

IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES

NO. 5

**THE VALIDITY OF RESERVATIONS AND
DECLARATIONS TO CEDAW:
The Indian experience**

International Women's Rights Action Watch Asia Pacific



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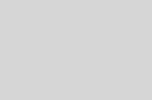
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I. Introduction

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) is the principal international document to address the right of women to be free from discrimination. The Preamble to this convention recognises that discrimination against women violates the principle of equality of rights and respect for human dignity. Such discrimination affects the equal participation of women in the political, social and economic lives of their countries. The CEDAW Convention not only prohibits overtly discriminatory actions by states but also requires them to take affirmative steps to eradicate discriminatory treatment of women by both state and private actors in all social, cultural, and political areas of life. Article 2 of the CEDAW Convention places an affirmative obligation on States parties to procure equality of the sexes through national constitutions or through legislation.

II. The CEDAW Convention: Unique features

The CEDAW Convention is a unique international treaty in many ways.

Firstly, it is a comprehensive international document that deals with a wide range of women's human rights. It deals with civil and political, economic and social, and many other third generation rights as well. Article 1 of the convention contains a sweeping definition of discrimination faced by women. It reads: "Discrimination is understood as any distinction, exclusion or restriction made on the basis of sex, [...] in the political, economic, social, cultural, civil or any other field".

Accordingly, Article 7, for example, deals with civil and political rights and guarantees women the right to vote, to hold public office and to exercise public functions, while Articles 10, 11 and 13 affirm women's right to non-discrimination in education and employment. Also, Article 15 asserts the full equality of women in civil and business matters, demanding that all instruments directed at restricting women's legal capacity "shall be deemed to be null and void".

The CEDAW Convention also deals comprehensively with the economic and social rights of women. The link between discrimination and the equal role of a woman in a familial context is a recurrent theme in this treaty. Article 16 asserts equal rights for men and women with regard to choice of spouse, parenthood, personal rights and command over property. Article 5 advocates "a proper understanding of maternity as a social function", demanding fully shared responsibility for child

rearing by both sexes. Article 4 recommends special maternity protection and asserts that such measures will not be considered discriminatory. The CEDAW Convention is based on the understanding that society's responsibility extends to offering social services, including childcare facilities, which allow women to combine family responsibilities with work and participation in public life.

One of the most important features of this treaty is that it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental human rights. It notes the interrelationship between cultural stereotypes and customs and the multitudes of political, economic and legal constraints on women. Therefore, the Preamble of the convention stresses that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve the full equality of men and women". The Preamble also refers to the principles of the Declaration on the Elimination of Discrimination against Women (the Declaration), as made by the United Nations (UN) General Assembly, and the need to implement such principles and eliminate discrimination against women in all its forms and manifestations.

The Declaration says, in no unclear terms, that all appropriate measures shall be taken to abolish existing laws, customs, regulations and practices, which are discriminatory against women.¹ Its Article 3 also deems that "all appropriate measures shall be taken to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices, which are based on the idea of the inferiority of women". The Declaration requires states to affect change in such discriminatory cultural practices on two levels: (i) to embody the principle of equality in the national Constitution or otherwise guarantee such principle in law; and (ii) to ratify, accede and fully implement international instruments of the UN and the specialised agencies relating to the elimination of discrimination against women as soon as practicable.²

The particular provisions of Articles 2(f), 5 and 16 of the CEDAW Convention deal specifically with the eradication of cultural stereotypes that hamper the advancement of women. (These provisions are explained in greater detail below). The CEDAW Committee, the expert body that monitors the implementation of the convention, has taken note of the cultural disparity in roles that exist. Women are thereby prevented from having equal access to resources and from enjoying

¹ Article 2. Declaration on the Elimination of Discrimination against Women.

² Articles 2(a) and (b). Declaration on the Elimination of Discrimination against Women.

equality of status in the family and society. Even where *de jure* equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality contained in such provisions are being violated.³ Through these provisions, the CEDAW Convention thus attempts to change existing cultural practices within national contexts that perpetuate discrimination against women. It is in this aspect that this treaty differs from many other international human rights instruments. Further, in its recognition of cultural stereotypes and the elimination of such, the CEDAW Convention also helps to negate the public-private divide with respect to women's rights.

III. The object and purpose of CEDAW

The object and purpose of the CEDAW Convention is to create legally binding standards for women's human rights by highlighting civil and political as well as economic, social and cultural rights, and placing them in a framework of the right to equality and non-discrimination based on sex. It also provides efficacious supervisory machinery for the obligations undertaken. The object and purpose of this convention encompasses the elimination of *all forms of discrimination* against women. The object of attaining equality for women is specifically realised in the elimination and modification of cultural practices and customs that discriminate against women, as reflected in Articles 2(f) and 5.

While the CEDAW Convention is an international treaty wholly devoted to the human rights of women in every sphere, its essence lies in Articles 2(f) and 5 because they capture the concern expressed in the Preamble that only change in traditional roles of men and women can bring about genuine equality between the sexes:

Article 2(f)

State parties shall "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".

Article 5(a)

State parties shall "[take all appropriate measures to] modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other

³ CEDAW. General Recommendation No. 21. paras. 7-10.

practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.

