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THE DISCOURSE OF RESERVATIONS TO CEDAW ON WOMEN'S RIGHTS IN MALAYSIA, BRUNEI, AND INDONESIA

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Abstract

Substantive religious-based reservations towards CEDAW have been made by a number of states. Unfortunately, this type of reservations can also have a negative effect on women's rights. This paper intends to examine the reservation system in CEDAW, state practices and the legal consequences of reservations in general and the rights of women, particularly in South East Asia, namely Malaysia, Brunei and Indonesia. This normative research uses a statutory, conceptual and comparative legal approach. The results show that States tend to object religious-based reservations because this type of reservations is against the object and purpose of the treaty. Whereas under international law, States are prohibited from using national (religious) law as a legitimization of failing to conduct international obligations. Although these reservations cannot be considered direct causes of discrimination and/or violation against women, some having the status of jus cogens do contribute to preserving the basic ideas of male dominance by, inter alia, maintaining the status quo and constructing it to the international legal framework. Thus, since treaties on human rights are not reciprocal in nature, countries need to agree on a mechanism that allows the fulfilment of permissible reservation thresholds, so that they stay within the object and purpose of the treaty, including the protection and the strengthening of women's rights. Each State has the obligation, to some extent, to show the willingness and efforts that lead to the fulfilment and protection of women's rights, which have been set out by international standards and principles.

Keywords: reservation, treaty, religion, object and purpose, women's rights

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I. INTRODUCTION

It has been repeatedly stated that reservation is one of the most debated issues in treaty law. Moreover, regarding the validity of reservations to international treaties, there have been deep and prolonged discussions and debates, some having contradictory views, both at the doctrinal level and in international legal practice regarding reservations to human rights treaties.¹

¹ Malgosia Fitzmaurice, "On the Protection of Human Rights, The Rome Statute and Reservations to Multilateral Treaties," *Singapore Yearbook of International Law* 10 (2006): 31.

Reservations are like two sides of a coin. On the one hand, as a right, a reservation that permits states to exclude certain articles in a treaty is considered capable of increasing the participations of countries in an international treaty.² This provides an acknowledgment of global political and cultural diversity where reservations affirm the principle of sovereignty. However, on the other hand, the practice which seems to encourage the universality of the human rights treaty has created concerns among the international community, namely states, human rights activists, and legal experts considering that the rights regulated in such treaties have a universal and interdependent character.³ This means that states must adhere to the integrity to protect human rights.

Based on the report of the Universal Rights Group, states most often use religious beliefs, doctrines, or dogmas as justifications for reservations to international human rights treaties. Over 40 percent of them are based on religion.⁴ One of the human rights treaties which is most reserved for this reason is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), where more than 60% of all reservations are based on religion. As the most comprehensive treaty that provides protection of the women's rights, reservations based on religion targets the general awareness of the rights that women should have.

The objective of this paper is to examine the substantive reservation system of CEDAW, practices by States parties and the legal consequences of reservations towards women's human rights. Specifically, this paper explores the impact of reservations to CEDAW in 3 different countries in South East Asia, namely Malaysia, Brunei and Indonesia.

² Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservation to General Multilateral Treaties," *British Yearbook of International Law* 64, no. 1 (1993), 247.

³ Ineta Ziemele and Lasma Liede, "Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 To Guideline 3.1.5.6," *European Journal of International Law* 24, no. 4 (2013): 1135, DOI: 10.1093/ejil/cht068.

⁴ Basak Cali and Mariana Montoya, "The March of Universality, Religion Based Reservations to the Core UN Treaties and What They Tell Us About Human Rights and Universality in the 21st Century," Universal Rights Group, accessed 30 March 2022, <https://www.universal-rights.org/urg-policy-reports/march-universality-religion-based-reservations-core-un-human-rights-treaties-tell-us-human-rights-religion-universality-21st-century/>.

There are three parts to this paper. The first part deliberates the nature of women's rights regulated in CEDAW and its system of reservation. The second part reviews responses and commentaries of the Human Rights Committee on reservations over the years. Meanwhile, the third part highlights the legal rights of women in Malaysia, Brunei and Indonesia, and how their reservations to CEDAW affects the commitment to fulfil their obligation to the Convention.

II. CEDAW AND ITS RESERVATION SYSTEM

CEDAW is among the oldest and most comprehensive international treaties that focus on the advancement of the rights of women. Its establishment was based on the needs of the international community to have an international law that prohibits discrimination against women that has a specific monitoring mechanism. Until the adoption on December 18, 1979 by the United Nations, there was no other treaty that comprehensively addressed gender equality within political, cultural, economic, social, and family life. On September 3, 1981, the Convention entered into force after the ratification of 20 member states.

