As international treaty law is made on the basis of the lowest common denominator of variant views of international community of States it is expected that it be implemented by State parties by way of its application in their domestic affairs. However there is no uniform method of domestic implementation followed by all States. Constitutions of various countries contain provisions providing different methods for the domestic application of international treaties. These methods are: 1) Treaties are part of internal law and superior to internal laws 2) Treaties are part of internal law and equal to internal laws 3) Treaties are part of internal law and equal to federal laws but superior to State or provincial laws 4) Treaties are not part of internal law unless expressly incorporated by legislative action. There are two major theories, which theoretically seek to explain two important methods of application of international law in domestic affairs of the states. These are monism and dualism. The former attributes primacy to international law both

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at the international as well as national levels. Under this theory the municipal law is relegated to a subordinate position as international law regulates even the domestic affairs of a State. Whereas the latter conceives the two streams to be two different systems and international law has primacy at the international level and municipal law has primacy at the domestic level. It further requires that the international law to be implementable at the national level needs its adoption into municipal law. Thus international law regulates the relations between States and municipal law does so within a State. “In case of a conflict between international law and municipal law the dualist would assume that a municipal court would apply municipal law.”

Whatever the method that is followed by the states, they will have to implement those international obligations to which they have consented. Thus, as we observed earlier, the reservations facilitate the states to avoid those obligations with which they have difficulties in implementation.

As far as India’s practice is concerned, it follows the dualist method of domestic application of international law and also adopts the practice of making reservations in respect of international treaties. This practice of making reservations is followed in the case of human rights treaties also. India is a party to some of the important human rights treaties. Though it was not a signatory to the covenants, in 1979 it acceded to both the

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5 Brownlie, Ibid., p.32.
covenants and became a party to them. Apart from the two Covenants the other important human rights treaties India has either ratified or acceded to are, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, the Convention on the Elimination of All forms of Racial Desrimination, 1966, International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, and the Convention on the Rights of the Child 1989. India made reservations or declarations to some provisions of all the above mentioned treaties while ratifying or acceding to them.

6.1. India’s Policy on Reservations

India, like many other countries, does not have a specific policy of its own with regard to the making of reservations to treaties in general or to the human rights treaties in particular. It also does not seem to make any clear distinction between reservations and declarations. There is also no instance of India being a party to an international dispute arising out of the issue of its reservations to treaties, which could have compelled it to articulate its views. However, there was an occasion when a declaration made by India at the time of becoming a party to a treaty led to a discussion at the international level. This was with regard to the Convention establishing the Intergovernmental Maritime
Consultative Organisation (I.M.C.O.),\textsuperscript{12} signed on March 6, 1948. India while depositing its instrument of ratification on 6 January 1959 declared that it accepted the convention 'subject to the following conditions.'\textsuperscript{13}

The condition read as follows:

In accepting the Convention on the Inter-Governmental Maritime Consultative Organisation, the Government of India declare that any measures which it adopts or may have adopted for giving encouragement and assistance to its national shipping and shipping industries (such, for instance, as loan-financing of national shipping companies at reasonable or even consessional rates of interest, or the allocation of Government-owned or Government-controlled cargoes to national ships or the reservation of the coastal trade for national shipping) and such other matters as the Government of India may adopt, the sole object of which is to promote the development of its own national shipping, are consistent with the purposes of the Inter-Governmental Maritime consultative Organisation as defined in article 1(b) of the Convention. Accordingly, any recommendation relating to this subject that may be adopted by the Organisation will be subject to re-examination by the Government of India. The Government of India further expressly state that its acceptance of the above-mentioned Convention neither has nor shall have the effect of altering or modifying in any way the law on the subject in force in the territories of the Republic of India.\textsuperscript{14}

\textsuperscript{12} As a result of the entry into force of the amendments adopted by the IMCO Assembly by its resolutions A.358 (IX) of 14 November 1975 and A.371 (X) of 9 November 1977, the name of the Intergovernmental Maritime consultative Organization (IMCO) has been changed to "International Maritime Organization (IMO)" and the title of the Convention modified accordingly.


\textsuperscript{14} \textit{Multilateral Treaties deposited with the Secretary-General}, status as at 31 December 2001, vol. II, p.5.
This instrument was deposited with the Secretary-General of the United Nations. Keeping in view that the nature of the 'condition' made by India seemed to be like a reservation, the Secretary-General of the United Nations suggested that the matter might be put before the Assembly of IMCO. The IMCO Assembly asked the Secretary-General to circulate the Indian declaration to all the members of IMCO and it was also decided that till the views of the members were received India should be allowed to participate in the work of the IMCO without voting rights. Two members of the IMCO, namely France and Federal Republic of Germany, made objections to the Indian acceptance. India contended that the position taken by the Secretary-General that India would be considered as a party only if he did not receive any objection from any State party. Describing the Secretary-General's view as improper India brought the issue of reservations to multilateral treaties before the Fourteenth Session of the General Assembly in 1959. The main contention of India was that as a depository for IMCO Convention, the UN Secretary-General had arrived at a conclusion on his own about the nature of India's declaration and that the procedure followed by him was similar to application of the 'unanimity rule' relating to the effect of reservations. India also contended that the Secretary-General, instead of forming his own conclusion, should have left it to each State party to draw its own inference of legal consequences of reservations and objections thereto. The Secretariat held that circulation of India's instrument was made in conformity with the well-established depositary practice and in pursuance of the request made by the IMCO Assembly. It further held that its action in no

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15 France objected on the ground that India was asserting a multilateral right to interpretation and Germany objected on the ground that India might take measures in the future that would be contrary to the Convention.
way implied that India's statement was a reservation and also did not amount to application of unanimity rule as the legal appraisal of the issue was left to the IMCO.

The Indian representative explained before the Sixth Committee of the General Assembly that the Government of India made a mere declaration of policy and that the Indian declaration did not amount to a reservation. The Sixth Committee discussed the issues of varied nature, which included the relationship of IMCO with the United Nations, the action of the Secretary-General requesting the views of the States Parties to the IMCO Convention, and the subject of reservations in general. Having discussed elaborately the General Assembly adopted resolution 1452A(XIV) on 7 December 1959 referring to the statement made by the representative of India before the Sixth Committee explaining that the Indian declaration was a mere declaration of policy and it was not intended to be a reservation, expressed the hope "that, in the light of the above-mentioned statement of India an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India." Accordingly the IMCO Council adopted a resolution on 1 March 1960 in which it took note of the statement of the representative of India which was referred to in the above General Assembly resolution clarifying that the declaration of India had no legal effect with regard to the interpretation of the Convention and held that it "considers India to be a member of the Organization."