How is the object and purpose of CEDAW achieved?

The object and purpose of the CEDAW Convention gain specific application in certain provisions of this treaty such as those guaranteeing the rights to education, employment, health, political representation and many other such rights. In this paper, we examine the role of Article 16, as a particular application of the object and purpose in Articles 2(f) and 5 of CEDAW, to remove discriminatory cultural practices in the area of marriage and family relations.

Article 16(1)

State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular, shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and enter into marriage only with free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children [...];
- (e) The same rights to decide freely and responsibly on the number and spacing of children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children [...];
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property [...].

Article 16(2)

[...] all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

It is apparent from the above that Article 16 of the CEDAW Convention is an application of the object and purpose of the treaty's Articles 2(f) and 5,

and stresses a woman's right to equality within marriage and the removal of discriminatory practices.

Core commitment of CEDAW

The importance of Article 16 has been emphasised by the CEDAW Committee, which as mentioned, is the body responsible for the progress of women made in countries that are States parties to the CEDAW Convention. As such, it is useful to note the committee's comments.

Articles 2 and 16 are considered by this expert body to be core provisions of the convention.⁴ The committee has also stated that traditional, religious, and cultural practices or domestic laws and policies which are incompatible cannot be invoked to justify violations of this convention.⁵ It can thus be said that the core commitment of a State party that relates to Article 16 is reflected in the broader provision of Article 5 and its advocacy to change discriminatory cultural practices that harm women and deny them parity with men and equality as human beings.

The CEDAW Committee has come down very heavily on reservations and declarations to the core commitment of the CEDAW Convention.⁶ The committee has stated:

Removal or modification of reservations, particularly to Articles 2 and 16, would indicate a State party's determination to remove all barriers to women's full equality and its commitment to ensuring that women are able to participate fully in all aspects of public and private life without fear of discrimination or recrimination. States which remove reservations would be making a major contribution to achieving the objectives of both formal and *de facto* or substantive compliance with the Convention...⁷

Any violations of the convention, in terms of reservations or declarations by States parties to these articles, would thus violate the core commitment of this treaty.

⁴ "Report of the Committee on the Elimination of Discrimination against Women". Eighteenth and nineteenth sessions. General Assembly. Fifty-third session. A/53/38/Rev.1. p47. para. 6.

⁵ *ibid.* p49. para.17.

⁶ See below for an explanation of reservations and declarations to the CEDAW Convention.

⁷ "Report of the Committee on the Elimination of Discrimination against Women". Eighteenth and nineteenth sessions. p50. para. 25.

Further, because Articles 2(f), 5 and 16 deal with the same subject matter and the essence of women's human rights, a reservation or declaration made against any of these articles would have the effect of violating a state's obligation under all three provisions. India, through its declarations to Articles 5(a) and 16 has, in effect, violated the core commitment of the CEDAW Convention as enshrined in Articles 2(f), 5 and 16.

Enforcement and monitoring

The procedures below relate to the scrutiny of State party compliance as undertaken by the CEDAW Committee.

Reporting by States parties

Article 18 of the CEDAW Convention requires all States parties that have ratified this treaty to submit an initial report, one year after ratification, on the legislative, judicial and administrative measures taken by the state to ensure that the provisions of the convention are fulfilled. The contents of the report are then subjected to a 'constructive dialogue' with the State party concerned, with members of the CEDAW Committee giving their own views on the issues in the report.

Further questioning prepared by a working group of the committee takes place when the State party submits its subsequent reports once every four years after the initial report. Aside from these periodic reports, the CEDAW Committee might also request a State party to submit an extraordinary report, different from the format of the regular reports. Usually countries whose governments are asked to give such reports are often in the midst of internal political strife, which raises concern within the committee on the effect or impact of the situation on women in the said country.⁸

Alternative reports of NGOs

NGOs can get involved in the CEDAW review process by submitting alternative information to the CEDAW Committee – either in the form of alternative or shadow reports – when their respective countries have been scheduled to report. These reports aid the committee in assessing the performance of States parties by throwing light on issues that have not been covered by the official reports to the committee. This information enables the CEDAW Committee to conduct a

⁸ IWRAP Asia Pacific. *Building Capacity For Change: A training manual on the Convention on the Elimination of All Forms of Discrimination against Women*. 2001.

more incisive review and give recommendations and concluding comments that are more specific and constructive to the cause.

Recommendations by the CEDAW Committee

Article 21 of the CEDAW Convention requires the CEDAW Committee to report annually to the UN General Assembly on its activities. In the course of this reporting, the committee may make suggestions and recommendations based on the examination of reports and information received from States parties. In this way, the committee performs a monitoring function.

The Optional Protocol to CEDAW

The CEDAW Convention provides a unique opportunity to fundamentally enhance the dynamics of international human rights mechanisms through the provision of the Optional Protocol to CEDAW (OP-CEDAW). The OP-CEDAW functions as a separate treaty that is open to ratification only by those states that are already parties to CEDAW. The advantage of this optional protocol is that it is the first gender-specific international procedure for reviewing individual claims and investigating grave or systematic violations of the human rights of women. Therefore, it can also be used for the specific end of addressing individual complaints on discriminatory cultural practices towards women.

