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The “Reservations Dialogue” as a Constitution-Making Process

1. Introduction

Human Rights occupy a particular place in the international arena. Ever since the adoption of the Universal Declaration of Human Rights¹ they have been regarded by many as a legitimating and value-adding part of international law and of the work of the United Nations.

More recently the revival of constitutionalist thought in public international law elevated human rights even further to a degree comparable to constitutional rights in national constitutions.² However, some aspects of the day-to-day functioning of human rights are not taken sufficiently into account by international constitutionalist lawyers proclaiming these human rights to be a core or at least an indispensable part of any future international constitution. This article proposes to take a closer look at one of these particular aspects, namely reservations to human rights treaties. Since the majority of human rights

¹ UN GA Res. 217 A (III) of 10 December 1948.

² For some examples see Stephen Gardbaum, “Human Rights as International Constitutional Rights”, 19 *European Journal of International Law* (2008) pp. 749-768; Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”, 19 *Leiden Journal of International Law* (2006) 579-610; Ernst-Ulrich Petersmann, “The WTO Constitution and Human Rights”, 3 *Journal of International Economic Law* (2000) 19-25.

guarantees take their source in treaties, it is important to pay specific attention to the mechanisms and structures of the treaty regime which accompany human rights on their way to becoming a part of an international constitution. Taking into account the peculiarities of the practice of reservations to human rights treaties, the article concentrates on what was called, the reservations dialogue, by the Special Rapporteur of the International Law Commission on the Reservations of Treaties, Mr. Alain Pellet.³ The article proposes a reading of this reservations dialogue as a constitution-making mechanism. On the basis of this interpretation the argument is advanced that the position taken on the reservations dialogue in the Seventeenth Report is too narrow and does not pay due attention to the constitutional dimension of the reservations dialogue. The fact that the Special Rapporteur did not restrain the reservations dialogue by precise rules and placed it outside the main reservations regime in the 2011 Guide to Practice on Reservations to Treaties⁴ to some extent leaves the way open for future developments. However, in preserving the status quo the Special Rapporteur missed opportunities to recognise and encourage some very promising developments. The article advances some proposals as to a more adequate approach to this dialogue from a constitutional point of view.

The article starts with a brief overview of international constitutionalism and its relationship to human rights in general and human rights treaties more specifically. As a

³ See in particular Seventeenth Report on Reservations to Treaties, by Alain Pellet, Special Rapporteur, UN Doc.

A/CN.4/647, 26 May 2012, hereinafter: Seventeenth Report.

⁴ Guide to Practice on Reservations to Treaties, adopted by the International Law Commission at its sixty-third session, 2011, contained in UN Doc. A/66/10 or Yearbook of the International Law Commission, 2011, vol. II, Part 2, hereinafter: Guide to Practice.

next step the practice of the reservations dialogue is presented in the light of the general reservations regime. This presentation is done in two stages. The first stage accounts of the reservations dialogue as it appears in the Seventeenth Report of the ILC Special Rapporteur and the Annex to the Guide to Practice. At the second stage a broader view of reservations dialogue is taken. This is done through the analysis of some examples of the reservations dialogue within the context of the CEDAW. The concluding part of the article formulates some proposals as to a more adequate vision and accommodation of the reservations dialogue from a constitutionalist perspective.

2. International Constitutionalism and Human Rights

2.1. General Observations

The idea of an international constitution is old but it gained in popularity in the last few decades. The discussion about international constitutionalism and international constitution takes many different forms today and has its opponents and proponents.⁵ The purpose of this article is not to engage in discussions about the viability of one or another version of international constitutionalism, but to attract attention of international lawyers working on issues related to international constitutionalism to a paradox at the heart of their project. Therefore, the article presents just a brief overview of some basic ideas of any international constitutionalist project. The proposal made in the second part of the article is an attempt to provide an interpretation of the paradox assuming the existence of these characteristics of international constitutionalism as they are articulated by the doctrine.

⁵ See e.g. Christine Schwöbel, “The Appeal of the Project of International Constitutionalism to Public International Lawyers”, 13 *German Law Journal* (2012) pp. 1-22.

The basic motivation behind the idea of international constitutionalism is the same as the motivation of any constitutionalist movement, namely to place constraints on the exercise of power.⁶ Similar to any modern constitution, an international constitution is envisaged as containing a set of basic rights and liberties protecting individuals against arbitrary exercise of power by States. To a certain extent the very revival of the idea of an international constitutionalism was conditioned by the growth of the human rights movement and proliferation of human rights treaties. Therefore, a part of the doctrine of international constitutionalism regards international human rights as a core of the nascent international constitution. Moreover, human rights slide into the centre of international constitutionalism indirectly through affirmation by many authors of the constitutional value of such notions as *jus cogens* and *erga omnes* which introduce according to them the required hierarchy into international law.⁷ Equally important for constitutionalisation

⁶ Within the framework of national constitutions one could speak about “establishing and controlling the powers of the governing institutions of the state” (Martin Loughlin, “What is Constitutionalisation?” in: P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (2010) pp. 47-69, at 47. The situation is more complex at the international level: there is no governing structure as such. At least this structure is not as easily identifiable as within States. Therefore, the literature on international constitutionalism is very broad and encompasses such issues as global governance and transnational regimes side by side with structure and functions of international organisations and other more abstract theoretical issues concerning exercise of power on international level. For some examples see: Deborah Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (2005); Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009); Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law* (2009).

⁷ Nicholas Tsagourias, “The Constitutional Role of General Principles of Law in International and European Jurisprudence”, in N. Tsagourias (ed.), *Transnational Constitutionalism International and European Perspectives* (2007) p. 93; Christine E.J. Schwöbel, *Global Constitutionalism in International Legal Perspective* (2011) p. 39ff. See also

processes is the role attributed by some authors to the so-called law-making treaties (sometimes also referred to as world order treaties) in this process of international law's constitutionalisation.⁸ Human rights treaties constitute the core of this particular group of treaties as defined by authors who use this notion. According to the dominant vision of law-making treaties since these treaties have a quasi-universal membership, they represent a hybrid between treaty and law and “can be regarded as embodying the collective will of mankind.”⁹ Therefore, the notion of law-making treaties represents a bridge between traditional international law based on consent and reciprocity and the constitutional vision of international law aimed at binding all members of international community.

2.2. *Human Rights Treaties*

individual contributions in Christian Tomuschat, Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006).

⁸ The notion of law-making treaties refers to the nature of norms contained in the treaty which would according to authors defending the existence of this category of treaties have a more general norm-creating character as opposed to the contractual nature of obligations in traditional international treaties. For example, Sir Gerald Fitzmaurice in his second report on the law of treaties states with regard to this category of treaties: “The obligation has an absolute rather than a reciprocal character—it is, so to speak, an obligation towards all the world rather than towards particular parties. Such obligations may be called self-existent, as opposed to concessionary, reciprocal or interdependent obligations (...)” Second Report on the Law of Treaties by Sir Gerald Fitzmaurice, UN Doc. A/CN.4/107, YILC 1957, Vol. II, p. 54, para. 126.

