



## Embryonic reservation regime for human rights treaties

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### Abstract

The article critically analyses the evolution of a sophisticated reservation regime within the scope of international human rights corpus. The ignorance of the unique character of human rights treaty is viewed to have devastating consequences in the state practice. Moreover, the paper seeks to determine the effectiveness of the severability of reservations in the human rights treaties. It further seeks to resolve the quest of state sovereignty and the need to protect the integrity of human rights treaty through the severability doctrine.

**Keywords:** severability doctrine, treaty regime, reservations, international human rights, opposability doctrine

### Introduction

This article aims to carve out the present underdeveloped treaty reservation regime with respect to the human rights law. *Part I* highlights the introduction of reservation in treaty law and the need to scrutinize and distinguish declarations from reservations to protect the integrity of the treaty. Further, *Part II* focuses on the gradual dilution of traditional ascertainment of invalidity of reservations through oppositions of the states in the framework of human rights treaties. *Part III* identifies the nature of human rights treaties as distinct from the multilateral treaties leading to the inadequacy of customary international law laid down by VCLT to ensure integrity of the human rights treaties. *Part IV* throws light on the emergence of the doctrine of severability in General Comments 24 by HRC triggered from frustration of the grave violations of ICCPR due to sweeping reservations. *Part V* discusses the circumstances where severability conflicts with the state consent through the test of essentiality of reservations. Lastly, in Para VI, the lack of effectiveness and irregular usage of the tool of severability in the present scenario by the treaty bodies is discussed, indicating the severability controversy to be a mere intellectual exercise.

### Constructing the parameters of acceptability of reservation

Treaties are written agreements entered by the states through a unilateral statement of interpretative declaration clarifying its interpretation and scope of the treaty. However, when the state parties exclude the binding application of certain provisions of the treaties according to their diverse cultural, socio-economic state interests and political issues, they are termed as reservation<sup>[1]</sup>. Though reservations play an instrumental role in allowing numerous states to participate, it also poses a risk of the states jeopardizing the object of the treaty<sup>[2]</sup>. Therefore, it is imperative to distinguish between mere interpretative declarations from reservations effecting the implementation of treaties. This distinction can be achieved by interpreting the declarations beyond its form and title to determine the substance and intention of the state, as directed in the *Belilos*<sup>[3]</sup> case. The declaration couched in terms of a reservation to deny free access to the court was in contravention with Article 64 of the treaty and its vague or generic terminology<sup>[4]</sup> was held to subvert the object and purpose of the treaty<sup>[5]</sup>. Similarly,

reservations made by the states that intentionally or unintentionally discriminate a section of group of the state violate the state's obligations to fulfil, protect and respect the human rights of its citizens. Such reservations creating differential treatment between individuals create serious doubts about the extent of commitment of the state to the treaty as seen in the *Kennedy case*<sup>[6]</sup>. Based on these parameters there have been objections on these reservations, but how effective is the opposition of the other contracting states over time in the human rights regime is the question?

### Effectiveness of the opposition of the states in human rights framework

Traditionally, the doctrine of opposability originated, that allowed the contracting states to object against the validity of the reservations by the reserving parties without the determination of the extent of its congruity with the object and purpose of the treaty. This practice was further recognized in the context of human rights treaties in the General Comment 24 that encouraged states to participate and object to the reservations by other contracting states. However, this scheme of objections by other states seems to be redundant in case of human rights treaties. The human rights instruments, unlike the general multilateral treaties doesn't determine one state contractual obligation on the other state (reciprocal), but creates an objective regime to protect human rights. There also seemed a lack of authority<sup>[7]</sup> in the other states to determine the validity of the reservation since it can lead to some erroneous reservations going unchallenged as seen in the case of reservation by Libya in CEDAW<sup>[8]</sup>. However, these oppositions do impose political pressure on the reserving state with no legally binding effects. The extent to which the state surrenders to this pressure is very subjective if observed in the light of Mutua's<sup>[9]</sup> differentiation of good and bad state. There are good states that submit to these objections and alter their reservations at the cost of its sovereignty to protect the human rights of its citizens. Conversely, there are states that can be categorized as 'bad' states such as North Korea that don't submit to the political pressure and societal criticisms on the generic sweeping reservations, indulging in extensive human rights violations. Though, the opposition by the states is redundant with respect to the human rights treaties, yet it does

provide a guidance to the compatibility of the reservation to the treaty <sup>[10]</sup>. This issue of the unique nature of human rights instruments emerged while analyzing the inadequacy of Vienna Convention of Law of Treaties (VCLT) with respect to human rights.