Adjudication

The CEDAW Convention also allows for disputes between states to be taken to the international forum, namely the International Court of Justice, if arbitration fails. This is another level of scrutiny at the international level, contained in Article 29 of the convention. (This provision is dealt with in greater detail in later parts of this paper.)

IV. CEDAW and Indian constitutional obligations

The Constitution of India guarantees certain fundamental rights to its citizens. These were conceived of as a limitation of the law-making function of the state. Prominent among these rights are the right to equality and the right to non-discrimination on the grounds of sex.

Part III of the Constitution guarantees the right to equality, but more specifically, the equality code is contained in Articles 14, 15 and 16. Further, all

laws have to be tested against the touchstone of Article 13⁹ and be consistent with all fundamental rights provisions. Therefore, even though fundamental rights are enforceable only against the state, all laws, whether personal or public, have to be in consonance with fundamental rights guarantees.

The core of the equality doctrine of the Indian Constitution is contained in Article 14. This article comprises two prongs: 'equality before the law' and 'equal protection of the laws', and its object is to ensure fairness and equality of treatment. It strikes at the arbitrariness of state action in any form. Specifically, Article 14 prohibits class legislation and unreasonable classification for the purpose of legislation. Two conditions need to be met to pass the test of 'reasonable classification': (i) that the classification is based on 'intelligible differentia'¹⁰ which distinguishes persons or things; and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. This test of 'classification' has now been modified in the *D.S. Nakara v. Union of India*¹¹ case and replaced by the test of 'arbitrariness'. The case emphasised that if an action is arbitrary, it is discriminatory as per Article 14.

Article 15 protects citizens from unequal treatment. This supplementary provision prevents the state from discriminating against any citizen on only grounds of sex, among other grounds. The use of the word 'only' in this provision has enabled courts to segregate 'sex' from 'gender' and uphold blatantly discriminatory legislation. Article 15(3) allows positive measures for women by the state and is an exception to the rule against discrimination. Under this provision, the state is not prevented from making special provisions for women and children. Put differently, the rule against discrimination in Articles 15 and 16 does not prohibit special treatment of women. The constitutional mandate against discrimination on grounds of sex is infringed only where the females would have received same treatment with males *but for their sex*.¹²

⁹ This states that all laws – including any ordinance, order, by-law, rule, regulation, notification, custom or usage, which in the territory of India has the force of law – cannot be inconsistent with or in derogation of fundamental rights enshrined in the Constitution.

¹⁰ 'Intelligible differentia' means that in the case of the law differentiating between two sets of people or objects, all such differentiation should be easily understood, logical and lucid. It should not be artificial or contrived.

¹¹ (1983) 1 Supreme Court Cases (SCC) 305.

¹² *Air India Cabin Crew Association v. Yeshaswinee Merchant*. (2003) 6 SCC 277.

Article 16(2) of the Constitution prohibits discrimination on grounds of sex in matters of employment or office under the state. Although the ambit of this article is more limited in scope than Article 15(1),¹³ it is equally binding on the state to prohibit discrimination on grounds of sex in the specified field of state employment.

The doctrine of equality contained in Articles 14, 15 and 16 prohibits discriminatory treatment on grounds of sex, but not preferential treatment for women, which is a positive measure in their favour. Therefore, the preferential treatment of women was upheld in *Air India Cabin Crew Association v. Yeshaswinee Merchant*.¹⁴ The state is thus constitutionally obligated to encourage the advancement of women in society, in addition to protecting them from negative discrimination. Judges of the Supreme Court have emphasised state obligation towards women in *Madhu Kishwar v. State of Bihar*¹⁵ saying “it was imperative for the state to eliminate obstacles, prohibit all gender-based discriminations as mandated by Articles 14 and 15 of the Constitution of India”.

It is clear that the commitment demanded of the Indian government under the CEDAW Convention is in consonance with provisions of the nation’s Constitution. If anything, obligations made by the state under CEDAW only enhance the emphasis on equality of men and women and the state’s obligation to provide for positive measures for the advancement of its women under the Constitution.

V. The law on reservations and declarations

What is a reservation?

International law on reservations to treaties is contained in the Vienna Convention on the Law of Treaties. Article 2.1(d) of this convention defines a reservation as:

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

¹³ *Government of AP v. P.B. Vijayakumar*. (1995) 4 SCC 520. Article 15(1) of the Indian Constitution says that “the state shall not discriminate against any citizen on grounds only of religion, race, caste, place of birth or any of them”.

¹⁴ (2003) 6 SCC 277.

¹⁵ (1996) 5 SCC 125.

From this, there are two key elements that bear special relevance to a state's obligation under a particular treaty:

- “Unilateral statement, however phrased or named”: This phrase indicates that it is the substance of the statement that matters and determines its nature as a reservation.
- “Exclude or to modify the legal effect of certain provisions of a treaty”: According to Article 2 of the Vienna Convention, a statement is a reservation only if it purports “to exclude or modify the legal effect of certain provisions of a treaty”. Some unilateral statements made by states, including statements made for primarily political significance and statements made for domestic rather than international significance, do not modify a state's legal obligation under a treaty.¹⁶

A reservation is made by a state when expressing its consent to be bound by a treaty. Reservations thereby intend to modify the legal effect of a treaty or convention.