⁹ Ulrich K. Preuss, “Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Project?” in P. Dobnerand & M. Loughlin (eds.), *The Twilight of Constitutionalism?* (2010) p. 45. It is striking that at the beginning of the 21st century and almost twenty years after the feminist legal analyses entered the field of international law, there are still authors who in their universalising move exclude the half of humanity by using perhaps only inadvertently the term ‘mankind’ instead of ‘humankind’.

The majority of the doctrine has always been feeling that there is something different about human rights treaties, something that singles them out and places apart from other international treaties. However, the definition and description of this difference is not an easy task. The already mentioned view of human rights treaties as law-making or world-order treaties is but one example of the continuous effort to grasp this peculiarity of human rights treaties.

Another particular feature of human rights treaties addressed in one manner or another by all authors writing on the subject is their objective character. Participation in human rights treaties imposes on States obligations which are not primarily vis-à-vis other States but rather vis-à-vis individuals on their own territory. As a consequence the doctrine admits that reciprocity has a very little, if any, role to play not only in human rights treaties, but also in human rights law in general.¹⁰

In his Second report on reservation, Alain Pellet, the special rapporteur on the issue also admitted that “reciprocity is certainly less omnipresent in human rights treaties than in other treaties and that (...) the obligations resulting from such treaties “are essentially of

¹⁰ Gérard Cohen-Jonathan, “Les réserves dans les traités institutionnels relatifs aux droits de l’homme, nouveaux aspects européens et internationaux”, 100 *R.G.D.I.P.* (1996) p. 916; Thomas Giegerich, “Vorbehalte zu Menschenrechtsabkommen : Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien”, 55 *ZaöRV* (1995) 713-782, at 742-745; René. Provost, “Reciprocity in Human Rights and Humanitarian Law”, 65 *BYbIL* (1994) pp. 383-454; Bruno Simma, “International Human Rights and General International Law: A Comparative Analysis”, *Collected Courses of the Academy of European Law, 1993, The Protection of Human Rights in Europe*, Vol. IV Book 2 (1995) p. 170.

an objective character (...)”¹¹ The Inter-American Court of Human Rights put this idea in the following way:

In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, **for the common good**, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction.¹²

Once you combine the particular characteristics of human rights treaties which put them above and apart from other types of treaties, and the idea of human rights as constitutional guarantees with the very existence of the possibility of making reservations

¹¹ Second Report by Alain Pellet, UN Doc. A/CN.4/477/Add. 1, para. 152, p. 42. It should be mentioned that Alain Pellet as some other authors recognise that human rights treaties also contain contractual clauses of reciprocal nature (see *id.* para. 85). However, the literature on international constitutionalism never addressed this type of provisions of human rights treaties and their role in the constitutionalisation of international law. This is another proof of only superficial attention paid to human rights as a part of the future international constitution. An analysis of this issue goes beyond the present research.

¹² Int.-Am.CtHR, the *Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion N° OC-2/82 of 24 September 1982, Ser. A, N° 2. Reprinted in 22 ILM 1983, para. 29 (emphasis added). Alain Pellet also quoted this passage in his Second Report: UN Doc. A/CN.4/477/Add. 1, para. 152, p. 42. Other human rights bodies also adopted a similar view. See e.g. EuComHR in Pfunder case: Decision on Admissibility from 11.01.1961, Application N° 7881/60, Austria v. Italy, 4 YbEuCHR 1961, pp. 138, 140; even the ICJ in its Advisory Opinion on Reservations to the Genocide Convention particularly emphasized this aspect: ICJ Reports, 1951, p. 23. Similar ideas, although formulated in different terms, can also be found in many decisions taken by different bodies. See e.g. Advisory Opinion N° OC-1/82 of September 24, 1982. “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court* (Art. 64). Reprinted in 22 ILM 1983, pp. 51-65, para. 24; Advisory Opinion N° OC-3/83 of September 8, 1983. *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4)). Reprinted in 23 ILM 1984, pp. 321-350, para. 50; General Comment N° 24 adopted by the HRC on 2 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para. 17.

to human rights treaties many questions emerge. Does it mean that the international constitution can be reserved or that states can opt-out of the world laws? Or perhaps the collective will of mankind is not as uniform as some authors pretend? If the answer is in the negative, what does the reservations regime to human rights treaties tell us about the constitutional quality of human rights and the quality of constitutional protection of human rights? Does it mean that only human rights recognized as having acquired customary law character will become part of the international constitution? What then about persistent objectors? Should then the constitutional guarantees be limited to *jus cogens* human rights only? Would we not arrive in the end at very thin constitutional guarantees which perhaps will even not protect us against torture if we come to be suspected of international terrorism?

I propose a reading of the reservations regime which supports the constitutionalist view of human rights generally and human rights treaties more specifically. However, the vision of international constitutionalism which emerges as a result of this reading has also some distinguishing features which go beyond the traditional understanding of international constitutionalism. Central to this proposed reading of the reservations regime is the so-called reservations dialogue. The vision of the reservations dialogue and its relationship to the reservations regime presented below is less formalistic and broader than the one which emerges from the work of the Special Rapporteur.

3. The Reservations Regime and the Reservations Dialogue

*3.1. Basics of the Reservations Regime*¹³

¹³ For a more detailed general discussion of the reservations regime see e.g. Frank Horn, *Reservations and Interpretative declarations to Multilateral Treaties* (1988), Alexander Behnsen, *Das Vorbehaltsrecht völkerrechtlicher Verträge*.

When a state becomes a party to a treaty with a reservation, it is because the state is either unwilling or unable to respect all the obligations imposed on it by the treaty. In order to accommodate such states the current reservations regime allows them when becoming parties to a treaty “to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.¹⁴ Obviously, this state can become a party with the reservation only if at least one other state party to the treaty agrees to this modification or exclusion either expressly or tacitly.¹⁵ Moreover states are not permitted to make reservations which would deprive the treaty of its object and purpose.¹⁶ States that do not agree with the modification or exclusion are given the chance to express their objections during a twelve-month period.¹⁷ When objecting they are given the choice of either simply objecting – in which case the provision to which the reservation relates does not apply between the reserving and the objection state while the rest of the treaty does – or to object to the entry into force of the treaty in its entirety.¹⁸ The states who wish to object shall be very attentive to the twelve-month period because if they do nothing

Vorschlag einer Reform (2007), Robert Garran Greig, “Reservations: Equity as a Balancing Factor?” 16 *Australian Yearbook of International Law* (1995) pp. 21-174; José Maria Ruda, “Reservations to Treaties” 146 *Collected Courses of the Hague Academy of International Law* (1975, III) pp. 11-112; and more recently Edward T. Swaine, “Reserving” 31 *Yale Journal of International Law* (2006) pp. 307-366; Laurence R. Helfer, “Not Fully Committed. Reservations, Risk and Treaty Design, Response” 31 *Yale Journal of International Law* (2006) pp. 367-382.

