Ratification of human rights treaties puts the onus on State parties to comply with them in the domestic practice protecting the rights of individuals. Failure to ratify these treaties isolates States in the international community as human rights record is arguably, considered as a yardstick for evaluation of the internal governance of a State. Caught in the web of external compulsions and internal inability to comply with, States are compelled to look for a way out without sustaining much damage from this dual attack.

Thus the practice of reservations is considered to be the most effective method to satisfy the international community as it facilitates ratification at the same time avoiding the national implementation of obligations with which a State party has difficulties.

However, the practice of making reservations is not taken for granted by the international community as there have been diverse opinions on it. It has become more controversial in the context of human rights treaties. Despite the fact that there exists a well established legal regime governing the practice of reservations in the form of Vienna Convention on the Law of Treaties, 1969 divergent opinions are in vogue on the applicability of this regime to human rights treaties.

Unlike other branches of international law, international human rights obligations are considered as obligations *erga omnes* of States which they owe to the international Community to implement without fail. Thus it is argued that the corpus of human rights constitutes *jus cogens* norms of international law. Therefore a necessary corollary to this position is that no derogation is permitted from human rights obligations. However there
has been a serious challenge to the notion of universality of human rights from Asian and African perspectives. This challenge is posed particularly from the cultural relativist point of view. It is argued that the present regime of human rights is pre-eminently based on Western value system which gives primacy to the individual as the unit of analysis. On the other hand the argument from the Asian and African perspectives asserts that these societies are largely based on the notion of the 'collective' and therefore reservations to human rights treaties become inevitable to safeguard themselves from the external imposition of values. Contradiction between international law and domestic law also forces States to make reservations.

The jurisprudence that has evolved in the form of ‘findings’ of the human rights treaty bodies also gives a new dimension to the issue as they have developed a system of their own which was not in strict conformity with the reservations regime of the Vienna Convention. Thus the law governing the practice of reservations in respect of human rights treaties is in a state of flux and remains as controversial as it was when this issue came before the International Court of Justice in the Genocide Convention case. Law of reservations has undergone many changes from the initial unanimity rule which was practised till the issue was raised by the International Court of Justice in the Genocide Convention case. However participation by increasing number of States in the international law-making in consequence of decolonisation warranted the need for a flexible system of reservations. Thus the ICJ evolved, arguably, an objective method of compatibility of reservations with the object and purpose of the Convention for governing the practice of reservations, which was later on incorporated into the Vienna Convention.

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reservations regime. The flexible system that was followed by the Organisation of American States (OAS) was also found to be suitable in respect of multilateral treaties. Thus the ultimate outcome of the work undertaken by the International Law Commission resulted in the form of reservations regime in the Vienna Convention on the Law of Treaties which encompasses both the compatibility test evolved by the ICJ in the Genocide Convention Case and the flexible system followed by the Organisation of American States (OAS). Further, the Vienna Convention regime also includes unanimity rule in respect of treaties with a limited number of parties and the majority rule in respect of treaties which are the constituent instruments of international organisations. The Vienna Convention regime is intended to be a general system applicable to all categories of treaties including human rights treaties.

However, even after the entry into force of the Vienna Convention, the problem of reservations is called into question in the context of human rights treaties particularly at the academic level. There is an argument that human rights norms constitute *jus cogens*, and that therefore derogation in the form of reservations is not allowed. Though it is undisputed that the human rights norms constitute *jus cogens*, it is argued that it is not the entire corpus of human rights treaties but certain specific human rights have attained the status of *jus cogens* in international law. Thus it is contended that any form of reservations to these *jus Cogens* norms of human rights are prohibited under international law. Another argument against the making of reservations is that human rights are universal in nature and that they are applicable to all conditions irrespective of social, economic, political and cultural variations in diverse societies. It is further argued that the

