CHAPTER-3
RESERVATIONS AND HUMAN RIGHTS TREATIES

Growth of human rights law in the latter part of the twentieth century has been in leaps and bounds. There has been a general consensus in the community of States on the need for the observance of human rights norms, albeit, with some differences with regard to certain issues. In the whole exercise of post world war human rights treaty making the role of the United Nations has been conspicuously prominent as it is the only place where States from different regions with different economic, social and cultural backgrounds share a common platform in the strict legal sense. And the United Nations started it with the adoption of Universal Declaration of Human Rights. Reasons for the emergence of human rights consciousness during this time are manifold and it can be attributed to many changes that took place in the international economic and political scenario. A large part of the world tasted the bitter experience of the Second World War. Many countries in Asia and Africa attained political independence from colonial powers and adopted liberal democratic political systems in their internal governance since the war. All these factors have resulted in a certain sense of apparent equality among States, which in turn paved the way to strike a balance with regard to certain aspects in their relations inter se. The common consensus on certain issues led to the formulation and conclusion of treaties on various branches of international law. The issue of human rights is one of them and it has been much debated and much publicised.

1 It is true that in the General Assembly where all the member states take part and share equal voting power, but in the case of the Security Council the five permanent members are provided with veto power reflecting the inequality of power in world politics.

Many of those treaties were adopted so far either at the General Assembly or at the international conferences convened under the auspices of the United Nations. All the members of the United Nations have had an opportunity to participate in the multilateral human rights treaty making. Like all treaties, human rights treaties too require ratification/accession by States to be bound by them. As a rule mere signature on the treaty does not create any legal obligations on the signatories in the legal sense of the current international practice unless the treaty otherwise provides.\(^3\)

Many States, which take part in the treaty making, decline to ratify a treaty for one reason or the other. Many of them even after many years of signing the treaty remain out of the treaty obligations by not ratifying it. But as a way out many States look forward to the concept of reservations. They adopt the method of making reservations while ratifying/accessing to human rights treaties as is the case with other international treaties. The Vienna Convention regime governs the present day reservation making process for the human rights treaties like any other treaties.

It is interesting to note that the issue of reservations to human rights treaties has been much debated ever since the human rights treaty making under the UN system. In

---

fact the debate on reservations gathered momentum, as discussed in the previous chapter, with the making of a human rights convention i.e., the Genocide Convention 1948.

As the significance and the number of human rights treaties are on the increase many a time a question has been raised regarding the validity of reservations to human rights treaties. As a consequence, matters involving the question of reservations were adjudicated upon by various international adjudicatory and treaty bodies. There are two distinctly different opinions, one in favour of reservations to human rights and the other against it, with the latter arguing that human rights treaties are distinct in nature, and hence not to be subjected to reservations, whereas the former arguing that they do not possess any special characteristic features, hence reservations are maintainable. Much of this discussion is undertaken either at the academic level or by the international bodies, but State practice does not seem to differentiate, from the legal point of view, human rights treaties from other multilateral treaties. This phenomenon can be substantiated from the fact that the human rights treaties so far entered into force do not contain any uniform method to govern the practice of reservations. Only two contain specific provisions prohibiting reservations. They are the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, and the Convention against Discrimination in Education 1960. There are conventions which prohibit reservations in part: the Convention Relating to the Status of

---

5 Article 9 of this convention reads: 'No reservation may be made to this convention', UNTS, vol. 266, pp. 3-87.
6 Article 9 of this convention reads: 'Reservations to this convention shall not be permitted', UNTS, vol. 429, p. 93.

---

Article 42(1) reads:


Article 38(1) reads:

'At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1) and 33 to 42 inclusive', UNTS, vol. 360, p. 117.

Article 8(1) reads:

At the time of signature, ratification or accession, any State may make reservations to any article of the present Convention other than articles 1 and 2', UNTS, vol. 309, p.65.

Article 17 reads:

(1). At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15.

(2). No other reservations to this Convention shall be applicable. UNTS, vol. 989, p. 175.

Article 64 reads:

(1). Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of general character shall not be permitted under this Article.

(2). Any reservation made under this Article shall contain a brief statement of the law concerned.

Article 75 reads:
test provided for in the Vienna Convention on the Law of Treaties, the Convention on the Elimination of All Forms of Racial Discrimination, 1965 also adopts collegiate system to decide upon the compatibility of a reservation. Similarly the Convention on the Elimination of All Forms of Discrimination against Women, 1979 also adopts the compatibility test but it expressly authorises reservations to the provision dealing with dispute settlement. The prominent human rights conventions that are silent about reservations are the International Covenant on Economic, Social and Cultural Rights and the International Covenant of Civil and Political Rights, 1966.

Lack of uniformity with regard to the practice of making reservations does not seem to be special to human rights treaties only as it is more or less similar with regard to the treaties of other branches of international law. The Convention on Damage Caused by

---

13 Article 20(2) reads:

A reservation incompatible with the object of 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 State Parties to this Convention object to it. UNTS, vol. 660, p. 195.

14 Article 28(2) reads:


15 Article 29 reads:

(1) Any dispute between two or more States parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organisation of the organisation, 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. Ibid.
Foreign Aircraft to Third Parties on the Surface, 1952 totally prohibits reservations.\textsuperscript{16} The Geneva Convention on the Continental Shelf, 1958 did not allow reservations to the provisions of Articles 1 to 3\textsuperscript{17} and there was no mention of reservations in the Geneva Convention on High Seas, 1958. The UN Convention on the Law of the Sea, 1982 conditionally prohibits reservations as some forms of declarations are allowed by it.\textsuperscript{18} The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, 1991\textsuperscript{19}

\begin{itemize}
\item Article 39 reads:
\begin{quote}
No reservations may be made to this Convention.
\end{quote}
\item Article 12(1) reads:
\begin{quote}
At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive. UNTS, vol. 499, p.311.
\end{quote}
\item Article 309 reads:
\begin{quote}
No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.
\end{quote}
\end{itemize}

However Article 310 allows declarations and statements. It reads:

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations, statements, however phrased or named, with a view,\textit{ inter alia}, to the harmonisation of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State. UNTS, vol. 1833, p. 3.


\begin{itemize}
\item Article 26 reads:
\begin{itemize}
\item (1) No reservations or exceptions may be made to this Convention.
\item (2) Paragraph 1 of this Article does not preclude a State when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view,\textit{ inter alia}, to the harmonisation of its laws and regulations with the provisions of this Convention, provided that such declarations
\end{itemize}
\end{itemize}
and the Basal Convention on the Transboundary Control of Hazardous Wastes, 1989 also adopt the procedure similar to the Law of the Sea Convention. Some environmental law treaties totally prohibit reservations. They include the Vienna Convention for the Protection of the Ozone Layer 1985, the Montreal Protocol on Substances that Deplete the Ozone Layer 1987, the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa 1994, the United Nations Framework Convention on Climate Change, 1992, and the Convention on Biological Diversity, 1992. The situation is similar with international trade law treaties also. However because of the special character of the

---

or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State.

20 Article 26 reads:

(1) No reservations or exceptions may be made to this Convention.

(2) Paragraph 1 of this Article does not preclude a State when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonisation of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State.

UNTS, vol. 1673, p.57.

21 Article 18 reads: No reservations may be made to this Convention. UNTS, vol.1513, p.293.

22 Article 18 reads: No reservations may be made to this Protocol. UNTS, vol. 1522, p.3.

23 Article 37 reads: No reservations may be made to this Convention. UNTS, vol. 1954, p. 3.

24 Article 24 reads: No reservations may be made to this Convention. Doc. A/AC.237/18 (Part II)/Add. 1 and Corr.1.


'No reservations are permitted except those expressly authorised in this Convention'. UNTS, vol. 1489, p.3.

