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RESERVATIONS TO CEDAW AND WOMEN'S EMPOWERMENT. AN OVERVIEW

Chiara Salamone

Contents

1. Reservations to CEDAW: General Rules

Reservations to treaties, together with interpretative declarations, are used by States to reaffirm their own views and prerogatives and so they are pretty frequent in connection with human rights treaties. The Convention on the Elimination of All Forms of Discrimination Against Women does not represent an exception under this point of view.

The treaty expressly rules reservations (article 28), stating that the Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession and that reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General himself, who shall then inform all States thereof (such notification shall take effect on the date on which it is received). Para. 2 also states that reservations incompatible with the object and purpose of the present Convention shall not be permitted, thus reproducing article 19 letter c of the Vienna Convention on the Law of Treaties. A list of the reservations formulated so far made upon ratification, accession or succession can be found on the website of the Office of the United Nations High Commissioner for Human Rights[1].

2. Positive Obligations of States and Reservations: the CEDAW Protection Standards

The more reserved articles obviously appear to be those concerning positive obligations of States in enforcing the CEDAW protection standards and particularly articles 2, 9, 11, 15 and 16. On the contrary, a provision like article 1, including the wide definition of

[1] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en, checked on January 2012, last update 2012 (see also the old Division for the Advancement of Women [DAW] website, at the webpage http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm, checked on January 2012, last update 2009).

"discrimination against women", wasn't made object of any reservation, thus showing that there is a least a certain uniformity of views about the core aim of the Convention and its scope (the declaration proposed by Liechtenstein only apparently concerns art. 1).

The provision which has probably attracted the highest number of reservations is article 2, that provides for positive obligations of States to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation, to adopt appropriate legislative and other measures (including sanctions where appropriate), to establish effective legal protection of the rights of women, 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, to take all appropriate measures to eliminate discrimination and to modify or abolish existing laws, regulations, customs and practices and to repeal all national penal provisions which constitute discrimination against women.

In particular, many Muslim States, such as Algeria, Bahrain, Bangladesh, Egypt, Iraq, Libya, Federated States of Micronesia, Morocco, Niger, Qatar, Singapore, United Arab Emirates, declared themselves prepared to apply the provisions of this article on condition that they do not conflict with domestic law, with national customs and traditions or with the Islamic Shariah[2]; some other States "objected" *tout court* to a single letter or to the whole of the article (i.e. Bahamas, Democratic People's Republic of Korea, Iraq, Niger, Syria).

It is evident how wide substantive reservations like these can impair the aim of economic empowerment of women at national level. Some other reservations to article 2 were also proposed to safeguard domestic provisions concerning family, inheritance and succession to the throne (i.e. Lesotho, Principality of Monaco, Morocco, Spain, United Kingdom; see also Luxembourg reservation concerning article 7, later withdrawn)[3].

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[2] On the topic see*, inter alia*, Z. F. KABASAKAL ARAT, "Promoting Women's Rights Against Patriarchal Cultural Claims. The Women's Convention and Reservations by Muslim States", in D. P. FORSYTHE, P. C. MCMAHON (eds.), *Human Rights and Diversity. Area Studies Revisited*, Lincoln and London, 2003, pages 231-253.

[3] On the role of reservations to article 2 see also Committee on the Elimination of Discrimination Against Women, *General Recommendation no. 28*, 16 December 2010, CEDAW/C/GC/28, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf.

Both in relation to article 2 and to other articles (especially article 16) or to the whole of the conventional text, “general reservations”, regarding those provisions that may be contrary to the Constitution of State, to domestic legislation or to the beliefs and principles of Islam, have been proposed (i.e. Brunei, Liechtenstein, Mauritania, Oman, Saudi Arabia, Tunisia).

Similar reservations caused strong objections from other States parties, mostly from West-European States, on the ground that they would inevitably result in an impermissible discrimination against women on the basis of sex, contrary to the object and the purpose of the Convention, and, due to their vagueness, may cast doubts on the commitment of the reserving State to fulfill its obligations under the Convention, thus undermining the basis of international treaty law (see, *inter alia*, the widely motivated objection proposed by Austria with regard to the declaration made by Pakistan upon accession). Nevertheless, none of the objecting States intended to preclude the entry into force of the Convention between themselves and the reserving States, a fact that seems pretty natural in the context of a treaty whose nature is “normative” and not “contractual”.