From a gender perspective, CEDAW incorporates the right of women and equality principles into the international legal framework. There are 30 articles throughout the six parts of the Convention, outlining from the principle of non-discrimination to women's rights in the public sphere and their equality in family life. CEDAW includes mandates that incorporate the gender equality principles and the prohibition of gender discrimination into the national law of its member states. It also regulates how states should amend or abolish laws and practices that discriminate women.

As of May 2022, 189 countries are States parties to CEDAW,⁵ making it one of the most ratified international treaties on human rights. However, at the same time, reservations made to the Convention has also been the most compared to other human rights treaties. On this matter, international law through the Vienna Convention on the Law of

⁵Division for The Advanced of Women, *CEDAW General Recommendations Nos. 2, 3 and 4, adopted at the Sixth Session* (UN Committee on the Elimination of Discrimination Against Women, 1987).

Treaties (VCLT) allows States, when entering ratification or accession, to make a reservation. According to VCLT, reservation is a statement made unilaterally by a State at the time of signing, ratifying, or acceding to a treaty, with the purpose to exclude or to modify the legal effect of certain articles of the treaty in their application to that state.⁶ VCLT further notes that a reservation must not be incompatible with the object and purpose of the treaty. Similar to other core human rights treaties, such specific provision could also be found in CEDAW, where its article 28(2) prohibits reservations incompatible with the object and purpose of the present Convention.

However, some issues to reservations remain unresolved, such as how to assess whether the substantive reservations such as those based on religion are consistent with the Convention's object and purpose.⁷ Moreover, testing the validity of these norms can create more serious problems at the practical level because it raises questions ranging from who has or should have the authority to assess the reservation's validity to the legal consequences of rejecting proposed reservations which applies both ways, namely to the reserving state and the rejecting state., Despite the norm of article 19 (c) and 20 (4)b VCLT, such situation results in no consistency either by the State or by human rights bodies or committees at the practical level.

In practice, CEDAW has gained the highest number of overall normative reservations which are generally considered as fundamental provisions. It also has the highest number of religion-based reservations (with 440 reservations, over 60% of which are inspired by religion or belief).⁸ Most of them have targeted the substantive articles such as articles 2, 9 and 16. Bahrain, Brunei Darussalam, Egypt, India, Qatar, Malaysia, Mauritania, Saudi Arabia, Singapore, Syria, Kuwait and the Maldives are among the States which have conducted religious-based reservations. These reservations have faced objection from other member states, stating that they are incompatible to CEDAW's object and purpose. Furthermore, the scope of the reservations is unacceptable, considering them to be very broad and without clearly defining how

⁶ Vienna Convention on The Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁷ *Ibid*,

⁸ Cali and Montoya, "The March of Universality."

far the states parties have recognized the obligations of the treaty. Furthermore, reservations with reference to domestic (national) law are not acceptable under customary international law, where VCLT codifies that a state party may not use its internal legal provisions as a justification for its failure to enter into a treaty.⁹ A commentary on the VCLT even records those reservations that intends to reserve the integrity of national law may conflict with the object and purpose of the treaty given their frequently unspecified and overarching nature.

The impact of reservations is another discourse that needs further attention, if not a solution. Discussions on the connection between reservations and international human rights treaties can and should be viewed from the perspective of how such treaties affect and challenge traditional international legal systems.¹⁰ This is because the impact of reservations largely depends on whether the proposed reservation is accepted or rejected by other participating countries. Based on the terms and methods of determining the validity of the reservation (including its compatibility to the object and purpose of the treaty), state parties will determine their judgment through acceptance or objection of the proposed reservation. Moreover, an objection to a reservation determines the scope of the treaty obligations between the reserving state and the objecting state. An objection by a State to a reservation does not prevent the entry into force of a treaty between the reserving state and the objecting state unless there are other purposes and objectives expressly stated by the objecting state.¹¹ This is because the regime for stating objections, which is within a period of twelve months, is designed to maintain reciprocal relations between the participating countries. In other words, States which do not raise objections to a reservation are considered to have accepted it after a period of twelve months. In practice, some states simply object by claiming that the reservation is against the object and purpose, or that it is invalid, while hoping that the reserving state will withdraw the reservation. Other states take a more explicit approach stating that the reservation is severable and void.¹²

⁹ Vienna Convention on The Law of Treaties.

¹⁰ Philip Alston dan Ryan Goodman, *International Human Rights* (New York: Oxford University Press, 2012), 23.

¹¹ Vienna Convention on The Law of Treaties.