Conventions of International Labour Organisation reservations are not allowed unless a Convention specifically authorises.\textsuperscript{27}

Treaties involving sensitive issues attracted more number of reservations as it is evident in the case of Convention on the Elimination of All Forms of Discrimination Against Women, which of all the human rights treaties, 'has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.'\textsuperscript{28} The main argument against the reservations to human rights treaties is that the reservation tends to subvert the purpose and act against the integrity of treaties as the reservations are bound to dilute the obligations of the parties. Counter to this view it is argued that reservations encourage more number of States to become parties, which ultimately result in promoting human rights. This view is premised on the assumption that respect for human rights, let alone their effective implementation, is not something instantly attainable and depends on a process of development, both material and cultural.\textsuperscript{29}

In the course of discourse on the issue one is confronted with many theoretical and practical propositions both in favour of and against the making of reservations to human rights treaties. Not necessarily with regard to the maintainability of reservations, but in general, there have been contending views on the application of the present


framework of international human rights. An appraisal of these contending views may be expected to throw some light on the conceptual legitimacy of allowing or opposing the making of reservations to human rights treaties. Before attempting to arrive at a conclusion on the admissibility of reservations to human rights treaties an indispensable inquiry needs to be made into these issues. There are few important factors at the conceptual level, which stand against reservations to human rights treaties. Prominent among these are (1) the *Jus Cogens* character of human rights (2) the Universal character of human rights treaties. Similarly the theoretical propositions that impliedly propel the cause of reservations to human rights treaties at the conceptual level include two important issues. They are (1) Cultural Relativism (2) Inconsistency of international human rights norms with domestic law. An attempt is made here to analyse these arguments not for the purpose of arriving at a single conclusive answer, but to gain an idea of the polemical depth and width of these arguments.

3.1. Concept of *Jus Cogens*

Many a time in the practice of States the concept of *jus cogens* has been used either at the theoretical level or in the application of certain international law principles. Reference is also made to this concept by international adjudicatory bodies in certain cases. The literal translation of the word *jus cogens* means cogent law. Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as follows:


30

31
A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of present convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.  

The inclusion of *jus cogens* provisions provoked a considerable debate on the issue. "By far the most important and, in retrospect, the most controversial of the provisions of the Vienna Convention are those relating to the invalidity of treaties conflicting with rules of *jus cogens*." Though the term *jus cogens* is relatively new to international law but its essential conceptual features are very much present in the international legal thought for centuries. There are diverse opinions on the nature, content and relevance of *jus cogens* in the application of contemporary international law.

The roots of the concept of *jus cogens* are traced back to ancient domestic legal systems, particularly to Roman law. As mentioned by Alexidge legal rules of Roman law were grouped into two main parts; (a) peremptory or absolute law, i.e., *jus cogens* or, using the term of Roman sources of law, *jus publicum*, (b) permissive law or *jus dispositivum*. Though it is considered that the *jus cogens* norms are primarily concerned with public law it is observed that the peremptory norms played a very important role in the realm of

---


34 See Alexidze, n.30, p. 228-29.

private law also. However Ian Sinclair observes that the application of private law analogy to international law does not help to conclude that there exists *jus cogens*. He says:

The analogies from private law sources do not seem very apt to warrant the conclusion that there exist, in present-day international law, certain peremptory norms from which States cannot derogate by treaty. There are also differing views on the possibility of existence of *jus cogens* norms in international law. Commenting on the concept of *jus cogens* Hans Kelsen observed;

No clear answer to this question can be found in the traditional theory of international law. Some writers maintain that there exists complete, or almost complete, freedom of contract in this respect; others maintain that treaties which are at variance with universally recognised principles of international law are null and void. But they do not and cannot precisely designate the norms of general international law which have the character of *jus cogens*, that is to say, the application of which cannot be excluded by a treaty. It is probable that a treaty by which two or more States release one another from the obligations imposed upon them by the norms of general international law prohibiting occupation of parts of the open sea, would be declared null and void by an international tribunal competent to deal with this case. But it can hardly be denied that States may by a valid treaty renounce in their mutual relations the right of exercising protection over their own citizens, a right conferred upon them by general intentional law.

Going ahead from this uncertain position, Schwarzenberger tries to provide a certain answer by totally denying the existence of *jus cogens* in international law. He says:

36 Ibid., p.234.
Unlike municipal law, international customary law lacks rules of *jus cogens* or international public policy, that is, rules which, by consent, individual subjects of international law may not modify. In fact, *jus cogens*, as distinct from *jus dispositivum*, presupposes the existence of an effective *de jure* order, which has at its disposal legislative and judicial machinery, able to formulate rules of public policy and, in the last resort, can rely on overwhelming physical force.39

Because of its binding nature irrespective of the will of States it has been identified with, the natural laws.40 It has also been viewed as having both the features of natural law and positive law and its presence in the major legal systems of the world.41 As natural law places the rules above the will of the subjects of law, *jus cogens* is also categorised as constituting the precepts of natural law than as rules emerged out of the co-ordination of the will of States. The natural law representatives consider international *jus cogens* as primary principles standing above customary law and treaty obligations.42 However, Tunkin argues against it. He says that "[a]s regards the methods of their creation, they do not differ in this respect from other principles on international law. Norms of general international law, including imperative principles, are created by the agreement of States".43

It was the latter view which found support from the International Law Commission. In his explanation at the Vienna Convention on the Law of Treaties the

---

41 See ibid.
Special Rapporteur Hamphry Waldock said “the International Law Commission had based its approach to the question of *jus cogens* on positive law much more than on natural law. It was because it had been convinced that there existed at the present time a number of principles of international law which were of a peremptory character.”44

The Vienna Convention does not contain any list of *jus cogens* norms nor does it provide any mechanism to ascertain the *jus cogens* character of rules. However the International Law Commission’s commentary provided three examples of treaties which could be considered as derogating from *jus cogens* norms. These are; (a) A treaty contemplating an unlawful use of force contrary to the principles of the Charter. (b) A treaty contemplating the performance of any other act criminal under international law. (c) A treaty contemplating or conniving at the commission of acts, such as trade in slaves, privacy or genocide, in the suppression of which every State is called upon to co-operate.45

Diverse views are expressed with regard to the content of international *jus cogens*. Alfred Verdross has divided the rules of general international law having the character of *jus cogens* into three categories.46 They are:

1. All treaties encroaching upon the rights of third States to be contrary to *jus cogens*.
2. All rules of general international law created for a humanitarian purpose.


45 *Yearbook of the International Law Commission*, vol. II (1966), p.248, also see Nageswar Rao, n.33.

(3) Rules of the Charter of the United Nations dealing with the use of force which include that the Member States to refrain in their international relations from the threat or use of force other than in individual or collective defence (Article 2, paragraph 4, and Article 51), the second rule is that the Member States to settle their international disputes by peaceful means (Article 2, paragraph 3) and the third rule is that the Member States to give the United Nations every assistance in any action taken in accordance with the Charter and to refrain from giving assistance to any State against which a preventive or enforcement action has been taken (Article 2, paragraph 5).

'Contemporary general international law is a product of the long historical development of the human society'. In the process of emergence throughout its history, the development of international law has been influenced by the requirements of international life involving relations between States. Given this nature of international law, the concept of *jus cogens* which is a component of general international law seems also to be the product of the continuous process of interaction between States in establishing economic, social, political and cultural relations. The phenomenon of emergence of *jus cogens* is a continuous process and new norms keep adding to the already existing corpus, which States have to recognise in their practice. This has been recognised by the Vienna Convention on the Law of Treaties.

---

47 Alexidze, n.30, p. 247.
49 Article 53 of the Vienna Convention defined *jus cogens* as part of general international law.
Article 64 of the convention states:

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.\(^{50}\)

But the Convention is silent about the consequence of a conflict between two different norms of *jus cogens*. There is a possibility for this when an action has been initiated by the concerned States or the United Nations in order to protect the *jus cogens* norm of a treaty, which results in contradiction to another *jus cogens* norm. However Article 71\(^{51}\) of the Convention refers to the consequence of the contradiction between the treaties and the *jus cogens* norms.

For the purpose of practice of State parties no effort has been made by any international body to enumerate the norms having the *jus cogens* character. Though there is an implied consensus among the academia, States and international institutions regarding the status of *jus cogens*, no consensual enumeration of such norms has at been made. “The drafters of the Vienna Conventions purposely omitted an enumeration of *jus

---

\(^{50}\) Vienna Convention, n.32.

