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and declarations to  
core human rights  
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## **Abstract**

A study of human rights anywhere in the world would be incomplete without understanding the various reservation and declaration to core international human right conventions by the nation. This paper attempts to demystify and simplify concept of reservations and declarations, difference between the two and the test of validity of reservations and declarations. Also it will provide an overview of India's engagement with international human rights treaties and reservations and declaration made. This paper will concluding by showing that how the reservations and declaration to core human rights treaties on basis of " Culture" are the treat to the concept of " Universality" of human rights.

## **Introduction**

International human rights treaties and conventions are the legal instrument concluded between states, those provide standards of conduct for governments to fulfill, and also spells out the state's mandate for protecting human rights. Majority of international human right convention are drafted by the UN and its specialized agencies emerged through negotiations, Consultations with governments and Consultations with the public and all is done under the observation of the United Nations. Once the contents of a treaty are agreed upon by the states, it is then presented to all members of the UN for a formal adoption of the treaty.

A treaty is binding in nature among those states that consent to being bound by the treaty. The process of committing to international human rights treaties involves, Signing international human rights treaties,

Ratifying/accessing international human rights treaties, Reservations and understandings and Making international human rights treaties part of domestic law. [1]

Ratification or accession is a voluntary undertaking by the State to be bound by the terms of the treaty under international law. Though accession has the same effect as ratification, but the process differs. In the case of ratification, the State first signs and then ratifies the treaty. The process for accession has only one step, it is not preceded by an act of signature. If a State chooses to ratify and 'become party' to a human rights treaty, that country is obliged to ensure that its domestic legislation complies with the treaty's provisions and the treaties should be implementing and legislated. Article 253 of the Indian Constitution empowers the union government to legislate with respect to India's treaty obligations. Reservations and Understandings made by State Parties upon ratification limits states obligations under the terms of the Convention.

## **The law on reservations and declarations**

### **Reservations**

In order to encourage countries to become parties of the treaty, a 'reservation' may be made, by which, the state modifies its obligations under the treaty. Reservations can only be made at the time when a country becomes a party to / ratifies the treaty.

Article 2. 1(d) of Vienna Convention on the Law of Treaties defines "reservation" in following words:

“ A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of a treaty in their application to that State”.

The definition has two key elements, first is “ Unilateral statement, however phrased or named” and second is “ Exclude or to modify the legal effect of certain provisions of a treaty”. [2] The first phrase indicates that the substance of the statement matters and determines its nature as a reservation, whereas the second phrase states that the reservation is said to be made if the legal effect of the provision is modified. But unilateral statements made by states of primarily political significance or for domestic purpose rather than international significance, do not modify a state’s legal obligation under a treaty. [3]

Reservations are intended to modify the legal effect of a treaty or convention. But a reservation that contradicts with the object and purpose of the treaty will not be permitted. This has been clarified by the Human Rights Committee [4] and also in the provisions of some international treaties on human rights. [5]

### **Declaration**

Declaration is the meaning or interpretation given to a particular provision by the state. [6] It outlines what and how the country understands its legal responsibility under the treaty. [7] A declaration does not modify the country’s legal obligations under the treaty, but merely clarifies the sense a state gives to certain provisions of a treaty. [8]

Sometimes statement though termed as a declaration, might have the result of modifying the legal effect of a treaty. In such cases, it can be said that such declarations have the effect of a reservation, and therefore they are governed by the law on reservations contained in the Vienna Convention and in the general principles of international law. [9] When a country makes both reservations and declarations. In such cases, it is to be presumed that a declaration was meant to be an interpretative tool and not a reservation. [10]

The Human Rights Committee has indicated the difficulty in distinguishing between reservations and declarations and laid down the following test:

“ It is not always easy to distinguish a reservation from a declaration as to a State’s understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to a State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State’s understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation”. [11]

### **The validity and effect of reservations and declarations**

Although reservations and declarations are permitted in the international treaty regime, international law stipulates that certain derogations are impermissible in law and in certain situations. The validity and effect of reservations and declarations can be discussed in the following ways.

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### (A) The object and purpose test

The landmark advisory opinion of the International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, laid down that reservations are impermissible if they are against the object and purpose of the treaty. The court, highlighting the importance of compatibility of the reservation or declaration with the object of the treaty, stated, “ the character of the multilateral convention, its purpose [...] and adoption are factors which must be considered in determining the [...] possibility of reservation”.

### (B) The Vienna Convention test

Article 21 of the Vienna Convention deals with the legal effects of reservations on the obligations between State parties. Article 21 is as follows:

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 20 requires the acceptance of and objection to reservations to be made in a particular way, while Article 23 specifies particular procedures to be followed while making reservations. The important provision is Article 19 that requires all reservations to be compatible with the object and purpose of the treaty to which such reservations are made.

