Human Rights Conventions and Reservations: An Examination of a Critical Deficit in the CEDAW

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By

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Abstract

Human rights agreements like CEDAW contain language that seeks to inspire and establish the legal boundaries of state action with regards to protected rights. Such agreements also contain reservation provisions that enable states to join an agreement and simultaneously exempt themselves from the very substantive goals the agreement seeks to achieve. In the past, the issue of reservation compatibility has been treated as political questions under an objection process. Establishing a mechanism for testing reservation compatibility before the ICJ is a better means of ensuring that states do not nonchalantly exempt themselves from human rights obligations through reservations.

I. Introduction

Like the American Declaration of Independence1 or the French Declaration of the Rights of Man and Citizen,2 human rights agreements can embody language that seeks to inspire as much as to achieve a political, social, or legal objective.3 As such, they have the capacity to establish the parameters of dialogue, promote agreed to principles, motivate a policy debate, and

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1 THE DECLARATION OF INDEPENDENCE (U.S. 1776) (“We hold these truths to be self-evident[.]”).

2 THE DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (France 1793) (“[B]elieving that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man[.]”).

3 See, e.g., Universal Declaration of Human Rights, Preamble (Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[.]”)
provide, in some instances, enhanced protection for certain fundamental rights. In their inspirational capacity they can serve the quintessential function of setting the “tone” of a dialogue, a factor that can be as important as establishing the basis for future legal action. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is credited with spurring nations to address racial discrimination by articulating principles that establish a new “base-line” for tolerance. Yet the very aspects of human rights conventions that spur needed debate and action – the articulation of broadly accepted human rights principles – can also form their Achilles Heel. The utter absence of a legitimized, practicable and uniformly enforceable legal regime acceptable to states can render a convention little more than a tonal achievement; one that is highly inspirational but does not necessarily offer the broad, tangible protections that their authors may have hoped would be the end result. Reservations to human rights agreements present a particularly thorny obstacle in developing effective legal regimes. If a human rights agreement is subject such qualification and reservation as to render its substantive provisions a nullity in many signatory states, not only is the genuineness of a particular agreement drawn into question but so too is the international community’s efforts to protect human rights and promote the rule of law as the countervailing force against egregious misconduct.

This article is divided into three parts. Part I will briefly explore the linkage between the status of states, state reservations, and modern human rights agreements. The Convention on the

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Elimination of all forms of Discrimination Against Women\(^6\) (CEDAW) is not alone in allowing nations to make reservations to “universal” human rights agreements.\(^7\) Utilizing CEDAW as a case study, Part II will examine whether state reservations to key provisions in human rights agreements effectively negate the very objectives of the agreement. Not all reservations are created equal. Those that exempt a signatory state from complying with substantively important provisions are of particular concern.\(^8\) Finally, Part III concludes by examining how reservations to human rights accords might be better addressed by replacing unenforceable statements of “incompatibility” with a process for assessing the degree to which a reservation conflicts with the objective of an agreement. Absent verification of compatibility with the objectives of a human rights agreement, reservations can actually encourage states to subtly disavow their substantive obligations while enjoying the political benefits of being seen as a member of the “club”. Such arrangements, far from promoting human rights, relieve states of their obligations to pursue political, social and economic reforms thus undermining faith in human rights agreements writ large and long-term progress towards ameliorating widespread mistreatment.

**II. Human Rights Conventions and Reservations**

**A. The Choice-accountability Problem and Treaties**

As international accords, human rights agreements are susceptible not only to broad language problems but the fact that their primary actors – nation-states (hereinafter “states”) –

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8 See, discussion, infra at §II.B.
enjoy a status that makes enforceability difficult under the best of circumstances. Unlike the European Convention on Human Rights and its relatively powerful rights vindication process, most human rights agreements do not come packaged with powerful enforcement mechanisms. The primary model of enforcement is the use of transparency methodologies as evidenced in state reporting systems, individual complaints processes, and international reports. Often subsequent efforts to improve enforcement have met with mixed results given the inherent weaknesses underlying a voluntary compliance system. The lack of powerful enforcement mechanisms in human rights agreements like CEDAW reflects not only sensitivity to widely varying cultural norms and internal power-politics, but perhaps as significant the very status we assign to states. The state does not exist in a theoretical vacuum unconnected to the social,

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cultural and political fabric upon which it rests.  

To assume that states are merely political entities lacking a social or cultural context is to ignore the diversity of humanity.

While cultural differences may explain varying attitudes to human rights, it is the status of states as imbued with “sovereign equality” that explains the political consequences of these differences. States, unlike their political subdivisions or individual citizens, have the advantage of two countervailing characteristics: they are imbued with wide choice joined by narrow accountability for their actions. This holds true whether we examine choice-accountability issues on a domestic or international scale. For example, domestically a state may claim “sovereign immunity” to insulate it from official wrong-doings or, in authoritarian regimes, use sheer power politics to avoid responsibility for various actions. Thus, states possess wide latitude regarding the nature of their legal regimes, the degree of interpretative freedom they deploy, and the manner and forms of their legal and political culpability.