### **The deficiencies of vclt in enabling the human rights regime**

The Vienna Convention can be identified to be the genesis of a modern regime of governing reservations in the framework of treaties, codifying the ICJ advisory opinion on Prevention of Genocide Convention <sup>[11]</sup>. In the ICJ advisory opinion, the universal and non-reciprocal nature of human rights treaties was identified however, but did not engage with this distinction extensively <sup>[12]</sup>. It saw the traditional rule of acceptability of all state to protect the integrity of the treaty as unworkable. It reiterated the right for the states to object to reservations that will determine the impermissibility of the reserving state in the treaty only with respect to the objecting state as subsequently stated in Article 20(4) VCLT. Further, it also laid the condition of permissibility of the reservation, to not be in contravention with the object and purpose of the treaty, which was further codified in Article 19(c) VCLT. However, the ICJ opinion as well as VCLT lacked in analyzing the scope of the so called 'object and purpose' of the treaty, the monitoring body that would determine the permissibility of the reservation and the legal consequences of the impermissibility of a reservation. VCLT initiates fragmentation of the treaties that is incongruent with human rights treaties being a '*web of interstate exchanges of mutual obligations*' <sup>[13]</sup>. It undermines the presence of other monitoring bodies except the state such as the courts and human rights bodies in assessing the permissibility of the reservation with respect to the object and purpose of the treaty. This ineffectiveness of the texts and conventions to avoid the subversion of the purposes of the human rights treaties through state reservations such in the case of ICCPR <sup>[14]</sup>, led to the issuance of the General Comments 24 by the Human Rights Committee (HRC).

### **Evolution of reservation law in the human rights regime: general comment 24**

The void created by VCLT in the context of human rights, was filled by the construction of the General Comments 24 <sup>[15]</sup> by HRC. It granted the HRC the competence to determine the validity of the reservation with respect to the object and purpose of the treaty <sup>[16]</sup>. Though it encourages states to object, no objection (tacit consent) from the states did not relieve the Commission determining the validity of the reservation <sup>[17]</sup>. The Comment not only created the test of congruence of reservation with the object and purpose of the treaty a '*necessary*' precondition, it also barred imposition of any reservations by the states on the provisions representing customary international laws or non derogable rights that are essential to state obligations such as equality <sup>[18]</sup>. It further denied any reservations through the vehicle of Optional protocol that imposes the obligatory rights of the States to be tested by the committee in the case of *Kennedy v. Tobago*. <sup>[19]</sup> Subsequently, it identified the '*normal*' effect of invalidity of a reservation through a very controversial doctrine of severability which was inspired by the precedents of the European Court <sup>[20]</sup>. By virtue of this doctrine, invalid reservation are severed from the declaration of the state and the reserving states membership is recognized without the benefits

of reservation. This doctrine was previously used in the *Belilos* case where the ECHR introduced the "*Strasbourg approach*" providing the Committee itself the competence to determine the impermissibility of the reservation and sever the same from the declaration of the state <sup>[21]</sup>. The validation of severability by the HRC was severely criticized by US, the UK and France <sup>[22]</sup> contending it to be in contravention with the customary international law of treaties *i.e.* VCLT and hampering the positivist idea of state sovereignty.