Though the Indian representative’s statement cleared the way for India’s entry into the IMCO, the whole issue left some doubts about the practice of reservations itself. The opinion expressed by the Legal Counsel to the United Nations, Stavropoulos in this regard is relevant here. He said:
In the history of United Nations depository practice there was no precedent for the Indian representative's contention that the Government stating a condition had a unilateral right to determine whether or not that condition constituted a reservation.\textsuperscript{16}

This observation seems to be of significance when India's position with regard to its declaration on the IMCO Convention is analysed in the framework of the reservations regime of the Vienna Convention on the Law of Treaties 1969. Though this entire issue had arisen prior to the making of the Vienna Convention the method of self-judgement of its declaration by India also contradicts with the finding of the International Court of Justice in the \textit{Genocide Convention} case.\textsuperscript{17} As observed by the Legal Counsel to the United Nations it was an unprecedented position that was adopted in this incident and was accepted by the international community. Neither the Vienna Convention reservations regime nor the practice of States provides an instance wherein a state attaching a declaration is asked to make statement of self-judgement about the nature of its declaration. In the circumstances of the present case India was allowed to become a party to the IMCO Convention based on its assurance that its statement was a mere declaration of policy and not a reservation. But what could be the legal consequences if such declaration, at a subsequent stage, is interpreted in such way to purport to modify or exclude the legal effect of the provisions of the Convention? It is argued that in such circumstances the doctrine of estoppel will come into play whereby the state making the statement that it attached a mere declaration and not a reservation would be estopped from taking a position contrary to its previous one.\textsuperscript{18}

\begin{thebibliography}{18}
\bibitem{16} Cited by McRae, n. 13, p.164.
\bibitem{17} \textit{ICJ Reports}, 1951, pp. 15-69.
\bibitem{18} McRae, n.13, p.165.
\end{thebibliography}
As aptly pointed out by France the text of the Indian declaration puts limitations on the obligations and "on its own, and without reference to the subsequent statement by India that the declaration was one of policy only, the declaration attached to India’s instrument of acceptance of the IMCO Convention must be regarded as a reservation."\textsuperscript{19}

Thus despite the fact that the text of the declaration results in the modification or declaration of legal effects of the Convention, it is the later statement made by India that decided the meaning and interpretation of the Indian declaration.

As observed earlier the Vienna Convention\textsuperscript{20} does not make any clear distinction between reservations and declarations. It is the effect of the statement whether named as reservation or a declaration that determines the character of that statement. Irrespective of the name given to it, its potential to modify or exclude the legal effect of the Convention provisions would characterise the nature of the statement of a state.

Thus, in the present case the clarification provided by India that its declaration was a mere declaration of policy and not a reservation did not clarify its general position with regard to the distinction between reservations and other statements however named.

6.2. India’s Practice Regarding Human Rights Treaties

As observed earlier India has made reservations to most of the important human rights treaties, which it has either ratified or acceded to. Though the significance and gravity of each of these reservations may vary, it seems that a state makes a reservation to a human rights treaty mainly as an abundant caution to avoid future allegations of human rights violations, the protection of which has become an international obligation with

\textsuperscript{19} McRae, n.13, p.164.

\textsuperscript{20} Article 2 (1)(d) of the Vienna convention defines reservations.
undeclared moral sanctions. India made reservations of a similar nature to the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948 and to the International Convention on the Elimination of all forms of Racial Discrimination adopted by the General Assembly of the United Nations in resolution 2106(XX) of 21 December 1965. The statement of reservation/declaration attached to its instrument of ratification by India in respect of the Genocide Convention, 1948 reads as follows:

With reference to Article IX of the Convention, the Government of India declares that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of justice, the consent of all the parties to the dispute is required in each case.\(^2\)

Article IX\(^2\) of the Genocide Convention deals with settlement of disputes arising out of its application. As of 31 December 1997, apart from India fifteen other states\(^3\) made reservations of similar nature to Article IX of the Genocide Convention. Some of them even categorically held that they are not bound by Article IX.\(^4\) The text of this reservation is general in nature to the extent that it requires the consent of all the parties to a dispute. The ultimate benefit that India wanted to get out of this reservation seems to be that it wanted to avoid the risk of being subjected to an international judicial scrutiny.

\(^2\) Multilateral Treaties, n. 8, p. 139.

\(^2\) Article IX reads:

Disputes between the contracting parties relating to the interpretation, application or fulfillment of the present convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

\(^3\) These states are: Albania, Algeria, Argentina, Bahrain, China, Malaysia, Morocco, Philippines, Rwanda, Singapore, Spain, United states of America, Venezuela, Vietnam and Yemen.

\(^4\) These countries are China, Rwanda, and Spain.
of its actions on the domestic plane. The position taken by India by way of making this reservation appears to be in conformity with its declaration accepting the compulsory jurisdiction of the International Court of Justice under Article 36(2) of the Statute of the Court.25 Paragraph 7 of this declaration makes a similar assertion with regard to the compulsory jurisdiction of the court. In its declaration India said that it accepts the compulsory jurisdiction of the International Court of Justice over all disputes other than:

(7) Disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the court or Government of India specially agree to Jurisdiction.26

In this declaration the Government of India expressed its intention of not accepting the jurisdiction of the court with regard to the disputes relating to all the multilateral treaties without its special consent in each case. Therefore, the views expressed in the reservation to the Genocide Convention are, in essence, in accordance with the Indian declaration accepting the compulsory jurisdiction of the International Court of Justice. But the Indian reservation and the reservation of similar nature of other countries did not go unnoticed or unobjected by other parties to the Genocide Convention. These reservations were categorically opposed by Netherlands and the United Kingdom of Great Britain and Northern Ireland. Netherlands underscored in its objection that reservations to Article IX were against the object and purpose of the Genocide Convention. The Government of the Kingdom of Netherlands therefore held that it did not deem any state, which has made or which would make such a reservation to

25 This declaration was made by India on 18 September 1974.
26 *Multilateral Treaties*, n. 8, p. 21.
be a party to the convention. In view of the Netherlands, the jurisdiction of the International Court of Justice for the settlement of disputes constituted an object and purpose so far as the Genocide Convention was concerned. Thus following the ruling of the International Court of Justice in the Advisory opinion on the Reservations to the Genocide Convention and also Article 20(4)(b) of the Vienna Convention on the Law of Treaties the Netherlands Government declined to accept the reservation.

The Government of the United Kingdom also objected to the reservations of states made to Article IX. Though its objection did not say that reservations to Article IX were incompatible with the object and purpose of the Genocide Convention the text of its objection did mean that states were not entitled to make such reservations. It says, "this is not the kind of reservation which intending parties to the Convention have the right to make." Though this objection did not expressly talk about the object and purpose of the convention, it is more categorical than the Netherlands objection as it emphasised is that the states could not make reservations of such nature. This position was closer to the view of impermissibility of reservations that were incompatible with the object and purpose of a convention. But the United Kingdom's objection was silent about the status of its treaty relations with those states who had made the objectionable reservations. It is difficult to deduce the conclusion from its silence that it intended not to have any treaty relations with States making such objectionable reservations so far as the Genocide Convention was concerned. Moreover this attitude of the United Kingdom was in accordance with Article 20(4)(b) which says that the treaty relations do exist between the

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27. Ibid., p.143.
objecting and reserving states unless a contrary intention has been expressed by the
objecting state.

In the case of the Netherlands, however, while making its objections, it clearly
stated that it did not have any treaty relations with the states, which have made
reservations to Article IX. Mexico took a different position while objecting to the US
reservation. It held that the reservation made by the United States of America to Article
IX of the Genocide Convention was invalid as it was not in keeping with the object and
purpose of the convention. But Mexico clarified that its “objection to the reservation in
question should not be interpreted as preventing the entry into force of the 1948
Convention between the (Mexican) Government and the United States Government.”

