
THE UN TREATY BODY SYSTEM

Protecting the integrity of the treaty body system: Pakistan's recent treaty action



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Residents of Khyber-Pakhtunkhwa province, Pakistan.

On 23 June 2010, Pakistan ratified the *International Covenant on Civil and Political Rights* (the Covenant) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention). In doing so, the Government appeared to be upholding the pledges it had made when running for election to the United Nations (UN) Human Rights Council, and giving effect to recommendations made by several States under the Universal Periodic Review, that Pakistan should become party to the Covenant and to the Convention. The ratifications, however, came with reservations to eight of the Covenant's 27 substantive articles, and to seven of the Convention's 16 substantive articles. Many of these reservations proved to be incompatible with the object and purpose of each treaty.¹

This article considers the compatibility of one of these reservations with the integrity of the UN treaty body system, tracing NGO advocacy, and giving consideration to the consequences of the outcomes of Pakistan's treaty action.

COMPATIBILITY OF PAKISTAN'S RESERVATIONS WITH INTERNATIONAL LAW

A reservation is a unilateral statement purporting to exclude or modify the legal effect of certain provisions of an international treaty, including as it applies at the domestic level. Under the Vienna Convention on the Law of Treaties (the Vienna Convention), States Parties are able to enter reservations at the time of ratification, provided they are not incompatible with the 'object and purpose' of the treaty (Article 19(c)).

Many of the reservations lodged by Pakistan were incompatible with the object and purpose of the Covenant and the Convention because of their scope and generality, including by restrictively altering the content of certain rights. The rights affected by the reservations included non-derogable rights such as the right to life; freedom from torture and other cruel, inhuman or degrading treatment or punishment; and freedom from discrimination on the basis of gender.

A reservation to Article 40 of the Covenant raised significant concerns. Article 40 requires States Parties to submit periodic reports to the Human Rights Committee (the Committee), recording their domestic implementation of the Covenant. It also establishes the competence of the Committee to examine and comment on these reports. The Concluding Observations that result from this exercise stand as an authoritative interpretation of the reporting State's obligations, and are key to ensuring compliance by States with their obligations. The competence of the Committee to review the compliance of States with human rights obligations under the Covenant, through the establishment of a supervisory machinery, is an essential 'object and purpose' of the Covenant. The reporting process is also one of the principal avenues for human rights defenders to engage with the UN treaty system to influence the implementation by their governments of international human rights obligations.

¹ Pakistan entered reservations to articles 3, 6, 7, 12, 13, 18, 19, 25, and 40 of the Covenant; and to articles 3, 4, 6, 8, 12, 13, 16, and 28 of the Convention.

The Committee has already addressed the question of permissible reservations to the Covenant in its General Comment 24.² It there observed:³

'The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.'

The Committee therefore affirmed that a State may not opt out of the obligation to periodically report to, and have that report considered by, the Committee.⁴ Pakistan's reservation to Article 40 of the Covenant was therefore clearly incompatible with the object and purpose of the Covenant, and consequently impermissible under international law.

When reservations are made to an international treaty, all other States Parties have the ability to object to the reservation within a one-year period. If no objections to a reservation are lodged by the end of this twelve-month period, the reservation is considered to have been accepted.⁵ Pakistan's reservation was submitted on 27 June 2010, giving other States Parties to the Covenant until 27 June 2011 to object.

THE ADVOCACY CAMPAIGN

A number of NGOs were concerned that Pakistan's behaviour could set a dangerous precedent for other States wanting to follow suit, not only in relation to the *International Covenant on Civil and Political Rights* but also to other human rights instruments. Accordingly, they lobbied governments to impress upon them the need to intervene with Pakistan by objecting to the reservations. Advocacy efforts in Geneva, New York, and in capitals focused on two objectives: to achieve withdrawal of the reservations by Pakistan, and failing that, to persuade States to object to the reservations.

Pakistan's response to challenges concerning the permissibility of its reservation to Article 40 was inconsistent. Almost immediately after lodging the reservation, Pakistan explained that this was a technical error and that it had in fact intended to lodge a reservation to Article 41 (concerning inter-State complaints). However, given that the inter-State complaint mechanism under Article 41 can only be activated by an explicit declaration in favour of such jurisdiction, this explanation was dubious. Nevertheless, agreeing that a technical error should not transform itself into a political issue, Pakistan indicated to States and NGOs that it would withdraw the reservation prior to 27 June 2011. Shortly before that date,

a Government press release announced that the President of Pakistan had directed that 'almost all' reservations to the Covenant and the Convention were to be withdrawn.

OUTCOME AND CONSEQUENCES

Despite this assurance, by the end of June 2011, Pakistan had failed to withdraw its reservations. In response, 16 States lodged objections to the reservations, with more States expected to follow.⁶ This is a significant outcome, demonstrating the important role of civil society in bringing issues that relate to the safeguarding of the international human rights system to the attention of States, and the ability of civil society to persuade States to take action. The fact that many States lodged objections to Pakistan's reservation sets an important precedent that is likely to deter other States from lodging reservations to the same article, or equivalent provisions in other human rights treaties, in the future. It should also be noted that the issue was considered to be of such importance that it prompted the United States, Switzerland and Uruguay to lodge objections, despite never before having done so in respect of the Covenant.