What is a declaration?

States also make other unilateral statements that derogate from the terms of a particular treaty, but are different from reservations. Such derogations include declarations and understandings made by a State party in accordance with the terms of a said treaty, during its continuance, in order to meet the requirements of particular circumstances, usually in cases of emergency. Interpretative declarations and understandings do not seek to limit or modify the legal effect of a treaty. Instead, they clarify the sense a state gives to certain provisions of a treaty.

In some instances, a statement, though termed a declaration or understanding, might have the result of modifying the legal effect of a treaty. In such cases, it can be said that such declarations have the effect of a reservation, and thereby they are governed by the law on reservations contained in the Vienna Convention and in the general principles of international law.

¹⁶ Jennings, Robert and Watts, Arthur. 1996. *Oppenheim's International Law*. 9th Edition. Vol. 1. New York: Longman. p1241.

On the other hand, a country may have made both reservations and declarations. In such cases, it must be presumed that a declaration was meant to be an interpretative tool and not a reservation, as the country was cognizant of the difference between the two and did not intend to 'reserve', i.e. exclude the legal effects of its obligations under a particular convention, when it made a declaration.

The difference between reservations and declarations

The Human Rights Committee constituted under the International Covenant on Civil and Political Rights (ICCPR) has indicated the difficulty in distinguishing between reservations and declarations and laid down the following test:

It is not always easy to distinguish a reservation from a declaration as to a State's understanding of the interpretation of a provision, or from a statement of policy. *Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, **purports to exclude or modify the legal effect of a treaty in its application to a State**, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.*¹⁷ (emphasis added in italics and bold)

Therefore, it is the intention of the government of India to exclude legal effect, which determines if the given statement is a reservation or declaration in international law. This intention may be visible from debates in the framing of the conventions and/or the words and language used in statements that states make at the time of reservation. It may also be inferred from state practice and policy.

It is important to examine if the statements made by the government of India seek to modify its legal obligation under CEDAW. The question relevant here is if it intended to 'declare' or 'reserve' certain provisions of the CEDAW Convention with the statements made.

¹⁷ Human Rights Committee. General Comment No. 24. para. 3.

VI. Reservations and declarations made by India to CEDAW

The government of India ratified the CEDAW Convention on 9 July 1993 with two declaratory statements and one reservation. First, we examine the declarations made.

India's declarations to Articles 5(a) and 16

The first declaration has been made to Article 5(a) and Article 16(1). While these provisions of the CEDAW Convention emphasise the government's obligation to eliminate cultural practices and customs that discriminate against women, the Indian government has declared its inability to do so without the consent and initiative of individual communities. The second declaration has been made to Article 16(2) of the convention. Under this declaration, the government of India indicates its helplessness to comply with the requirement for compulsory registration of marriages because of the vastness of the country and the existence of illiteracy.

The text of the declarations is as follows:

Declaration 1

With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

Declaration 2

With regard to article 16(2) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.

It is important to examine the nature of these 'declaratory statements' to CEDAW by the Indian government because they affect the state's core commitment under this treaty, reflected in Article 16. International law on reservations and declarations is relevant here.

India's reservation to Article 29(1)

India has also made a reservation to Article 29(1) of the CEDAW Convention, reserving its obligations to submit all disputes between parties to the International Court of Justice.

Article 29(1) of CEDAW provides that:¹⁸

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 for arbitration. If within six months from the date of 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.

India's reservation to Article 29 of the CEDAW Convention reads:

With regards to article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this article.

Are India's statements to Articles 5(a) and 16 declarations or reservations?

The government of India has termed its statements under Articles 5(a) and 16 as declarations in international law. Its intention to treat these statements as declarations, and not reservations, is apparent in the use of the word 'declare' in the statement itself. The statements made by the government of India to CEDAW are declarations because of the following reasons:

¹⁸ Article 29(2) and 29(3) of the CEDAW Convention respectively say that, "Each State Party may at the time of signature and ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the article. The other State Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation", and "Any State Party which has made such a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary General of the United Nations".

- The government has made both reservations and declarations to the CEDAW Convention, and is therefore cognizant of the difference between the two kinds of unilateral statements. The usage in the initial report of the government of India indicates its intention to treat the statements made to Articles 5(a) and 16 as declarations, and not reservations.
- The intention of the government to treat the statements made, as 'declarations' is apparent in the words used. In the declarations made to Articles 5(a) and 16, the government promises to "abide and ensure the provisions". In contrast, the government indicates its intention to "not be bound" by the content of Article 29(1), which it terms a reservation. Thus it is clear that they do not seek to exclude the legal effect of Articles 5(a) and 16.
- The Indian Constitution guarantees the fundamental right of equality to all women through Articles 14 and 15. Article 15(3) promotes affirmative action for the protection of women. Further, Article 13 provides that all laws are to be in consonance with fundamental rights guarantees. It is unlikely that the government of India intended to make legally binding reservations to the CEDAW Convention that would not be in consonance with the provisions of the Constitution itself.
- The words of the declaration indicate that the commitment to equality of women is not being questioned. The government promises to "abide by and ensure these provisions"; it has however indicated the progressive, and not immediate attainment of these objectives. It has also qualified its intention to fulfill these obligations under the CEDAW Convention and interpreted its obligations according to the "policy of non-interference". Therefore, the wording of the declarations show that while the government agrees to abide with its international obligations to assure equality between the sexes, it is discussing the manner and method of attaining such equality through these declarations.
- Article 44 of the Constitution of India has indicated the attainment of a uniform civil code for all communities as a goal of state policy. It cannot be said that the government intended to make a policy favouring religious communities among others, as such a policy would not be in tandem with the state policy laid down in Article 44.