Large number of states has found Article IX to be of greater importance as many
of them made reservations to this provision. Similarly same amount of significance has
been bestowed on this article by the objecting states as they held that the reservations to
this provision amount to be incompatible with the object and purpose of the Genocide
Convention. Certainly this provision is of profound significance as it not only talks about
the settlement of disputes with regard to the interpretation and application of treaty
provisions but it also asks the parties to accept the jurisdiction of the International Court
of Justice with regard to settlement of disputes concerning the responsibility of a state for
genocide or for the related acts enumerated in Article III. A provision dealing with the
task of judicial determination of responsibility for an act the prevention and punishment

30 Ibid., p. 143.
31 Some of the states that have made reservations to Article IX at the time of ratification or accession
have withdrawn such reservations. In communications received by the Secretary-General on 8
March, 19 and 20 April 1989, respectively, the Government of the Union of Soviet Socialist
Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic
notified that they had decided to withdraw the reservation relating to Article IX.
of which is the sole purpose of the convention, would undoubtedly constitute the core of the said convention. Moreover this convention is of such nature wherein "one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties." This convention is of universal significance with broad goals for it was "adopted for a purely humanitarian and civilizing purpose."

The opinion of the Human Rights Committee expressed in General Comment No. 24(52) relating to reservations to human rights is relevant here. For the purpose of present context similar conclusions may be drawn from the views of the Committee with regard to its competence to interpret the provisions of the International Covenant on Civil and Political Rights. The Committee is of the view that a reservation made to reject its competence to interpret the requirements of any provisions would also be incompatible with the object and purpose of the convention. By drawing an analogy it may be held that the reservations made by the states including India to Article IX of the Genocide Convention, which deals with the competence of the International Court of Justice to adjudicate on disputes relating to interpretation or application of the convention and the determination of responsibility for genocide and related acts, are equally contrary to the object and purpose of the convention.

32 ICJ Reports 1951, n.17, p.23.
33 Ibid., p.23.
34 General Comment No. 24 (52) of 2 November 1994 on issues relating to reservations made upon ratification or accession to the covenant or the Optional Protocols thereto in relation to declarations under Article 41 of the Covenant, adopted by the Committee at its 1382nd meeting (fifty second session). Doc. CCPR/C/21/Rev.1/Add.6. International Legal Materials, vol.34, no.3 (1995), pp. 839-46.
Though it was the dispute about the reservations to the Genocide Convention which prompted the ICJ to ponder over the question and formulate the test of compatibility with the object and purpose of the Convention, the formulation of which had marked a major turn in the debate, on the issue the court did not specify as to what exactly constituted the object and purpose of the Genocide Convention. The Court succeeded in formulating an objective criterion for the assessment of validity of reservations, but the identification of what constituted the objective criterion was left to the subjective determination of individual states. Therefore in the present case there exist no treaty relations between the Netherlands and India so far as the Genocide convention is concerned.

6.2.1. International Convention on the Elimination of All Forms of Racial Discrimination

India signed the International Convention on the Elimination of All Forms of Racial Discrimination on 2 March 1967 and ratified the same on 3 December 1968. While submitting its instrument of ratification to the Secretary-General of the United Nations India attached a reservation with regard to Article 22 of the convention. This reservation is about the settlement of disputes by the International Court of Justice. But before going into the reservation made by India it may not be irrelevant to mention about the modus operandi of reservations in respect of convention on the Elimination of All Forms of Racial Discrimination. Generally reservations to multilateral treaties are

35 Adopted and opened for signature and ratification by General Assembly resolution 2106 A (XX) of 21 December 1965 and entered into force on 4 January 1969.

36 Article 22 reads: Any dispute between two or more states parties with respect to the interpretation or application of this convention, which is not settled by negotiation or by the procedures expressly provided for in this convention, shall at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.
governed by the reservations regime of the Vienna Convention on the Law of Treaties 1969, which provides a procedure for governing the practice of reservations. However, the Convention on Racial Discrimination includes a provision on reservations, which requires, apart from the compatibility of a reservation with the object and purpose of the convention, acceptance of certain number of States parties to the convention. Laying down this rule Article 20, provides:

1. The Secretary-General of the United Nations shall receive and circulate to all states, which are or may become parties to this convention reservations made by states at the time of ratification or accession. Any state, which objects to the reservation, shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Paragraph (1) of this article is a modified version of Article 20(5) of the Vienna Convention which provides that “a reservation is considered to have been accepted by a state if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.” Similarly the third paragraph is

37 Article 20(5) of the Vienna Convention.
also a reiteration of Article 23 of the Vienna Convention. However paragraph two adds two innovative methods for the determination of validity of reservations. First, it invalidates those reservations, inhibit the operation of any of the bodies established by the Convention. Here an indirect reference is made to the Committee on the Elimination of Racial Discrimination the establishment of which is authorised by Article 8 of the Convention. This restriction underscores that the unfettered existence and functioning of the Committee also constitutes a part of the object and purpose of the Convention. Keeping in view the confusion arisen hitherto with regard to the determination of the object and purpose of a convention the drafters of this Convention seem to have intended categorically to assert the requirement of unconditional acceptance of the jurisdiction of the committee without leaving to the state parties for their subjective determination on whether the existence and functioning of the treaty body constitutes the object and purpose of the Convention. This provision is similar to the position taken by the Human Rights Committee in its General Comment no.24 (52) with regard to the status of its own in the application of International Convention on Civil and Political Rights. Treaty bodies are considered to be of utmost significance so far as the human right treaties are concerned as they are generally entrusted with the role of monitoring the state parties’ adherence to the treaty provisions. However, no human rights treaty contains a provision of this nature binding State parties with the clear supervisory role of the Committee. In this sense, this Convention is ahead of other human rights treaties for it stipulates at least one concrete aspect of the object and purpose of the convention rather than leaving it in an abstract manner with all its inconsistencies and subjectivities of individual States.
A second innovative method adopted in this convention is the requirement of acceptance of reservations by a minimum number of States parties before a reservation to be treated as valid. It requires that at least more than one third of the State parties should accept the reservation for it to be considered compatible with the object and purpose of the Convention and also not inhibitive to the operation of any of the bodies established by the Convention. If at least two thirds of the States parties to the convention have objected to the reservation, then that reservation may be deemed invalid being incompatible with the object and purpose of the Convention or inhibitive to the operation of the treaty bodies, as the case may be. This method of majority opinion seems to be innovative and also pragmatic to the extent of avoiding the hitherto existing confusion with regard to the determination of object and purpose of a convention. This method of requirement of minimum number of acceptances by the State parties is not new to the debate on the treaty reservations in international law as this proposal was made before the International Law Commission when it was considering the issue of reservations while drafting the Convention on the law of treaties.

The object and purpose of a convention is elicited, as it has been done by the ICJ in its advisory opinion and also incorporates in the Vienna Convention on the Law of Treaties, on the basis of essence and sine qua non nature of the provisions of a convention. A reservation is normally considered as compatible with the object and purpose of a convention if it contradicts with the core aspects of a convention. But the procedure laid down under Article 20 paragraph 2 of the convention on racial discrimination provides that the importance of a particular provision is determined based on the recognition of a minimum number of states parties to the convention. Irrespective
of the significance of a provision, if the reservation made to it has been opposed by the
two thirds of the states parties, that provision, accordingly, would be bestowed with the
status of object and purpose of the convention and the reservation made to it would be
considered as incompatible and, therefore, impermissible. The normal procedure that is
followed in respect of multilateral treaties with regard to the test of compatibility is that it
is left to the discretion of individual states without taking into consideration the
objections raised by the other states parties. A single state can claim that a particular
reservation made by another state is incompatible with the object and purpose of the
convention even if such reservation gains the acceptance of other states. But under the
convention on racial discrimination a reservation to become incompatible with the object
and purpose of the convention must be objected by at least two thirds of the states parties.
The procedure laid down under Article 20 paragraph 2 of the convention on racial
discrimination is different from the established practice under international law and
though it may not be considered as a fool-proof mechanism but it certainly provides a
practical solution to the intriguing issue of determination of object and purpose of a
convention.