A few other States only declared that some of their domestic provisions are not entirely compatible with the Convention and committed themselves to reform them in order to make national systems consistent with the obligations arising from CEDAW (i.e. Chile, Malta; see also the reservations nos. 2 and 3 formulated by Republic of Korea). The recourse to similar declarations is disputable, but they seem to have only a political role. The declaration of Niger, whereby the Government declared that a few articles “cannot be applied immediately, as they are contrary to existing customs and practices which, by their nature, can be modified only with the passage of time and the evolution of society and cannot, therefore, be abolished by an act of authority” appears debatable in its form, but clearly represents a reservation to the articles it mentions.

Articles 3 and 4, due to their general aim and wording, were not made object of any reservation. Similarly, article 5, which provides for the positive obligation of States parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, has attracted a low number of reservations (i.e. Federated States of Micronesia, Niger). Also article 6, which is, on the contrary, a very incisive provision concerning criminal law (“States parties shall take all appropriate measures, including legislation, to suppress all

forms of traffic in women and exploitation of prostitution of women") attracted no reservations, probably because it can't produce any (even indirect) effect in the national legal systems in lack of national implementation.

Looking at the public sphere, article 7, regarding positive obligations in the field of "public rights" (participation in political and public life, right to vote, participation in the formulation of government policy and the implementation thereof, access to public office and public functions, participation in non-governmental organizations and associations concerned with the public and political life of the country), was made object of some reservations (i.e Maldives, withdrawn in 2010). A few declarations made with regard to this article, as well as others worded in general terms, concern the law of armed forces. Australia, for instance, stated that "it does not accept the application of the Convention in so far as it would require alteration of Defense Force policy which excludes women from combat duties"; similar declarations were proposed by Principality of Monaco and United Kingdom and also Switzerland proposed a declaration of the kind, later withdrawn.

Analogous reservations concern religion: for instance, the State of Israel expressed its reservation with regard to article 7 para. b of the Convention, concerning the appointment of women to serve as judges of religious courts, where this is prohibited by the laws of any of the religious communities inside the State (see also reservation no. 1 formulated by Singapore and reservation A (c) formulated by United Kingdom upon ratification).

Article 8, another provision that, due to its general wording, can be almost considered as merely programmatic, did not attract any reservation.

On the other hand, those provisions that affect the status of individuals in the national legal systems were object of a great attention from the States parties. A significant example of this attitude is provided by article 9, which obliges States parties to grant women equal rights with men both to acquire, change or retain their nationality and with respect to the nationality of their children: this article has been made object of a large amount of reservations, in particular on behalf of Muslim States, jealous of their cultural tradition in the field of family law (i.e. Algeria, Bahamas, Bahrain, Democratic People's Republic of Korea, Iraq, Jordan, Kuwait, Lebanon, Principality of Monaco, Morocco, Oman, Qatar, Republic of Korea, Saudi Arabia, Syria, Tunisia, United Arab Emirates, but also France and United Kingdom).

It is worth underlining that in formulating their reservations some States, such as Algeria and France, expressly mentioned the national laws they intended to exclude from the Convention, an attitude that is consistent both with the CEDAW Committee recommendations and with the latest guidelines of the International Law Commission on the topic. Several Governments notified the Secretary-General that they consider similar reservations as incompatible with the object and purpose of the Convention and, therefore, prohibited by virtue of art. 28 para. 2 (i.e. Sweden, Portugal and Denmark with regard to the declarations proposed by Algeria). However, reservations to the international uniform rules about nationality of women and children appear almost unavoidable at the present stage of international integration, since States tend to be jealous of their national traditions and prerogatives regarding the attribution of citizenship, also in the light of its effects on the resolution of conflict of laws' issues.

Looking at Part III of CEDAW, articles 10 and 12, concerning education and health care, attracted no reservations. Also article 13, concerning economic and social rights (right to family benefits, right to bank loans, mortgages and other forms of financial credit; right to participate in recreational activities, sports and all aspects of cultural life) has been made object of reservations of limited importance, for instance that formulated by Malta. On the contrary, article 11, a key provision in the field of women's social rights, was objected by States with a developed system of welfare, such as Australia (para. 2), Austria, Ireland, Principality of Monaco (given reservation no. 6 can be regarded as referred to article 11) and United Kingdom, thus showing that the level of protection it means to ensure is particularly high.