¹² Tom Ginsburg, "Objections to Treaty Reservations: A Comparative Approach to

Of course, this is related to the distinct character of human rights treaties that is well known as a type of objective declaration,¹³ which makes such treaties be more considered as promises to be complied internally within a state rather than contracts between states. The Human Rights Committee¹⁴ shows the nature of human rights treaties which is not a web of mutual exchange of obligations between states, but which pays attention to the protection and provisions of human rights towards citizens within the country. When a state ratifies such treaty, it promises to protect, fulfill and respect human rights in its respective territory and at the same time recognize the same promises made by other participating states. Thus, human rights treaties are not directly beneficial to other states parties but to each citizen of the parties participating in the agreement. This character hence makes the principle of reciprocity between states unapplicable to international human rights treaties. Based on such notion, states also do not benefit from objecting to a reservation. Moreover, politically, some consider that an objection to a reservation can be considered as interfering in the domestic affairs of another state.¹⁵ Meanwhile, legally, an objection to a reservation is actually unnecessary, unless the objecting state expressly prevents the entry into force of the agreement between itself and the reserving state.¹⁶

Ultimately the practice of incorporating reservations into human rights treaties and the legal validity of those reservations continue to be highly controversial. In practice, this fact causes reservations to have a substantial undesirable impact on the enjoyment of human rights. When a state does not fully subject itself to a human rights treaty, then

Decentralized Interpretation,” in *Comparative International Law*, Anthea Roberts, Paul B. Stephan III, Pierre-Hugues Verdier & Mila Versteeg eds. (New York: Oxford University Press, 2018), 233.

¹³ Olivier De Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2014), 11.

¹⁴ Officer of The High Commissioner for Human Rights, “CCPR General Comment No. 24: 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,” *UN Human Rights Committee* (1994).

¹⁵ Johanna Fournier, “Reservations and the Effective Protection of Human Rights,” *Goettingen Journal of International Law* 2, no. 2 (2010): 446.

¹⁶ Jan Klabbers, “Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties,” *Nordic Journal of International Law* no. 69 (2000): 179.

that state may not be able to take the obligatory steps to fully promote, respect and protect the rights concerned at the domestic level.

Therefore, it is necessary to limit certain obligations (the most core nature) which cannot be reserved by any state. In other words, efforts need to be made to set minimum standards that all states parties must comply with. Thus, the fulfillment of minimum obligations to the core provisions of the agreement is something that must be done by each state party. It is also important to note that there should be no reservation of the categories of human rights having the *jus cogens* status,¹⁷ as well as rights that fall under customary international law, such as the right to freedom of religion with the status of *jus cogens*. This *jus cogens* right is an absolute right,¹⁸ which cannot be derogated,¹⁹ and any reservation for any reason to this type of norm will be completely set aside or rejected. It is also necessary to consider the use of the blue pencil test method that leads to a specific and transparent approach to the reservation of the Human Rights Committee. In regard to this test, a party crossed out with a blue pencil only the illegal parts. The removed portion is later void, while the remainder of the reservation remains legal, as long as it remains a true and reasonable sentence. However, if the remaining part is not a grammatically correct sentence, the entire reservation must be cancelled.

Based on the above description, it can be concluded that the problem of the legal consequences of invalid reservations to international human rights treaties remains complex. For this reason, the role of the human rights committee of human rights treaties becomes crucial.

III. RESPONSE OF THE CEDAW COMMITTEE

The International Law Commission (ILC) commented that in the cases of reservations, the treaty monitoring bodies²⁰ have the

¹⁷ Vienna Convention on The Law of Treaties.

¹⁸ Ibrahim Menshaw, “Unilateral acts and peremptory norms (Jus Cogens) in the international law commission’s work,” *Review of Economics and Political Science* 4, no. 3 (2019): 190, DOI: 10.1108/REPS-11-2018-0030.

¹⁹ William E. Conklin, “The Peremptory Norms of the International Community,” *European Journal of International Law* 23 no. 3 (2012): 837, DOI: 10.1093/ejil/chs048.

²⁰ Office of The United Nations High Commissioner of Human Rights, “The United

competences to assess the compatibility of the reservations, including their compatibility with the object and purpose of the treaty, when the issue arises while they are carrying out their functions.²¹ In assessing the reservation, States must pay attention to the nature of the indivisibility, interdependence and interrelationship of the rights regulated in the treaty as well as the importance of the rights or provisions that are the subject of the reservation and how big the impact the reservation has on those rights.²² In this case, the role of the respective committees is to make space and boundaries. This opinion is also in line with what has been observed by Schmidt where one possible and necessary approach to dealing with extensive and excessive reservations is to allow the human rights instrument regulatory body to provide some guidance to the State making the reservations.²³

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has certain responsibilities as an expert body based on periodic reports that have been submitted to them. In its examination of states' reports, they engage in positive discussion with member states and provides comments on a regular basis regarding the proposed substantive reservations or the state's failure to withdraw or modify them. The following are some of the comments and commentaries of the CEDAW Committee and other developments on reservations.