\(^{51}\) Article 71 reads as follows:

(1) In case of a treaty which is void under Article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

(2) In the case treaty which becomes void and terminates under Article 64, the termination of the treaty,

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not itself in conflict with the new peremptory norm of general international law.
cogens rules in the Convention itself because of their evolving nature". In its commentary the International Law Commission gave the reasons for non-inclusion of any examples of jus cogens, it said:

The Commission decided against including any examples of rules of jus cogens in the article for two reasons. First, the mention of some cases of treaties void for conflict with a rule of jus cogens might even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of jus cogens, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.

3.1.1. Jus Cogens and Human Rights Treaties

The concept of jus cogens has been discussed widely in the context of implementation of human rights norms. Human rights norms are considered as having universal value and the obligations of a State to protect the rights of its citizens is not just a matter between themselves but it is the obligation of that State towards the international community. "These treaties create obligations not only among parties but also between parties and individuals." This view is premised on the nature of obligations of States under general international law. Depending on the context and content of the issue the obligations also vary. There are certain issues which concern only two or a few States and violation of obligations in that case is concerned to those States only but the other States

52 Parker, n.40, p. 428.
who are not related to it do not have any say in it. There are other categories of obligations under international law, which are the concerns of the entire international community irrespective of the direct involvement in it.

While dealing with the question of obligations of States the International Court of Justice observed in the *Barcelona Traction* case that:

…an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". 55

It can be deduced from the above judicial observation that norms of *jus cogens* character get evolved from the obligations of the parties of *erga omnes* nature. Any derogation in the form of treaty of these obligations would invalidate the treaty. Based on these formulations the whole corpus of human rights is considered as come under the category of *jus cogens* as they inherently involve obligations *erga omnes*. In different contexts international adjudicatory bodies also subscribed to this view while deciding upon various aspects of human rights. The ICJ observed in the reservations to *Genocide Convention* case as follows:

The origins of the convention show that it was the intention of the United Nations to condemn and punish genocide as a crime under international

---

law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and spirit and aims of the United Nations.\textsuperscript{56}

The Court further held:

The first consequence arising from this conception is that the principles underlying the convention are principles, which are recognised by civilised nations as binding on states, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge."\textsuperscript{57}

While delivering a dissenting opinion in the \textit{South-West Africa} cases Judge Tanaka expressed the view that human rights fall under the category of \textit{jus cogens} under international law. He observed:

Human rights have always existed with the human being. They existed independently of, and before, the State. Alien and even stateless persons must not be deprived of them.......There must be no legal vacuum in the protection of human rights. Who can believe, as a reasonable man, that the existence of human rights depends upon the internal or international legislative measures etc., of the State and that accordingly they can be validly abolished or modified by the will of the State?\textsuperscript{58}

He further emphasised:

If we can introduce in the international field a category of law, namely \textit{jus cogens}, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the \textit{jus dispositivum} capable of being changed by way of agreement between states, surely the

\textsuperscript{56} Reservations to the Genocide Convention Case, \textit{ICJ Reports 1951}, p. 23.

\textsuperscript{57} \textit{Ibid.}, p.23.

\textsuperscript{58} \textit{South-West Africa} Cases, \textit{ICJ Reports 1966}, pp.297-98.
law concerning the protection of human rights may be considered to belong to the *jus cogens*\(^59\).

Another important human right i.e., the right to self-determination which was, in fact, considered as an important weapon in the hands of former colonies in their fight against colonialism was also included under the category of *jus cogens*. The right to self-determination which was incorporated in the UN Charter and both the Covenants \(^60\) was considered by Judge Ammoun in his individual opinion in Namibia (South West Africa) Case, as a norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances.\(^61\)

As under general international law an unresolved question that remains under human rights law is as to what norms constitute *jus cogens*? Is it the whole treaty law on human rights or is it only the catalogue of non-derogable rights\(^62\) that constitute *jus cogens*?

---

\(^59\) Ibid., p.298.

\(^60\) Paragraph one of the common Article 1 of both the Covenants reads as follows:

> 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.

\(^61\) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Not withstanding Security Council Resolution 276,(1970), *ICJ Reports*, 1971, p.90. Also see Judge Weeramantry’s dissenting opinion about the significance of the *erga omnes* principle in respect of right to self-determination in ‘Case Concerning East Timor (Portugal Vs Australia)’, *ICJ Reports*, 1995, pp.139-223.


**Article 4(2) of the ICCPR says:**

> No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

**Article 27 (2) of the European Convention reads:**

> No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this Convention.

**Article 27 (2) of the American Convention on Human Rights states:**

---

103
cogens? If it is only non-derogable rights what about those treaties which cover particular aspects of human rights like the prohibition of genocide and slavery and which do not constitute any derogation clauses? In this respect Rosalyn Higgins remarks:

It has always been the view in some quarters that any form of derogation, reservation or qualification is inappropriate in conventions for the promotion of human rights. In general terms, the suggestion has been made that human rights treaties have the character of *jus cogens*. There certainly exists a consensus that certain rights – the right to life, to freedom from slavery or torture – are so fundamental that no derogation may be made. And international human rights treaties undoubtedly contain elements that are binding as principles which are recognised by civilised States, and not only as mutual treaty commitments. Some treaties may focus almost exclusively on such elements – such as the Genocide Convention – while others may cover a wide range of rights, not all of which may have for the present a status which is more than treaty based. This being said, neither the wording of the various human rights instruments nor the practice thereunder leads to the view that all human rights are *jus cogens*. 63

This observation seems to be factually valid as the practice of States does not seem to endorse the view that all the manifestations of human rights constitute *jus cogens*. This can be substantiated by the fact, as observed earlier, many human rights

---

treaties contain provisions allowing reservations and denunciation clauses. It is also significant to mention here that no human rights treaty expressly enumerates the *jus cogens* provisions in it. This ambiguous practice of States prompted the view that “the idea of international *jus cogens* has not yet penetrated into the day-to-day thinking and action of governments”.64

There also arises another question whether the object and purpose of a human rights treaty as propounded by the International Court of Justice in the *Genocide Convention* case 195165 is what constitutes *jus cogens* of that treaty which in turn can be subsumed under the non-derogable rights. The Inter-American Court of Human Rights in its advisory opinion held that:

> It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it.66

While dealing with the problem of reservations to human rights treaties the Human Rights Committee observed, contrary to the above view of the Inter American Court, that “while there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.”67 However the

65 ICJ Reports, n.56.

105
Committee further held that the "[r] eservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant." 68

Though there is a consensus on the *jus cogens* character of some of the human rights norms, there lacks an expressly enumerated catalogue of human rights norms having the character of *jus cogens*. The fact that some human rights norms have achieved the status of *jus cogens* seems to be prompting some proponents of some category of rights to highlight the discriminatory character of international legal system. The case for inclusion of prohibition of discrimination against women is a genuine one which has been neglected so far by the international community. Thus it is argued:

All the violations of human rights typically included in catalogues of *jus cogens* norms are of undoubted seriousness; genocide, slavery, murder, disappearances, torture, prolonged arbitrary detention, and systematic racial discrimination. The silences of the list, however, indicate that women's experiences have not directly contributed to it. For example, although race discrimination consistently appears in *jus cogens* inventories, discrimination on the basis of sex does not. And yet sex discrimination is an even more widespread injustice, affecting the lives of more than half the world's population. While a prohibition on sex discrimination, as racial discrimination, is included in every general human rights convention and is the subject of a specialised biding

---

68 Ibid, p.842. The Committee also enumerated certain rights in the Covenant for which reservations may not be made. It observed; "[P]rovisions in the Covenant that represent customary international law ( and *a fortiori* when they have the character of peremptory norms ) may not be the subject of reservations. Accordingly a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest or detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be."
instrument, sexual equality has not been allocated the status of a fundamental and basic tenet of a communal world order.\textsuperscript{69}

Thus, the demand for inclusion of certain category of rights like the prohibition of discrimination against women substantiates the position that all human rights norms do not constitute the \textit{jus cogens} unless it has been accepted in the practice of States. Therefore it may not be legally invalid to argue, in the light of observations made by the adjudicatory bodies and the views of the Human Rights Committee, that the human rights norms that are recognised as \textit{jus cogens} do constitute the object and purpose of the respective Conventions and reservations that result in violation of those norms may be considered as incompatible with the object and purpose of those Conventions.