VII. The validity and effect of reservations and declarations

Although reservations and declarations are permitted in the international treaty regime, international law stipulates that certain derogations are impermissible in law and in certain situations. The law on impermissible derogations has been discussed in case law, codified law and in the interpretations of treaty bodies. The validity and effect of reservations and declarations can be discussed in the following ways.

(a) The object and purpose test

The landmark advisory opinion of the International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,¹⁹ laid down that reservations are impermissible if they are against the object and purpose of the treaty. The court, highlighting the importance of compatibility of the reservation or declaration with the object of the treaty, stated, “the character of the multilateral convention, its purpose [...] and adoption are factors which must be considered in determining the [...] possibility of reservation”.

Following the *Genocide* case, the object and purpose test has also been codified in the Vienna Convention on the Law of Treaties and the CEDAW Convention. Article 19 of the Vienna Convention provides that,

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 sub-paragraphs (a) and (b) the reservation is incompatible with the object and purpose of the treaty.

Further, under Article 28(2) of the CEDAW Convention: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted”.

(b) The Vienna Convention test

Article 21 of the Vienna Convention deals with the legal effects of reservations on the obligations between State parties. Article 21 is as follows:

¹⁹ 28 May 1951. p15.

- (1) A reservation established with regard to another party in accordance with Articles 19, 20 and 23:
 - a. Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservations; and
 - b. Modifies those provisions to the same extent for that other party in its relations with the reserving State.
- (2) The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
- (3) When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

It can be seen that Article 21 modifies the legal effects of obligations between State parties, *provided such reservations are made in consonance with Articles 19, 20 and 23 of the Vienna Convention*. Article 20 requires the acceptance of and objection to reservations to be made in a particular way, while Article 23 specifies particular procedures to be followed while making reservations. The important provision is Article 19 that requires all reservations to be compatible with the object and purpose of the treaty to which such reservations are made. Thereby, if the reservation or declaration made is not compatible with the object and purpose of CEDAW, such declarations would be impermissible according to a combined reading of Article 19 and 21 of the Vienna Convention.

(c) The human rights treaties test

Human rights treaties occupy a special position in international law. Such treaties are unique in that they promote state obligation towards the citizens of the state. These treaties are unlike other international treaties, including multilateral trade treaties, which prescribe state obligations vis-à-vis other contracting states.

The Human Rights Committee, in its General Comment 24 dated 2 November 1994, has indicated the special position of human rights conventions when it stated, "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."²⁰ The Human Rights Committee, discussing the consequences

²⁰ para. 8.

of impermissible declarations and reservations, stated that the special and often universal nature of human rights conventions implies that the normal consequence of an unacceptable reservation is not that the convention is not in effect at all for the reserving party. Instead, the reservation is generally severable and therefore, the convention will be operative for the reserving party without the benefit of this reservation.²¹

(d) Breach of peremptory norms of international law test

The Human Rights Committee has indicated that provisions in international conventions that represent customary international law, when they have the character of being peremptory norms of international law, may not be subject to reservations. It is important to note that the Human Rights Committee has listed the denial of the right to marry to persons of marriageable age as a peremptory norm, and therefore a reservation or declaration may not be made to such a norm.²²

The validity of India's declarations to Articles 5(a) and 16

Analysing the declarations made by the government of India to Articles 5(a) and 16 against the four tests laid out above, it can be said that such declarations are impermissible.

Analysis

Applying the object and purpose test and the Vienna Convention test:

The 'declarations' are not compatible with the object and purpose of the CEDAW Convention to eliminate all forms of discrimination against women, especially cultural discrimination and therefore violate the 'object and purpose' test. Articles 5(a) and 16 of CEDAW form part of the core commitment of states under this treaty along with Article 2(f). These provisions reflect the concern expressed in the Preamble of the CEDAW Convention that change in traditional conceptions of gender roles is required to attain genuine equality between men and women. The 'declarations' to these articles strike at the essence of this object and purpose of CEDAW, and so are impermissible.

Applying the human rights test:

The declarations made to a human rights convention like CEDAW do not realise the purpose of such treaties. The International Court of Justice observed

²¹ *ibid.*

²² *ibid.*

in the *Genocide* case that the Genocide Convention is of a type in which “the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d’être* of the Convention”. The CEDAW Convention is one such international treaty that seeks to accomplish the high purpose of eliminating discrimination against women. The human rights tenor of this convention is apparent in every provision and through the interplay of these provisions. It is clear then that reservations and declarations made to any one of its provisions would hamper the realisation of the spirit of the entire convention, and thereby any such derogations made to this human rights treaty must be impermissible.