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*Articles 19-23 of the Vienna Convention on the Law of Treaties deal with reservations.*
entire international human rights law is based on the notion of universality of rights which is being reiterated from the days of Universal Declaration of Human Rights. This view has been contested from the cultural relativist point of view on the ground that the present corpus of human rights is premised on the Western system where primacy is accorded to the individual, whereas in the Asian and African context it is the collective rights of the society which are accorded primacy. The latter view is emphatically asserted in the African Charter of Human and Peoples’ Rights. This view was also very categorically voiced in the context of the World Conference on Human Rights at Vienna in 1993. Thus it is felt that reservations would help to protect the interests and specificities of societies which are different in certain respects. Inconsistency between international law and domestic law is another important reason which compels State parties to make reservations. Though Article 27 of the Vienna Convention on the Law of Treaties prohibits invocation of domestic law for non-compliance with international obligations, State parties do make reservations to human rights treaties with a view to avoiding any changes in domestic law in accordance with new international obligations.

International jurisprudence on the maintainability of reservations to human rights treaties is not uniform and there are differences in the approach of various bodies. However, there seems to be a consensus about the definition of a reservation provided in the Vienna Convention on the Law of Treaties among various international treaty bodies. Yet there have been deviations from the Vienna Convention reservation regime on various issues. The prominent issues on which diverse views are expressed are namely, competence of the treaty bodies to decide on the validity of reservations, object and

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purpose of the human rights conventions, legal effect of invalidity of reservations, special character of human rights treaties and the scope of acceptances and objections to reservations.

The continuing existence of diverse views brings into question the Vienna Convention reservations regime and its applicability to human rights treaties. As a result, the International Law Commission is called to enquire into the issue and formulate a viable mechanism in the event of the Vienna Convention regime found to be inadequate in this respect. However, the International Law Commission’s preliminary conclusion of continuing relevance of the Vienna Convention regime apparently puts an end to the debate as the Commission intends to retain the Vienna Convention system. The emerging jurisprudence of the treaty bodies made the Commission recognise the role of these bodies in deciding the validity of reservations, particularly their compatibility with the object and purpose of treaties. Thus the final outcome of the study undertaken by the Commission would depend on the opinions of international organisations, and treaty bodies, but primarily the views of States.

The study of India’s practice has involved an analysis of the nature of reservations attached by India to some selected human rights treaties while ratifying them. It shows that the domestic compulsions involving national specificities compel States to resort to reservations. However, in certain cases though the executive government has made reservations to an international convention, the national judiciary has overruled some of them for purposes of domestic law and interpreted the Indian law including the constitution in conformity with the provisions of international treaties which, of course, not generally be applied in respect of other treaties.
Findings

1. The foregoing study reveals that the practice of reservations has become an important component of the treaty law though some of the treaties contain provisions expressly prohibiting reservations. Its juridical legitimacy has been substantially recognised with its inclusion in the Vienna Convention on the Law of Treaties, 1969. This position is primarily based on a sound juridical premise that it is the sovereign right of States whether or not to become a party to an international treaty. Thus it is recognised that making reservations is a legitimate right of States, subject, of course, to certain established conditions. Thus it can also be said that it has become part of general international law in the light of its century old growth influenced by international practice.

2. The flexible system of acceptances and objections as incorporated in the Vienna Convention has become a valid method of reservation making as against the ‘unanimity rule’ followed prior to the Genocide Convention case. Though the unanimity rule is still valid in respect of treaties with limited number of negotiating States and the object and purpose of that treaty requires the application of the treaty in toto as provided under Article 20, paragraph 2 of the Vienna Convention, the flexible system is recognised as the most suitable formula in regulating the practice of reservations. The unanimity rule has become obsolete due to the increasing number of participants in international law making which gathered momentum during the period of decolonisation. As there is a large number of countries participating in international law making it becomes difficult for the consensus to emerge without accommodating the contending views. It is more so because of the patent dissimilarities in various respects among States. The flexible system
is also considered to be more relevant keeping in view the expanding varieties of issues covered by international law. Many a time issues covered by international law influence domestic conditions and require policy and legal measures. In such a situation the flexible system of acceptances and objections becomes handy as it serves both the purposes of becoming a party to an international treaty while at the same time avoiding implementation of difficult provisions with lesser damage at the international as well as national levels.