\textbf{3.2. Universality of Human Rights}

The Universal Declaration of Human Rights and subsequent developments in the field of human rights have ushered in a new phase in the human rights discourse. At the conceptual level these developments have spearheaded an idea that human beings have certain inalienable rights which are applicable universally. It emphasised that irrespective of social, economic, cultural and spatio temporal specificities it is binding on States to protect certain human rights of its citizens which are of universal nature. The underlying notion in it is that human beings inherently possess certain rights without regard to their social surroundings and these rights are inviolable and universal. All the efforts made under the United Nations system in the field of human rights carried this notion as a guiding principle. From the date of the Universal Declaration of Human Rights till today there has been a consistent effort by the United Nations to promote wider acceptance of

the notion of universal nature of human rights from States. We are witnessing an unequal process of universalisation of the concern for human dignity.\textsuperscript{70}

Basic components of the Universalist argument can be summarised in the following manner:

- Every human being possesses inherently certain rights by virtue of being a human being.
- These rights are available and applicable to human beings universally.
- These rights are inviolable.
- States are bound by the duty to implement these rights irrespective of their will.
- Primacy is accorded to individual rather than to a group or community.

The theoretical underpinnings of universalism were initially found in natural law theory and moral philosophy.\textsuperscript{71} “The “natural law” that the idea of human rights presupposes is simply that all (or virtually all) human beings share significant characteristics, in that sense they share a “nature”, in virtue of which some things are good for every human being- some things are valuable for (and, so, should be valued by) every human being- and, some things are bad for every human being --some things are harmful to (and, so, should be disvalued by) every human being”.\textsuperscript{72} The United Nations in its human rights mission carried this spirit forward from its inception. As observed earlier the promotion and protection of human rights at the political and legal levels started with the establishment of the United Nations. This grand mission was started along with the birth of this organisation, as the promotion of human rights was included


in the Charter itself. The Charter of the United Nations emphasises the universal application of human rights without any distinction. Article 1 (3) says:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Thus it is argued that promotion of respect for human rights was one of the pillars on which the United Nations was erected and "[i]t was on these foundations that the new international law of human rights was built". As a testimony to this object the preamble of the Universal Declaration of Human Rights states:

Whereas Member States have pledged themselves to achieve in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Therefore all the efforts undertaken by the United Nations in the field of human rights are universalist in their approach. In spite of contending views about the universality of human rights which took explicit form at the Vienna Conference on Human Rights 1993, the declaration adopted there categorically sticks to the universal application of human rights. The declaration states:

Paragraph 1: The World Conference on Human Rights reaffirm the solemn commitment of all States to fulfil their obligations to promote respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.

---

Paragraph 5: All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, in the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Paragraph 32: The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.\(^{74}\)

In the making of the two covenants and other human rights conventions many newly independent African and Asian States participated and have become parties to them. All these States are drawn from different social, political, economic and cultural background without much similarity with the European countries. In this process many countries have also made reservations to these conventions. Provisions of all these conventions are applicable to peoples of all countries from various backgrounds. To avoid some of the obligations under these treaties States made reservations to these provisions while becoming parties to it.

The proponents of universality are against these reservations as they argue that they thwart the efforts for universal application of human rights and are also contrary to the notion of inviolability of human rights. Though it was not patently expressed in the advisory opinion of the International Court of Justice in the *Genocide Convention* Case it can be deduced from the compatibility test that the object and purpose of the human

rights treaties is, *inter alia*, their universal significance and application. The major proponents of universality are from the West who give much importance to the individual rather than to a group or community. From the Universal Declaration of Human Rights to the Vienna Declaration and Programme of Action, 1993, all the human rights documents are endorsed by many States representing different regions. But those States that find it problematic to accept the entire treaty provisions have become parties subject to reservations.

From the point of view of Asian and African countries there have always been differences with regard to the guiding principles of human rights treaties. The international covenants on human rights are hailed as reflecting a worldwide consensus on human rights. Unfortunately, even leaving aside the issue of universal ratification and compliance, they do not represent a genuine consensus.\(^{75}\)

As stated earlier the idea of universality is based on the natural law principles.\(^{76}\) The underlying assumption of this idea is that every human being possesses certain rights by virtue of being a human being. These rights are not conferred on a human being by another human being but were attained naturally. With birth itself these rights are conferred on them. As these rights are attained with birth they are neither altered nor negated by the external conditions. Social, economic, cultural and regional differences do not have any impact on their application. As these rights are inherent and internal, external surroundings do not affect their application and, hence, they are universal in nature and protected everywhere. Universality presupposes unanimous acceptance by

\(^{75}\) Pollis, n.71, p.9.

international community consisting of sovereign States. And this acceptance should be made without any amendments and alterations to the whole corpus of rights. The consequence of this is that universalism do not entertain any amendment to the human rights principles in the form of reservations. Thus it is argued that the reservations *per se* contradict the universal character of human rights.

Another important feature of universality is that these rights are inviolable. By acts of omission or commission these rights should not be violated. The presumption is that these rights are absolute and indivisible. Another necessary corollary of these features is that it is binding on States to implement these rights. In the concrete sense it is the individuals who possess these rights and it is the States who protect them. As an implementing agency a State is bound to implement the basic human rights of people.

### 3.3. Cultural Relativism and Human Rights

The concept of cultural relativity is used in different contexts and disciplines to denote the plurality in defining relations between peoples and negates the supremacy of concept of uniform value system.

Cultural relativism may be described as the method whereby social and cultural phenomena are perceived and described in terms of scientific detachment or, ideally, from the perspective of participants in or adherents of a given culture. Further, cultural phenomena are evaluated in terms of their significance in a given cultural or social context. The methodology of cultural relativism rests on the assumption that the ethnologist is able to transcend, or to eliminate for the moment, his own cultural conditioning and values and to assume the subjective, ethnocentric attitudes and mentality of an adherent of or a participant in the culture. 

In the field of international law this concept is largely applied to the branch of human rights to counter the universalist argument. As against universalism, cultural relativism argues that the human rights standards are not uniform; there are variations in the approaches based on cultural specificities. It is the cultural specificities of peoples that decide the standards and content of human rights. Universal application of human rights standards, the basic premise on which the international human rights law is based, is fundamentally challenged through the concept of cultural relativism.

Relativist argument emphasises that the application of human rights standards is subject to the cultural specificity of particular peoples. Uniform standards may not be applicable to peoples belonging to different cultures. An act that results in violation of human rights in the context of one culture may not be the same in the case of other cultures. As there is a multitude of variations in the social, economic, political and cultural conditions among countries, it is argued that application of universal human rights standards is not feasible in all the countries. It may be defined as the position according to which local cultural conditions (including religious, political and legal practices) properly define the existence and scope of civil and political rights enjoyed by individuals in a given society. 78

It does not seem to be irrelevant here to quote from the American Anthropological Association’s Statement on Human Rights which was submitted to the UN Commission on Human Rights in 1947, when the latter was in the preparation of the draft of the Universal Declaration of Human Rights. The statement said:

If we begin, as we must, with the individual, we find from the moment of his birth not only his behaviour, but his very thought, his hopes.

78 Teson, n.70, p.870.
aspirations, the moral values, which direct his action and justify and give meaning to his life in his own eyes and those of his fellows, are shaped by the body of custom of the group of which he becomes a member. The process by means of which this is accomplished is so subtle, and its effects are so far-reaching, that only after considerable training are we conscious of it. Yet if the essence of the Declaration is to be, as it must, a statement in which the right of the individual to develop his personality to the fullest is to be stressed, then this must be based on a recognition of the fact that the personality of the individual can develop only in terms of the culture of his society. 79

As observed earlier the whole corpus of international human rights approaches the problem from the individual point of view. Individual being is taken as a unit for the application of these rights. Of course there are certain exceptions to it as in the case of Declaration of the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities adopted by the General Assembly in December 1992 which talks about the exercise of community rights along with individual rights. 80 But the basic ideological premise of these rights is the predominantly western notion of individual rather than communalism or community based rights.