The pressure exercised by the international community resulted in Pakistan ultimately withdrawing most of its reservations to the Covenant and the Convention.⁷ Unfortunately, Pakistan's reservations to articles 3 and 25 of the Covenant remain in place. Despite having been modified, they undermine the ability of women in Pakistan to enjoy equal rights to men, and continue to impose a general limitation on the Pakistani population's rights to participate in public affairs, to vote, and to have equal access to public services. As far as the Convention is concerned, Pakistan has not withdrawn reservations to articles 8, 28, and 30, reflecting its decision not to recognise the competence of the Human Rights Committee or the International Court of Justice in respect of inter-State disputes.

Several legal and practical consequences flow from Pakistan's withdrawal of its reservation to Article 40 of the Covenant. If Pakistan had continued to reject the competence of the Committee under Article 40, it would most likely have argued not to be bound to submit reports on the implementation of the Covenant. Should that position have prevailed, it would have meant that civil society in Pakistan and around the world would have been less aware of the measures taken by the Government to implement the provisions of the Covenant, and less able to assess the status of such implementation.

2 Human Rights Committee, *General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under Article 41*, UN Doc CCPR/C/21/Rev.1/Add.6 (1994).

3 Ibid, para 7.

4 Ibid, para 11.

5 Vienna Convention, Article 20(5).

6 States that are officially recorded to have lodged an objection are Spain, Poland, Greece, the Netherlands, Ireland, Uruguay, Austria, Canada, France, Australia, Sweden, Finland, US, Denmark, Switzerland, and Estonia. Four more States (Portugal, UK, Germany, and the Czech Republic) are said to have objected to the reservation to Article 40 but this has not been recorded yet.

7 On 21 September 2011, reservations to articles 6, 7, 12, 13, 18, 19 and 40 of the Covenant, and to articles 3, 4, 6, 12, 13 and 16 of the Convention, were withdrawn.

Human rights defenders would have been deprived of a key opportunity to work with their Government to improve its human rights record.

In response to the Article 40 reservation, the Committee stated that, even if Pakistan had continued to refuse to recognise the Committee's competence, the State would nonetheless be treated as a 'non-reporting State'.⁸ This means the Committee would have examined Pakistan's implementation of the Covenant in the absence of a report by Pakistan. For the review of non-reporting States, the Committee drafts a list of issues and sets a date for the review, inviting the State to send a delegation. The Committee then considers the State in a closed session, either in dialogue with a delegation or on the basis of any information that has been made available concerning the implementation of the Covenant, often only based on information from civil society. At the end of the examination, the Committee adopts Provisional Concluding Observations that are sent to the State without being published. These usually include a request that the State responds to the concerns in the Concluding Observations by a certain date. If the State fails to do so, the Concluding Observations are adopted and made public.

While the intended approach of the Committee is laudable, and probably represents the best alternative available, it would nevertheless have presented difficulties. Politically, the issuing of Concluding Observations by the Committee, despite a rejection by Pakistan of the Committee's competence to review periodic reports, would have given Pakistan arguments to dismiss the Concluding Observations as invalid or irrelevant. Notwithstanding the clear impermissibility of Pakistan's reservation under international law, and the inferred capacity of the Committee to treat Pakistan as a non-reporting State, there seems little doubt that such reasoning would have been used in an attempt to undermine the authoritative status of the Concluding Observations.

A further problem with this approach is that civil society would have been given little opportunity to actively participate in the periodic reporting process. Other than providing written submissions, human rights defenders from Pakistan would not have had the opportunity to formally engage with the Committee during the examination phase because the review would have taken place in a closed meeting. By not being able to attend the examination, important opportunities to submit supplementary information based on the discussion of issues would have been lost, thereby reducing the overall effectiveness of the examination process.⁹

Furthermore, at the end of the examination of a non-reporting State, the provisional Concluding Observations remain confidential for a period of 12 months. The implementation of Concluding Observations is one of the most important aspects of the periodic reporting process. Such a delay in making the Concluding Observations public has the potential to undermine, or at least impede, the role of local human rights defenders concerned with the implementation of international human rights obligations. It frustrates the ability of local NGOs to start a national dialogue concerning the recommendations made by the Committee and to lobby authorities to ensure concrete steps are taken towards implementation.

The wider implications of the outcome of Pakistan's treaty action concerning Article 40 are also important. The number of objections to the reservation constitutes a clear affirmation that the article represents an essential object and purpose of the international covenant, thus reinforcing the integrity of the UN treaty body system. Combined with the pressure brought to bear that ultimately saw the withdrawal of the reservation by Pakistan, a strong message was sent to States who may in the future become party to the Covenant: do not entertain the idea of objecting to the competence of the periodic reporting mechanism. ■

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⁸ See Human Rights Committee, *Statement on the reservation of Pakistan to Article 40*, 30 March 2011. The Committee initiated such a procedure in 2001, in accordance with rule 70 of its rules of procedure in UN Doc CCPR/C/3/Rev.9 (2011), in order to ensure the periodic review of the implementation of the Convention even in the case of States Parties failing to submit their report on time.

⁹ See rules 70(1) and 70(3) of the Human Rights Committee's rules of procedure, in UN Doc CCPR/C/3/Rev.9 (2011). It should be noted that the Committee is considering revision of this procedure such that the

examination would be held in open session: compare with rule 67(3) of the Committee against Torture's rules of procedure, in UN Doc CAT/C/3/Rev.5 (2011).