As noted already, India’s reservation was with regard to Article 22 of the convention,
which deals with the settlement of inter-state disputes concerning the interpretation or
application of the Convention and the jurisdiction of the International Court of Justice
there on. India’s reservation reads:

The Government of India declare that for reference of any dispute to the
International Court of Justice for decision in terms of Article 22 of the
International Convention on the Elimination of All Forma of Racial
Discrimination, the consent of all parties to the dispute is necessary in each individual case.38

Apart from India twenty more countries made similar reservations to Article 22 of the Convention.39 Most of the reservations to this article are opposed to the requirement that any of the States to the dispute can automatically approach the ICJ for the settlement of disputes. Most of the reserving States felt that consent of all the parties to the dispute was a pre-requisite for referring an inter-state dispute to the ICJ for its adjudication. As mentioned above a reservation to be considered as incompatible should have been objected by at least two thirds of the states parties to the convention. In the absence of such objection, a reservation may be deemed to be compatible with the object and purpose of the Convention. So far as India’s reservation to this Convention was concerned the UN Secretary-General received only one objection. This was made by Pakistan, which in a communication received on 24 February 1969 notified the Secretary-General that it “has decided not to accept the reservation made by the Government of India in her instrument of ratification.”40

Thus in accordance with Article 20(2) of the Convention the reservation made by India may be considered as compatible with the object and purpose of the Convention as it did not attract the objections of the two thirds of the states parties. Therefore it may remain as a valid and permissible reservation.

38 Multilateral Treaties, n. 8, p. 151.
39 These countries are: Afghanistan, Bahrain, China, Cuba, Egypt, Iraq, Israel, Kuwait, Lebanon, Libyan Arab Jamahiria, Madagascar, Morocco, Mozambique, Nepal, Romania, Saudi Arabia, Spain, Syrian Arab Republic, United States of America and Yemen. For the text of the reservations see, Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 2001.
40 Multilateral Treaties, n. 8, p. 165.
6.2.2. International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights

Both The International Covenant on Economic, Social and Cultural Rights and the International covenant on Civil and Political Rights were adopted by the UN General Assembly on 16 December 1966 and the former came into force on 3 January 1976 and the latter on 23 March 1976. Though India did not sign both covenants it acceded to them on 10 April 1979. While submitting its instrument of accession India has attached reservations of varied nature to both the covenants in respect of some of its provisions. The 'declaration' as it has been titled, is in respect of Article 1 of both the Covenants, which deals with the right of self-determination of all peoples. This declaration was intended to clarify India's position with regard to right of self-determination as it understands. The declaration reads that:

With reference to Article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International covenant on Civil and Political Rights, the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these

Article 1 of both the Covenants is formulated in the same manner. It reads:

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

(3) The state parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the charter of the United Nations.
words do not apply to sovereign independent states or to a section of a people or nation.... which is the essence of national integrity.42

This declaration of India seems to have been made keeping in view the debate on the issue of right of self-determination.43 "The principle of self-determination, like virtue, receives in theory the full-throated support of every member-state of the United Nations. But when it comes to the question of implementation in actual practice the members have shown an ambivalent attitude."44 From the inception of the United Nations this principle remains controversial on this point. "The newly independent states, while vociferously championing the cause of self-determination as applied to colonial territories, have denied its applicability to sectional and tribal ambitions in their own territories. The colonial powers, championing on the one hand the right of some group of people in Asian-Arab-African States to self-determination, challenge its applicability to their overseas possessions on the other."45 The principle of self-determination has also been

42 Multilateral Treaties, n.8, p.170.


45 Ibid., p.94.
enumerated in the Charter of the United Nations as one of its purposes. But the UN resolutions that were adopted on the issue of self-determination were opposed to extending them to the non-colonial territories also. It was argued that “[t]he General Assembly resolutions on self-determination, thus, were conceived, drafted, and adopted in the context of decolonisation. They were aimed at the colonial powers, and apply to dependent peoples in the trusteeship, Non-Self-Governing and other colonial territories. Any attempt to extend their application, despite the loose, broad terminology (“all peoples”) employed therein, to establish states with demarcated boundaries will create havoc in international relations.” This seems to be the view that has prompted the Government of India to make such a reservation to the common Article 1 of both the covenants, which talk about the right of self-determination of all peoples. These articles are directly relevant when it is applied to the domestic situation in India. In particular, India is very much concerned about their applicability to Kashmir. The Security Council of the United Nations has taken note of Kashmir issue long ago and plebiscite was also recommended to decide on the question of accession of Jammu and Kashmir to India or Pakistan. In this regard two resolutions dated 13 August 1948 and 5 January 1949 were also adopted by the United Nations Commission for India and Pakistan (UNCIP) which was created by the Security Council resolution of 20 January 1948. There have also been demands of secession for Nagaland and Punjab. In view of these, in its reservation

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46 Article 1 paragraph 1 of the Charter states: To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

47 Further Article 55 also states: With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:


For a detailed discussion, see Ibid.
the Government of India made it clear that the principle of self-determination was applicable only to those cases where the peoples are 'under foreign domination' i.e., colonial domination and it can not be applied to "sovereign independent states or a section of a people or nation" clear indication that no demand of separate nation is entertained under the guise of right of self-determination. However it is debatable issue that 'foreign domination' in the context of self-determination means only European colonial domination and not of domination of one group over another. But it is argued that "the application of the principle of self-determination has been expanded and limited in the United Nations, and "all peoples" have been identified as the non-self-governing peoples separated by salt-water from their colonial masters who are all while European or European-descended peoples."49

There is no uniformity in the approach of States, including India, with regard to the principle of self-determination. It is clear from the "Declaration on Granting Independence to colonial countries" unanimously adopted by the General Assembly of the United Nations in 1960. While asserting the right to self-determination of all peoples it was held that it "solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations." Having said so the declaration was careful to say that 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."50

50 This declaration states:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.
Highlighting the contradicting assertions of the declaration, Rupert Emerson remarks:

If its primary purpose is the right to overthrow alien rule, its secondary and almost equally important purpose is very close to bringing reverse of this. Self-determination has been proclaimed as the inalienable right of all dependent peoples and has in fact been applied to the great bulk of them: but in the eyes of most of those who have been asserting the immediate and unchallengeable validity of self-determination, it has, once exercised, no justification for a reappearance on the scene. It represents, in other words, no continuing process but has only the function of bringing independence to people under alien colonial rule.

As colonialism is held to be incompatible with the Charter, so is any attempt to appeal to self-determination in such fashion as to disrupt “the national unity and the territorial integrity” of a country which is achieving or has already achieved independence.51

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2. All peoples have the right to self-determination: by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing territories or all other territories which have not yet attained independence to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will or desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All states shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights, and the present declaration on the basis of equality, non-interference in the internal affairs of all states, and respect for the sovereign rights of all peoples and their territorial integrity.