3. The compatibility test as propounded by the International Court of Justice in the *Genocide Convention* case remains as an objective test, notwithstanding the shortcomings involved in its application. Despite the initial resistance, the criterion of compatibility of a reservation with the object and purpose of the convention has been incorporated into the Vienna Convention. From then onwards there has been almost unanimous acceptance to this test in the practice of States though there have been practical difficulties given the situation that there is no mechanism to ascertain the object and purpose of a treaty in question and conclusively rule on the validity of a reservation. This test is also found to be valid by the treaty bodies of some of human rights treaties. It is of significance to note here that neither the ICJ nor the Vienna Convention provide any mechanism to define the object and purpose of a convention except leaving to State party’s individual discretion which results in a subjective assessment of the issue. Thus the test which is intended to be an objective criterion is left to the individual decision of States leading to perennial uncertainty.

4. An uneasy relationship continues to haunt between the law of reservations and human rights treaties even after a considerably long period of developments in this
respect. As observed, the issue of reservations became more controversial in respect of an important human rights convention i.e., the Genocide Convention, 1948 and it remains to be so even now. It is argued that reservations in respect of human rights treaties are not as welcome as in respect of other treaties, as the former are of the norm setting nature and are non-reciprocal and applicable universally. Apart from the fact that some of the human rights norms have achieved the *jus cogens* from which no derogation is permitted it is argued that human rights treaty obligations are not of traditional contractual nature defining the relations between States but they endow beneficent effects on all individuals against States, irrespective of dissimilarities among States. Thus it is concluded that any derogation in the form of reservations is not allowed in respect of human rights treaties. On the contrary, the relativist contention argues that human rights are not universal and hence they have to be interpreted and applied keeping in view the local conditions. Thus it is inevitable for States to make reservations to human rights treaties to protect the local interests. Some of the sweeping reservations made to the Women’s Convention testify this view as they are mainly intended to protect the national specificities.

The relativist challenge posed by the Asian and African countries attempts to refute the hitherto held fundamental view of human rights that the individual is pre-eminent holder of these rights vis-à-vis his/her State. The relativists argue contrary to this liberal democratic view of individual rights that it is the notion of collective rights of societies that is embedded in many of the non-western, ancient societies. Thus in the present framework of human rights law it becomes inevitable to resort to reservations to protect these local specificities. However, while according its due credit to the relativist view, the Vienna Declaration and Programme of Action, 1993 emphasised the universal
and indivisible nature of human rights. It cannot be denied that both the universalist and relativist standpoints have valid reasoning in their support, and also it is difficult to subscribe to any one of the extreme views in total negation of the other. Therefore, there is a need for a consensual approach to accommodate the specificities of many Asian and African societies.

5. One of the major factors influencing the making of reservations is the inconsistency of domestic law with international legal obligations. Domestic legal systems are primarily based on the social, economic, political, cultural and religious conditions of the concerned societies, whereas international law is intended to be applicable to all societies irrespective of the diversity of their domestic milieu. When it comes to the acceptance of international obligations States are confronted with the contradiction between domestic law and international law. It appears to be more so in the case of human rights treaties as these treaties directly address individual subjects against States. Therefore, States are more inclined to make reservations to human rights treaties on the ground of contradiction between domestic law and culture, and international treaties. Many Islamic countries have overwhelmingly resorted to this practice in respect of Women’s Convention. This is, in a way, a clear violation of Vienna Convention on the Law of Treaties as Article 27 of this Convention prohibits invocation of internal law for non-compliance with international treaties. However, this practice seems to be prevalent as many States have made reservations to human rights treaties on this ground. Many of these reservations are also open-ended without any mention of the time required to bring about changes in the domestic law for it to make consistent with international treaty obligations. It is understandable that changes are not possible overnight in the domestic
law as they call for complex policy and legislative measures. It is not unreasonable to resort to reservations on this ground; but it is certainly unwarranted to make such reservations without any hint of time frame to take required measures. This type of reservations are more detrimental when they are of blanket nature e.g. those reservations which declare that the domestic law prevails whenever there arises a contradiction between it and an international treaty. This kind of reservations are not infrequent as many human rights treaties do not contain provisions requiring States to attach a brief statement of law concerned to the reservations as it is provided under Article 57 (2) of the European Convention on Human Rights and Fundamental Freedoms.

