

‘Islamic Reservations’ to Human Rights Treaties and Universality of Human Rights within the Cultural Relativists Paradigm

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Abstract

The legitimacy debate between ‘universal’ human rights and its apparent conflict with the Islamic value system (broadly characterized as the ‘relativist’ challenge to ‘universal’ human rights) is still far from settled. My paper will reflect on this debate in terms of the current international treaty law.

The paper will consider this conflict in the light of the interaction of Islamic states with multilateral human rights regimes, starting from United Nations Charter, Universal Declaration of Human Rights, the two covenants (International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights) and the stream of other international and regional human rights regimes. It will analyze through the ‘reservations’ clause of human rights regimes, the interaction between ‘universal’ human rights and Islamic law. In particular, it will focus on how Islamic states have put forward what has come to be known as the “Islamic reservations”, and it will attempt to outline to what extent these reservations are contradictory to universal human rights, as noted in the objections to these reservations by various states parties to the treaties. An assessment will also be made of the extent to which the human rights to which the ‘Islamic reservations’ have been made, may actually be incorporated into the legal systems of the reserving Islamic countries.

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Universal Human Rights *apply* in equal measure to every country, it is *desirable* in every corner of the world, regardless of the extent of diversity of one corner from the other, and it is presumed to be *equally understood* by every one in the world.

This kind of pervasive conceptualization of human rights was developed and promoted through international treaties in the new world community that emerged under the aegis of the United Nations during the 1950s through to the present, by Europe and the United States after World War II.

Human rights have become a new creed, one that is more important than any other in the world today. It has created an elite club made elite by a *greater understanding* of the human ethics than any other community before them. “Democracy” and “good governance” is immediately attached and equated to the acceptance and implementation of universal human rights as enshrined in the international treaties that emerged from this club. The pursuit of universality is zealously undertaken to the extent, that many advocates of universality promote the participation of nations in the international human rights treaties even though the new members make sweeping reservations to many of the key issues addressed in these instruments. Universal membership was the beginning of the progressive application of the new ethics or so it was believed. The newly independent states of Africa and Asia had little to choose from. It was a peculiar *either/or* situation.

The *telos* of human rights is to protect and promote dignity of the human being. And it is in the pursuit of this objective that the human being is vested with rights and obligations are placed on everyone to respect, protect and promote those rights. But the fact that not all cultures perceive the promotion of human dignity as comprising recognition of the same set of rights, harks us to the discourse with which the present paper shall attempt to engage. Reservations made by Islamic countries to international human rights treaties, this paper shall argue, represent the culturo-religious worldview of the Muslim world. And it has the potential for meaningfully engage a community of people belonging to a different culture zone, in the pursuit of human rights.

The impact of universalisation of the standards of human rights on different cultural systems need to be assessed in order to substantiate the relevance of the (self evident) universality claim as expressed in the

international human rights treaties. The numerous reservations made by states to the various human rights treaties contradict the idea that these standards are applicable to all communities and cultures, regardless of the extent of their acceptability among different communities of people. In this context, reservations may be said to represent one of the significant assaults on international human rights treaty law's claim of universality and it underlines the importance of cultural consideration on international human rights.

The existence of the multitude of reservations premised on cultural-religious distinctions raises the importance of the "relative value and validity of contradictory claims by those from different cultural and ideological traditions about human rights." As Cohen had aptly noted, "At issue are questions about when and under what (if any) circumstances contradictory human rights beliefs and practices are supportable. Contrarily, when do they run counter to truly human interests, if such a quality can be defined." (Cohen, 1989: 1014) The vinculum between cultural relativism and reservations to universal human rights treaties may be seen from the distinct reservations based on cultural factors (such as reservations) made to these treaty regimes. These reservations are reflections of the capacity of the states parties to discharge their treaty obligations as they are increasingly compelled to navigate their cultural norms within a universalized system. Culture-based reservations like reservations are indicators of the capacity of the states to undertake international obligations like those contained in international human rights treaties.

The capacity, the political will and the authority of a state to engage in international relations and interface with the global community are largely decided by the interests, security and the wellbeing of the people who comprise the states. Where such interests and wellbeing of the people includes their cultural and religious system as well, it not only puts an onus on the governments of the states concerned to protect those interests but also limits the political power of the governments to engage with the outside world in detriment to those interests. Prior to the formulation of universalized normative treaties like the human rights regimes, states desirous of engaging in international relations largely relied on the classical formulation of the principle of the supremacy of national sovereignty (which is no longer considered as a thumb rule).

A case in point are the reservations that are widely considered by the Muslim states as representing cultural reservations made in the exercise of their sovereign powers to protect their individual national interests. However, such an approach to international law is no longer the ruling principle, more so in the case of human rights treaties. Consequently, reservations based on made by the Muslim states are perceived as running contrary to international treaty law and unmindful of the interests of the universalized human rights regimes. The argument for universal human rights are premised on the basis that human rights are not just the rights of states *per se*, but they are the rights of the individuals living within a state and most often exercised against the state. Therefore, the interests of the individuals should precede the interests of the nation.

By sidelining the importance of national sovereignty, such arguments effectively create an artificial schism between the 'state' and the 'individuals' within it. This can be seen emphatically in countries where the form of government and national identity are intertwined with the moral consciousness of the people. Muslims states, for one reason or the other, are strongly reliant on the religious convictions of the people, to assert and maintain its legitimacy.¹ The many considerations based on which the governments of Islamic countries have patronized Islam show the overarching role of religion in their polity. "Whatever the actual foundations of their power, many Middle Eastern [for that matter all Muslim countries] regimes clearly share a belief that in the effort to mobilize or to pacify a mass public, some gesture in the direction of "Islamic politics" is required." (Tripp, 1996: 60)

In secular Western democracies, where the role of religion has been effectively relegated to the private enterprise of the people, it is easy to conceive and legitimize a secular universality of human rights as such. But even in the West, religious influences underpin the moral consciousness, playing an effective role in conceptualizing human rights.

1. As Charles Tripp had noted, "Clearly, there has been a common belief among the ruling elites in the efficacy, as well as the appropriateness, of the emphasis on aspect of Islamic belief as one of the means of winning popular approval for projects. As the founders of states... those in power evidently felt the need to take some account of the belief systems of the people whom they were seeking to bend to their will ...it was also intended to induce in people a feeling that the form of government was appropriate, that the newly defined or liberated state was in some 'theirs'." See: Tripp, 1996: 58.

The Islamic imperative which plays a dominant role in the Muslim countries cannot be ignored and the governments are perforce required to protect these as national interests, even while engaging with issues on human rights. If we fail to give due recognition to this aspect of the cultural reservations such as , we also fail to appreciate the *capacity* of the states that desire to be part of the international human rights regimes, to undertake and implement these universalistic standards. And if one persists in enforcing the universalized standards of human rights even in a state that has openly declared its *incapacity* through such cultural reservation, the attempt is fraught with the dangers of presenting itself with allegations of cultural imperialism. Such attempts serve little to the objective of improving the general condition of humanity and furtherance of universal human rights. To the contrary, it only entrenches the rift between peoples. Historically, different moral and ethical systems have fought wars to win its "rightful" place in the world and proselytized each one's supremacy over the other. The process of countless religious wars demonstrates this strife for moral authenticity, where believers fight non-believers to enforce their sense of justice and righteousness. Religions such as Christianity and Islam are open and canonical in their declarations of universal laws of each of their particular theologies - universals that at times converge on some principles and diverge on many. Zealous *universal human rights* regimes are also carving its own niche over this historically entrenched religious terrain, for a universal theology of the highest sense of justice, irreverent to all senses of justice that stand contrary or different from it.

The development of universalized human rights regimes through international treaties may be said to have created a tussle for authenticity and political legitimacy of the moral domain, grounds which had hitherto been controlled by universal religions. In engaging different communities of varying cultural systems with human rights, it is imperative that due recognition be given to their worldviews and such recognition be manifestly represented, without falling prey to reductionist essentialism. Cultural relativism has been touted by many as an alternative paradigm to engage with the human rights discourse - in place of the reigning universalist paradigm.

Cultural Relativism and Human Rights:

Cultural relativism developed as an anthropological theory for an alternative examination of the universalistic edification of social norms

and values¹. The fundamental premise of cultural relativism is that the members belonging to one culture should not 'judge' the members of another culture.

As Amitai Etzioni points out, cultural relativism argument hinges on the proposition that cross-cultural judgements are erroneous, since there are no overarching moral truths, universalistic in nature.² As one of the foremost theorists of cultural relativism, Melville Herskovits³ pointed out, human "judgements are based on experience, and experience is interpreted by each individual in terms of his [her] own enculturation." (Herskovits, 1972: 15) On a similar note, Hatch had observed that cultural relativism "refers to the notion that the standards that can be applied in judging good and bad or right and wrong are relative to the cultural background of the person making the judgement." (Hatch, 1983: 5) Characterising cultural relativism, Vincent noted, "There is no universal morality, because the history of the world is the story of the plurality of cultures, and the attempt to assert universality...as a criterion of all morality, is a more or less well-disguised version of the imperial routine of trying to make the values of a particular culture general." (Vincent, 1986: 37-38)

Indeed, it is this in context that Teson observed that "a central tenet of cultural relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable."⁴

Cultural relativism proposes the recognition of the diversity of various cultures and peoples. When we consider the universality of human rights within this paradigm, at the outset it appears that the two represent points of strong opposition.

1. However, it must be admitted here that the concept of relativism in epistemology had existed since the Classical times. As Ross points out, "The first clear statement of relativism comes with the Sophist Protagoras, as quoted by Plato, 'The way things appear to me, in that the way they exist for me; and the way things appear to you, in that the way they exist for you' (Theatetus 152a)." Kelley L. Ross, Relativism, <http://www.friesian.com/relative.htm>.

2. See: Etzioni, 1997: 177-189.

3. See: Herskovits, 1972; Benedict, 1934; Marcus & Fischer, 1986.

4. F. Teson, International Human Rights and Cultural Relativism, 25, *Virg. J. Of International Law* (1985), 871 as cited in Sam Garkawe, *The Impact of the Doctrine of Cultural Relativism on Australian Legal System, E Law*, <ftp://infolib.murdoch.edu.au/pub/subj/law/jnl/elaw/refereed/garkawe.txt>.

According to David Little, four important propositions emerge from this consideration. "(1) Human rights are related to moral convictions; (2) moral convictions are determined by underlying cultural commitments; (3) underlying commitments differ fundamentally from one culture to another, therefore (4) the interpretation of human rights must vary fundamentally across cultures."¹

Accordingly, they advocate that a universal conceptualisation of human rights becomes inapplicable in such a diverse cultural cosmos. Staunch supporters of cultural relativism like John Gray,² consider that all rights must be given a relativist interpretation, thereby making the right relevant to the particular culture. In simple terms, Gray calls for the toleration of diverse cultural practices of people and the application of human rights norms according to the relativist requirements of the respective cultures.³

Little had noted two principal theses relating to the debate between cultural relativism and universal human rights.

Firstly, the Diversity Thesis, "holds that the world is divided up into separate, fixed, internally unified, and significantly diverse cultural units"⁴ while the second thesis, Dependency Thesis, "holds that moral beliefs (including related beliefs about human rights) are determined by prior (necessarily diverse) cultural commitments."⁵ This may be summed up as the traditional conceptualisation of the need to consider human rights within the prism of diversity that relativism propounds.

At the same time, the relevance of cultural relativism to the human rights debate has been strongly criticised by several observers for its across-the-board treatment of the concept of "internally unified" cultures in the world. For instance, Inoue Tatsuo challenges the notion that there

1. David Little The Universality of Human Rights, (United States Institute of Peace) <http://www.usip.org/research/rehr/universality.htm>.

2. See: Gray, 1993.

3. Renteln notes the great dilemma that these traditional advocates of relativist human rights confront, "namely, that tolerance requires approval of all cultural practices no matter how repulsive" Alison D. Renteln, The Unanswered Challenge of Relativism and the Consequences for Human Rights, 7 *Hum Rts. Q.* 521 (1985).