However an inclusivist approach to the principle of self-determination recognizes the legitimacy of national liberation movements waged against external domination. While substantiating the legality of India’s assistance to Bangladesh freedom struggle V.S. Mani observes:

The question that may now be raised in this connection is whether armed assistance to a legitimate freedom struggle would be tantamount to a violation of the territorial integrity of the State within which the struggle is waged. The answer is that it would not be so, for several reasons. First, the principles of international law may overlap, but cannot conflict, with one another; nor can one principle ineffectuate another. A principle, such as the one relating to territorial integrity, cannot operate in such a way that the principle of self-determination should remain merely a pie in the sky. Second, the rule permitting assistance to struggles for self-determination of peoples is one of the basic “purposes of the United Nations”. Third, the territorial integrity rule is inapplicable in cases of situations, which partake the qualities of colonialism.52

In this context it is significant to mention the Friendly Relations Declaration which says:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.53

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Nevertheless this assertion is also put to certain cautious limitations as it was done in the case of 'Declaration on the Granting of Independence to Colonial Countries and Peoples.' The Friendly Relations Declarations states as follows:

nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Both these declarations (1514 (XV) and...) appear to be unambiguous about the circumstances that warrant the application of the principle of self-determination as they are forth right in limiting it only to classical colonial rule. Nevertheless this view has been differed with by certain countries who considered that the principle encompasses the secessionist demands also. Summarising divers views expressed by the delegations of different States before the Special Committee for the drafting of the 'friendly Relations Declaration' V.S.Mani observes:

There has been a divergence of views on the question whether self-determination implies a right of secession.

One view, mainly held by the Socialist countries has been that the right of self-determination of peoples necessarily involves a right to secede, and that, in that sense, the territorial integrity rule is not absolute in the context of self-determination.

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The opposite view has been that in the light of the territorial integrity rule, self-determination does not contemplate any right of secession. A great

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majority of Western as well as Third world countries have articulated this view.\textsuperscript{55}

The Indian delegation adopted the later position before the Special Committee. The essence of India’s reservation to common article 1 of the Covenants is similar to the view expressed by the Indian delegation before the Special Committee for drafting the ‘Friendly Relations Declaration’. The view of the delegation was that:

The right of self-determination did not apply to sovereign and independent States or to integral parts of their territory or to a section of a people or nation. Without such an understanding, the principle of self-determination would lead to fragmentation, disintegration and dismemberment of sovereign States and Members of the United Nations. The dangers in that context would be particularly acute in the case of States having multi-racial and multi-lingual populations.\textsuperscript{56}

It may not be factually incorrect to say that self-determination of peoples has received recognition as a principle of international law during the post war decolonisation phase. However, it does not necessarily mean that it should be interpreted and applied only in the context of colonialism as this principle embodies a universal value of political, economic, social and cultural independence of subjugated peoples all over the world. Context for the origin of a principle does not restrict the application of such principle only to that context particularly when that principle carries certain universal values. After all, the whole corpus of human rights is based on this premise for it is argued that certain rights are universally applicable irrespective of spatio temporal

\textsuperscript{55} \textit{V.S. Mani, Basic Principles of Modern International Law} (New Delhi, 1993), p.250.

specificities. Along with individual rights collective rights such as right to self-determination also stand as universal value.

The reservation made by India in respect of the common Article 1 of both the covenants, which was meant to mean the right of self-determination as against only foreign domination, was framed as a general value though it was intended to avoid the domestic compulsion of implementing that right in respect of the peoples who claim to have been deprived of their independence. As observed above the right of self-determination does constitute a universal value underlying all human rights and therefore it would be rather arbitrary to narrow down the scope of right of self-determination by limiting to only those contexts wherein the foreign domination in the classical form of colonialism is involved.

The next reservation that was made by India to the International Covenant on Civil and Political Rights was with regard to Article 9 of the covenant. This reservation was intended to safeguard the relevant provisions of the Indian Constitution and also to exclude itself from the application of the provision of the Covenant with regard to

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57 Article 9 reads as follows:

1. Every one has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Any one who is arrested shall be informed at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Any one arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for executing the judgment.

4. Any one who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
payment of the compensation on which the Indian domestic law is silent. This reservation reads as follows:

With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the constitution of India. Further under the Indian legal system, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the state. 58

Article 9 of the Covenant talks about the right of liberty and security of an individual and is intended to provide safeguards against the violation of such right. It is meant to be a protection against the arbitrary use of power by the state apparatus. There is a corresponding provision under the Indian Constitution dealing with similar situation in domestic affairs. Article 22 59 of the Indian Constitution imposes restrictions on the

5. Any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

58 Multilateral Treaties, n. 8, p.170.

59 Article 22 reads as follows:

1. No person who is arrested shall be detained in custody without being informed, as soon as may be, of the ground for such arrest nor shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.

2. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

3. Nothing in clauses (1) and (2) shall apply

(a) to any person who for the time being is an enemy alien: or

(b) to any person who is arrested or detained under any law providing for preventive detention.

4. No law providing for preventive detention shall authorize the detention of a person for a large period than two months unless an Advisory Board constituted in accordance with the recommendations of the chief justice of appropriate High Court has reported before the expiration of the said period of two month that there is in its opinion sufficient cause for such detention:
powers of the State to arrest and detain a person in certain cases. These would indeed flow from Article 21 of the Constitution, as being now interpreted by the Supreme Court of India.

Clauses 1 and 2 of Article 22 bestow certain rights on the persons who are arrested under ordinary law. Exceptions to the rules contained in clauses 1 and 2 are provided by clause 3 of Article 22, which says that the rights enumerated under clauses 1 and 2, are not available to an enemy alien and a person arrested and detained under a preventive detention law. Clauses 4 and 7 of Article 22 deal with the procedure that is to be followed when a person is arrested under the law of preventive detention. When compared with Article 22 of the Indian Constitution Article 9 of the ICCPR does not talk about the preventive detention of individuals. Thus clauses 1 and 2 of Article 22 are similar to the safeguards provided under Article 9 of the covenant but clause 3 of Article 22 provides restrictions on clauses 1 and 2 only by limiting their application only in the cases dealt with by ordinary law. Accordingly clauses 4 to 7 of Article 22 provide the

Provided that an Advisory Board shall consist of a chairman and not less than two other members, and the chairman shall be a serving judge of the appropriate High Court and the other members shall be serving or retired judges of any High Court:

Provided further that nothing in this clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by parliament under sub-clause (a) of clause (7). Explanation:-

5. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been and shall afford him the earlier opportunity of making a representation against the order.

6. Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

7. Parliament may by law prescribe

(a) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(b) the procedure to be followed by an Advisory Board in an inquiry under clause (4).
procedure, by way of certain safeguards, to be followed when a person is arrested under preventive detention law. It is an interesting feature that the preventive detention laws have been given a constitutional status in India.\(^{60}\) Thus clause 3 of Article 22, which says that the protection provided under clauses 1 and 2 are not applicable to cases involving preventive detention law, also contravenes the procedure laid down under Article 9 of the covenant which deals only with ordinary arrests but not preventive detention. Therefore the reservation made by India to article 9 of the Covenant, which says that the article 9 would be applied in consonance with provisions of clauses 3 and 7 of Article 22, is intended to say that the provisions of Article 9 would be applied in cases involving arrests under ordinary law and in case of preventive detention it is the procedure that is laid down under clauses 4 to 7 of Article 22 of the Indian Constitution is followed. Though the preventive detention is not expressly prohibited under the Covenant it is understood that in all circumstances involving arrest of individuals procedure laid down under Article 9 should be followed. India by making reservation to Article 9 of the Covenant restricted the operation of Article 9 of the Covenant in cases of arrests undertaken under the preventive detention law. This reservation of India is clearly intended to protect the domestic law as against the obligations under international law.