6. The Vienna Convention on the Law of Treaties entrusts the sole authority of deciding the validity of reservations exclusively on State parties. No mechanism is provided to resolve disputes relating to reservations. Besides, no human rights treaty specifically provides for a mechanism to deal with disputes related to reservations despite the fact that some of the human rights treaties contain provisions governing reservations. This apparently deliberate omission is particularly significant because many human rights treaties establish treaty bodies of their own to look into the application of concerned treaties. Thus, a void exists in this regard. However, the human rights treaty bodies have filled this gap by assuming jurisdiction over this issue. The claim to competence to decide the matters relating to reservations began with the European Commission of Human Rights in the Temeltasch case wherein the Commission assumed competence to decide on the question of validity of a reservation made to the European Convention on Human Rights and Fundamental Freedoms. This is followed by other human rights treaty bodies, namely, the European Court of Human Rights and the Inter American Court of
Human Rights. General Comment no.24 (52) made by the Human Rights Committee under the International Covenant on Civil and Political Rights may be classified under this category so far as its assertion of competence to decide on the validity of the reservations is concerned. Apart from assuming competence the Human Rights Committee has held that the determination of compatibility of a reservation with the object and purpose of a treaty by State parties would result in harm to the individual beneficiaries as States are likely to be subjective in their assessment. Thus, it was opined that the Committee was the competent organ to determine the validity of reservations to the Covenant. This view clearly repudiates the system of the Vienna Convention with reference to acceptances of and objections to reservations, which empowers States as the ultimate authority in determining the validity of reservations. Though there has been opposition to this position from States there is considerable recognition of this attitude by the International Law Commission in its recent “Preliminary Conclusions” on reservations to human rights treaties. It is observed by the International Law Commission that the assertion by the treaty bodies in this regard was not envisaged at the time of making of those treaties. Therefore, the Commission suggested for the inclusion of special clauses or elaborating protocols to the existing treaties if States are inclined to confer the power to determine the admissibility of reservations on these bodies. Therefore, the assertion made by these bodies is apparently found to be not totally invalid in the present circumstances. It may also be argued in support of these assertions by treaty bodies that at the time of drafting of the Vienna Convention on the Law of Treaties there was no established system of treaty bodies in existence except under the European Convention on Human Rights, which resulted in the adoption of the system that inclined
to authorise States to determine the validity of reservations. However, the apparent failure of the system of acceptances and objections by State parties particularly in the case of human rights treaties, arguably, justifies the position adopted by these treaty bodies, which has also been accepted by the International Law Commission.