4. David Little The Universality of Human Rights, (United States Institute of Peace) <http://www.usip.org/research/rehr/universality.htm>

5. David Little The Universality of Human Rights, (United States Institute of Peace) <http://www.usip.org/research/rehr/universality.htm>.

exist homogenous cultural units that could be considered as “internally unified” so as to validate a relativist treatment, when it comes to human rights¹. He believes that the notion of ‘Asian values’ itself is a construct of the *orientalist* conundrum that these countries aim to evade through a rejection of human rights as Western concepts. In similar vein, Little declares that to speak of unified cultural units of Asia, Africa or for that matter, Islamic, Buddhist or Christian is erroneous since, these cultural zones themselves are subject to disparate internal diversities.²

The above view has gained far greater currency in relation to human rights since it reaffirms the universality of these norms. However, it is submitted that this stream of thought culminating in the complete rejection of the validity of the relativist argument suffers from several defects.

In the first instance, this view may be said to imply two vital consequences in its application to the domain of international law. That is, it either fails to recognise the inherent diversity of social and cultural factors that are prevailing in the various states of the world. In other words, it sees the rainbow of diversity through the single colour of universalism. Or, it refuses to accept the operation of international relations within diverse cultural zones and in place of the latter, introduces the uniformity of universal human rights³. If this later view is to be considered, it must be admitted that the zeal with which universalism of human rights are advocated present not a mere introduction of the concept, but an aim to promote these human rights, through almost coercive enforcement so as to create a universalist reality.

Secondly, it is flawed in its absolute rejection of ‘internally unified’ cultural units. While Little had gone at great length to propose that there does not exist any such cultural unit, either in Asia, Africa or as Islamic,

1. See: Tatsuo, 1999: 27. Further more, Little asserts, “The simple point is, that the idea of a ‘cultural unit’, as something defined, fixed, and internally unified, tends to fall apart on inspection.” David Little The Universality of Human Rights, (United States Institute of Peace) <http://www.usip.org/research/rehr/universality.htm>.

2. For a lucid argument against the internal unified Islam and of a common *Islamic human rights* conceptualisation, See: Mayer, 1999.

3. It is interesting to note here that several states had formulated various reservations based on cultural peculiarities to the two covenants (ICCPR and ICESCR), as well as to CRC and CEDAW. If one were to go by the logic argued by Little, these reservations are little explained. See: Mayer, 1999: 47-48. See also, Jeremy McBride, *Reservations and the Capacity to Implement Human Rights Treaties*, Chinkin and Others (eds.) Human Rights as General Norms and a State’s Right to Opt Out, (London: B.I.I.C.L., 1997), 120.

Buddhist or Christian etc, he has not given any substantiation for this rejection. For the purposes of relevance to our present study, let us consider his rejection of the Islamic cultural unit.

It may be conceded that there is no 'internally unified' Islamic cultural zone in its absolute sense. However, it goes without saying that there exists substantive jurisprudence, literature, recorded history and continuing customary and religious sources that bring out a platform of values and norms that are held in common throughout the Islamic community¹. These values and norms are recognised, through the rules of recognition, as the 'highest law' within such communities. When we consider particular instances of such collective cultural representations in juxtaposition with other such collective representations belonging to other cultural zones, the inherent diversity and the flaw in the hasty conclusion by Little becomes evident.

It cannot be discounted that culture represents the very source of the worldview for individuals as well as for the communities concerned. "It provides both the individual and the community with the values and interests to be pursued in life, as well as the legitimate means for pursuing them. It stipulates the norms and values that contribute to people's perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies." (An-Na'im, 1995: 23) Therefore, the significance of culture to the self-identity of individuals as well as to societies within which it is deep rooted is considerable. It is this significance that adds weightage and legitimacy to these values and norms to the individuals and communities concerned. They represent the "matter of material and psychological survival" (Herskovits, 1964: 54) for these culture zones.

However, given this general concession to cultural relativism, one must consider that an over emphasis on cultural relativism leads to a zealous ethnocentrism that undermines the notion of tolerance of diversity which is so central to relativist philosophy. This characteristic of tolerance of diversity also is pluralist in nature. Still one must admit what Joyner and Dettling had observed, that is the "Profound differences

1. One preliminary indicator of this unity may be seen in the consensus with which Qur'an and Sunna (Hadith) of the Prophet are perceived as forming the basic sources of . In similar vein, one may note the unity prevailing in large measure, within each of the two main sects of Islam, namely Sunnis and Shia's over the elements of creed.

between Western legal theories and structures and those of Africa, China, India and *Islam must preclude attainment of a universalistic legal system of predominantly Western orientation.*"¹

One of the reasons why many people outside the Western world find it hard to accept the universalised version of human rights as represented in the Universal Declaration and other prominent international human rights treaties may be understood from the sense of shared history of colonisation. A historical perception of what is at stake drives the debate between universality and relativism of human rights. To the victims of history, in particular the colonised history, human rights as a Western prescription reminds and revives a victimization, the redress of which has not been considered to be included within universally designed human rights regimes. Therefore, this historical perception reinforces the pain of that victimization and gives vigour to the advocates of relativism - a voice and a message to convey. That their particularist voices are submerged under the deluge of universal human rights makes their sense of loss even more aggravated. In the process, the reformist advocates from the Third World, who seek to legitimize human rights through an appeal to an intra-cultural dialogue, gets sandwiched between the two. This is the state of Islamic emerging reformers in the Muslim countries, who are constantly attempting to engage the imperatives of their religious paradigm with universal human rights.²

However, at the most, one should consider such a historical perception of human rights as igniting suspicion in the minds of the non-Western people who are perforce required to execute the treaty provisions that their countries have become a party to. To say that such a perception is the reasoning behind cultural reservations such as Shari'a reservations, would be an overstatement. The common concern of states making cultural reservations to core human rights may be understood in their perception of the idea of justice. The effort to "make some reality of justice beyond borders" (Best, 1995: 780) through the promulgation of universal human rights laws come into conflict with the local consciousness of particularist conceptions of justice. In the case of Islamic

1. Joyner and Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, as cited in Sam Garkawe, *The Impact of the Doctrine of Cultural Relativism on Australian Legal System*, *E Law*, <ftp://infolib.murdoch.edu.au/pub/subj/law/jnl/elaw/refereed/garkawe.txt>.

2. For a lucid discussion see the series of essays on the subject in Sidahmed & Ehteshami, 1996.

Shari'a, this aspect plays an important role, especially in the areas of criminal law that conflict with the provisions of the ICCPR and CAT. The perspective on justice may also be seen behind much of the rights regime that Islam itself establishes.

Islam, like all other religions has its own sense of justice¹. And the Islamic concept of justice is engrained in the belief of all Muslims it forms an essential part of the creed of the believer and shapes his consciousness. It is universal and unalterable in a fundamental way.

That such alternative universalised concept of justice and rights thrive in different culturo-religious systems throughout the world harks well to the common cause of the protection and promotion of human rights. It denotes that there exists regard and consideration for the wellbeing of the individuals and it condemns arbitrariness. At the same time, it also shows how varied and different these alternative conceptualisations of rights are in different parts of the world: it demonstrates the diversity of perspectives on moral norms, yet within each culture zone their own perspective offers justice and protects the rights of each other.

The depth of political consideration and the position given to culturo-religious perspectives on different aspects of life by different communities may also vary. For instance, within the Western political tradition, religion and culture represent a less of a significant marker in their conceptualisation of justice, rights and wrongs. The belief that these concepts should exist outside the parameters of the religious domain is a historical outcrop of Western legal and political theory. However, that other communities of the world may view things from different perspectives and that they may not follow the same secularisation of worldview, is a position one must accept if only to give due regard and dignity to the culturo-religious heritage of other communities. The line of contact between these different worldviews have more often than not, created conflict and trouble. The self-righteousness of each of the different worldviews does not permit the presence of the other. The position that both could be right in their own way has been regarded with scepticism and disdain. This is the narrative of a singular perception of the universality of human rights that has been promoted since 1948. According to this narrative there can be only one way of looking at

1. See: Kamali, 1999.

human rights and that way is either enshrined in the Universal Declaration or any of the other six treaties on human rights that have almost evolved into an international bill of rights.¹ And the rights embodied in these instruments are to be construed from a secularised hermeneutics.

It is amply clear that this path to universality has not received wide acceptance throughout the world. Even though most of the countries have ratified or accepted these international human rights treaties (some with reservations while others without any), that fact alone does not ensure that the human rights embodied in these instruments are being fully implemented in accordance with the secularised interpretation given to them. Two things need to be noted in this connection.

In the first place, it is well known that mere ratification of a treaty does not ensure their performance. This is even more emphatic in the case of human rights treaties. Indeed, most of the states that have ratified the UDHR and other human rights covenants already have included in their national constitutional documents, much of the rights contained in these instruments. That those rights were already constitutional in these countries do not mean that they are in effect implemented to the word in these countries. In similar vein, though these countries may ratify human rights treaties, the effectual implementation of these are hardly the practice. The numbers of countries that have overdue country reports for submission before the various committees set up under these treaties² testify to this position. The failure of the international human rights regimes cannot be attributed to the issue of culturo-religious differences or differences in perspective or approach. There exists a wider malaise of a lack of genuine pursuit of de-politicised human rights protection. The measure of human rights have more often than not, been the political correctness and dexterity of the regimes in different parts of the world. The massacres and genocide that the latter part of the 20th Century witnessed is in no lesser measure than the Holocaust. And in the midst of such duality in the human rights domain, many governments use culture and religion as impenetrable shields for the protection of their arbitrary

1. The seven treaties are: Convention on the Elimination of All forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child.
2. See: Bayefsky, 2001.

authoritarianism. The human rights discourse needs to weed itself out of the dominant paradigm of universality (both in numbers and in the absolute sense). It needs to be relevant to different people of different cultural universes. This paradigm shift must also necessarily ensure that the human rights discourse do not slip into an essentialist argument, where it becomes a convenient legitimising tool for authoritarian regimes that provide culturo-religious pretexts to override human rights concerns. This is the real challenge of a pluralist human rights discourse. The many culturo-religious reservations, such as the reservations emphatically point out the need to engage in this new paradigm.¹

Indeed, reservations may be said to represent a gateway for engaging human rights concerns in a pluralist discourse as have been suggested above. Reservations may be said to be a mode for giving recognition to “‘Other’ vocabularies” (Chan, 2000: 60) on human rights, without running into an essentialist cul-de-sac or universalist rhetoric.

Reservations and the Vienna Convention:

Reservations clauses in international treaties have often been used by states as a mechanism for avoiding unwanted provisions.

It had served as a gateway to overcome being bound to unnecessary obligations of a treaty. As a concept of international treaty law, ‘reservations’ gained prominence in particular after the development of the corpus of international human rights treaties. As this new breed of treaties developed, the ensuing particularistic disagreements of states with principles of universal human rights came to be increasingly manifested through the reservations made to international human rights treaties.

The Vienna Convention on the Law of Treaties 1968, compiled the various traditions and practices of states relating to treaty law and formulated the prevailing international law on treaties. Although the Convention did not provide a doctrinal, watertight definition for ‘reservations’ under Article 2 (1) (d), it stated thus; “a ‘reservation’ means a unilateral statement, however phrased or named, made by a

1. Countries like the Maldives islands, where there exists a homogenous religious culture (and this sense of culture is enshrined in the very identity of the people historically, culturally, politically as well as legally), face significant difficulties in trying to adjust to a universal code of human rights that not only challenge their belief structures but also perforce advocate a total revision and possible displacement. Giving due regard to any political manipulation of an essentialist position, one must also give weight to the culturo-religious concerns of such societies.

