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## A Gendered Refutation of Epiphenomenal Norms Through the Median Voter: A Case Study of India's CEDAW Compliance

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# **A GENDERED REFUTATION OF EPIPHENOMENAL NORMS THROUGH THE MEDIAN VOTER: A CASE STUDY OF INDIA'S CEDAW COMPLIANCE**

*Shritha Vasudevan\**

## ABSTRACT

*This Article hypothesizes on the reasons behind India's Declaration to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Article 5(a) as a manifestation of the intensive compliance deadlock over its due diligence obligation which castigates traditional, cultural attitudes as responsible for gender-based violence.*

*A qualitative analysis of two historical moments when India was confronted with an empirical conflict of the CEDAW's due diligence obligation: the sati of Roop Kanwar in 1987 and the Shah Bano judgment in 1985, even prior to its CEDAW accession in 1993 is undertaken, to argue that the rational choice theory of voting and elections perfectly explains non-compliance. This article contests the position that norms are epiphenomenal and makes the case that only a study of gendered compliance alters the epistemological lens. This finding implies norms could be rationally restructured to make it in nations' interest to comply, simultaneously contesting the post-positivist feminist IR contention that eschews the relevance of the mainstream discipline.*

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## INTRODUCTION

One of the most seriously under-theorized and understudied aspect of international relations is the set of reasons behind the massive number of reservations and declarations to the one of the few existing international legal principle on gender-based violence (GBV) known as the due diligence obligation to the CEDAW. The due diligence obligation was formulated in response to the widespread crimes of GBV during the Balkan conflict in 1992, which provided the historical imperative to force the agenda for a right against GBV onto the international stage.<sup>1</sup>

The promulgation of an international legal principle on GBV has been hindered by the massive number of reservations and declarations advanced by nation-states. The process of promulgating an international legal principle on GBV at the inception of the CEDAW has been termed the biggest deadlock in the history of the human rights system.<sup>2</sup> When the CEDAW was drafted and subsequently promulgated at the United Nations in 1979, governments unilaterally invoked their rights under the *Vienna Convention on the Law of Treaties*<sup>3</sup> to unequivocally reiterate that the right against GBV could not prevail when it conflicted with the right to freedom of religion.<sup>4</sup> The number of

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<sup>1</sup> The term “due diligence” in this Article refers exclusively to the CEDAW’s due diligence obligation incorporated by way of a General Recommendation of the CEDAW treaty in 1992. It should be noted that this principle has not yet been codified into formal international law, making the present study still one of international norms. This distinction is made in order to prevent a reference to the other principle of due diligence under public international law—the due diligence obligation of states with regard to the *jus cogens* right against torture. The due diligence obligation to the CEDAW has borrowed from the concept of the due diligence against torture and has evolved a gendered interpretation of this right stating that states have a duty to prosecute, punish, and prevent violence against women, which may be characterized as torture in the private sphere. The text of the CEDAW’s due diligence obligation can be accessed at: G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979).

<sup>2</sup> Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW’s Reservation Regime under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT’L L. REV. 605, 605 (2002).

<sup>3</sup> Pamela Goldberg & Nancy Kelly, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195 (1993); Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women’s Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J. L. & RELIGION 106, 107–08 (1995); See J. ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS: FEMINIST PERSPECTIVES ON ACHIEVING GLOBAL SECURITY 18–19 (John Gerard Ruggie & Helen Milner eds., 1992); Riddle, *supra* note 2.