7. The assumption of power on the part of treaty bodies to determine the validity of reservations inevitably leads to complex legal problems. In the cases where a treaty body found a reservation to be valid, there would not be much problem regarding the treaty relations. However, if a reservation is found invalid by a treaty body it poses a major legal problem on the continuance of a State, whose reservation is found invalid, as a party to treaty. The Vienna Convention on the Law of Treaties does not contain any mechanism regulating the consequences of an invalid reservation. This situation was confronted by the European Court of Human Rights in the Belilos case wherein a reservation made by Switzerland was found invalid and the Court directed that the particular reservation might be severed from the instrument of ratification and that Switzerland would continue to remain as a party minus this impugned reservation. The Human Rights Committee also expressed a similar view in its General Comment no. 24(52). An important issue which this finding raises is about the scope of consent of State parties to international treaties. As observed earlier, it is an established rule of general international law that a State cannot be held to be obliged to an international norm without its consent. Accordingly, the ratification or accession by a State attaching reservations to its instrument of ratification/accession should be considered an expression of consent subject to certain conditions specified in the reservation. Therefore it can further be observed that in an event when such reservation is being declared invalid, it
would lead to uncertainty about that State’s relationship with treaty until it is expressly stated by the State party concerned about its position vis-à-vis that treaty. However, the treaty bodies, endowed with the power to determine the validity of reservations, have also assumed the power to decide the status of a State party whose reservation has been declared invalid. This position apparently amounts to encroaching into the power of States undermining their sovereign right. In this context a legally justifiable position may be to leave it to a State party to decide whether or not to continue as a party to the treaty concerned after its reservation has been held invalid as has been held by the International Law Commission in its preliminary conclusions. Otherwise, compelling a State to continue as a party without its reservations would be forcing it to abide by obligations against the well-established principles of general international law.

8. The International Law Commission’s current engagement with the issue of reservations to treaties has brought into focus the practice of reservations to human rights treaties; unlike the situation in the previous occasions wherein the primary focus was on reservations to general multilateral treaties. Though conflicting views and practices have led the Commission to undertake the study, the preliminary conclusions arrived at by the Commission are mostly aimed at reiteration of the existing system of the Vienna Convention so far as the substantive part of law is concerned. The Commission’s assertion that the Vienna Convention reservation regime is the most suitable system may be considered as a significant development as it attempts to end the controversy on one of the most complex and controversial issues of international law. The Commission’s preliminary conclusions are also significant as they settle another controversy by holding that the Vienna Convention regime is also suitable in respect of human rights treaties.
The Commission's substantive addition was the recognition of the recent practice of treaty bodies as it has taken cognisance of the recent developments in this regard. Its finding that the treaty bodies may be made competent to determine the validity of reservations may be described as an attempt to codify the law which has been developed in the practice of States and other treaty bodies. The Commission's proposal to empower treaty bodies to determine the validity of reservations may contribute significantly to the strengthening of the Vienna Convention reservation regime as the objective assessment by these bodies would help apply the object and purpose test strictly while permitting reservations. However, the jurisdiction of treaty bodies may restrict the scope of the existing flexible system of acceptances and objections. In the present system based on the Vienna Convention a reserving State can become a party to a treaty on the acceptance of its reservation by any one of the parties to the treaty. The objections raised by other parties cannot stop the reserving State from becoming a party to the treaty except that they can inhibit treaty relations between them and the reserving State, depending on the declaration by the objecting State to that effect. However, if a treaty body declares that a reservation is invalid without ordering its severance, as was done in the Belilos case, the probable result could be that either the particular State has to withdraw the reservation or its entire ratification. The flexible system would operate as long as the issue of reservations is not taken to the treaty body concerned. Once the matter is taken to the treaty body the flexible system would operate only when that body holds the reservation valid. In the event of a reservation being declared invalid the flexible system would cease to operate because the reserving State can no longer continue as a party to the treaty along with its impugned reservation. The need of the treaty bodies to determine the
validity of reservations may not be required in respect of treaties providing alternate system of assessing the object and purpose of the treaty. For example the Racial Discrimination Convention provides for the collegiate system to determine the compatibility of a reservation with the object and purpose of the Convention. The treaty body’s role will be minimal in such cases.

9. Many States are not readily inclined to take measures to bring about required changes in the domestic law in accordance with international obligations. States are also not willing to submit themselves to the international adjudication in the case of disputes arising out of the interpretation or application of treaties. A study of India’s practice reveals that States make reservations primarily to protect domestic interests involving policy and legislative issues. An analysis of India’s reservations to various human rights treaties shows that many a time States do not make a clear distinction between reservations and declarations. As in the case of India’s ratification of the two Covenants, India labels its ‘conditions’ as declarations though they act as reservations so far as their impact is concerned. In such cases the definition of reservations provided in the Vienna Convention serves the purpose rightly in determining their scope.