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.” (Article 2 (1) (d) of Vienna Convention on the Law of Treaties (hereinafter referred to as “VCLT”))

Accordingly a reservation must result in altering the legal effect of the treaty to the State making the reservation. Indeed, this is the primary purpose of reservations – to alter the already agreed contents of a treaty, in its application to the reserving state. Furthermore, VCLT also states that a state may make a reservation at any time before legally accepting the membership of the treaty.¹

The scope of a state to make reservations is limited by the three express circumstances provided under Article 19 (a), (b) and (c) of the VCLT. Most importantly, Article 19(c) lays down the infamous “object and purpose” compatibility test as the definitive yardstick for determining the validity of reservations. But a crucial question that it fails to address is, how the compatibility test is determined and by whom. One way of looking at the format proposed under Article 19 (c) is that, it presumes that where a state desires to make a reservation, such reservation must not contravene the ‘object and purpose’ of the treaty and this is to be decided by the different states subjectively.

The real problem arises when a reservation is strongly based upon certain interests that the reserving state aims at protecting and when such interests are not in consonance with the ‘object and purpose’ of the treaty. In such cases the state, despite all its good will to comply with the compatibility test, deviates from the ‘object and purpose’ when it makes the reservation. This conflict between *jus cogens* of international human rights treaties and peremptory norms of other cultures such as the *Hadd* issues in Islamic present uncompromising positions of opposition.

1. See: Article 19 of the VCLT provides the substantive scope of reservations, as recognised under the Convention for general state practice. It reads,
“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 the subparagraphs (a) and (b) the reservation is incompatible with the object and purpose of the treaty”

In the absence of any specific direction in this regard in the VCLT, when a state makes a reservation that is *incompatible* with the 'object and purpose' of the treaty, the validity of it is to be deciphered from the objections made to the reservation in question by the rest of the states-parties. So how do the rest of the states determine whether a reservation is compatible or otherwise?

1. Article 20 (4) (a)¹ of the Convention provides that, when a reservation is accepted by another state, thenceforth, the treaty comes into effect between the reserving and the accepting states.

2. Article 20 (4)(b)² points out that when a member state raises an objection to a reservation made by a state, such objection does not necessarily preclude the coming into effect of the treaty between the reserving and the objecting state, *unless* the objecting state makes a stipulation to that effect.

The 'object and purpose' compatibility test of the Convention formulates the law on reservations relying on the assumption that every state will act in making the reservation, according to its enlightened consciousness of what constitutes the 'object and purpose' of a treaty. It is presumed that the reserving state, the accepting state as well as the objecting state will be directed by a mystical consciousness of the 'object and purpose' of the treaty.

The Convention is criticised for its failure to provide for the creation of an independent mechanism that has the obligation to decide the validity of reservations. The Convention does not stipulate that all treaties must establish an independent organ for deciding the validity of reservations nor does it provide nor assign such an obligation to a third party institution like the International Court of Justice. Consequently, different states react differently to the question of validity of reservations.

1. "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 in force for those States;" Article 20 (4)(a) of VCLT.

2. "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;" Article 20 (4)(b) of the VCLT.

The raising of objections to reservations has become a subjective exercise of the political will of the states concerned.¹ The absence of a provision for a separate independent machinery to decide issues relating to reservations is not an oversight, nor the result of a failure in drafting². The Expert Consultant and Rapporteur to the International Law Commission, Sir Humphrey Waldock had earlier declined any attempt at creating such an institutional authority. He rejected the idea that a special institution shall determine the compatibility or otherwise of a reservation made by a state because, “proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations.” (Sinclair, 1968: 126)

It goes without saying, therefore, that the principle of reservation formulated under the VCLT was aimed at establishing a flexible and fluid scheme that take into consideration the divergent views, interests and forces involved in international relations and diplomacy.

Critics of the VCLT argue that its provisions relating to reservations need change, keeping in mind the universal character of normative treaties. There are also suggestions pointing out that reservations (in the context of normative humanitarian treaties) have become redundant altogether.

The advocates of a more stringent reservations regime for normative treaties disparage the existing reliance on the subjective will of states in the determination of the validity of reservations, arguing that it gives unnecessary importance to the concept of sovereign will at the cost of the ‘higher’ normative values enshrined in normative treaties. The fear is that universal values espoused in normative regimes like human rights treaties, may be undermined in the process of the making of and objections to, reservations by states in the exercise of their sovereign will. Indeed, this is the crux of the Contractualists vs. Normativists tussle.

1. “The confusion arises because the Vienna Convention provides no mechanism by which the object and purpose of the treaty can be determined.” Koh, 1982: 98.

2. Sir Ian Sinclair had pointed this problem when he stated, “There was an obvious need for some kind of machinery to ensure that the test [the compatibility test] was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with the object and purpose of the treaty.” See: Sinclair, 1968: 137. (hereinafter referred to as the *Official Records*). [parenthesis added]

The Convention appears to have swayed strongly in favour of what H.G. Knight had observed as “the permissive use of reservations,” that “encourages the adherence to the multilateral treaties and thus encourages universality.” (Knight, Policy Issues in Ocean Law, In: King Gamble, 1980: 372)¹ The point regarding wider membership of international treaties appears to have won greater ground under the VCLT. One reason for this flexible formulation may be noted in what Gamble observed; “The point to be emphasized is that in most instances this group of reservations is of a demonstrably minor, technical nature that does not seriously jeopardize the intent of the treaties. The large size of this group (40 per cent of all reservations) lends support to the argument that reservations do not seriously jeopardize the uniformity and consistency of multilateral treaties.” (King Gamble, 1980: 386)

On the other hand, insisting on the special status of normative treaties, especially human rights treaties, writers like Clarke have argued that by their unique nature human rights treaties should be given special treatment². This special treatment, they argue must include a rejection of the conventional understanding of the basis of treaty law.

However, reaffirming the VCLT position, the Special Rapporteur of the ILC pointed out in a recent report on the question of reservations, that the term “normative treaties” often encompassed several classes of treaties of a very differing nature and *did not constitute a homogeneous category*³. Furthermore, he pointed out that while they did have certain essential features conferred on them by their “normative” character, designed above all to institute common international regulation on the basis of shared values, it was important not to take too simplistic a view: *such treaties still contained typically contractual clauses.*

He had concluded in his report that it was clear that because of its flexibility, the *regime* was suited to the particular characteristics of

1. Indeed, the ILC had also conceded this aspect when it stated in its 1966 Report, “in the case of multilateral treaties, it appears that not infrequently a number of States have, to all appearances, only found it possible to participate in the treaty *subject to one or more reservations.*” Report of International Law Commission, *ILC Year Book*, 1966, II, 205-206.

2. “These treaties are based on the public international law principle that individuals have certain inalienable rights, which states cannot justify overriding by their imperatives of culture, tradition, expediency, economic advantage or such other factors.” See: Clarke, 1991: 286.

3. See: *ILC Year Book* 1996.

normative treaties, *including human rights instruments*. Although not ensuring their absolute integrity, which was scarcely compatible with the actual definition of reservations, the VCLT regime on reservations preserved the essential content of normative treaties and would guarantee that it was not distorted.

Approving this flexible approach of the VCLT, Gamble concludes, “It makes sense to conclude that a *flexible policy* on the admissibility of reservations will *encourage some states to become party to a treaty they might otherwise find unacceptable*.” (King Gamble, 1980: 393) Therefore, the VCLT quite adeptly balances the need for maintaining integrity of treaty provisions with the need for wider membership. At the same time, it also maintains a singular regime of treaty law applicable to all forms of treaties, normative as well as contractual.

Reservations to Human Rights Treaties:

In this section of the present paper, attempt shall be made to examine these criticisms on the basis of the capacity of states to execute the ‘universal’ claims of human rights treaties and the need for retaining the VCLT flexibility system.

Most of the criticisms of the VCLT regime flow from the fear that it “tends to fragment those multilateral agreements into a number of smaller multilateral or bilateral agreements” (Restatement (THIRD) of the Foreign Relations Law of the United States, section 313 comment b (1987)) and thereby undermine both the integrity and the universal nature of the human rights embodied in these treaties. However, as Clarke affirms, “It cannot be said that resultant multitude of treaties has caused chaos since different understandings pertain to the scope and nature of the obligations the reserving state has assumed *in respect of its own citizens*, rather than in respect of other states parties.” (Clarke, 1991: 297) Another aspect of the VCLT regime that is criticized in respect of human rights treaties is its reliance on the concept of reciprocity as the basis for raising objections to and acceptance of reservations. When it comes to human rights, (which are not based on reciprocal obligations and rights of states *per se*, but on the obligations of states in respect of individuals within its jurisdiction), critics point out that the concept of reciprocity becomes inapplicable.¹

1. See: Clarke, 1991: 318.

The fact that states make reservations that circumscribe and hold at bay several important segments of international human rights treaties, in spite of all the criticisms and the arguments for the universality of human rights, point out the deep schism between universalistic and particularistic comprehension of human rights itself. Reservations represent a classic case in this regard and culturo-religious reservations, such as the reservations make it even more emphatic. These reservations represent internal constraints¹ that impede states concerned from accepting universalized international moral obligations such as human rights regimes. As McBride pointed out, "States parties are seeking to restrict the scope of their obligations and in many instances they are attributing the need to do so to factors which limit their capacity to implement particular rights." (McBride, 1997: 126)

Apart from financial constraints that confine the capacity of a state to adhere to and implement certain human rights obligations, there are also several other elements that create similar internal constraints. These may be in the form of political capacity of a state to deliver its obligations under international human rights regimes, social, cultural as well as religious capacity of a state in relation to its international human rights obligations.

Reservations may be formulated by states because of *political factors* that are considered as affecting the capacity of the reserving State in implementing the respective treaty obligations. For instance, some of the Middle Eastern countries made reservations regarding the ratification of the two Covenants of ICCPR and ICESCR, on the basis that their respective ratification did not involve the recognition of the state of

1. Internal constraints that curb the capacity of states to undertake international obligations vary from country to country. Sometimes these could be in the form of economic and financial factors that prevent a state from accepting such external obligations. For instance, Article 7(d) of the ICESCR calls on all members to provide "periodic holidays with pay, as well as remuneration for public holidays." Surprisingly, some of the most industrially advanced countries like Japan and Denmark, have made reservations in respect to this provision. The establishment of penitentiary system stipulated under Article 10 of the ICCPR, would require the availability of sufficient financial resources with the implementing State and such financial sufficiency may not be the case with many of the 'underdeveloped' states. Examples of reservations made on account of lack of economic capacity of states include: Indian reservation to the CRC provisions relating to the economic exploitation of children and their exposure to hazardous work [Article 32 of the CRC]; reservation by United Kingdom, Barbados and Mauritius to the provision of equal pay to men and women for equal work [Article 11 (1)(d) of CEDAW]; Barbados and Zambia reservations relating to the provision of compulsory and free primary education [Article 13 (2)(a) of ICESCR].

Israel.¹ It may be recalled that the non-recognition of the state of Israel had formed a substantive plank of the foreign policies of these countries.

Aside from financial and political considerations, States may formulate reservations to treaties due to social, cultural or religious factors that affect the capacity of a state to undertake the particular treaty obligations.² Indeed, reservations formulated to human rights treaties, based on these factors appear to be the most stringently opposed as well as most controversial.

Cultural, social or religious factors, at times, acquire a significant dimension in relation to the capacity of a state to undertake particular international obligations under treaties. Hence, provisions of treaties which call upon states to disregard their peculiar cultures or social norms or religious values that are strongly enmeshed in the fabric of nationhood of these states come into direct conflict with the capacity of these states to undertake such obligations. When states are faced with this kind of situations, formulation of reservations to protect such interests become the only viable option or choice for them.

In other words, at such times, these states are presented with an either/or circumstance. Either concede to the demanding obligations of the treaty by vitiating the significance attached to the cultural, social or religious values that the state had earlier sought to protect *or* reject the treaty altogether and become a *pariah* before the international community of states. What ensues can only be termed as an inevitable stereotyping of the state, a systematic vilification of all that the state holds as its endeared values. When we place into this conundrum the principle of reservations as formulated under the VCLT, it offers a middle path to engage more meaningfully in the debate.

