

Shari'a Reservations in The Eyes of The Vienna Convention on The Law of Treaties

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ABSTRACT

The author tackles the concept of reservations under The Vienna Convention on The Law of Treaties of 1969, as an approach to achieve universality in the international legal sphere. The instrument in question can be an enabling tool that helps with development of international treaties, and motivates states globally to participate as active actors within the international system. Although many legal experts expressed their concern toward the usage of reservation, the contentious use of Shari'a reservations is faced with even a greater one. Although met with worries of hindering the effectiveness of international conventions, Shari'a reservations is seen as an imperative part of treaty development in the eyes of state sovereignty. The literature shows how reservations have been beneficial under Islamic law to Middle Eastern countries, serving Islamic states and enabling them to become active international actors.

ARTICLE INFORMATION

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1. Introduction

The field of international law is developmental and dynamic in nature, as seen with the establishment of the Vienna convention on the Law of Treaties back in 1969 (Edwards, 1989). The efforts of the International Law Commission was the beginning of treaty regulation and governance for international agreements between states under contemporary international law. The Convention came to be the primary source for international treaties' ratification, acceptance, approval and accession, with instrumental guidelines and obligations on states. Under the VCLT, reservations is a legal tool that establishes the right for states to limit the scope an obligations, by attaching reservations to provisions as a state party. As mentioned in article 2(1)(d) of The Vienna

Convention defining reservations, "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"(Edwards, 1989). Although international law experts are conservative toward such practices due to fear of reservations weighing down effectiveness of a treaty's enforceability. Nevertheless, reservations are a common practice under contemporary international law. On basis of state's sovereignty the imperative need for reservations cannot be denied, especially with states' differing views and practices when it comes to legal interpretation. Here, Interpretive deceleration is seen as another legal statement within the international legal sphere that enables states to

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have a say on a convention's provisions scope of obligation. As defined under the Report of the International Law Commission, Interpretative declarations is seen as a legal instrument where states are able to interpret and clarify provisions of a treaty (The International Law Commission, 2011b). As seen with the drafting of the VCLT, the ILC established categories for sufficient grounds for reservations as the primary rule for its practices and admissibility. Under article (19) of the convention, categories for sufficient grounds for attaching reservations are listed (Edwards, 1989). The general rule sees reservations as admissible, unless; the act of reservations is prohibited by the treaty in questions, which is stated clearly when the treaty is formulated. Secondly, the treaty in question states that certain reservations may be attached, and certain reservations may not. And finally, if the first two cases aren't present, then the reservation must not go against the object and purpose of a treaty. Reservations with sufficient grounds as stated above have legitimate means to be attached, without hindering the effectiveness of a treaty. A question that arises out of the standard set above, is the metrics for measuring a treaty's "object" and "purpose". Where the VCLT document of 1969 is ambiguous toward the set standards, the International Law Commission doesn't fail to fill the gap. Under the Guide to Practice on Reservations to Treaties of 2011, it is stated that a treaty's object and purpose should be interpreted in good faith, to start with. Furthermore, the terms put to use and the context of the treaty carry legal weight, in addition to circumstances of conclusion of the treaty and the following practices of state parties (The International Law Commission, 2011a). The effort exerted by the ILC is helpful to certain limits, solving the ambiguity of the VCLT document, but not fulfilling enough. The work of monitoring bodies also service the notion of reservations' validity and practices for human rights conventions. Monitoring bodies have the competence to determine compatibility and legal consequences of attached reservations, as the Special Rapporteur on the topic of reservations, Professor Alain Pellet expressed (Simma & Hernández, 2011). The statement of the International Court of Justice in relation to the Genocide Convention of 1948, has also added to the object and purpose criterion, stating that such

a standard limits a status capability and ultimate freedom in adding a reservation to a regulating extent (Pellet & Müller, 2011).

2. Literature Review

2.1. Islamic Law Under Contemporary International Law

With the progressive development of international law, the Islamic legal regime's position must be discussed, as a topic of controversy. Islamic law, is a system of religious rulings derived from two primary sources; the Quran holy book, and the Sunnah; also known the prophet's practices. Such a system came to see the light in the 7th century, and has been prevalent globally ever since (Mahmoudi, 2019). Several Middle Eastern, African, and Asian countries rule the state on basis of Islamic law, also refereed to as Shari'a. International legal theorists approach Islamic law as inconsistent due to differing islamic state practices, yet it must be established that such a complex system has within it schools of thought, for interpreting legal text and religious practices of secondary sources (Mahmoudi, 2019). Hence, not all Islamic states follow the same legal text of rulings, as the system's inward dynamic carries differing views. The imperative position of the Islamic regime within contemporary International law effect states' stance and participation under international agreements. With the rise of international conventions, states are motivated to join the sphere of international actors, to take a progressive stand, and administer international standards, such as a human rights framework. Nevertheless, Shari'a reservations, a common practice in contemporary international law, is frowned upon by many states, as it will be discussed below through the case of CEDAW; Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (UN General Assembly, 1979). In addition to another convention under international human rights law that came to rise in 1989, titled as the CRC; Convention on the Rights of the Child (General Assembly resolution 44/25, 1989).