<sup>4</sup> The Reservations and Declarations to the CEDAW are available at: Rep. of U.N. Meeting of States Parties to the Convention on the Elimination of All Forms Discrimination against Women, Sixteenth meeting, Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination Against Women, at 11–12, U.N. Doc. CEDAW/SP/2010/2 (Mar. 1, 2010) [hereafter U.N. Doc. CEDAW/SP/2010/2]. Algeria, Bahrain, Bangladesh, Brunei, Egypt, France, India, Indonesia, Iraq, Israel, Jamaica, Kuwait, Libya, Malaysia, Malta, Micronesia, Morocco, Niger, Oman, Pakistan, Saudi Arabia, Singapore, Syria, Tunisia, Turkey, and the United Arab Emirates have entered Reservations on the conflict of rights frame between religion and gender-based discrimination. *Id.* at 5–28.

reservations to the CEDAW on this ground is the largest to any human rights treaty,<sup>5</sup> reiterating the charge of scholars of human rights compliance that norms are indeed epiphenomenal to international life.<sup>6</sup>

This Article argues that this international deadlock that impeded the adoption of a principle on GBV in 1979, when the CEDAW was drafted,<sup>7</sup> resurrected itself in 1992 as a legal obstacle when the due diligence was promulgated. Governments have refused to support an international legal principle that blatantly asks them to interfere in the religious practices that cause GBV precisely because the principle conflicts with the right to freedom of religion.<sup>8</sup> The due diligence obligation has not yet been codified into a formal principle of public international law because of this trenchant opposition.<sup>9</sup> This is the only existing international legal principle that unequivocally states that traditional, cultural attitudes emanating from religious practices that cause GBV cannot be condoned. The due diligence is thus based on a conflict of rights framework—the right to freedom of religion and the right against GBV.<sup>10</sup> It is based on a liberal conceptualization of the relationship between the right to equality and the right against GBV, which does not permit a normative determination of the hierarchy between these norms.<sup>11</sup> The lack of a normative hierarchy has permitted the deadlock to compliance with this principle at the international level. This Article submits that nation-states have utilized this absence of a normative hierarchy to advance reservations against implementing the only existing international norm on GBV.

As stated above, this international deadlock with regard to compliance is the longest witnessed to any treaty on human rights.<sup>12</sup> Yet, the causes have not been seriously investigated, simultaneously reaffirming the charge by feminist International Relations (IR) theorists that gender is accorded scant priority by

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<sup>5</sup> Julie A. Minor, *Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT'L & COMP. L. 137, 144 (1994).

<sup>6</sup> The role of the epiphenomenal contention as the primary explanation for non-compliance with the principles of human rights law will be explained in the next section.

<sup>7</sup> Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 495 (1990); see Radhika Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in the International Community*, 23 COMMONWEALTH L. BULL., 1249, 1250 (1997).

<sup>8</sup> Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 807 (1992).

<sup>9</sup> Ronagh J. A. McQuigg, *Is it Time for a UN Treaty on Violence Against Women?*, 22 INT'L. J. HUM. RTS. 305, 318–19 (2018); Sullivan, *supra* note 8, at 796–98.

<sup>10</sup> Sullivan, *supra* note 8, at 814.

<sup>11</sup> *Id.* at 796.

<sup>12</sup> Riddle, *supra* note 2, at 606.

the mainstream discipline of IR.<sup>13</sup> One of the principal arguments of feminist IR theorists first made in 1987 was that the realm of international relations was patriarchal, male, and incapable of realizing the interests of women.<sup>14</sup> This state of affairs contributed to insufficient theorizing of gender within the paradigms of the IR discipline. Hence, this strand of feminist IR theorization, as applicable to the present argument, will contend that the insufficient theorization on the numerous reservations to the CEDAW, and subsequently its due diligence principle, is a reflection of the patriarchal realm of IR.