Reservations of this nature are particularly prevalent in relation to the two human rights conventions, CEDAW and CRC.

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1. Most notably, Iraq, Syria, Libya and Yemen made reservations to the ICCPR and the ICESCR stating that their ratification of the two Covenants did not make any recognition of the state of Israel.
 2. For the purposes of the present paper, the social, cultural and religious factors shall be clubbed together and dealt with under the term '*cultural*' or '*culturo-religious*' as and when specified. It is noted here that, often the lines of demarcation between what is cultural, social or religious become intertwined and difficult to make out for our present purposes. Hence, the above stated collective term has been used.

Indeed, several Islamic states have formulated reservations to these two conventions on the basis that their provisions come in conflict with the Islamic precepts.¹ Apart from what has been termed as the 'Islamic reservations' or 'culturo-religious' reservations, several other reservations based on cultural and other social factors have been formulated by different states. For instance, Canada formulated a reservation in respect of Article 21 of the CRC, to the extent that the said provisions "may be *inconsistent with customary forms of care* among aboriginal peoples." (McBride, 1997:150) Again, Malta made reservations to Article 13 of the CEDAW based on its interest in protecting the tradition of headship of families for men. Similarly, Belgium made reservations to Articles 2, 3 and 25 in order to protect the custom of retaining the exercise of royal powers with men. New Zealand also made reservations to Article 2 (7) and Article 5 (a) of the CEDAW to the extent that these provisions conflicted with the customs governing the inheritance of certain chief titles.

Therefore, it is clear from the above demonstration that there exists an extensive state practice of making reservations based on cultural as well as culturo-religious factors. These reservations have been made to the respective human rights treaties and conventions because the reserving states consider it of practical importance to protect the values or interests laid therein. The 'cultural' factors that are protected under these reservations permeate into the very fabric of nationhood of these states and forms part of the platform that legalises the authority of these states to enter into international relations. In this respect, they are not merely political compulsion but also more fundamentally, these form part of the moral authorisation of the power to execute international obligations by these states. As McBride concedes, "The strength of cultural, religious and philosophical attitudes in States has clearly meant that full acceptance of certain human rights obligations would have been politically impossible, even if their Governments had wanted to commit themselves to them." (McBride, 1997:154)

In his article, McBride also concedes that reservations may come as a boon in situations where reservations made by states are strongly based on factors affecting the capacity of states to operationalise international human rights obligations. Rightly, he points out, "Such an approach is premised on the assumption that respect for human rights, let alone their effective implementation, is not something instantly attainable and depends on a

1. This aspect shall be adverted to in detail subsequently, particularly in the context of Maldives.

process of development, both material and cultural.” (McBride, 1997:122) He suggests a slow and steady approach to the realisation of human rights in these countries - much in line with the ‘progressive realisation’ approach provided under Article 2 (1) of the ICESCR. Such a slow and steady approach to the realisation of certain human rights may be conceded.

However, what McBride does not comprehensively address is the grey area, when it comes to conflicts between core values of a human rights treaty and similarly held core values that are considered as intractable by certain states. In a conflict as such where harmonisation is not possible, the primary issue that arises is the validity of a reservation made to that extent. Under the VCLT regime, where such a reservation becomes incompatible with the ‘object and purpose’ of the treaty concerned, it is held as invalid, of course, through a subjective assessment of the same. It is, thus observed that the VCLT regime does not give any consideration to the capacity of states to effectively implement the human rights obligations of a treaty. On the contrary, the VCLT regime is based on a non-receptive formulation of the compatibility test, where it does not give any recognition or regard to the capacity factors upon which the reserving state makes its reservation. The only yardstick that it recognises is the treaty.¹

It is pointed out here that while such a perception may hold good in relation to reciprocal, contractual treaties, a special case of accommodation of reservations based on capacity needs to be developed in reference to human rights treaties. This conceptualisation may appear to be self-defeating to the advocates of the ‘integrity’ of the universal human rights obligations. Indeed, these advocates would argue that enough has already been conceded by the ‘flexible’ regime on reservations set under the VCLT.

However, in considering the above proposition relating to the accommodation of reservations based on the capacity of states, one has to operate from a platform of a necessary recognition of the diversity of the cultures and capacities of the states desiring to be part of human rights regimes. The advocates of universality of human rights aptly point out, that this diversity digresses from the point of emphasis in human rights treaties – namely, the universal application of these rights, regardless of

1. In this connection, one cannot help observing the extremely positivistic perception that is pervading when it comes to reservations under the VCLT. It is positivistic in the sense that it rejects any form of assessment of reservations based on values and norms that are not therein enshrined in the respective treaty regime. See: generally, F.S.C. Northrop, *Contemporary Jurisprudence and International Law*, 61, *Yale L. J.* 5 (1952), 623.

any diversity that may exist. Indeed, the advocates of universality raise the issue that since human rights are concerned with the rights of the individuals and not of collectivities as states, the collective conceptualisation of diversity cannot be conceded. In response, it is submitted that it would be an abstract exercise to conceptualise human rights as purely individual rights, disregarding the collectivities involved.

As all treaties, including human rights treaties and conventions are primarily addressed to States and consider its implementation through the collectivity of the State it goes without saying that States do occupy a pre-eminent position in international relations. Secondly, it is the states that are primarily held responsible for the effective implementation of the human rights, as well as other treaty, obligations under international law¹. Therefore, it is observed that the significance of the position of States is still not discounted as to completely exclude it from the view, when considering human rights. The implication that one may derive from this is that collectivities do retain a significant position, despite being discounted by a certain measure, under the human rights regimes.

Consequently, the legitimate interests of these diverse collectivities do require proper addressing, even under human rights treaties. While conceding that the interests of collectivities necessitate addressing their interests, it must also be conceded that a legitimate mechanism must be sought for such address. It is submitted that reservations to treaty form an apt mechanism wherein such interests are addressed, recognised and protected, while at the same taking into cognisance the 'universal' human rights as much as is possible.² Further more, where collective interests are recognised, the diversity that it represents must also follow suit.

In order to accommodate controversial reservations better than under the VCLT, some human rights regimes makes allowance for states to make reservations to a certain extent to the 'object and purpose' of the regime. In order to facilitate the formulation of such reservations, these

1. In this respect, it is quite inviting to draw an analogy of these obligations to constitutional law where certain fundamental rights and duties are guaranteed to the subjects as against the authority of the state. Consequently, even under the human rights treaties, the rights are guaranteed to the individuals primarily against the State authority.

2. McBride had remarked in this connection that, "encouraging reservations which reflect genuine problems of capacity may be a more satisfactory route to the achievement of the broader goal than the acceptance of obligations which cannot be implemented." See: McBride, 1997:161.

regimes demarcate certain core obligations that may not be reserved to by any state. In other words, the attempt is to set a minimum benchmark in respect of which all states party to the regime must comply. Reservations to subsequent provisions are thereby permitted. In this respect, the Committee on Economic, Social and Cultural Rights had stated that, “a *minimum core* obligation to ensure the satisfaction of, at the very least, *minimum essential levels* of each of the rights is incumbent upon every State party.” (General Comment No. 3 (1990); HRI/GEN/1/Rev.1, 51)¹

This approach provides for loosening up the tight grip that the incompatibility test lays down under the VCLT to accommodate some reservations based on capacity of states. However, it must be noted here, that even this approach excludes the making of any reservations to the class of human rights that are covered under *jus cogens* and rights that fall under customary international law². This class of rights is considered as peremptory, permitting no derogation therefrom, in any manner. Thus, reservations are completely ruled out to obligations that fall under this class.

Thus, it is submitted that along with this development of the law relating to reservations to human rights treaties, the cultural diversity of states making culture-based reservations must be acknowledged. With this acknowledgement must also come the recognition that under certain circumstances for some states, culture becomes a strong capacity factor that is required to be taken into consideration while assessing its reservation³.

1. As cited in McBride, 1997: 165.

2. It must be submitted here that there exists considerable doubt as regards which particular rights are conclusively regarded as falling under rights *jus cogens* and customary international law. There exists strongly divided jurisprudence regarding this issue. “The extent to which human rights norms constitute obligations of customary international law, let alone *jus cogens*, remains controversial but the practice of reservations itself indicates that states do not regard the bulk of them as constituting obligations to which they are already bound.” See: McBride, 1997: 120. Some of the rights that are considered as falling under this category include rights against slavery and rights against torture.

3. As Donnelly points out, “There at least three ways in which a state ... may be ‘unable’ to discharge its obligations. The first is *political* impossibility, in which the state ‘cannot’ act because it would threaten the existing distribution of power or wealth. ... The second way is *moral* impossibility, in which the right ‘cannot’ be realised because to do so would threaten or sacrifice *higher rights, values or interests*. The third is *physical* impossibility, in which the objective restraints of resources or administrative capacity preclude establishing the right.” See: Donnelly, 1982: 394. It is submitted that the reservations based on cultural factors may be considered as falling under both the “political impossibility” as well as the “moral impossibility” that Donnelly had noted.

The onus of providing clear rules for making reservations rest with the particular treaties concerned, as VCLT only makes residual provisions. Yet, most international human rights treaties do not provide any specific reservations clause peculiar to the rights espoused within the treaty. To the contrary, they either adhere to the reservations rules provided under the VCLT or in the absence of a clause to this effect, invoke the residual implementation of the VCLT provisions.

For instance, the two human rights covenants, International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights do not provide any specific reservations clause. In the absence of such a clause, the residual international law enshrined in the VCLT Articles 19 to 23 becomes the applicable law. Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) merely adopts the VCLT regime. In the case of CEDAW, Article 28 (2) provides that the VCLT regime shall operate in relation to reservations made thereto. Article 51 of the CRC provides that as regards reservations, it would be governed by the compatibility test laid down in Article 19(c) of the VCLT. Hence, it is seen that in one way or the other, most of these critical human rights treaties have brought in the reservations regime of the VCLT into operation under their framework. This being the case, perhaps a necessary state practice needs to evolve on the lines of what Schmidt had observed, "One possible approach to the handling of far-reaching and excessive reservations would be to allow the supervisory bodies of a human rights instrument to give some guidance to the reserving State, allowing it to formulate its reservations." (Schmidt, 1997: 20)¹

Shari`a Reservations examined:

Many of the reservations made to the international human rights instruments² are from African and Asian countries that have a majority or a significant population of Muslims. These reservations were designed to make important parts of the treaties inapplicable on account of their apparent incompatibility with the religious law of Islam that formed part of the fundamental national law of these countries.

1. See: Schmidt, 1997: 20.

2. The present research shall mainly deal with the seven international human rights treaties: CERD, CAT, ICCPR, ICESCR, CEDAW, CRC, ICPMW

At a preliminary level, it may be observed that the so-called Shari'a reservations do not pose any significantly different problem than do other reservations made on a variety of bases by different countries to the same human rights treaties. In other words, one may be prompted to ask the question; why is it important to bunch reservations made by some countries under a common slogan such as "Shari'a reservations" and distinguish them from other series of reservations?

It may be noted that the reservations made by the Muslim countries, invoking the Islamic religious law against the provisions of international human rights treaties, not only have serious implications on the claim of universality of human rights, but as many observers point out, they also undermine principles governing international treaty law.

Further more, it may also be pointed out that the so-called "Shari'a reservations" bring in a new paradigm into the universality discourse of human rights, by invoking religious law against that of the international legal norms. I shall attempt to elaborate on these issues through an examination of the content of "Shari'a reservations" while at the same time, assess those reservations within an ongoing internal dialogue on human rights within the Islamic world.

Muslim countries throughout the world have raised objections to the application of certain human rights within their jurisdictions on grounds of incompatibility of these rights with the religious tenets of Islam. These Muslim countries have become members of international human rights treaties after noting their objections in the form of reservations.