Many reservations were formulated with respect to social rights concerning work, employment opportunities, free choice of profession, right to promotion, job security, conditions of service, vocational trainings, remuneration, retirement, unemployment, sickness, invalidity, old age, paid leave, protection of health, safety in working conditions, pregnancy, maternity, marital status and child-care facilities and this could represent a factor of impairment for the economic empowerment of women both at national and at global level (see for instance the reservation formulated by the Federated States of Micronesia, that declared themselves not at present in a position to take the required measures, or that formulated by Mexico).

Nevertheless, these rights represent typical examples of “economically conditioned rights”: it appears almost unavoidable that States tend to subordinate them to their financial capacity and to the present level of protection provided by national legislation, especially given they are guaranteed by a treaty conceived outside the framework of a regional organization. At the same time, the strong affirmation of these rights, outside the narrow ILO conventions’ “labour market approach” (which is not reckoned to suit women’s economic contributions), can play a “cultural role” towards the realization of the Millennium Development Goals.

Also article 14, another core provision regarding social rights in rural areas, was reserved by some States (i.e. France), to the extent that the rights it mentions (participation in the elaboration and implementation of development planning at all levels; access to adequate health care facilities, including information, counseling and services in family planning; access to social security programs, training and education; organising self-help groups and co-operatives; participation in all community activities; access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes; adequate living conditions) have to be guaranteed only when conditions provided by national legislation are fulfilled and are not unconditionally or free of charge.

Analysing Part IV of the Convention, articles 15 and 16, concerning civil law, obviously attracted a high number of reservations, in the light of their deep impact on national legal systems. In particular, article 15 para. 4, concerning equality with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile, provoked objections from Muslim States (i.e. Algeria, Bahrain, Morocco, Niger, Oman, Syria), due to its strong connection with family law and with public policy (see the motivated reservation no. 2 formulated by Singapore, withdrawn in 2007) and given residence and domicile represent important criteria for the application of national discipline in conflict of laws.

Also para. 3, that states that all other private instruments with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void, attracted some reservations. The fact is not surprising: when international rules directly affect the validity of acts at domestic level, it is likely them to be made object of formal exceptions (see

for instance the reservation proposed by United Kingdom). Article 15 paras. 1 and 2 attracted some reservations too (i.e. Qatar, Switzerland, United Arab Emirates).

Also article 16, concerning equal rights for men and women in all matters relating to civil status and marriage, both during marriage and at its dissolution, was "reserved" by many States (i.e. Algeria, Bahrain, Egypt, France, India [which invoked its practical difficulty in requiring compulsory registration of marriages], Iraq, Ireland, Israel, Jordan, Kuwait, Lebanon, Libya, Maldives, Federated States of Micronesia, Principality of Monaco, Niger, Oman, Republic of Korea, Singapore, Syria, Switzerland, Thailand, United Arab Emirates). An outstanding reservation was formulated by the Government of Malta, which declared that it "does not consider itself bound by sub-paragraph (e) of paragraph (1) of article 16 in so far as the same may be interpreted as imposing an obligation on Malta to legalize abortion" (a similar declaration was formulated by the Principality of Monaco).

The possibility of formulating reservations is expressly mentioned in the dispute settlement clause (article 29), which provides that any dispute between two or more States parties concerning the interpretation or application of the Convention should be settled by negotiation and, in lack of the latter, submitted to arbitration or, in case of failure after six months, to the International Court of Justice. Para. 2 also states that the other States parties shall not be bound by this provision with respect to any State party which has made such a reservation (so called minimum or simple effect; art. 21 para. 3 VCLT and also ILC guidelines on Reservations to treaties, 4.3.5). Similar reservations were formulated by Algeria, Argentina, Bahamas, Bahrain, Brazil, China, Cuba (see the peculiar wording), Democratic People's Republic of Korea, Egypt, El Salvador, Ethiopia, France, India, Indonesia, Israel, Jamaica, Kuwait, Lebanon, Mauritius, Federated States of Micronesia, Principality of Monaco, Morocco, Myanmar, Niger, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Syria, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, Venezuela, Viet Nam, Yemen; some States expressly stated that a dispute over the Convention can be submitted to arbitration or to judicial settlement only with the consent of all the parties to the dispute. Nevertheless, para. 3 expressly "encourages" the withdrawal of similar declarations, stating that they can be at any time withdrawn by notification to the Secretary-General of the United Nations.