2.2. Literature on Shari'a Reservation Under International Law

In Chaudhry's article dating back to 2015, the author reflects the views of the western

world when it comes to Shari'a reservations, such as those on CEDAW of 1979, the Convention on the Elimination of All Forms of Discrimination Against Women. The convention aims to confirm the rights and dignity of women, reaffirming equality between the two sexes, and denying all acts of discrimination. Yet as seen below, Chaudhry claims that Islamic states, such as the Kingdom of Bahrain uses Shari'a as an excuse.

Bahrain expresses its reservations to Article 16 using vague language, saying that it cannot comply with this article "insofar as it is incompatible with the provisions of the Islamic Shari'a" (UN Women, 2006). In their lack of specifications, these reservations alert us to the power of religious language in stymieing international criticism for gender discriminatory laws (Chaudhry & Hauser Fellow, 2011).

The problematic aspect is the assumption that Islamic states administer unequal rights between the two sexes, and that states hide behind Shari'a reservations to escape the obligations and standards set forth by human rights conventions. Such assumptions build a contentious outlook on Shari'a reservations.

In another case a Shari'a reservation was met with respect from the state of Norway, where the European country actually portrayed its view on the State of Libya's intention to uphold national legislations above International conventions. Although that is the reality to most states globally, the international community seems to attack Islamic ruling countries when national legislations and views are put forth above international ones.

Norway seems to have appreciated that Islamic reservations to human rights treaties basically accord priority to upholding domestic law. Since one goal of human rights treaties is to get states to upgrade their domestic laws to bring them into conformity with international human rights principles, there are strong reasons for objecting to reservations based on a preference to uphold domestic law (Mayer, 1998).

Furthermore, Mayer shares a contrasting view with an Islamic state's responses to the CRC, the Convention on the Right of Child of 1989;

Ratifications of the CRC by Muslim countries may have been encouraged by the fact that the CRC seems more accommodating of cultural difference than does CEDAW. The CRC preamble does give a nod to cultural diversity, calling for taking into account the importance of the traditions and cultural values of each people for the protection and harmonious development of the child (Mayer, 1998).

Such statement reflects where Islamic states seem more willing to adopt and ratify the CRC than other international human rights convention since the instrument is more complying with cultural practices and the nature of eastern states. This shows how the states in question aren't resisting international human rights instruments rather than practices and provisions that aren't in alignment with the state's national legislation, as all other states globally presume. But rather, when given an opportunity for states' compliance with an international human rights' tool, Islamic states were more than willing to participate and proactively becomes a party to human rights conventions. The literature above portrays the reality of Islamic states attachment of Shari'a reservations to international human rights convention. Although seen as contentious, it is only expected of states, with different governing national regimes to attach reservations and restrict obligations put forth by international law. The universalism of international law captures the various dynamics of states globally, and is expected to be inclusive of diverse regimes and states, with an aspirational value and outlook applicable to all.

2.3. The Importance of Reservations Under International Law

Although reservations concerning human rights treaties is a sensitive matter, it is within a state's capacity to take such measures. In the eyes of International law, states may attach reservations or explanatory declarations, in the scope what suits the state's national regulations, in relationship to the matter discussed. Furthermore, attaching reservations has also been seen as move to protect a state's sovereignty in the field of public international law (Monforte, 2017).

Reservation measures give states the room to adjust, limit, or interpret provisions within the convention to the extent that suits the state's legal vision and national legislation. It is also an empowering tool to encourage states to enter into treaties, to sign and ratify, with means of consent to be bound. For international treaties to spread, as an international global practice, and to reach consensus of states, there must be room for change or alteration as each state's national system differ. There lies many aspects that affect a state's decision to enter into a treaty, or so, to avoid commitment to one. Whether aspects such as cultural differences, social practices, national legislations, or political agendas, reservations came to be a tool of encouragement. Hence, reservations are a method for treaties and conventions to develop in the field of international law, with respect to state's sovereignty (Nollkaemper, 2011).