The extent of "Shari'a reservations"¹ made by Muslim states need to be put into perspective. As may be noted from Table 1 below, reservations have been made to human rights treaties by many states on various grounds. However the reservations (including declarations and

1. For the purposes of the present study, "Shari'a reservations" are defined as reservations (including substantive and sweeping declarations and interpretative statements) made by Muslim countries to the international human rights treaties, wherein it is explicitly stated that the reservations are made due to the incompatibility of the treaty provisions to the norms of Islamic religious law. Reservations made by some Islamic countries do not explicitly refer to the Shari'a incompatibility instead references are made to the codified national legislations and constitutional provisions. For the purposes of the present study such reservations are not deemed to be "Shari'a reservations" but shall be considered as ordinary reservations that may assist in the examination of the religious concerns of the respective countries concerned.

interpretative statements) based on Islamic religious law made by Muslim countries' are widely considered as the most sweeping and most detrimental to the effective *universalisation* of human rights.

Table 1:

Treaties	Total Number of Reservations ¹	Total Number of Shari'a Reservations	Total % of Shari'a Reservation
CERD	101	1	1.01%
ICCPR	181	1	1.81%
ICESCR	83	1	0.83%
CEDAW	132	14	18.48%
CAT	45	2	0.9%
CRC	204	19	38.76%

Although in numerical terms the "Shari'a reservations" may be minute, some of these reservations are very general in their formulation. Such general reservations referring to the incompatibility of treaty provisions with norms of Shari'a are very loosely framed and do not specify which article or which specific right or part of a right contained in the concerned treaty actually conflicts with what provision of the Shari'a law. Consequently these reservations are highly ambiguous and are subject to wide criticism due to their over arching generality.

For instance, the Afghanistan reservation to CRC states that "all provisions of the Convention that are incompatible with the laws of Islamic Shariah" are inapplicable in Afghanistan. Again, the reservation to the same Convention by Djibouti states, that it "shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values." Another instance of a general Shari'a reservation may be found in the Saudi Arabian reservation to CEDAW that states, "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."

However, some reservations that come within the domain of Shari'a reservations are very specific and point out the particular provisions of the respective treaty that are inconsistent with the Islamic religious law

1. See: Bayefsky, 2001: 68-69.

and at some instances as in the case of the Egyptian reservation to CEDAW,¹ the particular principle of Islamic religious law that the country gives precedence over the treaty provisions are also specified.

From an overview of the Shari'a reservations, it appears that there exists no uniform formula or standard for making them. That is, some countries appear to pass a very generic and nonspecific reservation while other states go into lengthy details, explaining their reservations.

While some Muslim countries may raise reservations with reference to particular international human rights treaties, others have not raised any reservations leave alone a declaration or an interpretative statement to the same treaties. For instance, while Afghanistan had made a Shari'a reservation to CRC, it had not lodged any reservation to its ratification of the CEDAW, a treaty that has seen the second most number of Shari'a reservations of all the international human rights regimes.

In the same way, while most Muslim countries that had ratified CERD like Egypt, Iran, Iraq and Jordan, Libya, Maldives etc had not made any Shari'a reservations to any of its provisions, Saudi Arabia as the only country making a Shari'a reservation asserts, "[The Government of Saudi Arabia declares that it will] implement the provisions [of the above Convention], providing these do not conflict with the precepts of the Islamic Shariah."²

The point to be noted is that the Shari'a reservations to international human rights treaties are not a uniform and monolithic set of reservations

1. "Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Shari'a's provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Shari'a lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Shari'a therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband." Reservation made by Egypt to Articles 16 of CEDAW. See, UNHCHR Treaty Body Database.

2. Reservation made by Kingdom of Saudi Arabia to CERD. See, UNHCHR Treaty Body Database.

that all Muslim or for that matter, all Arab countries have made on a consistent basis. The content of the actual reservations and the selection of the human rights treaties to which these reservations are made, vary from country to country.

The absence of consistency and uniformity in the Shari'a reservations may be attributed to;

- diversity of the cultures in the Muslim countries
- differences in their political systems
- the sectarian variances within Islam
- the dissimilarities in the political philosophy of Islam

The only thread of commonality within these reservations may be said to be their appeal to Islam for justifying the exclusion of significant parts of the concerned human rights treaty from operation within the territories of the reserving states parties.

In doing so the states making Shari'a reservations may be said as attempting to create a separate domain for Shari'a within International Law that is not in existence at present. International law has always been understood to be based upon the sources of international treaties, customary international law and international judicial precedence. The age of the dominance of religious law in the governing of international relations is now considered a relic of the distant past, most notably the Christian past of the Western world, the principle terrain where modern international law developed. The justification of international law through appeal to these sources is an unquestioned legal reality in our contemporary world.

A different legal world view is not only unacceptable but fraught with controversies in the light of the universalising effect of modern international law. Indeed, contemporary international law has even relegated to a lesser glorified status, the once dominant role of national sovereignty as may be seen in the development of international human rights norms. In the area of international human rights, nothing takes precedence over the rights that are espoused under its banner. No justificatory claims of national sovereignty, no relativistic cultural claims, not even religious law takes precedence over the universal validity of international human rights norms. Consequently, the Shari'a reservations may be said to present, on the one hand, an anachronistic appeal to a

religious law to take precedence over international human rights, and on the other hand it challenges the contemporary understanding of how the international legal system is organised. This is how hard core universalism of international human rights system perceives particularistic claims such as the Shari'a reservations. This is the peculiar *either/or* situation that communities that believe in a *higher moral law*, like the Muslim states are faced with today. The universal claims of the growing body of international human rights law are projected as the highest law for all peoples. Such a positioning of the human rights debate puts the changing societies in different cultural systems in a dilemma that does not bode any good to any of the parties involved. Should the human rights debate be placed within a Huntingtonian *clash of civilisations* dilemma?

The cultural differences that are reflected in the Shari'a reservations presents us with an opportunity to engage with this debate and seek a healthy format for attempting to resolve it. A resolution of this dilemma may hold the key in making human rights *understandable* to all the people, and one that might make it not only *desirable* but *applicable* to all the people as well.

In order to unravel the complexities presented by Shari'a reservations and understand the issue with an aim to look for a resolution of the apparent dispute between Islam and human rights, one must necessarily engage international human rights law with Islamic law or Shari'a.

It is important to understand the law that over 1000 million people of the world consider as indispensable in the governance of not only their international relations, but also their public and private lives. The secularisation and the lessening of the role of national sovereignty in international law cannot necessarily mean the disengagement of the normative laws of a quarter of the world population from it. Universal human rights cannot be meaningful by isolating the Muslims or by dictating that the believing Muslims must alter their religious norms by harmonising it with a 'universal' human rights hermeneutics. Such an enterprise cannot be a truly universal one. The colonial history of the modern world and the imperialist international real politic will not help in eliminating any sense of alienation that such a forced 'universalism' would create in the hearts and minds of the people involved.

Can Shari'a reservations be validated within the cultural universe of Islam?

Sharia, an Arabic word meaning "path," is the name of the sacred or religious laws of Islam. It is considered by the Muslims as the embodiment of all the laws and rules that obligates and governs all walks of life for a Muslim. Unlike Christianity, Islam through the Sharia emphasizes orthopraxis, or proper conduct, more strongly than orthodoxy, or proper belief.¹

The Sharia is considered as the immutable and infallible expression of the divine will as revealed in the Koran and the *Sunna*.² Apart from these two primary sources, it is also the product of jurisprudence developed by Muslim jurists over the course of several centuries incorporating laws derived from ancient Arabian custom as well as those of the peoples conquered during the first century of Islam.³ Many legal rulings formulated by jurists in response to actual cases were also included in the formulation of the corpus of Islamic Shari'a. By the 8th century a movement toward systematising the Sharia had arisen, notably at Medina, where the first legal digest was produced by Malik ibn-Anas (d. 796), and at Kufa, under Abu Hanifa (d. 767) and al-Shaybani (d. 804). The methods of Islamic law were also codified in the *Risala* of al-Shafi (d. 820).⁴

During the development of the principles of Shariah, especially in the context of interpreting the law and making it applicable to circumstances not mentioned in the Koran and Sunna, the jurists introduced several categories of jurisprudence. They include, *Qiyas* or 'argument by analogy, *Ijma* or 'argument from the consensus of the Muslim community and *Ijtihad* or independent argument in the absence of any consensus on the particular issue. These are significant in the understanding of the body of laws that form the Shariah. These three categories of jurisprudence stand in stark distinction with the earlier stated two primary sources, in that they are not directly derived from Divine sanctification. These three categories of laws are developed by the exercise of juristic acumen by the leading Companions of the Prophet, early Muslim jurists as well as learned jurists

1. For an appreciation of this view, See: Miller, Version 8.0.

2. The term Sunna denotes all the sayings and actions of the Prophet Mohammad that are regarded as authoritative points of reference and guidance in the interpretation of the Quranic verses as well as other issues that arise under the Shari'a. See: Rahman, 1994.

3. See: Schacht, 1964; Rahman, 1994; Zakaria, 1988.

4. See: Schacht, 1964.

of later times. Indeed, An-naim aptly observed in this connection when he said, “the *Shari’ah*, as a body of positive law, was developed by Muslim jurists in the second and third centuries of Islam. The raw material out of which *Shari’ah* was constructed was not, therefore, the pure Quran and Sunnah, but rather the Quran and Sunnah as already understood and practiced by generations of Muslims.” (An-Nai’m, 1987: 16)

The body of laws that constitute Shariah is considered as laws of the highest order¹ by the Muslim jurists. Indeed, it may be said that some of the provisions of Shariah are considered by many jurists as forming ‘peremptory norms’ that all Muslims have to conform to, with little space for derogation of any nature.² Indeed, this conceptualisation of Shariah as peremptory norms from which there exists no derogation has been one of the primary grounds of conflict with international human rights law, parts of which is now considered as peremptory norms under international law.³

The prevalence of this perception is evident in the language of the reservation made by Libya to the CEDAW; “Article 2 of the Convention shall be implemented with due regard for the *peremptory norms of the Islamic Shariah* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male.” (Reservations of the Libyan Arab Jamahiriyya to the CEDAW)⁴ The fact that the rules of Shariah law are viewed as forming the primary rules of recognition of the

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1. Indeed, in this respect, one cannot overlook the analogy to the concept of ‘higher law’ in the Corwinian sense. On the concept of ‘higher law’. See: Corwin, 1928: 151. Indeed, the marked characteristics of the concept of Shari’a jurisprudence may be said to have a strong resemblance to how Cicero conceptualised *jus naturale*, “It is a sacred obligation not to attempt to legislate in contradiction to this law, nor may it be derogated from nor abrogated,” it is “one eternal and unchangeable law binding all nations through time.” See: Cicero, *De Legibus*, in: Corwin, 1928: 157.
 2. The conceptualisation of Shari’a as ‘peremptory norms’ is a well-settled point of jurisprudence in Islamic law. It is based on this notion that all subsequent laws be it civil, constitutional and criminal are required to be in conformity therewith. Being principally sourced from the Holy Quran and the Sunna or Traditions of the Prophet, great transcendental sanctity is attached to some of the core provisions of Shari’a. This includes matters regulating the faith of Muslims, issues on apostasy, and many other select issues. See: Rahman, 1994; Askari, 1978.
 3. The core group of select rights that are embodied under various international human rights regimes are considered as *jus cogens* or peremptory norms from which there exist no derogation. This has become a conceptually validated part of international law. See: Martin 1997; Brownlie, 1995.
 4. See, Human Rights: Status of International Instruments, 1987.

rest of the laws that operate within an Islamic state, point out the deep rooted place that it occupies¹.

Consequently, both the rulers and the ruled are obligated to conform to all the requisites of the Shariah. Derogation from that becomes violation of the 'highest' law and the liabilities that ensue are substantively established under Islamic jurisprudence. What is of particular relevance in this connection to our investigation is that, it provides a picture of the concept of Shariah within an Islamic state. The Shariah forms part and parcel of the foundation of the Islamic states,² forms one of the basis for the validity of the existence of an Islamic State. It also forms part of the moral and ethical laws that are binding on all Muslims and thereby is regarded as a factor determining the authentication of faith of the believers. No doubt, viewed in this perspective, Shariah occupies a place of pre-eminence in an Islamic state.