Some cultural relativists argue that, in general, individual rights are irrelevant to the cultures and to the values of many non-western societies. They argue that communalism, predominates, as it did in the west prior to the rise of capitalism. 81 Hence


80 Article 3 of the Declaration says:

Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination. General Assembly Resolution 47/135 of 18 December 1992.

81 Pollis, n. 71.
the individualist notion of human rights contradicts the non-western cultural values. Though the phrase ‘cultural relativism’, not withstanding the frequency of its use, has no single, canonical meaning its main emphasis in the context of international human rights is that there exist different cultural values attached to different social systems and uniform standards of human rights are not applicable universally as there exist contradicting value systems in the cultures.

Major challenge to the western notion of human rights (which, it is argued, has the predominant influence on the body of existing international human rights law) is posed from the African and Asian approaches to the problem of human rights implementation. At the outset it is important to mention that the title of Banjul Charter includes the phrase ‘peoples rights’ which denotes the collective nature of human rights. In a sense it challenges the fundamental tenet of human rights law which emphasises on the rights of the individuals rather than collectives. It “seeks to combine African values with international norms. In other words, it has important similarities with but also significant differences from other international human rights instruments”. It is the significant factor of this Convention as it “departs from recognised international norms and proclaims collective rights and individual duties”. The Banjul Charter was envisaged keeping in view the specific conditions of the African continent. This point was categorically emphasised by the former president Senghar of Senegal when he

---

82 Perry, n. 72, p. 80.
84 Ibid., p.8.
addressed the group of African experts who gathered in Dakar to prepare the first draft of the African Charter. He observed:

Europe and America have construed their system of rights and liberties with reference to a common civilisation, to respective peoples and to some specific aspirations. It is not for us Africans either to copy them or to seek originality for originality’s sake. It is for us to manifest both imagination and skill. Those of our traditions that are beautiful and positive may inspire us. You should therefore constantly keep in mind our values and the real needs of Africa.85

It is also the same with Asian experience. It is vehemently argued that the myth of the universality of all human rights is harmful if it masks the real gap that exists between Asian and western perceptions of human rights. The gap will not be bridged if it is denied86. While substantiating a ‘Third World’ perspective on equality and freedom C.G. Weeramantry observes:

Most Third World societies were organised around groups rather than individuals as the units of society. The individual acquired his rights and discharged his obligations primarily in relation to his group. The family, the extended joint family, the small village unit, the tribe- all these were units of society which to a large extent, provided their own dispute-resolving mechanisms and other forms of protection of the individual, as well as an assurance of support in relation to his fundamental wants. Where these were lacking, it was first to the group that the individual had recourse, and traditions of group responsibility were so strong that in the first instance, the group provided for the satisfaction on his basic wants.

He further holds:

85 Cited by Ankumah, Ibid., p.6.
The performance of these group duties depended to a large extent on customary obligations, by contrast with Western systems, which exact performance of duties through the concept of individual rights. The later notion had, in general, a scant place indeed, but its want was scarcely felt owing to the strong pressure of custom operating both within the group and externally, in the group’s relations with the rest of the community. It was reinforced, moreover, by the sanctions of religion and by the personal authority of leaders, whereas Western systems had only the support of impersonal laws to achieve performance. 87

As observed earlier, the United Nations World Conference on Human Rights held at Vienna in 1993 provided a suitable platform for the Asian and African assertion about their specificities in various spheres. The Bangkok Declaration 88 which was adopted at the Asia level preparatory meeting to the Vienna Conference emphasised the significance of particularities in the implementation of general human rights norms based on universalist framework. This declaration, without negating the universality of human rights, upheld the significance of the specificities in promoting human rights. The declaration stated:

Paragraph 7. Stress the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in

---


the implementation of human rights and its politicisation, and that non-violation of human rights can be justified. Paragraph 8. Recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.89

Concern for cultural values played an important role in the case of Convention on the Elimination of All Forms of Discrimination Against Women90 which received large number of reservations. Views counter to the relativist argument aver that it is being used as a pretext for non-compliance with the international standards. In contrast to it the non-western world frequently objects to an alleged over emphasis on individual, justiciable rights and political and civil liberties in contrast to social welfare, collective rights, consensual dispute resolution, economic development and state interest.91 The argument of cultural relativism encompasses the ‘submergent divergence’92 in approaches to an understanding of human rights among states and attempts to conceptualise it in relation to international human rights standards.

While describing relativism in the context of human rights discourse Douglas Lee Donoho viewed it as some combination of three related propositions. He says:

The first proposition simply points out that an observable divergence in moral judgements exists among societies due to their differing cultural,

89 Bangkok Declaration, Ibid.
90 This Convention was adopted on 18 December 1979 in General Assembly Resolution 34/180 and entered into force on 3 September 1981.
political and social traditions. The second proposition often described as ‘normative relativism’, asserts that these divergent moral judgements and values have no meaning or validity outside their particular social context. In other words, “what is right or good for one individual or society is not right or good for another, even if the situations involved are similar”. The third, less extreme version of relativism argues that no objectively justifiable moral standards or judgements exist outside particular cultural contexts. This “meta-ethical” view does not necessarily deny the possibility of universal truths or shared values, but rather contends that no valid means exist to objectively justify one culture’s moral values over another’s. 93

So far as the treaty law is concerned, evidence in support of relativist argument seems to be very less. There are no instances of human rights conventions addressing the problem of cultural relativism. But article 63(3) of the European Convection on Human Rights appears to have given some amount of recognition to relativism while applying the treaty provisions. Article 63(3) reads that ‘the provisions of this convention shall be applied in colonial territories with due regard, however, to local requirements’. There need not be any hesitation in concluding that this provision gives a scope to build an argument in favour of cultural relativism. This provision clearly means that if there is any contradiction between the local conditions and the treaty provisions the former will prevail over the latter. But the European Court of Human Rights’ opinion was contrary to this view. This matter came for discussion before the court in the Tyrer Case. 94 The issue involved was corporal punishment which was a local tradition in the Isle of Man. The Court opined that the word ‘requirement’ in Article 63(3) connotes necessity. In the

93 Donoho, n. 91, pp.351-52.
present case the Court held that the corporal punishment was not at all a necessary thing to maintain law and order. It was also held that local requirement should not derogate from the treaty provision of prohibition of degrading punishment which is enshrined under the Article 3 of the European Convention.

A close look at the practice of States clearly endorses the view that the cultural relativist argument does not necessarily mean the outright rejection of international human rights law. From the days of Universal Declaration of Human Rights to till now many newly emerged sovereign States have been signatories to many international human rights conventions and many of them have become parties by ratifying them. This attitude of States show that subject to the national specificities it is possible to have a broad frame work of understanding about international standards. This can also be substantiated by the fact that apart from treaties entered into under the UN system there are other regional human rights conventions limited to particular regions but not just confined to a single nation or single culture.⁹⁵ This situation has been succinctly summarised by Douglas Lee Donoho in the following manner:

Three related assertions justify the relativist claim that national (or local) conditions determine the specific content and interpretative meaning of rights. First, the actual shared understanding between nations over human rights norms exist only at the level of abstract rights, the meaning of which is necessarily indeterminate. Second, interpretation of these rights legitimately varies among nations, depending upon their cultural, social and political conditions. Third, adherence to these abstract human rights

can be satisfied by diverse interpretations of their specific content and application. The conclusion which follows from these assertions is that the international community must allow States to interpret rights in ways consistent with their particular national conditions. 96

Thus it is argued that:

There is, therefore, a logical case that the meaning of universal human rights principles can be determined only by their interpretation, and that interpretation is a cultural practice. One can, therefore, consistently affirm the universality of human rights principles and the legitimacy of culturally diverse interpretations. 97

