSW</td>
<td>New South Wales</td>
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<td>OHCHR</td>
<td>United Nations Office of the High Commissioner for Human Rights</td>
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<td>OP – CEDAW</td>
<td>Optional Protocol to CEDAW</td>
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<td>RD-12</td>
<td>Rural Development Program of the Bangladeshi Government</td>
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<td>SPT</td>
<td>Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>UN Industrial Development Organization</td>
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<td>UPU</td>
<td>Universal Postal Union</td>
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<td>USCCR</td>
<td>United States Commission on Civil Rights</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WHO</td>
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<td>WMO</td>
<td>World Meteorological Organization</td>
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1. INTRODUCTION

1.1. Problem

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), also known as the ‘Women’s Convention’, has a total of 188 state parties, representing more than 90 per cent of the member states of the United Nations (UN), and a total of 61 filed reservations. This means that 32 per cent of CEDAW’s state parties have entered reservations to the Convention. Currently, this is the highest number of reservations of the ‘nine core’ international human rights treaties adopted under the auspices of the UN.

A reservation is defined as

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3 See United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, ‘Convention on the Elimination of all forms of discrimination against women: Declarations, Reservations and Objections to CEDAW’. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed 10 February 2016].

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.\(^5\)

Reservations express an individual state’s desire to depart from specific terms of a treaty against the general agreement of all parties to be bound equally by the terms of what was supposed to be a ‘common’ document. Thus, the right to enter a reservation to a treaty strikes at the heart of the concept of a multilateral convention. If a large number of states make reservations to exclude or to modify the legal effect of certain provisions of the treaty, considered to be ‘core’ provisions, consistency in the regulation of specific areas of law is impaired.\(^6\) Lijnzad has observed that,

Reservations restrict the potential domestic effect of a human rights treaty, and a large number of reservations made by many States will turn a human rights instrument into a moth-eaten guarantee.\(^7\)

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which oversees the implementation of CEDAW, has addressed the problem concerning the number of reservations made to the


Convention and has stated that some of them critically affect the implementation of the ‘object and purpose’ of CEDAW. According to Article 28(2) of CEDAW, reservations will be invalidated if they are ‘incompatible’ with the object and purpose of the Convention. However, CEDAW does not establish a treaty-specific regime of reservations. The Convention neither defines the meaning of the term ‘object and purpose’, nor indicates which provisions should be regarded as representing the object and purpose of CEDAW.

The International Law Commission (ILC) has developed a Guide to Practice on Reservations to Treaties\(^8\) to aid treaty bodies, governments and international organizations in dealing with reservations to treaties and in complying with the regulation for entering reservations in the exiting conventions.\(^9\) The ILC Guide suggests that the object and purpose of a treaty is the ‘provision of the treaty essential to its raison d’être’.\(^10\) The Guide also adds that a reservation that affects the object and purpose of a treaty is an incompatible reservation. This is the case even when the provisions that express the object and purpose, previously accepted by the reserving state, are later part of a dispute settlement and the reservation has the effect of excluding the state from this settlement.\(^11\)

In order to understand the object and purpose of CEDAW, it is important to understand the principles that inform the interpretation of the Convention. While the nine core UN human rights treaties protect and promote the human rights of all people, CEDAW is the first legally binding international instrument that prohibits

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\(^{10}\) Ibid, p.18, Guideline 3.1.5.

\(^{11}\) Ibid, p.19, Guideline 3.1.5.7.
discrimination against women and requires state parties to take affirmative steps to advance the equality of women.\textsuperscript{12} Therefore, the principle of equality is central to the Convention.

To address that matter, CEDAW promotes a model of ‘substantive equality’, expressed in Articles 1, 2 and 3, which encompasses: equality of opportunity (Articles 1 and 2), equality of results (Article 2) and equal access to opportunities (Articles 2 and 3). The Convention is based on the interrelation of substantive equality with two other principles: the principle of ‘state obligation’ and the principle of ‘non-discrimination’. Although ‘…each of them is a distinct element in itself, they are also interdependent. Taken together, they provide a holistic framework for achieving women’s rights’.\textsuperscript{13} The conceptual framework that validates these principles is the recognition that ‘formal equality’, often concerned with ‘the content of laws and practices and their even-handed application’,\textsuperscript{14} is not sufficient to ensure the equal enjoyment of rights between men and women.

The CEDAW Committee has argued in General Recommendations Nos 19 and 21, that a reservation entered against Articles 5 to 16 has a greater effect on the implementation of CEDAW when Articles 2, 3 and 24 are affected as well\textsuperscript{15} and


\textsuperscript{13} See UN Women, UN Women in East and Southeast Asia Region. UN Entity for Gender Equality and the Empowerment of Women, The principles of CEDAW. Available at: <http://www.unwomen-esesia.org/projects/Cedaw/printprinciplecedaw.html> [last accessed 10 February 2016].


\textsuperscript{15} See United Nations, Division for the Advancement of Women, Convention on the Elimination of all forms of Discrimination Against Women, General recommendations made by the Committee on the Elimination of Discrimination against Women. Available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> [last accessed 10
stressed in the General Recommendation No 28 that reservations against Article 2 are ‘in principle incompatible with the object and purpose of the Convention’.\textsuperscript{16}

Articles 2, 3 and 24 of CEDAW are as follows:

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

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Article 3

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

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Although General Recommendations Nos 19, 21 and 28 address central aspects concerning the relevance of specific Articles to CEDAW, there is still no interpretation or express determination of the relevance of the individual Articles to the implementation of the object and purpose of CEDAW. For instance, although the CEDAW Committee refers to Article 2 as expressing the object and purpose of CEDAW, it does so with reference to reservations, without mentioning the relevance of that Article to the implementation of the Convention. In addition, the Committee uses euphemisms, such as ‘reservations to Article 2 are in principle…’[emphasis added], which undermines the significance of the recommendation and leaves a gap for questioning. Are all reservations to Article 2 incompatible with CEDAW? Are there exceptions?

Leaving the object and purpose of CEDAW undetermined erodes the Convention’s capacity to guide state behaviour and can damage the strength and
legitimacy of CEDAW as an international human rights convention. In turn, the CEDAW Committee struggles to monitor the implementation of the Convention in the state parties and to address reservations entered against important provisions of the Convention.

CEDAW also does not provide a treaty-specific regime of reservations. Thus, the Convention is governed by the residual reservation rules of the 1969 Vienna Convention on the Law of Treaties (VCLT). The VCLT adopted a flexible approach to treaty reservations, applicable to treaties of all types, under which reservations are presumed permissible and their acceptance is achieved easily. Impermissible reservations are those which are attached to provisions of a treaty to which reservations are prohibited, are formulated irrespective of the type of reservations permitted by the treaty, are incompatible with the object and purpose of a treaty (Article 19, paragraphs a, b and c, VCLT). Thus, incompatible reservations are impermissible reservations attached to provisions that express the raison d’être of the treaty.

In addition, Articles 19–23 of the VCLT contemplate a system where a treaty contains reciprocal obligations among states and its system of reservations and objections can be used to achieve identifiable consequences. In this regime, objections function as the main tool against impermissible reservations. However, CEDAW is composed of non-reciprocal obligations and it does not provide definite rules regarding the consequences of impermissible reservations, which makes the application of the VCLT rules on reservations a challenging and incoherent process.


18 See supra note 8, Guideline 3.1.
The lack of coherence is caused by normative ambiguities in the VCLT rules themselves in the context of impermissible reservations to human rights treaties.\textsuperscript{19} The drafters of the VCLT presumed that most reservations would not incorporate substantive changes to treaties, but would be triggered by incompatibilities of procedural or jurisdictional provisions of the treaty with constitutional or administrative rules of the signatory states. Thus, the treaty would ‘remain the master agreement providing guidance for the international community’.\textsuperscript{20}

The Vienna Convention considers that states will only formulate permissible reservations.\textsuperscript{21} Nonetheless, a review of the reservations made to CEDAW suggests that a significant number of those reservations are arguably impermissible. For example, although the CEDAW Committee has stressed the relevance of Article 2 to the object and purpose of CEDAW, states including Egypt, Libya, Saudi Arabia, Nigeria, Pakistan and Bangladesh have made reservations to CEDAW which affect compliance with Article 2 of the Convention.\textsuperscript{22}

Article 2 of CEDAW describes a framework for the achievement of equality and non-discrimination in all areas of a woman’s life. It establishes the implications of equality and non-discrimination for the interpretation and implementation of CEDAW. Hence, reservations that affect Article 2 will potentially affect states

parties’ compliance with all the provisions of CEDAW.

Bangladesh’s reservation to CEDAW is illustrative. The reserving state denies compliance only with Article 2 of the Convention. In this case, the reservation does not expressly affect the entire Convention, but may nonetheless have this effect, which makes it even more difficult to assess whether the state is upholding its treaty obligations. The text of the reservation is as follows: ‘The Government of the People’s Republic of Bangladesh does not consider as binding upon itself the provisions of article 2 ... as they conflict with Sharia law based on Holy Quran and Sunna’.23 Although not a ‘sweeping reservation’ per se,24 in that it does not expressly derogate from the entire Convention, Bangladesh’s reservation may have the effect of a sweeping reservation for denying compliance with all the paragraphs of Article 2.

Sweeping reservations denote an apathetic approach to treaty observance. Consequently, it is reasonable to question the effectiveness of CEDAW as a regulatory mechanism in states that entered reservations that will potentially have the effects of sweeping reservations and to ask whether its rules and institutions mitigate the problems they are designed to address. This suggests that further discussion is needed to understand whether CEDAW is able to constrain state practices and protect treaty integrity, to ultimately achieve compliance with the principles of equality and gender discrimination.

23 See United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, ‘Convention on the Elimination of all forms of discrimination against women: Declarations, Reservations and Objections to CEDAW’. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed 10 February 2016].

24 See Redgwell, Catherine J., ‘Reservations to Treaties and Human Rights Committee General Comment No 24(52)’ (1997) 46 International and Comparative Law Quarterly 390, 391. Other authors have referred to this type of reservation as an ‘across-the-board’ reservation, see, for example, Zemanek, Karl, ‘Alain Pellet’s Definition of a Reservation’ (1998) 3(2) Austrian Review of International & European Law 295. The ILC also references the ‘across-the-board’ reservation in its Draft Guide to Practice, 1.1.1 and accompanying commentary.
1.2. Significance

The issue of reservations to CEDAW has been the subject of academic research and debate for a long time.\(^{25}\) CEDAW’s reservation rules as well as the Convention’s object and purpose have been extensively examined. It has been demonstrated that a large number of reservations to CEDAW arguably affect essential provisions to the successful implementation of the Convention.\(^ {26}\) This thesis aims to build on and add to the previous works on CEDAW’s regime of reservations.

The thesis reports a case study of CEDAW’s regime of reservations. It examines how a reservation to Article 2 affects the monitoring and implementation process of the Convention. By investigating the monitoring and implementation process of CEDAW in Bangladesh, the thesis contributes to debates on the effectiveness of the CEDAW regime of reservations to protect gender equality and non-discrimination. Bangladesh’s reservation stands as an example in the dialogue concerning the effectiveness of CEDAW in the reserving states.

Bangladesh’s reservation has unique characteristics. A reservation to Article 2 of CEDAW may have the effect of a sweeping reservation because of the significance of Article 2 for compliance with the principles of equality and non-discrimination. In this instance, the reservation to a single Article may facilitate a lack of respect for the full panoply of women’s rights protected under the treaty. A close examination of Bangladesh’s reservation provides access to the universality


\(^{26}\) Ibid.
versus integrity debate on human rights treaties in the context of CEDAW.

In the 1951 Advisory Opinion to the Genocide Convention, the International Court of Justice (ICJ) argued over a particular characteristic of UN treaties: the aim of ‘universality’, which meant that there should be no complete exclusion of any state on the grounds of objection to a proposed reservation.27 The ICJ also observed that the parties could not sacrifice the object of the Convention for an aspiration to secure as many participants as possible.28 In a few words, this is the universality versus integrity debate of UN human rights treaties.

The universality versus integrity debate is facilitated by the reservation rules found in the 1969 Vienna Convention on the Law of Treaties (VCLT), which provides little guidance as to how the rules related to reservations found in Articles 19–23 should be applied. The VCLT regime of reservations contemplates a system where a treaty embodies reciprocal obligations among states and reservations and objections can be used to achieve identifiable consequences. As a result, the VCLT regime of reservations fails to protect the integrity of treaties made up of non-reciprocal obligations, such as human rights treaties. As Simma explains,

[w]hen human rights are violated there simply exists no directly injured State because international human rights law does not protect States but rather human beings or groups directly. Consequently, the substantive obligations flowing from international human rights law are to be performed above all within the State bound by it, and not vis-à-vis other States.29

28 Ibid.
Thus, the starting point in the study of CEDAW’s regime of reservations is the Vienna Convention and its shortcomings for dealing with invalid reservations, particularly to human rights treaties. Without a clear understanding of the law governing reservations, the institutions that promote and protect women’s rights (and human rights in general as well) have little chance to create a stable system based on accountability.

By looking into Bangladesh’s reservation, this thesis illustrates existing debates on the effectiveness of CEDAW’s regime of reservations. The examination goes beyond describing the scope of the reservation and provides an analysis of state practice to achieve equality and non-discrimination.

Bangladesh is part of a group responsible for a third of the reservations entered to CEDAW. Islamic states and Islamic countries\(^{30}\) have entered at least 24\(^{31}\) of the 61 reservations made to CEDAW.\(^{32}\) Therefore, studying Bangladesh’s reservation to the Convention will shed light on the current challenges with the monitoring and implementation process of CEDAW in the reserving states and on the effectiveness

\(^{30}\) In this thesis the term ‘Islamic country’ refers to a country where the majority of its people is Muslim but with a regulatory system that recognises diverse religious traditions and practices; whereas ‘Islamic states’ refers to states that establish Islam as the official state religion, despite which religion is followed by the majority of its population. See Lapidus, Ira, ‘The Golden Age: The political concepts of Islam’ (1992) 524 (13) *Annals of the American Academy Political and Social Science* 13-25; Mayor, Ann, *Islam and human rights: Tradition and Politics* (London, Pinter Publishers, 1995); Poljarevic, Emin, ‘Exploring the Islamic State’ (2008) 7(4) *European Political Science* 487–493.


\(^{32}\) See United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, ‘Convention on the Elimination of all forms of discrimination against women: Declarations, Reservations and Objections to CEDAW’. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed February 2016].
of CEDAW’s regime of reservations. Also, it may assist in the development of specific frameworks or recommendations for the analysis of the implementation of CEDAW in reserving states.

An examination of Bangladesh’s commitment to addressing the reservation to Article 2 includes an understanding of the state’s legislation and Sharia Law. In particular, I consider how they influence the achievement of substantive equality and non-discrimination nationally. The aim of this examination is to illustrate how religious and customary practices influence a reserving state’s compliance with CEDAW.

This thesis also seeks to enhance our understanding of the CEDAW Committee’s engagement with reserving states, allowing for a more detailed assessment of the impact of the Committee’s management of reservations on the successful implementation of the Convention. The CEDAW Committee has used general recommendations since the early 1990s to interpret and address the relevance of CEDAW provisions, and to offer guidance on which provisions are considered crucial for the implementation of the Convention.33 However, currently, there is no accurate differentiation between the meaning and value to be attached to the Convention’s Articles, particularly how they impact on the achievement of substantive equality and non-discrimination.

The lack of a defined set of rules establishing the meaning and relevance of the Convention’s Articles encourages state parties to interpret CEDAW according to their own perspectives and interests. This, in turn, makes it difficult for the CEDAW

Committee to continuously address the influence of the CEDAW provisions to the achievement of equality and non-discrimination for women.\(^{34}\)

As a monitoring agent, the Committee is under the generic rules that govern the UN treaty body system. The monitoring procedures of the treaty body system can be summarised as follows:

a) \textit{the reporting procedures}, by which states must submit reports regularly to the treaty bodies on the implementation of the treaty provisions;\(^{35}\)

b) \textit{the communication procedures}, by which individuals alleging that their rights have been violated by a state party can complain to the treaty bodies, provided the state party has accepted the given Committee’s competence to do so;\(^{36}\)

c) \textit{the inquiry procedures}, allowing a treaty body to initiate inquiries into allegations of serious or systematic violations of their Conventions\(^{37}\) and the \textit{state-to-state complaints procedure}, by which a state may complain to the treaty bodies about violations committed by another state. (Article 29, CEDAW)

CEDAW establishes that state parties should ‘report on the legislative, judicial, administrative or other measures’ which they have adopted and ‘which give effect to the provisions of this Convention’ (Article 9) and also requires information ‘on the

\(^{34}\) See chapter 3 of this thesis for further details.


\(^{36}\) \textit{Ibid.}

progress made’ and on ‘factors and difficulties’ encountered (Article 18). Therefore, in addition to their obligation to implement the substantive provisions of the Convention, each state party is also under an obligation to submit regular reports to the CEDAW Committee on how the rights expressed in the Convention are being implemented, at least every four years, as established by CEDAW (Article 18, paragraph b).

The report preparation process is the only monitoring procedure common to all human rights Conventions. It offers an occasion for each state party to assess what has been achieved, and what more needs to be done, to promote and protect human rights in the country. The reporting process should encourage and facilitate, at the national level, popular participation, public scrutiny of government policies and programs and constructive engagement with civil society conducted in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment by all of the rights protected by the respective Convention.

It is important to observe that, as part of the communications procedure, the CEDAW Committee receives information from UN specialized agencies and from non-governmental organizations (NGOs). They submit reports on the implementation of the Convention by the state parties. Since state party reports very rarely go beyond what is mentioned in their constitutions and legal instruments, the information that can be provided by NGOs has the potential to add to or contradict the assessment and arguments of the state parties.

The implementation of CEDAW in a state party may encounter several obstacles, such as the state’s legislation and common practices in society. These elements may conflict with the achievement of substantive equality and non-discrimination domestically. Therefore, an examination of Bangladesh’s engagement
with CEDAW’s regime of reservations will highlight areas where Bangladesh’s compliance with the Convention may be deficient.

These insights are likely to be particularly relevant to NGOs, such as the Bangladesh Mahila Parishad\(^{38}\) and the Ain O Salish Kendra (ASK)\(^{39}\) when addressing Bangladesh’s compliance with CEDAW. In addition, since its second session, the CEDAW Committee has invited UN specialized agencies to cooperate with its work by providing reports containing country-specific information and generally contributing to the implementation of the Convention.\(^{40}\) The most recent report has been submitted by UNESCO to the Committee’s forty-eighth session.\(^{41}\) Thus, the reports produced by UN specialized agencies might also benefit from additional information on the social, political or economic practices in Bangladesh which conflict with the implementation of CEDAW.

In this thesis I examine the procedural and substantive challenges faced by the CEDAW Committee to effectively discharge its mandate in monitoring the implementation of CEDAW in a reserving state. This will include an examination of

\(^{38}\) Bangladesh *Mahila Parishad* is considered the largest Bangladeshi women’s human rights organization. The BMP is well networked with other civil society organizations and has adopted CEDAW as basis for its work. See Bangladesh Mahila Parishad. Available at: <http://www.mahilaparishad.org> [last accessed 10 February 2016]; Norwegian Agency for Development Cooperation, NORAD, *Mid Term Review of Bangladesh Mahila Parishad* (Norway, Norad, 2013).


the format and working procedures of the treaty bodies and of the outputs of a consultation process that lasted from 2009 to 2012, when the Office of the High Commissioner for Human Rights (OHCHR) produced a comprehensive package of proposals on ways and means to strengthen the treaty body system. Any reform, however, needs to take into account the context of the implementation of each convention in each state party in order to address the singularities facing the monitoring and implementation process in each case.

Examining the engagement of the CEDAW Committee with Bangladesh will ultimately demonstrate how the current working methods adopted by the CEDAW Committee impact on the effectiveness of the Committee’s work. Thus, both existing processes and the effectiveness of the Committee will be taken into account. This analysis aims to extend current understanding on the influence of the CEDAW Committee on a reserving state’s compliance with CEDAW’s regime of reservations.

1.3. Research questions and objectives

The primary objective of this thesis is to understand the effectiveness of CEDAW as a regulatory mechanism in the reserving states. I discuss the CEDAW Committee and Bangladesh’s engagement with the monitoring and implementation process of CEDAW to examine Bangladesh’s commitment to the implementation of CEDAW and the effectiveness of the CEDAW Committee as a monitoring and regulatory agent. To do that I address one central research question and a sub-question, as follows:

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1. Is CEDAW able to constrain reserving states’ practices to protect equality and non-discrimination?

1.1. How does Bangladesh’s reservation to Article 2 of CEDAW affect the effectiveness of the monitoring and implementation process of the Convention?

1.4. **Research design and methodology**

The research design adopted to answer these research questions incorporates two key components. The first is a review of relevant primary sources and expert secondary commentary to support:

a) the analysis of the 1969 Vienna Convention regime of reservations and human rights treaties; and

b) the interpretation of the object and purpose of CEDAW.

The second component is a case study of Bangladesh’s compliance with CEDAW, with a focus on illuminating:

a) the impact of Bangladesh’s reservation to Article 2 of CEDAW; and

b) the monitoring and implementation process of CEDAW in Bangladesh.

The primary concern of this thesis is to assess whether the reservation system impedes the realisation of the goals of the international human rights treaty system. A case study approach – based on CEDAW as the focus treaty and Bangladesh as the focus country – has been adopted for the following reasons.

Key characteristics of CEDAW make it more susceptible to reservations (and, therefore, a good vehicle for examining the nature and effects of the treaty
reservation system in the human rights context). They are: repeating the criterion of compatibility as established in the 1969 VCLT; not defining which provisions express its object and purpose; and the use of objections as the only tools to protect the integrity of the Convention. In fact, CEDAW has been the subject of more reservations than any other human rights treaty.\(^{43}\) For this reason (that is, the large number of reservations made to the Convention), CEDAW is a perfect illustrative example of the current challenges faced by the UN monitoring system in protecting the integrity of human rights conventions.\(^{44}\)

Previous studies indicate that the UN monitoring system is struggling to manage reservations made against core provisions of human rights treaties and to achieve effective treaty implementation in the reserving states.\(^{45}\) The deficiencies of the system have been on the UN agenda for several years. This subject has also been the focus of prior research.\(^{46}\) Although there is extensive discussion in the literature


on the effects of reservations to treaty implementation, detailed examinations through case studies can improve our understanding of the problems related with human rights treaty implementation and reveal contextual factors that need to be taken into account when investigating solutions to those problems.

One of the key benefits of a case study methodology is that it allows for a complex social phenomenon (in the case of this thesis, the impact of reservations on treaty implementation) to be analysed in its operation contexts, using a variety of data sources. In this way, the dynamic interaction of treaty bodies, state parties, NGOs, UN specialized agencies and individuals in the monitoring and implementation process of human rights conventions can be taken into account by the researcher. 47

In order to ground this thesis’ analysis of the implementation of CEDAW in reserving states, and thereby make a contribution to the existing literature, I have chosen to focus on the experience and performance of a specific reserving state: Bangladesh. A country specific focus will allow for a fine-grained and context sensitive analysis of a reserving state party’s compliance with CEDAW and interactions with the CEDAW Committee.

The number of states that have entered reservations to CEDAW is large, but there is one common element to almost forty percent of the reservations: Islamic states and countries made twenty-four of a total of sixty-one reservations to CEDAW. A significant number of states used Sharia Law as a justification for their reservations. Prior research has argued against the use of Sharia as a justification

47 See Yin, Robert K, Case study research: design and methods (Sage, 2014).
because of its vague nature. It is not the ‘letter of the law’ but the interpretation given to the law that determines how and if Sharia will conflict with CEDAW. Bangladesh is one state. By focusing on Bangladesh in this thesis it will be possible to attend to the complex interaction of Bangladesh’s reservation to CEDAW, the obligations attached to the Convention, the practices of the CEDAW Committee, as well as the intricacies of both Sharia law and the relevant domestic laws of Bangladesh.

A study of Bangladesh’s reservation to CEDAW will provide an opportunity for improving existing understanding of the impact of reservations on treaty implementation. Despite having ratified CEDAW, Bangladesh made a reservation to Article 2. An alleged conflict with the Sharia Law is the reason for the reservation to the Convention. Religion is not only a fundamental aspect of Bangladesh’s reservation but it is also responsible, in great part, for the current status of gender equality in the state. Interpretations of the Sharia Law in Bangladesh’s patriarchal society allow and support discrimination against women, the continuity of women’s disadvantaged position in society and the reservation to CEDAW.

Bangladesh’s reservation to Article 2 of CEDAW is regarded by the CEDAW Committee as incompatible with the object and purpose of the Convention, which makes the treaty monitoring process an even more challenging task. Nonetheless, the state maintains an ongoing dialogue with the Committee regarding the implementation of the Convention. This conversation with the Committee results in

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the production of continuous periodic reports by Bangladesh and several comments and recommendations by the Committee.

Bangladesh has submitted eight periodic reports, since the Convention was ratified in 6 November 1984, and the reservation to Article 2 has been subject of debate in the review of seven of them (with the eighth report still to be reviewed by the Committee). These documents offer a significant perspective on the progress and on ‘factors and difficulties’ encountered with the implementation of CEDAW (Art. 18, CEDAW), thus providing crucial data on the relationship developed by Bangladesh and the CEDAW Committee and their commitment with the monitoring and implementation process of the Convention. These documents will represent the primary corpus of data in the analysis of Bangladesh’s implementation of the Convention.

Bangladesh’s reservation to Article 2 has been chosen as case to illustrate the problematic with the implementation of CEDAW in reserving states because: a) it has been justified on the grounds of conflict with a religious law (cultural differences) and b) for the significant data that has been produced and is available for analysis. The findings from this study will produce insights of wider significance in relation to impermissible reservations made to CEDAW and those that are justified on incompatibility between the Sharia Law and the Convention.

This study emphasises a close understanding of CEDAW’s capacity to constrain a reserving state’s practices to protect the implementation of the Convention. To do this, the thesis reviews UN documents produced over the past 30

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years. In particular, I examine Bangladesh’s periodic reports to the CEDAW Committee, the Committee’s comments to the state party and general recommendations nos. 19, 21 and 28. Additionally, NGOs’ shadow reports and UN specialized agencies’ reports that refer to the implementation of CEDAW in Bangladesh are also examined. In order to understand the context of the monitoring and implementation process of CEDAW in Bangladesh, relevant research studies and theoretical debates are also analysed.

Bellow, I describe the development of the discussions on: the 1969 Vienna Convention regime of reservations and human rights treaties; the interpretation of the object and purpose of CEDAW; Bangladesh’s reservation to Article 2 of CEDAW; and the monitoring and implementation process of CEDAW in Bangladesh.

1.4.1. The 1969 Vienna Convention regime of reservations and human rights treaties

The starting point of this research is a theoretical examination of the 1969 Vienna Convention regime of reservations. When conventions do not establish a treaty-specific reservation regime, as in the case of CEDAW, they are governed by the residual reservation rules of the 1969 VCLT. As Aust argues, ‘Although the [Vienna] Convention does not occupy the whole ground on the law of treaties, it covers the most important areas and is the starting point of any description of the modern law and practice of treaties’. 51

In chapter 2 I will discuss the history and development of the VCLT regime of reservations, focusing on its applicability to human rights treaties. The thesis will

discuss the specific characteristics of the VCLT regime of reservations and its application to human rights treaties. The main purpose of chapter 2 is to identify the characteristics and shortcomings of the law of reservations as they influence the monitoring and implementation process of CEDAW.

Particularly relevant to this discussion are Articles 19 to 21 of the VCLT, as their application to the workings of the CEDAW Committee results in gaps in the process of monitoring impermissible reservations to CEDAW. The requirements for a reservation to be both permissible and accepted are listed, respectively, in Articles 19 and 20.4 (a), (b) of the Vienna Convention.\(^{52}\) Articles 19 to 21 are as follows,

**Article 19**

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

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

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

**Article 20**

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an

\(^{52}\) *Supra note 7, Vienna Convention*. 

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essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
   (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.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21
Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
   (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
   (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. 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.

In light of recent developments in the area of reservations, particularly the culmination of the ILC’s study on reservations to treaties, this thesis seeks to provide further elucidation on the specific legal issues surrounding reservations to human rights treaties. The study enhances our understanding of the performance of treaty bodies in establishing their capacity to assess the permissibility and validity (legal effects) of reservations.

Reservations have been on the ILC’s agenda for a long time. However, the growing number of treaties, reservations and the practice of human rights monitoring bodies have provoked intense study of the subject. The ILC’s Special Rapporteur on reservations to treaties, Alain Pellet, has issued seventeen reports addressing various aspects concerning reservations. The reports culminated in the adoption of the Guide to Practice on Reservations to Treaties.\(^{53}\) To understand the Guide to Practice, it is important to have knowledge of the 17 reports of the Special Rapporteur, produced between 1995 and 2011. However, the most significant discussion for the purposes of dealing with CEDAW are his thoughts on reservations to ‘normative treaties’, which are examined in chapter 2.

With the exception of the CEDAW Committee’s work, the intervention of another member state or dispute resolution mechanism, there is limited recourse when it comes to determining the permissibility of a reservation. Therefore, the purpose and value of objections to reservations made to human rights treaties are elements examined in this thesis to understand the effectiveness of CEDAW’s regime of reservations. In fact, currently, objections are still the only form to

\(^{53}\) *Supra* note 8, ‘Guide to Practice’.
effectively determine the validity of reservations made to UN human rights treaties.

Additionally, as Seibert-Fohr notes, ‘Objections may inform the question whether a reservation is inadmissible. It is an important form of state practice which evidences *opinion juris* and informs the meaning of the ‘object and purpose’.

Thus, objections also play an important role in the examination of the object and purpose of CEDAW.

1.4.2. Interpreting the ‘object and purpose’ of CEDAW

In the third chapter I examine the CEDAW provisions according to the ‘General rule of interpretation’, expressed in Article 31 of the VCLT. I provide an interpretation of the CEDAW Articles according to their significance to the implementation of the object and purpose of CEDAW, aiming to develop a framework for the analysis of Bangladesh’s reservation to CEDAW.

Article 31 of the VCLT is as follows:

Article 31. General rule of interpretation,

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended. 55

According to paragraph 1, in the process of interpretation of CEDAW, there are three sources from which practitioners may seek the meaning of the Convention: the Convention’s terms, the context of those terms, and the Convention’s object and purpose. In the study of CEDAW’s context I will provide an outline of CEDAW’s origin and examine the text of the Convention. For the interpretation of the text of CEDAW, I will examine international law doctrine and practice where the principles of state obligation, substantive equality and non-discrimination are elements of the discussion. After their significance to the creation, interpretation and implementation of CEDAW is examined, I will review the comments and recommendations of the CEDAW Committee on the subject of reservations to CEDAW.

Furthermore, since the term ‘object and purpose’ carries subjective meanings, I apply Guideline 3.1.5, adopted in the ILC’s Guide to practice on reservations to treaties, to establish the meaning of the term object and purpose. Guideline 3.1.5 suggests that the object and purpose is represented by the provisions that express the raison d’être of the treaty.

55 Supra note 5, ‘Vienna Convention’. 
Against this background, aiming to provide a definition that achieves the most basic meaning of the term object and purpose, applicable for the interpretation of CEDAW, I draw a distinction between provisions that:

a) express the ‘object and purpose’ of CEDAW;

b) are ‘significant’ to the implementation of the ‘object and purpose’ but do not express it; and

c) are ‘procedural’, for establishing acts to be observed by state parties and the CEDAW Committee.

The remaining chapters of the thesis will examine the monitoring and implementation process of CEDAW. This will be structured in two parts: the ‘monitoring process’ and the ‘implementation process’ of CEDAW.

1.4.3. The monitoring and implementation process of CEDAW: A conversation

Examination of the monitoring and implementation process of CEDAW begins with a discussion of the engagement between the CEDAW Committee and Bangladesh. In reviewing the dialogue between Bangladesh and the CEDAW Committee I aim to understand how the current obligations attributed to Bangladesh and to the CEDAW Committee (Articles 2, 18, 21 and 24 of CEDAW) are accomplished. I will consider how successful the CEDAW Committee has been in providing Bangladesh with authoritative guidance on the meaning of the provisions expressed in CEDAW. I will also examine Bangladesh’s implementation of CEDAW.

To this end, I survey the communications between Bangladesh and the CEDAW Committee, in particular, to: a) understand the interaction between
Bangladesh and the CEDAW Committee; b) assess the CEDAW Committee’s views on Bangladesh’s reservation; and c) examine Bangladesh’s performance in complying with its obligations to CEDAW, and how/whether the reserving state addresses the CEDAW Committee’s recommendations.

1.4.3.1. Monitoring the implementation of CEDAW in Bangladesh

Although the CEDAW Committee is the treaty body responsible for monitoring the implementation of CEDAW, in the monitoring process of the Convention other agents hold roles outside the scope of the Committee, which may influence Bangladesh’s compliance with the Convention. For instance, even though state parties are not invested with the capacity of monitoring agents, they are the only human rights stakeholders with the competence to determine the invalidity of a reservation in the UN human rights regime.

Thus, understanding the impact of state party objections in protecting the integrity of CEDAW against reservations is a significant step in the study on the effectiveness of the CEDAW’s regime of reservations. These objections also serve as informative tools regarding the permissibility and validity of the reservation.

The monitoring process of CEDAW should not be seen as an exclusive treaty body and state member relationship. NGOs turn to the Convention’s monitoring process as a tool to redress gender-based inequalities and advance domestic political change. They use CEDAW as a reference point when advocating for policies and programs aimed at achieving equality and non-discrimination domestically. NGOs are crucial sources of information to the CEDAW Committee on the implementation of CEDAW. In chapter 4 I will examine the position adopted by national and
international women’s NGOs on Bangladesh’s reservation to the implementation of CEDAW.

UN specialized agencies also have an important role in treaty monitoring. They are invited by the CEDAW Committee to assist with information regarding state parties’ compliance with the Convention. Thus, within the scope of their activities, UN agencies may contribute significantly to the monitoring process of CEDAW. The engagement of UN specialized agencies with the CEDAW Committee will be examined in chapter 5, as I explain in the following section.