This Article stands as stark testimony to the fact that a proper analysis along a gender axis can reveal the principles on which the relationships between nation-states are structured. This Article contends that only this approach enables discernment of the conditions that cause or preclude compliance with human rights norms. The standard contention by human rights scholars—that non-compliance is generated because the due diligence norm and the norm privileging the right to gender-based equality over the right to freedom of religion is epiphenomenal—will be contested on the basis of the median voter theorem. The median voter theorem states that politicians prefer the position held by the average voter. This Article argues that the Indian Government's Declaration to the CEDAW was based on its perception of the median voter in India. This perception is hypothesized to be male, Hindu patriarchal and firmly in favor of the Hindu religious attitudes that cause GBV. An examination of the empirical occurrence of the due diligence obligation in India during the *sati* of Roop Kanwar and the parliamentary reversal of Shah Bano is used to make this case. As a result, this Article demonstrates the relevance of gender analysis to theorization on the relationship between nation-states. Non-compliance with human rights norms ensues not because nations consider norms to be epiphenomenal. In this significant instance of India's compliance with the CEDAW, the evidence indicates unequivocally that the median voter precludes India's compliance with a principle requiring affirmative state action to redress the traditional religious attitudes that cause GBV. Therefore, the empirical evidence in this Article indicates that the Indian government's non-compliance with the due diligence obligation is motivated by concerns about its median voter, which all governments and politicians unequivocally seek to please rather than a perception that the due diligence obligation is epiphenomenal. This

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<sup>13</sup> J. ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS: FEMINIST PERSPECTIVES ON ACHIEVING GLOBAL SECURITY 18–19 (John Gerard Ruggie & Helen Milner eds., 1992).

<sup>14</sup> *Id.* at 6, 10; Susanne Zwingel, How Do International Women's Rights Norms Become Effective in Domestic Contexts? An Analysis of the Convention on the Elimination of All Forms of Discrimination Against Women (2005) (unpublished Ph.D. dissertation, Ruhr University Bochum) (on file with author).

surely, then, contests the primary argument of the human rights compliance literature that norms are epiphenomenal.

Further, this Article demonstrates the validity of evolving testable hypotheses on gender proposed by Keohane<sup>15</sup> and partially contests the post-positivist feminist IR contention<sup>16</sup> that the mainstream discipline of IR has *nothing* to offer to resolve the situation of gendered oppression. An ancillary effect of the feminist IR contention—that the system of IR is incapable of representing the interests of women—is that the system of IR is indeed irrelevant to the resolution of the situation of gendered oppression. But, this Article argues that the mainstream discipline of political science through its median voter theorem has provided the keys to unlock the puzzle of compliance with the due diligence principle, the most contested principle of the human rights treaty system. This finding is important, particularly to address gendered oppression in developing nations where pervasive cultural practices can be linked to GBV, such as with a specific cultural practice of the majority Hindu religion in India.<sup>17</sup> Only the liberal sphere, and particularly the instruments of public international law, provide an important analytical and substantive tool of redress. The feminist IR theorists' contention that the sphere of IR is irrelevant to the situation of gendered oppression negates the validity and relevance of the instruments of public international law like the CEDAW that have been valiantly used by feminist activists to construct an alternative discourse on the rights of gender-based equality in countries like India.<sup>18</sup> Hence, this Article is also a trenchant call to the discipline of feminist IR to reformulate its primary proposition to account for an immanent critique of IR. On the basis of a developing nation's experience, the mainstream discipline of IR is indeed relevant to gender.

To demonstrate the paradigmatic relevance of gender to the discipline of IR, the factors precluding compliance with the CEDAW's due diligence obligation will be studied on the basis of the gendered experience in arguably the most dangerous country for women: India.<sup>19</sup> The rationale for this case selection is to

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<sup>15</sup> Robert O. Keohane, *Beyond Dichotomy: Conversations Between International Relations and Feminist Theory*, 42 INT'L STUD. Q. 193 (1998); Zwingel, *supra* note 14 at 21.

<sup>16</sup> Laura Sjoberg, *Introduction to Security Studies: Feminist Contributions*, 18 SECURITY STUD. 183, 205 (2009).

<sup>17</sup> One specific cultural manifestation of this practice that is considered by the current Article is the *sati* of Roop Kanwar, who was just 18-year-old and a bride for six months when she was forcibly immolated on the funeral pyre of her husband, Maan Singh.