#### (C) The human rights treaties test

The Human Rights Committee, in its General Comment 24 dated 2 November 1994, has indicated the special position of human rights conventions when it stated,

“ Although treaties that are mere exchanges of obligations between states allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction”.

The Human Rights Committee, discussing the consequences of impermissible declarations and reservations, stated that the special and often universal nature of human rights conventions implies that the normal consequence of an unacceptable reservation is not that the convention is not in effect at all for the reserving party.

#### (D) Breach of peremptory norms of international law test

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The Human Rights Committee has indicated that provisions in international conventions that represent customary international law, when they have the character of being peremptory norms of international law, may not be subject to reservations.

## **India and Core Human right conventions**

India gained Independence in 1947 and the framing of constitution started in 1948 so the drafters of the Indian constitution were also inspired by the aspirational goals sets out in the Universal Declaration of Human Rights 1948 (UDHR). The preamble of the Constitution of India underlines the need to secure to all citizens justice, liberty, equality and also dignity of the individuals as important values. India is a signatory of almost all the core Human right treaties. India is a State party to the International Convention on Civil and Political Rights (ICCPR), 1966 , the International Covenant on Social, Economic and cultural Rights (ICESCR), 1966 , the Convention on the Elimination of All forms of Racial Discrimination (CERD), 1965, the International Convention on the Suppression and Punishment of Crime of Apartheid (ICSPCA), 1973, the Convention on the Elimination of Discrimination Against Women (CEDAW), 1979 , the Convention on the Rights of the Child (CRC), 1989 , the Convention on the prevention and Punishment of the Crimes of Genocide, 1948, the Geneva Convention 1, 2, 3, and 4, 1949, the Convention Relating to the status of Refugees and Protocol Relating to the Status of Refugees, 1951, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984, the International Convention on the protection of all persons from Enforced Disappearances, 2006, and the Convention on the Rights of Person with



Disability (CPD), 2007. It has signed but not ratified the Torture Convention i. e. CAT and International Convention on the protection of all persons from Enforced Disappearances. Also India is yet to sign and Ratify the International convention on Protection of Rights of All Migrant worker and Members of their Family (MWC), 1990 and Rome Statute of the International Criminal Court, 1998. It has not ratified any of the Optional Protocols to these instruments except the Optional Protocol to the CRC (Child prostitution and child pornography) and Second Optional protocol to the CRC (Involvement of children in armed conflict), Also not accepted any of the individual complaints procedures under those conventions it has ratified.

While ratifying the Core human right treaties India has entered substantive reservations and declaration to the ICCPR, ICESCR, CRC, CERD and the CEDAW Convention. This section will analyze the reservation and declarations made by India under these aforesaid human right treaties.

## **ICCPR and ICESCR**

ICESCR and ICCPR, together known as the “ Bill of rights” was adopted by UN General Assembly on 16th Dec, 1966 were opened for signature at New York on 19 December 1966. The conventions were entered into force on 3rd Jan, 1976 and 23rd March, 1976 respectively. India accessed the conventions on 10th Apr, 1979 with certain reservations and declarations.

### **Declaration under ICCPR**

The Government has ratified the ICCPR on 10 April, 1979 with declarations to Art 1 (Right to Self- Determination), Art 9(5) (right to compensation victim of

unlawful arrest or detention) and Art 13(rights of aliens in matters of expulsion).

India supports a “ restricted interpretation” of self- determination. In reference to Art 1 India declares that the words ‘the right of self-determination’ apply peoples under foreign domination, but not to sovereign independent States or to a section of a people or nation because of the essence of national integrity. The declaration was objected by Germany, France and Kingdom of Netherland. But in my view the India has filed reservations, limiting the right of self-determination in order to preclude the possibility of its application within India. As from the Independence India is facing the problem of “ Kashmir” and “ North-Eastern States”. If there were no reservation like that there is a possibility of more “ Khalistan” and “ Kashmir”.

India made reservation to Article 9(5) (right to compensation victim of unlawful arrest or detention), stating that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention. But in many of its decisions, the Supreme Court of India crystallised the judicial right to compensation. In D. K. Basu case the Court went to the extent of saying that since compensation was being directed by the courts to be paid by the State held vicariously liable for the illegal acts of its officials the reservation to clause 9(5) of ICCPR by the Government of India had lost its relevance. Remarkably, the Supreme Court has found Article 9 (5) ICCPR to be enforceable in India even though India has not adopted any legislation to this effect but had even entered a specific reservation to Article 9 (5).