1.4.3.2. The implementation process of CEDAW

Bangladesh has argued that a conflict between CEDAW and the Muslim personal law was the cause for the reservation against Article 2. Thus, the implementation process of the Convention in Bangladesh will focus on the reserving state’s performance in addressing the reservation. The thesis will examine how religious personal laws affect the achievement of equality and non-discrimination in the country. In order to study the influence of religious personal laws to the implementation of CEDAW in Bangladesh I will:

a) explain how the conflict between Article 2 of CEDAW and domestic norms in Bangladesh was and is negotiated in order to obtain successful adoption of the CEDAW provisions;

b) trace the conflict between Article 2 of CEDAW and Bangladesh’s domestic norms;

c) discuss the effects of the conflict between CEDAW and Bangladesh’s domestic norms on the state party’s efforts to ensure national compliance with the Convention.
d) Bangladesh’s national implementation of the recommendations given by the CEDAW Committee and how far the output of those recommendations has been integrated into all national efforts to protect women’s rights.

Chapter 5 is structured in three parts. Part I will explore several questions concerning reservations made to CEDAW by Islamic countries and Islamic states grounded on conflicts with the Muslim personal law. I will discuss existing literature on Muslim countries and human rights compliance, focusing on CEDAW. I will also outline the normative parameters within which the conflicts between gender equality and current discriminatory interpretations of the Sharia Law might be addressed.

Part II of chapter 5 will discuss the impact of discriminatory interpretations of religious personal laws on women’s rights in Bangladesh. In this thesis, interpretation of religious personal laws are considered to be ‘discriminatory’ to the extent that they exclude women’s access to the rights established in Article 2 of CEDAW. Focusing on social and political dimensions of gender equality and religion in Bangladesh’s society, I will examine how patriarchal notions of equality, derived from religious principles, affect the public and private lives of women in Bangladesh.

The extent to which religious personal laws curtail women’s human rights may be conditioned by class structures, regional customs and by the state enforcing or promoting discriminatory practices in the public and private arenas.\(^{56}\) Thus, in this study I will consider whether and how religious personal laws may affect women

living in urban environments and women living in rural Bangladesh in different ways.

Part III of chapter 5 will analyse the accuracy, quality and relevance of the CEDAW Committee’s comments, questions and recommendations to Bangladesh in the review of the state party’s periodic reports. This analysis seeks to demonstrate how the CEDAW Committee has addressed Bangladesh’s reservation to CEDAW and the influence of religious personal laws on the implementation of the Convention.

The general effectiveness of the Committee’s comments to the reserving state is significantly affected by the quality of the information received by the Committee on the implementation of CEDAW. Thus, I will examine current working methods adopted by the CEDAW Committee for the submission of data on the implementation of CEDAW. I will also analyse the common practice and guidelines currently adopted by the CEDAW Committee for the preparation and submission of reports by NGOs and UN specialized agencies. This is followed by a review of past and current theoretical studies and discussions on the relevance of the information provided by reserving states, NGOs and UN specialized agencies to the CEDAW Committee.

This discussion aims to provide a framework for assessing the effectiveness of the current working methods adopted by the CEDAW Committee for the submission of information on the implementation of CEDAW. The analysis will specially examine the quality of the information provided to the Committee and ultimately, the impact on the Committee’s assessment on the implementation of CEDAW in Bangladesh.
1.5. Limitations of the research data

NGOs can submit their reports to the Committee prior to or at the session concerned, as well as email their reports to the International Women’s Rights Action Watch (IWRAW) Asia Pacific, a non-governmental organization that has made arrangements with the Committee to distribute NGO shadow/alternative reports electronically and/or in hard copy directly to experts in advance of the session.\(^{57}\)

Therefore the shadow reports examined in this thesis were those available via the OHCHR and by the IWRAW Asia Pacific. Specifically, the reports examined were:

a) Ain O Salish Kendra; Bangladesh Mahila Parishad; Steps Toward Development, *Shadow Report to the Fifth Periodic Report of the Government of Bangladesh* (May 2004);


The CEDAW review process begins when a working group of the CEDAW Committee first meets to identify gaps in state parties’ reports. The working group prepares a list of issues and questions that is then sent to the reporting state. The state is required to provide a written reply to the questions in a session prior to the session in which the periodic report will be reviewed (the pre-session).

The NGOs can submit topics, in written or oral form, for the Committee to question the state party as part of the list of issues and questions. The pre-session is also the last chance to get the state party’s government to submit written information

\(^{57}\) See United Nations, Division for the Advancement of Women. *NGO Information Note.* Available at: <www.un.org/womenwatch/daw/cedaw/NGO_Information_note_CEDAW.pdf> [last accessed 10 February 2016].
on certain subjects that may have been overlooked in the periodic reports.\textsuperscript{58}

The OHCHR did not, however, provide the documents submitted to the CEDAW pre-sessional working groups prior to the 58\textsuperscript{th} pre-session, which took place from 21 to 23 October 2013. Therefore, it is not possible to identify whether NGOs participated in the pre-sessions for the review of Bangladesh’s fifth periodic report, which was conducted in 2004 or the review of the Combined sixth and seventh periodic reports, which was conducted in 2011.\textsuperscript{59}

After taking part in the pre-sessional working group, NGOs and national human rights institutions may submit reports to the CEDAW Committee and also make an oral presentation of ten minutes, during the session scheduled for the review of the periodic report. While this is a very short presentation, it can be used to comment on relevant issues that have not been addressed properly by the state party or that may have been left out of the shadow reports.\textsuperscript{60}

If NGOs and national human rights institutions participated in any form in the 31\textsuperscript{st} Session, scheduled for the review of Bangladesh’s fifth periodic report, and in the 48\textsuperscript{th} Session, scheduled for the review of Bangladesh’s sixth and seventh combined reports, it is not registered in the documents submitted to the CEDAW


Committee for the respective sessions as available by the OHCHR.\textsuperscript{61} Therefore, in chapter 4 the participation of NGOs in the monitoring and implementation process of CEDAW in Bangladesh is examined from the perspective provided by the shadow reports listed previously. Although the number of shadow reports is limited, they refer to the state party’s latest periodic reports. Therefore, they provide a current representation of how information is chosen, structured and submitted to the CEDAW Committee by the NGOs.

2. INVALID RESERVATIONS AND HUMAN RIGHTS TREATIES

In 1949, upon establishment of the International Law Commission, the United Nations Secretary-General’s Survey of International Law\(^62\) contained a section on the ‘Law of the Treaties’, which observed that ‘persuasive reason may be adduced in support of the view that it is desirable to include the entire subject of treaties within the orbit of codification.’\(^63\) The law of treaties was listed among the topics for codification\(^64\) and in its first session, the ILC appointed J.L. Brierly as \textit{Special Rapporteur} for the subject.\(^65\)

In the years after its first session, the ILC considered a series of reports by Brierly and his successors as \textit{Special Rapporteur} on the Law of the Treaties. They were Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice. After which, in 1961, the Commission appointed Sir Humphrey Waldock as \textit{Special Rapporteur} on the Law of the Treaties.\(^66\) From 1962 to 1966 Sir Humphrey Waldock carried on an intensive examination of the Law of the Treaties and during this period sets of Articles were

\(^62\) See United Nations General Assembly. \textit{Memorandum submitted by the Secretary General. Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission - Memorandum submitted by the Secretary-General A/CN.4/1/Rev.1 (1949).}

\(^63\) \textit{Ibid.}, p. 52, para. 91.

\(^64\) According to Article 15 of the Statute of the International Law Commission, ‘codification’, in terms of international law, is defined as ‘the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine’. See Statute of the International Law Commission, Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1950 and 36/39 of 18 November 1981. Available at: <http://legal.un.org/ilc/texts/instruments/english/statute/statute_e.pdf> [last accessed 10 February 2016].


\(^66\) \textit{Ibid.}
provisionally adopted by the Commission, submitted to governments for comment and then re-examined in the light of these comments.

The United Nations Conference on the Law of Treaties took place in Vienna, in two sessions, from 26 March to 24 May 1968 and from 9 April to 22 May 1969. The Vienna Convention was opened for signature on the following day. Finally, after 18 years (1949–1966), 292 meetings and with the work of four Special Rapporteurs, in its eighteenth session in 1966, the ILC adopted seventy-five draft articles on the Law of Treaties, as well as accompanying commentary.

The VCLT regulates the creation, effects and interpretation of international agreements and is conceived as being responsible for the establishment of the modern regime dealing with reservations to treaties under international law. Its preamble, 85 articles and one annex, deal with the following subjects:

a) Scope of the Convention, Use of terms, Non-retroactivity rule (Articles 1 to 5);

b) The conclusion and entry into force of treaties and reservations to treaties (Articles 6 to 18);

c) Reservations to treaties (Articles 19 to 23);

d) Entry into force and provisional application to treaties (Articles 24 to 25);

e) The observance, application and interpretation of treaties (Articles 26 to 85).


f) Amendment and modification of treaties (Articles 39 to 41);

g) The invalidity, termination and suspension of treaties (Articles 42 to 72);

h) Miscellaneous provisions relating to treaties, such as the effect of a treaty with regard to third parties (Articles 73 to 75) and

i) Depositaries, notifications, corrections and registration of treaties (Articles 76 to 80).

As noted in chapter 1, this thesis examines the effects of impermissible reservations on the monitoring and implementation process of CEDAW. In order to understand this issue Articles 19 to 21 of the VCLT will be discussed in this chapter. I will, however, primarily focus on Article 19, paragraph (c).

According to Article 21, paragraphs a, b the legal effect anticipated by the Vienna Convention for a reservation is the entry into force (or not) of the treaty between the reserving state and other state parties and the exemption of obligations to the extent of reservations between states based on acceptance or objection (Article 21, paragraphs a, b). Swaine observes that under this system objections serve as a form of insurance whereby non-reserving states are able to ‘recapture some of the insurance benefits that reserving states capture in exempting their future conduct’.70 This practice, however, developed based on the notion that reservations would be permissible71 and that treaty obligations are reciprocal.


71 In this thesis the term ‘permissible’ refers to reservations that are not prohibited by a convention (Article 19, paragraph a, VCLT), are specifically permitted by a convention (Article 19, paragraph b, VCLT) and are compatible with the object and purpose of a convention (Article 19, paragraph c, VCLT).
The current practice of states making objections based on impermissibility will hardly protect the integrity of human rights treaty obligations. The VCLT regime of reservations does not account for the primary fact that the beneficiaries of human rights treaties are the people and not the states. Human rights treaties are non-reciprocal in nature.\textsuperscript{72}

With human rights treaties the people under the jurisdiction of a state are the ones to lose by a reservation made and not the other members of a convention. In this scenario, non-reserving states have little incentive to object to a reservation. Neither their people nor their legal obligations to the treaty will be harmed by the reserving state attempt to evade compliance with a particular obligation. In sum, there is no legal duty to object, nor will the objecting state’s legal obligations be affected and thus, impermissible reservations stand.

According to Article 19(c) of the Vienna Convention it is prohibited to enter reservations ‘incompatible’ with the object and purpose of a treaty, but the VCLT does not discern how to interpret a treaty’s object and purpose. In fact, Article 31 of the Convention suggests that a treaty’s object and purpose should be interpreted in light of its object and purpose.\textsuperscript{73} Thus it can be said that the VCLT borders on the self-referential.\textsuperscript{74}

\textsuperscript{72} Exceptions may occur. Article 41 of the International Covenant on Civil and Political Rights, which provides for reciprocity of inter-state complaints with regard to human rights breaches may be referred to in this regard. See International Covenant on Civil and Political Rights, ICCPR. Opened for signature on December 1966. Entered into force on March 1976. Available at: \texttt{<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed 10 February 2016]}.  


The VCLT also fails to identify the criteria to determine the compatibility of a reservation and fails to specify the consequences for a reservation identified as incompatible with the object and purpose of a treaty as well. The vagueness of the object and purpose test adds to lack of consequences for when a reservation is objected to for its ‘impermissibility’.

The Vienna Convention does not shed light on how the object and purpose of a treaty should be reckoned. It does not provide the effects for impermissible reservations and for objections, and does not suggest an arbiter to rule on such matters. The 1969 VCLT is, thus, riddled with gaps and so is CEDAW. The ‘Women’s Convention’ does not provide any clues for these issues either.

CEDAW uses the approach of the VCLT to allow reservations, unless they are incompatible with the object and purpose of the Convention. CEDAW does not provide a meaning for the term object and purpose, nor does it describe the provisions that express the object and purpose of the Convention (Article 28, paragraph 2).75 CEDAW also fails to determine the body with the competence to determine the legal effects of an impermissible reservation.

The CEDAW Committee is left with the task to assess the permissibility of reservations, without the power to determine the validity76 of reservations. Consequently, the Committee struggles to deal with reservations made against important provisions of the Convention and to monitor implementation of the treaty by the state parties.

75 The CEDAW regime of reservations will be examined in chapters 3 and 4. See supra note 12, ‘CEDAW Convention’.

76 Debating the ‘validity’ of a reservation is discussing whether a reservation has been considered either valid or invalid and what legal effect is to be attributed to an invalid reservation. Note that all compatible reservations are permissible and thus valid; whereas, incompatible reservations are impermissible and thus invalid. The debates question what legal effect should be attributed to an invalid reservation.
Without an identification of the provisions that express the object and purpose of CEDAW, without establishing the body with competence to determine the incompatibility of reservations and with no indication as to the effects of an incompatible reservation to the Convention, Article 28(2) of CEDAW remains without much effect\(^7\) and the debates on the incompatibility of reservations to the Convention seem to have no end.

In light of the conundrum formed with the applicability of the Vienna Convention regime of reservations to CEDAW, and to human rights treaties in general, this chapter will discuss three lacunae in the Vienna Convention, namely the vagueness of the object and purpose test, the lack of a defined legal effect for objections and for impermissible reservations, and the failure to designate the consequences for the state party that has entered an impermissible reservation.

Although states claim the right to determine the validity of a reservation (legal effects of permissible/impermissible reservations), in human rights treaties the status of invalid reservations is obscure, even when the reservations are objected to based on impermissibility. Reservations of questionable validity gain the same status as valid reservations because the VCLT does not address the consequence for a reservation determined to be invalid beyond the traditional reciprocal application of the reservation between the reserving and objecting states.

As I will discuss further in this chapter, the doctrines of permissibility and opposability have traditionally been used to define the legal effects of a reservation. However, they have little resonance in the context of human rights treaties, for

\(^7\) Article 28(2), CEDAW states ‘A reservation incompatible with the object and purpose of the present Convention shall not be permitted.’ See supra note 12, ‘CEDAW Convention’.
neglecting the rules to object to incompatible reservations and how they are utilized in the context of human rights treaties.\textsuperscript{78}

Thus, to examine the application of the VCLT regime of reservations to the monitoring process of CEDAW, the history of the Vienna Convention regime of reservations should be understood. Accordingly, this chapter begins with the historical background of the development of the VCLT regime of reservations. I will account for significant factors that have had an influence on the development of the regime of reservations, particularly the 1951 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.\textsuperscript{79}

As part of the work undertaken in relation to reservations, since 1951 the ILC has been carrying out studies and debates on reservations to international treaties. It was ultimately decided that the work would culminate in a ‘Guide to Practice’ with guidelines and model clauses that could be used together with the existing rules on treaty law in the development of future treaties.\textsuperscript{80} The ‘Guide to Practice on Reservations to Treaties’\textsuperscript{81} reflects residual rules and practices that may be applied in the absence of special provisions on the permissibility and validity of reservations to treaties and interpretive declarations.

The Guide proposes a concurrent competence between state parties and treaty monitoring bodies to determine the permissibility and validity of a reservation.


\textsuperscript{79} Supra note 27, ‘1951 Advisory Opinion’.


\textsuperscript{81} Supra note 52, ‘Guide do Practice’.
(Guideline 3.2.4). According to Guideline 3.2.4, states parties would have to take into account the competence of the treaty body to not only identify the object and purpose of a convention, but to determine the incompatibility of a reservation as well. Thus, the Guide extends the power of treaty bodies beyond their competence to ‘comment’ on the acceptability of reservations.  

However, due to the consensual nature of international law, only through express acceptance by state parties can Guideline 3.2.4 be formally recognized, usually via an amendment or an optional protocol to a treaty. As I will discuss later, although treaty bodies aim for a more prominent role as ‘guardians’ of their respective treaties, state parties do not recognize the monitoring bodies with competence to determine the compatibility of reservations or the effects of an incompatible reservation.

Thus, in the analysis of the applicability of the Vienna Convention regime of reservations to human rights treaties, I will consider, where appropriate, the comments made by Alain Pellet, the ILC’s *Special Rapporteur* on reservations to treaties, on the application of the VCLT regime of reservations to human rights conventions and will also review the ILC’s ‘Guide to Practice on Reservations’, while making sense of the paradox between universality versus integrity of human rights treaties and state consent.

The analysis conducted in this chapter will provide the theoretical background on the reservations regime, particularly, on the object and purpose test established by the Vienna Convention. This will serve to examine CEDAW’s regime of reservations as well as the identification and interpretation of CEDAW’s object and purpose.


83 *Supra note* 52, ‘Guide do Practice’.
Subsequently, Bangladesh’s reservation to CEDAW will illustrate how the monitoring and implementation process of the Convention suffers from the current regime of reservations, which allows for incompatible reservations to stand and reinforces weak accountability for reserving states that do not comply with treaty obligations.

2.1. Background history of the ‘object and purpose’ test in the 1969 Vienna Convention

The issue of reservations to multilateral treaties goes back to the 1951 International Court of Justice Advisory Opinion on reservations to the Genocide Convention.\textsuperscript{84} Although the Advisory Opinion did not set forth a system of reservations, it clearly merits attention here not only as background for the VCLT regime of reservations, but also for representing a historical moment at which the discussions of reservations fundamentally changed.

Usually, when states objected to reservations the UN Secretary-General informed the reserving states that they could no longer be party to the Convention, due to the objections presented. However, as Fenwick explains,

\begin{quote}
The Secretariat of the United Nations confronted with reservations to the Genocide Convention had called attention to the lack of unanimity, both as to the procedure to be followed by a depositary in obtaining the necessary consent to a proposed reservation, by other parties to the Convention and as to the legal effect of an objection made by one of the parties.\textsuperscript{85}
\end{quote}

In 1950 the United Nations General Assembly requested an Advisory Opinion

\textsuperscript{84} Supra note 40, ‘Genocide Convention’.

from the International Court of Justice on three specific questions regarding this matter. Questions 1, 2 and 3 are as follows,

Question 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?\(^{86}\)

Question 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?...\(^{87}\)

Question 3:

What would be the 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?...\(^{88}\)

The ICJ replied with:

a State which has made and maintained a reservation which has been objected by one or more of the parties to the Convention but not by others, can be regarded as being party to the

\(^{86}\) Supra note 58, ‘1951 Advisory Opinion’, p.10.

\(^{87}\) Ibid., p.15.

\(^{88}\) Ibid., p.16.
Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as party to the Convention.

Ibid., p.18.

90 Ibid.

91 Ibid., p.19.
The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.  

The Court identified that when making a reservation or raising an objection states must account for the object and purpose of a treaty. Thus, not only universality, but also the integrity of treaties should be preserved. However, the ICJ failed to discuss who would determine the object and purpose of a particular treaty and did not address who would be competent to be the arbiter of reservations.

Following the ICJ Advisory Opinion, the ILC gave priority to a study of the question of reservations to multilateral conventions. In a report to the UN General Assembly, the Commission stated that the object and purpose test, applied by the ICJ in its Advisory Opinion, would not be suitable for application to multilateral conventions in general. Thus, the first three ILC Rapporteurs did not take over the principles elaborated by the ICJ in their proposals on reservations to treaties.

The second Brierly Report of 1951 proposed the strict unanimity rule. This

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92 Ibid., p.24.
position was followed by Lauterpacht, in his second Report of 1954\(^97\) and by Fitzmaurice, in its first Report of 1956.\(^98\) In sum, under the unanimity rule a reservation was valid only if the treaty concerned allowed it and if all the members of the treaty accepted the reservation.\(^99\)

However, Waldock, the final Rapporteur on the topic before the adoption of the VCLT, acknowledged the framework set out by the ICJ in 1951.\(^{100}\) His first Report of 1962 placed his proposals on reservations within the current practice of states, which moved away from the unanimity rule.

In 1962, after an intricate debate, the ILC concluded that where a treaty was silent on the matter of reservations, the compatibility of the reservation with the object and purpose of a treaty provided a suitable criterion to determine the legitimacy of the reservation.\(^{101}\) The ILC’s proposal adopted the ICJ’s notion of compatibility with the object and purpose of the convention and allowed for each state to decide on the admissibility of a proposed reservation rather than admissibility depending on majority acceptance.\(^{102}\) This thereby gave the freedom for each state party to choose whether or not the reservation proposed would be applicable in its


\(^{102}\) *Ibid.*
relation with the reserving state party.

In 1965 the ILC’s proposal was put forward, resulting in draft Article 16 of the 1966 VCLT, which was as follows,

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

In its commentary on the draft Article 16, the ILC argued that, although it had agreed with the principle of compatibility with the object and purpose of the treaty as suitable for adoption as a general criterion, it also found that, ‘[t]he difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty.’ Thus, each individual state’s acceptance or rejection of a reservation is the only way of settling the matter, suggesting that ‘[t]he subjectivity inherent in this


104 In the 1966 Draft of the VCLT, Articles 16 and 17 dealt with the right to enter a reservation and its acceptance by the other state parties to a treaty, which is currently regulated in Articles 19 and 20 of the Vienna Convention.


106 Ibid., p.203-208.
approach provides considerable flexibility. As Lijnzaad observes, ‘the claim that a particular reservation is contrary to the object and purpose is easier made than substantiated’.108

In the Tenth Plenary Meeting of the United Nations Conference on the Law of Treaties,109 the debates of text of the ILC draft Article 16 began. The Mexican delegation proposed to expressly envisage the consequences of a judicial decision which recognizes the incompatibility of a reservation.110 There were even attempts to draw consequences from the incompatibility of a reservation.111 The delegation from Japan argued that ‘the new rules embodied in article 16 and article 17 might lead to undesirable situations which would have the effect of permitting virtually any reservation that any party wished to make’.112

Mr. Brazil, the representative of Australia, recalled that:

[the Australian delegation was] still not convinced that the present articles 16 and 17 were a satisfactory solution to that problem; it would prefer the inclusion of a clause providing for

some machinery of control, such as had been proposed by the Japanese delegation. His delegation would therefore have to abstain from voting on articles 16 and 17\textsuperscript{113}

Despite the arguments presented and seven abstentions during the voting, the text of Article 16 was adopted without amendments, by 92 votes to 4. The text of draft Article 16 is currently observed in Article 19 of the 1969 VCLT. Universality became the prime objective of the law of reservations, which functioned on a largely subjective basis, hence the flexible approach taken to the right to enter reservations to an international treaty.

In the next section I discuss the topic of invalid reservations to human rights treaties before moving to a more specific analysis of reservations to CEDAW. The discussion will consider available literature on the effects of invalid reservations and the competence to determine the validity of reservations within the scope of human rights treaties.

2.2. The VCLT regime of reservations and human rights treaties

The 1969 Vienna Convention attempted to devise a fixed, all-encompassing set of rules to govern the permissibility and legal effects of reservations to all kinds of treaties. Taking into consideration the need for a more flexible system of reservations, the unanimity rule was discarded and a new reservations regime was introduced, which is codified in Articles 19 to 23 of the 1969 Vienna Convention.

Article 19 of the VCLT provides that a state can formulate reservations when signing, ratifying, accepting, approving or acceding to a treaty, unless: ‘(a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified

\textsuperscript{113} Ibid., p.30 para. 34.
reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.\textsuperscript{114} Thus, Article 19 establishes the limits of permissibility\textsuperscript{115} of a reservation.

Article 19(a) deals with the express prohibition of reservations. Article 19(b) has settled for the solution that only preclusive authorizations\textsuperscript{116} imply a prohibition of reservations to those treaty provisions that are not mentioned by the provision. Thus, when conventions, such as CEDAW, do not express the provisions against which no reservation can be made, the reasoning of the VCLT is that any provision can be subjected to a reservation. In the words of Frank Horn,

> [t]he Vienna Convention now stands for a quite liberal view. Whenever there is a slight doubt as to the admissibility of reservations, the presumption is in favor to a liberty to formulate reservations\textsuperscript{117}

Article 19(c) reflects the view taken by the ICJ on the 1951 Advisory Opinion on reservations to the Genocide Convention. As discussed previously, the Court was concerned to protect the integrity of human rights instruments from erosion due to broad reservations that diluted the most fundamental provisions of the treaties.

Article 21 of the VCLT leaves for state parties the onus of assessing the permissibility and determining the legal effects of reservations by stating that a

\textsuperscript{114} Supra note 7, ‘Vienna Convention’.

\textsuperscript{115} Supra note 94.

\textsuperscript{116} An authorization of certain reservations does not preclude the formulation of other reservations, except when the authorization explicitly admits only individualized reservations.

\textsuperscript{117} See Horn, Frank, \textit{Reservations and interpretative declarations to multilateral treaties} (Elsevier Science Publishers, 1988) 114.
reservation modifies for the reserving state and for the objecting state the provisions of the treaty to which the reservation relates to the extent of the reservation. This, Article address the legal effects of only valid reservations and in the context of relationships between states, which has little relevance to human rights treaties.

Human rights treaties differ from other international treaties due to certain distinctive characteristics. According to the ICJ:

In such a convention [Genocide Convention] the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.

Thus, human rights treaties differ from the standard treaties because of the content and the beneficiaries of the norms. ‘The object of human rights treaties is not the exchange of reciprocal obligations between the states, but rather objective obligations towards the individuals under the jurisdiction of the states parties.’ Human rights treaties recognize individuals as the subjects of international law and with that recognition grant them the benefit of obligations imposed on the states.

In short, human rights obligations are for the benefit of individuals, rather than states. Thus, the substantive provisions of the treaty will have to be fulfilled between a state and its subjects, and not between different states. The lack of a direct interest for states and the objective interest of individuals under the jurisdiction of

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118 Supra note 7, ‘Vienna Convention’.
state parties suggest that the validity of reservations to human rights treaties is not found within the bounds of reciprocity.

Objections do not make much sense in the context of the non-reciprocal rights and obligations observed in human rights treaties. Article 21(3) of the VCLT explains 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’\(^{121}\) This rule, however, is not appropriate when considering reservations to human rights treaties, since the states receive no reciprocal benefits from one another. Will the objecting state not comply with the provisions affected by the reservation \textit{vis-à-vis} the reserving state? How would that work?

Instead, when objecting to reservations made to human rights treaties, state parties maintain their obligations to the covenant and to the people under their jurisdiction. The absence of reciprocal obligations does not equate with the complete absence of benefits exchanged between state parties to a human rights treaty. The most essential benefit is the accomplishment of those ‘high purposes’, which are the \textit{raison d’être} of the conventions.

However, if a reserving state does not comply with a provision in a human rights covenant the remaining state parties to the convention will not have their legal obligations to the treaty affected and will only be harmed in their interests if their common goal is in fact the regulation and protection of human rights at an international level. The existence of a common goal between the members of an international agreement cannot be assured, nonetheless.

Although it is not the focus of this thesis to examine the states’ interests as

\(^{121}\) \textit{Supra note} 7, ‘Vienna Convention’.
parties to human rights treaties, this is a topic that merits comment in this thesis. Elaborating on the interests of reserving and non-reserving states may not solve the problems created by the applicability of the regime of reservations to human rights treaties. The point of such discussion, however, is to better understand the status quo before accounting for an analysis of the monitoring and implementation process of CEDAW and its regime of reservations.

Flodd argued that ‘UN effectiveness is due to the fact that, as members of a community, states pursue goals whose achievement depends highly on avoiding political isolation.’ Koskenniemi has also made this argument. Their views attribute the success of the human rights movement and its institutions to politics. However, the motives behind becoming a party to an international law-making system may also include a state’s desire to be a relevant member of the international community and also the aim to avoid criticism for not being part of such an agreement.

Although not a primary interest, political considerations are a part of state acts in an international environment. They influence objections to reservations, as much as they influence reservations. Thus, the motivation of states as parties to the treaty

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or in their individual relationships with the other members will, ultimately, impact on their interests to object or not to a reservation. Therefore the purpose and value of objections based on invalidity must be considered. This is because the Vienna Convention does not contemplate what happens to a reservation in the instance where it has been objected to based on impermissibility and invalidity.

Once it is admitted that a state cannot formulate a reservation against the provisions of Article 19, than the question arises of what happens if a state formulates a reservation in spite of these prohibitions. What is the legal effect of an impermissible reservation? In addition, are the other states prevented from acquiescing to a reservation formulated in spite of the prohibitions of Article 19?126

Technically, the Vienna Convention allows state parties to come to their own conclusion regarding the acceptability of reservations, even if it affects the object and purpose of a treaty. Under the VCLT there are no provisions against state parties from accepting reservations that are contrary to Article 19(c). In fact, under Article 20(5) of the VCLT if objections are not raised within twelve months of states being notified about the reservation, the reservation is formally considered as having been accepted by the state parties to the treaty.127

Thus, objections are not restricted by the type of reservations they may affect. They have, however, limited legal effects. Nonetheless, objections are at the heart of the debates over the consequences of impermissible reservations and this is not restricted to the scope of human rights treaties.


127 Supra note 7, ‘Vienna Convention’.

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The ‘permissibility doctrine’ suggests that incompatible reservations are void *ab initio*, which originates from Article 19(c) of the VCLT.\(^{128}\) However, this leads to one question: if the reservation is void, will the reserving state remain a party to the treaty without the benefits of the reservations or be excluded from treaty participation? In the literature it is possible to identify suggestions to answer this question.

According to the ‘backlash doctrine’, an incompatible reservation invalidates the state’s instrument of ratification and therefore the state is excluded from the treaty.\(^{129}\) A second trend of thought considers that the normal consequence of an incompatible reservation is not that the covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable in the sense that the covenant will be operative for the reserving party without benefit of the reservation. This is known as the ‘severability doctrine’.\(^{130}\) The severability doctrine, however, fails to account for state consent and, as I will discuss in the next section, it is not an alternative that will gain state parties acceptance with ease or gain any acceptance at all. Finally, an alternative view suggests that the state remains bound to the treaty, except for the provision to which the reservation relates.\(^{131}\)

The permissibility doctrine limits states parties’ freedom to object to

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reservations. Under this doctrine, states parties would not have competence to determine the legal effects of a reservation that affects the object and purpose of a covenant, since an incompatible reservation would be void *ab initio*. Thus, it would be necessary to legally define the entity with competence to identify the object and purpose of a treaty and the validity of the incompatible reservations. This would restrict even more the power of state parties to accept or reject reservations. Additionally, Article 20(5) of the VCLT, which indicates that a state party’s silence on a reservation is equivalent to ‘consent’ or ‘acceptance’, will have no effect if a reservation is deemed impermissible.

On the other extreme of the permissibility doctrine there is the ‘opposability doctrine’, which proposes that if a reservation is objected to by another state party to an agreement then there will be no treaty relations between the reserving and objecting state.132 Thus, in cases when there are no objections to incompatible reservations, according to the opposability doctrine, the reserving state will become a party to the treaty despite the impermissible reservation, which in turn, will become a permissible reservation if there is no objection (Article 20, paragraph 5, VCLT). Thus, objections to impermissible reservations based on invalidity will produce the same effects as objections to permissible/valid reservations.

As Craven argues, ‘[i]f a state can become party to the Convention entirely independently of the views of other contracting states, it makes little sense then to

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suggest that the reservation may be opposable.’ The opposability doctrine then does not solve the problem of invalid reservations.

Given the incomplete character of the rules embodied in the Vienna Convention and the difficulties experienced by state parties and monitoring bodies regarding reservations to international treaties, the ILC decided to place the topic of reservations back on its agenda and in 1994, the ILC established a Special Rapporteur on reservations. The Special Rapporteur, Alain Pellet, issued seventeen reports addressing various aspects concerning reservations. The reports culminated in the adoption of the ‘Guide to Practice on Reservations to Treaties’.135

The Guide to Practice is observed in the Addendum to the ILC’s Report for 2011. It is described as ‘a code of recommended practice’ to ‘guide’ the practice of states. Comprising a total of 630 pages in the ILC’s 2011 Report, the Guide suggests 179 guidelines and commentaries on these guidelines. The Guide is a non-binding document that aims to assist states in formulating reservations and interpretative declarations, and reacting thereto.

In regard to the effects of an impermissible reservation, Guideline 4.5.1

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135 Supra note 52, ‘Guide do Practice’.


137 Ibid p.401, Guideline 3.2.2, Commentary (2).


declares that when a reservation does not meet the conditions of formal validity and permissibility it is null and void, and therefore does not have any legal effect. Subsequently, it is proposed that unless the author of an invalid reservation ‘has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.’

Criticism can be made of this approach, however. A reservation is an expression of a state’s interest to not be bound by certain provisions of a treaty. Therefore, unless a treaty body requests from the reserving state a new declaration (Guideline 4.5.3, paragraph 1) the reservation is, in itself, an explicit declaration to not be bound by the treaty as a whole. As De Pauw observes,

It is possible that a State’s ratification of a human rights treaty was dependent on its reservation made. In that case, the severability doctrine cannot be reconciled with the principle of State consent, which is considered to be the foundation of international treaty law.

According to the Guide, an impermissible reservation is considered invalid and with no legal effects. However, there is no tool to bind the state to all treaty provisions without its consent. Thus, if the author of the reservation insists on maintaining it the reservation is preserved until the state party decides to withdraw it. Therefore, universality still prevails over the integrity of treaties.

In regards to the right to object to reservations, Guidelines 2.6.12, 2.6.13 and 4.5.2 of the ILC’s Guide establish, respectively:

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140 Supra note 52, ‘Guide do Practice’, Guideline 4.5.3(2) p.24.

2.6.12. Time Period for Formulating Objections

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation within a period of twelve months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.13. Objections Formulated Late

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.12 does not produce all the legal effects of an objection formulated within that time period. 