¹⁴ Vienna Convention on the Law of Treaties, 23 May 1969, UNTS vol. 1155, p. 331, art. 2(1)(d). Hereinafter: Vienna Convention.

¹⁵ Art. 20 (4) (a) and (c) and art. 20 (5) of the Vienna Convention.

¹⁶ Art. 19 (c) of the Vienna Convention.

¹⁷ Art. 20 (5) of the Vienna Convention.

¹⁸ Art. 20(4) (b) and 21 (3) of the Vienna Convention.

during this period they are considered as having accepted the reservation and have no other chance to lodge a formal objection.¹⁹ The accepted reservation thus enters into force and modifies the treaty relationships between the reserving and the accepting state to the extent of the reservation.²⁰

This brief and formal description of the reservations regime demonstrates that within the reservations regime itself states have only limited opportunities for interaction. However, the difficulties and uncertainties with regard to the application of the reservation regime e.g. consequences of incompatible reservations,²¹ effects of objections to excluding as opposed to modifying reservations,²² insufficiency of the twelve-month period²³ led to a significant degree of creativity in state practice. This creativity was named by the Special

¹⁹ Art. 20 (5) of the Vienna Convention.

²⁰ Art. 21 (1) of the Vienna Convention.

²¹ See e.g. Roberto Baratta, “Should Invalid Reservations to Human Rights Treaties be Disregarded?”, 11 *European Journal of International Law* (2000) pp. 423-425; Curtis A. Bradley, Jack L. Goldsmith, “Treaties, Human Rights and Conditional Consent”, 149 *University of Pennsylvania Law Review* (2000) pp. 399-468; Ryan Goodman, “Human Rights Treaties, Invalid Reservations, and State Consent”, 96 *American Journal of International Law* (2002) pp. 531-560; Lisbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (1995); Eric Neumayer, “Qualified Ratifications: Explaining Reservations to International Human Rights Treaties” 36 *Journal of Legal Studies* (2007) pp. 397-430; Catherine Redgwell, “Reservations to Treaties and Human Rights Committee General Comment No 24 (52)” 46 *International and Comparative Law Quarterly* (1997) pp. 245-282; ; Brunno Simma, Gleider I. Hernández, “Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand”, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011) pp. 60-86.

²² Massimo Coccia, “Reservations to Multilateral Treaties on Human Rights” 15 *California Western International Law Journal* (1985) pp. 34-38; Rebecca J. Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women”, 30 *Virginia Journal of International Law* (1990) pp. 656-660; Horn, above fn 13, p. 182; Ruda, above fn 13, pp. 199-200;

²³ Greig, above fn. 13, pp. 118-135; Horn, above fn. 13, pp. 206-209; Swaine, above fn. 13, p. 319.

Rapporteur ‘the reservations dialogue’. This reservations dialogue took many different forms. It is justified to say that it was initiated by states who wanted to discourage the number as well as the extent of reservations. Being faced with general or imprecise reservations they requested clarifications and precision. Being faced with apparently incompatible reservations, they invited their reconsideration. Being faced with the inflexibility of the twelve-month rule they still sent their opinions on reservations to the depositary so that the reserving state and other state parties could be informed about their position. In their attempt to invite the reserving state to reconsider the reservation or provide clarifications they at times omitted to object properly speaking to the reservation. Perhaps, such was the intention. We will return to these points later. The reserving states did not always remain silent and passive in face of such creativity. Sometimes they responded with clarifications and provided additional information. Sometimes they reconsidered their reservations by modifying or partly withdrawing them. The creative objecting states continued to react by felicitating the effort made by the reserving states and by indicating where appropriate that some more effort would be desirable. An important role has been played in this context by some treaty-monitoring bodies which with diplomacy, tact and curiosity enquired about states’ reasons for making reservations, exchanged views with the reserving states on different possibilities for reform leading eventually to a partial or total withdrawal of the reservation.²⁴ Does this reservations

²⁴ Unfortunately, the limited space of the article does not allow for the consideration of the particular role played by treaty-monitoring bodies in the reservations dialogue. However, the internal dynamics of the reservations dialogue as it takes place with participation of the treaty-monitoring bodies is very similar to that of the reservations dialogue between states which is analysed below. For an interesting analysis of the role played by the CEDAW with regard to reservations see

dialogue take place inside or outside the reservations regime? What does it tell us about the reservations regime itself and about human rights treaties and their constitutional quality more specifically?

3.2. The Reservations Dialogue

3.2.1. 'Inside reading'

It clearly appears from the outset of the Alain Pellet's Seventeenth Report the first part of which is devoted to the issue of the reservations dialogue that his intention was to keep the traditional vision and the Vienna Convention regime intact. As will be demonstrated in the second part of this chapter, many developments taking place in relation to the reservations dialogue are certainly challenging the traditional framework and can be interpreted as qualitatively new practices. However, the official vision of the reservations dialogue as it appears from the Seventeenth Report and the Guide to Practice underplays many of these developments.

Alain Pellet starts by defining borders within which he will then keep his description of the reservations dialogue:

The reservations regime instituted by the Vienna Convention does not impose static solutions on contracting States or contracting organizations; rather, it leaves room for dialogue among the key players (...) ²⁵

Ekaterina Yahyaoui Krivenko, *Women, Islam and International Law Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women* (2009) pp. 199-208.

²⁵ Seventeenth Report, p. 2 para. 2.

The report contains two separate parts: one about the reservations dialogue within the Vienna regime (para. 8 to 27) and another about the reservations dialogue outside the Vienna system (para. 28 to 53).

3.2.1.1. Reservations Dialogue Within the Vienna Convention

According to Alain Pellet the two reactions to reservations recognized by the Vienna Convention – acceptance and objection – are the means of conducting the reservations dialogue. Thus, he affirms that consequences of objections are not limited to the effects attributed to them by the Vienna Convention. They also “may mark the beginning of cooperation between the key players.”²⁶ He continues describing how some objecting states invite the reserving state to reconsider its reservation, to provide additional information on the reservation thus initiating in some cases a reflection on the reservation by the reserving state. In some cases the result is the withdrawal or reformulation of the reservation, but as Alain Pellet notes himself, the link between the reactions of the objecting states and the withdrawal of the modification or the reservation cannot always be clearly established.²⁷

Alain Pellet also mentions a similar effect (encouragement of reactions and comments and eventually withdrawal of reservations) produced by other reactions of states which do not qualify as objections but which according to him still fall within the Vienna

²⁶ Id., p. 5, para. 9.

²⁷ See e.g. his observation with regard to Malaysia’s partial withdrawal of its reservations to Convention on the Elimination of All Forms of Discrimination Against Women: “Although the link cannot be clearly established . . .” (p. 5, para. 9) or his note with regard to the Chile’s withdrawal of a reservation to the Convention Against Torture: “The political changes that took place in Chile in the early 1990s probably encouraged withdrawal of the reservation formulated in 1988.” (p. 11, fn. 37).