<sup>18</sup> Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws"*, 4 INT'L. J. CONST. L. 181 (2006).

<sup>19</sup> A global study ranked India, Afghanistan, Pakistan and Somalia in the same tier and amongst the worst places to be a woman. This study noted the status of India vis-à-vis "surprise." By demonstrating that the worst

understand the reasons causing GBV in a society and civilization that have been suffering from intense forms of GBV since 1000 CE. Rather than deploy a comparative cross-national analysis, this Article uses the gendered experience of a single country as a heuristic for some of the worst forms of GBV. Also, a study of the factors precluding compliance with the due diligence principle in a country suffering and witnessing some of the worst manifestations of GBV hopefully will bring heightened international attention to its nature and intensity.<sup>20</sup> For the *sati* of an 18-year-old girl on the funeral pyre of her 21-year-old husband is now hopelessly lost in the dusty annals of Indian history.<sup>21</sup> Through the examination of non-adherence to the CEDAW's due diligence principle, this Article revisits her last moments and hopes to invoke her memory to set into motion the complex process of redressing GBV in Indian society.

The nature of CEDAW compliance will be examined through the immolation of an 18-year-old girl, Roop Kanwar, on the funeral pyre of her husband in 1987, in the village of Deorala, in the north-western state of Rajasthan in India, and the Parliamentary reversal in 1985 of the Shah Bano judgment by the Supreme Court of India. The latter is a significant moment of GBV when a Supreme Court judgment that granted a marginal alimony to a 72-year-old divorcee was retracted by the liberal, democratic Indian Parliament.<sup>22</sup> Despite the fact that the Supreme Court of India has recently held Triple Talaq to be "void, illegal[,] and 'unconstitutional,'"<sup>23</sup> the Shah Bano Judgment (taken in conjunction with Roop Kanwar's *sati* in 1987) is structured on the conflict of rights frame of the due diligence obligation.<sup>24</sup> The nature and pervasiveness of

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position of woman is actually the median voter preference this article negates the construct of surprise by empirical social scientific evidence. See Press Trust of India, *India Slips 21 Slots on WEF Gender Gap Index 2017*, HINDU (Nov. 2, 2017), <http://www.thehindu.com/news/national/india-slips-21-slots-occupy-108th-rank-on-wef-gender-gap-index-2017/article19966894.ece>; see also Belinda Goldsmith & Meka Beresford, *Poll Ranks India the World's Most Dangerous Country for Women*, GUARDIAN (June 28, 2018), <http://www.theguardian.com/global-development/2018/jun/28/poll-ranks-india-most-dangerous-country-for-women>.

<sup>20</sup> Belinda Goldsmith & Meka Beresford, *Poll Ranks India the World's Most Dangerous Country for Women*, GUARDIAN (June 28, 2018), <http://www.theguardian.com/global-development/2018/jun/28/poll-ranks-india-most-dangerous-country-for-women>.

<sup>21</sup> *Sati* refers to the ancient Hindu practice of burning a widow alive on the funeral pyre along with her husband's corpse. This is prescribed in the Hindu religious texts and was routinely carried out in some parts of the Indian subcontinent for at least 4000 years. See Dorothy K. Stein, *Women to Burn: Suttee as a Normative Institution*, 4 SIGNS 253, 255 (1978), <http://www.jstor.org/stable/3173024>.

<sup>22</sup> Zoya Hasan, *Minority Identity, Muslim Women Bill Campaign and the Political Process*, 24 ECON. & POL. WKLY. 44, 44 (1989).

<sup>23</sup> *Supreme Court Bars Triple Talaq for Six Months. Here's a 11-Point Primer*, ECON. TIMES (Aug. 22, 2017), <http://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-bars-triple-talaq-till-parliament-makes-a-law-heres-a-11-point-primer/articleshow/60169892.cms>.