Choice-accountability issues are amplified in the international arena given the relative lack of democratic or institutional systems of multilateral accountability. Authoritatively, human

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16 See, e.g., Roger O'Keefe, The "Right To Take Part In Cultural Life" Under Article 15 of the ICESCR, 47(4) Int’l Comp. L.Q. 904 (1998) (noting that

17 See, e.g., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 12 (advisory opinion) [hereinafter cited as Genocide Advisory Opinion] (“It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto.”).


19 See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2012); BELGIUM CONST., art. 88 (the King’s person is inviolable).

20 See, e.g., Kai Ambos, The Fujimori Judgment: A President's Responsibility for Crimes against Humanity as Indirect Perpetrator By Virtue Of an Organised Power Apparatus, 9(1) J. INT’L CRIM. JUSTICE 137 (2011). See also, Nuno Garoupa & Maria A. Maldonado, The Judiciary In Political Transitions: The Critical Role Of U.S. Constitutionalism In Latin America, 19 CARDozo J. INT’L & COMP. L. 593 (2011) (noting that “In authoritarian regimes political crimes, human rights violations, police activity regulation, and all acts that potentially threaten the regime may be allocated to a new system of political courts that will smoothly implement the wishes and goals of the regime.”).

rights are often cast as supra-national objectives enjoying an independent basis beyond conventional and customary state obligations. In practice, however, the protection and implementation of human rights is distinctly state-centric in which “the state” remains even today the pivotal actor. States not obligated to adopt human rights agreements, may *ex post* “opt-out” of agreements, may “reinterpret” agreements, or may make reservations to agreements that elevate domestic political needs over universal protections, all without much fear of profound consequence. Accordingly, while human rights can be cast in a distinctively monolithic construct of highest norms, in actuality the implementation and protection of human rights is a distinctively multifarious exercise almost always dependent on states exercising their significant and often unilateral discretion, a fact that makes compliance vulnerable to internal theologies, philosophies, and power politics. A state that is politically and economically powerful or whose leaders do not have to contend with an internally strong civil society enjoy a wide-range of choices with regard to its various legal regimes commingled with thin accountability constraints. Thus, states operate with the capability of manipulating the choice-accountability equation with relative impunity and generally to suit the domestic needs of the

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22 See, e.g., South West Africa Case (1966) ICJ Rep 4, dissenting opinion at 296 (“States which do not recognize this principle or even deny its validity are nevertheless subject to its rule ... its validity extended beyond the will of States . .. into the sphere of natural law and assume an aspect of its supra -national and supra -positive character.”).  
23 See generally, S.S. Wimbledon, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17) (establishing the principle that the right to enter into international engagements is an act of state sovereignty).  
26 See, e.g., Christine Chinkin & Jane Gordon, The UK CEDAW story, 3 Eur. Human Rights L. R. 274-293 (2011) (observing that implementation of CEDAW in the UK is linked to the country's self-perception of its place in the international legal order and its contested relationship with Europe).  
state.\textsuperscript{28} Such is the case with CEDAW. While CEDAW seeks to promote gender equality by globalizing certain “universal” principles that are to guide the internal policies of states, in practice many states have made reservations to CEDAW that effectively render their commitments more symbolic than substantive.

\textbf{B. Reservations}

Reservations are a relatively new development in modern treaty-making. Prior to the late 19\textsuperscript{th} century, the process of constructing a treaty was rather linear and uncompromising, framed by the notion that unanimity, uniformity and full consent were key elements to legitimacy and enforceability.\textsuperscript{29} Crucial aspects of a treaty were negotiated and once agreed to \textit{ex post} departures from the regime were doubtful.\textsuperscript{30} A state objecting to a particular treaty provision had the choice to either accept the treaty as written (even over its own objections) or refuse to join the agreement. This approach preserved the core principles of uniformity and unanimity, and at least in theory laid a footing for an effective compliance regime.\textsuperscript{31} In the late-19\textsuperscript{th} and throughout 20\textsuperscript{th} centuries, however, this approach to treaty-making crumbled.\textsuperscript{32} In place of uniformity, the notion of gradations of treaty rights emerged as evidenced in the “Pan-American Rule” that recognized the possibility of differentiated obligations between signatory states.\textsuperscript{33}

\textsuperscript{28} Douglas H. Ginsburg & Steven Menashi, \textit{Nondelegation and the Unitary Executive}, 12 U. PA. J. CONST. L. 251, note 9 (2010) (observing that the Bush administration was able to reinterpret Geneva Convention requirements because of public demand to fight terrorism).


\textsuperscript{30} See, \textit{e.g.}, genocide Advisory Opinion, \textit{supra} note 17 (“To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.”)


\textsuperscript{32} See, \textit{e.g.}, Genocide Advisory Opinion, \textit{supra} note 17 at 15, 16.