Applying the breach of peremptory norms of international law test:

The ‘declarations’ of the Indian government to Articles 5(a) and 16 of the CEDAW Convention adversely affect a woman’s right to marry and thereby such declarations affect peremptory norms and are not permissible in international law.

Impermissible ‘declarations’ are severable:

In accordance with the view expressed by the Human Rights Committee, it can be said that India’s impermissible ‘declarations’ to Article 5(a) and 16 of the CEDAW Convention are severable from the rest of the convention and do not restrict the state’s obligations towards its citizens in any way. As such, India must adopt its obligations under this treaty in full and substantial measure, particularly under Articles 5(a) and 16, and allow for effective implementation of such obligations.

Indian courts have referred to the importance of international human rights standards in various human rights conventions, although international law is not directly enforceable by these courts. In *Jolly George Verghese v. Bank of Cochin*,²³ the Supreme Court stressed the significance of the human rights standard-setting function laid down in these international conventions, including the ICCPR. These standards set a common standard of achievement for all citizens. The Court also referred to the obligation of the state, as per Article 51(c) of the Constitution to “foster respect for international law and treaty obligations”, once it is a signatory to such conventions. In *Nilabati Behera v. State of Orissa*,²⁴ the Supreme Court referred to the rights and standards laid down in the ICCPR.

²³ (1980) 2 SCC 360.

²⁴ (1993) 2 SCC 746.

Further, it is useful to refer to the statement of the Supreme Court in *Apparel Export Promotion Council v. Chopra*²⁵ with regard to India's commitment under the CEDAW Convention. The Court observed that India, as a party to this treaty and related international instruments, must give effect to international law because ratification creates expectations. The court stressed "these international instruments cast an obligation on the Indian state to gender sensitise its laws". In light of this overwhelming importance given by the Supreme Court to international obligations under human rights treaties, it can be argued that declarations that are not in consonance with international standards of human rights may be disregarded by such courts of law.

Conclusion: 'Declarations' are ambiguous

The declarations made by the government of India are vague and ambiguous in content. It has made its obligations under Articles 5(a) and 16(1) subject to an undefined and indeterminate "policy of non-interference". Although such a policy finds mention in the text of the declarations, the meaning and contents of such a policy have not been outlined anywhere. It is, therefore, difficult to understand the state's objective and understanding of such a policy. Further, the 'declaration' also does not make clear what it means by 'community' and if such a 'community' is religious, political and social or of some other undefined nature.

It is also uncertain if the government will restrict its policy to obtaining the consent of 'minority communities' as evident from the Indian State party report or if it will extend this to the majority Hindu community as well. It is important to note too that there are no standards outlined for obtaining consent from these communities. In the absence of clear and well-defined standards and policy in this regard, the practical consequences of such action can be chaotic. Under the declarations to Article 16(2), the Indian government indicates its full support for the principle of compulsory registration of marriages; it is also ambiguous. This 'declaration' lacks a specific definition of the obligation entailed or method of implementation.

The vague and ambiguous nature of the Indian government's declarations contravenes the requirement that derogations to multilateral conventions, particularly human rights conventions, ought to be specific. The government ought to have outlined a clear and reasoned policy for its immediate non-

²⁵ (1999) 1 SCC 759.

compliance and stipulated a time period for the expiry of such policy as well as a time period for the full implementation of its obligations.

The 'declarations' of the government of India lack a specific time period within which compliance with CEDAW obligations will be achieved. Therefore, they reflect a disregard of the requirement of specificity and also, the fact that the government has not made these statements with the understanding of its responsibility towards women under this convention.

It is argued that the Indian state has abdicated from its constitutional responsibility towards women by making such an obligation subject to the consent of indeterminate communities. The CEDAW Convention is a treaty signed by governments of sovereign states, and bestows obligations and commitments only upon governments of those states and not on private actors. For a reservation or declaration to remain compatible to the convention, States parties have to take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the convention, and specify the manner of implementation of such obligations. The declarations by the government of India do not do so. The Human Rights Committee in its General Comment 24 has laid down that specificity and transparency are requirements for acceptable reservations and declarations, so it may be clear what obligations of human rights compliance have been undertaken by a state.²⁶ Accordingly, such ambiguous declarations ought to be severed and their legal effect rendered void.

The validity of India's reservation to Article 29(1)

India's reservation to Article 29(1) of the CEDAW Convention, which allows it to be excluded from the jurisdiction of the International Court of Justice when arbitration has failed, is permissible in law. Such a reservation does not contravene the object and purpose of the CEDAW Convention. It only removes the jurisdiction over the disputes from the international arena, as India has a written Constitution with guarantees of fundamental rights, including the right to equality and non-discrimination based on sex, which can be enforced in domestic courts of law. The core commitment of CEDAW is thus not violated by the reservation. Further, the treaty's Article 29(2) permits such reservations to be made by States parties.

²⁶ para. 19.

VIII. Developing advocacy strategies to promote India's obligations under Articles 5 and 16

Any advocacy strategy developed to promote India's obligations under Articles 5 and 16 of the CEDAW Convention must encourage and require the state to submit in whole to its obligations under the treaty, *without declarations and reservations*. It is therefore useful at the outset, to judge the compatibility of reservations and declarations with human rights conventions – including CEDAW – using the guidelines of the Human Rights Committee.