[...]

4.5.2. Reactions to a Reservation Considered Invalid

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that a reservation is invalid should formulate a reasoned objection as soon as possible.

Therefore, the ILC’s Guide maintained the VCLT timeframe of twelve months to formulate objections to a reservation. However, an incompatible reservation is still considered invalid, even without state parties’ objecting to it. So, theoretically, the invalid reservations would not create any relationship between the reserving state and the remaining state parties to the treaty, as far as the reservation extends. In this case, objections are a more significant instrument when the reservations are valid, since invalid reservations are automatically stripped of any legal effects. Nonetheless, the Guide recommends states parties to object to an invalid reservation ‘as soon as
possible’, which suggests that objections are regarded as having a significant weight as a declaration of the state parties’ understanding of the reservation.\textsuperscript{142}

As observed, the VCLT regime of reservations gives to states parties the competence to determine the validity of reservations and the consequences of the reservations in a state-to-state relationship. This system, however, does not answer the needs of the non-reciprocal rights and obligations conveyed in human rights treaties. The growing number of reservations to human rights treaties poses a threat to the protection of the rights and obligations established by the respective covenants. This threat is not well addressed by the current regime.

As human rights treaties are often silent on the procedure to determine the validity (legal effects) of reservations (e.g. ICCPR and CEDAW), the establishment of treaty bodies raises the question of whether such bodies are competent to perform such task. In this regard, Alain Pellet has already argued that human rights treaty bodies possess this competence as part of their mandates just as the state parties to an international treaty have a concurrent competence under general rules of international law.\textsuperscript{143}

The following sub-section examines the role of treaty bodies in interpreting reservations to human rights treaties. This is an issue that has been specifically addressed in the context of human rights treaties for decades. Thus, I will not attempt to resolve such complex debate in one chapter. I will, instead, focus the debate on the role of treaty bodies in interpreting reservations to human rights treaties and in the


increasing need for a new regulatory mechanism that gives power for treaty bodies to monitor the permissibility and determine the validity of reservations, as part of their monitoring work.

Besides surveying existing literature, I will consider historical developments in case law, the Human Rights Committee General Comment n.24 and the CEDAW Committee’s observations on this matter. I will also look into the ILC’s understanding of the position of human rights treaty bodies within the regulatory framework of the Vienna Convention’s regime of reservations and discuss the ILC’s Guide to Practice approach to this issue. This discussion will assist in the study of the CEDAW Committee’s competence to monitor states parties’ accountability for non-compliance with the object and purpose of CEDAW, which will be illustrated later in the thesis with the analysis of Bangladesh’s implementation of the Convention.

2.2.1. The role of treaty bodies in interpreting reservations to human rights treaties

Debates over the competence of treaty monitoring bodies to examine and determine the validity of reservations go back decades in history. In the Temeltasch and in the Belilos cases the European Commission of Human Rights assumed the competence to decide on the compatibility of reservations to the European Convention of Human Rights and Fundamental Freedoms. In particular, the Temeltasch case established the Commission’s authority to deal with reservations and interpretative declarations, on the basis of the essential characteristics of the

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In the Temeltasch case, the European Commission considered a declaration made by Switzerland on Article 6(3)(e) to the European Convention. Switzerland intended to use the declaration to remove the obligation to provide the free assistance of an interpreter if a person charged with a criminal offence could not understand or speak the language used in court. After determining that the Swiss interpretative declaration was a reservation, the European Commission considered the validity of the reservation.

The Commission based its competence to determine the validity of the Swiss reservation on ‘the very system of the Convention’. The Commission made it clear that it is competent to determine the validity of a reservation entered by states parties to the Convention. This precedent paved the way for other cases in which the European Convention’s supervisory bodies, namely the European Court of Human Rights and the European Commission (or Commission of Ministers of the Council of Europe), would have to decide on the validity of reservations.


148 Supra note 161, p.145.

149 Until the entry into force of Protocol 11 of the European Convention on Human Rights, individuals could not access the European Court of Human Rights directly. First, individuals should apply to the Commission. If the Commission understood that the case was well-founded it would launch a case in the Court on the individual’s behalf. Protocol 11 abolished the Commission and enlarged the Court, allowing individuals to have direct access to it. See Council of Europe, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. (Strasbourg, 1994). Available at: <http://conventions.coe.int/treaty/en/Treaties/Html/155.htm> [last accessed 10 February 2016]. For theoretical analysis see Petaux, Jean, Democracy and Human Rights for Europe: The Council of
The competence to examine the compatibility of a reservation was also confirmed for the European Court of Human Rights in 1988, in the judgment on the Belilos case. The Belilos case concerned an application against Switzerland by Mrs Belilos, before the Convention for the Protection of Human Rights and Fundamental Freedoms, alleging a breach of Article 6, paragraph 1 of the Convention. In its decision of 29 April 1988, the Court held that an interpretive declaration made by Switzerland (concerning Article 6, paragraph 1 of the Convention) in its instrument of ratification was legally equivalent to a reservation. It further held that the reservation was invalid under the rules on reservations of the European Convention.150

In the context of the UN human rights monitoring system, one of the earliest initiatives to determine the role of a treaty monitoring body with regard to reservations occurred in 1976 in connection with the work of the Committee on the Elimination of Racial Discrimination (ICERD Committee).151 One of the questions referred to the Office of Legal Affairs of the UN by the ICERD Committee was whether the Committee had the authority to decide upon the compatibility of reservations made to the Convention on the Elimination of Racial Discrimination. In response, the Office of Legal Affairs was clear, ‘stating that the Committee had no competence to decide on the compatibility of reservations, as the Committee was not a representative organ of states parties.’152

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The CEDAW Committee also referred to the Office of Legal Affairs a question as to the role of the Committee to interpret incompatible reservations and thus monitor Article 28(2) of CEDAW. In response to the question, the Office of Legal Affairs stated,

the functions of the Committee do not appear to include a determination of the incompatibility of reservations, although reservations undoubtedly affect the application of the Convention and the Committee might have to comment thereon in its reports in this context.

When deciding upon the competence of the CEDAW Committee, the Office of Legal Affairs acknowledged the relevance of reservations to the ‘application’ of CEDAW, which can be understood as referring to the monitoring and implementation process of the Convention, and the need for the Committee to express its considerations on incompatible reservations. However, both in the ICERD’s and in the CEDAW Committee’s cases the Office of Legal Affairs followed Article 20 of the VCLT, according to which states parties retain the competence to determine the compatibility of reservations to treaties in a reciprocal relationship with the reserving state.

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153 Article 28(2) of CEDAW prohibits reservations unless they are incompatible with the object and purpose of the Convention. See Convention on the Elimination of all forms of discrimination against women (CEDAW). Opened for signature on December 1979 (Entered into force on September 1981). Available at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [last accessed 10 February 2016].


Treaty bodies continued to claim a more prominent role, however. In 1994, in their fifth meeting, the chairpersons of the treaty bodies stated that treaty bodies should seek explanations from state parties regarding the reasons for making and maintaining reservations to human rights treaties and most significantly, they recommended that ‘treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law’. \(^\text{156}\)

In regard to treaty bodies’ engagement with reserving states Pellet observed that:

the [treaty] bodies[…] are anxious to engage in a dialogue with the state authors of the reservations to encourage them to withdraw the reservations when these appear to be abusive, rather than to rule on their impermissibility[…] This is, for example, the practice of the Committee on the Elimination of Discrimination Against Women.\(^\text{157}\)

I would not go so far to say that treaty bodies were not interested in ruling on the inadmissibility of a reservation, but they were indeed limited by the powers conferred on them by their respective covenants. The position adopted by the CEDAW Committee with respect to its competence to judge the admissibility of


\(^\text{157}\) The treaty bodies referred by Pellet are: The Human Rights Committee; The Committee Against Torture; The Committee on the Elimination of Racial Discrimination; The Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child. See Pellet, Alain (Special Rapporteur), Seventh Report on Reservations to Treaties A/CN.4/526 and Add.1–3 (5 and 9 April, 16 May and 14 June 2002) p.15 para.50.
reservations is one example. In a report, where it discussed the issue of reservations to the Convention, the CEDAW Committee argued that,

Despite the prohibition of such reservations [incompatible reservations], there is no explicit mechanism, beyond the mechanism of objections by other States parties, in the Vienna Convention or in the Convention on discrimination against women itself by which a reservation can be adjudged incompatible with the Convention.158

A similar understanding can be found in the work of the ILC. In the ‘Preliminary conclusions on reservations to normative multilateral treaties, Including human rights treaties’, from 1997, the ILC recognized that monitoring bodies have an implicit competence to ‘comment upon and express recommendations’ with regard to the admissibility of reservations. However, this cannot affect the traditional modalities of control by the contracting parties.159

When addressing the efficacy of objections in determining the validity of reservations, the HRC argued in General Comment n.24160 that objections are not enough to determine the compatibility of a reservation, especially because most states do not submit objections at all161 and when they exercise their right to object,


160 See Human Rights Committee, International Covenant on Civil and Political Rights. General Comment adopted by the Human Rights Committee under Article 40, paragraph 4 of the International Covenant on Civil and Political Rights. General Comment 24 (52)1 CCPR/C/21/Rev.1/Add.6 (11 November 1994) [hereinafter ‘General Comment 24’].

161 Ibid., p.7 para.17.
[the objection] often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned.\textsuperscript{162}

This problematic is often observed in other human rights conventions, such as CEDAW. This issue can be illustrated with Bangladesh’s reservation to Article 2 of the Convention.\textsuperscript{163} Although three states objected to Bangladesh’s reservation, claiming that the reservation is incompatible with the object and purpose of the Convention, none of the objecting states requested that CEDAW would not come into force between them and the reserving state. I will discuss this in more detail in chapter 4, but it is safe to say that the objections raised against Bangladesh’s reservation serve more as informative instruments regarding the incompatibility of the reservation, rather than principal mechanisms to determine invalidity.

The CEDAW Committee, although limited by the competence conferred by the Convention, has primarily voiced its concerns on incompatible reservations through the use of general comments and through responses to periodic reports, the latter aimed at specific reserving states. The Committee has been continuously engaging state parties in a conversation on the implementation of CEDAW\textsuperscript{164} and has been

\begin{small}
\textsuperscript{162} Ibid.


\textsuperscript{164} See the analysis of the working methods and of the CEDAW Committee in Chapters 3 and 4 of this Thesis.
\end{small}
emphatic as to the relevance of particular provisions to the object and purpose of CEDAW, such as Article 2.\textsuperscript{165} However, state parties’ explanations for the reservations often ‘may not be acceptable and do not solve the problem of the impermissibility’.\textsuperscript{166}

Although the Committee has expressly argued that reservations against Article 2 are incompatible and thus impermissible, to this day reservations entered by Bangladesh, Egypt and Saudi Arabia (among others) to Article 2 have not been withdrawn. Without the competence to determine the validity of reservations, the Committee is limited to discussing the incompatibility without attributing legal effects to the impermissible reservations.\textsuperscript{167} With the current regulations, if the object and purpose of CEDAW is contravened there are no means to rectify the incompatible reservation other than to urge the reserving state to withdraw it.\textsuperscript{168}

The debate as to which entity – state, court or treaty body – has the ultimate


\textsuperscript{166} See Fitzmaurice, M, ’On the Protection of Human Rights, the Rome Statute and Reservations to Multilateral Treaties’ (2006) 10 Singapore Yearbook of International Law and Contributors 156.


\textsuperscript{168} It is important to note, however, that the Committee’s comments regarding the compatibility of the states parties’ reservations do not affect the relationship between the reserving states and the remaining members of the Convention, which could only happen with the use of objections.
competence to assess reservations to human rights treaties using the Vienna Convention is a prolonged one. Alston and others have spent many years analysing the development, strengths and weaknesses of the treaty bodies as part of the human rights regime. Overall, their analyses show that one of the strong criticisms of the treaty bodies by states is attributed to their positions as independent organs of the UN system. Meaning that they do not serve as representatives of states parties’ interests.

However, Flood understands that treaty bodies represent the covenant itself and if state parties want the covenant to be carried out through the action of the treaty bodies, then treaty bodies would, in fact, represent state parties’ interests to see the treaty in effect. On the other hand, the author also observes that ‘since the expert members of the treaty monitoring bodies serve in their personal capacity they cannot in any direct sense represent anyone but themselves.’

Nonetheless, the VCLT flexible approach taken to the right to enter reservations to international treaties allows states parties to enter reservations that can easily go to the root of the treaty or render it inoperative in the ratifying state. As a consequence, reservations are a growing threat to compliance with human rights treaties, especially when they affect the implementation of provisions regarded as the object and purpose of the covenants. In response to this threat in General Comment

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171 Ibid.
n.24 the HRC, asserted ‘It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant’.\textsuperscript{172}

In practice, General Comment n.24 redefined the scope of the HRC’s powers. Although there is no express provision in the International Covenant on Civil and Political Rights (ICCPR) that provides the Committee with power to determine the compatibility of reservations, the HRC claimed this power aiming to improve the performance of its functions and for considering that it was unsuitable for state parties to make such a determination.\textsuperscript{173}

The reasoning used by the Committee in General Comment n.24 was challenged by the US, the United Kingdom (UK) and France.\textsuperscript{174} In the discussion on the powers of the Committee to determine the compatibility of reservations to the ICCPR, the absence of attributed powers (powers conferred on the HRC by the ICCPR itself) was raised in the objections of the United Kingdom and the United States.

The United Kingdom and United States used similar reasoning and emphasized that any binding competence could not come into being in face of the absence of law (the VCLT regime of reservations). Instead, an amendment of the Covenant would be required.\textsuperscript{175}

In their understanding, in order to provide the HRC with the competence to determine the compatibility of a reservation, the ICCPR would have to be amended or another Protocol to the existent Convention would have to be created, since the

\textsuperscript{172} Supra note 182, p.7 para.18.

\textsuperscript{173} Ibid.


treaty body does not have the power to assume this competence by its own decision as it excludes state consent. In its Second Report, Alain Pellet voiced support for this view\textsuperscript{176} and added: ‘This may be seen as an unfortunate situation, but it is a fundamental characteristic of international law as a whole and, as such, affects the implementation of any treaty, irrespective of its object.’\textsuperscript{177}

2.3. Concurrent competence to decide on the validity of reservations

The VCLT regime of reservations is based on a bilateral pattern of relationships between states, which makes it not well suited to effectively manage impermissible reservations to human rights treaties. In human rights treaties, there are no immediate advantages to be obtained with the signature of a treaty, as happens with international treaties that create economic bonds between the signatory states.

Thus, state parties may not feel compelled to object to reservations, since such reservations will primarily affect the nationals of the reserving state.\textsuperscript{178} It is therefore ‘difficult to rely on traditional inter-state mechanisms, such as state responsibility for the breach of treaties, counter-measures or dispute settlement between states, to ensure their [human rights obligations] fulfillment.’\textsuperscript{179}

Boyle and Chinkin note that ‘while consensus negotiations aim to produce a set menu for everyone, human rights negotiators prefer to offer an à la carte selection


\textsuperscript{177} Ibid., para.205.

\textsuperscript{178} For instance, a reservation that limits the rights established in a human rights treaty may directly affect the interests of other states if such a reservation limits the rights of their nationals on the territory of the reserving state. Therefore, an objection to an incompatible reservation would serve to protect the rights of the objecting state’s own nationals.

from a gourmet menu.'\(^\text{180}\) In light of the non-reciprocal nature of human rights treaties and the obligations set forth by these agreements, they have been greatly affected by reservations and the result has been detrimental to the advancement of a consistent international human rights system.\(^\text{181}\) In this context, it is argued that ‘human rights treaties belong to a specific regime to which a different system of reservations should apply’.\(^\text{182}\)

In this regard Pellet notes, ‘the categorization of a treaty as a human rights (or disarmament or environmental protection) treaty is not always problem-free; a family law or civil status convention may contain some provisions which relate to human rights and others which do not.’\(^\text{183}\) If only on the basis of non-reciprocity, it may be argued that other treaties, with similar non-reciprocal nature (e.g. the United Nations Framework Convention on Climate Change\(^\text{184}\)) may also claim a different regime of reservations. Therefore, non-reciprocity is not enough for the establishment of a new regime of reservations.

Although states still decide on the validity of a reservation and its legal effects, the supervisory system for human rights treaties is not primarily based on inter-state action, but on a combination of both collective and individual approaches to

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\(^{180}\) See Boyle, Alan; Chinkin, Christine, *The making of international law* (Oxford University Press, 2007) p.159.

\(^{181}\) See chapters 3 and 4 of this thesis for an analysis on the effects of incompatible reservations to the overall working process of the CEDAW Committee and to the implementation of CEDAW in Bangladesh.


protection. It is in this scenario where monitoring bodies exercise their work. In light of this reasoning, it is reasonable to ask about the role and effectiveness of treaty bodies in monitoring compliance with human rights treaties. If treaty bodies’ findings carried significant legal weight state parties could be more inclined to accept them. However, states need to first consent to the competence of treaty bodies to make binding decisions.

Universality of treaties cannot remain a primary aim at the expense of treaty integrity nor, more importantly, at the expense of the human rights of the individuals under the jurisdiction of state parties. Thus, common ground must be achieved. While non-reciprocity may not be enough for the establishment of a new regime of reservations to human rights treaties, it might be enough to give competence to treaty monitoring bodies to assess and determine the validity of reservations made to human rights treaties in agreement with state parties.

Establishing a concurrent competence does not harm state consent since decisions will be made concurrently between states and treaty bodies, while the monitoring bodies would enjoy powers that are necessary to the effective exercise of their functions. The ILC’s Guide to Practice applied similar reasoning in guideline 3.2.4.

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.  

185 Supra note 52, ‘Guide do Practice’.
186 Ibid., p.19.

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Therefore, according to the ILC’s Guide, treaty monitoring bodies have concurrent competence to assess the compatibility of a reservation and, consequently, the object and purpose of a treaty. Perhaps the coexistence of these two forms of control therefore does not necessarily pose a problem, but rather an opportunity where states and treaty bodies’ assessments can become a useful and complementary guide for each other. As Pellet observes,

The control of the compatibility of a reservation with the object and purpose of the treaty by independent bodies constitutes a guarantee of a more objective assessment of this rather subjective test. Monitoring constitutes consequently a clear progress in the application of the Vienna rules and therefore contributes to ensuring the integrity of the treaty in question by permitting an objective assessment of the compatibility of a given reservation with the object and purpose of the treaty – whether a human rights treaty or not.187

However, since in international law state parties have to consent to be bound by any rule, treaty bodies continue to struggle to effect any changes in states’ behaviour, particularly concerning the withdrawal of an incompatible reservation. In light of this discussion, in chapter 4 I will analyze the CEDAW Committee’s working methods and its engagement with Bangladesh, in order to illustrate how the current law on reservations and the CEDAW regime of reservations – including the rules stated in the Optional Protocol to CEDAW (OP-CEDAW)188 – affect the Committee’s capacity to effectively protect the integrity of the Convention.

Consequently, notwithstanding the 1951 Advisory Opinion from the ICJ; 18 years of deliberation by the ILC which resulted in the conclusion of the Vienna Convention;\(^{189}\) extensive literature on reservations,\(^{190}\) and the most recent addition of the ILC’s Guide to Practice on Reservations, the competence to examine the validity of a reservation is still under debate. States are the only ones with competence to determine the legal consequences of an impermissible reservation and thus determine its validity. As a result, ‘in the event of incompatibility of a reservation with the object and purpose of a treaty, it is primarily the reserving State that has the responsibility of taking action.’\(^{191}\)

Ultimately, the issue of compatibility with the ‘object and purpose’ of a treaty remains a question of law, reviewable on the judicial plane by the ICJ. However, the ICJ has limited jurisdiction and mandate, which creates barriers for a more active role in human rights cases.\(^{192}\)

\(^{189}\) Supra note 7, ‘Vienna Convention’.


\(^{192}\) Individuals have no right of direct access to the ICJ. Only states can invoke the Court’s ruling. An exception to this rule refers to the capacity of the UN to present cases before the Court. Additionally, the ICJ is only allowed to hear contentious cases – and both parties must consent to jurisdiction. See Statute of the International Court of Justice, Art.36(2). Available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> [last accessed 10 February 2016]. For more on this subject see generally, Schwebel, Stephen M, ‘Human rights in the world court’ (1997) 24(5) Vanderbilt Journal of Transnational Law 945-970; Duxbury, Allison, ‘Saving Lives in the
In the next chapter I will examine the CEDAW Articles according to the definition provided by the ILC’s Guide to the term ‘object and purpose of a treaty’. This analysis aims to identify the Articles that express the object and purpose of CEDAW, or, according to guideline 3.1.5.7, the ‘goals’ of CEDAW without which the reason for its existence would be impaired. Additionally I will discuss how the remaining provisions can be categorised, taking into account their characteristics and relevance to the implementation of the object and purpose of the Convention. Studying and identifying the object and purpose of CEDAW will allow for the analysis of CEDAW’s regime of reservations and ultimately, of Bangladesh’s reservation to the Convention.

3. INTERPRETATION OF CEDAW

CEDAW was adopted in 1979 by the UN General Assembly and entered into force in 1981. The 30 articles of the Convention cover the identification of actions to end gender discrimination at the national level and highlight the need for proactive measures for the advancement of women through equal rights in all areas of their lives.

The Convention provides the basis for achieving gender equality through ensuring women’s equal access to, and equal opportunities in, political and public life. To that end, state parties ‘agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.’

The Convention stresses the need to eradicate sex discrimination in whatever form and requires countries to take ‘all appropriate measures’ to ensure ‘the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men’ (Article 3). Thus, ‘the Convention takes women’s disadvantaged position into consideration and expects state parties to cater to the

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195 Ibid.

196 Ibid.
difference, thus requiring a concept of substantive equality to underpin all initiatives for women’s advancement’. 197

The ‘Women’s Convention’ has attracted a great number of reservations with the potential to modify or exclude provisions that are key to the implementation of the Convention. Some of these reservations are regarded by the CEDAW Committee as critically affecting the ‘object and purpose’ of the Convention. 198

The reservation system as codified in Articles 28 and 29 of CEDAW is as follows,

a) Article 28 states that the Office of the Secretary-General will collect and circulate reservations to all member states of the Convention. The same Article establishes that reservations will be invalidated if they are against the ‘object and purpose’ of the Convention.

b) Article 28(3) provides that states can remove reservations upon notification to the Secretary-General, who will notify the other member states, and

c) Article 29(1) establishes that disputes over the compatibility of reservations will be settled by arbitration or in proceedings before the ICJ, if necessary.

Three groups stand out among the reservations that might critically affect the implementation of the object and purpose of CEDAW. They are:


a) ‘Broad reservations’, which make no reference to specific provisions that would be affected by the reservation and thus have the potential to affect the entire Convention (e.g. Saudi Arabia’s reservation). Saudi Arabia’s reservation provides, ‘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’.199

b) ‘Shadowed reservations’, which indicates provisions that might be affected in case they conflict with either the state party’s legislation or its religion and cultural practices. In such cases, the possible conflict with the state’s legislation has not been determined and consequently, there is no certainty as to whether the state party will implement the provisions affected by the reservation (e.g. Turkey’s reservation). Turkey’s reservation reads as follows:

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. 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.200 [emphasis added]

c) Reservations that specify the provisions affected and the reason for the conflict with the Convention’s provision(s) are clarified, but such reservations prevent compliance with the state parties’ obligations to the Treaty. Although not ‘broad’ or ‘sweeping’ reservations, these reservations may have the effect of a sweeping reservation for being attached to a core provision of the treaty (e.g. Bangladesh’s reservation).201

Since its establishment, the CEDAW Committee has been involved in addressing reservations like the ones described above, which detract from the integrity of CEDAW. In 1987 the Committee adopted General Recommendation n. 4, which expressed: ‘concern in relation to the significant number of reservations that appeared to be incompatible with the object and purpose of the Convention’.202

In 1992, in General Recommendation n.20, the Committee requested state parties to address the permissibility and validity of reservations made to CEDAW, ‘[w]ith a view to strengthening the implementation of all human rights treaties’.203

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200 See United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, Convention on the Elimination of all forms of Discrimination Against Women, Declarations, Reservations and Objections to CEDAW. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed 10 February 2016].

201 Ibid.


The Committee appealed to the state parties, the only human rights stakeholders with the competence to attribute legal effects to reservations, to act upon the reservations that are undermining the strength and legitimacy of the Convention. However, as discussed in the previous chapter, state parties rarely will resort to ‘objections’ and it is even more rare for states to determine the invalidity of a reservation, even when objecting on the grounds of incompatibility with the object and purpose of a treaty.

General Recommendation n.19 and General Recommendation n.21 commented on the significance of Articles 9, 15 and 16 to the achievement of gender equality and non-discrimination. They also commented that a reservation entered against Articles 5 to 16 has a greater effect on the implementation of CEDAW when Articles 2, 3 and 24 are affected as well.204 Thus, General Recommendations 19 and 21 attempt to address reservations that might represent an obstacle to the successful implementation of crucial provisions of CEDAW.

General Recommendation n. 28 successfully indicated that any reservation to Article 2 is subject to impermissibility for being incompatible with the ‘object and purpose’ of CEDAW. However, General Recommendation n. 28 still failed to address which provisions represent the ‘object and purpose’ of the Convention.

In sum, General Recommendations nos. 4, 19, 20, 21 and 28 addressed the significance of reservations to treaty integrity. General Recommendation n. 28 finally addressed the incompatibility of reservations. However, the Recommendations failed to determine what the Committee understands as being the

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object and purpose of CEDAW or the significance of the Convention’s provisions in relation to the object and purpose of CEDAW.

Generally speaking, the term ‘object and purpose’ of a treaty refers to the agreement’s essential aims and motivations. Beyond this basic notion, the literature has not provided an adequate and detailed definition. Those who have tried argued that, ‘[i]nstead of reducing the potential of future conflicts [debating the meaning of ‘object and purpose’] […] plants the seed of them.’

However, the ILC’s Guide to practice on reservations suggests in Guideline 3.1.5.7 a definition for the object and purpose of a treaty, according to which the object and purpose of CEDAW is represented by the provisions that express the raison d’être of the Convention. This thesis adopts Guideline 3.1.5.7 in the analysis of the object and purpose of CEDAW.

In light of this understanding, to identify the raison d’être of CEDAW, the Convention should go through a process of interpretation, after which the meaning and significance of the Convention’s Articles would be identified. Thus, the interpretation of CEDAW’s text is a valuable tool in monitoring reservations and to the analysis of state party’s compliance with the object and purpose of the Convention.

International Law scholarship has been focusing on the question of how treaties should be interpreted especially with reference to Article 31 of the VCLT. Thus, text, context, object and purpose, and the preparatory works of a treaty are


206 See supra note 52, ‘Guide to Practice’.

elements to be examined when looking for the meaning of a treaty’s provisions. For the context of a treaty, Article 31, paragraph 2, also establishes the relevance of the Preamble, which explains the treaty’s aims and often the philosophy adopted in drafting the document. Article 31(2), reads as follows, ‘[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes[…]’

According to Gardiner the VCLT rules for treaty interpretation are not a ‘step-by-step formula for producing an irrefutable interpretation’. They are not ‘simple precepts that can be applied to produce a scientifically verifiable result’. Therefore, judgement by the interpreter is a critical component in determining how these elements come into play.

In the interpretation of a treaty’s terms, the context of those terms and the treaty’s ‘object and purpose’, it is important to consider effectiveness as a prerequisite of international law. Therefore, the interpreter should provide an understanding that facilitates coherence in monitoring compliance with international treaties.

In this chapter I will apply the rules for treaty interpretation, as expressed in Article 31 of the VCLT, in order to provide an interpretation that facilitates coherence in monitoring the compliance of state parties to CEDAW provisions. In the first part of this chapter I will discuss the origins of CEDAW and provide a context to the Convention. This discussion will be followed by a review of the history of the creation of CEDAW.


209 Ibid.
I will then analyse the position adopted by the CEDAW Committee on the subject of reservations to the Convention, aiming to demonstrate the Committee’s interpretation on the application of the Convention’s provisions. I will later examine the principles of state obligation, substantive equality and non-discrimination. This will provide a framework for the analysis of CEDAW’s text and the CEDAW Committee’s arguments on the object and purpose of the Convention. In light of this analysis, I draw a distinction between the Articles of CEDAW according to their relevance to the implementation of the object and purpose of the Convention.

3.1. The origins of CEDAW

Between 1949 and 1959, the Commission on the Status of Women (CSW)\textsuperscript{210} elaborated the Convention on the Political Rights of Women,\textsuperscript{211} adopted by the General Assembly on 20 December 1952; the Convention on the Nationality of Married Women,\textsuperscript{212} adopted by the Assembly on 29 January 1957; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,\textsuperscript{213} adopted on 7 November 1962 and the Recommendation on Consent to

\begin{itemize}
  \item \textsuperscript{210} The Commission on the Status of Women (CSW) was established in 1946 as a commission to protect women’s rights. Their goal was to promote the principle that women and men are equal and to create proposals to ensure the development of women.
  
  
  
\end{itemize}
Marriage, Minimum Age for Marriage and Registration of Marriages, adopted on 1 November 1965. Each of these treaties protected and promoted the rights of women in areas in which the Commission considered such rights to be particularly vulnerable.

However, many in the international community came to see this approach to women’s equality via general human rights treaties as fragmentary and felt the need for a treaty that focused exclusively on eliminating discrimination against women. As a consequence, on 5 December 1963, the UN General Assembly adopted Resolution 1921 (XVIII), in which it requested the Economic and Social Council to invite the CSW to prepare a draft declaration that would combine in a single instrument ‘international standards articulating the equal rights of men and women’.

The CSW prepared a Declaration on the Elimination of Discrimination against Women, adopted in 1967. However, this Declaration did not bind the signatory states to any commitment. There were no obligations attached to it. It was a statement of political intent. Five years later, in 1972, the General Assembly asked the CSW to consider working on a binding treaty.

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In 1975, in Mexico City, the most significant steps in the development of CEDAW were taken. At that time the First World Conference on Women was held, (as part of the United Nations’ International Women’s Year) which adopted the First World Plan for Action that called upon the international community to create an international treaty on women’s rights. Governments were asked to develop strategies that would achieve gender equality, eliminate gender discrimination and integrate women into development and peace-building. It was argued at the First World Conference on Women that:

even if legislative measures were a prerequisite of real equality, they were not, by themselves, sufficient to guarantee women genuine and lasting equality. A variety of social and economic measures and changes had to be taken. For example, women’s numerical participation in the labour force could be a misleading indicator of equality, as women were employed in the lowest-paid jobs.218

This idea that equality on paper does not necessarily represent equality in real life came to be the foundation of the principle of ‘substantive equality’ and a guide to the development of CEDAW. The process of compiling an overall treaty was facilitated by the First World Conference on Women and was elevated to one of the priority areas on the UN agenda. Then, after a few years of drafting and discussions, CEDAW was adopted by the UN General Assembly on 18 December 1979.219

The Convention includes rights recognized in earlier treaties applying


specifically to women and also incorporates the rights stated in the International Covenant on Economic, Social and Cultural Rights\(^{220}\) and the International Covenant on Civil and Political Rights.\(^{221}\) Both treaties already include provisions stating the international obligation of non-discrimination (Article 2 of each) and prohibiting discrimination on the basis of sex (Article 3 of each), but they do not address specifically the obstacles to women’s enjoyment of human rights in equality with men. This is CEDAW’s aim.

### 3.2. The CEDAW Committee

Article 17 of CEDAW establishes the CEDAW Committee, which began operating in 1982. The Convention states that the Committee serves the purpose of ‘[c]onsidering the progress made in the implementation of [CEDAW]’ (Article 17). The Committee describes its own mandate in similar terms: ‘[t]he Committee’s mandate is very specific: it watches over the progress for women made in those countries that are the states parties to the 1979 Convention on the Elimination of All Forms of Discrimination against Women’ and ‘[m]onitors the implementation of national measures’ to fulfil states parties’ legal obligations under the Convention.\(^{222}\)

The Committee works through a process of ‘constructive dialogue’, which follows a series of steps. They are as follows: a state party submits a report to the Committee; the Committee then provides the state with questions to be discussed at


\(^{221}\) Ibid.

hearings in Geneva; the state presents written and oral reports at this hearing; and after considering these reports, the Committee produces its own report which identifies areas of progress and areas of concern with the state’s implementation of the Convention and offers conclusions and recommendations.

The Committee’s conclusions and recommendations are not binding interpretations of the treaties and are not legally enforceable within the jurisdiction of state parties. This is true even under CEDAW’s Optional Protocol. However, in the absence of specific legislation, individuals who seek to enforce a decision of a human rights treaty body may attempt to fit their case in generally available national remedies and procedures.

Human rights advocates can employ the Committee’s recommendations in national courts to, for example, assist and influence the interpretation of legislation in accordance with the spirit of CEDAW or provide precedents around the provisions of CEDAW. An example of how a treaty body’s decision can serve as basis for a case in a national court is observed in Vuolanne v. Finland and in Torres v. Finland.

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224 Supra note 212, ‘Optional Protocol to CEDAW’.

225 For examples of references made by domestic Courts about the relevance and utility of treaty body findings see Kavanagh v Governor of Mountjoy Prison [2002] IESC 11 (1 March 2002); Residents of Bon Vista Mansions v Southern Metropolitan Local Council [2002] 6 BCLR 625 (5 September 2001).


Although not legally binding, a finding by the HRC was accepted as a basis of liability in Finnish courts. Vuolanne and Torres sought compensation from Finland because they were unable to challenge their detention before a court. The HRC understood that Article 9(4) of the ICCPR had been violated in their case. While Vuolanne instigated a civil claim, Torres instigated a procedure for administrative disputes, and was eventually granted compensation by the Supreme Administrative Court.²²⁸ Now, ‘on the basis of this jurisprudence, under Finnish law, a finding of a violation of the ICCPR in a HRC decision may create an obligation for the state to pay compensation.’²²⁹

Additionally, although not binding, the CEDAW Committee’s recommendations will form a body of case law that can be used in interpreting the provisions of CEDAW and clarifying state parties’ obligations, even more so when a state party’s ratification of the Convention is conditioned on a reservation. In the next section I discuss the CEDAW Committee’s decisions regarding reservations to the Convention. The focus is on the Committee’s understanding of the object and purpose of CEDAW.