\textsuperscript{33} See, Catherine Logan Piper, \textit{Note, Reservations to Multilateral Treaties: The Goal of Universality}, 71 IOWA L. REV. 295, 308 (1985); \textit{See, also} Andres E. Montalvo,
The Pan-American Rule formally legitimized the principle of “reservation” and the fact that a reserving state could become a party to a treaty even if other states objected to the reservation.\footnote{See, Comment, The Problem of Reservations in Multilateral Conventions, 30 ALB. L. REV. 100, 104 (1966).}

As a general principle, states are bound to adhere to their treaty obligations in accordance with the fundamental norm of \textit{pacta sunt servanda}.\footnote{Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331 (1969) [hereinafter Vienna Convention] (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).} A state is obligated not to invoke its domestic law as an excuse for non-compliance with its obligations.\footnote{Id. at art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”). See also, Tunis and Morocco Case, PCIJ Rep, Series B, No 4 (1923) (a state’s discretion with respect to its domestic authority may be limited by obligations undertaken vis-à-vis other states).} Thus, the use of reservations in modern multilateral agreements reveals a critical contradiction with respect to modern treaty making: (1) treaties are intended to create a uniform and binding legal regime between the signatory states;\footnote{See, Genocide Advisory Opinion, supra note 17 at 21 (“a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d’être of the convention.”).} and yet (2) Article 19 of the Vienna Convention on the Law of Treaties (“Vienna Convention”) institutionalized the Pan-American Rule by recognizing the principle of reservations as a means of accommodating peculiar state interests at the expense of uniformity.\footnote{See generally, Francesco Parisi & Catherine Ševčenko, Treaty Reservations And The Economics Of Article 21(1) Of The Vienna Convention, 21 BERKELEY J. INT’L L. 1 (2003). See also, Eric Neumayer, Qualified Ratification: Explaining Reservations to International Human Rights Treaties, 36 J. LEGAL STUD. 397 (2007).} As Edward T. Swaine has observed, reservations have the effect of “turning a \textit{a prix fixe} menu à la carte.”\footnote{Swaine, supra, note 31.} The right to make a reservation is only constrained by three considerations: (1) a treaty explicitly prohibits reservations;\footnote{Vienna Convention, supra note 35 at art. 19(a).} (2) a treaty limits reservations to specific matters;\footnote{Id. at art. 19(b)} or (3) a reservation is “incompatible with the object and purpose of the
treaty.” While the first two considerations concerning the validity of reservations rest on clear standards, the third consideration is more problematic given the utter lack of standards to measure the lawfulness of a reservation. Consequently, whether a reservation is “incompatible” is currently more a political question than legal question, particularly given the status we have assigned to the state.

The right to make a reservation can be implied from the status of states or specifically authorized in the text of an agreement by either positive or negative reference. Once made, a reservation effectively becomes a reciprocal obligation in the negative; that is as between a reserving state and an objecting state that part of the treaty impacted by the reservation is not in force. Consequently, the legal effect of making a reservation is not simply to relieve a state of its domestic obligation to conform its laws to the terms of the treaty, it is to relieve other signatory states of the obligation to comply with a provision as between the two states that is otherwise operable between all non-objecting states. Moreover, while an objection to a reservation may render it inoperable between the two signatory states, silence as to a reservation by other signatory states arguably effectively legitimizes the reservation. This creates an odd situation in which a reservation that maybe viewed as illegitimate and incompatible by some signatory states is viewed as perfectly legitimate and compatible by other member states. This contradiction is

42 Id. at art. 19(c)
43 See, Genocide Advisory opinion, supra note 17 at 44 (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, & Hsu Mo) (“What is the ‘object and purpose’ of the Genocide Convention? To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter.”).
44 See, Genocide Advisory Opinion, supra note 17 at 22 (it cannot be inferred from the absence of an article providing for reservations that contracting states are prohibited from making certain reservations). See, e.g., Venezuela Reservation to the International Covenant on Civil and Political Rights, art. 14 (3)(d), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (follow the link to “Venezuela”); Sweden Reservation to the International Covenant on Civil and Political Rights, art. 10(3), art. 14(7), art. 20(1). http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (follow the link to “Sweden”).
45 See, e.g., Convention on the Rights of Children, art. 51(1) & (2) (Secretary General shall receive reservations; reservation may not be incompatible with objectives of the convention).
particularly problematic in the human rights arena where the relatively universality and superiority of human rights as to all other interests is undercut by reservations that are themselves seen as legitimate by signatory states that think likewise about the distinctly “non-universal” or even subordinate nature of the rights being protected by an agreement. If, for example, a state makes a reservation to a substantive provision of a genocide or torture or antidiscrimination convention that is not repudiated by all other signatory states, arguably the protections offered by such conventions are not only differentiated between the signatory states, they are diminished for all people otherwise to be protected by the convention because the principle of universality and superiority is substantially undercut.

The use of reservations is a calculated risk, subject undoubtedly to a cost-benefit analysis: if a reserving state is more concerned with the domestic impact of an agreement and less concerned about reciprocal non-compliance, it is more apt to make a reservation. The converse is equally true: the less impact an agreement will have on important domestic interests, the less likely it is that a state will make a reservation to substantive provisions even if permitted to do so. Because provisions impacting human rights can present a distinct challenge to the cultural fabric of a society, states appear to demand much greater leniency or a “higher premium” in implementation and enforceability than is demanded in, for example, a bilateral investment treaty. More importantly, because human rights agreements can present high domestic costs, states are much more likely to demand a higher premium in the form of the right to make reservations as reciprocity for joining a “universal” accord, in effective demanding much higher discretion when it comes to compliance than might otherwise be allowed in other context.

