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Reservation to International Human Rights Treaties

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ABSTRACT

Reservation to an international treaty means a unilateral statement 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 the treaty in their application to that State. Human rights treaties do not regulate the relations between states, but guarantee the rights of individuals with regard to the state. A treaty of such a nature should be set out without the interventions or interruptions of the States. Use of reservation in human rights treaties are seen by human rights activists, as a disturbance to the actual purpose and motive of the treaties as the Vienna Convention on the Law of Treaties continues to govern the matters of reservations to human rights treaties and the fundamental rule remains that a reservation cannot be incompatible with the object and purpose of a treaty. Reservation also makes human rights treaties interdependent in nature as the states interpret the treaties with their own laws and create certain restrictions and modifications in the treaties which spoil the actual essence and purpose of the treaty and it remains without serving any much good to the people.

This research paper will basically answer the question as to what extent states can validly make reservations to human rights treaties. This paper tries to address the following questions such as what is the reason for providing reservations in international conventions, how do these reservations make the treaties weak in the light of human rights treaties, how to protect the treaties from getting influenced by different states.

I. INTRODUCTION

International law is gaining momentum by which almost no matter is limited to the internal affairs of the country but as an aspect of international law intertwined with it. Earlier it was considered that the relationship between the states and its individuals is matter of only an internal affair and nothing else. But this area of Human rights has gained much of an importance in the international arena to a great extent especially after the Second World War and after the adoption of the United Declaration of Human Rights by the general assembly of

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the united nation in 1948[3]. But the main problem while considering the Human rights is that it has been always considered as a matter of inter-state relation that means bringing this term into international context means bringing in more friction between the states resulting in the exact opposite sense for which these laws are trying to be established that is for maintaining the world peace. Nonetheless the human rights problems that was taking place in the world such as slavery grabbed the attention of international law and in 1807 Britain the major slave owning and slave trading nation of Europe abandoned the practice and also tried to strangle the practice in other states as well and as a result nearly after a century slave trading and slave owning became a part of history. This can be considered as the birth of bringing human rights into the International context. Followed by the efforts League of Nations especially the establishment of International Labour Organization (ILO) in the year 1919 is also a sparkling move towards upholding Human rights in an International spectrum[4]. The modern international human rights law is a result of mainly the UN charter and its objectives. Article 55 of the charter created a direct link between the maintenance of peace and security in the world with the human rights, this brought about the signing of many multilateral human rights treaties between various countries. In order to include more and more members to these international treaties to increase their applicability and enforceability, the international Law on Treaties that is the Vienna convention provide for Reservations to the states. Reservations are nothing but unilateral statements in multilateral treaties that the states according to their convenience and suitability to their domestic law will decide not to follow a particular part or provision of the treaty. The states ratify the agreements on the condition that they may bring in some reservation changing the legal implications[5]. The Reservations, Understandings and Declarations (RUD) as provided by the Vienna convention, help the states to become parties to a treaty but with a different obligation without affecting their domestic legal structure. These reservations are also present in the International Human treaties and to be specific the most in these treaties. There are two different views with respect to providing of these RUDs one is that these are legitimate and they are needed in order to maintain the diversity in different countries and to respect their domestic or internal laws and as an encouragement for the states to get much more involved in the international law. The other one is that by way of providing these reservations the main objective of any treaty gets diluted and its application will not have the expected level of impact in the same manner in all the member countries of the treaties[6]. With special reference to the

[3] "GM Ferreira, "The impact of treaty reservations on the establishment of an international human rights regime" 38 The Comparative and International Law Journal of Southern Africa 149 (2005)."
[4] "Malcolm.D.Evans(ed.), International Law 785(Oxford University Press, United Kingdom, 4th edn, 2014)."
[5] "Richard W. Edwards Jr, "Reservations to Treaties" 10 Michigan Journal of International Law 363 (1989)."
[6] "Eric Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaties" 36

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human rights treaties which needs to be the same in all countries because human rights is something that is very objective and is universally applicable but by providing reservations its importance is undermined. In this project this aspect of how reservation is affecting the human rights treaties is dealt in the light of the current global scenario and the steps that can be taken to lessen the impact of the reservations are also discussed.