<sup>24</sup> Nawaz B. Mody, *The Press in India: The Shah Bano Judgment and Its Aftermath*, 27 ASIAN SURV. 935, 937 (1987).

GBV in Indian society, makes it important to understand the factors precluding compliance with the due diligence obligation to the CEDAW. These two moments unveiled a tension between the right to freedom of religion and the right against GBV and provided clues to understand the nature of India's Declaration to the CEDAW's due diligence in 1993. Hence, the passage of the current Supreme Court Judgment does not denude the Shah Bano Judgment of its empirical validity vis-à-vis India's CEDAW compliance.

It is the submission of this Article that if the Indian government chose the right to freedom of religion in both these instances over the right against GBV, then its subsequent behavior in 1993 during CEDAW accession privileging the right to freedom of religion can be stated to be a reflection of its prior behavior. Despite the fact that these two moments are situated immediately prior to India's CEDAW accession, they are historically fortuitous occurrences of the conflict of rights of the due diligence obligation permitting reasonable inferences on the nature of India's CEDAW compliance. The due diligence obligation is jurisprudentially based on a conflict between the right to freedom of religion and the right against GBV.<sup>25</sup> The liberal international sphere does not provide for a normative determination of the superiority of either norm. In other words, religious practices that cause GBV are not deemed problematic under the liberal paradigm of international law. This is as the liberal sphere permits the right to freedom of religion to co-exist with the right to gender-based equality and the right against GBV.

Methodologically, this Article specifically locates the factors precluding compliance in these two moments through the median voter theorem, demonstrating their paradigmatic relevance in the present-day context. Hence, this Article departs significantly, for reasons explained in the next section, from other studies on CEDAW compliance that only study the trajectory of compliance after its occurrence. The historical experiences of nations prior to compliance matter immensely to understand the true causes behind compliance.

This Article contends that India's Declaration to CEDAW's Article 5(a) is a derogation of the due diligence obligation that has been recognized as a principle emanating from *jus cogens* principle of public international law.<sup>26</sup> There exists

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<sup>25</sup> Sullivan, *supra* note 8, at 796.

<sup>26</sup> E.g., David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 225, 246 (2005); Yakin Erturk (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *15 Years of United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences (1994–2009) – A Critical Review*, ¶ 66, U.N. Doc. A/HRC/11/6/Add.5 (May 27, 2009); accord Felice D. Gaer, *Rape as a Form of Torture: The Experience of the Committee Against Torture*, 15 CUNY L. REV. 293 (2012); see Indira Jaising, *The Convention*

a stream of legal consciousness that the due diligence principle is actually a precept of customary international law since it *inter alia* emanates from the *jus cogens* right against torture.<sup>27</sup> It can be conceptualized as a non-derogable norm under the canons of public international law. India acceded to the CEDAW in 1993 with a Declaration to Article 5, which calls on states to “modify the cultural practices of men and women and eliminate all customary practices”<sup>28</sup> claiming that it will implement this principle only to the extent that it does not require modification or interference in the religious laws of its minority communities.<sup>29</sup> India is governed by personal status laws on inheritance, succession, guardianship, and custody, which discriminate against women.<sup>30</sup> A formal link between the practices of GBV and the personal status laws has not been established. Feminist scholar Parashar contends that one of the principal fallacies of the feminist victory in securing a legislation against domestic violence in India in 2008 was that it failed to account for the patriarchal religious practices reflected in its personal status laws that cause violence.<sup>31</sup> The legislation merely retained the right of women suffering from GBV to remain in their matrimonial homes.<sup>32</sup> In other words, this Article argues that Parashar’s argument can be restated as follows: the implicit connection between the Hindu Personal Laws and the institutions of GBV did not figure in the remedy obtained in the domestic violence legislation.