Convention regime: objections formulated by non-contracting states, conditional objections to specified but potential or future reservations, late objections formulated after the end of the time period, and objections to incompatible reservations.²⁸

Alain Pellet's description of the reservations dialogue within the Vienna Convention regime makes clear that any positive effects of the reservations dialogue within the Vienna Convention are achieved not because of the legal effects attributed to various reactions of states by the Vienna Convention but for other incidental reasons. These reasons are linked either to the attitude of the reserving state or to the cumulative effect of the attitude of the reacting state(s). However, these reasons and motivations are not examined in detail in the report. Alain Pellet just notes that number and consistency of objections play a significant role²⁹ as does the concerted way of expressing opinion on reservations.³⁰ As will become clear later, the understanding of reasons and motivations is fundamental for the efficiency of the reservations dialogue. A more detailed analysis of these reasons and motivations is provided below from the point of view of constitution-making.

3.2.1.2. Reservations Dialogue Outside the Vienna Convention

When considering the reservations dialogue outside the Vienna Convention regime, Alain Pellet distinguished reactions other than objections and acceptances of contracting States and contracting organizations³¹ from the reservations dialogue with treaty monitoring

²⁸ Seventeenth Report, p. 7, para. 14 ff.

²⁹ Id. p. 13, para. 22.

³⁰ Id. p. 14, para. 25.

³¹ Id. paras. 30-38.

bodies and international organizations.³² The placing of this latter type of reservations dialogue outside the Vienna convention regime is unquestionable. However, the reasons for excluding the former group of reactions from the Vienna Convention regime are less straightforward, especially if one considers their similarity to “other reactions” discussed by Alain Pellet in the part of his report which deals with the reservations dialogue taking place within the Vienna Convention regime. For example, Alain Pellet places outside the Vienna Convention regime undefined reactions which do not reveal their purpose as well as what he identifies as complaints about reservations.³³ He even affirms that they “serve little purpose.”³⁴ However, the late objections which are included by Alain Pellet in the part of his report on the reservations dialogue taking place within the Vienna Convention regime present no notable distinguishing features as compared to imprecise statements in terms of strictly legal effects. On the other hand the practical effects of these imprecise statements are exactly the same as that of late objections: partial or total withdrawals of reservations. It seems that this distinction between inside and outside of the Vienna Convention regime serves the purpose of preparing the ground for maintenance of the status quo and avoiding any modifications to the Vienna Convention regime. This attitude of the Special Rapporteur is confirmed by his conclusions and proposals. Thus, although he insists that the reservations dialogue is a valuable practice he abstains from proposing any specific draft guideline on the reservations dialogue. He simply recalls that

³² Id., paras. 39-53. This second aspect of the reservations dialogue outside of the Vienna Convention is not discussed further because as stated previously (fn. 24) the limited space of the article does not allow for consideration of the role of treaty-monitoring bodies in the reservations dialogue.

³³ Id., para. 31.

³⁴ Id.

some previously adopted draft guidelines recommending states to adopt certain practices with regard to reservations and objections are sufficient indicators of the ILC's support of the reservations dialogue.³⁵ Alain Pellet also formulates draft recommendations or conclusions on the reservations dialogue which use the language different from the language used in the main text of the draft guidelines. In the Guide to Practice these conclusions do not form part of the Guide itself but are included as an annex. Therefore, the impression is created that despite ILC's "welcoming the efforts (...) to encourage such a dialogue"³⁶ the dialogue instead of moving into the core of the reservations regime is pushed into its periphery.

3.2.2. 'Outside viewing'

When taking a closer look at the state practice with regard to reservations, a broader view of the practices included under the heading of the 'reservations dialogue' is emerging. In order to demonstrate these broader implications of state practice, I will draw on some examples from the practice developed within the Convention on the Elimination of All Forms of Discrimination against Women.³⁷

³⁵ Thus he points out the draft guidelines 2.1.9 (became 2.1.2) encouraging States to indicate reasons for their reservations (para. 58), the draft guideline 2.6.10 (became 2.6.9) encouraging states to do the same with regard to their objections (para. 59); the draft guideline 4.5.3 (became 4.5.2, paragraph 2) encouraging states to formulate objections to invalid reservations (para. 60), and finally the draft guideline 2.5.3 encouraging periodic review of reservations with a view of withdrawing them either partially or totally (para. 61).

³⁶ Guide to Practice, Annex, last paragraph of the preamble.

³⁷ The United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS, vol 1249, p. 13, hereinafter the CEDAW. All reservations, objections and other reactions to reservations discussed below are available at the corresponding page of the United Nations Treaty Collection web-site:

http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited 15 Jan.

The most important observation in this regard is the fact that states express their views on reservations and clarify some aspects of the reservations regime without really objecting to reservations. This is a very peculiar stance taking into account the often expressed contention that the twelve-month period is insufficient for many states for formulating objections. What happens in the series of examples presented below is that states react within the twelve-month period but they find it more important to express their views on the reservations and uncertainties of the reservations regime than to express a formal objection.

When faced with a reservation states often are puzzled whether this reservation is compatible with the object and purpose of the treaty. The Vienna Convention regime also left unresolved the issue of consequences of incompatible reservations.³⁸ Therefore, the states have been uncertain about the legal effects of their objections to reservations which they deemed incompatible with the object and purpose of a particular treaty. Therefore when reacting to reservations states used the objections made as an opportunity to clarify the nature of their original reservation and the legal consequences of this reservation should it be considered incompatible with the object and purpose of the treaty.

Thus, Denmark made the following statement with regard to the Libyan initial reservation. This statement was included by the depositary in the text of objections:

The Government of Denmark has taken note of the reservation made by the Libyan Arab Jamahiriya when acceding [to the said Convention]. In the view of

2013). The latest official printed version dates 2009: Multilateral Treaties Deposited With the Secretary-General, ST/LEG/SER.E/26 (1 April 2009), hereinafter: Multilateral Treaties.

³⁸ For discussions on this issue see references in fn. 21 above.

the Government of Denmark this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.³⁹

However, this statement does not constitute a formal objection but rather an expression of state's opinion about the nature of the reservation. Other reactions of states to reservations would also contain explanations about why a particular state regards a specific reservation as potentially incompatible with the object and purpose of the treaty without however making a final authoritative statement. They would rather suggest that the reservation "creates doubts" as to the commitment of the reserving state.⁴⁰

Some objecting states would invite the reserving state to either provide additional information or proof through subsequent practice that the reservation is not incompatible with the object and purpose of the treaty.⁴¹

As far as uncertain consequences of incompatible reservations are concerned, many states choose to express their opinion on this issue in their reactions to reservations (be they formal objections or other types of statements). Thus, many states emphasized that the

³⁹ Multilateral Treaties, p. 309.

⁴⁰ See objections of Norway to the reservations by the Maldives, Kuwait and Pakistan (For some reason objections of Norway are not listed in the latest 2009 edition of Multilateral Treaties, therefore for an official reference see the 2006 edition ST/LEG/SER.E/25 (31 Dec. 2006), p. 278) and Austria's objection to the reservation of Pakistan (Multilateral Treaties, p. 306).