Looking at the whole CEDAW system, the Optional Protocol, which instituted the Committee on the Elimination of Discrimination Against Women, was made object only of a few reservations, due both to article 17 of the Protocol itself, which prohibits them (so that all statements were defined as mere "declarations") and to the fact that similar reservations would completely disrupt the CEDAW system, affecting the role of control held by the Committee in the enforcement of the Convention and making it more difficult to fix a uniform interpretative and applicative standard at the international level. A list of the declarations formulated so far by the States parties in connection with the Protocol can be found on the OHCHR website as well[4].

3. Interpretative and Political Declarations to CEDAW: "Safeguard Clauses" and Reservations in Disguise

Besides reservations, a few declarations of various nature were also proposed by States parties.

Some articles gave rise to "interpretative declarations". However, declaring that some of the CEDAW provisions "should not be interpreted in such a manner as to contradict" national law, States actually formulate reservations in disguise of statements concerning the mere interpretation and application of the treaty (see, for example, the declaration proposed by Algeria concerning art. 15 para. 4, the declaration no. 5 by Tunisia or the general statement formulated by Thailand); also the so-called "statements of compliance", whereby States declare that a provision of the Convention is not in conflict with domestic rules, can be seen as a potential reservation (i.e. see the statement proposed by Turkey on art. 9). Also the declaration formulated by India, by which it stated that "with regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent" is of an ambiguous nature.

[4] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en.

A genuine interpretative declaration, on the contrary, was proposed by France, when it declared that "the term 'family education' in article 5 (b) of the Convention must be interpreted as meaning public education concerning the family" (a similar declaration was proposed by Niger). Also the declaration proposed by United Kingdom on art. 16 para. 1 (f) and those formulated by Qatar (reaffirming the role of marriage and of women as mothers) are interpretative in their essence.

Some declarations, on the other hand, are of a pure political nature (i.e. the declarations formulated by France and Netherlands criticizing some preambular paragraphs), leaving aside the usual Iraqi and Syrian declarations, by which the Governments stated that approval of the Convention in no way implies recognition of or entry into any relations with Israel.

Some other statements provide examples of the so-called "safeguard clauses", which are intended to exclude domestic laws from the field of application of the Convention (i.e. statements formulated by France) or to affirm the prevalence of other international instruments (i.e. France affirmed that art. 5 has to be applied subject to respect for art. 17 ICCPR and art. 8 ECHR).

Some more declarations (i.e. those formulated by France, Ireland, Principality of Monaco and United Kingdom) are just meant to underline how CEDAW standards can be derogated *in melius* at domestic level and in no way intend to decrease the level of protection already ensured in the national legal systems (see also declaration A formulated by the Government of Malta and declaration no. 3 by Singapore).

4. The Impact of Reservations on the CEDAW System: the Goal of a Uniform Implementation

Analysing the impact reservations have on the application of the Convention in the States parties, this brief survey has shown that the number of substantive reservations formulated by States upon signature, ratification of accession was considerable, especially in relation to articles providing for positive obligations in the field of personal and family status and of social and economic rights (leaving aside reservations to art. 29, which represents a sort of secondary rule and does not really fall within the normative regime set by the Convention).

It is also worth underlining that a certain number of reservations were withdrawn over the years, thanks to a slow but progressive development of States' concern towards women rights' protection. The reduction of the number of reservations, which is particularly important in the field of human rights treaties, obviously promotes the settlement of uniform CEDAW standards. Many withdrawals also concerned article 29, thus showing how the global settlement dispute system represented by ICJ is playing an increasing role in the international scene.

Nevertheless, it should be considered that the fragmentation arising from the current situation is not seriously detrimental to the Convention, given the proposed statements all concern the scope of the obligations each State party has assumed in respect of its own citizens and, sometimes, they also are of limited effect. In can't be denied that reservations to social rights (i.e. articles 11 and 14) can, to some extent, impair the economic empowerment of women and the concrete realization of "gender perspective" in the realization of the Millennium Development Goals; nevertheless, outside the framework of a regional organization, it is very complex to find the resources and, in second instance, the instruments of coaction directed to the aim of implementing these rights at domestic level.

Furthermore, looking at the general role of unilateral declarations, it has to be taken into due consideration that the Committee has always maintained, in its Reports and General Comments, that the formulation of reservations should be strictly limited and has always encouraged and recommended the withdrawal of reservations, sometimes trying to engage in discussions with States about the justification and the scope of their declarations[5].