3.2.1. The work of the Committee with reservations

A relevant number of the reservations made to CEDAW jeopardize the integral and effective implementation of substantive provisions of the Convention. These

reservations render the commitment of state parties to comply with the core obligations of the treaty more symbolic than genuine.\textsuperscript{230}

In order to elucidate the provisions considered to be crucial for the implementation of CEDAW, since 1994 the CEDAW Committee has been involved in interpreting the Convention and addressing which reservations affect its ‘object and purpose’. The Committee has engaged states parties on the subject of reservations during the review of state parties’ periodic reports, in the ‘Concluding Comments’ to the state parties’ reports\textsuperscript{231} as well as with the production of ‘General Recommendations’.

A number of the ‘Concluding Comments’ include statements indicating the Committee’s determination that certain reservations are contrary to the ‘object and purpose’ of the Convention or concern articles that are ‘central’ to the Convention.\textsuperscript{232}

With the adoption of General Recommendations Nos 19 and 21, the CEDAW Committee addressed the relevance of Articles 2, 3 and 24.


\textsuperscript{231} See chapter 3 of this thesis for a discussion of the Concluding Comments of the Committee to Bangladesh’s periodic reports.

Articles 2 and 3 establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under articles 5–16.\(^{233}\)

The Committee has noted with alarm the number of States parties which have entered reservations to the whole or part of article 16, especially when a reservation has also been entered to article 2 … Consistent with articles 2, 3 and 24 in particular, the Committee requires that all States parties gradually progress to a stage where, by its resolute discouragement of notions of the inequality of women in the home, each country will withdraw its reservation, in particular to articles 9, 15 and 16 of the Convention.\(^{234}\)

This position was reaffirmed in the Committee’s statement adopted for the Fiftieth Anniversary of the Universal Declaration of Human Rights, in 1998, when it concluded that Article 2 was ‘central to the object and purpose of the Convention’\(^{235}\) and that ‘reservations to Article 16 are incompatible with the Convention.’\(^{236}\) Therefore, ‘[c]onsistent with articles 2, 3 and 24 in particular, the Committee requires that all States parties gradually progress to a stage where … each country will withdraw its reservation, in particular to Articles 9, 15 and 16 of the Convention’.\(^{237}\)


Article 2 of CEDAW expresses the state parties’ general obligations in implementing the Convention, while Articles 3 and 24 reaffirm the relevance of the general obligations stated in Article 2 by requesting the implementation of equality and non-discrimination in all spheres of life. Article 5 expresses that states must take all appropriate measures, including legislation, to change social and cultural patterns of conduct and eliminate prejudices and customary practices based on stereotypes or ideas about the inferiority of women.

In essence, Articles 6 to 16 describe the areas of a woman’s public and private life where the goals of ‘substantive equality’ and ‘non-discrimination’ must be observed, according to the state parties’ obligations established in Article 2, as follows,

   a) Article 6, suppression of all forms of traffic, exploitation and prostitution of women.
   b) Article 7, equality with men in the political and public life of the country.
   c) Article 8, government representation.
   d) Article 9, equality to acquire, change or retain their nationality.
   e) Article 10, equality with men in the field of education.
   f) Article 11, equality with men in the field of employment and prevention of discrimination against women on the grounds of marriage or maternity.
   g) Article 12, equal access to health care services, including those related to family planning.
   h) Article 13, equal rights to family benefits, bank loans, mortgages and other forms of financial credit as well as to participate in recreational activities, sports and all aspects of cultural life.
   i) Article 14, application of the provisions of CEDAW to women in rural
areas.

j) Article 15, equality with men before the law.

k) Article 16, elimination of discrimination against women in all matters relating to marriage and family relations.

Articles 17 to 22 describe the role of the Committee on the Elimination of Discrimination Against Women. Article 23 stresses that any domestic legislation or international agreements shall be prioritized over CEDAW if they are more beneficial in achieving ‘equality’ between men and women. Articles 25 to 30 refer to the administration of the Convention.

In General Recommendation no. 28, on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all forms of Discrimination Against Women the CEDAW Committee stressed the relevance of Article 2 to the implementation of CEDAW and argued that:

Article 2 is crucial to the full implementation of the Convention since it identifies the nature of the general legal obligations of States parties. The obligations enshrined in article 2 are inextricably linked with all other substantive provisions of the Convention.238

... Article 2 expresses the obligation of States parties to implement the Convention in a general way. Its substantive requirements provide the framework for the implementation of the specific obligations identified in paragraphs 2 (a)–(f) and all other substantive articles of the Convention

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... 

Article 2 of the Convention should be read in conjunction with articles 3, 4, 5 and 24 and in the light of the definition of discrimination embedded in article 1.239

The Committee then added:

The main element of the chapeau of article 2 is the obligation of States parties to pursue a policy of eliminating discrimination against women. This requirement is an essential and critical component of a State party’s general legal obligation to implement the Convention.240

When arguing specifically about reservations to Article 2, the Committee stressed that it:

considers reservations to article 2 or to subparagraphs of article 2 to be, in principle, incompatible with the object and purpose of the Convention and thus impermissible in accordance with article 28, paragraph 2. States parties that have entered reservations to article 2 or to subparagraphs of article 2 should explain the practical effect of those reservations on the implementation of the Convention and should indicate the steps taken to keep the reservations under review, with the goal of withdrawing them as soon as possible.241

The consequence of a reservation’s ‘impermissibility’ is that the Committee may examine a state party’s implementation of the reserved provision. The state party could refuse to discuss that provision on the basis of its having entered a reservation. However, the Committee expects to have a dialogue about progress on

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239 Ibid., p.7 para.30.
240 Ibid., p. 6, para.24.
the specific issues reserved and whether and when the reservations could be withdrawn.242

After careful review of the arguments expressed by the Committee about the relevance of specific Articles of CEDAW to the implementation of the Convention, I conclude that when the Committee argued that reservations to Article 16 were ‘incompatible’ with CEDAW, the term ‘incompatible’ was used loosely. In the same document, where reservations to Article 16 were argued to be ‘incompatible’ with CEDAW, Article 2 was specifically addressed as ‘central’ to the ‘object and purpose’ of the Convention.

Additionally, as noted above, on two separate occasions the significance of Article 16 to the implementation of CEDAW was attached to compliance with the obligations expressed in Article 2. The same Article 2 was mentioned on several occasions as being essential and critical in ensuring the implementation of all of the Articles of the Convention and reservations against it were deemed ‘incompatible’ with the ‘object and purpose’ of the Convention.

Furthermore, according to the comments made by the CEDAW Committee, Articles 5 to 16 are more ‘significant’ to CEDAW when Articles 2, 3 and 24 are also affected by a reservation, which demonstrates a distinction between those provisions according to their relevance to the implementation of the ‘object and purpose’ of CEDAW.

Therefore, I understand that when the CEDAW Committee used the term ‘incompatible’ with reference to reservations entered against Article 16 it meant that reservations to that provision were not in accordance with the overall intent of the Convention, which is different from arguing that reservations to Article 16 affected

242 Ibid., p. 10, paras. 41–42.
the provisions that express the ‘goals’ of a treaty, without which the reason for the existence of the treaty would be impaired (‘object and purpose’ of CEDAW).

In order to examine the Committee’s understanding of the ‘object and purpose’ of CEDAW, in the next section I analyse the most relevant characteristics of the Convention. The focus is on the principles of substantive equality, non-discrimination and state obligation as instruments to guide the interpretation and implementation of CEDAW.

3.3. Equality, non-discrimination and state obligation: Guiding the interpretation and implementation of CEDAW

The 30 articles of CEDAW address the identification of actions to end gender discrimination at the national level and the need for pro-active measures for the advancement of women through equal rights in all areas of their lives. The ‘Women’s Convention’ recognizes that ‘despite legal rights being granted to women in many countries, discrimination persists, and women’s access to legal rights is curtailed by a denial of their rights to economic and social development.’

As Cook has noted, ‘CEDAW is an international instrument, universal in reach, comprehensive in scope and legally binding in character.’ The Preamble of the Convention refers to equal rights for men and women, but it also provides that it is necessary to go beyond the rights and principles expressed in its text, looking forward to address factors that threaten not just de jure but also de facto inequality.


Therefore, CEDAW addresses the elimination of gender discrimination by results and does not just stop at frameworks of equality that are strong on paper. States should demonstrate what they have achieved in terms of real change for women. Article 2 of the Convention stresses the need for the state party to ensure the practical realisation of rights. In this way CEDAW stresses that equality must inform the practice of institutions.245

The Articles of CEDAW are structured based on the interrelation of three principles: 1. the principle of state obligation; 2. the principle of substantive equality and 3. the principle of non-discrimination. It is explained, that, although ‘each of them is a distinct element in itself, they are also interdependent. Taken together, they provide a holistic framework for achieving women’s rights.’246

In fact, as observed in the discussion of the origins of CEDAW, the necessity for a more effective approach for the achievement of equality and non-discrimination resulted in the development of CEDAW. The principles of non-discrimination and equality, as well as the state obligations to implement ‘equality and non-discrimination’ are crucial to the interpretation of all the provisions of the Convention. Given their relevance to the Convention, it might prove to be illogical to try to interpret individual Articles of CEDAW if they are not understood according to


246 See UN Women, UN Women in East and Southeast Asia Region, UN Entity for Gender Equality and the Empowerment of Women, The principles of CEDAW. Available at: <http://www.unwomeneseasia.org/projects/Cedaw/principlescedaw.html> [last accessed 10 February 2016].
an understanding of equality and non-discrimination, as addressed by the Convention.247

In the next subsection I will examine the principles of state obligation, equality and non-discrimination through the development of a theoretically grounded framework. This analysis aims to assist in the interpretation of the CEDAW Committee’s Comments and Recommendations on the issue of reservations to the Convention and to determine the specific provision(s) which express the ‘object and purpose’ of CEDAW.

3.3.1. The principle of state obligation

The obligations to respect, protect and fulfil are known as the three types of obligations in international human rights law. This tripartite typology was introduced by Henry Shue248 and further developed by Asbjorn Eide, who acted as the UN’s


Special Rapporteur for ‘Food’ during the early 1980s.  

According to the obligations to respect, protect and fulfil states are responsible for bringing their domestic laws and practice into conformity with their obligations under international law. This responsibility is fully consistent with the principle of state sovereignty, since it does not purport to force any state to assume legal obligations against its will. It simply ‘seeks to ensure that states effectively fulfil legal obligations they have already assumed under international law’.  

Eide explained that the obligation to ‘respect’ requires states to abstain from violating a right; the obligation to ‘protect’ requires states to prevent third parties from violating that right and the obligation to ‘fulfil’ requires the state ‘to take measures to ensure that the right is enjoyed by those within the state’s jurisdiction’. The obligations to ‘respect’, ‘protect’ and ‘fulfil’ can be a helpful analytical tool in implementing and uncovering the ‘object and purpose’ of a human rights treaty because:  

[c]ategorising obligations under human rights law into obligations to respect, protect and fulfil clarifies the nature and scope of the obligations. Dividing human rights obligations in this way highlights the fact that states have an active role to play in the implementation of human rights, rather than a mere obligation of non-interference.  

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Therefore, understanding how the principle of state obligation is addressed in CEDAW will assist in finding the ‘object and purpose’ of the Convention and in examining Bangladesh’s obligations to ‘respect’ and ‘fulfil’ the commitment to implement CEDAW. It will also assist in discussing the current opportunities for state parties to CEDAW to ‘protect’ the Convention against ‘incompatible’ reservations (which might result in the violation of gender equality and non-discrimination in the reserving states).

3.3.1.1. State parties’ obligations under CEDAW: Discussing Article 2 of the Convention

In essence, Articles 2–4 of CEDAW set out the broad principles of state obligation under the Convention while Articles 5–16 provide the substance and context to which these obligations of the state should be applied. As Cook has noted, ‘Article 2 is the general undertaking article that applies with respect to the rights recognized in Articles 5–16 of the Women’s Convention’. 253

Article 24 of CEDAW is an endorsement of the value attached to Article 2, as it expresses that each state party to CEDAW will ‘undertake all necessary measures, at the national level, aimed at achieving the full realisation of the rights recognized in the present Convention’. 254 Therefore, Article 24 gives support to the state parties’ obligations described in Article 2.

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The clause ‘states parties … agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women’, expressed in the chapeau of Article 2, imposes an obligation of result. The seven paragraphs of the same article express obligations of means.\textsuperscript{255} The obligations of means and results are also categorized as ‘positive’ and ‘negative’ obligations.

Positive obligations require a positive intervention by the state, where the state interferes to prevent acts of discrimination. Thus, violation of CEDAW will occur from, for example, passivity on the part of the national authorities after being informed about conduct of discrimination against women. Negative obligations require the state to refrain from interfering in a given situation. Violation of CEDAW will occur, for instance, if the exercise of a right expressed in the Convention is limited by the state.\textsuperscript{256} In regard to the state parties obligations under CEDAW:

The State is required to fulfil both positive and negative obligations. It is required to ensure non-interference in the exercise of the rights in the CEDAW Convention (negative obligation); at the same time, it is mandated to adopt measures designed to achieve de facto equality as well as the full development and advancement of women (positive obligation).\textsuperscript{257}

\begin{footnotesize}


\end{footnotesize}
However, state parties are not liable under CEDAW for failing to implement the *means* prescribed in the Convention. So as long as the state is acting with diligence to discharge its obligations as requested by the Convention, it will be considered to have fulfilled its dues, even if substantive equality has not been achieved.²⁵⁸

Therefore, a state will not be in violation of its obligations under CEDAW if it fails to ensure compliance by all individuals with the law prescribed by that treaty in its territory, as states can never guarantee that discrimination against women will never occur. Adding to this discussion the CEDAW Committee argued that:

[under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.²⁵⁹

This notion has been accepted to incorporate the acts of private actors by the


CEDAW Committee and even in regional human rights Courts. However, in the words of Edwards, ‘it remains vague in many respects … Although private acts can now be brought within the purview of international human rights law, a close linkage with the state is still required’.  

The CEDAW Committee examined a case of discrimination perpetrated by private actors in 2005. Because of the deficient response of the Mexican authorities to widespread abduction, murder and rape of women in Ciudad Juárez, the Committee understood that the crimes did not constitute isolated or sporadic incidents. In fact, they had not been eradicated, effectively punished or remedied for over a decade. The Committee found that there was a grave violation of CEDAW, of General Recommendation no 19 and of the UN Declaration on the Elimination of Violence Against Women.

In order to address the violation of CEDAW, the Committee adopted general recommendations, aiming to strengthen coordination between the various levels of government. The CEDAW Committee acted within the limits allowed by the

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261 The OP-CEDAW entered into force on 22 December 2000. The Protocol contains two procedures: communication and an inquiry procedure. The first procedure offers the individual or a group of individuals the possibility to submit a complaint to the CEDAW Committee claiming that a state party has violated the complainant’s rights under the Convention. It provides a means of seeking redress for specific violation(s) which result from an act or omission by a state party. For the Optional Protocol to CEDAW see supra note 176, ‘Optional protocol to CEDAW’. For the comment quoted see Edwards, Alice, Violence against women under international human rights law (Cambridge University Press, 2011) p.167-168.


263 Ibid., p.41.

264 Ibid.
‘Women’s Convention’. As expressed previously, although CEDAW addresses the protection of women’s human rights in both the public and private spheres, when discriminatory practices are perpetrated by non-state actors, the only way the acts may be found to be within the scope of international law is if the state party is held responsible for not acting with ‘due diligence’ in executing the means specified in Article 2 of the Convention, in order to prevent the discriminatory practices.\textsuperscript{265}

However a doctrine that widens state responsibility for the actions of private actors or non-state actors has been gaining gradual acceptance in the literature. According to adherents of this doctrine, the current protection for the acts of non-state actors fails those who are violated in the private sphere.\textsuperscript{266} As Roth explains:

\begin{itemize}
\item implicit in this approach is that a state has some duty to protect those within its territory from private acts of violence and illicit force. When the state makes little or no effort to stop a certain form of private violence, it tacitly condones that violence. This complicity transforms
\end{itemize}


what would otherwise be wholly private conduct into a constructive act of the state.267

Under this doctrine of state responsibility in international law, a state will be in violation of its obligations under international human rights law if it fails to ensure compliance with that law in its territory by, for instance, failing to prevent violations, control and regulate private actors, investigate, prosecute, punish the violators and provide effective remedies to victims. This understanding is applied to the examination of Bangladesh’s compliance with CEDAW in chapters 4 and 5.

3.3.2. The principle of equality

CEDAW provides standards based on the notion that ‘equal treatment’ is not about treating all people the same, but about treating people differently in order to address their different needs. As a consequence, it is no longer sufficient for the state to provide equal access to services. Instead, the state needs to ensure these services adequately meet the different needs of all individuals and groups of people under its jurisdiction.268


Discussing the ‘Miller-Wohl’ controversy, Krieger and Cooney argue in favour of ‘affirmative’ policies put into practice by the states’ governments. They understand that, in some situations, equal treatment actually results in inequality for women. They argue that, ‘[i]n these situations, positive action to change the institutions in which women work is essential to achieving women’s equality because those institutions are, for the most part, designed with a male prototype in mind’.

Formal equality, often manifested in a gender-neutral framing, policy or law does not consider women’s disadvantaged positions in society. Thus, formal equality is not sufficient to ensure that women enjoy the same rights as men. For example, laws that mandate a minimum wage may raise general wage levels, but they do not fully address the pay gap between men and women, which leads to women being paid less for equal work. Equality ‘on paper’ does not necessarily lead to equal results.

In order to address the imbalance that often exists between reality and practice, CEDAW requires that the differences and inequalities between men and women are taken into account through laws and policies created to transform the unequal power relations between women and men. For this to happen, not only should there be equal opportunities for women but there should be equal access to the opportunities as well.

269 In her first year of work Tamara Buley got pregnant and missed a few days work at Miller-Wohl Co. – retailer of young women’s clothes based in Secaucus, New Jersey, USA – due to morning sickness. Following the company policy of denying any sick leave to employees during their first year, Buley was fired. Buley filed a successful discrimination complaint with the Montana Human Rights Commission, which considered that the company had violated the Montana Maternity Leave Act (MMLA) by firing Ms Buley instead of granting her unpaid disability leave. Miller-Wohl challenged the decision in federal court, arguing that equality is synonymous with equal treatment and that any law, such as the MMLA, which deviates from the equal treatment principle, is dangerous for women. See Miller-Wohl Co. v. Commissioner of Labour & Indus, State of Montana, 515 F. Supp. 1264, 1265 (D. Mont. 1981).

CEDAW promotes the model of *substantive equality* and consolidates three approaches to it: equality of opportunity (Articles 1 and 2), equal access to opportunity (Articles 2 and 3) and equality of results (*chapeau* of Article 2). The concept of substantive equality as applied by the Convention is seen as ‘directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political, and cultural participation in society’.

In the next sub-section, I examine how CEDAW addresses the model of substantive equality for women through equal opportunities, equal access to opportunities and equal results. This analysis aims to identify the provisions that are attached to the principle of ‘substantive equality’, hence providing a framework for the interpretation of the CEDAW Committee’s Comments and Recommendations on reservations to the Convention and ultimately assist in the interpretation of CEDAW.

3.3.2.1. Equality of opportunity, equality of access to opportunity and equality of results

The Convention’s approach to equality of opportunity and equality of access to opportunity considers that all women, regardless of their race, ethnicity and other features have the right to *equality of opportunities with men of access to the*

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resources of a country or community. This has to be secured by a framework of laws and policies, and supported by institutions and mechanisms for their operation.\textsuperscript{273}

In addition, the principle of ‘substantive equality’ emphasises that the measure of a state’s action to secure the human rights of women and men needs to ensure ‘equality of results’ (Article 2, paragraph 1 of CEDAW).\textsuperscript{274} Article 2 of CEDAW enjoins states parties to ensure the practical realisation of rights and states that ‘the indicators of equality are not in policies, law or institutions that have been created to give opportunities to women, but in what these laws and policies have achieved.’\textsuperscript{275}

\textit{This is the premise of the principle of equality of results.}

It should be observed though, that these results may be quantitative and/or qualitative in nature; that is, ‘women enjoying their rights in the various fields in fairly equal numbers with men, enjoying the same income levels etc. and/or women enjoying freedom from violence, equality in decision-making and political


influence. As also noted by the CEDAW Committee, ‘[p]ursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women’.

Finally, the primary provisions of CEDAW that establish the definition (Articles 1-3) and implications (Articles 4-16) of the principle of ‘substantive equality’ are:

a) Article 1 – Discrimination: defined as any act that has the ‘effect or purpose’ of impairing or nullifying women’s enjoyment and exercise of their rights in equality with men;

b) Article 2- States must pursue a policy of eliminating gender discrimination by all appropriate means, in public and private spheres. This includes the practice of the state or any private ‘person, organization or enterprise’;

c) Article 3 - States shall take all appropriate measures, including legislation, to ensure women’s full development and advancement with equal enjoyment of their rights;

d) Article 4 - ‘Temporary special measures’ should not be considered a form of discrimination, when their ultimate goal is to achieve de facto gender equality;

e) Article 5-16 - States must take all appropriate measures, in political, private and public fields, to change social and cultural patterns based on

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277 Ibid.
stereotypes or ideas about the inferiority of women. This affects the right to vote, nationality, access to education and work, etc.

As seen above, the goal of CEDAW is to address all the situations in which discrimination against women hampers equal and non-discriminatory recognition, enjoyment or exercise by women of human rights and fundamental freedoms. The state parties to the Convention undertake an obligation to ensure the practical realisation of this principle by, among other means, incorporating the principle of equality of men and women into legislation, as well as adopting other measures to prevent and prohibit all forms of discrimination against women, in public and private spheres. (Article 2)

The principles of equality and non-discrimination do not mean that all distinctions between people are illegal under international law. Differentiations are legitimate and lawful provided that they pursue a legitimate aim, such as affirmative action\textsuperscript{278} to deal with ‘factual inequalities, and are reasonable in the light of their legitimate aim.’\textsuperscript{279} These are considered ‘special measures’, as mentioned in Article

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\textsuperscript{278} In general, ‘affirmative action’ is a term used to identify policies or programs aimed at levelling the playing field for minorities in the pursuit of jobs, admission to colleges or universities or even government contracts. However, ‘affirmative action’ policies are implemented differently in different countries. For instance, in the United States affirmative action tends to refer to ‘quota systems’. Whereas in Australia, it is commonly observed in widening the opportunities for the widest possible pool of applicants to be considered for any position, and then appointments are made on merit. For more information on ‘affirmative action’ see Gamson, William A; Modigliani, Andre, ‘The changing culture of affirmative action’, In: Burtein, Paul (ed.), Equal employment opportunity: Labour market discrimination and public policy (Aldine de Gruyter, 1994) Chapter 25; Bacchi, Carol, The politics of affirmative action: women, equality and category politics (Sage Publications, 1996); Sheridan, Allison, ‘Patterns in the policies: affirmative action in Australia’ (1998) 13(7) Women In Management Review 243–252.

4 of CEDAW.  

Sometimes states undertake *affirmative action* in order to address specific conditions that are causing or maintaining discriminatory practices towards women. For example, if the policies for women to have access to undergraduate courses at universities are found to discriminate against women, impair their enjoyment of equal rights to that of men to access education, the state should take specific action to correct those policies. As explained by the Human Rights Committee, ‘as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant’.  

Therefore, elimination of discrimination against women through special measures, such as ‘affirmative action’, may be a necessary step in the removal of obstacles preventing women from enjoying or exercising human rights and fundamental freedoms on a basis of equality with men. As emphasized by the Human Rights Committee, ‘non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights’.

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3.3.3. The principle of non-discrimination

CEDAW describes, in Article 1, discrimination against women as:

Any act of distinction, exclusion or restriction which has the intent/purpose or effect of nullifying, impairing or denying the enjoyment of rights 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.

The definition of gender discrimination, as stated in Article 1, helps us greatly in understanding that discrimination can occur in the recognition, in the enjoyment, or in the exercise of a right. Discriminatory acts may occur in families, workplaces, and other sectors of society. Discrimination may happen anytime, anywhere.

For instance, players in the private housing sector (such as private landlords and credit providers) may directly or indirectly deny access to housing or mortgages on the basis of gender while some families may refuse to send girls to school solely because of their sex. Therefore, state parties must adopt measures to ensure that individuals and entities in the private sphere do not discriminate on any prohibited grounds.

It is implied in this understanding that there must be some mechanism through which a woman can denounce the violation of her right and obtain redress for it. Thus, it is part of the state parties’ obligations to CEDAW to provide the conditions so that women can enjoy the rights recognized in the Convention and to create the mechanisms for denouncing their violation and obtaining redress.

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According to Article 1 of CEDAW:

a) Discrimination can exist as distinctions, exclusions, or restrictions.

b) Discriminatory acts include those that have either the ‘purpose’ or the ‘effect’ of violating the human rights of women.

c) Discriminatory acts should be eliminated in both private and public spheres of a woman’s life.

Laws and policies that are clearly discriminatory as well as laws and policies that are sex-neutral but result in discriminatory conduct against women contravene the definition of discrimination as stated in Article 1 of CEDAW. To illustrate this argument I discuss two different cases: first, the practice of ‘virginity testing’ in women over 16 years old in South Africa and second, sex discrimination in the workplace. As explained by the CEDAW Committee,

[gender-neutral laws, policies and programs unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modeled on male lifestyles and thus fail to take into account aspects of women’s life experiences which may differ from those of men.]

In South Africa the Children’s Act of 2005 regulates the practice of virginity

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285 Virginity testers, usually older women, conduct vaginal exams to determine if a female’s hymen is intact and assess other physical features held to be indicative of the ‘innocence’ and ‘purity’ of the individual tested such as her muscle tone and the firmness of her breasts. See George, Erika R, ‘Virginity Testing and South Africa’s HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities’ (2008) 96(6) California Law Review 1447-1518.

testing. According to the law, virginity testing for males and females older than 16 years old is allowed if the children have given their ‘consent’. However, Article 12(5), b of the Children’s Act establishes that the ‘consent’ should be given after the child has been ‘counselled’. Article 12, paragraphs 4 and 5 state:

(4) Virginity testing of children under the age of 16 is prohibited.

(5) Virginity testing of children older than 16 may only be performed-
(a) if the child has given consent to the testing in the prescribed manner;
(b) after proper counseling of the child; and
(c) in the manner prescribed.

Although the Children’s Act allows virginity testing only in boys and girls over 16 years old, girls ranging from the ages of ten to 18 years are in practice subjected to this testing. Rural areas and townships, such as Kwa-Zulu Natal and Eastern Cape, have a growing prevalence of this practice or it is already widespread.288

Opponents of testing maintain that, there are no means to differentiate ‘counselling’ from ‘coercion’. They argue that it is difficult to determine whether girls would opt out of testing if there was no strong parental persuasion or social sanction.289

The justification for virginity testing is to minimise HIV/AIDS infection and to

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avoid teenage pregnancy. While one can observe a rationale behind testing as a strategy for managing the pandemic of HIV/AIDS, these tests also infringe the human rights of girls and perpetuate female oppression through strict monitoring and control of female sexuality.

Erika George explains that virginity testing has become one of the country’s most celebrated and politically charged public health initiatives in response to the pandemic of AIDS. Hugo argues that in South Africa, where it is estimated that approximately 5.5 million of the country’s 48 million people are infected with HIV/AIDS, communities look to the past for solutions to the crises.

One of the strongest arguments supporting virginity testing today is that it tries to address the spread of HIV/AIDS. According to popular belief the South African Government has failed to do so and this only fuels the arguments in support of virginity testing. Additionally, ‘Testers believe that by encouraging girls to guard their virginity, they will curb unwanted pregnancy and HIV infection rates.’

Leclerc-Madlala also suggests that some girls appreciate the social support and solidarity that develops among participants. She notes that with this added emotional support they are more likely to remain sexually inactive and withstand pressure from boys to engage in sex.

However, members of the South African Human Rights Commission on Gender Equality have condemned the practice of virginity testing. They are

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concerned that virginity testing places the expectation of subservience on young girls in regard to their sexuality, which is contradictory to dominant HIV/AIDS campaigns based on ‘empowering’ women to protect themselves.\textsuperscript{293} They also argue that although it is important for the South African people to protect their cultural practices,

[c]ulture however is not static, but dynamic. We therefore need to question many of our cultural practices and interrogate in a constructive manner the extent to which they conform with the constitution ... The founding values of our constitution include amongst others, human dignity, the achievement of equality and non-sexism. The Commission is not convinced that virginity testing, as it is currently practiced, promotes these values.\textsuperscript{294}

Taking into account the human rights violations that result from the practice of virginity testing, the CEDAW Committee urged South Africa to amend the Children’s Act. The Committee expected future changes to:

prohibit virginity tests for the child girl irrespective of their age and to design and implement effective education campaigns to combat traditional and family pressures on girls and women in favour of this practice in order to comply with its international obligations.\textsuperscript{295}


\textsuperscript{295} See Convention on the Elimination of all forms of Discrimination Against Women. Committee on the Elimination of Discrimination against Women. 48\textsuperscript{th} session. Concluding observations of the Committee on the Elimination of Discrimination against Women: Africa CEDAW/C/ZAF/CO/4 (4
Therefore, although the Children’s Act 38 of 2005 allows virginity testing, this practice is still considered discriminatory (as it should be the legislation that regulates it). Boys are far less commonly tested\textsuperscript{296} and it inflicts harm on the principle of equality, recognised by both the South African Constitution\textsuperscript{297} and CEDAW, to which South Africa is a signatory state.

A distinct example of sex discrimination that results from \textit{distinctions, exclusions, or restrictions} is commonly found hidden in gender neutral policies in the workplace. Hidden under the idea of work policies or practices, certain differential treatment may be held as forms of discrimination against women, such as: promotion and bonus criteria for men over women with the imposition of requirements for late night work or travel, which discriminate against workers with family responsibilities.

The \textit{Hopkins v. Price Waterhouse} case illustrates why the practices described above may be found to be discriminatory against women. The plaintiff was Ann Hopkins. In 1982, Price Waterhouse was considering 88 candidates for partnerships. Hopkins was the only woman candidate.

Partners were asked to make one of three recommendations (admission, denial, or hold for further consideration) and comment on candidates’ appraisal. The recommendations for Hopkins were as follows: 13 admissions, 8 denials, 3 holds, and 8 no opinions. Additionally, several partners commented on Hopkins’ poor interpersonal skills. The final decision was to hold the nomination for consideration in the next year.


In an attempt to improve her chances for the following year, Hopkins was advised by her male supervisor to walk, talk and dress in a more feminine manner. The supervisor also suggested that she wear make-up, style her hair, and wear jewellery. Hopkins resigned shortly thereafter, and filed a suit alleging sex discrimination.298

The question before the Court was whether the interpersonal skills rationale constituted a legitimate non-discriminatory basis on which to deny her partnership, or was merely a pretext to disguise sex discrimination. The Court required Price Waterhouse to show by clear and convincing evidence that the denial of partnership would have occurred without the discrimination she had demonstrated. Price Waterhouse failed to meet this burden.

The cases discussed above are just two examples of discriminatory practices perpetuated by law, policies, programs, general practices or predominant cultural attitudes in either the public or private sector, which create relative disadvantages for women and privileges for men. However, the definition of ‘discrimination’ stated in Article 1 of CEDAW also helps us to identify the weaknesses of formal or so called ‘neutral’ laws and policies. According to the Women’s Convention, discriminatory actions include those that intentionally discriminate, also known as ‘direct discrimination’, such as laws that provide that married women cannot freely dispose of their property, as well as Acts that, without having the intent to do so, result in discrimination against women, namely ‘indirect discrimination’.

In the understanding of International Women’s Rights Action Watch

nullifying, impairing or denying the enjoyment of rights of women, irrespective of their marital status … of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The distinction between ‘direct’ and ‘indirect’ sex discrimination was acknowledged by the CEDAW Committee in General Recommendation no. 25. The Committee considered that state parties have an obligation ‘to ensure that there is no direct or indirect discrimination against women’.

In General Recommendation no.19, the CEDAW Committee identified gender-based violence as another form of ‘direct discrimination against women’ and defined it as ‘violence that is directed to a woman because she is a woman or that affect women disproportionately’. Gender-based violence is a concept often used to describe practices and behaviour such as rape, sexual abuse, sexual harassment,

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301 Gender-based violence is a concept often used to describe practices and behaviour such as rape, sexual abuse, sexual harassment, domestic violence, trafficking and sexual war crimes. Both women and men can be victims of gender-based violence, however, women are usually in the majority among those affected. See United Nations General Assembly. 85th plenary meeting. Declaration on the Elimination of Violence against Women. A/RES/48/104 (20 December 1993).
domestic violence, trafficking and sexual war crimes. Both women and men can be victims of gender-based violence but women are usually in the majority among those affected.\footnote{302}{See United Nations General Assembly, 85th plenary meeting. Declaration on the Elimination of Violence against Women. A/RES/48/104 (20 December 1993).}

As mentioned previously, Article 1 of CEDAW also regulates ‘indirect gender discrimination’. Acts of indirect discrimination ‘have the effect of violating the human rights of women’. Examples are requirements such as being within particular age limits, being able to work full-time or having particular types or length of experience that impact adversely upon women employees.\footnote{303}{See McColgan, Aileen, \textit{Just wages for women} (Claredon Press, 1997); McColgan, Aileen, \textit{Discrimination Law: text, cases and materials} (Hart Publishing, 2005); Dyle, Oran, ‘Direct discrimination, indirect discrimination and autonomy’ (2007) 27(3) \textit{Oxford Journal of Legal Studies} 537-553; Forshaw, Simon; Pilgerstofen, Marcus, ‘Direct and indirect discrimination: Is there something in between?’ (2008) 37(4) \textit{Industrial Law Journal} 347-364.}

A form of ‘indirect discrimination’ is observed in Bangladesh’s Evidence Act,\footnote{304}{See Evidence Act. Came into force 15 March 1872. Available at: <http://bdlaws.minlaw.gov.bd/pdf_part.php?id=24> [last accessed 10 February 2016].} Chapter X, Section 155(4), which provides that when a man is prosecuted for rape or an attempt to ravish, it may be shown that the ‘prosecutrix’ (victim) was of generally ‘immoral character’. Therefore, Bangladesh’s Evidence Act allows the defence to introduce ‘character evidence’ about a woman victim of rape and allows procedures such as the ‘two-finger test’ (an inspection to detect if the hymen has been torn, which is part of a medical evidence collection procedure to establish rape) to be used in the courtroom to cast doubt on the moral character of the victim.