Given this critical status of Shariah in an Islamic State, the complications that arise when international human rights obligations come into conflict with it are immense. The issues involved challenge the validity and authority of each of the two systems of norms. One of the measures through which the debate over this conflict has been manoeuvred is to bring in the cultural relativist framework and completely hinder any correspondence between the two. The traditional relativists take it up as a theoretical justification for the preservation of status quo in Shariah and to restrict the acceptance of the human rights obligations.

On the other hand, the human rights advocates keep on maintaining the 'higher' ground of universalism and find measures to develop international coercion in the implementation of the same. The debate is all too familiar.

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1. However, going against this established tradition of jurisprudence, An-Nai'm proposes the creation of a space for a restatement and reinterpretation of Shari'a. "Belief in the Quran as the final and literal word of God and faith in the Prophet Mohammed as the final prophet remain the essential prerequisites of being a Muslim. The prescribed worship rituals such as prayers and fasting, known as the five pillars of Islam, remain valid and binding on every Muslim. What is open to restatement and reinterpretation, I submit, are the social and political aspects of Shari'a." See: An-Nai'm, 1987: 17. What in effect, he proposes is a methodology for derogability from the 'peremptory' status.
 2. The concept of Islamic State has come under close scrutiny at the hands of many Islamic scholars of recent. Indeed, according to the Egyptian judge, Muhammed S. al-Ashmawi, the creation of an Islamic State with Shari'a forming its constitutional foundation, "is not desirable because this would only contribute to establishing totalitarian regimes." See: Tibi, 1994: 279; Afshari, 1994: 235; Askari, 1978.

One of the most notoriously censured aspects of Shariah, when it comes to human rights relates to the Islamic criminal law. The various Shariah provisions on punishments like *sariqa*¹, *zina*², *jinayat*³ are considered by most human rights advocates as cruel, inhuman and degrading forms of punishments that violate the 'inherent dignity' of the human being. But when we consider this removed from the 'secular' perception of human rights, and view it from the binding obligations and characteristic of the Islamic Shariah, these punishments do not violate the human dignity as perceived therein⁴. In other words, from the relativist perspective, the content of human rights relating to cruel, inhuman and degrading punishments vary inevitably. Where the advocates of universal human rights norms term such punishments as absolute violations of human dignity, it is perceived as an imposition of an alien concept of what constitutes 'human dignity' by the relativists⁵. The reluctance of the Islamic world to do away with such provisions of the Shariah indicates this perception⁶. It is looked upon as a form of 'cultural imperialism'. Further more, a rigid coercive enforcement of these universalist human rights that conflict with the cultural specificities of a particular culture zone has a strong potential to "produce a devastating break down of social

1. Amputation of the right for theft

2. whipping for fornication

3. exact retribution or monetary compensation for homicide or bodily harm

4. Of course, in taking up this justification, one has to consider the substantive as well as procedural limitations that are placed on the execution of these punishments under Islamic Shari'a in order to attribute the comprehensive meaning to the claim of validity. For an elucidation of punishments under Shari'a and human rights provisions, See: An-Na'im, 1995. Indeed, Na'im aptly observes, "Neither internal Islamic reinterpretation nor cross-cultural dialogue is likely to lead to the total abolition of this punishment as a matter of Islamic law". An-Na'im, 1995: 36. He concedes the peremptory nature of such provisions of the Shari'a.

5. Indeed, this aspect had been summed up by Garkawe when in relation to the opposition to the aborigines customary penal provisions in Australia, he observed that, "This represents a lack of acknowledgement and acceptance of the cultural relativist paradigm, and a western view of what is 'cruel' or 'degrading'. The law appears to be discounting the possibility that what may appear to be universal notions of 'cruel' or 'degrading' may not in fact coincide with what other cultures may think. In particular, the reluctance of Australian law to incorporate traditional Aboriginal punishments as a sentencing option is unfair". Sam Garkawe, *The Impact of the Doctrine of Cultural Relativism on Australian Legal System*, *E Law*, <ftp://infolib.murdoch.edu.au/pub/subj/law/jnl/elaw/refereed/garkawe.txt>

6. However, one must take this with a necessary caveat, that though many Islamic governments advocate such position, the requisite legal mandates in executing such punishment are hardly followed in most instances.

order as well as a heightening of influence of restrictive or fundamentalist cultural tendencies." (Falk, 1995: 58)

A Middle Path:

It is conceded that there exist peremptory norms from which no derogation is permitted under both the Islamic Shariah as well as under the international human rights system. However, this does not necessarily mean a continuing clash between the two.

Indeed, Donnelly's formulation of the 'weak cultural relativism' position is a conceptual development in point. Under his 'weak cultural relativism' limited deviations are to be permitted from the universalist human rights standards, primarily at the level of interpretation and form. That is, "the cultural variability of human nature not only permits but requires significant allowance for cross-cultural variations in human rights." (Donnelly, 1984: 401) In other words, he suggests a possible mediation between the culture specific necessities of the various culture zones of the world and the demands of the universal human rights regimes. Conceptually, therefore, Donnelly concedes the possibility of creating space for the possible harmonisation of the diverse normative systems.

Further developing in this line of thinking, Renteln and An-Na'im also propound the creation of wider space for correspondence between the claims of universality and relativism when it comes to international human rights.

According to Renteln, in order to properly assess the true universality of a human right, "it would be necessary to evaluate diverse cultures to see if a concept of human rights exists there. If it does, the next question is whether or not the concept resembles that expressed in international human rights documents [...] Commitments to basic principle may not be articulated in a rights framework in many cultures. It may not be expressed though it underlies traditional beliefs and practices." (Renteln, 1985: 531) What in effect she suggests is that, any variation between the cultural specificities of a particular culture zone and human rights norms may, in the final analysis appear to be of mere *approach*. While a culture zone may already have those norms in existence therein, albeit in a different form, the international human rights regimes may approach the same right in a formal, positivistic approach.

In order to overcome a binary divide on the lines of a Huntingtonian 'clash of the civilizations', we need to explore the avenues available in the

protection of and observance of the obligations so necessitated by the human rights regimes, *within the concerned culture zones*. Indeed, Renteln concedes that this would require extensive and detailed and tedious research into the legal and cultural materials available in such a culture zone. She writes, "From an understanding of cross-cultural moral categories may come the capacity to build universal support for principles, principles concerning the humane treatment of individuals." (Renteln, 1985: 538)

So does the investigation include merely going into the moral categories of the concerned cultures and make blanket justifications therefrom, as has been the case in most instances? Foreseeing this situation, Renteln notes that, "it is extremely important that any analysis of and conclusions about human rights *identify the assumptions* made. Otherwise *if each notion* is taken to be *self-evident*, there will be little progress toward justification." (Renteln, 1985: 538)

In going ahead with this approach, it is also vital to make a distinction between the authentic claims of cultural relativism and the oblivious vilification of human rights as Western imperialism *per se*, that are indulged in by several states. While the state concerned may raise legitimate claims of cultural relativism, the anti-Western clamour often amount to a mere politicisation of the issues involved.

Hence, Renteln proposes an effective method for creating possible space for correspondence between the conflicting claims of universalist human rights and relativist objections to the same. In order to put this approach into practice first, one must identify where the conflict lies specifically. That is, what is the particular universalist right involved that is coming into conflict with the relativist claims, in our case with Shari'a. In this regard, it is submitted that the practice under the European Commission on Human Rights (ECHR) is of great relevance. Article 64 of the ECHR calls for the identification of the domestic law provision that is specifically in conflict with the provisions of the ECHR.¹

In addition to the identification of the specific conflicting provision, it is also important to assess the measure by which the two are diverse in their ambit and then the attempt should be, as Renteln suggests, to explore the possibilities of harmonisation between the two.

1. See: Renteln, 1985: 41-42.

In the same vein, An-Na'im proposes an alternative methodology that would provide space for not only correspondence, but also effective harmonisation.

By effective harmonisation, it is implied here that the process of correspondence between the two must be based on the initial premise of give and take. That is the paradigm should be moved from the prevailing one of complete conflict and into one of accommodating where inevitable diversities become comprehended. Focusing on the tension between Islamic Shariah and the universal human rights regimes, An-Naim proposes a methodology for the reviewing of the conflicting provisions between human rights and Shariah. In the first instance, this would involve making a distinction between the anti-West based rhetoric against human rights norms and what constitutes as human rights norms really. In other words, one need to make a distinction between the norms and values that are embodied in the human rights regimes and the political rhetoric of attributing human rights as a pure product of Western imperialism.

In order to achieve this, he suggests that there should be an assessment of the values and norms that are considered as human rights within the Islamic Shariah itself. This exercise would establish the extent and content of the non-Westerness of the human rights norms and values. It becomes a process of internal identification of the jurisprudence of human rights. At the same time, he also warns that one should be extremely "sensitive to the dangers of cultural imperialism" (An-Na'im, 1995: 38) and therefore, must attempt to make the distinction with this caveat.

According to An-Na'im, "Shar'iah is not the whole of Islam, but rather the early Muslims' understandings of the sources of Islam." (An-Na'im, 1987: 15) In so suggesting, he advocates that there exist inherent room for interpreting, reviewing and reforming Shariah. Indeed, he is of the opinion that this inherent space for correspondence needs to be utilised to generate an internal debate over conflicting provisions of Shariah and universal human rights. It is not aimed at establishing the absolute legitimacy of one over the other and thereby to conclude the matter in haste. He states, "The cross-cultural approach, however, is not an all-or-nothing proposition. While total agreement on the standard and mechanisms for its implementation is unrealistic in some cases, significant agreement can be achieved and ought to be pursued as much as possible." (An-Na'im, 1995: 39) He proposes that this methodology

have two requisite sides to it. “Firstly, we must try to extrapolate, *as much as possible*, a universal concept through the interpretive reading of existing international standards while being open to the possibility of revising these standards if necessary.... On the cultural side, each of us must work from within his or her culture to bridge the gap, *as much as possible*, between the present international standards, on the one hand, and the norms and values of the culture, on the other.” (An-Na’im, 1995: 423)

His insistence on “*as much as possible*” may be said to form one of the most important platforms upon which he theorises. Namely, that the attempt should involve the exploration of all resources of the particular culture involved from within. Such an exploration may provide either a possible harmonisation or an alternative mechanism through which the same values and norms in question may be achieved in all their practicality. The crucial issue, still remains, what happens when there is neither space for harmonisation nor an alternative. Na’im points out that in such a situation, the “*as much as possible*” understanding must be utilised so as to justify the position of relativity. It is submitted that An-Na’im gives in to the latter circumstance, only after the exhaustion of all local means within the particular culture zone.

Thus, the middle path that has been proposed, both by Renteln and An-Na’im gives consideration to the claims of universality as well as relativism. The point of particular interest for our present investigation is that, both of them look at universal human rights from the cultural diversity perspective. And the attempt is to do justice on an equitable assessment of the claims of both the systems, *as much as possible*. The effect of this particular formulation is that, it gives validity to the relativist justification raised by the Islamic states.

The concept of relativism has been a point of focus not only among the Islamic states, but also within various other states of the world. For instance, the relativist v. universalist debate has gained particular significance in Australia, in the context of the rising claims of the assertive rights of the Aborigines cultural traditions. The application of universal international human rights norms under Australian legal system has gone through a significant change recently. Australian Law Reform Commission had strongly formulated that the application of the human rights norms within the Australian legal system is part of the accepted law. Although Australia does not have a distinct set of Bill of Rights, the

international human rights norms are applied within the state as part of the domestic regime, wherever there is a gap in the statutory law or the common law provisions. The Australian Law Reform Commission stated, "One source of principles to guide the Commission in dealing with competing values are the international human rights instruments to which Australia is a party."¹ However, the case of *Queen v. Wilson Jagamara*² has made a significant impact in the way universal human rights norms are applied. The case involved the question of whether an Aboriginal murderer should be subjected to the customary penal law of the Aborigines people of Australia. The Supreme Court of the Northern Territory decided in the application of the customary punishment of spearing the murderer by the Aborigines. In effect, what this decision did was to make a turn around in Australian legal history by incorporating the customary laws of the Aborigines people, despite the secular law of the Australia as well as human rights obligations of the state. The case makes a strong pointer to the fact that cultural diversity needs to be given greater recognition and validity within the rights debate and accommodation is not an unrealisable thing and for that matter it is also not an undesirable approach.