These propositions are some what similar to the views of some of the relativists who argue that “[t]he western media, NGOs, and human rights activists, especially in the United States tend to press the human rights dialogue beyond the legitimate insistence on humane standards of behaviour by calling for the summary implementation of abstract concepts without regard for a country’s unique cultural, social, economic and political circumstances”. 98 The assertion made in the Bangkok Declaration also did not reject the universality of human rights, however asked for consideration in the context of national and regional particularities. Though an extreme form of relativist argument may result in chaotic situation, the argument has received conceptual legitimacy in the field of international law for its recognition to the extent possible. Thus it is argued:

Cultures must be allowed to resist forces of global homogenisation generated by supranational, statist, economic and technological forces. Granted, compromise between cultures is necessary, especially within multicultural States. Yet, unless international law recognises and upholds

96 Donoho, n. 91, p.368.
98 Kausikan, n.86, p.33.
this important mandate of cultural diversity, many indigenous and minority cultures will be eradicated or coercively assimilated. A qualified cultural relativity must therefore be promoted as a universal value by future intentional law. In an age of accelerating multifaceted global interdependence, however, this challenge seems likely to become increasingly more difficult.\footnote{Christopher C. Joyner and John C. Dettling, "Bridging the Cultural Chasm : Cultural Relativism and the Future of International law", \textit{California Western International Law Journal}, vol. 20 (1989-90), pp. 275-314, at p.291.}

In this context the significance and necessity of reservations arises as it allows States to opt out of the obligations imposed by a treaty provision which a State feels contradicts with its domestic specific conditions. The present regime of reservations as it is enshrined in the Vienna Convention on the Law of Treaties,\footnote{From article 19 to 23 of the Convention deal with the problem of reservations.} which, \textit{inter alia}, allows States to become parties except to that part of the treaty to which reservation has been made, seems to be a suitable frame work for human rights treaties from the standpoint of relativism.

\subsection*{3.3.1. Cultural Relativism and International Law}

The basic premise on which international law is based is that a State cannot be held obligated to any international legal principle without its allegiance to that obligation. A necessary corollary to it is the principle of sovereign equality of States without any discrimination whatsoever. However it is argued that \"[d]espite all the assertions of the principle of equality and teachings or preachings of the classical jurists, the principle was in fact more honoured in the breach than in observance\".\footnote{R.P. Anand, "Sovereign Equality of States in International Law", \textit{Recueil des Cours}, vol. 197, no. II (1986), pp.13-228, at p.54.} A holistic approach to the analysis of international relations may be helpful to elicit the reasons for such
phenomenon. Inequality in economic sphere has resulted in dependence of developing
countries on economically superior countries. Historical conditions also necessitated the
biased views on international law.\textsuperscript{102} Thus it is held:

Now there is one truth that is not open to denial or even to doubt, namely
that the actual body of international law, as it stands today, not only is the
product of the conscious activity of the European mind, but has also drawn
its vital essence from a common source of European beliefs, and in both of
these aspects it is mainly of Western European origin.\textsuperscript{103}

Thus it is not unreasonable from the point of view of newly emerged African and Asian
countries to argue that their interests are not fully respected in the present framework of
international law. Commenting on this situation R.P. Anand observed:

Apart from their general preference to resort to non judicial proceedings
for the settlement of their international conflicts, the new countries of Asia
and Africa, it is also felt, could not agree to the application of the present
system of international law which is alien to their legal traditions and
cultures.\textsuperscript{104}

Be that as it may, as it is discussed in the beginning of this chapter, it is argued
that certain human rights have achieved the status of \textit{jus cogens} and they are part of
customary international law. Thus they are applicable to States not as an expressed
obligation to a treaty provision but as a customary principle. The relativist view of
specificity contradicts with this proposition. But it is also not new to customary
international law allowing states to opt out of the obligations for various reasons. The
relativists position is facilitated by the ‘persistent objector rule’ according to which a

\begin{flushright}
104 R.P. Anand, “The Role of the International Court of Justice in the Peaceful Settlement of
\end{flushright}
State can opt out of the obligations imposed by a customary principle if that State objects to that principle from its emergence and persistently doing so.

Even though most of the authorities recognise that a State is not required to have expressly consented to be bound by a rule of customary international law, virtually all authorities maintain that a State which objects to an evolving rule of general customary international law can be exempted from its obligations.\textsuperscript{105} The International Court of Justice also applied this principle in its judgement in the \textit{Fisheries Case} between United Kingdom and Norway\textsuperscript{106} and the \textit{Asylum Case}.\textsuperscript{107} Thus, at the conceptual level customary international law also provides for States the right to exercise their discretion before accepting a customary principle.

There is also not any mechanism under the customary international law to check the indiscriminate use of this principle like the one the regime of reservations has in the form of objections under the Vienna Convention. Thus at the conceptual level the position of relativists is clearly substantiated by this principle with a historical sense and authenticity. But the empirical evidence with regard to the practice of States presents different picture of the case. As far as the practice of States is concerned the principle seems to have not been used much despite the undisputed fact that it has been in existence for a long time.

\textsuperscript{106} \textit{ICJ Reports}, 1951, pp. 116-206.
This gloomy picture compels a writer to conclude that "an unsystematic, but fairly broad, survey of modern text books on international law and of works on the doctrine of sources in particular to turn up any case where an author provided even one instance of a State claiming or granting an exemption from a rule on the basis of the Persistent Objector principle excepting of course the Asylum and Fisheries cases themselves. Most of the authorities consulted in fact contended themselves with citing these two decisions as proof of the existence of the Persistent Objector principle". While rejecting this rule in the case of general customs, D'Amato argued that the principle of Persistent Objector rule can be applied in the case of special customs which is valid and applicable to only a group of states. He observes that the persistent objector rule is appropriate in the case of special custom since such a custom represents derogation from generally applicable legal obligations by a limited group of States. Therefore to require consent in that limited circumstances would be compatible with the general jurisprudence of public international law.

But there are instances under general international law in support of recognition of cultural specificities. 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of The United Nations states that "every State has an inalienable right to choose it political, economic, social and cultural system without interference in any form by another State". Prior to it the General Assembly's Declaration on the Granting of Independence

---

108 Stein, Ibid., pp. 459-460, see also, Charney, n. 105.
to Colonial Countries and Peoples\textsuperscript{111} also emphasised the right of peoples to define their status keeping in view the other conditions. Article 2 of the declaration states that ‘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’.

3.4. Inconsistency of Laws

Inconsistency of international human rights law with domestic legal systems is another important ground on which justification for making reservations may be based. There are variations among States with regard to the application of international law in the domestic practice. Application of international law takes place in different forms depending on the method adopted by a particular State. Some States confer the status of self-executing treaties on international treaties, whereas some other states need an enabling domestic legislation for a treaty to become applicable in the domestic practice. Some States have adopted the practice of conferring higher status on par with the constitutional law than the ordinary statutory law. For e.g., by way of constitutional amendment Argentina conferred the status of constitutional law on many of the important human rights treaties.\textsuperscript{112} There seems to be some difference in the approach of some States vis-à-vis human rights treaties as they confer higher status on them than the other international obligations.\textsuperscript{113} Theoretically speaking whatever approach that is adopted with regard to the application of international law, it is only those obligations which were accepted in a treaty would be implemented in the form that is adopted by a State. A State


\textsuperscript{113} See Ibid.
which made a reservation to a particular provision would implement that treaty excluding those obligations to which a reservation is made.

Domestic law of a State reflects the economic, social, political and cultural setting of a country as it is intended to regulate those conditions from which it is evolved. Due to variations in various spheres there are bound to be differences between domestic laws of different States. In contrast, international legal obligations are intended to be one and the same to all States irrespective of the nature of their domestic legal systems. Thus there is a need for a negotiating factor to bridge the gap between the requirement of international law and the domestic law. It is more so in the case of human rights obligations as they address the issues which are rooted in the social and cultural milieu of a particular society.