In 1987, the Committee stated concern on the amount of reservations that appeared to be inconsistent with the Convention's purpose and object.²⁴ In 1988, the Committee proposed that it would be useful for them to have material on the topic of Islamic law and their practices. In 1992, the Committee through its General Recommendation No. 20 wanted to resolve the issue.²⁵ In June 1993, States were encouraged

Nations Human Rights Treaty System An Introduction to the Core Human Rights Treaties and the Treaty Bodies," *Fact Sheet* no. 30 (2015): 23.

²¹ United Nations General Assembly, "Sixty-Fourth Session, Report of the International Law Commission Sixty-First Session," *Supp.* no. 10 (2009): 219.

²² United Nations General Assembly, "Sixty-Second Session, Report of the International Law Commission Fifty-Ninth Session," *Supp.* no. 10 (2007): 65.

²³ *Ibid.*

²⁴ Division for The Advanced of Women, *CEDAW General Recommendations Nos. 2, 3 and 4*, adopted at the Sixth Session (UN Committee on the Elimination of Discrimination Against Women, 1987).

²⁵ Division for The Advanced of Women, *CEDAW General Recommendation No. 20*:

to consider restraining the reservations, to precisely and narrowly formulating the reservations, to ensure that they are compatible with the object and purpose of the treaty, and review any reservations with a view to withdrawing them on a regular basis. This was conducted through the Vienna Declaration and Programme of Action.²⁶ In 1994, the Committee expressed its concern at the amount of reservations and the extent of them entered to Articles 2 and 16, which are core provisions of CEDAW.²⁷ The Committee required States parties to progressively withdraw its reservation, particularly to substantive provisions.

Similarly, in 1995, The Beijing Declaration and Platform of Action emphasized that in order to protect women's rights, it was essential to evade resorting to reservations.²⁸ It recommended States to limit reservations; in any case formulate them precisely and as narrowly; ensure the consistency with object and purpose of the Convention and regularly review to withdraw the reservations. Despite the concerns by the Committee, CEDAW has no provisions regarding enforcement. Therefore, it is left to the Committee to repeatedly request states parties to remove such reservations, either through its general comments or in responses to individual states' reports.

In 1997, The Committee continually encouraged States parties to object illegal reservations. In particular, the Convention's article 21 (1) specified that the activities of the Committee will annually be reported to the General Assembly (GA) and that they may provide general recommendations based on the state parties' examination reports and information submitted. Consequently, the concluding observations and the general recommendations of the Committee plays a significant means to recognize the parties' obligations under the Convention.

Reservations to the Convention (UN Committee on the Elimination of Discrimination Against Women, 1992).

²⁶ Vienna Convention on The Law of Treaties.

²⁷ Division for The Advanced of Women, *UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations* (UN Committee on the Elimination of Discrimination Against Women, 1994).

²⁸ The Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, UN Doc. A/CONF.177/20, 1995 para. 218, 219, 230, available at <https://www.un.org/en/development/desa/population/migration/general-assembly/docs/globalcompact/A_CONF.177_20.pdf>].

In 1998, the Committee stated that although the Convention did not prohibit the entry of reservations, reservations to the core principles of the Convention were contrary to the Convention itself and to international law in general. The Committee views that states parties to CEDAW agreed to condemn discrimination against women in all forms and that the approaches regulated in Article 2 should be implemented by states parties to eliminate such discrimination. Thus, the Committee has determined that reservations to article 2 and 16 of CEDAW as well as overbroad reservations are impermissible. Likewise, based on the Committee, any national, cultural or religious reasons to reserve Article 16 are not permissible.

In 2010, the Committee urged for states parties that entered reservations to Article 2 to clarify the real effects of such reservations on the implementation of CEDAW. With the goal of withdrawing such reservation in a timely manner, states also had to specify the stages taken to retain the reservations under review. When differences arise between reservations to and obligations of other human rights treaties ratified, state should choose to review its reservations, with an assessment to withdraw them.²⁹

The reservations made to CEDAW can have a dual effect. Reservations indicates state's unwillingness to promote and protect those certain norms on women's rights. It also confirms the differences that will be regulated (at the domestic level) between men and women. This situation will affect the ability of women to enjoy and exercise their rights. Thus, men will remain to be superior to women and enjoy more access to human rights in all aspect. The implications (difficulties) for women are therefore significant.

Certain options are opened to states parties entering reservations. The Special Rapporteur stated that a state party may: after having examined the findings in good faith, maintain its reservation; withdraw its reservation; regularize its situation by replacing its impermissible reservation with a permissible reservation; or denounce being a party to the treaty. In practice, states have used those options differently as discussed in the following section.

²⁹ Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1259 UNTS 1 (entered into force 3 September 1981).