46 Compare, Medellin v. Texas, 552 U.S. 491 (2008) (provisions in convention mandating a foreign national be given access to his consulate not self-executing and therefore not a bar to imposition of death penalty) with Loewen Group, Inc. v. United States. ICSID Case No. ARB(AF)/98/3. 42 ILM 811 (2003) (court decisions may give rise to individual NAFTA claims under the agreement’s definition of “law” and “measure”).
The Vienna Convention’s rules governing reservations make no distinctions as to particular categories of treaties; reservations made to a human rights agreement are not considered legally more distinctive than those made to a trade agreement notwithstanding the super-normative weight supposedly assigned to human rights.47 Reservations seek to accommodate peculiar state interests and as such can be placed in two broad categories. First, many reservations may be defined as technical,48 including procedural49 or jurisdictional reservations.50 Others are narrowly substantive in nature, in effect exempting a state from compliance with a narrow provision in an agreement. Such reservations may prove highly inconvenient in particular circumstances or for particular individuals, but they do not relieve the state of its broad substantive obligations stated in the convention.

The second category of reservations carves out broadly substantive exceptions to an agreement. Such reservations, found with regard to numerous human rights agreements, can effectively exempt a state from complying with a fundamental or core objective of an agreement. For example, numerous states have made reservations to Article IX of the Convention on the

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47 See, Vienna Convention, supra note 35 at art. 21. See also, Konstantin Korkelia, New challenges to the regime of reservations under the International Covenant on Civil and Political Rights, 13(2) EUR. J. INT’L L. 437 (2002).
49 See, e.g., Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Reservation of Israel to Art. 26, http://www.hcch.net/index_en.php?act=status_comment&csid=626&disp=resdn (“Israel hereby declares that, in proceedings under the Convention, it shall not be bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.”)
50 See, e.g., Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Reservation of Switzerland to Art. 55, http://www.hcch.net/index_en.php?act=status_comment&csid=193&disp=resdn (“Switzerland reserves the right not to recognize any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to the property of a child situated on its territory.”) But see, discussion infra at page 11, note 51 (noting the problem with broad jurisdictional reservations that effectively negate enforceability).
Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). These reservations either (1) reject the jurisdiction of the International Court of Justice, or (2) qualify its jurisdiction by a consent-to-suit requirement. By making a reservation to Article IX, a state effectively insulates itself from the nucleus of the convention’s accountability regime. States have rejected such reservations holding that, “In [the view of Norway], reservations in respect of article IX of the Convention are incompatible with the object and purpose of the said Convention.” But what normative effect these repudiates to a reservation actually have is questionable when viewed through the choice-accountability and cost-benefit prisms.

Reservations made to human rights conventions present two particular challenges. First, unlike “ordinary” treaties that manage purely sovereign relationships, human rights agreements operate simultaneously at two levels: state-to-state and state-to-individual. (Whether the theoretical distinction between “ordinary” and “human rights” treaties holds true today in light of the emerging trend in trade agreements that confer individual economic rights is becoming more questionable.) Human rights agreements seek to articulate a universality of right that is broader in scope and depth than the economic relationships protected by, for example, a bilateral

52 See, e.g., Genocide Convention, Reservation of Algeria to Art. IX (“The Democratic and Popular Republic of Algeria does not consider itself bound by article IX of the Convention, which confers on the International Court of Justice jurisdiction in all disputes relating to the said Convention.”).
53 See, e.g., Genocide Convention, Reservation of Malaysia to Article IX (“That with reference to article IX of the Convention, before any dispute to which Malaysia is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of Malaysia is required in each case.”).
55 See, Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocol thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 ¶ 8(Apr. 11, 1994) (“Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.”).
56 See, e.g., North American Free Trade Agreement, ch. 11. See also, Archer Daniels Midland Co.; Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/5).
trade agreement. As such they can be perceived as more intrusive and threatening to the social, cultural and political interests of a state and its leaders, and thus, if permitted, encourages states to make reservations to substantive provisions.

The second challenge with reservations in the context of human rights agreements drives to the issue of compatibility. The Vienna Convention disallows reservations that are “incompatible with the object and purpose of the treaty.” Even human rights agreements permitting reservations adopt this principle. But who decides what constitutes “incompatibility”? Attempts to address this issue within the context of human rights agreements have met with little success given the overtly political nature of reservations. The Human Rights Committee’s assertion that it has authority to judge the compatibility of certain reservations has met with great skepticism and outright denunciation. Agreements that recognize the authority of states to declare a particular reservation incompatible often set the thresholds so high that it is nearly impossible to achieve this result. Consequently, one is left

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59 Vienna Convention, supra note 35 at art. 19(c).
60 See, e.g., CEDAW, supra note 6 at art. 28.
61 See, Brad R. Roth, Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation, 47 WAYNE L. REV. 891 n. 5 (2001) (noting that notwithstanding the HRC assertion that it can judge the incompatibility of a reservation, “it is not clear who can so judge, and with what legal consequence.”).
62 See, UN Human Rights Committee General Comment 24 ‘On issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant’ (11 November 1994) CCPR/C/21/Rev.1/Add.6.
63 See, e.g., Observations by the United States on General Comment 24, 3 Int'l Hum. Rts. Rep. 265 (1996) (rejecting committee's views that it has authority to judge compatibility of reservations and insisting that reservations are presumptively valid unless rejected by the parties).
64 See, e.g., ICERD, art. 20(2)
wondering what if any purpose a human right agreement can serve if states are allowed to make substantive reservations without fear of after effect.65