### **When does severability threaten the state sovereignty?**

The bedrock of treaty law *i.e.* state consent derived from the general maxim of '*pacta sun servanda*' <sup>[23]</sup> seems to undercut the appeal of severability as identified by Roberto Baratta <sup>[24]</sup>. It makes a problematic assumption of the ratification by the state to the treaty irrespective of the acceptability of the reservation it claims. It is contended that severability cannot undermine overarching general law of treaties *i.e.* VCLT based on state consent for the mere protection of the integrity of human rights treaties. The degree of violation of state consent can be derived from the test of '*essentiality*' of reservation to the consent of the state to the treaty <sup>[25]</sup>. The argument of essentiality was argued by US that were against the object and purpose of ICCPR but were integral for US' consent to the treaty <sup>[26]</sup>. Though severability attempts to weed out the inessential reservations of the treaty <sup>[27]</sup>, the state consent is seemed to be vitiated only in cases where the reservations made are essential to the state consent to treaties <sup>[28, 29]</sup>. There seems to be an inherent contradiction in the application of severability as its harsh consequences can increase states' resistance to human rights treaties that will nullify the essential aim to increase participation of states in such treaties for greater protection of human rights <sup>[30]</sup>. The only plausible solution to this conundrum is the recognition of the 'new sovereignty' that is distinct from the traditional sovereignty consisting of mere freedom of states to act independently <sup>[31]</sup>. It has evolved to being a member of a strong international regime by maintaining high standards of economic, socio-cultural wellbeing that will be derived from ratifying to human rights treaties <sup>[32]</sup> as it is evident in the membership regime of European Union <sup>[33]</sup>. Thus, to be present in the interdependent international regime, it is beneficial to ratify more human rights treaties to enhance the state sovereignty more than it will violate state consent due to severability. The question is how effective is severability in protecting the human rights of individuals to make this doctrine merge with the new idea of sovereignty?

### **The deaf dialogue of severability controversy**

While severability may be considered as an instrumental tool for eliminating incompatible reservations, it is not yet viewed as an emerging customary international norm <sup>[34]</sup>. The impact of the its evolution can to be questioned on two grounds. Firstly, the lack of authority of the treaty bodies to bind the states to enforce the protection of human rights according to their treaty <sup>[35]</sup>. As states have emerged from positive law, they have been masters of their own will whether to consent to a treaty and abide by it or not. The void lies in the lack of authority of the treaty bodies to ensure enforceability of these protections in the respective states. Secondly, it is the ineffectiveness of HRC to sever all the present recognized sweeping reservations such as in the case of US reservations to

ICCPR<sup>[36]</sup> or Malaysia's reservation to CEDAW<sup>[37]</sup>. Though these reservations have been identified as sweeping and inconsistent with the purpose of the treaty, they haven't been severed till date.

### Conclusion

There is a visible evolution from mere opposition by the states to codification of a mechanized framework on reservation on treaties. However, this evolution seemed redundant in the context of human right treaties due to their universal and non-reciprocal nature. The General Comments 24 identified VCLT to endanger the integrity and universality of the human rights treaties due to its flexible and liberal guideline for the use of reservation. Further, inspired by the Belilos case, the introduction of severability doctrine by HRC, to maintain the integrity of the human rights treaties was also subject to immense criticism. The severability controversy highlighted the ongoing quest between the claims of the state for the privileges provided by VCLT to preserve state sovereignty as against the aim of protection of integrity of human rights as per the General Comment 24. Moreover, the lack of authority of the human rights treaty bodies to inspect the state practice of protection of human rights and the failure of the monitoring bodies to sever several sweeping reservations by states seems to highlight the severability debate as a '*deaf dialogue*'. This severability controversy can be resolved only when the states identifies with the idea of new sovereignty that is dependent on protection of human rights and interdependent international relations. There is ambiguity in the reservation regime due to the irregular application of severability as well as opposability doctrine for determining the validity of the reservation. The need of the hour as Baratta recognises is to develop of a structured and a cooperative mechanism of reservation to human rights treaties that can be imbibed in the domestic laws of the state along with strengthening the binding authority of the treaty bodies over states to ensure protection of integrity of the treaty<sup>[38]</sup>.