IV. RESERVATIONS OF MALAYSIA, BRUNEI AND INDONESIA TO CEDAW AND THEIR IMPACT ON WOMEN'S RIGHTS

States in the Southeast Asian region are not only economically diverse, but also socially and politically. These countries did not ratify CEDAW at the same time. The first country to ratify the convention was Philippines in 1981. It was then followed by the Lao People's Democratic Republic (PDR), Vietnam, Indonesia and Thailand, which all consent to be bound by the Convention in the beginning of 1980s. In the 1990s Cambodia, Malaysia, Singapore and Myanmar ratified the conventions consecutively. Timor-Leste was last to ratify the Convention in 2003.

For most of these countries, it has been many years since they ratified the Convention. Most states of ASEAN have ratified the conventions without reservations to the substantive provisions, except Brunei, Malaysia and Singapore. They have all accepted the binding obligations to promote and protect the women rights according to the principles as standards of the Convention. To add, all countries, except Brunei have given reports to the Committee of CEDAW. Many of them have even reported more than once. Therefore, these countries could rely on the Concluding Observations of the Committee to assist them in fulfilling their duties and to show their improvements at the national level.³⁰

As stated earlier that the reservations of CEDAW made by these countries are divided into types, name substantive and procedural reservation. States that have entered reservations on substantive articles are Brunei, Malaysia, Singapore and Thailand. Malaysia expresses reservations on Articles 5 (a), 7 (b), 9 (2), 16 (1a), 16 (1c), 16 (1d) and 16 (2); Singapore on Articles 2, 9 and 1; Brunei on Articles 2, 9 and 29 (1); and Thailand entered reservation towards article 16. Whereas Myanmar, Indonesia and Vietnam have conducted reservations more on the procedural matters, particularly towards Article 29 (1) on dispute settlement. Meanwhile, in the entire Southeast Asian region, there are three countries that are considered as Muslim majority states, namely Indonesia, Brunei and Malaysia, but, as stated above, the types

³⁰ UN Women, *Women's Rights to Equality: The Promise of CEDAW*, 2014, 103, available at <https://asiapacific.unwomen.org/en/digital-library/publications/2014/7/women-s-rights-to-equality#view>.

of reservations entered by them differ. By using Malaysia, Brunei and Indonesia as examples, this part examines the reservations entered and improvements of right rights of women in their normative legal framework.

A. MALAYSIA

The Government of Malaysia ratified CEDAW in July 1995. Malaysia declared that its accession is based on the consideration that the Convention's articles are not in conflict with the Islamic law and the Federal Constitution. Malaysia, thus, does not consider itself bound by the provisions of Article 5 (a), 7 (b), 9 (2), and Article 16 paragraph 1, (a), (c), (f) and (g), and paragraph 2 of CEDAW. Related to Article 11, Malaysia reads the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.

A number of CEDAW state parties have objected Malaysia's reservations, namely, Austria, Finland, Netherlands, and Norway. The reservations made by Malaysia are towards fundamental provisions of the Convention whose implementation is essential to fulfill its object and purpose. If put into practice, the reservations would certainly discriminate women making it incompatible to the object and purpose of the Convention. Furthermore, by stating general reference to religious law and national law, state parties consider such reservations do not define clearly on Malaysia's commitments to fulfill its obligations under CEDAW. No modifications were stated. This generates serious uncertainties about the commitment of Malaysia under CEDAW. A number of state parties also recall that the reservations are inconsistent with the general principles on the law of treaties where states may not invoke the provisions of its internal law as justification for failure to perform its treaty obligations. On the contrary, states must be prepared to take the necessary steps in order to fulfil the object and purpose of the treaty at the national level.

Reservations to Article 16 (1)(a), 16 (1)(c) and 16 (1)(f) of CEDAW are based on their inconsistency with Syariah Law in Malaysia. The Human Rights Commission of Malaysia stated that it appreciates

and respects the stance of Malaysia to maintain the reservation under Article 16(1)(a) due to its apparent inharmoniousness with Syariah Law and also due to the possibility of the said article advocating same sex marriage, which is prohibited under both Syariah and civil law in Law Reform (Marriage and Divorce) Act 1976.³¹ However, according to such commission, it is preferable for Malaysia to consider lifting its reservation while insertion a provision on its application to be within the understanding of Syariah Law and the national law of the country.