States normally are less inclined to bring about changes in the domestic laws to suit the international legal obligations as it is argued that domestic law is framed keeping in view the economic, social, political and cultural milieu of a State, where as the international law is framed not based on a single system but it is intended to meet the requirements of larger international community. Therefore, States are more inclined to make reservations to protect the domestic law, which they could not do during the making of the convention. Thus, resorting to reservations becomes handy for the States to avoid any unwanted amendments to the domestic law. This practice of making reservations to protect the domestic laws is more visible in the case of human rights treaties, particularly with regard to those treaties, which address certain issues involving social and cultural implications. One such example is the Convention on the Elimination
of All Forms of Discrimination Against Women\textsuperscript{114} which has attracted a good number of reservations intended to protect the domestic laws. Large number of reservations of this nature are made by countries constituting Muslim population and whose domestic legal systems are based on Islamic law. It is not only in the case of women’s convention, but in respect of other conventions also States make reservations keeping in view the domestic law provisions. Declarations/reservations made by India in respect of International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights\textsuperscript{115} are intended to safeguard the domestic law as they declare that the provisions of the Covenants will be applied in conformity with the domestic law provisions. Thus the implication is that when there is a contradiction between the Covenant obligations and the domestic law provisions it is the latter which prevails over the former as the implementation of Covenant obligations are subjected to the relevant domestic law provisions. The primary purpose of making reservations on this ground would be to avoid any amendments in the domestic law, as resorting to the latter would,

\textsuperscript{114} Women’s Convention, n.90.

\textsuperscript{115} These declarations are:

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 clause (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.

With respect to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating foreigners.

With reference to Articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, the Government of the Republic India declares that the provisions of the said article shall be so applied as to be in conformity with the provisions of the Article 19 of the Constitution of India.

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.
many a time, involve many other policy and legal implications. The glaring examples of reservations based on the ground of inconsistency between the international laws and the domestic laws are found from the ratifications of States parties to the Women’s Convention. This Convention was intended to provide a comprehensive mechanism to fight against discrimination against women as it was recognised that the other conventions and declarations do talk about the equality of men and women but it was realised that despite these various instruments extensive discrimination against women continuing to exist.\(^{116}\) The reservations to this convention are as general as were made by Maldives and Libya. Maldives’ reservation reads as follows:

The Government of the Republic Maldives will comply with the provisions of the convention, except those, which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives founded.

Further more, the Republic of Maldives does not see itself bound by any provisions of the convention which obliges to change its constitution and laws in any manner”.\(^{117}\)

Similarly Libya also made a general reservation at the time of accession which said that its “accession is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Sharia”.\(^{118}\) However on 5 July 1995 the Government of Libya notified the Secretary General of the new formulation of its reservation to the convention replacing the reservation contained in the instrument of accession. Though the new formulation is based on the Sharia, but it is

---

\(^{116}\) See preamble of the Convention.

\(^{117}\) *Multilateral Treaties Deposited with the Secretary General, Status as at 31 December 1997*, p.175.

\(^{118}\) Ibid.
made in respect of specific provisions of the convention. Likewise Tunisia also made a 'general declaration' along with other reservations which stated that:

[...] The Tunisian Government declares that it shall not take any organisational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of chapter I of the Tunisian Constitution.

Apart from these sweeping reservations some other reservations were also formulated to certain specific provisions but on the same ground that they contradict with the domestic law. Most of these reservations were made by Islamic countries and were intended to protect the Sharia i.e., Islamic law. Some non-Muslim countries also made reservations, which were intended to safeguard their customs and domestic laws. New Zealand made reservation to article 2 (f) and article 5(a) of the Women’s Convention and the United Kingdom had made largest number of reservations ever made to a treaty. Interestingly Indonesia, the most populous Muslim country in the world did not make any substantive reservation to any of the provision except the one made to article 29 (1) dealing with settlement of disputes which is authorised by article 29 (2). So also with regard to Yemen.

Some of these reservations are made to some of the important articles of the Women’s Convention, which directly address the issue of discrimination against women.

119 Ibid., p.173.
120 Ibid., p.176.
121 This reads as follows:
The Government of the Cook Islands reserves the right not to apply article 2 (f) and article 5(a) to the extent that the customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with those provisions.

122 Christin Chinkin, "Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women", in Gardner ed., n. 29, p.70.
These articles, for example, are Articles 2 and 16, which constitute “the crucial core of the Convention”. Reservations to these provisions may arguably be considered as against the object and purpose of the Women’s Convention as Article 2 obligates the States to take legislative measures to combat discrimination based on sex and article 16 addresses “the private sphere and family life, the fundamental site of discrimination against women which, effectively, sets the framework and opportunity for discrimination in public life”.

All these reservations are genuinely made to safeguard the domestic law as against the international obligations. In many of the Islamic countries the existing domestic law reflects the social, cultural and religious life styles and systems. Unhesitatingly some of the practices in these countries, which are justified under the respective domestic laws, may be considered as discriminatory against women. However any effort to formulate alternative to this would face opposition not only from the State apparatus concerned but also from the civil society as it is considered against the established practices of the concerned people. Though it sounds to be true from the point of view of these sections of respective societies, it does not receive much justification and support from the standpoint of international law. So far as the treaty law is concerned the Vienna Convention on the Law of Treaties categorically prohibits invocation of domestic law for avoiding treaty obligations. Article 27 of the Vienna Convention states:

---

124 Ibid, p.94.
A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.125

Article 46 of the Vienna Convention reads:

1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.126

Thus article 46 paragraph 1 of the Vienna Convention invalidates consent to a treaty when that consent has been expressed in violation of internal law regarding competence to conclude treaties. Therefore the invalidation of consent takes place only on the technical ground of competence to conclude treaties but not on the ground of contradiction of treaty provisions with the internal law. Hence Article 27 prohibits invocation of internal law for non-compliance of treaty provisions. Article 27 is based on the basic principle of international law that States as sovereign entities are entitled not to enter into a treaty obligation against their interests, but once they have chosen to accept a treaty obligation on their own they are not entitled to invoke domestic law as a reason for failure to comply with the treaty obligations for it is assumed that they have accepted such obligations after a careful consideration. Thus invocation of internal law as a reason for non-compliance with treaty obligations is not permitted under international law and...

---

125 Vienna Convention, n. 32.
126 Ibid.
this principle is not different in the case of human rights obligations also. Moreover, human rights treaties lay higher responsibilities on the State parties to comply with the treaty obligations. Apart from not invoking the existing internal law as prohibited under Article 27 of the Vienna Convention, some of the human rights conventions require the state parties to take legislative measures to meet the requirements of these treaty obligations. For example, the International Covenant on Civil and Political Rights requires State parties to take appropriate measures for its implementation. Article 2 (2) of the Covenant reads as follows:

Where not already provided for by existing legislature or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional process and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.127

Similarly, Women's Convention also provides for taking appropriate measures to implement the treaty obligations. Article 2(b) of the convention reads as follows:

To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.128

Thus under these conventions States parties are obliged not only not to invoke the internal law for non-compliance of the treaty obligations but they should also take positive legislative and other measures to implement the treaty obligations. Article 2 of the Women's Convention129 is specifically intended to take positive steps to implement

---

128 Women's convention, n. 90.
129 Article 2 reads:
the convention obligations. But contrary to the general principles of international law and also to the treaty requirement reservations are made to the Women’s Convention on the ground of its inconsistency with the domestic law.

Analysis of reservations to the women’s convention shouldn’t drive us to the conclusion that reservations intended to protect the domestic law are made only by Islamic countries to protect the Islamic law. The situation is similar with other human rights treaties also. As observed earlier, like India’s reservations, other countries also made reservations on similar grounds to the ICCPR. These reservations are intended to subject the covenant obligations to the existing domestic law in contrary to the requirement of bringing legislative action as provided under Article 2 (2) of the Covenant. Some of the reservations made by the United States at the time of ratification of the ICCPR are of this nature. These are:

---

States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate, the practical realisation of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutes the effective protection of women against any act of discrimination

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination;

(g) To repeal all national penal provisions which constitute discrimination against women.
(1). That article 20 does not authorise or require legislation or other action by the United States that would restrict the right of free speech and association protected by the constitution and laws of the United States.