The declaration made regarding the Article 13 (rights of aliens in matters of expulsion) concerns with refugee rights. India is not a party to Convention on the Status of Refugees and protocol relating the status of refugees, 1951. This, however, does not mean that this reservation is also to refuses or is reluctant in acknowledging the rights of refugees. Even though in India, the Foreigners Act of 1946 contains provisions for prohibiting, regulating, or restricting the entry of foreigners into India, as well as provisions for their expulsion from India. [12]

In *Louis De Raedt Vs. Union of India & Ors* [13] honorable Supreme Court held in context of refugee rights, “ it necessarily follows that Article 21 encompasses the principle of non-refoulement, since the forcible expulsion or deportation of a refugee to a country, where his life or freedom is threatened on account of his race, religion, nationality, political opinion or affiliation, would be violative of the constitutional scheme, provided for in Article 21.” [14] Also in the case of *National Human Rights Commission Vs. State of Arunachal Pradesh* [15] , the Supreme Court has held that Art 21 is available to all “ People”, be he a citizen or otherwise.

### **ICESCR**

The Declarations made by India other than the Article 1, were regarding Article 4, Art. 7(c) , and Art. 8 and they are to be applied as to be in conformity with the similar provisions available under of Constitution of India. Article 4 and 8 of ICESCR deals with the freedom to form Trade unions, join trade unions, and collectively demand rights. The similar freedom is given under the constitution of India in Article 19 and specifically under Article 19(1)(c). Regarding the reservation under Article 7 (c) which deals <https://assignbuster.com/indias-reservations-and-declarations-to-core-human-rights-conventions-international-law-essay/>

with the “ Equal opportunity”, the concept is also embodied in Article 14 of Indian constitution.

So there is no harm in reading the provisions of the Convents in pursuance with the provisions of Constitution of India, as both have almost same language and “ purpose and object”. Also these reservations are not against the core of the ICESCR hence passing all the test of validity.

### **CERD**

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is an important of the general instruments requires “ respect for and observance of human rights and fundamental freedoms for all, without distinction as to race”. [16] The jurisprudence behind the Convention was to put an immediate end to discrimination against blacks. [17] It was adopted by UN in New York, on 7 March 1966 and entry into force on 4 January 1969. India has signed it on 2 Mar 1967 and ratified on 3 Dec 1968 with reservation on Article 22, which allows India to be excluded from the jurisdiction of the ICJ in case arbitration between the parties has failed, I think is permissible because reservation does not contravene the object and purpose of the Convention. There were 26 procedural reservations [18] filed to the Racial Convention, but only Pakistan objected India. No other state objected to the procedural reservations made to this Convention. So it is clear that the objection is for apparently political motives of Pakistan.

India has made no declaration or reservation to Article 1 of CERD but, India has maintained the view, that caste-based discrimination does not fall within

the purview of the definition of racial discrimination. [19] It was said that the “ caste” is not same as “ descent”. [20] 21But in reality it is being contended “ that it was an Indian who proposed the inclusion of descent in the definition of racial discrimination in the U. N. Convention on the Elimination of All Forms of Racial Discrimination (CERD) when it was first being drafted in the mid-sixties.” [22]

### **CEDAW**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is the principal international document to address the right of women to be free from discrimination. The Convention prohibits discriminations those affects the equal participation of women in the political, social and economic lives of their countries. CEDAW was adopted by UN General Assembly on 18 December, 1979 and were entered into force on 3 September 1981, in accordance with article 27 of the present Covenant. India has signed the convention on 30th of July, 1981 and ratification was done on 9th July, 1993.

India has made 2 declarations and 1 reservation and declarations were objected by the Government of the Kingdom of the Netherlands as they were not compatible with the object and purpose of the Convention. India has made obligations under Articles 5(a) and 16(1) subject to “ policy of non-interference”. Although these words are not defined or determined in the text of the declarations, and contents of “ policy of non-interference” have not been outlined anywhere in the text of declaration. In such a scenario it is difficult to understand the objective and understanding of the policy. Also the word ‘ community’ is undefined; it is not clear in the declaration that which <https://assignbuster.com/indias-reservations-and-declarations-to-core-human-rights-conventions-international-law-essay/>

type and nature of 'community' it is? Whether it is religious, political and social or of some other un-defined nature.

Article 5(a) of the convention and Article 16, stresses a woman's right to equality within marriage and the removal of discriminatory practices and the basic core commitments or objects to CEDAW. The same is stated by the CEDAW Committee [23] :

" Removal or modification of reservations, particularly to Articles 2 and 16, would indicate a State party's determination to remove all barriers to women's full equality and its commitment to ensuring that women are able to participate fully in all aspects of public and private life without fear of discrimination or recrimination. States which remove reservations would be making a major contribution to achieving the objectives of both formal and de facto or substantive compliance with the Convention." [24]

It is clear from the above reading that, the Article 5 and 16 are the core of the CEDAW so the ' declarations' are not compatible with the object and purpose of the CEDAW, especially cultural discrimination and therefore violate the ' object and purpose' [25] test. Also the declarations of the Indian government to Articles 5(a) and 16 of the CEDAW Convention adversely affect a woman's right to marry and thereby such declarations affect customary norms in international law, thus impermissible.