⁴¹ Austria's objection to the reservation by Pakistan (Multilateral Treaties, p. 306).

particular reservation deemed to be incompatible “cannot alter or modify in any respect the obligations arising from the Convention for any State Party thereto.”⁴²

Another interesting group of reactions to reservations is constituted by objections and other statements which clarify one or another aspect of the relationship between the reservations regime and human rights treaty obligations. Thus, several states included statements indicating that the reserving state is already a party to human rights conventions protecting rights similar to those, it attempts to reserve. Moreover they also stress that these rights are also protected in virtue of customary law. Therefore, the reserving state is not entitled to make the reservation.⁴³

In order to understand this type of statements the Vienna Convention regime on its own is insufficient. The Vienna Convention regime was designed to bring into the international treaty law the balance between the universality of participation and integrity of a treaty by preserving at the same time the fundamental principle that states cannot be bound

⁴² See statements made by Austria with regard to the reservation of the Maldives (Multilateral Treaties, p. 305), Finland with regard to reservations of Bahrain, Kuwait, Malaysia, Mauritania, Niger, Pakistan, Saudi Arabia and Syria (Multilateral Treaties, p. 312-314), Norway with regard to reservations of Niger, Mauritania, Saudi Arabia, Portugal with regard to reservations of the Maldives (Multilateral Treaties, p. 326-327) and Sweden with regard to reservations of Bahrain, Mauritania, Saudi Arabia and Syria (Multilateral Treaties, p. 331-333).

⁴³ See statements made by Mexico with regard to reservations of Bangladesh, Egypt, Iraq and Libya (Multilateral Treaties, p. 322), Sweden with regard to reservations of Bahrain, Bangladesh, Tunisia, Egypt, Iraq, Libiya, Jordan, the Maldives, Kuwait and Syria (Multilateral Treaties, p. 331-332) and Denmark with regard to the reservation of Syria (Multilateral Treaties, p. 310).

without their consent.⁴⁴ The drafters of the Vienna Convention could not have imagined that states in reacting to reservations would express their opinions on the reservations regime itself or discuss the nature of the reservation with the reserving state. In attempting to subsume these statements under the Vienna Convention regime the Special Rapporteur missed the opportunity to favour a more innovative and far-reaching development.

Before analyzing further the implications of such statements beyond the Vienna Convention regime, it is important to recall two other practices mentioned by the Special Rapporteur but not analysed sufficiently.

Firstly, many states reacted to reservations after the expiration of the twelve-month period. These reactions can be divided into two groups. Firstly, some of these reactions can be regarded as motivated by the desire of states to catch up the missed time because they were not able to object within the prescribed twelve-month time-limit.⁴⁵ This type of late reactions is less significant for the purposes of present analysis but demonstrates that insufficiency of the twelve-month time-limit rule represents a real problem for some

⁴⁴ See e.g. Second report of Alain Pellet, UN Doc. A/CN.4/477/Add.1, p. 16-18, paras. 90-98. Similar view was also expressed by the International Court of Justice already in 1951: Reservations to the Convention on Genocide, Advisory Opinion: ICJ Reports 1951, p. 24-26 in particular.

⁴⁵ This type of reactions will contain such words as 'objection', 'object' etc. See for example the French communication sent in response to the reservation of Niger where the French government even attempted to persuade the depositary that the time-limit did not yet elapse (Multilateral Treaties, note 47, p. 344). See also communications by Denmark to the reservation of Kuwait (Multilateral Treaties, note 30, p. 340-341), communication of Portugal to the reservation of Pakistan (Multilateral Treaties, note 49, p. 344). It should be noted that when the reaction of the state is submitted after the time-limit but does not have as its primary purpose to object to the reservation, but simply make a statement about the reservation, it is called by the depositary notification.

states. More significant is the second group of reactions where states reacting to reservations are not at all concerned with the twelve-month time-limit rule. The only real motivation for them was the desire to express their view on the reservations. As the previously mentioned reactions to reservations made within the prescribed time-limit but without containing a formal objection, these statements are even less subsumable under the reservations regime. In order to understand their real implications, we need to analyse them from a broader perspective.

At the following stage of the reservations dialogue some reserving states provide responses to the requests they received from reacting states. Although direct responses to concrete inquiries are relatively rare, they do exist and evidence the emergence of a new trend.⁴⁶ In other instances the responses are more indirect and take the form of partial withdrawals or reformulations of reservations. Within this category of responses, the ‘dialogical’ nature can be easily established in some cases, while in other cases there is little evidence as to the precise reasons for withdrawal or modification.

For example, the sequence of events which led to the first partial withdrawal of Malaysia’s initial reservation described above clearly indicates the role which objections played in the process as well as the fact that Malaysia acted ‘in response’ to these objections.

Finally, in some cases the dialogue continues and states react even to these modified or partially withdrawn reservations. These reactions can never fit into the framework of the

⁴⁶ See e.g. response of Syria to the objection of Germany provided on 6 May 1996 within the context of the Convention on the Rights of the Child, 20 November 1989, UNTS, vol. 1577, p. 3. The response is contained in the note 52 of the status of the Convention available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec.

reservations regime because it does not provide for a possibility to object to a partially withdrawn reservation.⁴⁷ However, they are fundamental for a deeper understanding of the reservations dialogue and its reading articulated below. Therefore, I will reproduce the full text of the two of these reactions.

In response to the proposed partial withdrawal and modification of the reservation by Malaysia the Government of The Netherlands declared:

The Government of the Kingdom of the Netherlands has examined the modification of the reservations made by Malaysia to article 5(a) and 16.1. (a) and paragraph 2 of the [Convention]. The Government of the Kingdom of the Netherlands acknowledges that Malaysia has specified these reservations, made at the time of its accession to the Convention. Nevertheless the Government of the Kingdom of the Netherlands wishes to declare that it assumes that Malaysia will ensure implementation of the rights enshrined in the above articles and will strive to bring its relevant national legislation into conformity with the obligations imposed by the Convention. This declaration shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Malaysia.⁴⁸

⁴⁷ This situation is maintained in the Guide to Practice: Rule 2.5.7 and 2.5.11. I emphasized the illogical nature of this solution, especially as far as states which objected to the initial reservations are concerned. States which objected to the initial reservation might legitimately still have some objections to the partially withdrawn reservation, but the Vienna Convention regime does not allow for expression of objections or any other reactions at this stage. See (reference omitted for peer review purposes).

⁴⁸ Multilateral Treaties, note 35, p. 342.

Very similar in nature was the reaction of Finland to the proposed modification of the reservation by Maldives:

(...) The Government of Finland welcomes with satisfaction that the Government of the Republic of Maldives has specified the reservations made at the time of its accession to the Convention. However, the reservations to Article 7 (a) and Article 16 still include elements which are objectionable. The Government of Finland therefore wishes to declare that it assumes that the Government of the Republic of Maldives will ensure the implementation of the rights recognised in the Convention and will do its utmost to bring its national legislation into compliance with obligations under the Convention with a view to withdrawing the reservation. This declaration does not preclude the entry into force of the Convention between the Maldives and Finland.⁴⁹

These two statements adopt a very cautious language. However, they also use the opportunity to remind reserving states about their expectations (and expectations of many other states) concerning the fulfilment of international obligations.