Guidelines on reservations to human rights treaties (the case of the ICCPR)

Due to the special character of human rights conventions, the compatibility of a reservation to the object and purpose of a convention must be established objectively, by reference to legal principles. General Comment 24 of the Human Rights Committee lays down the following criteria to judge the compatibility of a reservation to a human rights convention.²⁷

- “Reservations must be specific and transparent, [so that it is] clear what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.”
- “When considering the compatibility of reservations with the object and purpose of the Covenant, states should also take into account the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration.”
- “States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law.”
- “Nor should interpretative declarations and reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law.”

²⁷ *ibid.*

- “States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any international treaty body.”

Advocacy strategies and state intervention

The achievement of equality in India through the CEDAW Convention would depend largely on two strategies: advocacy and education, and state intervention and law reform. Both these strategies have seen the involvement of the state as well as NGOs or women’s groups.

Advocacy and education

There is a need to use a gamut of strategies, including training and gender-sensitisation in formal and informal educational systems, through extensive revision of syllabuses and teaching material, and through community and NGO involvement, as well as innovative use of the media to spread democratic values within the family.²⁸ It is necessary to examine the roles of the state and the NGOs in this context.

There exist several NGO initiatives that attempt to persuade the state to be more proactive towards initiating reforms in the lives of women. The sensitisation of law enforcement remains a critical factor to bring about enduring changes in gender perceptions. While national- and state-level training centres for police personnel and civil servants exist,²⁹ the state process of training has not secured the desired momentum. There also remains an urgent need to train judges at the district and higher levels. On the other hand, NGO communities have initiated several national and regional trainings for women lawyers and women’s groups. A large number of these have met with considerable success.³⁰

The Indian government has undertaken a review of the textbooks under the District Primary Education Programme to eliminate gender bias.³¹ While Indian

²⁸ “Preparations for the Fourth World Conference on Women: Action for equality, development and peace”. E/CN.6/1995/5/Add.1. 4 January 1995. *c.f.* <<http://www.un.org/documents/ecosoc/cn6/1995/ecn61995-5add1.htm>> Accessed on: 6 April 2005. para. 49.

²⁹ Aggarwal, Kiran. “Responses to questions on India’s first report on CEDAW. 22nd CEDAW Session.” New York. 24-31 January 2000. p8.

³⁰ Alternative NGO Report on CEDAW. India. Initial submission to the CEDAW Committee. January 2000. pp3-4.

³¹ Aggarwal. *op. cit.* p16.

NGOs have a dynamic existence of their own, public-private partnerships between the government and such organisations are not prevalent. The role of the media towards the elimination of gender disparities needs to be encouraged.³²

Similarly, several national and regional consultations have been organised by NGOs over the span of a decade, where the CEDAW Convention was introduced to a large constituency of women, highlighting the element of substantive equality and the immense possibilities that this convention offers in seeking larger areas of equality for women. At many of these occasions, the issue of state non-compliance with CEDAW has been addressed strongly and strategised upon. There has also been widespread sharing of information between women's groups in preparation of alternative reports to the CEDAW Committee.³³

The government of India's reservations to the CEDAW Convention have remained an area of concern among the NGO community. Not surprisingly, their advocacy efforts to pressure the government to withdraw its reservations have been significant. On previous occasions, the government has argued that such reservations were necessary to preserve and protect the interests of individual communities. NGOs on the other hand have argued that women of such communities ought to be involved in the decision-making process. More so, they have demanded that the government make visible efforts to secure the consent of such communities. To date, however, there have been few efforts to do so.

Further, several NGO alliances representing women's groups have pressured the government to withdraw the reservations to CEDAW, and sign the Optional Protocol to CEDAW. Methods employed include lobbying the Ministry for Human Resource Development through delegations, and the preparation and dissemination of effective advocacy materials. They have also submitted memoranda to this effect to the Department of Women and Child Development.

State intervention and law reform

The state should intervene in a much more active manner than it has done in the past to reform family law provisions that treat women unequally in matters such as property and inheritance, custody of children, divorce and maintenance, and so on, preferably with the initiatives for such reforms coming from women in the community. Stricter laws and law enforcement are also needed to end

³² *ibid.*

³³ Alternative NGO Report on CEDAW. pp3-4.

existing violence and discrimination against women and girls.³⁴ Specific law reform targeted at the areas of personal laws of different communities, domestic violence and gender discrimination is required too.

The government of India is expected to continue its work on the reform of laws pertaining to women. One of the functions of the statutorily appointed National Commission for Women (NCW) is to oversee the reform of discriminatory laws. While considering any legislation, the NCW goes through a process of consultation with academicians, NGOs, legal experts and other members of civil society. The NCW also undertakes lobbying with women parliamentarians on women-related issues and provides necessary inputs to the Parliamentary Committee on Empowerment of Women. This work is supplemented at the regional levels by respective State Commissions for Women. The National Human Rights Commission and the National Law Commission also play important roles.³⁵

However, despite the presence of these mechanisms for law reform, the pace of such change has been slow. Further, sufficient effort has not been made to bring on board the views of women from communities. Most recently, the United Progressive Alliance – a coalition of parties led by the Congress party and currently forms the government – drafted the Common Minimum Programme which lists all legislation that it wants to enact during its tenure. In this, listed as a priority, is the enactment of laws on domestic violence, gender discrimination and women's political reservation. The roles of NGOs in the drafting of such laws and lobbying have been prominent. The enactment of such laws with the support of the affected women and women's groups will further India's national and international commitment to CEDAW and bring about reform in laws governing the rights of women in the family.