This reservation also states that there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the state. It is patently clear that Article 22 of the Indian Constitution, which deals with the protection

\(^{60}\) Patanjali Shashtri, J., said about Article 22 that: "[t]he sinister looking feature, so strangely out of place in democratic constitution, which invests personal liberty with the sacrosanctity of a fundamental right and incompatible with the provisions of its preamble, is doubtless, designed to prevent the abuse of freedom by anti-social and subversive element which might imperil the national welfare of the infant republic". "A.K. Gopalan V. State of Madras", All India Reporter, 1950 S.C. 27.
against arrest and detention, does not guarantee any compensation for unlawful arrest or
detention. This part of the reservation is intended to avoid the obligation enshrined under
paragraph 5 of Article 9 of the Covenant. But contrary to the position taken by India by
way of this reservation, the Indian judiciary has by its practice nullified the reservation by
upholding under Article 32 of the constitution that the right to constitutional remedies
includes a right to compensation for violation of fundamental rights. By way of awarding
compensation for illegal detention the Supreme Court of India has established this legal
position in the case of Rudul Shah v. State of Bihar, which is different from the hitherto
followed practice. The petitioner in this case was acquitted by the Court of Sessions of
Muzaffarpur on June 3, 1968 but he was released from jail only after more than 14 years
i.e., on October 16, 1982. The Government of Bihar submitted that while passing the
acquittal order, the Additional Sessions Judge of Muzaffarpur held ‘the accused is
acquitted but he should be detained in prison till further orders of the State Government
and D.G. (Prisons), Bihar.’ It was also submitted that ‘the accused Rudul Shah was of
unsound mind at the time of passing the above order.’ The Supreme Court was
convincingly disappointed by these and other explanations offered by the Government of
Bihar and also by its callousness towards prison administration. Consequently the
Supreme Court was confronted with a situation whether it can pass an order awarding
compensation for the deprivation of fundamental right under Article 32 of the Indian
Constitution? Having taken note of other possible avenues available for the petitioner, the
Court responded to this question affirmatively and held that:

| Article 21 which guarantees the right to life and liberty will be denuded of |
| its significant content if the power of this Court were limited to passing |

orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably prevented and due compliance with the mandate of Article 21 secured, is to mulet its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the state as a shield. If the civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the right of individuals is the true bastion of democracy. Therefore, the state must repair the damage done by its officers to the petitioner’s rights.62

Having held that it has the power to grant compensation under Article 32 of the constitution, the Supreme Court directed the State to pay Rs. 30,000 to the petitioner as compensation. The Supreme Court carried forward this spirit in a number of other cases.63

The Indian reservation stated that there is no enforceable right to compensation for unlawful arrest or detention. But the Supreme Court has expanded the scope of Article 32 vis-à-vis Article 21 so as to embrace the power to order for payment of compensation. Article 9 of the Covenant provides certain safeguards to those who are arrested under ordinary laws and these safeguards include an enforceable right to compensation for unlawful arrest or detention. In the case of India a person may be arrested not only under ordinary laws but also under the preventive detention law, which

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62 Ibid., p.1089.

has got the constitutional status under Article 22 of the Indian Constitution. Thus there is an abundant scope for misuse of these special laws as it empowers the state machinery with special powers. As these laws constitute special features there should have been remedial mechanism in the constitution as a safeguard against the misuse. As the Supreme Court of India held in *Rudul Shah v. State of Bihar* the award of compensation to the victims of unlawful arrest or detention is one of the remedial mechanisms which needs to be given the enforceable status as is done by the Covenant. But by making reservation to this provision in the Covenant the Indian Executive has made up its mind not to make any such efforts to give enforceable status to the remedy of compensation. But the Supreme Court’s finding in *Rudul Shah v. State of Bihar* and other cases filled this legal gap, which the Indian Executive and the legislature declined to do. However, the reservation made by India with regard to the payment of compensation is certainly against the spirit of the Covenant for the Covenant is intended to protect the individual against the state’s unlawful exercise of power. Having stated that it would apply the provisions of Article 9 of the Covenant in consonance with clauses 3 to 7 of Article 22 of its constitution, which deal with special laws, i.e., preventive detention laws, India should have accepted the obligation for enforceable right to pay compensation in cases of unlawful arrests and detentions.

The third Indian reservation in respect of both the covenants is with regard to Article 13 of the Intentional Covenant on Civil and Political Rights. This reservation is

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64 Article 13 reads as follows:

An alien lawfully in the territory of a state party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.
made in clear terms and it is against the application of article 13 in place of the Indian law relating to foreigners. In that sense it is a clear reservation where in the relevant position of domestic law is also not mentioned.

The fourth reservation of India reads as follows:

With reference to articles 4 and 8 of the Intentional Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India.\textsuperscript{65}

Article 4\textsuperscript{66} of the Covenant talks about the general limitations on the application of rights provided under the Covenant and Article 8\textsuperscript{67} deals with the establishment of trade unions.

\textsuperscript{65} Multilateral Treaties, n. 8, p.170.

\textsuperscript{66} Article 4 reads:

The states parties to the present Covenant recognize that, in the enjoyment of those rights provided by the state in conformity with the present covenant, the state may subject rights only to such limitations as are determined by law only on so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

\textsuperscript{67} Article 8 reads:

1. The state parties to the present Covenant undertake to ensure:

(a) The right of every one to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organization;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the state.

Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 Concerning Freedoms of Association and Protection of the Right to Organize
Article 4 of the Covenant says that limitation as determined by law may be imposed and such limitation should be compatible with the nature of these rights. The reservation made by India declares that Article 4 of the Covenant shall be applied in conformity with the provisions of Article 19 of the Constitution. Article 19 guarantees six fundamental freedoms[^68] to the citizens of India along with certain ‘reasonable’ restrictions on certain grounds contained in clauses 2 to 6 of Article 19. The grounds on which these restrictions may be imposed are: security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation, incitement of an offence, and sovereignty and integrity of India. Article 19 provides that the restrictions should be ‘reasonable’. The phrase ‘reasonable restrictions’ corresponds with the requirement of Article 4 of the Covenant, which says that the limitations imposed by the state on the rights provided by the state in conformity with the present Covenant should be ‘compatible with the nature of these rights’. Article 4 also states that the limitations, which are compatible with the nature of rights, should be imposed ‘solely for the purpose of promoting the general welfare in a democratic society’. Though the phrase general ‘welfare in a democratic society’ is too general to define its scope, still this condition is also similar to the ground provided under clauses 2 to 6 based on which reasonable restrictions may be imposed. Thus, though differing in the terminology used, the essence and purpose of both Article 4 of the Covenant and Article 19 of the Indian Constitution correspond with each other.

[^68]: These six freedoms are:

[^285]: to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.
Similarly, Article 8 of the Covenant says that no restrictions may be placed on the exercise of right to form trade unions 'other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'. This phrase is also similar to the restrictions imposed under Article 19 of the Indian Constitution. Therefore the reason for making a reservation of this nature could have been that the Government of India felt it necessary, as abundant caution, to avoid any interpretational difficulties in future while applying the Convention domestically.

The last reservation made by India to both the Covenants deals with Article 7(c) of the International Covenant on Economic Social and Cultural Rights. This reads as follows:

With reference to article 7 (c) of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic of India declares that the provisions of the said article shall be so applied as to be in conformity with the provisions of article 16 (4) of the Constitution of India.