On February 6 1998, Malaysia withdrew its reservations in respect to Articles 2(f), 9(1), 16(1)(b), 16(1)(d), 16(1)(e) and 16(1)(h). Moreover, on July 19 2010 the country withdrew its reservations to Articles 5(a), 7(b) and 16(2). This practice, which addresses discrimination against women in public life, child marriage and stereotyping of women and girls, is a step in the right direction towards Malaysia's commitment to end discrimination against women in all aspects of the public and private lives. At the moment, the country still maintains its reservations to Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) considering them to be in conflict with the Islamic Law and the Federal Constitution.³²

1. Citizenship

Reservation to Article 9(2) was due to its contradiction to Malaysia's Federal Constitution that states to paternalistic values in providing citizenship. Until today, Malaysia has not made reviews on this reservation to include a maternal link for citizenship. According to the Federal Constitution, a person can be a Malaysian citizen through operation of law, by registration (of wives and children of citizens), or naturalization of the citizenship.³³ While the Commission is of the view that there is differential treatment with regards to awarding citizenship to children by Malaysian fathers and non-Malaysian fathers,

³¹ Malaysia, *Laws of Malaysia, (Marriage and Divorce) Act 1976 (Act 164) Law Reform Incorporating All Amendments Up To 1 January 2006*

³² Human Rights Commission Of Malaysia, State Party: *Malaysia, Treaties Covered: Convention On The Elimination Of All Forms Of Discrimination Against Women* (UN Committee on the Elimination of Discrimination Against Women, 2017).

³³ Malaysia, *Laws of Malaysia Federal Constitution*. [trans. Ministry of Justice (Malaysia), English Translation of Federal Constitution available at <https://www.constituteproject.org/constitution/Malaysia_2007.pdf?lang=en>].

the government will maintain its reservation to CEDAW's Article 9(2). Though forms of discrimination against Malaysian women appeared, the decision was based on the Federal Constitution and other existing policies.

2. Marriage and Family Relations

In Malaysia, despite Islam being the religion of the Federation, all other religions can be practiced in peace and harmony in any part of the Federation.³⁴ On grounds that they are in contradiction with Syariah Law, reservations were made on Article 16(1) (a), 16(1) (c) and 16(1) (f) of the Convention. Article 16 (1)(a) is based on two main principles, namely equal rights to enter marriage and equal rights to choose their spouse for marriage. This equal right to marriage is intended to protect women and children from forced marriage and is adequately protected, particularly under the Islamic Family Law Act 1984 where a marriage is considered legal and can be registered if both parties come to an agreement for marriage.³⁵ However, before marrying a woman (in Islam), consent from her legitimate male guardian is required. Moreover, the Act is somewhat inconsistent to equal rights to choose a spouse as, unlike women, it allows men to have polygamous marriages. Meanwhile, on Article 16(1)(c) concerning equal rights during marriage and at its dissolution, the Commission records that the former husband's failure to provide reliable alimony to his former wife (and children) has been one of the core problems of marriage and family relations in Malaysia.

In addition, the Government has taken legal actions to continue to improve protections against violations of human rights of women in family and marriage matters through its newest revisions to the Law Reform (Marriage and Divorce) Act 1976, which came into force on 15 December 2018. The aim is to ensure that the rights of spouses whose marriages are solemnized under the civil law are protected despite the

³⁴ *Ibid.*

³⁵ Malaysia, *Laws of Malaysia, Islamic Family Law (Federal Territory) Act 1984, Act 303*. [trans. Ministry of Justice (Malaysia), English Translation of Islamic Family Law available at <

https://www.constituteproject.org/constitution/Malaysia_2007.pdf?lang=en>].

conversion to Islam by one spouse.³⁶ The Human Rights Commission of Malaysia expressed its hope that Malaysia will further continue to participate in realizing the CEDAW Committee's concluding comments. To add, the Commission continues to encourage the Government to remove all the remaining reservations to CEDAW.

3. Other Development of Women's Rights

The following shows several major legislations, programs and policies related to women after the reservations of CEDAW:³⁷ the establishment of the Women's Entrepreneur Fund in 1998; the establishment of the Human Rights Commission (SUHAKAM) in 1999; the formulation of the Code of Ethics for Sexual Harassment Prevention in 1999; amendment to the Federal Constitution in 2011 to prohibit discrimination in any law on the basis of gender; the establishment of the Ministry of Women, Family Development in 2001 (now renamed Women, Family and Community Development) to ensure effective implementation and coordination of programs for women and families; the introduction of the Gender Budget Analysis in 2003 to ultimately establish a gender-sensitive national budget; the establishment of the Cabinet Committee on Gender Equality in 2004 to provide policy direction and monitor the implementation of strategies and programs on women and development; the enactment of Islamic Family Law in 2005; the formulation of the Second National Policy on Women in 2009; and the amendment to the 1955 Employment Act (EA) in Bill 2021 to provide flexible working hours and increase maternity leave for women in the public sector as well as paternity leave.

The above legislations, programs and policies indicates that the Malaysian government seeks to harmonize Islamic and CEDAW perspectives on gender equality through amendments to its constitution. This will be followed by an amendment in the implementing law and legislation. These developments show positive efforts to narrow the gender gap in the Malaysia society by focusing on strengthening women's empowerment policy.