A woman's right to own and inherit property has long been denied under Indian law. Further such rights vary by religion. Even where the law grants some limited rights, societal practices compel women to relinquish these. Further, the rights of married women are often not recognised. This gets accentuated when they lose the security of the family, as single women, separated, divorced or widowed. While there have been some amendments in the southern states giving daughters co-parcenary rights,³⁶ long sought amendments to make the law equal for women are still pending with Parliament. Also, the present set of amendments does

³⁴ "Preparations for the Fourth World Conference on Women". para. 49.

³⁵ Aggarwal. *op. cit.* pp1-8.

³⁶ Co-parcenary refers to the joint inheritance of property.

not adequately cover reform to land laws. The denial of the right to property for women is yet another reason for combining forces of advocacy and law reform to realise the rights of women.

In October 1994, NGOs filed a writ petition in the Supreme Court requesting the government of India to explain what actions it had taken to promote the CEDAW Convention and what measures it had taken to remove discrimination against women in public and private spheres. The matter was taken up to be heard and is now pending before the courts.³⁷ The landmark judgment *Vishaka v. State of Rajasthan* on the issue of sexual harassment at the workplace was also the result of NGO initiative.³⁸ Again, a coalition of NGOs and lawyers with the support of the Department of Women and Child Development, Ministry of Human Resources, and the Central Government, have successfully drafted the law on sexual harassment at the workplace and are currently lobbying for it to be adopted.

POSSIBLE SHORT- AND LONG-TERM STRATEGIES

- *Lobby the government of India to withdraw the declarations made to Articles 5(a) and 16 of CEDAW*

These declarations are impermissible under international law and they are not in consonance with the object and purpose of the CEDAW Convention. They contravene the core state obligation towards women under Articles 5(a) and 16 of this treaty.

Further, these declarations are not in consonance with the state's own obligations towards its citizens under the Constitution of India. These declarations run counter to the guarantee of equality to all persons under Article 14, and the right to non-discrimination on grounds of sex under Article 15. The declarations do nothing whatsoever to further the state's affirmative and protective obligation towards women in Article 15(3). The situation is further aggravated because the declarations come at a time when the state's constitutional commitment to equality has not been realised even after fifty years of independence.



³⁷ Alternative NGO Report on CEDAW. p3.

³⁸ *ibid.*



By giving importance to the wishes of religious communities over the rights of women in these declarations, the state's declarations to CEDAW are not in consonance with Article 25 of the Constitution and the guarantee of freedom of religion, which can be fettered when the fundamental rights to equality of women citizens are at stake.

Any declarations to the CEDAW Convention made by India ought to be interpreted in the context of India's own national Constitution. Further, the declarations made by the state should be in consonance with its constitutional obligations to prevent discrimination against women in all matters. It is important to note that state obligation towards women is affirmative under the Constitution. Thus, the government of India has failed in its constitutional obligations towards women by making such 'declarations' to the CEDAW Convention.

- *Push for more immediate action seeking clarity on the text of declarations*

As the text of the declarations stands today, they indicate the arbitrariness and a lack of commitment to women's rights on the part of the Indian government. There is much ambiguity on the meaning of the terms used in the declarations including "policy of non-interference", "community" and "with initiative and consent". These terms require urgent definition. The government of India is required to clarify the meaning of such terms used in the declarations. In addition, the declarations do not specify any mechanism to secure the consent of such communities. The government must set into practice mechanisms that will consider the wishes of women of the community.

- *Insist that the government of India adheres to a time bound commitment to honour its obligations under the CEDAW Convention*
- *Have the state institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of a said convention*

It is desirable for a state entering a reservation to indicate in precise terms the domestic legislation or practices that it believes to be



→ incompatible with the convention obligation reserved. The state also needs to explain the time period it requires to render its own laws and practices compatible with the treaty, or why it is unable to do so. States should also ensure that the necessity for maintaining reservations and declarations is periodically reviewed, taking into consideration the reports and comments made by expert Committees constituted under international human rights treaties.

- *Advocate for a comprehensive review carried out in cooperation with the enforcement or monitoring mechanisms and states*

The assistance of NGOs in such matters ought to be considered. Such study and examination must be detailed and substantive, and should gather together reservations and interpretative declarations on human rights treaty norms by norm, by treaty and by state.

- *Exercise sufficient pressure on the Indian government to withdraw its reservation to Article 29 of CEDAW, thereby making its obligations under the CEDAW Convention enforceable in the International Court of Justice*
- *Lobby the government to sign the Optional Protocol to CEDAW, enabling individual complaints on discrimination on the grounds of sex to be brought before the CEDAW Committee. This will allow for enhanced accountability under the CEDAW Convention. ■*