III. CEDAW: A Case Study in Reservation Problems

CEDAW, with some 187 members, is among one of the most widely ratified human rights agreements in the world having been adopted by the United Nations General Assembly on December 18, 1979. Though widely accepted, CEDAW has received mixed reviews, in part because of the sheer number of reservations and declarations that accompany it.66 Supporters credit CEDAW with important victories such as the development of women’s rights in Botswana and Japan, inheritance reforms in Tanzania, property rights in Costa Rica, and constitutional reform in Brazil and Uganda.67 However, critics of CEDAW see its various shortcomings as undermining progress towards ending gender discrimination. For example, some signatories are only nominally committed to the objectives of the agreement, which is to end all forms of discrimination.68 Other countries either fail to meet or outright ignore reporting requirements.69 Still others fail to provide remedies for individual violations.70

To the extent CEDAW has failed to meet its objective, that failure can be attributed to two structural shortcomings in the agreement. First, notwithstanding attempts to strengthen the enforcement mechanisms through the adoption of the Optional Protocol,71 the fact remains that

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66 See, e.g., Chinkin & Gordon, supra note 26 (observing that the UK made the largest number of reservations and declarations to CEDAW of any nation at that point).
68 CEDAW, Preamble
71 CEDAW Optional Protocol, supra note 24.
CEDAW’s enforcement system is weak especially when compared to the enforcement mechanisms contained in other international agreements,\(^{72}\) particularly trade agreements. Like many human rights agreements, CEDAW relies heavily on transparency mechanisms rather than a strong, binding enforcement mechanism to facilitate compliance.\(^{73}\) As such, the “enforcement” of universal rights is often left to a non-binding political process rather than to a binding adjudicatory process most often associated with the effective enforcement of rights.\(^{74}\) Enforcement systems premised substantially or exclusively on transparency mechanisms work only so long as states can be shamed into compliance or placed at an economic disadvantage. States lacking the capacity to feel shame will hardly be intimidated into compliance by transparency. Moreover, while the Optional Protocol to CEDAW seeks to improve enforcement, it enjoys less substantial membership than CEDAW itself.\(^{75}\) Its internal structure gives the enforcement mechanisms less weight than is perhaps needed to ensure effective compliance with the substantive provisions of CEDAW.\(^{76}\) Arguably, the weak enforcement provisions in CEDAW, though improved by the Optional Protocol, are not unique; many multilateral human


\(^{74}\) See, Laurence R. Helfer & Anne-Marie Slaughter, Towards a Theory of Effective Supra National Adjudication, 107 YALE L.J. 273 (1997) (comparing and contrasting the jurisdictions of the European Court of Human Rights and concluding that the combined power of the institutions creates an effective “community of law”); Makau wa Mutua, Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement, 4 BUFF. HUM. RTS. L. REV. 211 (1998) (discussing the weaknesses of the consensus-based approach of the Human Rights Committee and arguing that the constraints placed on UN-based enforcement mechanisms leave gaps in enforcement which are exploited by abusive states).


\(^{76}\) See, e.g., CEDAW Optional Protocol, art. 10 supra note 24 (“Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 8 and 9.”). Bangladesh, Belize, Columbia and Cuba have all exercised their discretion and exempted themselves from the authority granted in articles 8 and 9. See, CEDAW Optional Protocol, supra note 24, Ratifications and Declarations, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en.
rights agreements suffer from similar problems either through design, implementation, or the unwillingness of states to give credence to enforcement efforts.\textsuperscript{77}

The second shortcoming in CEDAW is the degree to which it both authorizes and to which states have taken advantage of its reservation provision. Arguably, the heart of CEDAW is contained in Article 2, which requires signatory states to initiate a series of policy reforms including the following: (1) embody the principle of gender equality in national constitutions or other appropriate legislation and to ensure, through law and other appropriate means, the practical realization of the principle; (2) adopt legislative and other measures prohibiting all discrimination against women; (3) establish legal protection of the rights of women on an equal basis with men and to ensure that tribunals and public institutions protect women against any act of discrimination; (4) refrain from engaging in discriminatory acts or practices and ensure that public authorities and institutions act in conformity with this obligation; (5) take measures to eliminate discrimination against women by any person, organization or enterprise; (6) take measures to modify or abolish existing laws, regulations, customs and practices which are discriminatory; and (7) repeal national penal provisions that discriminate against women.\textsuperscript{78}

Nevertheless, under Article 28 a state may make a reservation to the convention provided that it is not “incompatible with the object and purpose of the present Convention.”\textsuperscript{79} These two provisions taken together mean that states are at once obligated to make the necessary reforms envisioned by CEDAW and yet can through reservations exempt themselves from doing precisely that.

\textsuperscript{78} CEDAW, supra note 6, art. 2(a)-(g).
\textsuperscript{79} Id. at art. 28.
The list of countries that have made reservations to CEDAW is extensive with over 50 states making reservations or limiting declarations. Some reservations are technical in nature, in effect exempting states from various compliance issues because of federalism concerns, or due to the extent to which a state is prepared to implement a particular feature of CEDAW relative to a particularized right. But other reservations are more substantive in nature. For example, a large number of reservations, like that of Argentina, relate to Article 29’s dispute resolution provision, which provides, in part, that:

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Article 29 further provides that a state “may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article” thus other states “shall not be bound by that paragraph with respect to any State Party which has made such a reservation.”