It has been noted over time, that many states seem to enter into treaties and show consensus, after including reservations. And so, such an approach help in the development of international law, and state participation on both a national and global level. Yet, the reluctance toward attaching reservations to normative treaties, also known as human right treaties, are based on the difference in the nature of human rights treaties in relation to other International conventions and treaties.

3. Methodology

4. Results and Discussion

4.1. The Nature of Human Rights Treaties

Such imperative difference must be addressed, first and foremost. Human right treaties are different in relation to other international treaties, where the relationship of reciprocity is clear between one state and another, unlike normative treaties. Through signing and ratifying a treaty, states have mutual obligations toward each other, and such reciprocity plays a role when reservations are attached. While normative treaties are of an inward dynamic where obligations are set on the state in favor of its individuals, those within the state's jurisdiction. As mentioned in the Second Report on Reservations to Treaties in 1996, "While, as a rule, provisions that protect human

rights have a marked normative character, human rights treaties also include typically contractual clauses." (Pellet & Müller, 2011).

This statement adds the obligatory nature of human rights treaties, confirming that provisions protecting human rights should not be undermined on basis of normative standards. Hence, the effect of reservations on human rights treaty carry out a different effect that that of any other international treaty. Limiting the scope of application not just between a state and another, but as mentioned above, the scope of application affects the individuals within the reserving state. Another differing aspect in human rights treaties that aren't prevalent in other international conventions is the nature of humanitarian and a civilized purpose of creation. Such a characteristic was further discussed in the Advisory Opinion of the Genocide Convention of 1948;

It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951).

Although there is a gap in regulating the application of reservations to human rights treaties under the Vienna Convention, the convention's input cannot be completely disregarded, rather than set the basis for practice. Furthermore, customary international law can be used as a source in this case for what the convention lacked to mention, when it comes to reservations on human rights treaties. The 'Strasbourg' tool is a common customary practice, where this approach proposes that an invalid reservation made to a covenant shall be seen as ineffective and has no power over the covenant, and the convent in question will be operating at full extent without limits. The 'Strasbourg approach' has also been confirmed in practice through the committee of human rights of The International Covenant on Civil and Political rights, in 1994 (Baratta, 2000).

4.2. Shari'a Reservations Under International Human Rights Treaties

One of the main topics of discussion, under reservations on human rights treaties, is Shari'a reservations in the eyes of international law. Shari'a reservations is derived out of Islamic Sharia law, the ruling system in many Middle eastern countries. Due to the difference in nature of the Eastern and Western world, many society's within the eastern world carry a different states' system when it comes to national legislations and social practices. On an international sphere, Middle Eastern countries do exert effort and time to take part as international actors within the international legal community, reflecting progress and participation through legal tools, such as reservations and explanatory declarations. Whether eastern states attach reservations to treaties to limit the scope of certain provisions, or alter the obligations treaties establish on states, reservations are an enabling tool for states to stay active globally. "In that context, religion-based reservations account for 40 per cent of all reservations." (Salem, 2020)

Such statistic shows the reality of Islamic ruling state's intention to participate and commit to international standards even when such framework isn't inclusive to all systems. Reservations created the space for Islamic ruling states to take an active role and commit to human rights obligations, to the extent that serves the states and its sovereign power. Yet, such actions by eastern states have been met with disapprovals from many opposing western states. The west's perception of Shari'a law and the Islamic system is ancient and outdated, in addition many western countries diminishes between Islamic Shari'a law and cultural practices. On more legal grounds, the west expressed their continuous concern on the effect of reservations and the measures taken against international treaties, in the context of international human rights agreements. Opposing states fear the paradoxical nature of sharia reservations on treaties and conventions, and how these legal measure effect the power of the treaty and its effectiveness, within the international community. In the Colombia Journal of Gender and Law, Monforte expresses her concern on the clashing nature of Sharia law and International law, reconstructing the nature of the relationship between the two paradigms, addressing the two systems as "internally

coherent and in conflict with one another" (Monforte, 2017).

The true struggle presented lies in the intersectionality of human rights conventions with the effect of reservations on them. International human rights law are of a normative standard, creating obligations on states for the sake of protection of individuals within the state's jurisdiction, and the question of reservation has been sensitive for years. "Excluding certain rights in certain regions also violates those rights which are said to be guaranteed in this region; thus, a reservation saying that certain rights do not apply in certain countries is a violation of human rights. Reservations are therefore incompatible with human rights (Fournier, 2010). The struggle becomes prominent when reservations of Shari'a law, are met with the predisposed belief by western states that the Islamic legal paradigm is degrading for women, and go within its nature against human rights law.