Recommendations

As the practice of reservations has come to remain as an important constituent of international treaty law, it necessarily requires certain measures to strengthen the existing system which is found to be partially inadequate in certain respects. Following recommendations are made for the purpose of strengthening the mechanism governing reservations.
1. As many reservations are made by States on the ground of inconsistency of domestic law with international law there is a need for a method to make these reservations to be precise and unambiguous and discourage general reservations. For that purpose the method adopted by the European Convention system of requiring a brief statement of law concerned may be adopted in respect of all the human rights treaties. This requirement will give a clear picture of the genuine constraints of States to implement the treaty obligations. However, it is argued, as Switzerland did in the Belilos case, that it is a difficult task in the case of federal States to enumerate all the inconsistent laws applied in all the provinces. But it is not an impossible task though it requires some technical expertise. Notwithstanding the difficulties involved in it, it will reduce the possibility of general reservations and attendant international problems.

2. Though the criterion of compatibility of reservations with the object and purpose of treaty has become an accepted test for the validity of reservations, as observed, there have been lacunae in its application by State parties. Thus it may not be ill-premised to argue that a neutral body be empowered to decide on this question. In the context of human rights treaties it is the treaty bodies which are rightly placed to look into this matter. As this practice has already developed even if with certain shortcomings, it is suggested that this system be legally institutionalised with a proper definition of powers of these bodies so that they cannot unduly encroach upon the already existing flexible system of acceptances and objections. It is true that this power of treaty bodies may affect the universal acceptability of treaties as many States hesitate to ratify treaties along with reservations fearing the power of treaty bodies to invalidate the reservations. Many States may rather avoid ratifying treaties instead of subjecting their ratifications
along with reservations to the scrutiny of the treaty bodies whose decision invalidating
the reservations might bring an international pressure on the States concerned either to
modify or withdraw reservations. Notwithstanding the demerits involved in the
empowerment of treaty bodies a carefully defined scope of these bodies would help
strengthen the existing mechanism. To support this view it can also be argued that it is an
accepted principle of many legal systems including international law to refer a dispute to
a third party to decide upon the questions of law involved. Therefore the same principle
may also be applied in the case of disputes relating to the law of reservations.

3. The International Law Commission's recent preliminary conclusion that the
Vienna Convention reservation regime is the most suitable system governing the
reservations does not necessarily preclude further development in the law as the
Commission itself has recommended that the treaty bodies may be empowered to
determine the validity of reservations. The existing human rights treaties cover a wide
range of issues involving important human rights. Therefore as suggested by the
Commission, protocols or guidelines may be drafted in respect of these treaties
containing the provisions dealing with the powers of the treaty bodies and related
developments without narrowing down the mechanism provided under the Vienna
Convention. The provisions contained therein may be regarded as an addition to but not a
replacement of existing system in the Vienna Convention and the relevant provisions in
the treaties concerned.

4. The treaty bodies' powers may be limited only to the extent of declaring the
validity or invalidity of reservations. In the event of a reservation being declared invalid
it may be left to the decision of State concerned to take further action on whether or not
to continue as a party to the treaty. It may be left to State to decide whether it wishes to withdraw the reservation or revoke its ratification. It is probable that a State’s withdrawal of ratification might pose a threat to the efficacy or existence of a treaty when that State’s ratification is essential to satisfy the requirement of minimum number of ratifications for the treaty to come into force. This uncertainty of a treaty’s existence is always there as many treaties contain denunciation clauses whereby States can withdraw from a treaty. However the possibility of a denunciation is infrequent whereas the possibility of a reservation being declared invalid is frequent. Thus the onus lies on the State party involved to act keeping in view the relevance and significance of the treaty concerned and the purposes it serves.

As the practice of reservations is one of the most controversial issues of international law any effort to formulate a comprehensive system of reservations to human rights treaties should involve as many views as possible to arrive at a consensus keeping in view the heterogeneous nature of the international community.