II. RESERVATIONS AND ITS IMPLICATIONS IN HUMAN RIGHTS TREATIES:

Vienna Convention on law of treaties is the authoritative instrument on the international law of treaties and explains and defines all the aspects of the treaties. "*Article 2(1) (d) of the Vienna Convention on the Law of Treaties (1969)*" defines a reservation as "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 the treaty in their application to that State.[7]"

There are various reasons for the states asking for reservation some of them include, the states or even international organization may want to be a part of the agreement but some of the aspects of the agreement may be against their interests, or they may not be fine with the procedural aspect for settling the dispute as mentioned in the agreement it way ask reservation for the compromissory clause, or in order to not affect its domestic law, and sometimes the federal states may ask reservations to not apply in some of its units or in other countries where it has international responsibility[8]. The most important reason for giving reservations is to motivate the states irrespective of the form of government or their internal frame work. The intent behind asking for reservation maybe sometimes social or political in most of the cases, the states may feel that certain clauses are discriminatory or in order to not affect their international goals and relation with the other states they tend to declare that that particular clause may not be applicable for them. The more the number of members to the treaties the more shall be integrity between the states and less the disputes, this is the rationale behind being so flexible with the states[9]. The more the number of states the more is the authority of the treaty but this can backfire, making it so flexible and each state bringing in their own reservation will defeat the very purpose of providing this perk that is it will weaken the treaty instead of strengthening it. The Vienna convention (VCLT) allows for reservations unless it prohibited by the treaty itself or when it is incompatible with the objects of the treaty as per

The Journal of Legal Studies 398 (2007)."

[7] "Vienna Convention on Law of treaties, 1969, Art.2."

[8] "Richard W. Edwards Jr, "Reservations to Treaties" 10 Michigan Journal of International Law 365 (1989)."

[9] "Roslyn Moloney, "Incompatible reservations to human rights treaties: severability and the problem of state consent" 5 Melbourne Journal of International Law (2004)."

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Article 19 of the VCLT. This has worked for many treaties but not in few others especially the human rights treaties where it is not entered into in bilateral interest whereas in the interest of the entire community. The advantage of the treaties in comparison with other international instruments is that there will be no doubt about the existence of the legal obligations of the state but by the way of providing reservation this is diluted, since there will be no uniformity in the legal obligations of different states because each state may have reservation of a particular clause defeating the very purpose of having a multilateral treaty.

The main problem is that though the VCLT has placed certain restrictions on reservations it does not specify the essentials of any treaties that are not supposed to be reserved, this decision is once again given to the states, so if a majority of states agree for the reservation of certain clause then it can be applied even though if it carries the main objective of the treaty[10].

The decision with regard to the incompatibility of the reservation to the treaties is given in the hands of the member states, the other states if it were any other treaty such as a contractual treaty that are reciprocal in nature where the interest of the state is getting affected for instance treaties on territory, trade, security then there is an incentive for the state therefore it might object for any incompatible reservations. Whereas in case of human rights treaties it is for the community in general and not in the pecuniary interest of the state so the states care least about the reservations that are taken by the other states as it will have no impact on them. The obligations created in there international human rights treaties for instance "*International Bill of Rights thus produced consists of the Universal Declaration of Human Rights, adopted by the General Assembly in December 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*", both adopted by the General Assembly in December 1966 are not reciprocal in nature and are erga omnes that is the obligation is owed to the international community as a whole, only collective interest can be reaped and not individual interest of the state. The European Convention on Human rights (1953) specifically pointed to this fact that the obligations are erga omnes and it is in the common interest of the international community. This is the reason why the reservations are exploited in the human rights treaties to a greater extent in comparison with other treaties.