### Reference

1. Shaw, Malcolm Nathan. International law. 6th ed. Cambridge: Cambridge U Press, 2014. Print. Chapter 16, Page 915
2. This has been evident in the reservation made by Kuwait to CEDAW, that made an exemption to compliance to Article 9 of the convention as it was contrary to its nationality act determining the nationality of child through his/her father.
3. Belilos v. Switzerland, 132 Eur. Ct. H.R. ser. A 1987.
4. Belilos v. Switzerland, 132 Eur. Ct. H.R. ser. A 1987; ultimate control by the judiciary over the acts or decisions of the public authorities relating to civil rights or obligations or the determination of a criminal charge" was the reservation made. This reservation is very generic that it makes it difficult to determine the scope of the reservation. This was thus in contradiction to Article 64 that promoted precision and clarity in the reservation.
5. Similar sweeping reservation of generic terms was seen in case of reservation by Saudi Arabia to CEDAW that stated that in case of conflict between provisions of Convention and Islamic law, the Islamic law would prevail.
6. Mr. Rawle Kennedy v. Trinidad and Tobago, Communication, CCPR/C/74/D/845/1998 (2002). Through the reservation, Trinidad and Tobago created a differential reservation which excluded the competence of HRC from hearing any complaints/communications of a prisoner who was given death penalty. This created a differentia between prisoners who were on the death robe and those who weren't were denied certain human rights as against others.
7. Identified as problematic in GC 24, paragraph 17
8. Roslyn Moloney. Incompatible reservations to Human rights treaties: Severability and the problem of State consent it was argued that it was an example of unchallenged sweeping reservations where merely four objections were made against the far-reaching reservation made by Libya that the Convention would not apply where its provisions conflicted with sharia law. 2004
9. Mutua. Savages, Victims, and Saviors: The Metaphor of Human Rights. Harvard International Law Journal, 42:242
10. Human Rights Council HRC. General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add.6, Paragraph 17. Also seen in the case of Loizidou v Turkey, where the objections by the other states are sufficient indications for the reserving state to know the impermissibility of their reservation. 1994
11. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951. In this case, the court wanted to protect the integrity of the Genocide convention due to broad reservations. Therefore, it introduced the compatibility test *i.e.* invalidity of a reservation is to be determined objectively by considering whether the reservation is compatible with the object and purpose of the treaty.
12. The advisory opinion was not very effective in the field of Human rights law since it focussed on the Public International law regime more.
13. Human Rights Council HRC, General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add.6, Paragraph 17 1994
14. Human Rights Council HRC, General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add.6, There was a boom of the number of reservations to 150 reservations by 46 countries out of 127 States parties to ICCPR wherein some excluded the duty to provide and guarantee rights in the Covenant. Others were drafted in generic abstract terms undermining the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. 1994,1;
15. General Comments are one of the tools that are used to interpret the scope of convention to reiterate the state obligations in favour of human rights treaties. Here, General comment 24 acted as a dialogue on the effect of reservations that was further taken up by ILC and then a guide to practice reservation on treaties was formulated. Moeckli, Sources & Nature of Obligations, 2003, Page 81
16. Identifying the special character of Human right treaties, it viewed it unsafe to give power for member state to determine on the effect of reservation. The committee further pointed out that the special status of treaty body's members; their diversity based on culture, social and religious backgrounds provide these special organs a unique competence to deal with reservations issues.
17. Belilos v. Switzerland, 132 Eur. Ct. H.R. ser. A 1987.
18. Human Rights Council HRC, General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add.6 1994; 8:19
19. Mr Rawle Kennedy v. Trinidad Tobago, Communication, CCPR/C/74/D/845/1998 2002
20. Roberto Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded? 11 EUR. J. INT'L L. 413 2000; 414
21. Roberto Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded? 11 EUR. J. INT'L L. 413; Page 425. The sweeping reservation by Switzerland restraining free access to the court was viewed to be in