Akstiniene' discusses in her writing the consensual and willingness of Islamic ruling states to participate in international covenants of human rights to the extent of what is permitted by Shari'a law. Such approach from Middle Eastern and Islamic states portrays the willingness of these parties to participate in the progressive development of international human rights. Thus, Islamic states are more than accepting of international standards of human rights, as long as these standards do not undervalue the sovereign and national legislation of state parties.

The member states who are willing to join this international document declare that they are willing to comply with the content of the articles on condition that such compliance does not run counter to the Islamic Shariah law (Akstiniene, 2013).

Such an approach is not only permissible under international law, but is seen as complying with the concept of state sovereignty and the importance of fulfilling state's consent.

4.2. Universality of International Human Rights Law

One of the main key principles under the field of public international law is the principle of universality of the law. With the development of International law, the importance of a unified

system of global protection and universal application is an imperative concept for the success of the field. Yet, one of the many dilemmas faced is universalism in the face of cultural relativism. While many states do seek to play an active role in the sphere of international law, alas states find it problematic to enter a treaty as a signatory party when certain provision aren't aligned with local legislations. In the face of cultural relativism, universality doesn't always succeed, especially when it comes to eastern countries. It can be seen with the case of many states who follow Islamic Shari'a law as the primary source for national legislations and governance of the country. Although eastern countries are willing to take part in the international sphere, and be seen as actors of international law, their participation comes with limitations and respect in relation to the states legal system. Cultural practices and social norms take part and creates a unique dynamic within each state, as states differ in ruling systems across the globe. Hence, reservations as a legal instrument is imperative in the face of international human rights law, for state's participation in international convents and treaties. Furthermore, cultural relativism isn't an excuse for the eastern world's lack of participation in human rights treaties(Akstinienė, 2013). nevertheless such theory does constitute an excuse for eastern countries attachment of reservations on international conventions, on basis of Shari'a law.

The legal tool of reservations on international conventions has bridged the gap between the East and the West, in addition motivated many states who aren't willing to agree fully with the treaty in question, to become a signatory party yet with restricting views. The belief that the feminist view for the protection of women's rights is singular and takes one form is very limiting and outdated, where Shari'a law constitute its own system of protection for women, that many middle eastern countries comply with and follow. The fact that the western world and the Eastern world have different forms of protection and legal development, doesn't make one approach dominant over the other, due to its prevalence in international covenants and treaties. The importance of reservations, and the role it plays is crucial and cannot be dismissed, for the efforts

and gap it has bridged between many legal systems, of western views and the eastern ones. Shari'a based reservations, are actually a progressive approach for Middle Eastern countries to voice out concerns, whether of a social or a political nature.

4.3. States Response to Shari'a Reservations

Middle Eastern and African states have retreated to reservations when joining international convention. Through Islamic regime, these states found it hard in many scenarios to commit to a convention without any conflicting articles between provisions within the international convention and the state's national legislation. Yet, due to responses of non-Islamic states and other regimes, Islamic states become hesitant in practicing its own right of attaching reservations. In the case of the CEDAW convention, it was noted that Libya withdraw a general reservations that it previously administered due to fear of backlash from other states. Libya's intention was not to limit the scope of any certain provision under the CEDAW to be exact. The Islamic State attached a reservation clarifying that it is committed to the convention to the extent that Shari'a law allows, within the boundaries of Islamic rulings. Where Domestic laws are seen to hold a higher status of hierarchy over international agreements. To avoid conflict, the state of Libya reconfirmed that the Islamic regime of the state hold peremptory norm over any other obligation and the state in question will not deviate from that. With that said, Libya notified the secretary general of its intention to withdraw the reservation the state previously attached during accession (Mayer, 1998).

Nonetheless, Libya worked to modify its stance toward the CEDAW with a new reservation before the meeting of the Beijing conference in 1995 (*Report of the Fourth World Conference on Women*, 1996). Although some states might see such practices as reluctance to achieve equality and fulfill human rights standards, other see that it is within a state's capacity to practice its sovereignty and put forth its national legal system over International agreements (UN General Assembly, 1979). The extent of states reaction to Islamic reservation can also be seen with the state of Algeria's position with ratifying the CEDAW (UN General

Assembly, 1979). The Islamic State prolonged joining the convention up to 1998. When the state finally joined the convention, the reservations attached didn't mention Islam or Shari'a as basis for the reservation, rather than the intention to uphold the national constitution of Algeria over conflicting terms of the convention. Such a move was definitely of a calculated and political means, reflecting the fear exerted onto Islamic states. Although international law aims to uplift national legislation standards and implement a more progressive human rights regimes, state's national law should not be undermined nor dealt with lightly, or the question of conflict of sovereignty will arise.