What is the implication of this formulation to our present context of reservations to international human rights regimes? It is submitted that the validity of cultural relativism within given circumstances foretells the necessity for comprehending the issue of controversial reservations within a culturally diverse perspective. Such a comprehension enables States to appreciate the content of reservations and the validity of the justifications made by the reserving states to their respective reservations. Even where such justifications are not particularly offered, it still goes a long way in demonstrating the force of validity of the reservations made by the states to international human rights obligations. Further more, such a comprehension would also enable States to comprehend the substantive potential of states to actually adhere to or implement the treaty obligations that it had accepted under a human rights treaty. Or in the alternative, to appreciate the compelling reasons of states to restrict

1. Multiculturalism and the Law, *Australian Law Reform Commission Report No. 57* (1992), as cited in Sam Garkawe, *The Impact of the Doctrine of Cultural Relativism on Australian Legal System*, *E Law*, <ftp://infolib.murdoch.edu.au/pub/subj/law/jnl/elaw/refereed/garkawe.txt>.

2. *Queen v. Wilson Jagamara* SCC No. 46 (1993)

their international human rights obligations through formulation of reservations such as made by Muslim States.

When we assess for instance, the Islamic reservations made by States to international human rights regimes strictly from the perspective of the provisions of the VCLT that has been discussed above, their ambiguity, and incompatibility with the 'object and purpose' provisions of the treaty become obvious. The legal consequence that ensues from such incompatibility as discussed is however left to the individual determination of the states party to the respective regimes. In the following section, this position is analysed with respect to the reservations made by the Republic of Maldives in its acceptance of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1989).

Reservations to CEDAW and CRC by the Maldives – A Classic Reservation Case:

The Maldives is a party to only three essential human rights instruments of all the international human rights regimes. It acceded to the;

- Convention on the Elimination of All Forms of Racial Discrimination (1966) on April 24 1984
- Convention on the Elimination of All Forms of Discrimination Against Women (1979) on July 1 1993
- Convention on the Rights of the Child (1989) on February 11 1991 (ratified)¹

While acceding to the CEDAW, the Maldives made the following reservations to the regime;

“The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Shariah upon which the laws and traditions of the Maldives is founded.

Further more, the Republic of Maldives does not see itself bound by any provisions of the Convention which obliges it to change its Constitution and laws in any manner.” (Status of Accession under)²

1. In 2004, Maldives also became a member of the ICCPR.

2. Available at: <http://www.un.org/Depts/Treaty/final/ts2/htm>.

This formed the initial reservations made by the Maldives to the CEDAW. It is to be noted here that the Maldives had modified its reservations made to CEDAW on June 23 1999. However, on 29 January 1999, the Government of Maldives notified the Secretary-General of a modification of its reservation made upon accession. In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification (i.e. 25 March 1999). No objection having been received, the modification was accepted for deposit upon the expiration of the stipulated 90 day period, that is to say on 23 June 1999.¹ The text of the reservations made upon accession read as follows: "1. The Government of the Republic of Maldives expresses its reservation to article 7 (a) of the Convention, to the extent that the provision contained in the said paragraph conflicts with the provision of article 34 of the Constitution of the Republic of Maldives. 2. The Government of the Republic of Maldives reserves its right to apply article 16 of the Convention concerning the equality of men and women in all matters relating to marriage and family relations without prejudice to the provisions of the Islamic Sharia, which govern all marital and family relations of the 100 percent Muslim population of the Maldives." (Status of Accession under)²

The initial reservations made by the Maldives to the CEDAW may be noted for its many defects in respect of formulation and content in the context of international treaty law. In the first instance, the nature of the treaty makes it evident that strictly speaking it does not come within the meaning of reservation provided under Article 2 (1)(d) of the VCLT. The latter stipulates that a reservation in order to qualify as one, must be made either at the time of "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." (Article 2 (1)(d) of the VCLT) It is observed that the initial reservation made by the Maldives to CEDAW is in the nature of a 'continuous reservation' wherein the reservation becomes a recurring one whenever the government of the Maldives decides that a particular provision of the Convention "is contradictory to the principles of the Islamic Shari`a upon

1. See: Status of Accession under, <http://www.un.org/Depts/Treaty/final/ts2/htm>.

2. Available at: <http://www.un.org/Depts/Treaty/final/ts2/htm>.

which the laws and traditions of the Maldives is founded.”¹ Thus the ambiguity and vague nature of the initial reservation lands it in serious doubt. Noting this aspect, Chinkin writes, “their indeterminacy, imprecision and open-endedness are contrary to the certainty required for the acceptance of a clear legal obligation. These reservations have not accompanied by explanations of their intended legal or practical scope”².

While several states had objected to this reservation, pointing out its incompatibility with the object and purpose of the Convention, not many States objected to the entry into force of the Convention between Maldives and the respective States. Sweden had made express objections to this regard, consequently, CEDAW may be said to be not in force as between the Maldives and Sweden.

Contrary to the initial reservation the modified reservation appears to have made definite progress in attempting to keep in compliance with the law. What is of particular interest in the modified reservations is its specificity.

1. *Ibid.*, n 310.

2. Christine Chinkin, *Reservations and Objections to the Convention on the Elimination of All forms of Discrimination Against Women*, Chinkin and Others (eds.) Human Rights as General Norms and a States Right to Opt Out, (London: B.I.I.C.L., 1997), 70. It is interesting to note here the type of reservations that had been made by the different States to the Maldivian reservation. Some of the most radical objections include; on 26 October 1994 Austria made the following objection, “The reservation made by the Maldives is *incompatible with the object and purpose* of the Convention... Austria therefore states that this reservation cannot alter or modify in any respect the obligations arising from the Convention for any State Party thereto.” Canada objected on 25 October 1994 as “In the view of the Government of Canada, this reservation is *incompatible with the object and purpose* of the Convention (article 28, paragraph 2). The Government of Canada therefore enters its formal objection to this reservation. This *objection shall not preclude the entry into force* of the Convention as between Canada and the Republic of Maldives.” Finland, on May 1994 objected that “In the view of the Government of Finland, the *unlimited and undefined character of the said reservations* create *serious doubts about the commitment* of the reserving State to fulfil its obligations under the Convention. In their extensive formulation, they are clearly *contrary to the object and purpose* of the Convention. Therefore, the Government of Finland objects to such reservations... The Government of Finland *does not, however, consider that this objection constitutes an obstacle to the entry into force* of the Convention between Finland and Maldives.” Norway also made similar reservations yet did not rule out entry into force of the Convention between the two states. Again, “The Government of Sweden also stated that: “The Government of Sweden therefore objects to these reservations and considers that *they constitute an obstacle to the entry into force of the Convention between Sweden and the Republic of Maldives.*” Thus Sweden appears to be the only State that had objected to entering into treaty relations. See Status of Accession under, <http://www.un.org/Depts/Treaty/final/ts2/htm>.

In the first part of the modified reservation, the Maldives reserves the application of the Convention in respect of Article 7 (a) of the CEDAW, which states that all States parties must take all appropriate steps to guarantee equality between men and women in respect of the right to “To vote in all elections and public referenda and to be eligible for elections to all publicly elected bodies.” (Article 7 (a) of the CEDAW)

This portion of the modified reservation gives an interesting perspective into the legal system prevailing in the State. It must be noted here that, the Maldives does not make any reservations with reference to the rest of Article 7 of the CEDAW, which speaks of guaranteeing equality between men and women in the participation for making governmental policies and other aspects of public life through non-governmental organisations and associations. The State does not make reservations with regard to these provisions. So the question arises, why Article 7 (a)?

The same portion of the reservation suggests that it is so made because of its patent incompatibility with Article 34 of the Maldivian Constitution. Article 34 of the Maldivian Constitution stipulates the qualification for Presidential candidacy in an election. In particular, Article 34 (c) of the Maldivian Constitution declares that a person standing for election as President “is a male who has attained thirty five years of age.” (Article 34 (c) of the Constitution of Maldives) It is submitted that this provision of the Constitution goes against the spirit and intent of the equality clause embodied under Article 7 (a) of the CEDAW. Consequently, one may object to it for going against the spirit of equality of men and women that pervades the entire Convention.

The apparent reason for this provision of Article 34 (c) may be attributed to some of the provisions of the Qur'an and some Hadith of the Prophet Mohammed that are interpreted by some to indicate that men are appointed as rulers over women or that societies led by women leaders would not prosper and be stable.¹ However, this particular area has been considered as a disputed area of interpretation, with different jurists giving varying interpretations. According to Chaudhry, the explicit absence of any such prohibition in either of the primary sources of Islamic Shariah, namely the Qur'an and the Hadiths (Sunna), points out that such decision was not decided as a peremptory norm for the

1. For a further elaboration on the theme, please see Chapter 21 titled, *Can a Woman Rule?* In: Chaudhry, 1997: 164.

purposes of Shariah. Indeed, he agrees that the Qur'an and the Hadiths make distinctions between men and women and such distinction pervade through much of the Shariah, including its principles of evidence, marital relations and so on. He points out the Qur'an makes specific mention of the rule of the Queen of Sheba and the narration is not in any manner disapproving of such rule.¹ From here he deduces that there is nothing explicit in the Qur'an that objects to the rule of women. He writes, "The silence of the Qur'an and Hadith on this very important and vital issue is not without wisdom and sagacity. This deliberate silence means that Islam has given full freedom and discretion to the Muslim *Ummah* to decide this matter according to the ever changing socio-political circumstances." (Chaudhry, 1997: 175) Perhaps what is desirable in such instances is to initiate the internal debate that Renteln and AN-Na'im had suggested in their relativist methodology, as noted above. Indeed, this particular reservation made by the Maldives does not appear to belong to the class of principles that are considered as distinctly put down in clear and unalterable terms under Shariah as peremptory norms. Where such is the case, it is submitted, the reservation can afford little support from a relativist paradigm, unless one takes the rather obstinate traditional relativist view. However, one may note that taking such a hard position on this issue is really not called for, especially since women are becoming distinguished leaders of Islamic states such as Pakistan, with much of the approval coming from the *ulema*.² Further more, the very history of the Islamic Maldives, post-1153 A.D, demonstrates on several occasions, women taking over the Sultanate and ruling with great merit and distinction³. Having considered this part of the reservation made by the Maldives in the light of Islamic jurisprudence as well as the historical reality, one cannot with ease accept a relativist justification of the same.

The second part of the reservation relates to Article 16 of the Convention, which calls for equality of men and women in a very critical area, the family law. It is submitted that provisions relating to family law, like adoption, divorce and dissolution of marriage, parental rights and duties, guardianship and concept of ownership of property does not

1. See, Qur'an Sura 27: verses 29-42.

2. See: Chaudhry, 1997: 175.

3. See the narrative on Sultana Rehendhi Khadeeja who ruled for 29 years over the archipelago between 1347-1380. *Dhivehi Thaarikhah Aa Alikameh*, Male': Centre For Linguistic and Historical Research of the Maldives, 1990: 141.

constitute as grey an area as had been noted under Article 7 (a). Indeed, Muslims consider Islamic personal law as the basic part of their religious faith. The issue is even more aggravated when one considers it in a unique set-up like the Maldives, where the demographic reality presents a hundred per cent Muslim State. In such a theocentric set-up, calling for the application of secular principles of equality takes far sharper focus within the relativist paradigm. Indeed, where there prevail a complete system of law on such particular areas, the imposition of an alien system, whether through internal hybridization or through coercive measures, present an increasing resemblance of secular cultural imperialism. The above noted case law development in the opposite trend in Australia, where instead of displacing the Aborigines customary legal system, a re-induction of the same is happening, gives a much better view of the relativist justification to sustain and preserve the cultural interests. Hence, this particular portion of the reservation made by the Maldives, appear to be based on a much more balanced relativist position than the previous one.¹ Hence, the formulation of the reservation may be said to represent a justification for the protection of the legitimate interests of the Maldivian sovereign state.