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80 States that have made reservations or limiting declarations to the CEDAW include: Algeria, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Brazil, China, Cuba, Democratic People’s Republic of Korea, Egypt, El Salvador, Ethiopia, France, Germany, India, Indonesia, Iraq, Ireland, Israel, Jordan, Kuwait, Lebanon, Lesotho, Libya, Liechtenstein, Luxembourg, Malaysia, Maldives, Malta, Mauritania, Mauritius, Federated States of Micronesia, Monaco, Morocco, Myanmar, New Zealand, Niger, Oman, Pakistan, Republic of Korea, Saudi Arabia, Singapore, Spain, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, UAE, United Kingdom, Venezuela, and Viet Nam. See, CEDAW, SP/2006/2 (June 23, 2006), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement.

81 See, e.g., Id. at 8 (“Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the Constituent States. The implementation of the Treaty throughout Australia will be effected by the Commonwealth State and Territory Authorities having regard to their respective constitutional powers and arrangements concerning their exercise.”).

82 See, e.g., Id. at 9 (“Austria reserves its right to apply the provision of article 11 as far as night work of women and special protection of working women is concerned, within the limits established by national legislation.”).

83 See, Id. at 7 (“The Government of Argentina declares that it does not consider itself bound by article 29, paragraph I[.]”).

84 CEDAW, art. 29(1).

85 Id. at art. 29(20 & (3).
Perhaps the most troubling reservations, however, are those that are made in reference to the obligations established in Article 2. As noted earlier, CEDAW Article 2 is the heart of the agreement setting out various core principles and requiring signatory states to take specific policy actions aimed at eliminating “discrimination against women in all its forms.” The range of policy actions are extensive including amending national constitutions, adopting appropriate legislation, providing for domestic administrative and judicial enforcement of rights to nondiscrimination, and arguably legislating against customs and practices that promote discrimination. Thus, Article 2 requires states to engage in a very robust reform effort aimed at eliminating all gender discrimination.

Numerous states, however, have made reservations to Article 2 thereby, in effect, qualifying the degree to which they will actually engage in the policy reforms and enforcement obligations mandated by the agreement. Algeria has stated that it will comply with Article 2 “on condition that [it does] not conflict with the provisions of the Algerian Family Code.” The Bahamas has declared that it “does not consider itself bound by the provisions of article 2(a)[.]” The DPK has declared that it “does not consider itself bound by the provisions of paragraph (f) of article 2[.]” Morocco has declared that it is not bound by article 2 to the extent that it (1) affects rules of succession, or (2) conflicts with Islamic sharia law. A number of signatory

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86 Id at art. 2 (Chapeau) (“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women[,]”)
87 Id. at art. 2(a).
88 Id. at art. 2(b), (f), (g).
89 Id. at art. 2(c).
90 See, e.g. Id. at art. 2(f) (“To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”) (Emphasis added).
91 See, CEDAW, SP/2006/2, supra note 6 at 7. See generally, Droit de la Famille 1984 (Act No. 84-11) (husbands can divorce a wife at will; women may divorce a husband only under certain circumstances).
92 CEDAW, SP/2006/2, supra note 6 at 9.
93 Democratic People’s Republic of Korea.
94 CEDAW, SP/2006/2, supra note 6 at 11. See also, Id. at 27 (Singapore).
95 Id. at 22.
The various reservations raise three important questions: (1) when will a reservation rise to the level of “incompatibility”; (2) what is the legal effect of objecting to a reservation made to a multilateral agreement; and (3) who decides what “incompatibility” means. It is perhaps simpler to take these questions in reverse order.

CEDAW Article 28 declares that “A reservation incompatible with the object and purpose of the present Convention shall not be permitted.” This obscure language has multiple implications. It may be read to mean that some entity will determine whether to “permit” a specific reservation. Alternatively, it could be read to create an ab initio obligation on states not to submit incompatible reservations; that is, rather than providing a negative opportunity to object it creates a positive obligation not to submit. But since no entity sits in judgment on reservations and no state can objectively judge its own reservations, the compatibility of reservations under CEDAW is in practice a state-to-state exercise of deference or objection. This patchwork approach to dealing with reservations to CEDAW necessarily means that the universality of its substantive provisions are distinctly non-universal and in practice left to the discretion of bilateral relationships not the multilateral regime.

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96 See, Id. at 8 (Australia), 11 (Austria), 15 (Ireland), 19 (Malta), 20 (Micronesia), 27 (Singapore), and 32 (United Kingdom).
97 See, Id. at 7 (Algeria), 9 (Bahamas & Bahrain), 11 (Egypt), 13 (France), 14 (India’s declaration & Iraq’s reservation), 15 (Israel), 16 (Jordan), 17 (Kuwait & Lebanon), 18 (Libya), 18 (Luxembourg), 19 (Maldives), 20 (Malta), 21 & 22 (Monaco), 25 (Niger & Oman), 26 (Korea), 28 (Switzerland & Syria), 29 (Thailand & Tunisia), 31 (UAE), 33 (United Kingdom).
98 CEDAW, art. 28(b).
99 See, e.g., Objection of Austria to UAE Reservations, Oct. 5, 2005, CEDAW, SP/2006/2, pg. 36 (June 23, 2006). See also, Objections of the Government of Denmark to UAE Reservations, Dec. 14, 2005, Id. (“[T]he Government of Denmark considers the said reservations as being incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.”); Objection of Finland to Micronesia Reservations, Sept. 7, 2005, Id. at 37 (“[T]he reservations made by Micronesia, addressing some of the most essential provisions of the Convention, and aiming to exclude the obligations under those provisions, are in contradiction with the object and purpose of the Convention.”).
Moreover, the legal effect of objecting to a substantive reservation to a multilateral agreement is not entirely clear. On the one hand reservations are intended to allow states to join multilateral agreements that they otherwise could not or would not join because of particularized objections. The right to make reservations to CEDAW is indicative of this approach. However, because under CEDAW the validity of objections to a reservation is essentially a bilateral determination, the legal effect of objecting to a reservation on compatibility grounds is indeterminate within the multilateral system. The lack of effect is compounded by the fact that many objections to particular reservations are themselves accompanied by qualifying language to the effect that notwithstanding the objection the convention remains effective between the two states. This ultimately plays lip service to the notion of objecting.