Human Rights Watch has denounced that the ‘two-finger test’ as having no scientific value. An obvious reason for this is that doctors’ fingers may be of different sizes, meaning that the perception of laxity will differ from one doctor to the next. A number of other concerns have been raised about the finger test’s forensic
value, with the general conclusion being that women’s bodies come in different shapes and sizes, and that the insertion of a finger cannot lead to a conclusion about a woman’s sexual past.

Doctors have indicated that the presence or absence of the hymen is not necessarily a conclusive sign that penetration has or has not taken place. In spite of scientific evidence against this method, in cases where it may be necessary to establish the occurrence of rape, the ‘Two-Finger Test’ can be used in judicial trials to demonstrate that the victim was not a virgin at the time of the alleged assault and that element can be considered to reduce the weight of the evidence.

In addition, Chapter II, Section 54 of the same Act states ‘if the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.’ Therefore, while the bad character of the victim is relevant, the bad character of the accused is not.

The concept of ‘indirect discrimination’ has been used internationally from the 1970s onwards first and foremost within European Community law. However, an example from Australia illustrates how employment practices of government

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307 Ibid.

departments, though seemingly neutral, may have an exclusionary effect on protected groups.

A neutral retrenchment policy of ‘last hired-first fired’ was found to be discriminatory against women, in the case of *Australia Iron and Steel Pty. Ltd. v. Banovic*. The High Court held that since the Australia Iron and Steel Pty Ltd did not take into consideration the effect of past discriminatory recruitment policies of the company, which resulted in fewer women than men being employed in positions of seniority and so immune from retrenchment than would have otherwise been the case, indirect discrimination had occurred, in violation of the *Anti-Discrimination Act 1977* (New South Wales, Australia). The policy of ‘last hired-first fired’ was considered unreasonable and the plaintiff was awarded a sum total of $AU1 million.

Another example comes from the United States. In 1971, the United States Supreme Court found in the case of *Griggs v. Duke Power Co* that the performance tests at issue in *Griggs* amounted to ‘indirect discrimination’. The results from the *Wonderlic Test* (a cognitive ability test, which rates mental ability) and the *Bennett Mechanical Comprehension Test* (a psychological aptitude test that is designed to measure job performance in mechanical fields) were applied as a requisite to allow non-high-school graduates to transfer to other departments. The Court found that the tests would necessarily discriminate against African-Americans,

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who only had access to education of lower quality at that time.\textsuperscript{311}

The concept of ‘indirect sex discrimination’ has gained broader ground within international human rights law\textsuperscript{312} and with the influence of CEDAW, the concept of ‘indirect sex discrimination’ has gained worldwide usage and has been implemented in the domestic law of countries such as Australia,\textsuperscript{313} England,\textsuperscript{314} Scotland and Wales.\textsuperscript{315}

The concept of ‘indirect sex discrimination’ is relevant because it manages, at least to some extent, to address the social differences between women and men. It plays an important role particularly in connection with the allocation of social and work-related benefits, in the areas of political participation and in education.\textsuperscript{316}

CEDAW also prohibits the total and the partial negation of a right. One example of the partial negation of a woman’s human right is laws that allow women to be citizens of a country but do not allow women to pass citizenship to their


\textsuperscript{315} Ibid.

daughters and sons, as in Algeria.

The People’s Democratic Republic of Algeria entered a reservation against Article 9(2) of CEDAW because, according to the Algerian Nationality Code and the Algerian Family Code, a child only takes the nationality of the mother 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; or when a child is born in Algeria to an Algerian mother and a foreign father who was not born on Algerian territory the child may, under article 26 of the Algerian Nationality Code, acquire the nationality of the mother providing the Ministry of Justice does not object.317

In order to understand what is meant as the object and purpose of CEDAW, in the previous sections I have addressed the relevance of the principles of substantive equality, state obligation and non-discrimination to the achievement of women’s human rights in the state parties to CEDAW. Against this background, in the following section, I will review the CEDAW Committee’s comments and recommendations on reservations to CEDAW. After this I will distinguish the provisions of CEDAW that express its ‘object and purpose’, those that are ‘significant’ for the implementation of the Convention, and those that might be classified as ‘procedural’.

317 See United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, ‘Convention on the Elimination of all forms of discrimination against women: Declarations, Reservations and Objections to CEDAW’. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed 10 February 2016].
3.4. Interpreting CEDAW and discriminating between the Convention’s Articles

A first step in the interpretation process was to apply the ‘General rules of interpretation’, as expressed in Article 31 of the VCLT, to examine the ‘text’ and the ‘context’ of CEDAW. As part of this process the arguments expressed by the CEDAW Committee regarding reservations made to CEDAW and the principles of state obligation, substantive equality and non-discrimination were studied.

When reviewing the history of the Convention, it was demonstrated that CEDAW was created to achieve one basic ideal: to obtain a consensus between states in order to promote equality between men and women by eliminating gender discrimination through a binding agreement and not merely a formal declaration of intent. Therefore, the development of state obligations in order to achieve the ideals of equality and non-discrimination constituted the goals of the drafters of the Convention.

Further, it was observed in the discussions of the CEDAW Committee that the term ‘object and purpose’ is only used with a degree of certainty when referring to Article 2 of the Convention. The Committee also indicates that Articles 5 to 16 are ‘significant’ to CEDAW due to the obligations stated in Article 2, which are enlightened by Article 1 and endorsed in Articles 3 and 24. Such distinctions

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between the provisions of CEDAW are evidence of a separation between Articles that are ‘significant’ to the implementation of the Convention and those that actually express its ‘object and purpose’.

According to Article 28 of CEDAW, reservations entered against provisions considered to express the object and purpose of the Convention are ‘incompatible’ with the Treaty and, therefore, should be withdrawn. Articles that express the ‘object and purpose’ of CEDAW are distinct from those that are ‘significant’ to the implementation of the Convention because in practice reservations entered against provisions considered to be ‘significant’ to CEDAW, even though they might eventually create difficulties in implementing the Treaty in the reserving state, are not regarded as ‘incompatible’ with the Convention.

Thus, in light of the definition provided for the term ‘object and purpose’ in Guideline 3.1.5, adopted in the ILC’s Guide to practice on reservations to treaties, I understand that the object and purpose of CEDAW is not represented by provisions only considered to be ‘significant’ to the implementation of the Convention but only those without which the reason for the existence of the Convention would be lost. Subsequently, it is necessary to discriminate between the provisions according to their value to the implementation of CEDAW.

When interpreting the CEDAW Committee’s arguments on reservations to the Convention according to the principles of state obligation, substantive equality and non-discrimination in guiding the interpretation and implementation of CEDAW, I conclude that the provisions which best express CEDAW’s ‘object and purpose’ are


319 Supra note 52, ‘Guide to practice’.

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Articles 1, 2, 3 and 24. These are not only ‘significant’ to the implementation of the Convention, but express the reason for the existence of CEDAW.

In retrospect, Article 1 of CEDAW not only introduces the need for ‘equality of opportunity’, but also describes the meaning of the principle of ‘non-discrimination’. Article 2 describes how the principle of ‘substantive equality’ should be achieved via compliance with the state parties’ obligations to the Treaty, requiring that they *effectively demonstrate* that women enjoy the same opportunities as men in all spheres of life, in both the public and private spheres. Consequently, Article 2 of CEDAW expresses not only the principle of ‘substantive equality’ but the principle of ‘state obligation’ as well. Articles 3 and Article 24 are endorsements of the necessity to achieve practical realisation of equality between men and women, as expressed in Article 2.

However, in order to provide a classification of the CEDAW provisions it is important to remember the scope of Articles 5 to 16 of the Convention. Articles 5 to 16 specify the obligations to eliminate discrimination and achieve equality as expressed in Article 2, with a focus on particular fields, such as: trafficking, exploitation and prostitution of women (Article 6); equality with men in the political and public life of the country (Article 7); government representation (Article 8) and so on.

Article 4 expresses that ‘Special Measures’ can/should be applied by the state parties in order to shift the balance and achieve ‘equality’ between men and women. Articles 17 to 22 describe the role of the CEDAW Committee. Article 23 stresses that any domestic legislation or international agreements shall by prioritized over CEDAW if they are more beneficial in achieving ‘equality’ between men and women. Articles 25 to 30 relate to the Administration of the Convention.
In conclusion, according to the study conducted above, an appropriate categorisation of CEDAW provisions is as follows:

a) Articles 1; 2; 3 and 24 – express the ‘object and purpose’ of the Convention;

b) Article 5 to 16 – are ‘significant’ to the implementation of the object and purpose;

c) Articles 4; 17 to 23 and 25 to 30 – are procedural provisions, for describing procedural conduct, such as ‘special measures’ to the achievement of equality between men and women and aspects relating to the general administration of CEDAW and the CEDAW Committee.

In the next chapter I will examine how Bangladesh uses CEDAW’s reservation system and how the reservation to Article 2 reflects on the implementation of CEDAW in the state party. To do so, a series of logical steps will be followed and part of this study is the examination of the compatibility of Bangladesh’s reservation to CEDAW, based on the classification of the Articles of the Convention developed in this chapter.
4. THE MONITORING PROCESS OF CEDAW IN BANGLADESH

Universal ratification of the main United Nations (UN) human rights treaties might be appearing on the horizon, but ratification in itself is largely a formal, and in some cases an empty gesture. The challenge now is to ensure that the promises contained in the treaties and affirmed through ratification are realized in the lives of ordinary people around the world.\(^{320}\)

In the previous chapter of this thesis I argued that the challenges related to the implementation of CEDAW are significant and unlikely to be resolved in the short term. Inconsistencies with concepts and definitions have resulted in a number of challenges with the interpretation and, consequently, the implementation of the Convention in the state parties, particularly in the reserving states. I offered a categorisation of the Articles of CEDAW applicable to the interpretation of all reservations made to the Convention, aimed at facilitating this difficult task. After interpreting the Convention, the next step in the study of the effectiveness of the CEDAW regime of reservations is to assess the impact of the Convention at the domestic or country level.

The effectiveness of any regulatory system reflects the capacity of its rules and institutions to actually address and mitigate the problems they are designed to address. Following this line of argument, I examine, in this and in the following chapter, whether CEDAW influences practices of Bangladesh towards protecting the principle of equality by eliminating gender discrimination, according to Articles 1, 2,

3 and 24 of the Convention, or whether ratification of the treaty remains ‘an empty gesture’.

In this chapter I begin to address and examine the engagement of Bangladesh and the CEDAW Committee with the monitoring and implementation process of CEDAW. This analysis has the potential to reveal pitfalls with the Convention’s regime of reservations as well as shedding light on the areas that should receive more attention from human rights stakeholders.

Since CEDAW adopted the residual reservation rules of the 1969 VCLT, I will discuss how these rules influence the monitoring process of CEDAW. This discussion includes an assessment of the performance and views of the human rights stakeholders involved with the monitoring process of CEDAW in Bangladesh, namely the CEDAW Committee, state parties and NGOs.

The success of the CEDAW Committee in monitoring the implementation of the Convention is closely tied to the effectiveness of the treaty body monitoring system and to the working methods developed and adopted by the Committee. To understand the challenges concerning the monitoring process of human rights conventions according to the current model of the UN treaty body system, I will outline the problems faced by the system and the most recent proposals for reform. Subsequently, I will survey the communications between Bangladesh and the CEDAW Committee and assess the challenges with the monitoring process of CEDAW in Bangladesh.

In reviewing the communications between Bangladesh and the CEDAW Committee, I will focus on the Committee’s comments regarding Bangladesh’s reservations and the influence of religious personal laws to examine the performance of the CEDAW Committee in monitoring the implementation of CEDAW, while
referring to the Committee’s limited competence to manage reservations made to the Convention. I will also assess how Bangladesh addresses the CEDAW Committee’s comments and recommendations in regard to the reservation.

The implementation of CEDAW in Bangladesh will be analysed in the next chapter, where I will discuss the status of women’s equality in Bangladesh. I will review the accuracy of the CEDAW Committee’s comments to the reserving state and Bangladesh’s commitment to implementing CEDAW. This chapter, however, focuses on the monitoring mechanisms to the implementation of the Convention. It assesses the positions adopted by the CEDAW Committee, state parties and NGOs as ‘agents of transformation’ in that they may potentially promote Bangladesh’s compliance with CEDAW.

As discussed in chapter 2, objections are the only mechanism with the potential to determine the legal effects of reservations. Although treaty bodies are still restricted to discussing the permissibility of reservations, member states can in fact determine the validity of reservations. Attributing legal effects to a reservation is a challenging task that may be seen as a two-edged sword. On the one hand, it can protect the integrity of the object and purpose of treaties; on the other hand, it may eventually, affect the state-to-state relationship outside the scope of human rights conventions.

In this context, I will examine the significance of the objections lodged by Sweden, Mexico and Germany to Bangladesh’s reservation. I will also demonstrate how the reciprocity system of rights and obligations established by the VCLT can be observed in the context of Bangladesh’s reservation to CEDAW.

NGOs also play an important role in the monitoring process of CEDAW. Shadow reporting is an important tool for NGOs supporting women’s rights. The
information shared through shadow reports may supplement or present alternative information to the periodic government reports that state parties are required to submit under CEDAW. Thus, shadow reports promote government accountability and are crucial sources of information regarding a state party’s compliance with CEDAW.

Following the analysis of the objections lodged by Sweden, Mexico and Germany to Bangladesh’s reservation, I will review the shadow reports submitted by ASK; BMP and STD\(^{321}\) to Bangladesh’s Fifth periodic report. I will also review the Citizens’ Initiative on CEDAW-Bangladesh to the Combined sixth and seventh alternative report.

Besides the shadow reports submitted by NGOs on Bangladesh’s implementation of CEDAW, the Committee also takes into account the information provided by UN specialized agencies\(^{322}\) on the state parties’ implementation of the Convention (Articles 22, CEDAW and Articles 2, 7, OP-CEDAW). So far only three agencies have submitted reports to the CEDAW Committee on Bangladesh’s implementation of CEDAW: the Food and Agriculture Organization of the United Nations (FAO),\(^ {323}\) the International Labour Organization (ILO)\(^ {324}\) and the United

\(^{321}\) For references and general information on the NGOs see chapter 1, section 1.5.


\(^{323}\) See Committee on the Elimination of Discrimination Against Women, Convention on the Elimination of all forms of Discrimination Against Women, Reports provided by the specialized agencies of the United Nations system on the implementation of the Convention in areas falling within the scope of their activities. Food and Agriculture Organization of the United Nations (FAO) CEDAW/C/2004/II/3/Add.1 (3 May 2004).

\(^{324}\) See Committee on the Elimination of Discrimination Against Women, Convention on the elimination of all forms of Discrimination Against Women, Reports provided by the specialized agencies of the United Nations system on the implementation of the Convention in areas falling within the scope of their activities. International Labor Organization (ILO) CEDAW/C/2004/II/3/Add.4 (11 May 2004).
Nations Educational, Scientific and Cultural Organization (UNESCO).\(^{325}\)

However, the reports did not comment on Bangladesh’s reservation or how religious personal laws may influence the achievement of gender equality. The analysis presented in these reports will be examined in the next chapter, where I review the working methods adopted by the Committee in its relationship with the UN specialized agencies as well as with NGOs. I will also study the current guidelines for the submission of reports to the Committee, and assess how the information provided by the agencies and by non-governmental organizations may influence the supervisory work conducted by the Committee.

The goals of this chapter are to analyse the CEDAW Committee’s assessment of Bangladesh’s compliance with CEDAW and Bangladesh’s engagement with the CEDAW regime of reservations. To do this, I examine the views expressed by the CEDAW Committee, by state members to CEDAW, and by NGOs. I will investigate, in particular, how the agents involved in the monitoring process of CEDAW influence the effectiveness of CEDAW’s regime of reservations in protecting treaty integrity against impermissible reservations.

4.1. **Outlining the challenges with the treaty body system**

The challenges faced by the UN treaty body system in adequately promoting respect for the protection and the fulfilment of human rights treaties have been discussed in the literature.\(^{326}\) Problems with late or non-submission of periodic

\(^{325}\) See Committee on the Elimination of Discrimination Against Women, Convention on the elimination of all forms of Discrimination Against Women. Reports provided by the specialized agencies of the United Nations system on the implementation of the Convention in areas falling within the scope of their activities. UN Educational, Scientific and Cultural Organization CEDAW/C/48/3/Add.1 (5 January 2011).

\(^{326}\) See Alston, Phillip; Crawford, James, *The future of UN Human Rights Treaty Monitoring* (Cambridge, Cambridge University Press, 2000); Bayefsky, Anne F (eds.), *The UN Human Rights
reports by states and delays in processing them have been well documented, as well as clear inefficiencies in states having to report on similar issues to different treaty bodies. States also argue that there is a lack of useful advice from the Committees on ways to address specific issues faced by the state parties domestically.\textsuperscript{327}

In 2012 the OHCHR made progress in addressing the format and working methods of the treaty bodies and how they impact on the effectiveness of the system in monitoring the implementation of the human rights conventions.\textsuperscript{328} The UN High Commissioner’s Office consulted all the human rights stakeholders in order to account for the major problems facing the treaty body system and consider possible suggestions for ways to address those problems. In summary, it was found that the major obstacles for a more effective UN treaty body system were:

a) non-compliance with reporting obligations;

b) backlogs in the consideration of reports and individual complaints; growth in the volume of documentation;


c) issues concerning national resources, capacity and coherence in the preparation of the periodic reports;

d) the need for coherence and consistency from the treaty bodies when issuing implementation advice and guidance to states; and

e) higher costs for the functioning of the treaty bodies.\textsuperscript{329}

The consultation process also resulted in the elaboration of a comprehensive package of proposals on ways and means to strengthen the treaty body system. The key proposals were the following:

a) the development of a comprehensive reporting calendar;

b) the promotion of a simplified and aligned reporting process;

c) the creation of a joint treaty body working group to make decisions on cases brought by individual communications;

d) strengthening of the expertise of Treaty Body members;

e) improvement of the implementation rates by state parties through: 1) Systematisation of a coordinated and more inclusive follow-up procedure; 2) Development of a specific, inter-committee ‘treaty body follow up mechanism’ for all Treaty Bodies or the establishment of a dedicated unit on follow-up or senior level ‘Treaty Body Follow-Up Coordinator’ post within OHCHR; 3) Treaty Bodies were also urged to develop indicators to monitor implementation and to conduct studies, in conjunction with OHCHR, to identify obstacles to treaty implementation, and 4) The idea of follow-up visits to monitor implementation was also indicated;

f) enhancement of the visibility and accessibility of Treaty Bodies through the

\textsuperscript{329} \textit{Ibid} p.20–28.
usage of modern technologies, such as webcasting and video conferencing.\textsuperscript{330}

This most recent package of proposals on ways to strengthen the treaty body system is innovative for taking into consideration the opinions of all the system stakeholders, which should, arguably, result in a more coherent, coordinated and effective system. As observed by O’Flaherty:

The observation in the statement concerning the need for all parties to reform to be willing to engage in open minded deliberation in a constructive spirit of consensus-building recognises that reform requires a generosity of spirit on the part of all its protagonists.\textsuperscript{331}

It is important to note, however, that the issues that the proposals aim to address have been a topic of concern since the mid 1980s. Within the UN,\textsuperscript{332} the most sustained contributions on the means to address the obstacles faced by the treaty body system between the late 1980s and the mid-1990s are those of an independent expert appointed by the UN Secretary-General Philip Alston, who served in that position from 1989 to 1996.\textsuperscript{333} After that, the more relevant

\textsuperscript{330}Ibid p.37–93.


\textsuperscript{333}See Alston, Philip, Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, Initial Report of
contributions arose from the 2004 ‘High-Level Panel on Threats, Challenges and Changes’\textsuperscript{334} and the 2009 ‘Dublin Statement’.\textsuperscript{335}

It appears, therefore, that there is reluctance or difficulty in implementing the required reforms. Only time will tell if the proposals on ways to strengthen the treaty body system will be successfully implemented by the UN and whether they will receive the necessary support from the treaty bodies and from other stakeholders of the monitoring system.

Nonetheless, any reform needs to take into account the challenges faced with the monitoring and implementation process of each convention in order to address the different rates of progress with implementation. The issues facing the monitoring and implementation process of CEDAW are discussed in this thesis as part of the study of CEDAW’s regime of reservations.

In the next section, I will review the communications between the CEDAW Committee and Bangladesh with the aim of understanding the CEDAW Committee’s guidance to Bangladesh on the implementation of CEDAW and Bangladesh’s responses to the CEDAW Committee’s comments and recommendations. This analysis aims to shed light on the discussion regarding the effectiveness of the CEDAW Committee as monitoring agent of the Convention.


4.2. Engaging in a conversation: Bangladesh and the CEDAW Committee discuss the reservation

At the time of the ratification of CEDAW in 6 November 1984, Bangladesh made reservations against Articles 2, 13 and 16 of the Convention. In the review of the combined Third and Fourth Periodic Reports, Bangladesh withdrew its reservation to Article 13(a), but kept the reservations against Articles 2 and 16. In July 1997, records show that the Government of Bangladesh notified the UN Secretary-General that it had decided to withdraw the reservation relating to Article 16. However, the reservation to Article 2 was still maintained.

In response to the reservation to Article 2, the CEDAW Committee expressed its concern in the Concluding comments to the Second Periodic Report submitted to Bangladesh.

The Committee also asked the Government to study article 2 of the Convention with a view to including in its subsequent reports its comments on the legislation or other structures that were preventing it from implementing that article. The Committee asked what proposals the Government had for withdrawing its reservation, which appeared to contravene articles 27, 28 and 29 of the Constitution of Bangladesh.

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338 Ibid.

In reply to the questions formulated by the Committee, Mr Pasha, representative of Bangladesh, said that three particular areas of family law – namely inheritance, marriage and divorce – conflicted with Article 2 of CEDAW and since they ‘derived directly from the Koran and Shariah there was no programme to change them, nor was there any programme to change Hindu laws on such matters that might also conflict with various provisions of the Convention’.\(^{340}\) Pasha stressed that, ‘[t]he provisions of Islamic law in force in Bangladesh did not conflict with the spirit or substance of the Convention except in the case of article 2 … in respect of which Bangladesh had expressed reservations.’\(^{341}\) Since the areas of family law that conflicted with CEDAW derived from *Sharia* Law, Bangladesh would not make any attempts to address the existing conflict with Article 2 of the Convention.

Although a conflict with the *Sharia* Law was alleged as the reason for Bangladesh’s reservation, the state party also argued that Muslim Personal Law was in agreement with the ‘substance’ of CEDAW. If that was the case, it is unclear why it Bangladesh reserves a provision that represents the substance of the Convention. It is clear that Muslim Personal Law has a strong influence in Bangladesh. This demonstrates that addressing the alleged conflicts between *Sharia* Law and CEDAW is crucial to the implementation of the Convention in Bangladesh.

A couple of months later, in July 1997, during the *Seventeenth session of the CEDAW Committee*, when analysing the *Third and Fourth Periodic Reports* submitted by Bangladesh, Mrs Cartwright, member of the Committee at that time, urged Bangladesh to withdraw its reservation against Article 2 of CEDAW. She


\(^{341}\) *Ibid*, p.7 para.27.
requested the Government of Bangladesh to ‘give very early consideration to withdrawing its reservation to article 2 of the Convention, which was incompatible with the object and purpose of the Convention.’

In reply, Bangladesh demonstrated that it was open to the idea of withdrawing the reservation to CEDAW. Mr Ahmed, representative of the reserving state, claimed that the government of Bangladesh had not refused to withdraw its reservation against Article 2 and that this provision would be reviewed in order to determine whether there are any conflicts with Muslim personal law. This was the first time Bangladesh had made a commitment to addressing the conflict between CEDAW and Muslim personal law, with a view to possibly withdrawing the reservation.

This appeared to represent a significant shift from the position previously adopted by Bangladesh’s representative at the time of the state’s Second periodic report. Previously, Bangladesh had demonstrated no intention to change domestic legislation that was in conflict with Article 2 of CEDAW. Ahmed’s comments, however, suggested the possibility of reviewing Article 2 in order to verify whether there were any conflicts with Muslim personal law. So, were there any conflicts that substantiated the reservation in the first place? In the next chapter my analysis of the conflicts of women’s human rights and interpretations of religious personal laws aims to shed light on this question.

In 2003, in the review of Bangladesh’s *Fifth Periodic Report to CEDAW*,

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the Government of Bangladesh argued that it was still assessing whether its reservation to Article 2 was in direct conflict with Muslim personal law. Although there was no declared conflict between the Muslim personal law and CEDAW, the reserving state persisted with the reservation to the Convention. Bangladesh’s reasoning for the reservation did not provide answers to the issues raised by the CEDAW Committee.

In addition, Bangladesh also suggested that because the country was still governed by the Civil and Criminal Procedure Codes345 enacted during the period of British rule, ‘followers from different religious backgrounds give discriminatory interpretations to the law [in the areas of marriage, divorce, custody, alimony and property inheritance].’346 Thus, personal religion dictates how the law should or should not be applied. Bangladesh demonstrated the existence of a conflict between the interpretation of its domestic legislation and CEDAW. However, there was no mention of what, if anything, would be done to address this conflict.

In the review of Bangladesh’s Fifth Periodic Report, the CEDAW Committee requested from Bangladesh a timetable for withdrawing the reservation against Article 2 and also asked what had been preventing the state party from withdrawing the reservation.347 In addition, the Committee questioned why Bangladesh had


chosen to opt out of the inquiry procedure, as part of the OP-CEDAW\textsuperscript{348} and observed that ‘the definition of discrimination provided by the State party conflicted with the definition set forth in the Convention.’\textsuperscript{349}

It appears that the lack of any reasonable argument for maintaining the reservation to Article 2 was catching up to Bangladesh. The CEDAW Committee was not convinced that there was a valid reason why the reservation had not been withdrawn. The Committee had already argued in General recommendations nos 19 and 21 that Article 2 has great relevance to the implementation of Articles 5 to 16 of CEDAW.\textsuperscript{350} Thus, Bangladesh’s reservation potentially affected the implementation of the entire Convention.

Bangladesh has also chosen to opt out of the inquiry procedure, as part of OP-CEDAW,\textsuperscript{351} which makes it more difficult to properly monitor the Convention. OP-CEDAW was adopted by the UN General Assembly in October 1999. The Protocol does not create any new rights but strengthens the Convention by establishing two procedures: the communications procedure (Article 2) and the inquiry procedure (Article 8).

The \textit{communications procedure} allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee. The \textit{inquiry procedure} enables the Committee to initiate inquiries into situations of grave or systematic violations of women’s rights. The Protocol

\begin{flushright}
348 \textit{Ibid.}, p.5 para. 22.
349 \textit{Ibid.}, p.5 para. 24.
351 See supra note 188, ‘Optional Protocol to CEDAW’.
\end{flushright}
includes an ‘opt-out clause’ for the inquiry procedure, allowing states, upon ratification or accession, to declare that they do not agree to answer before the Committee’s authority to investigate alleged systemic violations of women’s rights.

The ‘opt-out’ clause of the inquiry procedure allows states to avoid further scrutiny by the CEDAW Committee about cases of grave or systematic violation of women’s human rights that may have occurred in their territories. Given that Bangladesh opted out of the inquiry procedure, the CEDAW Committee cannot invite the state party to assist in the examination of any information received by the Committee or ask for the production of any observation with regard to the information received. Opting-out of the inquiry procedure may be interpreted as lack of commitment to implementing CEDAW as well.

In reply to the comments made by the CEDAW Committee Bangladesh argued that the only reason for the reserving state to have opted out of the OP-CEDAW was to ‘minimize duplication in dealing with the various UN human rights bodies and authorities.’\(^\text{352}\) The reserving state also added that the Constitution of Bangladesh, in Articles 10, 27, 28, 32 and 39 ‘reflected the ideals’ of CEDAW.\(^\text{353}\) Bangladesh assured the Committee that ‘the outlook of its people and society had evolved, as had their support for the advancement of women. In step with those changes, women themselves had become more independent and assured and were standing their

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ground against discriminatory treatment’.

However, it is important to note that no additional reports are requested under the Optional Protocol. As explained above, by accepting the inquiry procedure the state party is agreeing to participate in investigations of women’s rights violations and to produce reports on the status of women’s rights. In light of this, the Committee asked the state party whether it intended to withdraw its declaration to opt-out of the inquiry procedure. This question has not yet been addressed by Bangladesh, and the reserving state remains absent from the inquiry procedure of OP-CEDAW.

Since Bangladesh also argued that its Constitution, particularly Articles 10, 27, 28, 32 and 39, reflected the ideals of CEDAW, it is important to examine each provision. Article 10 regulates the ‘participation of women in all spheres of public life’ as a ‘Fundamental Principle of State Policy’. Article 27 regulates ‘Equality before the law’ as a fundamental right. Article 28 establishes the ‘Prohibition of Discrimination on the grounds of religion’. Article 32 regulates the ‘Protection of the right to life and personal liberty’ and Article 39 establishes the protection of ‘Freedom of thought and of conscience and speech’.

However, none of these provisions provides a definition of discrimination and, as discussed in the previous chapter, the path to achieving equality is through non-discrimination. This allows different interpretations to be given, not only to the

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354 Supra note 367, p.10 para.60.
Constitution, but also to other laws in the country that might be relevant to protecting women’s rights.\textsuperscript{357}

Article 28 (1) is a positive exception. ‘The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.’\textsuperscript{358} In other words, the state may undertake affirmative action measures to ensure equality. The state is not prevented from making special provisions in favour of women or children or for the advancement of any unprivileged section of the society.

However, Article 27 of the Bangladeshi Constitution, expressly addressed by the state party as representing the ‘ideals’ of CEDAW, may be subject to discriminatory interpretations. Article 27 states that ‘All citizens are equal before law and are entitled to equal protection of law’.\textsuperscript{359} If the concept of equality, as understood by existent interpretations of the Muslim Personal Law, is applied to the interpretation of Article 27, a situation comparatively different from the interpretation derived from the principle of equality as conceptualized in CEDAW may arise.

\textit{Shariah} Law recognizes the legal status of women and men as being equal before \textit{Allah} and the \textit{Ummah} (Islamic community). However, as Akstinienë


\textsuperscript{358} \textit{Ibid.}

\textsuperscript{359} \textit{Supra note} 348.
observes, ‘This ‘equality’ however, is not conceived in an absolute sense. Although all people are considered equal before Allah, with no distinction as to gender, language, race or religion; equality in religion is not the same as equality in society.’

According to the Shariah Law, women and men are not equal in their marital life nor in the context of family relations. Since Muslim Personal Law governs legal issues such as marriage, divorce, child custody and inheritance, the rights and duties of Muslim women are deeply affected with respect to fundamental social and family practices.

Although Bangladesh had defended its Constitution on the grounds that it reflected the substance of CEDAW, in the Fifth Periodic Report the reserving state observed that interpretations arising from doctrines of personal religion impair the achievement of equality for women: ‘[f]ollowers of different faiths come under somewhat different provisions of laws and as a result discriminatory situations arise in areas of marriage, divorce, alimony, custody and guardianship.’

Although the state party had agreed that ‘discriminatory situations’ happen as a consequence of interpretations of the national law influenced by religion, it is

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reasonable to ask why the state party has not yet provided a definition for the term ‘discrimination’? Providing a definition for ‘discrimination’ is crucial to avoid different interpretations of the law that might be harmful to the achievement of women’s rights. Therefore, the state party’s inaction may be regarded as an infringement of the state’s obligation’s under CEDAW.\(^{365}\)

In the review of the combined *Sixth and Seventh Periodic Reports*, Bangladesh restated its ‘commitment’ to review and consider the possible withdrawal of the reservation against Article 2 of CEDAW.\(^{366}\) However, that has been a commitment of the state party since July 1997, when the representative of Bangladesh addressed the considerations of the CEDAW Committee to the state party’s combined *Third and Fourth Periodic Reports*.\(^{367}\)

Bangladesh’s *Eighth periodic report*, submitted to the CEDAW Committee in 27 May 2015, has not yet been reviewed by the Committee, but nonetheless warrants discussing here. The withdrawal of the reservation on Article 2 is still under consideration:

Withdrawal of existing reservation on Article 2 … was considered and the LC was requested to review the merit of the reservation and to provide appropriate recommendations. Following the examples of other Muslim Countries, the LC opined, “The Government of Bangladesh withdraws her reservation from Article 2 … of the Convention on the Elimination of All Forms

\(^{365}\) See chapter 3, section 3.3.1.


of Discrimination Against Women. However, Bangladesh shall apply the provisions of these articles in compatibility and harmony with her Constitution and existing laws”. The Government is considering the recommendation.\textsuperscript{368}

However, unlike the previous reports, in the eighth periodic report Bangladesh stated with clarity why the withdrawal of the reservation had become such a time-consuming process:

The personal laws are in light with the religious provisions of different religious faiths, which in some cases have discriminatory provisions in marriage and divorce, inheritance, guardianship, etc. Modification of personal laws needs agreements by the leaders of all religious faiths. The society is not yet ready to accept such modification and the Government being mindful of the possible repercussion of the conservative religious groups, [is] taking cautious steps.\textsuperscript{369}

There are two contradictory aspects to this consideration. The reserving state claims that it is necessary to be cautious in considering the withdrawal of the reservation, and yet, the state argues that it is impotent in the face of the yet strong political support for religious personal laws.