Now the question arises, what about its compatibility with the 'object and purpose' test under the VCLT? It is submitted that the VCLT provides for the determination of the compatibility of a reservation by the individual states. At the same time, the effect of such reservations is also to flow therefrom. But the present modified reservation had not been rejected to as vociferously as was the case in the context of the initial reservations. One reason perhaps is that, the Secretary-General's stipulated ninety days for making objections to reservation expired before much could be made of the reservation by the rest of the states.²

Again with respect to the Convention on the Rights of the Child (1989), Maldives made the following reservations,

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1. In fact, if one considers an application of the provisions of Article 16 to the Maldives, it would require not only a transformation of a single set of laws, but the displacement of a whole gamut of legal relations and principles, upon which the theocentric State itself is founded. Further, such a consideration must necessarily have to be made within the parameters of competency and authority that the internal legal system permits and allows. As we have noted above, the Maldivian legal system, being based on Islam, does not provide any agent/person with the competency to change express provisions of Shari'a. Such a measure is, in fact, out of jurisdiction of the State itself.
 2. See Status of Accession under, <http://www.un.org/Depts/Treaty/final/ts2/htm>.

"1) Since the *Islamic Shariah* is one of the fundamental sources of *Maldivian Law* and since *Islamic Shariah* does not include the system of adoption among the ways and means for the protection and care of children contained in *Shariah*, the Government of the Republic of Maldives expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention on the Rights of the Child.

2) The Government of the Republic of Maldives expresses its reservation to paragraph 1 of article 14 of the said Convention on the Rights of the Child, since the Constitution and the Laws of the Republic of Maldives stipulate that all Maldivians should be Muslims."

Upon ratification the same reservation was modified as to include Articles 14 and 21 of the Convention. As may be observed, this reservation is essentially based within the restraints proposed by the *Shariah*. Article 14 and 21 are specified here because of their direct bearing on the much larger concept of the Right to Freedom of Thought and Religion of the child. Article 14 (1) of the CRC, for instance, reads, "States Parties shall respect the right of the child to the freedom of thought, conscience and religion." (Article 14 (1) of the CRC) Furthermore, Article 14 (3) states, "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others." (Article 14 (3) of the CRC)

Similarly, Article 21 is about the provisions relating to the concept of adoption. It is submitted that both these provisions appear to head into direct conflict with the theocratic legal system of the Maldives. These two provisions essentially involve an inconsistency between *Shariah* provisions and universal human rights.

In the first instance, the implications of Article 14 are that the State should guarantee the right of a child to convert to any religion of his free choice. Similarly, it connotes that the State must protect the right of a child/person to go against and the express tenets or *hudud* of God. It is submitted that *Islamic jurisprudence* does not give space for much of correspondence on this particular area. Changing of religion or conversion into another religion amounts to apostacy under the theocentric *Islamic State*, as is the case with the Maldives. Apostacy is a direct violation of the *hudud* laid down by God. No transgression from it

can be permitted or allowed by any man or woman, since it would amount to altering a peremptory norm set in under the word of God. The Shariah provides specific *hadd*¹ for apostacy. According to Shariah. Apostacy is the greatest offence that a Muslim could commit. It is considered as a violation of the sovereignty of God² and is visited with the most stringent of punishments meted out in the State. The Islamic law provides that, before penalising the apostate, he must be given the opportunity to recant his conversion, upon which, all the rights, freedoms, privileges and status enjoyed by such a person prior to conversion, would revert back.³ Where such recantation is not made, the Shariah provides for capital punishment. Clearly this is in violation of the letter and spirit of Article 14 of the CRC.

Here we have a classic case of conflict between the universal human rights norms and relativist cultural diversity. Following the methodology suggested by AN-Na'im, it is submitted, there exists very little scope for correspondence here. Consequently, in practical life we see almost all the Muslim nations objecting to these rights, through similar reservations. Here, it must be admitted that the relativist framework is substantively based on the cultural diversity and recognition of the cross-cultural legitimacy of relativism argument. The incompetence of the Maldivian State to progress in this regard may be observed on the limitations that has been expressed laid down under Article 25 of the Maldivian Constitution. It states, "Every citizen shall have the freedom to express his conscience and thoughts orally or in writing or by other means, unless prohibited by law in the interest of protecting the sovereignty of the Maldives, of maintaining public order and of *protecting the basic tenets of Islam.*" (Article 25 of the Maldives Constitution) From this formulation itself, it becomes evident that the so-called Bill of Rights in the Maldivian Constitution is also subservient to the binding provisions of Shariah. Thus, the reservations made to the CRC Articles 14 and 21 are supported through the cultural relativist framework, just like the case examined under the CEDAW.

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1. *Hadd* refers to the set of punishments that are distinctly specified under the Shari`a for certain offences. It includes offences like theft, fornication and apostacy. The Shari`a provides that were a Muslim
 2. It may be recalled that the Sovereignty of God remains one of the fundamental tenets of an Islamic State.
 3. See: Siddiqui, 1995: 907; Rahman, 1994; Askari, 1978.

CRC in practice in the Maldives¹:

It is observed that the Maldives has been attempting to integrate as much as possible of the Convention into its domestic law, though within the general constraints of its theocentric culturo-religious system. For instance, in its report submitted to the Committee on the Rights of the Child in 1996, the Maldives notes its status vis-à-vis the specific points of its reservations to the Convention. Accordingly, with respect to the reservation made to Article 14 of the CRC, it notes, "As Maldives is a 100 per cent Muslim country, the Constitution of Maldives is silent about the freedom of religion. *Regulations do, however, permit non-Muslims to practise their religion in privacy.* Thought and conscience are inextricably bound by and linked in Maldives with the Muslim religion, which all Maldivian citizens must follow and practise."

In other words, the State still maintains its position on the reservations as it had been made before. However, a perusal of the report shows that the State is making gradual progress towards integration of most of the provisions of the Convention. For instance, the Report noted that although "There is no "formalized" system of adoption in Maldives, although the system that does operate is organized through the Ministry of Justice and Islamic Affairs." Hence, it is observed that the State has made considerable progress with reference to its second reservation to the CRC, though the culturo-religious constraints do not permit an all out integration of the provisions of the Convention. Indeed, this approach of the State may be likened to what An-Na'im had suggested when he said that an internal debate must be pursued in the Islamic countries and a consistent effort at finding space for correspondence between the human rights demands and claims of cultural relativism must be made. The Maldivian implementation of the CRC may perhaps be taken as a case in point here.

1. The implementation of the CRC regime in the Maldives may be observed primarily from the country report submitted by the Maldives to the Committee. Maldives' initial report (CRC/C/8/Add.33 and CRC/C/8/Add.37) was considered at the Committee's May 1998 session; the second periodic report was due 12 March 1998. However, it is noted here that the Maldives, though acceded to the CEDAW in 1993, has not submitted its annual report to the Committee. Indeed, Maldives' initial and second periodic reports were due 1 July 1994 and 1998 respectively. See Status of Accession under, <http://www.un.org/Depts/Treaty/final/ts2/htm>.

Conclusion:

The above exploration of the concept of reservations with respect to international treaties, and in particular with respect to international human rights treaties provide us with interesting perspectives in the development of this particular public international law mechanism. We have considered the same within the paradigm of cultural relativism, especially since bulk of the reservations made to international human rights regimes are heavily culture laden, if not substantively, at least in its nominal sense. This examination of the reservations regime within cultural relativist debate became important for assessing the validity of the relativist justifications forwarded by States to stay away from the human rights obligations.

It is observed that the Vienna Convention on the Law of Treaties provides a flexible approach to the issue of reservations for a very pragmatic consideration. That is, by making a harmonisation between the demands of the contractualists who maintain that the status of sovereign will of the individual states should not be undermined through a creation of a restrictive reservations regime and the needs of the Normativists who insist on maintaining the integrity of the regime as of the greatest importance.

This harmonisation effort created what we considered as the VCLT flexibility approach, wherein the maintenance of the integrity of the treaty regimes were protected by subjecting reservations to the 'object and purpose' compatibility requirement. At the same time, the provision of the VCLT that such assessment of compatibility must be left to the subjective determination of the individual states parties to the treaty regime, recognises the importance of the sovereign will of the States. The fall-out of this formulation on our present subject is that, it gives room for the manoeuvring of the obligations that the reserving state undertakes through the acceptance of a treaty regime. It also provide a platform for the reserving state to present before the international community its legitimate concerns relating to the content of reservations, by providing a justification of the relativist interests of that state.

In our investigation, we had taken the particular instance of the reservations made by the Republic of Maldives to Convention on the Elimination of Forms of Discrimination Against Women and the Convention on the Rights of the Child. It had been noted that the

reservations made by the Maldives to these two conventions came within the domain of what had been termed in the parlance of reservations as the 'Islamic Reservations'. They are also called as the 'Islamic Relativist Reservations' since the distinguishing characteristic of these sets of reservations is that it takes up the peculiar practices and theocentric jurisprudence laid down under Shariah as a legitimate justification for the Islamic states to stay away from the international human rights obligations. These reservations are generally justified by using the cultural relativist paradigm.

It is observed that while the utilisation of the cultural relativist paradigm in respect to some of these reservations may be justified in a cultural perspective, there are also instances wherein, the same conceptual framework is utilised to weave a call for legitimacy of oppressive regimes and their totalitarianism.

Indeed, when we consider the above proposition within the context of the Maldives, it is observed that the country had accepted, out of all the international human rights regimes, only three conventions, namely, CERD, CEDAW and the CRC. What does this imply about the intent of the state vis-à-vis its claim to be true to the international human rights obligations, where such obligations are in not directly in conflict with the cultural relativist justifications that it provide? It is submitted that the acceptance of these three conventions come as a peculiar policy feature of the Maldivian government that defies logical comprehension. Indeed, most of the other Islamic and Middle Eastern countries have become parties to the other international human rights regimes, although they do qualify their participation with similar "Islamic Reservations". Then arises the question, why has the Maldives not done so? It could well have formulated the same reservations that it had made in respect of these two conventions while acceding to a ratifying the other regimes as well. However, as is evident, such a measure had not been considered at a policy level.

One obvious implication that may be deduced from this is that the government of the Maldives does not fully condone and commit itself to the values and norms that are declared in these international human rights, even where such norms and values are not in direct conflict with its relativist interests.

Indeed, in this context, it is submitted that the real commitment of the Maldives to become a part of the international human rights regimes while at the same time protecting its 'legitimate' formulation of relativist concerns is mystified in ambiguity of policy. The political will to partake in the international human rights regimes appear to be absent at the moment.

Perhaps what is required at the moment in the Maldives, with respect to coming within the fold of human rights regimes (while protecting its relativist concerns), is an internal debate about the true scope of commitment that the State can make to these international obligations. Especially so given the unique demographic and culturo-religious characteristics of the State that we had discussed above. As long as such a debate does not take place, it is submitted, the concept of respect for human rights would inevitably become entangled in rhetoric and political dilly dallying, at the cost of the potential protection that the people of the country could enjoy. There exists a need to verify the scope and authenticity of the relativist justifications of reservations to human rights that the country had formulated. The *telos* of such an exercise must be to assess to what extent the 'universal' human rights embodied under the international human rights instruments could be accommodated within a meaningful cross-cultural discourse. Given the rigid framework of Islamic jurisprudence, it becomes vital that such an exercise takes place from within so as not to castigate the harbingers of reform, even before an agenda for harmonisation is brought about.

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