Regarding the declarations to Article 16(2), the Government of India indicates its support for compulsory registration of marriages but India's declaration lack a specific time limit. The Government of India has taken some affirmative steps in that direction and the draft Bill for ' Compulsory

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Registration of Marriages Act, 2005', being drafted. [26] Also the Supreme Court has made it compulsory for all marriages in the country, to be registered. In the landmark judgement, of Smt Seema Vs Ashwani Kumar [27] , apex Court has issued notice to the National commission, for Women (NCW) for placing its views on the registration of marriages and the proposed legislation prepared by the commission. The Hon'ble Court in its judgment dated 14th February 2006 observed that:

“ as rightly contended by the national commission for women , in most cases non registration of marriages affects the women the most— and directed the states and central government to initiate steps including framing of the rules for registration of marriages “

The reservation made regarding the Article 29(1) of the CEDAW, allows India to be excluded from the jurisdiction of the ICJ in case arbitration between the parties has failed, is permissible because reservation does not contravene the object and purpose of the Convention. The core commitment of the Convention is not violated by the reservation. Also CEDAW's Art 29(2) itself permits such reservations to be made by States parties. As India have a written constitution and guarantees the right to equality and non-discrimination based on sex [28] , and can be enforced in domestic courts of law.

### **CRC**

Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20

November 1989, and it entered into force on 2nd September, 1990, in accordance with article 49. India accessed it on 11th Dec, 1989.

India has declared that the CRC laws can only be “ progressively implemented”, owing to availability of resources in contradiction of the resolve to “ eliminate the evil of child labour”

India on Article 32(2) [29] posed a declaration on “ prescribing minimum age for employment” stating “ that it is not practical immediately to prescribe minimum age for admission to each and every area of employment”. Also in regard to “ economic, social and cultural rights” of child, it was said that they can only be “ progressively implemented” as India is a developing county.

But now India has moved towards becoming an economic ‘ super power’ and the country with the tenth highest GDP in the world. Hosted commonwealth games and aiding other countries now for India to now take the plea that its “ present socio economic conditions” do not allow it to review its reservation on Article 32 clearly reflects a lack of political will and commitment to the realization of child rights, to deny realization of rights of all children and condone the existence of one of the worst forms of exploitation of children, burdening them with adult economic responsibilities, is a clear reflection of abdication of state responsibility. [30]

The Convention on the Rights of the Child (CRC) has two optional protocols:-

- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by



UN General Assembly on 25 May 2000 and entered into force on 18 January 2002.

- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted on 25 May 2000 and entry into force on 12 February 2002.

India ratified the both optional protocols on 15th Nov, 2004. With a “ compulsory and binding declaration”, this should be deposited under Article 3(2) of second optional protocol to CRC by every state party upon ratification or accession to the present protocol. Article 3(2) requires every state to submit a binding declaration upon ratification or accession, “ that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced”. India on this declare that the minimum age for recruitment into Armed Forces of India is 16 years whereas he will be sent to the operational area only after the attainment of age of 18 years. It was also declared that all the recruitment are “ purely voluntary and conducted through open rally system/open competitive examinations” and without coercion.

## **Conclusion**

The concept of reservation to the provisions of treaty was provided under Art. 19-23 of the Vienna Convention Reservations against the provisions of a treaty basically signify a states intention communicated in writing, that the particular provision is not binding upon it. However, no reservation can be made under Article 19 which is compatible with the purpose of the

treaty. [31] So much for the concept of reservation under the Vienna Convention of the Law of Treaty, 1969. [32]

But recent state practice regarding the reservation in human rights treaties is a matter of concern. This is so because it questions the very notion of universality; which is implicit in the idea of human rights.

The reservations relating to the human rights treaties are a potential threat to the universality of the international human rights order. The reservations against provisions of human rights treaties which are not customary norms of international law can prevent them from becoming so in due course of time.

According to the Human Rights Committee, reservations that offend customary norms (*jus cogens*) would be incompatible with the object and purpose of a treaty. [33]

The Committee concluded: "While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Convention, a state has a heavy onus to justify such a reservation" [34]

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Withdrawal of reservation - A reservation made by a country concerned may be withdrawn subsequently, due to a change in circumstances including the country's positive effort in overcoming the difficulties faced in implementing the provisions of the treaty. A provision and procedure for withdrawal of

reservation is prescribed in the treaties. For example, CERD prescribes for <https://assignbuster.com/indias-reservations-and-declarations-to-core-human-rights-conventions-international-law-essay/>

withdrawal of reservations “ at any time by notification to this effect addressed to the Secretary-General.”<sup>5</sup> Withdrawal of a reservation is also to be given in writing. An example is a withdrawal of reservations to CEDAW by Morocco in December 2008.<sup>6</sup>