Article 7 (c) of the Covenant states as follows:

Equal opportunity for every one to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

Article 16 of the Indian Constitution deals with the issue of equality of opportunity for all citizens in matters relating to employment or appointment. Article 16

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Multilateral Treaties, n.8, p.113.

(4) envisages reservations (special treatment) to backward classes. It reads, "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state." This provision was incorporated into the Indian Constitution keeping in view the Indian social reality, particularly the well-entrenched economic and social feudalism, which has divided the society into hierarchical gradations for hundreds of years in the past. The caste system has closed the entry of certain castes into educational system, which resulted in the confinement of people belonging to those castes to certain professions only which are considered to be of menial. Though Article 16 guarantees the equality of opportunity for all citizens in matters relating to employment or appointment, it is a generally established principle that competition among unequals would always result in perpetuation of inequality. Therefore Article 16(4) was intended to act as a remedy for this malady. Though this provision does not use the word 'caste' and only includes 'backward classes' caste is considered as an important criterion for determining the backwardness of certain classes. Therefore the relevant part of India to Article 7(c) of the Covenant seems to be inevitable as this provision does not include the criterion that is provided under Article 16(4) of the Constitution. However, this reservation need not be considered as against the object and purpose of Article 7(c) of the Covenant, as it is also intended to achieve the same goal, which the Covenant aspires to, namely the right to equality.

71 Article 16(4) of the Constitution of India.
6.2.3. Convention on the Elimination of All Forms of Discrimination against Women

India signed the Convention on the Elimination of all forms of Discrimination against Women on 30 July 1980 and ratified the same on 9 July 1993. While signing the Convention India made two declarations and a reservation, which it confirmed at the time of ratification. In its first declaration India states:

With regard to articles 5(a) and 16(1) of the convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.\textsuperscript{72}

India’s reservation is meant to overcome the conflict between the provisions of the women’s convention with its domestic practices and values as is the case with many countries, particularly Islamic, so far as the status of women is concerned. As the convention is meant to bring about equality between men and women, obviously all the provisions in it would inevitably carry this spirit. Likewise Article 5(a)\textsuperscript{73} keeps a major obligation on the agenda of the states parties to strive to bring about changes in the social and cultural structure of societies to do away with the discriminatory practices. Likewise Article 16(1)\textsuperscript{74} also deals with the equality of men and women. Equality of men and

\textsuperscript{72} Multilateral Treaties, n.8, p.244.

\textsuperscript{73} Article 5(a) reads:

States parties shall take all appropriate measures: (a) To modify the social and cultural patterns or conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

\textsuperscript{74} Article 16(1) reads:

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

(a) The same right to enter into marriage;
women is a complex social issue that achieving it should involve multipronged strategies at various levels. The economic factor plays a crucial role, as economic independence would liberate women to a large extent from the structural patriarchal oppression. However, the discriminatory practices in the social and cultural spheres would need to be addressed relentlessly on a long-term basis. In societies like the Indian it is extremely difficult to apply a single mechanism to the whole country. There are so many varied social and cultural practices and life styles of peoples. It is essential to take into consideration all these pluralities before taking any initiative in this direction. Social acceptability of such initiatives will be the key to their success. Keeping in view the peculiar character of Indian society a policy has been adopted by which certain practices of some communities were legally recognised without imposing any uniform system of personal law here and now. In accordance with that policy personal laws of certain religious communities were recognised which govern the family and succession related matters. Many of the religious and social practices do discriminate against women. However, there should be continuous efforts at gradual elimination of these practices, in

- The same freely to choose a spouse and to enter into marriage only with their free and full consent;
- The same rights and responsibilities during marriage and at its dissolution;
- The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children, in all cases the interests of the children shall be paramount;
- The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- The same rights and responsibilities with regard to guardianship, ward ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
order to avoid problems of implementation of the objective of equal status to women. In these circumstances the declaration made by India in respect of Articles 5(a) and 16(1) of the women's convention is both understandable and necessary. The effect of the declaration is that the Convention provisions have been accepted by India as de lege ferenda.

The second declaration made by India states as follows:

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

Article 16(2) of the convention is meant to ensure that there should be minimum age for marriage and also the marriages should be legally recognised as a protection against desertion and against other forms of marital disturbances. But in India more than 70% of the population lives in rural areas and more than 40% of the population is illiterate. It may not therefore be feasible to ensure that every marriage is registered. Moreover registration of marriages is not always possible to all people as the Government machinery is located in urban areas only. Also there are many religious and traditional ways of solemnising marriage and people do not recognise the importance of

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Multilateral Treaties, n. 8, p.244.

Article 16(2) reads as follows:

The betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.
registration of marriages. The Indian law takes cognisance of the evidentiary value of customary marriages. As this issue is directly linked with many other factors India’s declaration seems to be a reasonable.

The Indian statement which has been named as a ‘reservation’ reads as follows:

With regard to Article 29 of the Convention on the Elimination of all Forms Discrimination against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this article.\textsuperscript{77}

Article 29\textsuperscript{78} of the women’s convention is peculiar in its nature and it seems to be that there is no other human rights convention, which carries this kind of provision. This provision sets up a three-tier mechanism for settlement of disputes by way of negotiation, arbitration or referring the matter to the International Court of Justice. The same article contains another paragraph i.e. paragraph 2 that allows the states parties to make reservations to paragraph 1 so as to avoid the obligations provided therein. Women’s convention is in fact one of those conventions, which contain a provision of its own governing the reservations. But Article 29 paragraph 2 permits reservations to paragraph

\textsuperscript{77} Multilateral Treaties, n.8, p.174.

\textsuperscript{78} Article 29 reads as follows:

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

2. Each state party may at the time of signature or ratification of the present convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other states parties shall not be bound by that paragraph with respect to any state party which has made such a reservation.

3. Any state party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.
1 of the same article only and does not provide any mechanism with regard to reservations to other provisions of the convention. It leaves in doubt whether it does mean that other provisions of the Convention can not be subjected to reservations, or does it mean that reservations can be made to other provisions subject to other reservations regime of the Vienna Convention on the Law of Treaties? If it is meant that reservations made to other provisions are subject to reservations regime of the Vienna convention why not the same can be applied to Article 29 also. There were many doubts left unanswered than resolved by Article 29 paragraph 2 of the convention. However one thing is clear that Article 29 paragraph 1 does not constitute the object and purpose of the convention in conformity with requirement of the Vienna Convention. As the Convention itself permits States to make reservations to Article 29 paragraph 1, the reservation made by India is in conformity with Article 29 (2) therefore, does not act against the object and purpose of the convention.

6.2.4. Convention on the Rights of the Child

India acceded to Convention on the Rights of the Child on 11 December 1992. While acceding to it India made a declaration, which reads as follows:

While fully subscribing to the objectives and purposes of the Convention, realizing that certain of rights of child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the frame work of international cooperation; recognizing that the child has to be protected from exploitation of all

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forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India- the Government of India undertakes to take measures to progressively implement the provisions of article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a state party.\textsuperscript{80}

This declaration is also not premised on any legal argument, as it does not say that it has objections with the context of Article 32 of the Convention.\textsuperscript{81} There is no oblique motive to evade the obligations for the declaration has clearly recognised the importance of the rights enshrined in the Convention. It has also stated the steps taken by it with regard to the child which are in accordance with the requirements of the Convention. However the declaration is intended to express its inability to comply instantly with the requirement of Article 32(2)(a) regarding the minimum age for admission to employment. The declaration makes it clear that India is not against the requirement of

\textsuperscript{80} \textit{Multilateral Treaties}, n.8, p.299.