³⁶ *Ibid.*

³⁷ Sivachandralingam Sundara Raja and Evelyn S. Devadason, "Lack of Gender Sensitization In Malaysian Laws And Regulations: Need For A Rights-Based Approach," *Sejarah* 26, no. 2 (2017): 72.

B. BRUNEI

On 24 May 2006, The Government of Brunei Darussalam acceded to CEDAW.³⁸ The Government expresses its reservations regarding the provisions that may be in conflict with the Constitution as well as to the Islamic beliefs and principles, the official religion of the country, and without prejudice to the generality of the said reservations, expresses its reservations regarding Article 9 (2) and Article 29 (1) of the Convention.

Upon such reservations, a number of state parties have expressed their objections,³⁹ such as Czech Republic, Austria, Belgium, Canada, French Republic, Denmark, Estonia, Finland, Hungary, Germany, Hellenic, Italy, Ireland, Latvia, Netherlands, Norway, Poland, Portuguese, Romania, Spain, Slovakia, Sweden, and Great Britain. In general, these states find that the reservations to Article 9 (2) would certainly result to women discrimination which is inconsistent with the purpose and object of CEDAW. They further consider that, without any further explanation, the reservations regarding the provisions of the Convention that may be contrary to the Islamic principles and Brunei Darussalam's Constitution do not clearly specify their extent and therefore raise doubts as to the degree of commitment assumed by Brunei Darussalam in becoming a party to the Convention. Similar to the comments for Malaysia, States also recall that according CEDAW itself as well as customary international law as codified in the VCLT, any reservation against the object and purpose of a treaty shall not be acceptable.

1. Nationality

At the moment, Brunei Darussalam will retain its reservation on Article 9(2) as it has a policy of single nationality and does not recognize dual nationality. The current practice that children of woman citizens have the choice to be registered as either Brunei nationals or nationals like their fathers is still in place. The Brunei Nationality Act⁴⁰ provides that children of a Bruneian mother and a non-national father born in

³⁸ Vienna Convention on The Law of Treaties.

³⁹ *Ibid.*

⁴⁰ Brunei, *Laws of Nationality Brunei Chapter 15 Brunei*. [trans Ministry of Justice (Brunei), English Translation of Law of Nationality available at <https://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap015.pdf>].

Brunei must submit applications to register as nationals of Brunei. Then, the applications are to be considered at the discretion of His Majesty the Sultan and Yang Di Pertuan. On the contrary, children born in the country to a Brunei father and a non-national mother will automatically gain Brunei nationality. This situation led the Committee on the Elimination of Discrimination against Women⁴¹ and the Committee on the Rights of the Child⁴² to issue recommendation for Brunei to examine and evaluate its Nationality Act and other relevant regulations on nationality to guarantee that Bruneian women can transfer their nationality to their children automatically. This situation is very much similar to Malaysia where such regulation is provided in its Constitution. Furthermore, it is important to note that retaining a policy of single nationality is consistent with the Convention therefore a reservation to Article 9 is not needed. As a matter of fact, other ASEAN countries, for example Laos, Myanmar, Singapore and Vietnam, also have single nationality policies without entering to any reservations. Nationality is a policy issue that requires in-depth discussions.⁴³ On this matter, the Government of Brunei has initiated discussions on this issue and reviewed policies and practices of other states with a view to undertaking a comparative study on nationality.⁴⁴ Malaysian government also is looking into amending the relevant provision of the Constitution.

2. Other Development of Women's Rights

The progress achieved in undertaking legislative reforms since the ratification of the Convention was welcomed by the Committee, particularly the adoption of the following: the implementation of the new Maternity Leave Regulation in 2011, which provides maternity leave for 105 days for women working in both the public and private sectors; the establishment of Compulsory Education Act in 2011, that

⁴¹ Brunei, *Laws of Nationality Brunei Chapter 15 Brunei*. [trans Ministry of Justice (Brunei), English Translation of Law of Nationality available at <https://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap015.pdf>].

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ United Nations High Commissioners for Refugees, "Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 33rd Session," *United Nations* (2010).

offers a 9 year compulsory education for not only boys, but also girls;⁴⁵ the adoption of the National Plan of Action for Women to improve its institutional and policy framework aimed at accelerating the elimination of discrimination against women and promoting the equality of women and men; and the ratification or accession to international instruments such as the Minimum Age Convention 1973 and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2006.

These developments show great potential in further advancing the CEDAW agenda of gender equality in Brunei. Despite the remarkable progress towards gender equality and empowerment of women in Brunei Darussalam, gaps and challenges remain.