5. Conclusion

As a conclusive statement to the efforts achieved above, it must be stated the issue here is not of a Western regime versus an Eastern one, but a revaluation of the international legal system and its framework, and the VLCT in particular, in context of universality. The claim that international law serves all states is an imperative part for its success. Since the beginning of the 19th century, the legal system of the Law of Treaties developed to an impressive extent, as the VCLT came out as a primary source for treaty making and governance. As states accept the practices of the Islamic regime especially in dealing with international law, more Middle Eastern states will be motivated toward taking part in treaties and becoming a signatory party. Shari'a reservations serves the international legal system as much as the reserving state, as it helps motivate states to become a party to treaties without fear of conflicting provisions with a state's national legislation. The goal of international law is to be inclusive to all, yet Western state's reaction to Islamic reservations have created fear around such practices. Equality doesn't take one form, as states globally become more aware of the nature of Shari'a law, a more tolerant and inclusive the International system will be. And the development of international tools such as reservations are key success toward the global participation, for states with different regimes. Only then, will international law be able to truly uphold the aspirational value of universality.

REFERENCES

- Akstinienė, A. (2013). Reservations to Human Rights Treaties: Problematic Aspects Related to Gender Issues. *Jurisprudence*, 20(2), 451–468.
<https://doi.org/10.13165/jur-13-20-2-05>
- Baratta, R. (2000). Should Invalid Reservations to Human Rights Treaties be Disregarded. *The European Journal of International Law*, 11(2), 413–425.
<https://doi.org/10.1093/ejil/11.2.413>
- Chaudhry, A. S., & Hauser Fellow, R. E. (2011). *Interrogating the "Shari'a" Excuse: Religious Reasoning, international law and the Struggle for Gender Equality in the Middle East 1*.
<http://www.un.org/womenwatch/daw/cedaw/reservations->
- Edwards, R. W. (1989). Reservations to Treaties Reservations to Treaties Recommended Citation Recommended Citation RESERVATIONS TO TREATIES. In *Michigan Journal of International Law* (Vol. 10).
<https://repository.law.umich.edu/mjilAvailableat:https://repository.law.umich.edu/mjil/vol10/iss2/3>
- Fournier, J. (2010). Reservations and The Effective Protection of Human Rights. *Goettingen Journal of International Law*.
- General Assembly resolution 44/25. (1989). Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. *Audiovisual Library of International Law*, 1–15.
<http://ohchr.org/sites/default/files/crc.pdf>
- Mahmoudi, S. (2019). *Islamic Approach to International Law*. <http://opil.ouplaw.com>
- Mayer, A. E. (1998). *ISLAMIC RESERVATIONS TO HUMAN RIGHTS CONVENTIONS A CRITICAL ASSESSMENT* (Vol. 15).
- Monforte, T. (2017). *BROAD STROKES AND BRIGHT LINES: A RECONSIDERATION OF SHARI'A BASED RESERVATIONS*.
- Nollkaemper, A. (2011). Content type: Encyclopedia entries. *Max Planck Encyclopedias of International Law [MPIL]*.
<http://opil.ouplaw.com>
- Pellet, A., & Müller, D. (2011). Reservations to

- Human Rights Treaties: Not an Absolute Evil.... In *From Bilateralism to Community Interest* (pp. 521-551). Oxford University PressOxford.
<https://doi.org/10.1093/acprof:oso/9780199588817.003.0035>
- Report of the Fourth World Conference on Women.* (1996). United Nations.
https://www.un.org/womenwatch/daw/beijing/pdf/Beijing_full_report_E.pdf
- Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (May 28, 1951).
- Salem, N. (2020). *Sharia Reservations to HumanRights Treaties*. Max Planck Encyclopedias of International Law [MPIL].
<http://opil.ouplaw.com>
- Simma, B., & Hernández, G. I. (2011). *LEGAL CONSEQUENCES OF AN IMPERMISSIBLE RESERVATION TO A HUMAN RIGHTS TREATY: WHERE DO WE STAND?*
<https://durham-repository.worktribe.com/output/1658454/legal-consequences-of-an-impermissible-reservation-to-a-human-rights-treaty-where-do-we-stand>
- The International Law Commission. (2011a). *Guide to Practice on Reservations to Treaties. Adopted by the International Law Commission at its sixty-third session, in 2011.*
https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf
- The International Law Commission. (2011b). *Report of the International Law Commission.*
https://legal.un.org/ilc/documentation/english/reports/a_66_10.pdf
- UN General Assembly. (1979). 8. *CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (IV, Vol. 1249). United Nation.
<https://treaties.un.org/doc/Publication/MTDSG/Volume I/Chapter IV/iv-8.en.pdf>