\textsuperscript{81} Article 32 reads as follows:

1. States parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.

2. States parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, states parties shall in particular;

(a) provide for a minimum age or minimum ages for admission to employment;

(b) provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.
the said provision but feels that it cannot implement it with immediate effect keeping in view the socio-economic conditions in India. This declaration is an expression of inability to meet the convention standards, as it is with many developing countries as mentioned in the declaration, because of various social and economic reasons. Because of acute poverty conditions children at young age are sent to the work to meet the needs of the family. This problem is also manifestly linked with many other social and economic factors and directly related with comprehensive state policies with long-term objectives, which cannot be achieved overnight. As there is an existing corpus of legislation in India on the subject dealing with the protection of children and also keeping in view the spirit with which it is made the declaration made by India may not be categorised as reservation against the object and purpose of the convention. It is true that it postpones its obligations but it is candid enough to accept the convention obligations in principle without any legally premised hurdles.

While making observations on the initial report submitted by India\textsuperscript{82}, the Committee on the Rights of the Child felt that the declaration might be withdrawn by India keeping in view the relevant efforts made by India. It observed:

The Committee encourages the State party to withdraw its declaration with respect to Article 32 of the Convention, as it is unnecessary in the light of the efforts the State party is making to address the child labour. The Committee recommends that the State party ensure the full implementation of the 1986 Child Labour (prohibition and Regulation) Act, the 1976 Bonded Labour (System Abolition) Act and the 1993 Employment of Manual Scavengers Act.\textsuperscript{83}

\textsuperscript{82} CRC/C/28/Add.10. India submitted its initial report on 19 March 1997, more than two years after the due date of 10 January 1995.

\textsuperscript{83} CRC/C/15/Add.115, p.12.
Out of eleven reservations/declarations that were made by India in respect of the six major conventions three are made in respect of the provisions that deal with the issue of dispute settlement mechanism in particular with regard to the jurisdiction of the International Court of Justice. These three conventions to which the reservations are attached are the Genocide convention, the Convention on Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women respectively. Four reservations/declarations were made to ensure that concerned covenant provisions were implemented in conformity with the existing domestic law in India and all these reservations except one also included reference to the relevant provisions of the domestic law. Of the four 'declarations' two were made in respect of International Convention on the Civil and Political Rights and the remaining two were attached to the International Covenant on Economic social and Cultural Rights. Two declarations, which were made to both the Covenants and the Women's Convention, explain India's policy with regard to the subject matter of both the Conventions. Two declarations were made on the ground of non-feasibility of its implementation with immediate effect while accepting the contents of the provisions to which these declarations are made, in principle.

Of the three reservations categorised here as relating to dispute settlement, as mentioned above, one is made to Article 29 paragraph 2 of the Women's convention. This reservation is in conformity with Article 29 paragraph 2 that allows States to make reservations to paragraph 1 of Article 29. Therefore it does not, in any way, violate the 'object and purpose' of the Convention, for the Convention itself provides for it. The two other reservations for the disputes settlement provisions are made to the Genocide
Convention and the Racial Discrimination Convention and both are similar in their meaning and effect. Both these Conventions do not embody provisions similar to Article 29 (2) of CEDAW.

These two reservations seem to be of in conformity with the practice of India so far as its attitude towards the compulsory jurisdiction of the International Court of Justice is concerned. The reason for making these reservations becomes clearer when they are looked at in the light of India's declaration accepting the compulsory jurisdiction on the International Court of Justice under Article 36(2) of the statute of the Court. As observed earlier paragraph 7 of its declaration clearly says that it does not accept the jurisdiction of the Court over disputes concerning the interpretation or application of a multilateral treaty without its special agreement accepting the jurisdiction of the Court. This is applicable to all the multilateral treaties to which India is a party. Therefore the reservations made by India in respect of Genocide Convention and the Racial Discrimination Convention are in conformity with its general practice adopted by it vis-à-vis multilateral treaties so far as the jurisdiction of the International Court of Justice is concerned. As it is never contended by any one that India's declaration accepting the jurisdiction of the Court subject to its acceptance in respect of multilateral treaties, its reservations to dispute settlement clauses of both Genocide Convention and Racial Discrimination Convention may, arguably, stand as against the object and purpose of these conventions but subject to scrutiny in the light of India's declaration to compulsory jurisdiction on the International Court of Justice.

Four declarations, which were made to implement the convention provisions in conformity with the existing domestic law, are in respect of both the Covenants. Of these
three contain reference to the relevant provisions in domestic law, which it would take into consideration while implementing the Covenant provisions. One declaration does not mention any specific provisions of domestic law but makes a general statement in clear terms that it "reserves its right to apply its law relating to foreigners." The domestic law provisions that have been mentioned in three declarations are all constitutional provisions, which constitute the Law of the Land. Therefore through these declarations India implicitly declared that it cannot dispense with the domestic law even though there was a mismatch between it and the obligations under international law. Thus, by virtue of India's declaration, it is the domestic law, which prevails over international law whenever there is a contradiction between the two. The genesis to this understanding may be traced to the dualist view about the application of international law in the domestic matters, which India adopts as a general policy in its practice vis-à-vis international law. It is also not implicitly conveyed in the declarations that there would be endeavours to bring the domestic law in conformity with the international legal obligations over a period of time. Therefore the implicit meaning of these declarations is that in the event of a contradiction between domestic law and international law it is the former that prevails, thanks to the reservations. But it leaves it to speculation whether it will be the same even in cases where the international law obligations to which reservation is made constitute the object and purpose of the convention.

Two declarations were made with regard to the policy adopted by India in respect of the issues, which constitute the provisions of both the covenants and the Women's Convention. One declaration is about the right of self-determination and the other is

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84 Multilateral Treaties, n.8, p.170.
about the equality of men and women. The declaration on the right to self-determination excludes the application of the right to India. The second declaration states that India does not interfere in the personal affairs of any community without an initiative and consent from that community in respect of equality between man and woman. In both the declarations no provision of domestic law is mentioned but it is stated very generally at the policy level. These two declarations are intended purely to assert the domestic policy of India in respect of the issues involved in it. Therefore it is of significance to note here that the policies of a state involving large political and social implications also prompt them to resort to reservations irrespective of the significance of a particular international legal principle as is with the right to self-determination.

The declarations, one in respect of women’s convention and the other in respect of convention on the rights of child, are made on the ground of non-feasibility of their implementation. In the declaration attached to the Women’s Convention, India states that it is not practical to apply the principle of compulsory registration of marriages in India, given the variety and divergency of practices and customs in the country. In the other declaration made to the Convention on the Rights of the Child India expresses its inability to implement the Convention provision prescribing minimum ages for admission to each and every area of empowerment. In both the cases India accepts the requirements of the relevant provisions in principle and implies that it does not have any objections with these requirements in principle, but expresses its inability to comply with them. In the case of Convention on the Rights of the Child it declares that it undertakes to take measures to implement the provisions of Article 32, paragraph 2(a), which provides for minimum age for employment, progressively. However, this assurance is not provided in
the declaration to Women’s Convention provision of Article 16(2) regarding the compulsory registration of marriages. These two declarations are the result of socio-economic and cultural factors bringing any changes in it would need long-term efforts. Therefore these declarations are aimed at facilitating for temporal postponement of compliance with concerned obligations.