C. INDONESIA

Indonesia signed CEDAW on July 29, 1980 and ratified the convention on Sept 13, 1984.⁴⁶ Interestingly, although Indonesia is a Muslim majority country, unlike Malaysia and Brunei, the Government did not enter to any substantive reservations. Indonesia only entered a procedural reservation towards Article 29(1) where the Government of Indonesia takes the position that any dispute relating to the interpretation or application of the Convention may only be submitted to arbitration or to the International Court of Justice (ICJ) with the agreement of all the parties to the dispute. Besides Indonesia, a total of 40 other state parties have made reservation towards that article.⁴⁷ Unlike the reservations made towards substantive articles, the procedural reservations, such as entered by Indonesia, did not gain any objections from other state parties to the Convention.

⁴⁵ United Nations High Commissioners for Refugees, "Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 33rd Session," *United Nations* (2010).

⁴⁶ Vienna Convention on The Law of Treaties.

⁴⁷ Division for The Advanced of Women, *Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to The Convention on The Elimination of All Forms of Discrimination Against Women* (UN Committee on the Elimination of Discrimination Against Women, 2006).

No substantive reservations were made by Indonesia where it agreed to the treaty principles affirming equality between men and women. This is also due to the system of Indonesian law is not strictly based on Islam. Rather, it is grounded on common goals based on unity in diversity. Indonesia is not a religion state. Indonesia's constitution has remained secular, as have most of its codifications, whether in administrative law, criminal law, civil law, or laws of procedure. 'Islam' and 'sharia' lack a constitutional status as such.⁴⁸

However, although no substantive reservations are made, the provisions of the Convention are not consistently implemented at the provincial and district levels. In other words, even though the Constitution authorizes the central Government to implement such provisions accordingly, many parties, including the National Commission for women (*Komnas Perempuan*) have identified regional regulations that are discriminatory. To fulfill its obligation of the Convention, the Indonesian government has taken legislative efforts to promote and protect women's rights within its jurisdiction. As stated in its 8th report on CEDAW, Indonesia has strong commitments toward the protection and promotion of women empowerment and gender equality. These commitments can be seen through the involvement in various legal instruments and global agendas that promote the rights of all women and girls. One example is Indonesia's commitment towards the Beijing Platform Declaration and the Sustainable Development Agenda of 2030.⁴⁹

The Committee salutes the development achieved since the consideration of Indonesia's previous reports of 2012, particularly the implementation of the following: Indonesia's commitment towards women empowerment in the National Mid-Term Development Plan 2015-2019, concentrating on strategic purposes namely the promotion of the quality and role of women; the protection of women against violence and strengthening institutional capacity on gender mainstreaming and the protection of women against violence; the establishment of Law

⁴⁸ Press conference with Arskal Salim discussing Challenging the Secular State, The Islamization of Law in Modern Indonesia, 2008.

⁴⁹ "Indonesia's Eighth Periodic CEDAW Report (2012-2019)," Ministry of Woman's Empowerment and Child Protection Republic of Indonesia, accessed 20 May 2022, https://www.kemenpppa.go.id/lib/uploads/list/215d1-translasi-cedaw-report_eng.pdf

No. 8 of 2016 on persons with disabilities, which provides protections for persons with disabilities, including women and children; the establishment of Law No. 24 of 2013 on civil administration; the development of a grand design to increase women's representation in the legislative assembly for the 2020–2030; and the ratification or accession to the Association of Southeast Asian Nations Convention against Trafficking in Persons, Especially Women and Children, in 2017; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2012, and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in 2012.⁵⁰

V. CONCLUSION

States continue to ratify human rights treaties such as CEDAW with substantive reservations based on the principle of state sovereignty. Despite other member states have objected these reservations, claiming that such practices are not in accordance purpose and objectives of the treaty, the nature of human rights treaties as non-reciprocal hinders its impact of the reservation. Since the Human Rights Committee can only provide recommendations and certain options, the elimination of this type of reservations depends on the political will of each state, as seen in the case of Malaysia and Brunei Darussalam. Essentially, these states enter reservations as they find contradictions between the CEDAW implementation and their state Constitution, namely Syariah Law. Whereas Indonesia, although having a bigger majority Muslim population as compared to Malaysia and Brunei has not entered reservation based on religion. Indonesia is a more secular basis country where their national political system is not based on Islamic law.

In principle, states should not exploit the reservation system, effectively turning their ratification or accession to international agreements into a merely formal action that does very little to actually change the conditions of their citizens, in this case particularly the rights of women. By maintaining such reservation, these states hinder the improvement to ensure the protection of women against violence

⁵⁰ *Ibid.*

and discrimination which includes their ability to acquire compensation from proper national mechanisms. This leads to the fulfillment of minimum obligations to the core norms of CEDAW which needs to be established in its reservation system.

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