Bangladesh argues that because of a lack of enforcement of existing legislation, there are limits to the government’s commitment to eliminating discrimination against women. The state argued that because of women’s lack of knowledge, the cost and time involved in legal processes, and the patriarchal attitude of (as well as lack of commitment by) the members of the judiciary and law enforcement agencies,


\textsuperscript{369} Ibid, p.11 para 47.
‘the inequality in some personal laws outweighs the equality in civil laws.’

The reserving state endeavoured to explain how discrimination against women still exists in the public spheres of the country, and noted an even worse reality: law enforcement agents maintain and support this practice. Thus, the political power of religious leaders appears strong enough to exert influence over government agencies. There is an implication here that, in an Islamic state, religious doctrines will have great political influence over state affairs. However, in its Eighth periodic report Bangladesh expressed the view that fundamentalist religious groups practise discriminatory interpretations of the law and that these interpretations are adopted by law enforcement agencies. In these circumstances it is doubtful whether enforcement of any new legislation that is favourable to women’s rights is feasible. It is unlikely that any substantive progress with women’s rights will be achieved. As Chaturvedi and Montoya observe,

given the differences between Islamic culture and the Western conceptions of women’s rights,

Muslim countries [and Muslim states] that limit the influence of religious factions on government processes will expand women’s rights while Muslim countries that do not limit religious influence will either remain stagnant or weaken women’s rights.

Given the comments of the reserving state in its latest periodic report, the argument made by Chaturvedi and Montoya appears to be valid in the socio-political context of Bangladesh. Bangladesh’s government observed that the steps taken to promote gender equality via new laws and national programs are continuously

370 Ibid. p.11 para.49.
obstructed by discriminatory religious practices and argues that ‘[s]ociety is not yet ready to accept changes and some more time is necessary to change the social norms’. 372

Even if more time is necessary, the reserving state has not indicated any changes that could be implemented in order to address the influence of discriminatory interpretations of religious personal laws in state affairs and, in turn, to withdraw the reservation to CEDAW. Thus, it remains a task for the CEDAW Committee, NGOs and state parties to ask difficult questions, such as: what will the government do to address the discriminatory religious practices that still prevail in society? If legal and policy measures are not enough, how does the government plan to address the socio-cultural factors that make women vulnerable to discrimination?

From the Second periodic report to the Eighth periodic report, Bangladesh expressed completely opposed arguments. While in the Second report the state argued that it ‘would not’ do anything to withdraw the reservation because of the Sharia Law, in the Eight report the state argued that it ‘could do’ little to withdraw the reservation because of the Sharia Law.

At first, Bangladesh showed no intent to withdraw the reservation. Then, the reserving state indicated a willingness and commitment to withdrawing the reservation. However, it has also demonstrated limited power to act against discriminatory practices that originate in religious personal laws. Monitoring the implementation of CEDAW in a reserving state is, by itself, a challenging job, but monitoring compliance with CEDAW in a reserving state that declares its impotence against a major cause for discrimination in the country is an even more daunting task.

Bangladesh’s repeated commitments to considering withdrawal of the reservation have been made alongside elusive arguments that do not address directly the question of whether the state party will or will not withdraw the reservation. Instead, the state party has often provided subtle support for the reservation based on the existence of alleged women’s personal growth, in terms of their capacity to defend their human rights,\textsuperscript{373} or by claiming that the Constitution already reflects the ‘substance’ of CEDAW.

As mentioned above, the CEDAW Committee has repeatedly suggested that Bangladesh should not only remove the reservation against Article 2, but also abolish any discriminatory laws and enact necessary legislation to implement the state party’s obligations under CEDAW. However, despite the efforts of the Committee, Bangladesh’s reservation still stands. With the exception of the 2009 Amendment to the Citizenship Act of 1951,\textsuperscript{374} which allows women to pass citizenship to their children, no significant improvement has been made regarding reform of religious personal laws, including inheritance law.

As discussed in chapter two of this thesis, the CEDAW Committee is not a contractual party to the Convention. Instead, the Committee is a supervisory body that monitors the implementation of CEDAW. Thus, it has limited capacity to address the permissibility of Bangladesh’s reservation and request the withdrawal of the reservation.

The Committee does not have the competence to determine the validity of, and


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thus attribute any legal effects to, the reservation. This power is restricted to state members to CEDAW and to the ICJ by request. State parties to CEDAW can make use of objections to determine the legal consequences of Bangladesh’s reservation to the state’s bond to the Convention.

The state parties to CEDAW may or may not accept Bangladesh’s reservation. If the state parties find the reservation to be impermissible, they may ‘object’ to it. In contrast to the CEDAW Committee, state parties to CEDAW have the option of determining whether CEDAW will or will not enter into force between them and Bangladesh (Articles 20 to 22 of the 1969 VCLT). Consequently, objections to reservations made to the Convention are a crucial part of the monitoring process of the Convention.

In the next section I will examine arrangements for the ‘acceptance’ of, and ‘objection’ to reservations to CEDAW. Further I review state parties’ objections to Bangladesh’s reservation and discuss the effectiveness of the objections to protect the integrity of the Convention.

4.3. Acceptance of (and objections to) Bangladesh’s reservation to CEDAW:

When ‘object’ means to ‘accept’

According to Article 19 of the VCLT states cannot formulate reservations that are prohibited by the treaty, which fall out of the scope of reservations permitted by the treaty, or when they are incompatible with the object and purpose of the treaty. However, CEDAW only prohibits reservations entered against its object and purpose and does not determine which reservations are allowed under the Convention. Therefore, state parties may object to reservations based only on their

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375 Supra note 7, ‘Vienna Convention’.
impermissibility due to incompatibility with the object and purpose of the Convention.

In terms of the time frame for lodging objections, according to Article 20(5) of the VCLT, a state party to an international treaty has a period of twelve months to object to a reservation and after that time the silence is equivalent to consent or acceptance. Consequently, inaction from a state party on a reservation will result in it being precluded from making further objections.

However, CEDAW does not specify a time frame for its state parties to react to a reservation. In this regard Article 29(1) reads as follows:

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.

Thus, it can be inferred from Article 29(1) of CEDAW that if a state party to the Convention does not object to a reservation within twelve months of being notified, although it might preclude its right to ‘object’ to the reservation according to the VCLT rules, the state party can still submit its disagreement to arbitration and, if not satisfied with the result, to the ICJ.

As seen in chapter 2, the 1969 VCLT sets rules for reservations to treaties and does not distinguish between different categories of treaties. These rules are based on the notion of reciprocity of rights and obligations between the state members of the treaties. However, human rights treaties create ‘an objective regime of protection of
Human rights treaties are non-reciprocal in nature. Thus, states will have no immediate benefit when objecting to a reservation made to a human rights treaty. In such situations, states may see no interest in objecting, other than to maintain treaty integrity.

However, a state may seek to object to a reservation that limits the rights of their nationals on the territory of the reserving state. In this case, objecting would be in the interest of the nationals of the objecting state and not to limit similar human rights guarantees of the nationals of the reserving state living in the territory of the objecting state. However, generally the absence of reciprocity may discourage states from objecting to impermissible reservations.

So far, only three state parties to CEDAW have objected to Bangladesh’s reservation against Article 2. The objecting states are Germany, Mexico and Sweden. All three identified the incompatibility of Bangladesh’s reservation with the object and purpose of CEDAW. However, none of the objections requested the prevention of entry into force of CEDAW. In its objection Germany declared:

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377 Ibid.

378 See Church, Joan; Schulze, Christian; Strydom, Hennie, Human rights from a comparative and international law perspective (Usina Press, 2007) p.186.


380 Ibid, p.44.

381 See United Nations, Division for the Advancement of Women. Department of Economic and Social Affairs, Convention on the Elimination of all forms of discrimination against women: Declarations, Reservations and Objections to CEDAW. Objections (Unless otherwise indicated, the objections were made upon ratification, accession or succession.) Sweden, 17 March 1984. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed 10 February 2016].
The Federal Republic of Germany considers that the reservations made [...] by Bangladesh regarding article 2 [...] is incompatible with the object and purpose of the Convention (article 28, paragraph 2) and therefore objects to [it].

Later, the objecting state argued that, ‘[p]ursuant to article 28, paragraph 2, of the Convention, reservations that are incompatible with the ‘object and purpose’ of the Convention shall not be permitted.’ However, despite considering the reservation incompatible with CEDAW, Germany stated that the ‘objection shall not preclude the entry into force of the Convention as between … Bangladesh and the Federal Republic of Germany.’

Mexico also objected to the reservation made by Bangladesh to CEDAW but did not want to make any comments on the participation of Bangladesh as a state party to the Convention. Similarly, Sweden objected to Bangladesh’s reservation alleging its incompatibility with the object and purpose of the Convention. However, the Swedish government did not make any comments on the participation of Bangladesh as state party to the Convention or whether the objection would preclude

382 Supra note 371, p.42.
384 Supra note 371.
the entry into force of CEDAW between Bangladesh and Sweden.\textsuperscript{386}

As seen above, although Germany, Mexico and Sweden objected to Bangladesh’s reservation and argued for the incompatibility of the reservation with CEDAW, none of the objections changed the relationship between Bangladesh and the objecting states as parties to the Convention. In this regard, Lijnzaad observed that, ‘[i]t is hard to see why a state objecting to a[...] reservation would not oppose entry into force.’\textsuperscript{387} There are reasons, nonetheless.

Objections to reservations are often delicate acts because, before objecting to a reservation, the objecting state has to evaluate if the objection is worth making, considering the risks it might involve.\textsuperscript{388} For instance, if the relations between the two states are tense for other reasons, objections could be perceived as an unfriendly act. Therefore, objecting to the reservation, without precluding the establishment of treaty relations, is a way of expressing disagreement in a ‘friendly’ manner. In cases like these, objections do not represent substantial pressure on the reserving state to withdraw its reservation. Instead, they function primarily as ‘declarations’ or an ‘atypical form of acceptance’.\textsuperscript{389}

As noted previously, ‘the motivation of states as parties to the treaty or in their individual relationships with the other members will, ultimately, impact on their

\textsuperscript{386} See United Nations, Division for the Advancement of Women. Department of Economic and Social Affairs, \textit{Convention on the Elimination of all forms of discrimination against women: Declarations, Reservations and Objections to CEDAW. Objections (Unless otherwise indicated, the objections were made upon ratification, accession or succession.) Sweden.} Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed 10 February 2016].


interests to object or not to a reservation. Objectivity is impaired when analysis of
the compatibility of a reservation is left to individual state parties. Member states
might have, besides the legal reasons, also economic, political and other extra-legal
considerations to take into account before objecting to a reservation and deciding on
the entry into force of the Convention between the reserving state and the objecting
state.

Although Germany, Mexico and Sweden objected to Bangladesh’s reservation,
they did not oppose entry into force of CEDAW between them and Bangladesh.
According to the current residual reservation rules of the VCLT (Article 21,
paragraph 3), CEDAW would enter into force between Germany, Mexico, Sweden
and Bangladesh without the obligation of the objecting states to comply with Article
2. However, as Simma observes, ‘[r]eciprocal non-application of a reserved
provision by another State Party [to a human rights treaty] would not only be absurd
but also legally inadmissible.’

Under treaties with reciprocal rights and obligations the provisions affected by
the reservation will not come into effect between the reserving and the objecting
state. However, human rights treaties are non-reciprocal and therefore an objecting
state’s obligation will not be changed or reduced. The objecting state will continue to
fulfil the same obligations to its own nationals.

Thus, it is no surprise that states did not make use of arbitration to settle their
different opinions regarding Bangladesh’s reservation. The use of arbitration
represents an even greater chance for conflicting views regarding the permissibility

390 See chapter 2, p.52-53.
analysis’ In: Collected courses of the Academy of European Law (Kluwer Law International, Vol.4,
of a reservation to be translated into conflicts in the state-to-state relationships. Further, states would still maintain their original obligations to the Treaty.

Although the objections to Bangladesh’s reservation have no apparent legal effect, it should be noted that any objection carries the weight that the objecting state gives to the reservation. Hence, even in cases when the objections do not prevent the entry into force of the Treaty they are often considered as statements concerning the state of the law. Therefore, the objections may prevent or minimise the formation of customary law opposable to the objection.

Despite the apparent ineffectiveness of the objections submitted by Germany, Mexico and Sweden, their arguments represent an important element in the study conducted in this thesis. The objections to Bangladesh’s reservation express the opinions of state parties that are under the same regulations as the reserving state about the compatibility of the reservation to Article 2 of CEDAW.\(^{392}\)

In addition to the opinions expressed by CEDAW state parties regarding Bangladesh’s reservation to the Convention, the views shared by NGOs, particularly those that are actively involved with women’s rights in the state party, also represent an important element to be considered in the study of the impact of Bangladesh’s reservation to the implementation of CEDAW in the country.

As I discuss further below, NGOs have been successfully ‘translating’ CEDAW into the domestic reality of Bangladesh when advocating for policies directed at promoting and ensuring respect for women’s human rights in the reserving state. With the use of shadow reports NGOs also act as ‘watchdogs’,

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\(^{392}\) It should be stressed that the relationships between Bangladesh and the objecting states outside the ambit of CEDAW are not under analysis in this thesis. For instance, the present argument on the ineffectiveness of objections in pressuring Bangladesh to withdraw its reservation does not analyse the possible consequences of the objections on economic partnerships that were or could be formed between Bangladesh and the objecting states.
increasing the transparency of state actions and the participation of society in the promotion of gender equality in the public and private spheres. Therefore, NGOs play a key role in the monitoring process of CEDAW and they are also responsible for exerting increasing pressure on Bangladesh’s leaders and policymakers to advance gender equality and non-discrimination in the country’s public and private spheres.

4.4. NGOs in Bangladesh: ‘Empowering’ women and debating the reservation to CEDAW

After the war of independence of Bangladesh in 1971, ‘the state inability to contain poverty, illiteracy and corruption has posed limitations on the civil rights of women.’ With the assistance of foreign donors, who actively took part in rebuilding the weak and damaged economy and the socio-political structure of Bangladesh at the time, ‘women’s issues’ became tagged as development, which helped to promote the process of ‘empowerment of women’ in the region and the general interest and involvement of NGOs with women’s rights.

The concept of ‘empowerment’ is a controversial topic and it has a long history in the social sciences. In this thesis, ‘women’s empowerment’ is a term used to mean a mechanism to improve women’s lives in the public and private spheres. This


concept is accompanied by freedom and self-determination, enabling women to be independent of men.  

NGOs devoted to working for women’s rights in Bangladesh are numerous and varied, ranging from village-based groups with 10 to 15 members, working on manual activities like sewing and handicrafts, to vast national organizations, such as the Bangladesh Mahila Parishad with its 150,000 members. Their methods of work and the interpretations given to the idea of ‘empowering women’ differ as well. Studies conducted in the 1980s to the mid-1990s demonstrate how the notion of empowering women has been addressed by NGOs in Bangladesh.

Under the influence of a few NGOs, many illiterate women in rural Bangladesh were no longer subservient to the village elders, known as Matbars (members of the village courts who are next in hierarchy to the members of the Union Parishad (lowest electoral unit) nor to the Mallas (influential to the village elders for endorsing activities in the name of Sharia law). Many of them have acquired courage to speak to the local village councils and defy village elders who seek their votes in local and national elections.

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As Hashimi explains, ‘under the overpowering influence of the rural Mullas… the average Bangladeshi Muslim has been programmed to accept the subjection of women in every sphere of life as natural, efficacious’. The author further argues that ‘[t]he persecution of hundreds of poor rural women by village Mullas and their patrons (powerful village elders) in the name of “Islamic Justice” through village courts (salish) in the recent past (1990-5) further aggravates the situation’.

Therefore, by acquiring courage to speak to the local village councils and defy village elders, women in rural Bangladesh might be putting their lives at risk. This fact alone demonstrates the powerful influence of the NGOs that work to empower women with the confidence to voice their own opinions in face of those that continuously try to oppress them.

As Naher explains, the growing influence of NGOs came with a price and the work developed by women’s organisations became the central focus of attacks by some Islamist groups in Bangladesh between 1993 and 1994.

This development was, on the one hand, related to the increasing prominence of religious discourse in socio-political life in Bangladesh, and on the other hand, an outcome of attempts by different groups and institutions to gain or retain patriarchal control over women. The religious groups that opposed NGOs in general and women’s participation in NGO programs in particular, claimed to be defending Islam and women’s honour.

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400 Ibid, p.63.
Despite attacks from Islamist groups, the 1990s was a period of continued and accelerated proliferation of NGOs, many of which targeted women and girls in different sectors such as family planning, education and micro-credit. In fact, ‘NGOs in Bangladesh are currently very involved in the direct provision of services’. An example is the Bangladesh Rural Advancement Committee (BRAC), the world’s largest development NGO.

Goetz examines how BRAC’s development programs influenced the development of different notions of ‘empowerment of women’ at an institutional level. Goetz observes that ‘empowering women’ is not always a goal or even a concept understood by development workers involved with projects or programs created by BRAC and RD-12 (Rural Development Program of the Bangladeshi government). She examined how both institutions approached the idea of empowering women and the role women development workers play in promoting women’s interests in development programs.

Goetz also observed that women working for those institutions were concerned primarily with the disbursement and recovery of loans, and few of the female development agents believed they had a mission to empower women. From the two organizations studied, BRAC is making more explicit adjustments in terms of the behaviour of their women staff, whereas RD-12 has no agenda for using their women

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404 See BRAC. Who we are. Available at: <http://www.brac.net/content/who-we-are#.UGOv_RgVrZs> [last accessed 10 February 2016].

405 See Goetz A M, Women development workers: implementing rural credit programmes in Bangladesh (New Delhi, Sage Publications, 2001).

406 Ibid.
staff as social pioneers.\textsuperscript{407} Goetz concludes that hiring a large number of women does not by itself lead to gender equality. More has to be done at the institutional level, particularly addressing patriarchal strategies in policy implementation.\textsuperscript{408}

In a different study, Nazneen, Hossain and Sultan examined BRAC from the perspective of its clients. They argue that for BRAC, ‘rural poor women are empowered through engagement with the market and taking part in productive activities, reflecting the central importance of microfinance’.\textsuperscript{409} They then explain that ‘[a]nalysis of [BRAC] annual reports suggests that empowerment is seen as an outcome of the inputs they provide’ and that ‘[BRAC] reports are full of stories of women improving their material conditions or community status’.\textsuperscript{410}

The study states that in the BRAC reports, many women who joined the organisation felt that by taking out a loan their lives had changed, because they were able to make investments in business and send their children to school. This suggests that different ‘needs’ of women are connected with different dimensions of empowerment of the Bangladeshi women joining BRAC. In this case, ‘empowerment’ comes from the capacity of generating a source of income.

As mentioned above, the approach taken by women’s NGOs in Bangladesh to the idea of empowerment of women is varied. The studies conducted by Goetz and also by Nazneen, Hossain and Sultan demonstrate that although women development workers might not be much concerned with their role in empowering women, through the disbursement and recovery of loans they generate independent sources of

\textsuperscript{407} Ibid., p.195 – 257.
\textsuperscript{408} Ibid., p.291 – 328.
\textsuperscript{410} Ibid.
income to each client of BRAC and assist with the promotion of different notions of empowerment.

‘There is no “one-size-fits-all” approach to women’s empowerment.’ 411 Despite their different approaches, NGOs working in Bangladesh have assumed a position of ‘agents of development’, 412 targeting women as key sites of investment and promoting the significance of education and employment programs as arenas of women’s empowerment. Arguably, they represent a key element in shaping state practices and the view of women in the public and private spheres in Bangladesh.

As Gauri notes, ‘[t]he role of the NGO as lobbyist is potentially a powerful one. The prevalence of NGOs all over Bangladesh, and the importance of the services they provide for their communities, placed them in a unique position to influence the government at both a local and national level.’ 413 Thus, the opinions expressed by NGOs actively involved with advocacy and consciousness raising are an important component of the discussion of the impact of Bangladesh’s reservation to CEDAW on the implementation of the Convention.

4.4.1. NGO participation in the monitoring process of CEDAW

As part of the communications procedure of the OP-CEDAW (Articles 2 and 7), the CEDAW Committee receives information from NGOs on the record of state parties through shadow reports. They can challenge ‘where the state party’s


government may be trying to mislead the Committee’. 414

A well documented shadow report is a powerful tool for NGOs. It offers NGOs an official platform to review the accuracy and veracity of the information presented by the state as well as providing the CEDAW Committee with the additional information it needs to address specific gaps in the state party’s policies and specific barriers to the achievement of gender equality in the public and private spheres of a woman’s life.

In 2004 the NGOs ASK, BMP and STD jointly submitted a shadow report to the CEDAW Committee, expressing their common understanding that the government of Bangladesh should withdraw the reservation against Article 2 of CEDAW. 415 The NGOs argued that Bangladesh’s reservation is inconsistent with the country’s constitutional guarantees of equality and non-discrimination, as well as with the ‘National Policy for the Advancement of Women’ (NPAW). The NPAW enunciates a commitment to gender equality and covers a range of areas, such as the prevention of violence against women, women’s education, employment, food security, gender responsive budgeting, the rights of the disabled and distressed women, and the protection of women from the adverse effects of climate change. 416


ASK, BMP and STD also stressed that Bangladesh has a relevant number of citizens who are not Muslims and to whom Sharia Law does not apply. They then argued that it would be in the interest of the entire population for Bangladesh to withdraw ‘its remaining reservation to CEDAW’. 417

In the ‘Combined Sixth and Seventh Alternative Report’, the Citizen’s Initiative of Bangladesh (CIB) argued that, ‘Article 2 is fundamental to implementation of all other provisions of CEDAW. Reservations placed on it, therefore, appear to negate Bangladesh’s commitment to the elimination of all forms of discrimination’. 418 They also stressed that the reservation against Article 2 of CEDAW goes against the guarantees provided under Articles 10, 19, 27, 28, and 29 of Bangladesh’s Constitution. 419

As seen above, in the Sixth and Seventh periodic reports, Bangladesh argued that its Constitution was in conformity with CEDAW, particularly Articles 10, 27, 28 and 29. 420 However, the CIB stated that Bangladesh’s reservation is in conflict with the state’s commitment to implement CEDAW and contradicts its own Constitution. In this situation, the NGO used the same information used by the state party, but instead of defending the reservation, the NGO argued against it.

In a different document prepared for the CEDAW Committee, the Migrant

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419 Ibid.

*Forum Asia* (MFA)\(^{421}\) argued that Bangladesh’s reservation influenced labour migration of Bangladeshi women.\(^{422}\) The MFA requested the government of Bangladesh to consider withdrawing its reservation to CEDAW in order to improve the empowerment of women in the region and facilitate migration abroad.\(^{423}\) The MFA discussed Bangladesh’s policies in accounting for underlying societal causes for gender inequity and inequality, with a focus on the labour migration of women in Bangladesh.

The reservation of the government of Bangladesh in Article 2 [of CEDAW] has sustained the existing code of family laws, which ultimately put female labour migrants in a disadvantaged condition in terms of access to and control over resources. This provision has a major bearing on female labour migration in the context of the increasing cost of migration.\(^{424}\)

As seen above, the reports examined show that NGOs have argued against the reservation made by Bangladesh to Article 2 of CEDAW. The incompatibility with the ‘object and purpose’ of the Convention and its negative implications for Articles 10, 19, 27, 28 and 29 of the reserving state’s Constitution were the core arguments used. The opinions expressed by the NGOs are consistent with the arguments put forward by the CEDAW Committee and by Germany, Mexico and Sweden.

\(^{421}\) See Migrant Forum Asia. Available at: <http://www.mfasia.org/> [last accessed 10 February 2016].

\(^{422}\) See Migrant Forum Asia, *CEDAW and the female labour migrants of Bangladesh*, 2009-2010. Available at: <www2.ohchr.org/english/bodies/cedaw/docs/ngos/MFA_for_the_session_Bangladesh_CEDAW48.pdf> [last accessed 10 February 2016].


4.5. Bangladesh’s reservation and the commitment to CEDAW

Bangladesh’s persistence in maintaining the reservation can be considered, by itself, a demonstration of a lack of commitment to the monitoring process of CEDAW. The state party refuses to withdraw a reservation that affects the implementation of Article 2, which in addition to Articles 1, 3 and 24, expresses the object and purpose of the Convention. In the words of Yahyaoui Krivenko, ‘[if] a state refuses to comply with one or another provision of this Article [Article 2], it will inevitably find itself sooner or later violating other provisions of the Convention.’

Article 2 is the Article that expresses the core commitments of the state parties to the Convention. Thus, entering, and persisting in maintaining, a reservation against it may have, in practice, the same consequences as placing a reservation against any (or every) other provision of the Convention.

In its Eighth periodic report to the CEDAW Committee, Bangladesh argued that religious interpretations of the law are still responsible for discrimination against women that continues both in public and private spheres in the country. Bangladesh argued that even the judicial system is influenced by patriarchal and discriminatory views of the laws, which subsequently leads to a failure of the system to deliver equal treatment for women who try to access the courts for redress.

Bangladesh’s government attempted to show caution in addressing the pervasive effects of discriminatory interpretations of religious personal laws, but the state also indicated that it had limited power to act against discriminatory practices promoted by interpretations of religious personal laws. Recent news published by

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Human Rights Watch shows that the country’s ‘security forces have carried out enforced disappearances, killings and arbitrary arrests, particularly targeting opposition leaders and supporters, with impunity’. It seems that the state is under increasing pressure to maintain current political leaders in power and enforce their own agenda, which supports Bangladesh’s alleged caution in the Eighth periodic report.

Bangladesh has not proposed any changes that would or could be implemented in order to address the dominance of religious groups in political decision-making. Also, it has not identified any practical measures that could be implemented to achieve the withdrawal of the reservation to Article 2 of CEDAW.

Against this background, in the next chapter I will study how religious personal laws affect the achievement of equality and non-discrimination in Bangladesh. This discussion aims to assess the effectiveness of the CEDAW regime of reservations in achieving Bangladesh’s compliance with the Convention. I will examine the impact of religious personal laws on women’s rights and, in turn, address how religious personal laws affect the reserving state’s compliance with CEDAW. Looking into Bangladesh’s compliance with their obligations to promote gender equality and non-discrimination is important for enhancing the current understanding of the accuracy of the CEDAW Committee’s comments to reserving states.

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426 See Human Rights Watch, ‘Bangladesh’. Available at: <https://www.hrw.org/asia/bangladesh> [last accessed 10 February 2016].

5. RELIGIOUS PERSONAL LAWS AND THE IMPLEMENTATION OF CEDAW IN BANGLADESH

The CEDAW Committee’s review of Bangladesh’s periodic reports identified issues for the achievement of gender equality and non-discrimination in the country. The discriminatory interpretations of religious personal laws, in particular, provoked much debate in the review process from the Second to the Seventh periodic reports.\(^{428}\)

However, as discussed in the previous chapter of this thesis, Bangladesh is reluctant to bargain any aspect of Muslim personal law that may conflict with Article 2 of CEDAW. In the Eighth periodic report Bangladesh informed the Committee that the reservation to CEDAW is still intact because religious leaders who support discriminatory interpretations of personal laws still receive great political and social support.\(^{429}\) In turn, the reservation to Article 2 stands.

Bangladesh argued that religious fundamentalist groups are pressuring the government to maintain the reservation.\(^{430}\) There are also allegations from HRW that those same groups are behind kidnaps and deaths of people who oppose current political forces in the country.\(^{431}\) According to Bangladesh, despite any interest the government might have in withdrawing the reservation to CEDAW, religious groups

\(^{428}\) See chapter 4, section 4.2 for an examination of the engagement between Bangladesh and the CEDAW Committee in the review of the periodic reports.


\(^{430}\) Ibid, p.10 para.45.

strongly oppose it and the government can do little besides acting in a ‘cautious manner’. \(^{432}\)

Notions of gender equality and non-discrimination vary according to the interpretations of religious personal laws in Bangladesh. The state party’s reservation only promotes the continuity of this reality. Thus, examining the effects of religious personal laws on women’s human rights in Bangladesh is an important step in the study of the state’s compliance with the Convention.

In this chapter I examine the effects of current interpretations of religious personal laws on Bangladeshi women’s rights to equality and non-discrimination, as established in CEDAW. This chapter begins with a review of the debates regarding reservations made to CEDAW grounded on conflicts with religion, specifically with Muslim personal law.

Bangladesh’s reservation illustrates current debates on Sharia-based reservations to the Convention (such as the reservations entered by Egypt, Libya, Saudi Arabia, Nigeria, Pakistan, Cameroon, the Maldives, the United Arab Emirates, Jordan, Bahrain, Mauritania, Malaysia, and Lebanon). \(^{433}\) Currently, these reservations account for forty per cent of the reservations made to CEDAW. Thus, understanding the implications of religious personal laws for the achievement of gender equality can shed light on the effectiveness of the CEDAW regime of reservations to constrain reserving states’ practices to implement the Convention.

\(^{432}\) *Supra note* 444.

\(^{433}\) See United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, ‘Convention on the Elimination of all forms of discrimination against women: Declarations, Reservations and Objections to CEDAW’. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed 10 February 2016]; Organization of Islamic Cooperation, OIC. *Member states*. Available at: <http://www.oic-oci.org/member_states.asp> [last accessed 10 February 2016].
There has been extensive debate in the literature on the characteristics, causes and consequences of reservations that argue for a conflict between religion and international human rights conventions.\(^{434}\) Existing studies examine, in particular, how the difference between cultures is a central component in the debates regarding the universality versus integrity of human rights treaties.\(^{435}\)

Although claims of differences between cultures are legitimate, I also acknowledge that governments might use the difference of culture and religious traditions to avoid the implementation of human rights conventions that could endanger their status quo.\(^{436}\) Hence, in this thesis I do not follow theories that rely solely on the difference of cultures to explain the relation of Muslim states and countries with CEDAW’s regime of reservations. Taking into account the significant number of reservations made to the Convention on the grounds of conflict with Muslim personal law, I understand that differences between cultures and religious traditions are a factor, but not the only factor to be considered in the examination of the effectiveness of the CEDAW regime of reservations in protecting treaty integrity.

Against this background, I examine whether and how Bangladesh has complied with the state parties’ obligations to CEDAW. In particular, I ask whether Bangladesh’s government is acting with due diligence or is being negligent towards


the pervasive influence of discriminatory interpretations of religious personal laws in the country. To understand this issue, I review Bangladesh’s cultural-legal system. Specifically, I look into Bangladesh’s Constitution and pertinent laws in the country to assess the position of religious personal laws in Bangladesh’s legal framework. Then, I discuss how religious personal laws in Bangladesh regulate marriage, separation, divorce and guardianship. In light of this discussion, I will examine the effects of current interpretations of personal laws on gender equality and non-discrimination in the country.

This examination will reveal significant issues to be addressed by the CEDAW Committee as part of the monitoring process of the Convention. It will also provide the basis for the analysis of the accuracy of the CEDAW Committee’s comments and questions to Bangladesh.

As discussed above, the accuracy, quality and significance of the treaty bodies’ comments and questions to state parties play a significant role in improving the effectiveness of the UN monitoring system. Thus, when studying the effectiveness of the CEDAW regime of reservations to protect treaty integrity, it is important to assess the significance of the CEDAW Committee’s comments to Bangladesh.

Subsequently, I will look into the CEDAW Committee’s current main sources of information on the implementation of CEDAW: the state party, NGOs and UN specialised agencies. I will examine the current methods adopted by the Committee for the submission of documents discussing the implementation of CEDAW and how these methods affect the Committee’s assessment.
5.1. Overview of ‘Islamic-based’ reservations to CEDAW

Islamic states and Islamic countries do not always enter reservations grounded on conflicts with Muslim personal law or necessarily enter any reservation at all. In fact, Islamic states and Islamic countries have adopted different positions and approaches on human rights Conventions: “[s]ome states have ratified Conventions without reservations and some have made reservations that have nothing to do with Islam.”437

Albania, Algeria, Azerbaijan, Brunei Darussalam, Benin, Burkina Faso, Chad, and others have not entered reservations or have not argued a conflict with Muslim personal law in their reservations.438 This indicates that not all Muslim states and countries react to CEDAW in the same way. These differences often result from the level of incorporation of Islam into the legislation of each member state and from different interpretations that may derive from relevant provisions of the Sharia law in each case.439 Turkey and Saudi Arabia’s reservations to CEDAW illustrate this discussion.

Turkey had originally made a reservation against Article 15, paragraphs 2 and 4; Article 16, paragraphs 1 (c), (d), (f) and (g) as well as to Article 29, paragraph 1. On 20 September 1999, the government of Turkey withdrew the reservation against


Article 15, paragraphs 2 and 4; Article 16, paragraphs 1 (c), (d), (f) and (g), only maintaining the reservation to Article 29, and declared a possible conflict between Article 9 and the Turkish Law on Nationality.\textsuperscript{440} Saudi Arabia’s reservation, on the other hand, affects any provision of the Convention that may conflict with Muslim personal law, specifically Articles 2 and 9.\textsuperscript{441}

In Turkey and in Saudi Arabia there is a clear distinction in the relationship between the state and religion. This ultimately refers to the establishment of secularism \textit{versus} the adoption of an official state religion and the restrictions on freedom of religion.

Turkey has an overwhelming Muslim majority population. While Muslims constitute 99 percent of Turkey’s population, the country is still a constitutionally secular democracy with a separation of religion from all public spheres of life.\textsuperscript{442} The Preamble to the Constitution of Turkey affirms that ‘there shall be no interference whatsoever by sacred religious feelings in state affairs and politics.’ Article 2 declares that ‘the Republic of Turkey is a democratic, secular and social state.’\textsuperscript{443}

Powell argues that, ‘[t]here is a wide range of views concerning Islamic law in Turkey, but it could be argued that the three most influential approaches are the official state position, that of Yaşar Nuri Öztürk, and that of Fethullah Gülen’.\textsuperscript{444} The

\textsuperscript{440} For the reservation and declaration regrading Article 9 see \textit{note} 454. For the Turkish Law on Nationality see Turkish Citizenship Law. Law No. 5901. Adopted on 29 May 2009. Available at: <http://www.refworld.org/docid/4a9d204d2.html> [last accessed 10 February 2016].