Finally, the term “incompatibility” is legally ambiguous. There is no universal agreement on what constitutes incompatibility, the term being rather fluid in application if not in definition. Generally, a legal incompatibility exists when two purposes, offices, or obligations are not susceptible to co-existence. Such a definition would seem to foreclose the possibility of any substantive reservations since reservations are by definition unilateral declarations that exempt a state from one or more obligations to an international agreement. But a legal incompatibility is not simply a definitional question; it also exists on a functional plane. Thus, the difference between technical reservations and substantive reservations carries an important functional distinction that should largely determine the compatibility of a reservation with the objectives of the treaty. As such, a reservation must be assessed not relative to a particular definition but rather relative to the functional purposes of the agreement. Technical reservations may cause problems, but they do not necessarily conflict with the functional purpose of the agreement or

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100 See, e.g., CEDAW, SP/2006/2, supra note 6 at 40 (However, this objection shall not preclude the entry into force of the Convention between the Republic of Latvia and the United Arab Emirates.”)
erode the overall substantive obligations of a state. And even some particularized substantive reservations, while not ideal, can be accommodated so long as the principal objectives and obligations of the agreement are met.

However, broad substantive reservations such as those asserted with respect to CEDAW Article 2 are quite different. Such reservations raise grave questions regarding the co-existence of a legal obligation to act and a legal objection to that very act. Since Article 2 requires states to undertake a broad range of policy actions to end all forms of discrimination, making a broad reservation to this provision would appear incompatible ab initio not only with the objective of CEDAW but with very specific legal obligations signatory states have agreed to assume. In short, a state cannot agree to eliminate all forms of discrimination against women while simultaneously asserting that it will qualify its obligation to such an extent that it effectively renders the principal obligations null. One cannot make a reservation that effectively constitutes a reservation not to act at all.

IV. Is There a Solution?

Enforcing human rights agreements present particularly difficult challenges. These challenges result from the fact that (1) many agreements are broadly worded leading to multiple interpretations and opportunities for exceptions, and (2) unlike economic treaties, human rights agreements cross so many thresholds at once that they impact deeply ingrained religious, social, cultural, sovereignty, and political interests. Everyone may agree that gender equality is important but they do so based on distinctive domestic experiences that inform what “equality” means relevant to the role of women in a particular society. Thus, resolving questions of “equality” is often a derivative of cultural and emotional experiences. Moreover, human rights agreements themselves can present normative challenges in, for example, the conflict between
cultural rights (which can impact issues of gender) and individual rights (which can inform and conflict with culture). But is it intellectually possible to hold two opposing positions at once – recognizing the equality of cultural rights and individual rights? The myriad of human rights agreements would seem to suggest that the answer is the affirmative. Thus broadly worded reservations to agreements such as CEDAW are but forms of state accommodation that allows two seemingly opposing positions to coexist with low probability of consequence.

In the context of CEDAW, the international community has attempted to balance state accommodations with individual rights through the Optional Protocol. The protocol empowers the CEDAW committee to receive individual and group complaints regarding violations and, in some circumstances, to initiate sua sponte investigations into “grave or systemic violations by a State Party[.]” But within the context of CEDAW reservations, the Protocol suffers two infirmities. First, many of the states that have made substantive reservations to CEDAW Article 2 have not joined the Optional Protocol. As a result, the committee lacks authority to inquire into the actions of those states and the extent to which states have complied with their policy reform obligations. Second, to the extent that the Optional Protocol is available, it empowers the committee to accept individual and group complaints. It does not authorize the committee to assess whether a reservation is incompatible. This is important. Because reservations essentially operate on a bilateral plane, no individual or group of individuals are empowered to challenge

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101 See, e.g., Richard Frimpong Oppong, Private International Law in Africa: The Past, Present, And Future, 55 AM. J. COMP. L. 677 (2007) (noting that the impact of human rights law is felt in the area of internal conflict of laws as communities try to protect the customary laws by invoking their cultural rights and individuals resist the application of customary laws on human rights grounds). See also, Philip Fennell & Urfan Khalique, Conflicting or Complementary Obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English Law, 6 EUR. HUMAN RIGHTS L.R. 662 (2011).
103 CEDAW Optional Protocol, supra note 24, art. 8.
their validity and no state is empowered to present the question to the Committee. Consequently, there is no means to answer the legal question of whether a particular reservation is incompatible with the objectives of the convention, and legal incompatibility is a question separate from political incompatibility. As a result of this infirmity, reservations to fundamentally substantive provisions of CEDAW go unchallenged.