Moreover, although the CEDAW Committee has never analyzed *de plano* (neither while considering periodic reports, nor during the examination of individual complaints) the issue of the validity of reservations contrary to the object and purpose of the treaty, other treaty bodies, and specifically the Human Rights Committee and the European Court of Human Rights, consider as not formulated similar reservations (so called severability rule, also stated in ILC guidelines 4.5.1 e 4.5.2). Looking at the CEDAW practice, some States affirmed, in formulating their objections, that they considered reservations contrary to the

[5] See General Recommendations nos. 4 (Sixth Session, 1987) and 20 (Eleventh Session, 1992), http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html.

object and the purpose of the treaty as "devoid of legal effect" (so it is worded the declaration by Finland) or "null and void" (Swedish objections).

In general terms, reservations to CEDAW could be considered as not falling within the scope of the so called reciprocity rule[6]. So, on one hand, States, being allowed to formulate reservations, are not discouraged in signing and ratifying the Convention, given they can avoid the application of those provisions which seem to impose a too high level of protection or simply are not consistent with their national legal systems; on the other hand, the application of the rule *vitiatur sed non vitiat* can guarantee, to a certain extent, the integrity of the Convention regime and the enforcement of a uniform standard of protection amongst all the States parties[7].

At this point one more issue arises: can States "accept" impermissible reservations or is the Committee, as monitoring CEDAW body, the only judge of permissibility? Under a different viewpoint: has CEDAW to be ruled by the same rules applicable to other multilateral treaties or should it have a regime separated even from that ruling other (UN) human rights instruments? The answer is, at the current stage, still uncertain: although other monitoring human rights bodies have committed themselves with the task of ascertaining the permissibility of reservations (i.e. HRC and ECHR, ever since the *Belilos* case, judgment 29 April 1988), the CEDAW Committee has not gained this exclusive role yet. Single States' reactions have still a role in severing whether a reservation is invalid or not (so called flexibility principle), thus creating a tension between "permissibility" and "acceptability" (so called two-tiers test) and making the so called interplay of human rights complex and fragmented[8].

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[6] For the specificity of Human Rights Law see, for all, M. T. KAMMINGA, M. SCHEININ (eds.), *The Impact of Human Rights Law on General International Law*, New York, 2009. See also L. LIJNZAAD, *Reservations to UN-Human Rights Treaties. Ratify and Ruin?*, DordrechtBoston-London, 1995

[7] See International Law Commission, *Meeting with human rights bodies. Report prepared by Mr. Alain Pellet, Special Rapporteur*, ILC[LIX]/RT/CRP.l , 26 July 2007 http://untreaty.un.org/ilc/documentation/english/ilc(lix)_rt_crp1.pdf.

[8] On the topic see, *inter alia*, B. CLARK, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women", in *American Journal of International Law*, 1991, pages. 281-321 and W. SCHABAS, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women

De *iure condendo*, many solutions have been proposed, such as differentiating between derogable and non-derogable provisions and adopting a collegiate system of accepting reservations, but, after over thirty years of CEDAW experience, systems of the kind have not been established in any human right treaty, nor has any proposal of amendment to VCLT come to light during the ILC's works on the topic. Nevertheless, it is worth underlining that participation to CEDAW means something different from country to country, in relation to the effective level of implementation at the domestic level and, to a minor extent, to the willingness of States to collaborate (many States even fail to submit full reports to the Committee), regardless the number or reservations proposed by each State party.

In conclusion, a State can formulate a minor reservation and fully implement all the rest of the treaty at the domestic level: at present, reservations to the Convention do not appear to be the major factor of disruption in the CEDAW system and do not seem to be really detrimental in respect to the goal of the economic empowerment of women. Only general or undefined reservations, such as those formulated by many Muslim States, can really impair the enforcement of the Convention, thus making the almost global adherence to the Convention a formal data. *De iure condendo*, the role of international law can be that of promoting a strengthening of the role of the Committee and the diffusion of soft law guidelines on the matter, in order to open the way to a uniform implementation of CEDAW standards.

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and the Convention on the Rights of the Child", in *William & Mary Journal of Women and the Law*, 1997, http://scholarship.law.wm.edu/wmjowl/vol3/iss1/4.