(2). That the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

(3). That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth amendments to the constitution of the United States”. 130

By way of making these reservations the United States has made it very clear that it did not want to accept the obligations of the Covenant which contradict with its domestic law provisions. These reservations like many other reservations made to the Women’s Convention are open ended without any time frame. Keeping in view the domestic compulsions it may not always be possible to bring about required changes in the domestic law in conformity with the treaty obligations. Thus a reservation made with a time frame to make amendments to the domestic law would be an understandable reason, though it was made to protect the domestic law, since it was intended to buy some time to make changes in the domestic law. But the reservations made without mentioning any time limit may be understood as intended to be of permanent to avoid any future changes in domestic law.

As observed earlier reservations of this nature intending to safeguard the domestic law when it contradicts with the international legal obligations are in violation of general

---

130 Multilateral treaties Deposited with the Secretary General, as at 31 December 1997, p.130.
principles of international law as enshrined under Article 27 of the Vienna Convention on the Law of Treaties. It is well established under general international law that international law prevails over domestic law on the international plane when there is a contradiction between the two. This principle has been emphasised as early in arbitral award of Alabama Case between Great Britain and the United States. This principle also found justification before the Permanent Court of International Justice (PCIJ). The PCIJ held that ‘a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken’.131 This opinion was reiterated by the PCIJ in its later judgement in the Greco-Bulgarian Communities Case. The Court held that “it is a generally accepted principle of international law that in the relations between the powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty”.132 This view also received support from the International Court of Justice in the case of Applicability of the Obligations to Arbitrate under Section 21 of the United Nations Headquarters agreement of 26 June 1947.133 Thus, along with Article 27 of the Vienna Convention on the Law of Treaties judicial opinions are also not in favour of giving primacy to domestic law at the cost of repudiating international obligations. Therefore States which have accepted the international obligations -which, they are at liberty not to accept- cannot evade from its implementation on the pretext of its inconsistency with its domestic law. But the practice of States seems to be contrary to this

131 Exchange of Greek and Turkish Populations Case, Advisory Opinion, PCIJ Reports, 1925, Series B, no.10, p.20.
132 PCIJ Series, B. no. 17, p.32.
133 ICJ Reports, 1988, p.34.
well-established principle under international law. This attitude of States is glaringly visible from the reservations made by them to various Conventions.

Another example of conventions which suffers from this kind of reservations is the Convention Relating the Status of Refugees\(^{134}\) and also the Protocol Relating to the Status of Refugees.\(^{135}\) Apart from the reservations made to specific provisions of the Convention stating that they will implement those provisions to the extent permissible by their domestic laws two States have made reservations of general nature without mentioning any specific provisions but on the similar ground. These two countries are Angola and Guatemala.

The Angolan reservations states:

> The Government of the People’s Republic of Angola also declares that the provisions of the Convention shall be applicable in Angola provided that they are not contrary to or incompatible with the constitutional and legal provisions in force in the people’s Republics of Angola...\(^{136}\)

Like wise the reservations made by Guatemala reads as follows:

> The Republic of Guatemala accedes to the Convention relating to the Status of Refugees and its protocol, with the reservation that it will not apply provisions of those instruments in respect of which the Convention allows reservations if those provisions contravene constitutional precepts in Guatemala or norms of public order under domestic law.\(^{137}\)

---


\(^{136}\) *Multilateral Treaties Deposited with the Secretary General, status as at 31 December 1997*, p.230.

\(^{137}\) Ibid, p.232.
The Refugee Convention and the Protocol both provide provisions allowing reservations to some provisions and prohibiting it to others.\textsuperscript{138} However the Angolan reservation is made in very general way applying it to the entire Convention irrespective of the restriction provided by Article 42 (1). On the other hand the Guatemalan reservation subjects the application of only those provisions to which reservations are allowed under Article 42 (1) to the domestic law provisions. However both the reservations are general in nature as they subject the whole convention obligations (Guatemala reserving that part of the convention permitted under article 42(1)) to the test of their compatibility with the domestic law. These two reservations are similar to those made by Maldives\textsuperscript{139} and Tunisia\textsuperscript{140} in respect of women's convention. All these reservations go against Article 27 of the Vienna Convention on the Law of Treaties and also contradict with the well-established judicial opinions that a State party to a treaty cannot invoke domestic law for its failure to implement the international organisations.

\textsuperscript{138} Article 42 of the Refugee Convention reads as follows:

1. At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

2. Any state making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary General of the United Nations.

Similarly, article VII (1) of the protocol reads:

1. At the time of accession, any state may make reservations in respect of article 6IV of the present protocol and in respect of the application in accordance with article I of the present protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, provided that in the case of a state party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

\textsuperscript{139} See, n.117.

\textsuperscript{140} See, Ibid.
While commenting on the critical situation confronted by States in situations of this nature, Yogesh Tyagi observes:

A comparative study suggests that the compulsion to harmonise domestic law with international law has been the most compelling factor in the making of reservations. Because of their attachment to well established domestic laws, States may not recognise or accept that their laws are deficient. Even if they do, conservative forces do not allow them to amend their laws. Even if a consensus may be emerging on the need for amendment, the time factor may get in the way. In such situations, a quick solution is found in the form of reservations. In the process, reserving States, more or less ignore that ratification of international treaties entailed obligations to adopt a new legislation and to amend laws contradicting international instruments.\textsuperscript{141}

However, as a concessional method, it is argued that "[d]espite the generally accepted rule, the parties to a treaty may agree within the terms of that treaty that in certain circumstances their domestic laws may take precedence over their treaty obligations".\textsuperscript{142} Accordingly a State can make reservations if the treaty does not prohibit reservations. But this is made subject to two fundamental qualifications. First is that such reservation can only be made to those provisions to which reservations are expressly permitted, and the second qualification is that even when a treaty permits reservations the right of parties to make reservations is not unlimited as the permissibility of any reservation made is subject to its compatibility with the object and purpose of the treaty.\textsuperscript{143}

\textsuperscript{141} Tyagi, n.54, p.201.


\textsuperscript{143} Ibid, p. 546.
Even if the above method is accepted for the sake of argument, many of the reservations made by States parties on the ground of giving precedence to domestic law do not stand the test of the above two qualifications. Therefore the reservations of this nature made to various human rights conventions are not permissible under general international law. Some of the human rights conventions warrant strict implementation of the principle that domestic law can not prevail over the international law when there is contradiction between two, since it is argued that certain human rights obligations are obligation *erga omnes*. However the question that remains to be answered at both conceptual and practical levels is that is it legitimately feasible to accommodate certain international obligations in all the domestic legal systems as the latter have evolved in different social, cultural and economic conditions and also in different spatio-temporal specificities. There are many variations in domestic laws as they are the products of different legal systems. As discussed in the previous section cultural relativist argument would also come in support of reservations giving primacy to domestic law. The problem of this kind of reservations is more patent in the case of human rights treaties than the other branches of international law. Any effort to prohibit reservations of this nature would certainly discourage many states from becoming parties to the human rights treaties, which would ultimately thwart the aim of getting universal acceptance to these treaties. However to meet the practical necessity it may be suggested to allow time bound reservations wherein the reserving States would specify the time bound period required to bring about required changes in the domestic law in conformity with international obligations. In this case also if the required changes are merely of procedural it may not take much time, but when they are of substantial nature which are linked with social and
cultural values, as in the case of Women's Convention, it remains to be uncertain whether
the time-bound framework of reservations would be of any help.

Thus it is apparent that there is diversity of views among States and publicists
about the nature of international human rights law and its relevance to all societies. It is
not only at the conceptual level but in the practice also there are difficulties in full
compliance with international human rights law as observed in the case of inconsistency
between international human rights law and the domestic laws. Therefore the contending
views of this nature inevitably lead to difficulties in the application of human rights
norms warranting judicial and other opinions on the issue. This kind opinions are very
much expected in respect of human rights as many international human rights treaties
establish treaty bodies. Thus the next chapter will deal with the views expressed by
various adjudicatory and other treaty bodies on the question of reservations particularly in
relation to human rights treaties.