How to solve the dilemma of the legal validity of substantive reservations is not only important to CEDAW but to other human rights agreements as well. Reservations may have political or cultural origins, but they can have profound legal implications concerning state obligations under an agreement and individual rights sought to be protected. This later consideration is of particular importance given that many human rights agreements operate in that space between what would be considered state-to-state considerations under international law and the relationship between the state and the individual which is traditionally been reserved to the exclusive authority of the state under the principle of sovereignty. Accordingly, human rights agreements, like many emerging economic accords, technically require a surrendering of a certain amount of state sovereignty in favor of protecting individuals from the very power of the state if they are to be effective. Unlike many emerging economic accords, however, human rights agreements frequently lack the broad and effective dispute resolution processes often found in the former in which the authority of the state to ignore its treaty obligations are more constrained. As a result, reservations to substantive provisions in human rights agreement can compound the ineffectiveness of such agreements given the lack of otherwise effective enforcement mechanisms coupled with the power of the state to exempt itself from its substantive obligations. In effect, not only is a particular agreement rendered nothing more and a
tonal achievement by such state action, but the rule of law as a mechanism for combating misdeeds and forestalling future misconduct is also dubious.

One possible approach to resolving reservation validity is to extract the issue from its purely political context (where it rests today) and turn it into a truly legal question (where it needs to rest tomorrow). The Vienna Convention, CEDAW, and ICERD,\textsuperscript{104} all recognize the potential for incompatible reservations. However, the mechanisms available for resolving the legal questions are overly consensus driven or allow states to abstain from the judicial remedies provided.\textsuperscript{105} Combining an approach that (1) empowers the International Court of Justice (ICJ) to resolve the validity of a reservation without the requirement of consent, but (2) provides a triggering threshold through which a predetermined number of states can raise a validity question would provide a better mechanism for addressing the legal issue of reservation compatibility.\textsuperscript{106} And to be clear while the act of making a reservation is clearly an act of political judgment, its consequences are clearly legal in nature. Since reservations impact multilateral obligations not simply domestic interests, allowing a threshold number of states to challenge a reservation before the ICJ or establishing an automatic trigger for review based on such a threshold number of objections could dampen the politics of reservations while providing a less political, more objective international forum to adjudicate compatibility questions. This approach would provide a judicial forum for resolving a legal question but also require that access to that forum

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  \item \textsuperscript{104} ICERD, art. 20(2) (“A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed.”).
  \item \textsuperscript{105} See, e.g., CEDAW art. 29(2) (“Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.”). Similar language is found in other conventions. See, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 92; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 30(2).
  \item \textsuperscript{106} Cf. ICERD, art. 20(2) (“A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.”); International Convention for the Protection of All Persons from Enforced Disappearance, art. . The problem with the ICERD approach is that it leaves the question of incompatibility a political question and provides no means for a judicial determination as to legal validity.
\end{itemize}
is premised on a collective assertion that one state’s particular reservation may not be valid. A judicial determination as to the validity of a particular reservation may not in practice alter the reserving state’s behavior or its willingness to comply with its full treaty obligations. But a judicial determination is certainly more powerful than a transparency regime standing alone. A state may decide to ignore an ICJ determination that its reservation is incompatible and therefore null, but other nations may not be willing to ignore that determination prompting subsequent action to encourage compliance not only with the ICJ’s judgment but more importantly the very substantive obligations a state is otherwise seeking to avoid by exercising a reservation. Such an approach would also create a body of case law concerning reservation compatibility and place states on notice that making reservations to an agreement is a grave matter deserving of searching legal scrutiny and considerable attention and not simply a matter of political expediency.

V. Conclusion

Under international law the status of the state gives political leaders considerable leeway in adopting, qualifying, and abiding by international agreements. The use of reservations, largely a development of the 20th century, has been seen as a means of accommodating peculiar state interests while allowing states to be a member of a treaty regime. Clearly not all reservations are created equal and it is possible to accommodate peculiar state interests to a limited degree. This approach to qualifying treaty obligations is particularly understandable in the context of human rights agreements given their potential to intrude on deeply held cultural, social, religious and political views. CEDAW evidences an attempt to accommodate states while maintaining core principles. But when a state can exempt itself from the core objectives of an
agreement using reservations, nothing more is achieved than appearing as one of the “club” without the obligation to be a true member of the club.

An approach to resolving this dilemma is to recognize that reservations are not simply political but of legal significance as well. As such, the compatibility of reservations should be a legal question amenable to scrutiny before an appropriate tribunal, not simply a political question left to bilateral relationships. If human rights conventions are to be more than window dressing then the entire reservation process must more from an exclusively political assessment by signatory states to a true legal process where the compatibility of a reservation can be objectively assessed in a neutral forum. Addressing the validity of reservations calls for balancing sovereignty concerns against a state’s treaty obligations and the individual rights often recognized in human rights agreements. But the balance cannot be solely weighted to state sovereignty concerns (which are largely political) if human rights agreements are to have any long reaching and substantive impact. Subjecting uncertainties regarding state reservations to searching judicial scrutiny is one means of rebalancing the equation.