The ICJ in the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Problem of State Consent (Advisory Opinion)[11] case (even prior to the adoption of VCLT) wanted to protect the erosion and dilution of the human rights treaties from the broad reservations that the states were applying. The court did not say anything about who has to

[10] "A Reservation to Human rights treaties their validity, available at: https://www.lawteacher.net/free-law-essays/human-rights/reservations-to-human-rights-treaties.php (last visited on September 12 2019)."
[11] "Reservations Case [1951] ICJ Rep 15."

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apply the compatibility test, therefore we have to go back to Article 20(4) of VCLT where its say regarding the objection to the reservations, that it can be raised by only the contracting members to the treaties and not others this is the opposability school, where the reservation must be objected only by the contracting states and that too within 12 months on the grounds of incompatibility. There is one another school i.e. the admissibility school it applies objects and purpose test and says that the provision in the VCLT will apply to objections only against those reservations that are compatible with the objects and purpose of the treaty and in case of incompatible reservations if the issue is brought before the international court barring the time limit the reservation will be struck down if found incompatible. In case of Human rights treaties the court preferred to use the object and purpose test since the contracting states may not object because of the lack of self-interest. The court while articulating this test was of the opinion that this would act as an additional limitation to that of Article 20(4) of the VCLT and any other view might lead to the acceptance of unfair reservations which will frustrate the objectives of international human rights law. Human rights is an area that the states are taking it for granted and are not concerned about the long term goals it is trying to achieve One example of such an exploitation of reservation can be seen in this case of the Convention on the Elimination of All Forms of Discrimination against Women[12] there were just four objections raised when claiming it to be against sharia law Libya asked for reservation in the convention. The court preferred in using the applicability school's test but there again the court has left few issues unaddressed, first who has the authority to say that the reservations are incompatible and second what will such incompatible reservation will bring in as legal obligations.

There are three doctrines that are prevalent while discussing the case of consequence of reservations (i) the surgical doctrine where even though the reservations are incompatible with the objects and purpose of the treaty the state will still be given the benefit of that reservation as a party to the treaty, this doctrine cannot be followed as it would frustrate Article 19(c) of the VCLT. (ii) the backlash doctrine this is based on the principle of state consent, the international instruments revolve on the fundamental principle of state's consent and these reservations are conditions put forth by the states to give their consent to become a party to the agreement, when these reservations are incompatible and objected these states without their consent just because they have ratified the other provisions cannot be made a party to the agreement and so they will be kept outside the treaty regime. This doctrine would dilute the objective of Article 55 of VCLT, i.e. the motive of having such human rights treaties is to maintain the international peace and for it the universal application is very important and by

[12] "Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)".

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applying this doctrine this universal application will be affected as most of the states will be kept outside the treaty regime. (iii) the severability doctrine is the most supported of all that is it neither accepts the incompatible reservation nor does it removes that state from being a member rather it servers such a reservation from the state's ratification and the treaty would apply to that state as well without the benefit of such reservation[13]. This is the case where reservations are incompatible but other than this even the compatible reservations in general are often up for debate, whether it strengthens the Human rights treaties or in contrary dilutes it, which is dealt in the next chapter.

III. DILUTION OF THE MOTIVE OF HUMAN RIGHTS TREATIES:

The debate whether reservations have positive or negative utility is a long going one and there are scholars supporting each of the sides.

The UN Human rights committee has given its opinion about its concern of the increased reservations taken by the states in the Human rights treaties in the name of widespread participation we have lost the integrity of the treaties and these reservations undermine the universality of the human rights treaties. All the conferences and meetings on Human rights have always discussed about the exploitation of the reservations by these states, the World conference on Human rights (1993), the Vienna Declaration and program for action asked the sates not to use the reservations frequently and only as a last resort and not formulate these reservations narrowly and precisely as possible and none of which is incompatible with the treaties[14]. The VCLT in itself by the Article 22 makes provision for the withdrawal of the reservations with the hope of limiting the reservations as much as possible.