\textsuperscript{441} Supra \textit{note} 454.


Dyanet or the Directorate of Religious Affairs interprets Islam as a religious and moral system that speaks to all aspects of life. However, religion is not to be imposed on the legal system, but should be separate from civil laws. Yaşar Nuri Öztürk and Fethullah Gülen’s interpretations of Islam in Turkey address secularism as a natural product of Islam and not in confrontation with Islam.

While Turkey is a model of a secular Islamic country, it can be argued that Saudi Arabia is on the other extreme. Saudi Arabia’s legal system is based on Sharia Law and the ‘Basic Law’ establishes Quran and Sunna as the country’s Constitution (Articles 6-8). There is no practice of non-Muslim religions in public, only in the privacy of people’s homes. In fact, Saudi Arabia religious Police (Mutawwa’in) has been accused of raiding non-Muslim religious gatherings on private property. According to Amnesty International, non-Muslim worshippers

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risk arrest, lashing and deportation for engaging in overt religious activity that attracts attention from the Police.\textsuperscript{452}

Turkey and Saudi Arabia’s reservations to CEDAW reflect how Islam is incorporated into their legal frameworks. This discussion suggests that the influence of religion in state affairs can affect how a state party will respond to the establishment of equality and non-discrimination as provided in CEDAW.

Many Islamic states and Islamic countries ratified CEDAW even though they were dissatisfied with particular provisions and how the principles of ‘substantive equality’ and ‘non-discrimination’ are codified in the Convention.\textsuperscript{453} Although their justification for reserving the Convention can vary, as illustrated above, it is a fact that about 40 percent of all reservations made to the Convention are from Islamic states or Islamic countries and over 50 percent of these reservations were based on alleged conflicts with Muslim personal law.\textsuperscript{454}

While some of the reservations have specified the provisions of CEDAW believed to be contrary to Sharia Law (such as reservations entered by Bangladesh, Brunei Darussalam, Egypt, Iraq and Libya), others do not elaborate on the specific


\textsuperscript{454} See United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs, Convention on the Elimination of all forms of Discrimination Against Women: Declarations, Reservations and Objections to CEDAW. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [last accessed 10 February 2016].
conflicts argued (such as reservations entered by Malaysia and Syria) and there are also general reservations potentially applying to the entire Convention (such as reservations entered by Oman and Saudi Arabia). In light of this, it is reasonable to ask: what contributes to the number of reservations made to CEDAW by Islamic states and Islamic countries?

Bahrain, Brunei, Iraq, Jordan, Malaysia, Kuwait and the United Arab Emirates (UAE) all have reservations to Article 9 of CEDAW. However, only Iraq, Malaysia and UAE opposed a woman’s right to determine her own nationality. While Bahrain, Brunei, Iraq, Jordan and Malaysia argued for the existence of a conflict between the Islamic Sharia as cause for the reservations; the UAE and Kuwait’s reservations argue that their domestic laws apply on matters relating to nationality. Article 9 of CEDAW reads as follows:

Article 9
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.

Islamic countries and states provide different arguments for reservations to CEDAW. The literature suggests a number of possible reasons for this. Sawad argues that, ‘[m]any in the Muslim world appear to believe that certain provisions in

455 Supra note 454.
456 Ibid.
457 Ibid.
CEDAW not only conflict with but, if accepted, have the potential to override and replace Islamic Shari‘ah with a different normative standard.\textsuperscript{458}

Brandt and Kaplan claim that countries with strong Islamic traditions enter reservations to CEDAW because ‘Conventions like CEDAW … engender reservations by states worried that they will not be responsible to answer to an international group that may not include one of their own representatives’.\textsuperscript{459} That is, states enter reservations aimed at protecting Muslim traditions, as they might not be respected without an Islamic state or Islamic country as part of the international body responsible for monitoring the implementation of the Convention.

Reservations to human rights treaties are also considered a way of limiting interference in state sovereignty.\textsuperscript{460} Neumayer observes that ‘[g]iven that human rights treaties typically set up norms, the purpose of which is to comprehensively and broadly regulate domestic human rights observance by governments rather than relations among nations they are more intrusive than other treaties.’\textsuperscript{461} Reservations would be used to minimise ‘intrusion’ from international laws.

In this context Islamic reservations to CEDAW can be seen as a response to CEDAW’s attempt to influence interpersonal relationships. For instance, Article 2 of CEDAW mandates state parties to alter and change their domestic laws concerning the way they regulate the private affairs of individuals to comply with gender

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equality and non-discrimination. However, interpretations of the Muslim personal law that strictly follow verse 2:229 of the Quran do not support equality in private life. Verse 2:229 states: ‘[a]nd they (the women) have rights similar to those (of men) over them in equity; but men have a rank above them.’

Although CEDAW mandates state parties to ensure equal rights in family relations (Article 16), the Islam does not allow an equal inheritance right to women. In all capacities women receive one half of men’s share. Women’s NGOs in Bangladesh make constant complaints about the reduced share allowed for women. As observed in the ‘Alternative Report to the UN CEDAW Committee’, prepared by the Citizens’ Initiative on CEDAW-Bangladesh, ‘[a] dualistic system of rights leads to discrimination in the personal sphere because religious laws prevail in matters of inheritance, marriage, divorce, and maintenance over civil laws, notwithstanding constitutional guarantees of equality.’

Countries with strong religious groups are also susceptible to enter reservations to protect their own traditions and interpretations of the Muslim personal law. Mahalingam notes that: ‘CEDAW represents the most comprehensive statement regarding the political, economic, social, and cultural rights of women, and thus presents a direct challenge to some of the most ardently held views of militant Islamic fundamentalism.’ It is important to understand what represents the basis for religious fundamentalism. As Armstrong notes,

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463 Ibid, Verse 4:12.


[r]eligious fundamentalism represents a widespread rebellion against the hegemony of secularist modernity... The various fundamentalist ideologies show a worrying disenchantment with modernity and globalization... Indeed, every single fundamentalist movement that I have studied in Judaism, Christianity, and Islam is rooted in a profound fear of annihilation. All are convinced that the modern, liberal, secular establishment wants to wipe out religion... But at the root of all these movements is the same visceral dread that is rapidly being transformed in some quarters into ungovernable rage.  

As discussed in the previous chapter, Bangladesh argued that pressure from Islamic fundamentalist groups is a major reason for the state maintaining its reservation to CEDAW. Over the past few years, newspaper articles have been publishing news about attacks on secularists in Bangladesh. In 2013, Nadia Sharmin, a news reporter for Ekushey Television, was attacked by a group of Islamist activists. According to Motwani, ‘[t]o them, Sharmin’s presence represented one of the many facets of modern day Bangladesh that they were protesting against, namely the free mixing of males and females.

The British Broadcasting Corporation (BBC) drew attention to this issue and

468 Supra note 444.
reported the following in its website: ‘Death threats to secular bloggers are on the rise in Bangladesh. A few years back, hardline Islamists demanded a blasphemy law to stop bloggers they perceive to be anti-Islamic from writing about Islam.’\footnote{471} Although these crimes are still under investigation, the news articles mentioned, along with several others referred to in this chapter,\footnote{472} corroborate Bangladesh’s claims over the ongoing pressure from religious fundamentalist groups.

Despite the wide range of reasons that may explain the number of reservations made to CEDAW by Islamic states and Islamic countries, there may be a correlation between them, especially when the reservations are expressly grounded on a conflict with the Sharia Law.\footnote{473} However, even in such cases there is an element that may vary: Sharia plays a range of roles within a state’s legal system.\footnote{474} Abiad observes that the different roles of Sharia can be divided as follows: ‘(1) where Sharia is a significant source of the substantive law in general; (2) where Islam is declared as the religion of the state.’\footnote{475}

The role of Islam in Bangladesh’s legal system places the reserving state in a category that would encompass both characteristics described by Abiad. Although Bangladesh has declared Islam as the state religion (Article 2, paragraph a, Constitution of Bangladesh), the National Constitution also establishes that the state

\footnote{472}{Supra note 485.}
\footnote{473}{See Abiad, Nisrine, Sharia, Muslim States and international human rights treaty obligations: A comparative study (British Institute of International and Comparative Law, 2008); Wolfrum, Rudiger, ‘Constitutionalism in Islamic countries: A survey from the perspective of international law’ In: Grote, Rainer; Roder, Tillman J (eds.), Constitutionalism in Islamic countries: Between upheaval and continuity (Oxford University Press, 2012).}
\footnote{474}{Ibid.}
\footnote{475}{See Abiad, Nisrine, Sharia, Muslim States and international human rights treaty obligations: A comparative study (British Institute of International and Comparative Law, 2008) p.46.}
is secular (Article 8). This, then, raises the question, how does religion affect the state’s domestic legislation and how do the laws of Bangladesh regulate women’s rights?

In the next section I will discuss the role of religious personal laws in Bangladesh’s legal framework and discuss how the current legislation affects gender equality and non-discrimination in the country. In particular, I examine the legal norms for marriage, maintenance, separation, divorce, custody and guardianship and discuss pertinent judicial rulings.

5.2. Bangladesh’s legal framework and religious personal laws: Compromising the achievement of substantive equality and non-discrimination

General or secular laws and religious personal laws form the legal system in Bangladesh. The secular laws, including the Constitution, the Child Marriage Restraint Act, The Prevention of Oppression of Violence Against Women and Children Act, The Acid Control Act, the Special Marriage Act, and the

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Guardian and Wards Act, are applicable to all people regardless of their religion.\textsuperscript{481}

Religious personal laws regulate marriage, separation, divorce and guardianship according to each religious community. Hence, Muslims are governed by the Muslim personal law. Hindus are governed by the Hindu Personal Law and Christians are governed by the Christian Personal Law.

Family Courts have jurisdiction over cases involving separation, divorce, restitution of conjugal rights, dower, maintenance, guardianship and custody of children.\textsuperscript{482} According to Article 5 of the Family Courts Ordinance, the Family Courts are subject to the Muslim Laws Ordinance of 1961.\textsuperscript{483} However, following the decision in Pochon Rikssi Das \textit{v.} Khuku Rani Dasi and others,\textsuperscript{484} the Family Courts can try cases lodged by any citizen, irrespective of religion.

The Family Court Ordinance has not taken away any personal right of any litigant of any faith. It has just provided the forum for the enforcement of some of the rights as is evident from section 4 of the Ordinance, which provides that there shall be as many Family Courts as there are Courts of Assistant Judge and the latter courts shall be the Family Courts for the purpose of this Ordinance.\textsuperscript{485}

Thus, the matters tried in Family Courts refer to citizens of all faiths and it is the respective personal law of the parts involved that should be applicable in judicial

\textsuperscript{481} See The Guardian and Wards Act, 1890. Came into force 1 July 1890. Available at: <http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=64> [last accessed 10 February 2016].
\textsuperscript{483} \textit{Ibid.}
\textsuperscript{484} See Supreme Court of Bangladesh, Pochon Rikssi Das \textit{v.} Khuku Rani Dasi and others 50 [1998] DLR (HCD).
\textsuperscript{485} \textit{Ibid.}, p.47.
rulings.486 Personal laws, however, fail to observe the right to gender equality as established in CEDAW. Thus, women are at a disadvantage when they lodge cases in Family Courts against a male counterpart.487

All three sets of religious personal laws fail to protect women against discrimination or directly harm the right to gender equality. Studies on current interpretations of personal laws show that by discriminating against women, these laws contribute to women’s social and economic disadvantage, obstructing their public participation and perpetuating their subordination in Bangladesh’s patriarchal society.488

In Bangladesh, the right to equal treatment between men and women is regulated according to the guarantees described in Articles 26 to 47 of the Constitution of Bangladesh. However, according to the CEDAW Committee, the definition of ‘discrimination’ provided by Bangladesh is contrary to the definition set forth in CEDAW.489

Article 27 of the Constitution of Bangladesh reads: ‘[a]ll citizens are equal before law and are entitled to equal protection of law.’ Article 28(2) estates: ‘[w]omen shall have equal rights with men in all spheres of the State and of public

488 See Human Rights Watch, Will I get my dues...before I die? Harm to women from Bangladesh’s discriminatory personal laws on marriage, separation and divorce (2012).
life.’ The Constitution only addresses gender equality before the law in the public sphere. There are no constitutional guarantees to equality in the private sphere.

In reply to the CEDAW Committee, Bangladesh argued that the Constitution, in Articles 10, 27, 28, 32 and 39 ‘reflected the ideals’ of CEDAW. However, no provision in the Constitution addresses gender discrimination in the private sphere. This gap in the Constitution allows for discriminatory interpretations of Constitutional norms and of pertinent laws applicable to women’s rights in the private sphere, such as those that regulate marriage, maintenance, separation, divorce, custody and guardianship, that is, the personal laws.

This can be observed in the judgment delivered in Md. Chan Mia v. Rupanahar and Hosna Jahan (Munna) v. Md. Shajahan (Shaju). In both cases the husbands brought countersuits for restitution of conjugal rights. The High Court pointed out that conjugal rights are reciprocal and therefore not in violation of the equality clause of the Constitution.

The protection of equality only in the public sphere undermines the chances for women to claim and obtain judicial protection against any discriminatory practice perpetrated against them in the private sphere. In addition, it has the potential to affect the interpretation and enforcement of criminal laws that aim to protect women against acts of violence perpetrated in the private sphere, such as the Child Marriage

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492 See High Court of Bangladesh, Hosna Jahan (Munna) v. Md. Shajahan (Shaju) 1998) 18 BLD (HCD) 321.
Restraint Act,\textsuperscript{493} The Prevention of Women and Child Repression Act\textsuperscript{494} and The Acid Control Act.\textsuperscript{495}

In 2011, in the ‘Concluding Observations’ to the \textit{Combined Sixth and Seventh Periodic Reports of Bangladesh}, the CEDAW Committee addressed the protection for equality only in the public sphere and the absence of legal protection for equality in the private sphere.\textsuperscript{496} However, to this day, the state party has not made any changes to the current regulation of the right to equality in the private sphere.

Additionally, as the Committee observed, ‘no steps had been taken to enable the Supreme Court to determine whether any provisions of the personal laws conflicted with the equality provisions of the Constitution.’\textsuperscript{497} In other words, the state has not yet given the power for the highest court of the country to officially recognize rules of religious personal laws as discriminatory towards women.

In theory, the Supreme Court of Bangladesh has the power to interpret the Constitution and the laws made by the Parliament to ultimately enforce the fundamental rights of citizens (Articles 102, 103 and 110 of the Constitution of Bangladesh). The Supreme Court can declare any law that is inconsistent with any of

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the fundamental rights of the Constitution to be null and void by Article 26 and 101, paragraph 1.

However, since the Constitution only protects gender equality in the public sphere (Article 28, paragraph 2), the current legal framework of Bangladesh protects discriminatory rules and interpretations of religious personal laws from any major interventions from the Supreme Court. Additionally, with the Eighth Amendment, which introduced Article 2(a) to the Constitution, making Bangladesh an Islamic state, the ‘Principles of the Constitution’, set out in Articles 8 to 25, are often interpreted to give preference to the religion of the state, which is Islam.\textsuperscript{498} This shift from a secular state to a state guided by religious principles provides legitimacy to discriminatory interpretations of personal laws, grounded on individual religious backgrounds.

There is scope, however, for a different interpretation of Article 28(2) of the Constitution of Bangladesh. If Articles 8, 12 and 28(1) are read as a whole it may be understood that the ‘spirit’ of the Constitution\textsuperscript{499} aims to protect Bangladeshi citizens from discrimination altogether, without interference of religious principles or distinctions between the public and private spheres. Articles 8(1), 12(b), (c) and 28(1) of the Constitution of Bangladesh are as follows,

8. (1) The principles of nationalism, socialism, democracy and secularism, together with the principles derived from those as set out in this Part, shall constitute the fundamental principles


\textsuperscript{499} The ‘letter of the law’ is represented by the literal meaning of the rules in a given legislation. Here, the ‘spirit of the law’ is the interpretation of the Constitutional norms as a whole. See Islam, Mahmudul, Constitutional law of Bangladesh (Bangladesh Institute of Law and International Affairs, 1995) p.31.
of state policy.

…

12. The principle of secularism shall be realised by the elimination of:

…

(b) the granting by the State of political status in favour of any religion;

(c) the abuse of religion for political purposes;

…

28. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

In light of this, the Supreme Court has scope to decide on the admissibility and further annulment of religious personal laws that discriminate against women. In this regard, the Supreme Court has declared:

[1]he Constitution of Bangladesh being the embodiment of the will of the Sovereign People of the Republic of Bangladesh, is the supreme law and all other laws, actions and proceedings, must conform to it and any law or action or proceeding, in whatever form and manner, if made in violation of the Constitution, is void and non est.

However, there has as yet been no attempt to discuss the validity of personal laws by the Supreme Court. The current socio-political climate in Bangladesh is also not favourable to any decision that will ultimately affect the impact of personal laws on women’s rights. As previously discussed, violent attacks, allegedly perpetrated by religious fundamentalist groups, against those who oppose ancient views of Islam, including the perceptions of gender equality, are causing increasing concern within

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the government. Similarly, these attacks could also cause concern in members of the judiciary.

The relevance of personal laws in Bangladesh’s legal framework calls for an examination of their socio-legal impact on gender equality. In the next section I will continue to explore the position of gender equality in Bangladesh’s legal system. This examination draws on Bangladeshi case law and scholarly studies on Hindu, Christian and Muslim personal laws. The goal is to understand how current interpretations of personal laws in the country affect Bangladesh’s compliance with CEDAW.

The areas covered by religious personal laws are vast. I will examine the rules and interpretations that conflict with gender equality and non-discrimination as set forth in CEDAW. In particular, the analysis focuses on the Muslim personal law. It will provide a background to discuss in the next chapter the CEDAW Committee’s comments regarding the conflicts between religious personal laws and gender equality in the state party.

5.2.1. Religious personal laws in Bangladesh

Religious personal laws regulate the rights and duties of women with respect to fundamental social and family practices in Bangladesh. However, as the state party has observed, ‘personal laws that govern family life are a major impediment for women in exercising their fundamental human rights.’ Discriminatory

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interpretations of any personal law will create obstacles to the achievement of gender equality and, consequently, to the implementation of CEDAW in the country.\textsuperscript{503}

Bangladesh has four major religious communities: Muslims, Hindus, Christians and Buddhists. The Constitution, in Article 41, (1), (a), reads ‘[s]ubject to law, public order and morality: (a) every citizen has the right to profess, practise or propagate any religion’. Every community has the right to practice its own religion and live according to the personal laws that govern their religions.

There are three major personal laws in Bangladesh, namely Muslim, Hindu and Christian. Sunni Muslims constitute ninety per cent and Hindus make up nine and a half per cent of the total population. The remainder of the population is predominantly Christian and Theravada Buddhist.\textsuperscript{504}

Gender equality has been the subject of considerable debate and discussion involving Muslim, Hindu and Christian Personal Laws in Bangladesh.\textsuperscript{505} The central aspect of these discussions is the apparent incompatibility between existing rules and interpretations of personal laws and women’s right to equality and non-discrimination.\textsuperscript{506} Examples of such inequality are discussed below.

According to Hindu personal laws, Hindu women can formally apply to the


\textsuperscript{504} See Bangladesh Bureau of Educational Information and Statistics. Available at: \url{<http://www.banbeis.gov.bd/bd_pro.htm>} [last accessed 10 February 2016].


\textsuperscript{506} Ibid.
Family Court to seek a separate residence and maintenance from their husbands, but only on limited grounds. Even those minimal rights are nullified if a Court finds that the woman is ‘unchaste’, has converted to another religion, or fails to comply with a Court decree ordering restitution of ‘conjugal rights’.\(^507\) According to Ghosh, ‘[w]hile a Hindu man can terminate a marriage and marry again, his deserted wife is condemned to live as a widow for the rest of her life.’\(^508\)

Under the Divorce Act 1879, a Christian man can obtain divorce from his wife on the grounds of adultery alone. However, a Christian woman is entitled to the same relief only if she proves that her husband is guilty of one of the following: incest, bigamy, rape, sodomy, bestiality, adultery coupled with violence towards the woman, and adultery coupled with desertion for two years or more (Article 10).\(^509\) The same Act provides that the woman’s partner, with whom she allegedly betrayed her husband, should be named as co-party in the divorce (Article 11). The husband may also sue the woman’s partner for compensation for the ‘loss’ of his wife (Article 34). A woman does not have the same right, however. Additionally, a Christian woman has a right to maintenance during marriage and alimony after divorce, but this is tied to her ‘chastity’\(^510\)


Hindu and Christian personal laws are patriarchal and therefore women are not given the same rights that are given to men. It is not difficult to observe that the right to ‘equality before the law’ prescribed in Article 27 of the Bangladeshi Constitution is not observed in norms of Hindu and Christian personal laws in the country. However, given that Bangladesh made a reservation to CEDAW grounded on an alleged conflict between Muslim personal law and Article 2 of the Convention, I will examine the implications of the Muslim personal law for gender equality and non-discrimination in Bangladesh.

There are four doctrinal schools of Islamic traditions: Hanafi, Malik, Shafi’i and Hanbali. The majority of the Muslim population in Bangladesh follows the Hanafi school of thought. In light of this, when discussing the interpretation given to the Sharia Law, the next section addresses Hanafi understandings of Muslim Personal Law as reviewed in the literature.

5.2.1.1. Muslim Personal Law and gender equality in Bangladesh

According to prevailing interpretations of Shariah Law in Bangladesh, women and men are not equal in their marital life or in the context of family relations. In addition to embracing polygamy for men, current interpretations of Muslim personal law are patriarchal and do not recognize women’s rights equally. Legal reforms have not sufficiently addressed these gender disparities.


law in Bangladesh promote several other discriminatory practices and traditions, which include unequal provisions on inheritance rights and divorce, limited rights to maintenance during marriage and after divorce and the lack of maintenance beyond 90 days after divorce.\textsuperscript{514}

According to Article 6 of the Muslim Laws Ordinance, any man who wishes to marry another wife may, with the consent of his first wife, require local government arbitration councils to approve the polygamous marriage.\textsuperscript{515} However, in 2012, women and lawyers interviewed by HRW expressed that in no case was an arbitration council convened to approve a subsequent marriage. Similarly, activists and lawyers stated that husbands often flouted divorce notice procedures without penalty.\textsuperscript{516}

In essence, HRW found that even the limited entitlements personal laws offer women are poorly enforced by Family Courts.\textsuperscript{517} Female-headed households struggle to access critical judicial support and to obtain economic security when marriages


\textsuperscript{516} See Human Rights Watch, \textit{Will I get my dues...before I die? Harm to women from Bangladesh’s discriminatory personal laws on marriage, separation and divorce} (2012) p.36–38.

break down.\textsuperscript{518} This is especially true in a state where patriarchal traditions represent a powerful force. They affect interpretations of current legislation to reinforce women’s subordination to the domestic environment, depriving them of equal access to employment.\textsuperscript{519}

The Muslim Personal Law (Shariat) Application Act, 1937\textsuperscript{520} and The Muslim Family Laws Ordinance, 1961\textsuperscript{521} govern all matters related to inheritance rights of Muslim women in Bangladesh. Article 2 of The Muslim Personal Law Application Act provides that questions related to succession and inheritance are governed by Muslim personal law and the Quran is the primary source of the Sharia.\textsuperscript{522} In this regard, Spectorsky observes:

One of the main difficulties with introducing material from the Qur’an is that so much of it is open to different interpretations that it is hard to “start” anywhere: it is usually easy to see what it says … but frequently harder to say what it means.\textsuperscript{523}


\textsuperscript{522} Although there are debates regarding the sources of Islamic Law, it is accepted by the majority of scholars that the Qur’an is the primary source. See Hassan, Faroq A, ‘The Sources of Islamic Law’ (1982) 76 Proceedings of the 101\textsuperscript{th} Annual Meeting (American Society of International Law) 65-75; Spectorsky, Susan A, Women in classical Islamic Law: A survey of the sources (Brill, 2009); Souaiaia, Ahmed, ‘On the sources of Islamic Law and Practice’ (2004) 20(1) Journal of Law and Religion 123-147.

Since the *Quran* is open to a multitude of interpretations it is easier to interpret the legislation according to individual interests and ultimately damage women’s rights with conservative and patriarchal interpretations of the law. I will not examine the several meanings or interpretations that can possibly be given to the verses in the *Quran*. Instead, I will demonstrate that interpretations of the *Quran*, primary source of the Muslim Personal Law Application Act and the Muslim Family Laws Ordinance, discriminate against women. These interpretations are enforced in the Family Courts in Bangladesh.

Under the Muslim Personal Law Application Act, 1937 and the Muslim Family Laws Ordinance, 1961, the provisions concerning inheritance in Bangladesh are different for women and men. A daughter that is an only child inherits half the estate of her deceased father or mother. However, when the inheritance is to be distributed between a daughter and son, the daughter inherits half as much as the son.524 A wife (or wives taken together) receives one-eighth of the deceased husband’s estate if there is a child, and one-fourth if there is no child. In contrast, a husband inherits one-fourth of his deceased wife’s estate.525

The right to maintenance for divorced Muslim women in Bangladesh is based on classical Quranic interpretations. According to the Qu’ran there is a waiting period involved between the three times a man can declare the divorce.526 Post-divorce maintenance for women is subject to the *Iddat* period (time during which a woman is not allowed to marry after divorce or death of husband).527

524 See Holy Qur’an 4:11
525 See Holy Qur’an 4:12
527 See Holy Qur’an 2:228. For theoretical discussions see, Mohammadi, Fatemeh; Amirkhanloo, Mohammad Sadegh; Mohammadi, Fatemeh, ‘A Comparative Study of the Iddah (Waiting Period) in 199
Women are entitled to maintenance, although 90 days after divorce is usually the time limit and the obligation of the husband lapses when the wife is held to be ‘disobedient’. If a woman is considered to be ‘disobedient’ (‘disobedience’ can be interpreted as being arrogant with the man, leaving her matrimonial house without justifiable reason, and so on) she cannot divorce her husband for a period of two years, on the grounds of the husband’s incapacity to provide maintenance. After the waiting period is over, the man and woman are considered divorced. Although the man is no longer responsible for the woman’s expenses, he remains responsible for the maintenance of his children.

In 1995, however, the Supreme Court of Bangladesh handed down a progressive judgement in the case of Hefzur Rahman v. Shamsun Nahar Begum. After considering several verses of the Quran and judicial precedents, the Court held that after divorcing his wife a husband is bound to maintain her on a reasonable scale until she marries another man.

The custody of minors after divorce or death continues to be governed by the Guardian and Wards Act of 1890. Article 17 of the Act stipulates that the personal


530 Ibid.


532 See The Guardian and Wards Act, 1890. Came into force 1 July 1890. Available at: <http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=64> [last accessed 10 February 2016].
law to which the minor is subject shall guide the Court’s decision, but the ‘welfare of the child’ should be the dominant element to guide the ruling.

When the Guardian and Wards Act provides that the personal law of the child should guide the decision prior to establishing that the ‘welfare of the child’ should be the dominant element to guide the ruling, the Law allows for the magistrates to choose between personal law or the welfare of the child in the decision. In addition, Article 17 also allows for the meaning of the ‘welfare of the child’ to be subject to the conceptions of the child’s religious personal law. This can be observed in a report prepared by three Supreme Court Judges from Bangladesh in 2010.

Indeed, the principle of Islamic Law (in the instant case, the rule of hizam or the guardianship of a minor child as stated in the Hanafi School) has to be taken into account, but deviation from the principle seems permissible as the paramount consideration should be the child’s welfare.533

The declaration above indicates that, although the child’s welfare is argued as representing the main element to be considered in disputes over his/her guardianship, the principles of the Muslim personal law may be dominant, since ‘deviations’ are only permissible in certain occasions. Hence, the ‘child’s welfare’ may not be the guiding element in the judicial ruling, but an exception to the rules and principles of the religious personal law of the child.

However, there are cases of guardianship where if a conflict is observed with the religious personal law of the child, it is the ‘child’s welfare’ that determines the final ruling. For example, in Abdul Jalil v. Sharon Laily, the Court granted full

custody of three minor children, aged between 5 and 14 years to the mother, a British Christian citizen. The Appellate Division held in this case that in a proceeding for custody of a child it is not the rights of the parties but the rights of the child that are at issue. The Court came to the conclusion that the custody should be decided upon evidence as to where the interest and welfare of the children actually lie.\(^\text{534}\)

However, Article 17 of the Guardians and Wards Act has not been reformed and it is the responsibility of the magistrate to interpret what should prevail in the final ruling: the ‘child’s welfare’ or religious personal law. This may be costly for both the mother and child involved in a case of guardianship because it allows that discriminatory rules and interpretations can be used to guide the kind of justice that the mother and her child will receive.

According to Morshedul Islam, agnatic relations determine the guardianship of a minor in Muslim personal law. Usually the father, and in his absence the grandfather, are responsible for guardianship of the child. He adds:

\[
\text{In Muslim law guardianship of minor is of two types: guardianship of person and guardianship of property of minor. Guardianship of person of minor generally rests on the mother or in mother’s absence maternal grandmother.}\(^\text{535}\)
\]

However, the ‘remarriage of mother to a stranger (person other than relations of the husband’s family) disqualifies her from being appointed as guardian.\(^\text{536}\) In addition, there is a time limit for the female guardian. Classical Hanafi school determines that for a male minor, the time of guardianship for the mother is seven


\(^{536}\) Ibid.
years and when the minor is a girl the guardianship lasts until she attains the age of puberty. After that period, the child should be handed to the male guardians.537

The discussion above indicates that personal laws deprive women of equal rights with men to property and to the guardianship of minors. Poor enforcement of laws by Family Courts only adds to women’s struggle for equal access to the rights conferred on them by law.538 Interpretations of religious personal laws in Bangladesh hold a large share of responsibility for trapping women in ‘unwanted’ marriages, because they fear destitution, and for impoverishing those women who face separation or divorce.539

While there is no judicial remedy that can be used to determine the invalidity of a particular norm of religious personal law, the Constitution of Bangladesh was amended in 2011 and since then the right to ‘equality of opportunity’ to women became a ‘fundamental right’ to be respected in all spheres of their life (Article 19, paragraph 3). Therefore, the right to ‘equality of opportunity’ in the private sphere can be judicially enforced. However, since in practice, women do not experience equal results in judicial rulings, how will the right to ‘equality of opportunity’ ever be judicially enforced?

Women’s unequal legal status in Bangladesh is only aggravated by a lack of


539 See Human Rights Watch, Will I get my dues...before I die? Harm to women from Bangladesh’s discriminatory personal laws on marriage, separation and divorce (2012).

540 Ibid, p.2; 6; 8.
social and political will to deliver justice on violations to gender equality perpetrated in the private sphere, under the legal guarantees of religious personal laws.\textsuperscript{541} Although Bangladesh’s government cannot determine that every individual will respect gender equality, every state party to CEDAW should demonstrate that it has acted diligently, using the necessary \textit{means} in order to achieve the end \textit{result}, which is the elimination of discrimination against women in the public and private spheres (Articles 2–4 of CEDAW). Bangladesh, however, through positive and negative acts (inaction),\textsuperscript{542} reinforces the maintenance of discriminatory practices towards women in the country when they are a consequence of discriminatory interpretations of religious personal laws.

Bangladesh’s reservation to CEDAW protects the state from a commitment that would be contrary to current discriminatory interpretations of the system of laws enforced in the country. In light of the discussion above, I will examine next the quality of the CEDAW Committee’s comments to Bangladesh regarding the influence of religious personal laws on the implementation of CEDAW in the country. Specifically, I will examine how the information submitted by NGOs and UN specialised agencies affects the quality of the assessment conducted by the Committee on the implementation of CEDAW.

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\textsuperscript{542} Enforcing discriminatory rules towards women are examples of positive acts. Not providing legal means for the Supreme Court of the country to rule determining religious personal laws as discriminatory towards women is a form of inaction.
\end{flushright}
5.3. **Restriction of information and the effectiveness of the CEDAW Committee**

Religious personal laws have a major impact on the implementation of CEDAW in Bangladesh. Discriminatory interpretations of Muslim, Christian and Indian Personal Laws harm women’s achievement of *equality of opportunity*, *equal access to opportunities* and *equality of results* in both public and private spheres.

The Constitution of Bangladesh protects equality only in the public sphere and is silent on the protection of equality in the private sphere (Article 28, paragraph 2). Religious personal laws regulate the rights that concern the private sphere of individuals. Interpretations of these laws, enforced in the courts of Bangladesh, deny women equal rights to that of men in the areas of marriage, maintenance, separation, divorce, custody and guardianship.

The lack of equal access to justice in the Family Courts stretches even further the level of inequality faced by women. Unequal access to the justice system makes dispute settlement a very challenging task for women, limiting their access to the few rights that the personal laws confer on them. The absence of protection of equality in the private sphere facilitates the perpetuation of systemic discriminatory practices towards women because it protects patriarchal and conservative norms and interpretations of the personal laws.

Given that a conflict with Muslim personal law was the cause for Bangladesh’s reservation to Article 2, the alleged conflict should be under strict scrutiny by the Committee. However, as demonstrated in the previous chapter, the comments, questions and recommendations made by the CEDAW Committee to Bangladesh did not address this issue properly.

In the review of Bangladesh’s compliance with the state parties’ obligations to
CEDAW, the Committee did not make significant connections between the state party’s persistence in maintaining the reservation to CEDAW and the discriminatory interpretations of religious personal laws enforced in the country. While the Committee has continuously addressed the impact of the personal laws, the subject has been discussed very lightly. For example, considering the discussion above, pertinent and relevant questions with reference to this topic, which were never raised, include:

a) Since Bangladesh recognised that religious personal laws impact the achievement of equality and non-discrimination for women, how does the state plan to prevent the discriminatory legislation to be judicially enforced?

b) Why does the Constitution only protect equality in the public sphere?

c) How can the right to ‘equality in the public sphere’ ever be judicially enforced when, according to recent findings, women do not have equal access to the judicial system?

Although these are key issues that affect the implementation of CEDAW in Bangladesh, the Committee has not properly addressed them during the periodic review process.