- violation of the Article 64 of the Convention and was severed from the declaration of Switzerland to the treaty. 2000
22. Roberto Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded? 11 EUR. J. INT'L L. 413, Page 417. Also, Moeckli, Sources & Nature of Obligations, 2003, Page 81. 2000
  23. Inferring that where the state is presumed to be bound to the extent it consents where the will of the state is recognized to be supreme.
  24. Roberto Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded? 11 EUR. J. INT'L L. 413 2000
  25. As stated by Goodman, reservations imposed construct an ideal relationship between the state and the applicability of the treaty however it doesn't make it essential for the state consent. Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' 2002
  26. It was argued in the reference to ICCPR, that several reservations by the IS though subverted the object and purpose of the treaty, were argued to be "integral parts" of the United States' consent to be bound by the Covenant. However, the HRC failed to sever them from the declaration.
  27. Roslyn Moloney. Incompatible reservations to Human rights treaties: Severability and the problem of State consent 2004
  28. This was agreed by the HRC in the dissenting opinion of Kennedy v. Trinidad and Tabago, CCPR/C/74/D/845/1998. 2002
  29. However, in the case of Loizidou v Turkey, the principle of essentially was seen to have a restrictive applicability. In the case, it was contended by Turkey that the reservations made were essential to its consent to the treaty and couldn't be severed from its instrument of ratification. This contention was rejected by the ECHR. It laid high parameters for essentiality stating that Turkey must have been aware of the impermissibility of its reservation in view of the consistent practice of other contracting states. The objections by the other states were sufficient indications of invalidity of reservations. Therefore, it was held that where a state should have known that its reservation was invalid, it will be deemed inessential to the state's consent and subject to severance.
  30. Oette & Bantekalas, Sources, Page 57
  31. Devidal, Pierrick, Reservations. Human Rights Treaties in the 21st century: from Universality to Integrity. LLM Theses andEssays. 2003, 103
  32. The impact of re ratification of other human rights treaties will Devidal, Pierrick, Reservations, Human Rights Treaties in the 21st century: from Universality to Integrity. LLM Theses and Essays. 2003, 113
  33. This is visible in the case of the European Union EU regime where membership in the EU is determined by the extent of Human right protection provided by the state such as abolition of death penalty.
  34. Roberto Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded? 11 EUR. J. INT'L L. 413 2000, 420.
  35. Ibid.
  36. Concluding observations of the Human Rights Committee: United States of America, 3 October 1995, at paragraph. 279; Sweeping reservations have been made by US for enforcing capital punishment to offenders below the age of 18 as well. Multitude of reservations have been made to increase the scope of criminal penalties and with regards to cruelty, torture and punishment as against the provisions of ICCPR Article 6, 8 and 14 of ICCPR were violated
  37. McCall-Smith, K, 'Mind the Gaps: The ILC Guide to Practice and Reservations to Human Rights Treaties' International Community Law Review, Malaysia stated a general reservation excluding its obligation from a multitude of the provisions of CEDAW. It stated that it did not consider itself bound to provisions of CEDAW Arts. 2(f), 9(1), 9(2), 16(1) (a), (b), (d), (e), (f), (g) or (h). The Government of Malaysia declares that Malaysia's accession (to CEDAW) is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia law and the Federal Constitution of Malaysia. 2014; 16:21
  38. Roberto Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded? 11 EUR. J. INT'L L. 413 2000, 421.
  39. Devidal, Pierrick. Reservations, Human Rights Treaties in the 21st century: from Universality to Integrity. LLM Theses andEssays. 2003
  40. General Comments 24, Human Rights Committee, 1994
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  42. Moeckli, Sources. Nature of Obligations, 2003.
  43. Mutua. "Savages, Victims, and Saviors: The Metaphor of Human Rights." Harvard International Law Journal, 42.
  44. Oette & Bantekalas, Sources
  45. Roberto Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded? 11 EUR. J. INT'L L. 413, 2000
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  49. Belilos v. Switzerland, 132 Eur. Ct. H.R. ser. A 1987.
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  52. Human Rights Council HRC, General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add.6 (19