What clearly emerges from this brief description of the reservations dialogue as it took place within the context of the CEDAW is its broader scope going clearly beyond the reservations regime. In order to discover its full potential and significance it is necessary to read this exchange between states parties to a convention beyond the Vienna Convention regime. One such reading is proposed below.

4. The Reservations Dialogue through the Prism of Constitution-Making Processes

4.1. Introductory Remarks

⁴⁹ Multilateral Treaties, note 36, p. 342.

I propose to analyse the reservations dialogue as a constitution-making process in the field of constitutionally guaranteed rights. More precisely, the reservations dialogue is the way the states found to negotiate the content and extent of rights to be protected by the future international constitution. It is important to understand from the outset that this process and space created by this process needs to be as inclusive as possible in order to have a truly international constitution which then will be supported and respected by all members of the future international community.

I draw on the work of Jon Elster describing forces and mechanisms in the domestic constitution-making process.⁵⁰ This work allows for depicting of specificities of the constitution-making as opposed to other forms of law-making and legal negotiative practices. However, since direct parallels between domestic and international process are not always possible and desirable I will point out where necessary how his description of domestic constitution-making processes can be adapted to international law level. Secondly, I will demonstrate how the constitution making forces and mechanisms operate within the reservations dialogue. Some suggestions concerning the improved inclusiveness of this international constitution-making dialogue are formulated.

4.2. The Reservations Dialogue as a Constitution-Making Process

⁵⁰ Jon Elster, "Forces and Mechanisms in the Constitution-Making Process", 45 *Duke Law Journal* (1995) pp. 364-396 and Jon Elster, "Ways of Constitution-Making", in A. Hadenius (ed.) *Democracy's Victory and Crisis* (1997) pp. 123-142.

Constitution-making occurs according to Elster in waves and is often done in times of crisis.⁵¹ Looking back at the history of international law in general and human rights more specifically, we might interpret the adoption of the UN Charter in 1945 followed by the two Covenants in 1969⁵² as the previous two waves of international constitution-making. The present wave is more complex and less visible because it entails a difficult negotiation of values within constraints imposed by the Vienna Convention regime. Moreover, this stage of constitution-making can be described as spontaneous in contrast to the well-organized processes of the adoption of the UN Charter and the two Covenants.

The most important part of the constitution-making understanding relates to the inner dynamics of the process. Once we understand these dynamics, we will be able to propose more efficient ways of dealing with international constitution-making. This will also allow for a deeper and more detailed understanding of the reservations dialogue.

The first aspect of constitution-making dynamics as presented by Elster deals with constraints. He distinguishes upstream constraints from the downstream constraints.⁵³

Upstream constraints are imposed on those who participate in the deliberation of the future constitution and limit either the procedures for the deliberation or the substance of the future constitution. With regard to human rights treaties and reservations, the reservations regime could be regarded as a procedural upstream constraint. Pre-existing

⁵¹ Elster, *Forces and Mechanisms*, pp. 368, 370-373.

⁵² Covenant on Economic, Social and Cultural Rights, 16 December, 1966, UNTS, vol. 993, p. 3 and Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171.

⁵³ Elster, *Forces and Mechanisms*, above fn. 50, p. 373.

jus cogens norms and even customary law might be regarded as substantive constraints.⁵⁴

In this context previously mentioned reactions of states clarifying the relationship between the possibility of making reservations and the pre-existing human rights obligations of states can be regarded as a reminder of substantive constraints.

Downstream constraints relate to the fact that those who participate in deliberations often know that the final document has to be endorsed by (an)other body(s). In terms of international human rights the necessity to reach a consensus between all participating states can be read as such a downstream constraint. The requirement of consensus arises from the fact that the future constitution will not be a treaty and will have a qualitatively different nature. It is difficult to say today what precise form the future international constitution might take. However, it is important to be aware that it cannot rely exclusively on the traditional sources of international law and should emerge as a qualitatively new phenomenon.

In this context it is interesting to note that the reservations regime as a procedural upstream constraint and the requirement of consensus as a downstream constraint can function as contradictory and irreconcilable processes if we adopt a very formalistic reading of the reservations regime and the reservations dialogue. However, in practice the reservations dialogue viewed by states as a broader and more interactive process than the formalistic reading of the Vienna Convention regime allows, leads to a merge of the two types of constraints into one single regulative idea. For example, if only one acceptance

⁵⁴ See for example, the statement made by the Human Rights Committee that states cannot make reservations to articles codifying *jus cogens* norms or customary international law: General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para. 8.

of a reservation suffices to give it effect, why would a reserving state care about a single reaction similar to an objection which raises concerns about the nature of its reservation? The practice developed within the context of the CEDAW clearly demonstrates that states are concerned with reaching consensus going beyond the formal application of the reservations regime rules. Therefore, the reservations dialogue goes beyond the traditional rules of a treaty regime.

As Elster notes himself, the distinction between upstream and downstream constraints is somewhat arbitrary.⁵⁵ Furthermore, he remarks that constitution-makers do not always respect instructions from their upstream creators.⁵⁶ The way the reservations dialogue was developed by states beyond the formalistic reservations regime of the Vienna Convention is the best illustration of this latter phenomenon. While states do not completely ignore the reservations regime, they are able to work beyond and around it. As a next step, Elster considers the role of desires and beliefs (motivations and motivational assumptions) in constitution-making.⁵⁷ This aspect of constitution-making brings together the interplay between different interests, passion and reason.

When discussing interests involved in constitution-making Elster distinguishes personal, group and institutional interests. It should be noted that at the level of international law and within the context of the reservation dialogue the individual state interests predominate. However, we could also observe that these individual state interests are linked to the state identifying itself with a particular group of, for example, Islamic or

⁵⁵ Elster, *Forces and Mechanisms*, above fn. 50, p. 374.

⁵⁶ *Id.*, p. 374-375.

⁵⁷ *Id.*, p. 376ff and Elster, *Ways*, above fn. 50, p. 131ff.

Western states. Therefore, while the reservations regime itself does not really allow for the expression of group interests, the cumulative effect of the behaviour of individual states can represent an expression of a group interest.

Thus, reservations entered by Muslim states and motivated by their desire to protect Islamic laws and practices represent a wide palette ranging from general reservations which exclude application of any provision of the CEDAW which might conflict with Islamic law⁵⁸ to very detailed reservations explaining the manner in which the application of a particular provision of the CEDAW might be affected.⁵⁹ Moreover, the analysis of the legislation of the states parties to the CEDAW which entered reservations based on Islam reveals many differences and even divergences between these states with regard to their interpretation of Islamic law and its consequences on the status of women.⁶⁰ Despite

⁵⁸ See for example reservations of Mauritania (Multilateral Treaties, p. 291) and Saudi Arabia (Multilateral Treaties, p. 298) which approve the CEDAW “in each and every one of its parts which are not contrary to the principles of the Islamic Sharia.”