Other than weakening the strength of the Human rights treaties reservations also create various other problems as well with respect to the practical applicability of the treaties the obligations of the states that are seeking reservations to that of the other states and the others states obligations towards those reserving states as well as other states are very different they create a lot of complications, there will be no uniform obligations or remedies or dispute resolving method making the treaties the most difficult to comprehend of all international instruments. The reservations that cannot be compatible with any treaties would include the reservation to pre-emptory norms, the provisions of customary international law that act as pre-emptory norms cannot be asked for reservation as human rights treaties deal with one of the most

[13] "Roslyn Moloney, "Incompatible reservations to human rights treaties: severability and the problem of state consent" 5 Melbourne Journal of International Law (2004)."
[14]"David Kidd, "International Human Rights Treaty Reservations: Compliance Through Non-Compliance" University of Colorado 10 (2019)."

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important and needed aspect of international law that is the individual rights. For example no country can ask reservation for the abolishment of slavery or inhuman punishments or torture etc. But having said that these pre-emptory norms does not limit the treaties, treaties shall consists of various other provisions that may not have status of pre-emptory norms but still equally important for protecting the object of the treaty, For instance US's reservation on the International Covenant on Civil and Political rights (ICCPR) was against the avoidance of capital punishments on any person, this may not be a pre-emptory norm but still is a very important provision in maintaining the integrity of the treaty, This was objected by 11 other countries and on the basis of it incompatibility it was invalid with reference to the objects and purpose test brought in by ICJ in the reservation case.

There is also an upside for this reservation that is it helps more and more countries to be a part of the treaties including more members to these treaties would eventual improve the significance of human rights on a global perspective. It gives an opportunity to the states to slowly change their internal framework according to the global regime. The autocratic countries are able to be a party to these human rights treaties with the presence of the reservations which will in turn help them move towards being a democratic country.

Thus it cannot be altogether held that these reservations have only negative impact but the problem is the extent to which it is misused by the states defeating the objective of having reservations. The object and purpose of a treaty cannot be compromised in case of any reservations.

IV. CONCLUSION

Though it can be understood that for any treaty to be powerful it must have a considerable number of signatories to the same, this is the reason for providing these flexibilities like reservations. The court in various cases and the human rights committee has had the opinion that, if the states increasingly reserve important provisions to the treaties it will lower the human rights standard internationally. The main point to be noted and which can be derived from the Genocide convention case is the objects and purpose test, by following this test the reservations that are incompatible can be totally avoided. The other thing that can help reduce the impact of incompatible reservation is that the states must understand though not directly but at least indirectly in the broader sense their self-interest is also disturbed even in the case of human rights treaties, only even objections are raised the integrity of the human rights treaties can be protected. The human rights committee must enlighten the states about the negative impact each of their citizens have to face in the long run because of incompatible

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reservation, this should act as an incentive for them to raise their voice against incompatible reservations. The third solution that is possible is that before drafting any treaty its objective must be identified and the provisions which are very much needed to protect the individual rights and the treaty must contain a clause that prohibits the parties from claiming reservations from such provisions. For instance Article 2 of a Human rights treaty must quote that " The parties willing to ratify this treaty will be prohibited from reserving Article 10 which deals with the discrimination based on race, any party claiming for reservation of this provision shall no longer be a party to the treaty". The states using their sovereignty emphasising the importance of consent cannot run away from the fact that human rights treaties are not like any other treaties and deal with individual rights of the international community as whole and so must try to avoid reservation as much as possible. The states must be given an option to withdraw the invalid reservations, or the states must give the assurance that within a specified period they will move towards the objective of the treaty and will try to reframe their internal structure and withdraw the reservation[15]. Unless some serious actions are taken by the UN Human Rights Council against these incompatible reservations defeating the very purpose of introducing them that is to strengthen the treaty, the states will continue to exploit the reservations especially in Human rights treaties. Watering down of Human rights treaties is equivalent to not recognising the individual rights which cannot be allowed, therefore one of the above solution must be used not only in any one of the treaties but in all the human rights treaties.

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