As observed in the previous chapter, when Bangladesh was questioned about its commitment to addressing the discriminatory interpretations of religious personal laws, the state party’s assessment was usually incomplete, sometimes paradoxical and at times did not even address the questions raised. Hence, the information provided by the state party lacks clear and trustworthy elements on the implementation of the Convention. This makes the state party a biased source of information on the implementation of CEDAW.
Since the CEDAW Committee needs independent information from which to formulate its questions and identify the areas where the state party is not complying with its obligations to CEDAW, the participation of NGOs and UN specialised agencies in the monitoring process of CEDAW is welcomed and expected. In the next section I review the current working methods adopted by the CEDAW Committee for the submission of data by NGOs and UN agencies, specifically to understand how the information provided to the Committee may affect the assessment of the implementation of the Convention.

5.3.1. NGO reports: objectivity versus relevance of information

The CEDAW Committee does not provide any guidelines for NGOs to prepare their reports. The IWRAW Asia-Pacific, on the other hand, has provided some guidelines. It recommends that NGOs prepare the reports in the most concise possible way following the order of the Articles of the Convention. This format is consistent with the format of state parties’ periodic reports, which are also expected to address issues related to the implementation of CEDAW according to the order of appearance of the rights regulated in CEDAW.

Considering the volume of documents the Committee receives for the review of state parties’ periodic reports, ‘conciseness’ is a desirable feature for shadow reports because the Committee needs to focus on key topics addressed by the NGOs

543 The CEDAW Committee instructed NGOs only on the means for submission of the reports and not on their preparation. See Office of the High Commissioner for Human Rights, Committee on the Elimination of Discrimination Against Women, Information Note prepared by OHCHR for NGO Participation. Available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/NGO_Participation.final.pdf> [last accessed 10 February 2016].

and identify those that should be raised in the ‘List of issues and questions’ to the state parties.\textsuperscript{545} However, the format adopted for the preparation of shadow reports creates significant challenges for NGOs seeking to share relevant information with the Committee. When the reports are prepared according to the order of the Articles of CEDAW and in a concise manner, the amount of data shared and the way data is shared can restrict the quality of the information to be accessed by the Committee.

When a particular CEDAW provision addresses a broad range of rights, such as Article 2, a similarly broad range of potential issues will fall into the scope of that Article. Thus, the NGO preparing the shadow report will have to choose carefully which problems to address and after that, how to briefly discuss those problems. As a result, some issues may not be appropriately addressed or not addressed at all in the reports. For instance, Article 2(a), (f) of CEDAW establishes that state parties to CEDAW should address the following issues:

\begin{itemize}
\item[(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
\item[(f)] To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
\end{itemize}

Considering the scope of paragraphs a and f of Article 2, when NGOs report on the implementation of CEDAW in Bangladesh they could address questions such as: why is the principle of equality in the private sphere not recognised as a fundamental

right in the Constitution and, therefore, enforceable in a court of law? Why are discriminatory interpretations of religious personal laws enforceable in a court of law? Is there any connection between religious personal laws and the inaction of the government in providing legal and judicial protection to the right of equality in the private sphere?

In the previous section I argued that the three questions above are very important when examining the state party’s commitment to the achievement of substantive equality and non-discrimination. How could NGOs appropriately address them when they would have to succinctly discuss the state party’s conduct towards the implementation of the other 15 Articles of the Convention? How can NGOs effectively act as ‘watchdogs’ if they are restricted to share a limited amount of information with the Committee? In addition, given the challenges NGOs face in producing their reports, how can the Committee have access to quality information?

A standard example is as follows: the harsh reality faced by women who access Bangladesh’s judicial system is cited in one of the shadow reports as an obstacle to the implementation of CEDAW in the state party. Although religious personal laws are addressed as a contributing factor for this problem, there is no analysis or discussion explaining why this is an issue and how it is observed in practice. The discussion begins and ends in just one sentence:

A dualistic system of rights leads to discrimination in the personal sphere because religious laws prevail in matters of inheritance, marriage, divorce, and maintenance over civil laws, notwithstanding constitutional guarantees of equality.

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Information is ‘provided’ but not ‘discussed’. There is very little (if any) analysis of possible connections between the facts argued. In addition, there is not enough analytical support for the facts presented, which makes it difficult for the Committee to properly establish the extent of the influence of certain issues on the implementation of the Convention in the state party.

The current guidelines applied for the preparation of NGO shadow reports are effective in providing objectivity to the information shared with the CEDAW Committee. However, those guidelines also limit the extent and relevance of the information the Committee has access to in order to appropriately assess any obstacle to the implementation of CEDAW. In turn, this affects the accuracy of the Committee’s comments and recommendations to the state party about how to address those obstacles.

While lack of expertise or limited financial resources could be argued as factors impacting the quality of NGOs’ shadow reports, I argue that the current structure adopted by the CEDAW Committee to engage with NGOs is a key factor influencing the quality of NGOs’ analysis and of the information shared with the Committee. In this regard, the CEDAW Committee stated in the 45th Session Statement on its work with NGOs that: ‘NGOs may provide comments and suggestions to the State party’s reports in any way they see fit.’

The Committee has not produced guidelines for NGOs to prepare shadow reports and the IWRAW has not updated its set of guidelines. If the NGOs are

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expected to provide the CEDAW Committee with information that can effectively challenge or add to what has already been argued by the state party, they should be encouraged to provide a careful examination of the obstacles to the implementation of CEDAW, taking into account the relevance of those obstacles to the implementation of the Convention.

### 5.3.2. UN specialised agencies and the CEDAW Committee

According to Article 22 of CEDAW, UN specialised agencies ‘may be’ invited to submit reports on the implementation of the Convention ‘when the implementation of such provisions of the Convention as fall within the scope of their activities is being considered.’ This norm is repeated in Rule 45 of the ‘Rules of Procedure of the Committee on the Elimination of Discrimination Against Women.’

Therefore, the considerations of the UN specialised agencies on the implementation of CEDAW are restricted to the scope of their own activities.

Additionally, UN agencies’ reports should be provided only after an invitation made by the Committee. The agency invited to submit a report has to review the implementation of CEDAW in every state party with a periodic report scheduled to be reviewed in a particular session. According to the most recent revision of the guidelines for submission of reports from UN specialised agencies to the CEDAW Committee, the document submitted by the Agency should contain the following:

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(a) Country-specific information on the situation of women in regard to relevant articles of the Convention and their implementation in the State party, within the scope of work of the reporting entity;

(b) Country-specific information about the State party’s implementation of the Convention and follow-up to the Committee’s concluding comments in areas falling within the scope of work of the reporting entity;

(c) Information about the efforts made by the concerned UN agency or body to promote implementation of the provisions of the Convention and the Committee’s concluding comments through its own policies and programmes. This information should indicate the manner in which the entity concerned uses the Convention and the Committee’s concluding comments in its policies and programming activities.

(d) As applicable, information about ongoing efforts towards supporting the ratification of the Optional Protocol, and acceptance of the amendment to article 20, paragraph 1 of the Convention concerning the Committee’s meeting time in the State party concerned, or efforts to give publicity to the procedures available under the Optional Protocol.550

The information that the CEDAW Committee expects to be provided in a single report includes: country-specific efforts to implement CEDAW and the OP-CEDAW and the agencies’ own efforts to apply the Committee’s Concluding Comments in their programs. The agencies are required not only to review intricate aspects that concern the implementation of CEDAW in the state parties, but also to provide details of their own actions to comply with the Committee’s recommendations.

The Committee finds it most beneficial to receive all this data in ‘succinct,

country-specific, written reports’. In essence, the CEDAW Committee expects ‘succinct’ reports on all the state parties that have a periodic report scheduled for review in the same session.

The current format adopted for the UN agencies’ reports can be illustrated with UNESCO’s report to the Committee’s Forty-Eighth Session. In one of the reports, only 21 pages long, the agency reviewed the implementation of CEDAW in Bangladesh, Belarus, Israel, Kenya, Liechtenstein, Sri Lanka and South Africa and dedicated less than three pages to Bangladesh’s legislative framework (including the constitutional framework), policies and programs implemented by the state party from 1990 to 2010.

The large volume of information to be provided by the UN specialised agencies and the expectation that all data should be handled in in one report impacts the relevance, accuracy and quality of the analysis and, consequently, of the information provided in the reports. Specifying a narrower scope for the information to be provided by UN specialised agencies could result in a more detailed and accurate analysis of the relevant obstacles to the implementation of CEDAW. The current approach limits the quantity and quality of the information received because it requires succinct reports to cover a broad set of issues. Determining a narrower scope for the UN specialised agencies’ analyses could both restrict the volume of information in the reports and improve the quality of the information.

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551 Ibid., p.80.

552 See Committee on the Elimination of Discrimination Against Women, Convention on the elimination of all forms of Discrimination Against Women. Reports provided by the specialized agencies of the United Nations system on the implementation of the Convention in areas falling within the scope of their activities. UN Educational, Scientific and Cultural Organization CEDAW/C/48/3/Add.1 (5 January 2011) p.5−7.
5.4. Improving the quality of information through greater focus and substance

The lack of relevant information on the implementation of CEDAW in a state party potentially results in an incomplete assessment of the current status of gender equality and non-discrimination in the country. The OHCHR argued that one of the key goals of the proposals of reform for the monitoring system and implementation process of the human rights conventions is to ‘improve the impact of treaty bodies on state parties and individuals or groups of individuals at the national level by strengthening their work while fully respecting their independence’. It also supported:

further institutionalized cooperation of treaty bodies with other United Nations entities to provide the most efficient support to the State party and other stakeholders in the preparation, review and follow-up to a State party review by a treaty body…While a solid partnership has developed between the treaty bodies and United Nations entities, there is potential to strengthen and systematize such cooperation to provide more efficient support to the State party and other stakeholders in the preparation, review and follow-up processes.

When consulted by the OHCHR on their views of what was needed to strengthen the treaty body system, NGOs argued that:

Treaty Bodies should formalize a process whereby NGOs, NHRIs and other specialized agencies are given an opportunity to submit their own information regarding the

554 Ibid p.62.
implementation of Views and contribute additional data to complement information provided by States. 555

The comment above demonstrates that two elements play an important role in the participation of NGOs in the strengthening process of the treaty body system. First, there should be a formalisation of the process for the submission of information about the status of the implementation of human rights conventions. Second, there should be an improved opportunity for the submission of their own views regarding the implementation of the conventions and additional data considered relevant for the monitoring process. NGOs have expressed concerns with the current format adopted for the submission of reports to the CEDAW Committee.

In order to be effective, any proposal to strengthen the participation of NGOs and UN specialized agencies in the monitoring and implementation process of CEDAW should address the problems caused by the guidelines currently adopted by the CEDAW Committee: first, NGO shadow reports lack substance and the reports from UN specialized agencies lack both focus and substance. The obstacles facing all the treaty bodies, such as growth in the volume of documentation and higher running costs 556 should also be taken into account.

The analysis above indicates that to improve the CEDAW Committee’s access to accurate and relevant information on the implementation of CEDAW, the following should be considered: a) development of a specific set of guidelines for the preparation of ‘shadow reports’ and b) revision of the scope of reports to be prepared


by UN specialized agencies so that the reports focus on one key subject or topic, chosen by the CEDAW Committee.

In addition to the ‘Aligned models of interaction among Treaty Bodies, National Human Rights Institutions and Civil society organizations’, as proposed in the 2012 UN Report, the CEDAW Committee should develop a specific set of guidelines for the preparation and submission of shadow reports. The guidelines should prioritise the relevance of the obstacles to the implementation of CEDAW and not the order of the Articles of the Convention. The order of the Articles of CEDAW should be followed only when it facilitates the analysis of the arguments. The discussion must prioritise the obstacles to the implementation of the Convention and the Article(s) of CEDAW related to those obstacles.

In addition, NGOs should be encouraged to use any time allocated for their participation in the pre-sessional Working Group meetings and in the review of the state party’s periodic reports. If the NGOs cannot afford to send a representative to participate in the sessions, they should be allowed to present their statement through webcasting, a tool already being used by UN treaty bodies.

As discussed above, the UN agency invited to examine the implementation of CEDAW should provide a report on one specific and refined topic considered relevant for the implementation of CEDAW in the state party. At the time of the invitation, the CEDAW Committee should provide the Agency with the topic or area of concern with respect to each state party with a periodic report scheduled to be reviewed. Therefore, the UN Agency would be asked to focus their analysis on one topic per state party.

558 See UN Treaty Body Webcast. Watch the treaty bodies sessions live. Available at: <http://www.treatybodywebcast.org/> [last accessed 10 February 2016].
The suggestions above would be implicated in administrative actions and reforms of guidelines, which is not expected to create additional expenditure. However, if extra financial resources were needed, according to Rule 23 of the ‘Rules of Procedure of the Committee on the Elimination of Discrimination Against Women’, the Secretary-General would have the responsibility of preparing an estimate of the costs involved. The CEDAW Committee could put the cost estimate to a vote.\(^{559}\) If put into practice, the suggestions discussed above are likely to improve the substance and focus of the reports submitted by NGOs and UN Agencies to the CEDAW Committee.

6. CONCLUSION

In this thesis I have examined the effectiveness of the CEDAW regime of reservations in protecting the integrity of the object and purpose of the Convention. Bangladesh’s reservation to Article 2 of the Convention was studied to illustrate the implementation and monitoring process of CEDAW in the reserving states. The following research questions provided the focus of the study:

Is CEDAW able to constrain reserving states’ practices to protect equality and non-discrimination?

How does Bangladesh’s reservation to Article 2 of CEDAW affect the effectiveness of the monitoring and implementation process of the Convention?

To address these questions, I have framed theoretical debates and studies on: 1) the application of the 1969 VCLT regime of reservations to human rights treaties, 2) the interpretation of CEDAW’s provisions and 3) the monitoring and implementation process of CEDAW in Bangladesh.

This study has uncovered several challenges affecting the implementation and monitoring process of CEDAW in Bangladesh. These challenges refer to the gaps in the CEDAW regime of reservations, to which the subsidiary norms of the 1969 Vienna Convention apply. Specifically, CEDAW is silent on how to determine the validity of reservations when they are attached to core provisions of the Convention and the effects of invalid reservations. The CEDAW Committee does not have the authority to decide on this issue and only member states can do so. This affects the interpretation of CEDAW, the performance of the CEDAW Committee in monitoring the implementation of the Convention and the engagement of reserving
states with the monitoring and implementation process of CEDAW, particularly towards the withdrawal of reservations to the Convention.

In addition, current guidelines for the preparation of reports by NGOs and UN specialised agencies instruct them to provide relevant information, usually based on a significant volume of data, in succinct form. NGOs are asked to prepare the reports following the order of the Articles of CEDAW rather than according to the relevance of the topics. UN agencies are expected to provide a report on approximately five to ten state parties (the usual number of states that have a periodic report scheduled to be reviewed by the Committee per session), without specifying what topic should be the focus of the Agencies. The current format for the submission of reports to the CEDAW Committee results in documents with information that lacks in substance and focus, which undermines the assessment of the implementation of CEDAW.

Drawing from the analysis conducted in the previous chapters I have proposed a classification for the Articles of CEDAW, applicable to the interpretation of all reservations made to the Convention. In addition, I suggested two significant reforms for the current format adopted by the CEDAW Committee for NGOs and UN Agencies’ reports. Below I provide a synthesis of the analysis conducted in this thesis.

Chapter 2 examined the application of the 1969 Vienna Convention regime of reservations to human rights treaties. The primary focus was the limitations of the VCLT regime of reservations to protect the object and purpose of human rights treaties against impermissible reservations. The chapter discussed the effects of invalid reservations and the competence of human rights treaty bodies to decide on the admissibility and validity of reservations. While discussing the progress of the studies on reservations to treaties, I have examined the 2011 ILC’s Guide to Practice
on Reservations to Treaties. The Guide’s definition for the ‘object and purpose’ of a treaty, as stated in Guideline 3.1.5, was adopted for the analysis conducted in chapter 3.

Chapter 3 examined the history, the provisions and the principles of CEDAW. In light of the CEDAW Committee’s decisions regarding the impact of reservations to the Convention, I conducted a review of the Convention’s terms, the context of those terms, and the Convention’s object and purpose. They were examined as part of the interpretation of CEDAW’s provisions. Against this background I have provided a classification of the Articles of CEDAW according to their relevance to the raison d’être of the Convention.

In chapters 4 and 5 I addressed the monitoring and implementation process of CEDAW in Bangladesh. The starting point was an examination of the engagement between the CEDAW Committee and the reserving state. I discussed the state party’s persistence in maintaining the reservation and its commitment in addressing the impact of religious personal laws to gender equality in the country. The current format adopted by the Committee for the submission of data on the implementation of CEDAW was revised to identify whether it has any influence on the quality of the Committee’s comments, questions and recommendations to Bangladesh.

6.1. Findings and contributions to the field

This thesis adds to extant knowledge on the implementation and monitoring process of CEDAW. It provides a thorough examination of the implementation of CEDAW in Bangladesh and contributes to research in this area in two respects. First, it develops a classification of the Articles of CEDAW according to their relevance to the implementation of the object and purpose of the Convention. Second, it proposes
and discusses two main reforms to address the effectiveness of the information submitted by NGOs and UN specialized agencies to the CEDAW Committee.

Despite the ambiguities of the 1969 Vienna Convention, which were discussed in chapter 1, CEDAW uses the approach of the VCLT to allow reservations, unless they are incompatible with the Convention’s object and purpose (Article 28). However, the object and purpose test does little to protect the integrity of the Convention. There is no accepted definition for the term object and purpose, which can lead to confusion about the interpretation of the Convention. Also, CEDAW does not establish which provisions represent its object and purpose. These gaps in the Convention provide opportunities for state parties to interpret the CEDAW provisions according to their own interests and to attach reservations that affect the implementation of fundamental rights protected under the treaty.

While the CEDAW Committee holds responsibility for interpreting the Convention’s provisions, it is neither a member of the Convention nor does it have the powers of a court. The Committee only holds the powers of a supervisory body and, as a consequence, it cannot determine the validity of reservations made to CEDAW. Even if the Committee understands that a reservation is incompatible with the Convention, only state parties and the ICJ have the power to find a reservation invalid and request the Convention not to come into force for a reserving state.

State parties can object to an incompatible reservation (Article 20, VCLT), as well as request arbitration and submit a case to the ICJ (Article 29, paragraph 1, CEDAW). However, as discussed in chapter 2, state parties do not benefit from objecting to reservations made to human rights treaties. Human rights treaties are non-reciprocal in nature, which means that an objecting state will always maintain its obligations to the Convention. There are no reciprocal obligations between the states.
Extra-legal considerations are also taken into account when deciding on the admissibility of a reservation. To prevent negative ramifications in the relationship between states, it is expected that state parties to a human rights convention will consider how objecting to a reservation might affect their relationship with the reserving state outside the ambit of the Convention.

As seen in chapter 4, Bangladesh’s reservation has been objected to by Germany, Mexico and Sweden. Although the three states argued the incompatibility of the reservation as grounds for their objections, no state requested for CEDAW not to enter into force between them and Bangladesh. When objections do not request the prevention of entry into force of a convention, they have the same legal effect as accepting a reservation. Due to this fact, objections are not considered effective means of protecting the integrity of human rights conventions.

Despite the apparent ineffectiveness of the objections submitted by Germany, Mexico and Sweden in pressuring Bangladesh to withdraw the reservation to Article 2 of CEDAW, their arguments represent an important element in the study of Bangladesh’s reservation to the Convention. The objecting states understand that Article 2 represents a core provision of CEDAW, against which no reservation should be placed. Thus, by objecting, Germany, Mexico and Sweden corroborated the findings of chapter 3, where I provided a classification that demonstrates which Articles may be considered the object and purpose of the Convention. The remaining provisions of CEDAW are also interpreted according to their relevance to the object and purpose of the Convention. This interpretation follows the order of analysis described below.

As discussed in the previous chapters, although the CEDAW Committee is limited to only address the permissibility of reservations, in General
Recommendations nos. 19 and 21 the Committee addressed the relevance of Articles 1, 2, 3 and 24 of CEDAW, especially when compared to the remaining provisions of the Convention. In General Recommendation no 28, the Committee stressed that reservations to Article 2 are, ‘in principle incompatible with the object and purpose of CEDAW’ (emphasis added).

To better understand the Committee’s views on the CEDAW provisions, I examined in chapter 3 the most relevant characteristics of the Convention according to the principles of state obligation, substantive equality and non-discrimination. This provided a framework for the interpretation of CEDAW.

Article 1 introduces the need for equality of opportunity and describes the meaning of the principle of non-discrimination. Articles 2–4 of CEDAW set out the broad principles of state obligations under the Convention. Articles 5–16 provide the substance and context under which these obligations should be applied. Articles 17 to 22 describe the role of the CEDAW Committee. Article 23 stresses that any domestic legislation or international agreements shall be prioritised over CEDAW if they are more beneficial in achieving equality between men and women. Articles 25–30 refer to the administration of the Convention.

Article 2 of CEDAW enjoins state parties to ensure that substantive equality will be respected in both public and private spheres. In essence, Article 2 expresses the state party’s obligations to guarantee equality of opportunity, equal access to opportunities and equality of results in all spheres of a woman’s life.

Based on the analysis conducted in chapter 3, the interpretation of CEDAW’s provisions demonstrated that Articles 1, 2, 3 and 24 are not only ‘significant’ to the implementation of CEDAW, but express the goals or the object and purpose of the
Convention. Thus, a reservation made to any of these provisions may be deemed impermissible, due to incompatibility with the object and purpose of CEDAW.

A reservation to Articles 5 to 16 may threaten the object and purpose of CEDAW if the obstacles to achieve compliance with the Convention are not properly assessed and addressed by the CEDAW Committee and the reserving state. A reservation made to Articles 17–22 and to Articles 23–30 is relevant only to the extent that it influences compliance with Articles 1, 2, 3 and 24. The findings of chapter 3 support the CEDAW Committee’s understanding that Bangladesh’s reservation to Article 2 of CEDAW is incompatible with the Convention.

Bangladesh’s reservation affects the implementation of a core provision that represents the reason for the adoption of CEDAW. In such cases, universality of the convention is achieved at the expense of the integrity of its main goals, namely substantive equality and non-discrimination in all spheres of a woman’s life. Due to the damaging effects of the state’s reservation to the effective implementation of CEDAW, in the review of Bangladesh’s periodic reports, the CEDAW Committee has argued for the incompatibility of the reservation to Article 2 and requested the state to set a timeframe for its withdrawal.

The CEDAW Committee has repeatedly requested the reserving state to withdraw the reservation against Article 2, to abolish any discriminatory laws and to enact the necessary legislation to meet its international obligations under the Convention. Despite the numerous requests from the CEDAW Committee, Bangladesh’s reservation still stands. In its Fifth Periodic Report to CEDAW, Bangladesh argued that it was still assessing whether its reservation was in direct
contradiction with Muslim personal law.\textsuperscript{560} However, in the same report the state admitted that discriminatory rules and interpretations from religious personal laws affect women’s right to equality in the country.\textsuperscript{561} Religious personal laws regulate marriage, divorce, custody, maintenance and guardianship in Bangladesh.

Only in the Eighth periodic report did Bangladesh acknowledge that the discriminatory practices that derive from religious personal laws outweigh advancements of equality observed in other laws.\textsuperscript{562} The reserving state argued that although the withdrawal of the reservation is under consideration, religious fundamentalist groups are pressuring the government to maintain a patriarchal and conservative agenda with respect to women’s rights. Withdrawing the reservation to CEDAW would suggest that the state recognises women as equally relevant members of society as men, with the right not to be discriminated against. This would be at odds with the views of Islamic fundamentalist groups, which consider women as subordinate to men, with their legitimate roles invariably exhausted inside their homes.

The study of Bangladesh’s reservation to CEDAW provided the opportunity to analyse the degree of commitment of the reserving state in addressing the reservation to CEDAW and in complying with its obligations under the Convention. I have


demonstrated in chapters 4 and 5 that Bangladesh’s reservation to CEDAW is the result of a patriarchal system of laws that protects conservative and discriminatory interpretations of religious personal laws in the country.

In fact, in the review of the Fifth periodic report, the state party addressed the CEDAW Committee’s comments and argued that discriminatory interpretations of the Civil and Criminal Procedure Codes are enforced in the courts of the country. In Bangladesh, patriarchal attitudes by members of the judiciary and law enforcement agencies also contribute to women to be treated as inferior and having their entitlements to equal access to justice denied.

Despite the constitutional guarantees of equality of opportunity (Article 19, paragraph 1) and equality before the law (Article 27), as well as statutory provisions, such as the Prevention of Oppression of Violence Against Women and Children Act and the Acid Control Act, women have not achieved equal access to the justice system and equal opportunity to claim their entitlements, and remain disempowered. Lack of access to justice also results in poor enforcement of criminal laws that should protect women from acts of violence that are embedded in

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564 Ibid.


567 See Mittra, Sangh; Kumar, Bachchan, ‘Discrimination against women’ In: Mittra, Sangh; Kumar, Bachchan (eds.), *Encyclopaedia of women in South Asia: Bangladesh* (2004, Kalpaz Publications). 226
gender relations that privilege patriarchal control over women, such as acid burns.\(^{568}\)

In a state where the justice system still allows interpreters to treat men and women unequally, there is little chance for proper accountability and punishment of men responsible for acts of violence committed against women.

In chapter 4 I identified and discussed the link between discriminatory interpretations of the laws and Bangladesh’s patriarchal society. These two elements are intimately related and both responsible for women’s inability to get proper legal knowledge and fair access to the justice system.\(^{569}\)

The patriarchal system of laws and denial of rightful access to the justice system is currently under constitutional protection in Bangladesh. The Constitution of Bangladesh guarantees protection against discrimination only in the public sphere (Article 28, paragraph 2). This directly impairs the chances for women to claim and obtain judicial protection against discriminatory practices perpetrated against them in the private sphere. Since Muslim, Hindu and Christian personal laws regulate aspects that concern the private sphere of individuals, the constitutional protection of equality in the public sphere ultimately safeguards the discriminatory rules in the personal laws from reforms.

Besides protecting equality only in the public sphere, the Constitution of Bangladesh does not give express powers for the Supreme Court to determine whether any provisions of the personal laws are in conflict with the equality


provisions of the Constitution. This means that equality of opportunity and equality before the law are formal entitlements that will only be observed in practice according to the interpretation given to the law in each individual case put before the Family Courts.

The CEDAW Committee and NGOs that reviewed the implementation of CEDAW in Bangladesh have argued that Bangladesh’s reservation to Article 2 is incompatible with the Convention, creating considerable obstacles to the achievement and promotion of equality and non-discrimination in the country and, consequently, to the implementation of CEDAW. Yet, Bangladesh did not make any commitment to the withdrawal of the reservation.

In addition, Bangladesh is one of the state parties to the OP-CEDAW that has chosen to not accept the inquiry procedure (Articles 8; 9 of the OP-CEDAW). An inquiry may be conducted without the consent of a state party. However, by opting out of the procedure Bangladesh denies assistance in the examination of any grave or systematic violation of women’s human rights that allegedly happened or are happening in the country.

As part of the study of the monitoring and implementation process of CEDAW in Bangladesh, I have examined the CEDAW Committee’s scrutiny of Bangladesh’s reservation to Article 2 and the influence of religious personal laws on the state’s compliance with the Convention. The discussion in chapter 4 indicates that despite the CEDAW Committee’s efforts to obtain the commitment of Bangladesh to withdraw its reservation to CEDAW, the obstacles imposed by the discriminatory interpretations of religious personal laws were not properly assessed. The CEDAW Committee’s comments, questions and recommendations only addressed a small part of the complex relationship between Bangladesh’s reservation and religious personal
laws. In the Committee’s arguments, there were few (if any) significant connections between them.

In the review of the state party’s periodic reports, the Committee addressed the incompatibility of the reservation to Article 2 and questioned Bangladesh’s persistence in maintaining it. Bangladesh stated in its reservation to CEDAW that an incompatibility with Sharia Law was the reason for the reservation. However, the relationships of religious personal laws to the reservation to Article 2 and, consequently, their influence on the implementation of CEDAW, received limited attention by the Committee.

In order to understand the reasons that could justify the lack of sufficient ‘depth’ in the CEDAW Committee’s assessment, I have studied the documents submitted to the CEDAW Committee by its main sources of information on the implementation of the Convention: the state party, NGOs and UN specialised agencies. I have found that the data presented by NGOs and UN specialised agencies are very restricted, while the data presented by the state party seem biased by the state party’s interests. This, in turn, limits assessments regarding the significance of issues to the implementation of CEDAW.

Against this background, I have examined the current guidelines and working methods adopted by the CEDAW Committee for the submission of reports by NGOs and UN specialised agencies. Also, I examined whether and how the analysis conducted in those reports influence the accuracy, relevance and quality of the CEDAW Committee’s comments, questions and recommendations. I have found that the structure for the organisation and communication of data regarding the implementation of CEDAW has significant limitations that prevent NGOs and UN
agencies from providing substantive information on the state parties’ compliance with the Convention.

The CEDAW Committee did not provide any guidelines for NGOs to prepare their reports.\(^{570}\) NGOs’ shadow reports are structured according to the guidelines prepared by the IWRAW Asia-Pacific. In particular, IWRAW Asia-Pacific suggests that NGOs prepare the reports in the most concise possible way and organise the information following the order of the Articles of CEDAW.\(^{571}\)

However, the CEDAW Committee prepared guidelines for the submission of reports by UN specialised agencies. The review conducted by the agencies should contain information on the state party’s implementation of the Convention and follow-up to the Committee’s Concluding Comments. It should also include the Agencies’ efforts to apply the Committee’s Concluding Comments in their private programs and ongoing efforts supporting the ratification of the OP-CEDAW. The Committee does not describe which topic the Agency should focus on in its analysis and expects the reports to be succinct and prepared according to the status of implementation of CEDAW in each state party.

The analysis conducted in chapter 5 shows that the way NGOs and UN agencies currently prepare their reports to the CEDAW Committee results in restricted and limited information that can undermine the assessment conducted by

\(^{570}\) The CEDAW Committee instructed NGOs only on the means for submission of the reports and not on their preparation. See Office of the High Commissioner for Human Rights, Committee on the Elimination of Discrimination Against Women, Information Note prepared by OHCHR for NGO Participation. Available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/NGO_Participation.final.pdf> [last accessed 10 February 2016].

the Committee. Based on that analysis, I proposed two main reforms to the current format for submission of reports by NGOs and UN agencies. They are:

a) Proposal 1. The development of a specific set of guidelines for the preparation of ‘shadow reports’.

As they are currently written, NGO shadow reports do not provide enough analytical support for the topics reviewed. While the reports are helpful, they alone are not enough to establish the real extent of certain issues on the implementation of the Convention in the state parties. As I have suggested, the CEDAW Committee would benefit from shadow reports structured according to the relevance of specific issues to the implementation of the Convention, which do not necessarily follow the order of the Articles of CEDAW.

b) Proposal 2. Revision of the scope of reports to be prepared by UN specialised agencies.

When preparing their reports on the implementation of CEDAW, UN specialised agencies are required to condense large volumes of information. Yet there are no guidelines on the scope of the information required, which could affect the quality of the analysis conducted by the agencies. Delineating the scope of the information to be presented in the reports would provide UN specialised agencies with the opportunity for a more detailed and accurate analysis of the relevant obstacles to the implementation of CEDAW. These proposals were presented and discussed in chapter 5.

6.2. Summary of recommendations

The discussion summarised above and detailed in the previous chapters suggests that the CEDAW Committee would benefit from:
a) Developing a framework with a standard interpretation of all the CEDAW provisions to inform the state parties on their obligations under the Convention. The use of such a framework would leave little to no room for opposing interpretations of provisions by the reserving states. This would provide the Committee with a consistent platform to examine state parties’ commitment to the implementation process of the Convention, resulting in more relevant and accurate comments, questions and recommendations.

b) Implementing reforms aimed at strengthening the scope and effectiveness of the information provided by NGOs and UN specialised agencies.

6.3. Concluding remarks and future direction

In this thesis I have investigated the monitoring and implementation process of CEDAW in Bangladesh. I have examined the performance of the CEDAW Committee in monitoring the implementation of CEDAW and have assessed Bangladesh’s compliance with the Convention. The discussion above outlined the findings of the research, its contributions and recommendations for addressing structural challenges with the monitoring and implementation process of CEDAW in reserving states.

I have proposed an interpretation of the CEDAW provisions to facilitate the analysis of reservations made to the Convention and the investigation of state parties’ compliance with their obligations to CEDAW. While Islamic states and Islamic countries are responsible for the majority of reservations made to CEDAW, their reasons for entering and maintaining reservations vary. In particular, the influence of religion and religious laws in state affairs vary from country to country, was demonstrated with respect to Saudi Arabia, Turkey and Bangladesh. The study of
Bangladesh’s reservation to CEDAW uncovered a number of nuances affecting the implementation and monitoring of the convention in the reserving state. Also, I have shown that the literature will benefit from studies that focus on specific obstacles that are more likely to affect each reserving state’s compliance with the Convention. In particular, it would be possible to identify the key reasons motivating each reservation and assess effective means to approach the withdrawal of those reservations that are central to the implementation of CEDAW.

Further, I have shown that significant reforms are necessary in order to address the current deficiencies in the format adopted for the preparation of NGO and UN agencies reports to the CEDAW Committee. I have proposed and discussed two reforms that provide a platform for understanding the role of NGOs and UN agencies in the relationship between reserving states and the CEDAW Committee. It is important, however, to go beyond the proposed reforms and future studies could investigate how, and under what conditions, NGOs and UN agencies are likely to more effectively contribute to the monitoring and implementation process of CEDAW. Should a more formal network between these organisations be established? How would such a network be structured? This thesis contributes to the body of research investigating the monitoring and implementation process of CEDAW and uncovers opportunities for future studies to investigate the impact of various types of reservations (such as those made against Articles that express the ‘object and purpose’ versus those made to Articles that are significant but do not express the ‘object and purpose’) to the implementation of CEDAW. It also provides a platform for further research to improve existing knowledge on the role of NGOs and UN specialised agencies in the monitoring of the Convention in reserving states.
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