⁵⁹ See for example the following initial reservation of Morocco to article 9, paragraph 2 (Multilateral Treaties, p. 292): “The Government of the Kingdom of Morocco makes a reservation with regard to this article in view of the fact that the Law of Moroccan Nationality permits a child to bear the nationality of its mother only in the cases where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child its right to a nationality. Further, a child born in Morocco of a Moroccan mother and a foreign father may acquire the nationality of its mother by declaring, within two years of reaching the age of majority, its desire to acquire that nationality, provided that, on making such declaration, its customary and regular residence is in Morocco.”

⁶⁰ For a detailed analysis see (reference omitted for peer review purposes). The most obvious example is the issue of polygamy. While in some states this is a permitted non-restrained practice as in Saudi Arabia, other States place many restrictions on this practice making it virtually impossible, while some states even prohibit polygamy based on their specific interpretation of Islamic law. This prohibition of polygamy in law based on interpretation of Islam exists in Tunisia. It was also confirmed in a ruling of Bangladeshi Supreme Court (*Jesmin Sultana v. Mohammad Elias*, 17 (1997)

all these differences and disagreements about the interpretation of Islamic law and its effects on the status of women, there is no objection or reaction of a Muslim state to a reservation entered by another Muslim state. This stance of non-objection or non-reaction to reservations of other Muslim states is an expression of the appearance of Muslim states as a group. The group interest of these states consists in the representation of values expressed in the Islamic tradition. In order to preserve the appearance of a cohesive group despite internal divergences they do not engage in critique and discussion of each other's representation and interpretation of Islamic values.

There are many reasons for such an attitude of Muslim states which go beyond the scope of the present article. However, the fact that the reservations regime does not allow for a representation of group interests except through individual views and opinions favours such an attitude.

There is another explanation to this pattern of the reservations dialogue and attitude of some Muslim majority states. This explanation follows from the Elster's analysis of passion and reason, but more importantly from his explanation of the way constitution-makers' preferences (based either on interest, on reason or on passion) come together to produce a collective decision.

One particular passion identified by Elster has a potentially strong explanatory force with regard to difficulties surrounding the discussion of some reservations. As Elster puts it:

There is one particular passion that has, somewhat surprisingly, played a considerable role in constitution-making. This is vanity or self-love, *amour-*

Bangladesh Legal Decisions, 4. The same view (the necessity to prohibit polygamy in order to comply with Islamic law) was expressed in Syria's initial report to the CEDAW (UN Doc. CEDAW/C/SYR/1) p. 88.

propre, which many moralists from La Rochefoucauld onwards have considered the most powerful human emotion.⁶¹

Thus a public discussion or debates, especially if it involves commitment, tend to encourage stubbornness because vanity might prevent states from changing their minds. Once a state adopted a particular stance, representing itself as a state protecting certain cultural, religious or other values, it is difficult to persuade this state to change its position based on the critique of its values except when a state's self-identification with particular values changes which is not a very common phenomenon.⁶² In the context of the reservations dialogue all discussion is public. Therefore, the aim of bringing about a change or a modification in the position of reserving states can only be successful if it attempts to constructively engage with the values a particular state attempts to protect through the reservation rather than criticising the values and the stance of the state. In this sense the formalities of the Vienna Convention reservation regime do not encourage constructive dialogue and negotiation but tend to produce more stubbornness. The flexible nature of the reservations dialogue as reflected in the state practice opens ways for such a constructive discussion which will not deter states from changing their positions. The danger in attempting to put the reservations dialogue back into the framework of the reservations regime is that opportunities for such an open and constructive public discussion will become almost inexistent. A very telling example in

⁶¹ Elster, *Forces and Mechanisms*, above fn. 50, p. 384. This issue is also discussed in Elster, *Ways*, above fn. 50, p. 131 ff.

⁶² This change in the self-identification of the state is not impossible. E.g. regime change and change in foreign policy orientations, in the importance of values for state's international relations.

this regard is the situation around Malaysia's attempted modification of its initial reservation.

When accessing to the CEDAW on 5 July 1995, Malaysia formulated the following reservation:

The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2(f), 5(a), 7(b), 9 and 16 of the aforesaid Convention.

In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.⁶³

This reservation attracted a few reactions and objections from other states parties.⁶⁴ These reactions emphasized among others the general and unspecified nature of the reservation which does not allow other states parties to understand the degree of Malaysia's commitment to the Convention. They also criticized a general and unqualified reference to national laws without any further information as well as reference to some central articles of the CEDAW. On 6 February 1998, relatively rapidly for the treaty-related context the government of Malaysia responded to these comments made by objecting

⁶³ Multilateral Treaties, pp. 290-291.

⁶⁴ Finland, Germany, Netherlands, Norway and Sweden formulated objections within 12 months (Multilateral Treaties, p. 312, 317 and 323). Denmark submitted a communication after the expiration of the twelve-month period (Multilateral Treaties, note 29, p. 341).

states and proposed to partially withdraw the reservation while providing a clarification for remaining reservations. Thus, the government declared that it withdraws its reservation in respect of article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h). It also provided explanations on its remaining reservations.⁶⁵ The depositary of the CEDAW for some reasons did not regard this act of the Malaysian government as a partial withdrawal of reservations but as a modification comparable to a late formulation of a reservation. One of the explanations for this confusion can be the details provided by Malaysia on some of the pre-existing reservations. This wrong qualification of the Malaysian proposal led the depositary to ask other states whether they have any objections to the deposit of the Malaysian modified reservation or to the procedure envisaged by the depositary and to communicate any objections by 20 July 1998. The depositary also specified that Malaysia's intended withdrawal will be effective only if no objection is received by this date.⁶⁶ On 20 July 1998, France submitted the following reaction:

France considers that the reservation made by Malaysia, as expressed in the partial withdrawal and modifications made by Malaysia on 6 February 1998, is incompatible with the object and purpose of the Convention. France therefore

⁶⁵ With respect to article 5 (a) of the Convention, the Government of Malaysia declares that the provision is subject to the *Syariah* law on the division of inherited property. With respect to article 7 (b) of the Convention, the Government of Malaysia declares that the application of said article 7 (b) shall not affect appointment to certain public offices like the Mufti *Syariah* Court Judges, and the Imam which is in accordance with the provisions of the Islamic *Shariah* law. With respect to article 9, paragraph 2 of the Convention, the Government of Malaysia declares that its reservation will be reviewed if the Government amends the relevant law. With respect to article 16.1 (a) and paragraph 2, the Government of Malaysia declares that under the *Syariah* law and the laws of Malaysia the age limit for marriage for women is sixteen and men is eighteen. *Multilateral Treaties*, note 35, p. 341.

⁶⁶ *Id.*

objects to the [reservation]. This objection shall not otherwise affect the entry into force of the Convention between France and Malaysia. Consequently, the modification in question is not accepted, the Government of France having objected thereto.⁶⁷

As a consequence, confusion arose. For quite a long period of time, neither the depositary, no Malaysia nor the CEDAW Committee could determine what was the situation with regard to Malaysia's reservations.⁶⁸ The most adverse impact of this situation was the virtual retreat of Malaysia from the CEDAW for about 8 years. Malaysia resumed its active participation in the CEDAW by submitting its initial report only in 2006, once consensus was reached and reflected in the UN documents that the withdrawal did take place.

The reaction of France should be compared to the reaction of the Netherlands to the very same proposed withdrawal by Malaysia. The Netherlands has a very consistent and

⁶⁷ Multilateral Treaties, note 35, p. 342. It is interesting to note that the last sentence of the French statement does not appear in the text of the official printed collection of multilateral treaties after it was decided to accept Malaysia's partial withdrawal. However, this last sentence appears in the version published on the web-site (see above fn. 37).

⁶⁸ The confusion can be illustrated by the following. In the CEDAW official document Declarations, reservations, objections and notifications of withdrawal of reservations relating to the CEDAW its Annex I contains a comprehensive table of States parties that maintain their reservations. This table has among others two separate columns: one for reservations made and another for reservations withdrawn. This document in its 2000 edition (CEDAW/SP/2000/2) contains no information on reservations withdrawn by Malaysia. The corresponding space in the column "withdrawn" is empty (see p. 93). In the 2002 edition (CEDAW/SP/2002/2) the situation is different. All the reservations intended by Malaysia for withdrawal are indicated as withdrawn (see p. 77). In 2004 (CEDAW/SP/2004/2), surprisingly, only one reservation appears as withdrawn, namely that to article 2(f) (see p. 28). In document prepared in 2006 (CEDAW/SP/2006/2) all the reservations intended by Malaysia for withdrawal are again indicated as withdrawn (see p. 51).

regular record of objections to reservations based on Islam. It objected to almost all reservations invoking Islam contrary to France which did so only on a few occasions. Despite this regularity and respect for twelve-month period, when The Netherlands reacted to the proposed withdrawal of Malaysia, they submitted their reaction on 21 July 1998, one day after the expiry of the time-limit prescribed by the depositary.⁶⁹ It is hardly possible that this is just a coincidence. Contrary to France which has very limited experience in objecting to the reservations based on Islam and in conducting reservations dialogue, the government of The Netherlands is very skilful in this field. The reaction welcomed the government's efforts and expressed the belief in the respect by Malaysia of the reserved articles.⁷⁰

While the reaction of France perfectly fits into the Vienna Convention regime and ensures that the Vienna Convention regime's consequences are produced, it does nothing but impede positive developments in the field of human rights. The reaction of The Netherlands is less straightforward. It is so careful that it does not even qualify the remaining reservations as incompatible with the object and purpose of the CEDAW, although this idea is implied in its declaration that "it assumes that Malaysia will ensure implementation of the rights enshrined in the above articles ...". However, it engages in a dialogical conversation, provides space for the expression of views by the reserving state and is respectful of the culture and efforts of this reserving state. The very similar open, respectful and dialogical attitude of the majority of states participating in the reservations dialogue allowed for withdrawal of many problematic reservations and thus improvement

⁶⁹ Multilateral Treaties, note 35, p. 342.

⁷⁰ The text of the reaction is reproduced above fn.48 and accompanying text.

of the situation of women. The important aspect of this process for our purposes is that this withdrawal and thus the change in the attitude of reserving states occur from inside their own culture and religion. As a result they accept the newly negotiated rights as reflecting also their own values and thus adhering to them sincerely. This fact is very important for the success of the future human rights as international constitutional rights. In a public discussion, if a participant makes an apparent effort to improve his or her compliance with the mainstream vision, responses similar to that made by France will only offend this participant. The reaction of the offended participant will be stubbornness and refusal to continue negotiation as it happened with Malaysia. The Netherland's reaction produces the contrary effect. Being done in a public discussion it even pushes the participant to continue its efforts by presenting him as member of the human rights complying group.

It should be noted that within the framework of the reservations regime and reservations dialogue it is not desirable to resort to secrecy of negotiations just in order to overcome vanity. According to Elster in the context of constitution-making "secrecy may also tend to move the proceedings away from discussions and towards threat-based bargaining."⁷¹ This danger is the more important within the context of international law. The vanity factor helps to understand the nature of processes taking place within the reservations dialogue and adopt the most constructive attitudes suitable within this public framework. However, taking into account the particular nature of international negotiations, it does not seem productive to resort even to a degree of secrecy in order to overcome vanity as

⁷¹ Elster, *Forces and Mechanisms*, above fn. 50, p. 384.

suggested by Elster.⁷² However, the participating states should remember that “one should never place an agent in a situation in which his vanity might lead him to act against the public interest.”⁷³

5. Concluding remarks

The attempt to analyse the reservations dialogue through the lens of the constitution-making process demonstrates many similarities between these two mechanisms.

Reservation practice developed by states goes clearly beyond the traditional objectives of the reservations regime. Objecting states are not simply concerned with preserving their consent and excluding relationships with the reserving states. For many reserving states reservation is also not so much a means to exclude or modify application of particular provisions of a treaty, but a way to negotiate and accommodate its values and culture within the human rights framework.

Most importantly the constitution-making framework is very helpful for a deeper understanding of the dynamics of the reservations dialogue. It also helps to conceive this dialogue in a more constructive manner which will eventually lead to a creation of a better understanding between representatives of different states and cultures.

Finally it is important to emphasize that constitution-making within states occurs in waves and seen in a historical perspective never ends, especially if we take into account the dynamic and evolutionary interpretation which forms today an integral part of constitutional interpretation. Similarly, constitution-making at the level of international

⁷² He makes this suggestion as normative orientation for national constitution-making processes. Elster, Ways, above fn. 50, p. 138.

⁷³ Elster, Ways, above fn. 50, p. 137.

law and the reservations dialogue is a continuous process which should allow for change and modification and not freeze the state and our understanding of law at one particular moment in time. Currently, the inflexibility of the reservations regime is one of the major impediments towards the continuity of the constitution-making processes at the level of international law. While some informal mechanisms have been established and created by states and treaty-monitoring bodies, the law and formal rules of law should also respond to this need for flexibility and not create unnecessary obstacles.

The most important modifications to the current reservations regime would include the following: possibility of reaction to a reservation beyond the twelve-month time-limit rule, especially if the basis for this reaction is the suspicion that the reservation is incompatible with the object and purpose of the treaty and the possibility to react to modified reservations for all states, but especially for objecting states.

While there is a need for more flexibility in the reservations regime, this does not mean that reservations dialogue would best develop if left unregulated. Similarly to the constitution-making processes the reservations dialogue should be conducted within a certain legal framework. Simply, this legal framework should not include unnecessary impediments to the efficient negotiation, but attempt to favour good negotiative practices.