This Article attempts to craft a feminist voice that demonstrates the intrinsic links between the Hindu Personal Laws and the institutions of GBV in India. It does so by demonstrating that India’s CEDAW Declaration, structured in terms of protecting the Personal Laws of its religious minorities, indirectly protects and promotes those majoritarian Hindu cultural traditions that cause violence. In effect, there exists empirical interconnections between the patriarchal, cultural traditions that cause GBV in Hindu society and the religious norms of gender subordination codified in the Hindu Personal Laws.

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*on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Realisation of Rights: Reflections on Standard Settings and Culture*, in *WITHOUT PREJUDICE: CEDAW AND THE DETERMINATION OF WOMEN’S RIGHTS IN A LEGAL AND CULTURAL CONTEXT* 9, 9–11 (Meena Shivdas & Sarah Coleman eds., 2010).

<sup>27</sup> See Jaising, *supra* note 26; Erturk, *supra* note 26.

<sup>28</sup> G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979).

<sup>29</sup> U.N. CEDAW, 16th mtg. at 11, U.N. Doc. CEDAW/SP/2010/2 (Mar. 1, 2010).

<sup>30</sup> Archana Parashar, *Gender Inequality and Religious Personal Laws in India*, 14 *BROWN J. WORLD AFF.* 103, 103–12 (2008).

<sup>31</sup> *Id.* at 107–38.

<sup>32</sup> *Id.* at 108.

Then, this Article argues that India's Declaration to CEDAW's Article 5(a) is a substantive derogation of a peremptory norm of public international law: the due diligence obligation—in as much as it protects the religious and cultural attitudes that cause violence. Scientifically, this can be restated as follows: India is implicitly claiming in its Declaration that when it comes to a conflict between the right against gender-based discrimination and the right to freedom of religion, it unequivocally privileges the latter, because of its median voter. Hence, India's declaration privileging the right to freedom of religion makes this an empirical manifestation of the compliance deadlock over the due diligence obligation.

What could be the explanations that account for India's CEDAW Declaration? The standard rejoinder of the human rights compliance literature is that this Declaration is to be expected because, after all, norms are epiphenomenal: nations only comply with norms that are in their material interests.<sup>33</sup> This argument has dominated the human rights compliance argument and hence applies by default to the study of the nature of compliance with the CEDAW's due diligence.<sup>34</sup> As an explanation for India's Declaration to CEDAW's Article 5(a), this argument would entail the finding that in this instance, the due diligence obligation does not appeal to the material interests of nations. Scholars of human rights compliance and those who profess the epiphenomenal faith would proclaim that India's Declaration to CEDAW's Article 5(a) is solely motivated by the consideration that the due diligence norm is epiphenomenal.<sup>35</sup> In other words, India does not find the norm against GBV promulgated at the international level to be relevant to its material interests.

But an examination of two significant historical moments immediately prior to CEDAW accession in 1987 and 1985, when India was confronted with an empirical conflict between the right against GBV and the right to freedom of religion, reveals that the Indian government privileged the right to freedom of religion only because of its accurate perception of its median voter as male, religious, conservative, and firmly in favor of religious prescription *even* when it conflicts with the right against GBV.<sup>36</sup> The *raison d'être* for the compliant behavior of the Indian government, reflected in its subsequent Declaration, was

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<sup>33</sup> E.g., MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW (1999); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002).

<sup>34</sup> BYERS, *supra* note 33; Raustiala & Slaughter, *supra* note 33.

<sup>35</sup> BYERS, *supra* note 33; Raustiala & Slaughter, *supra* note 33; U.N. CEDAW, *supra* note 29, at 11.

<sup>36</sup> These historical moments will be discussed in further detail later in this Article.

an intense concern with appeasing its median voter—*not* the standard assumption that the due diligence principle is epiphenomenal.<sup>37</sup> The CEDAW's due diligence generates non-compliance in India not because norms are epiphenomenal, but because the government is just responding as a rational actor to perceptions of this issue by its median voter.

In order to demonstrate this, this Article proposes and tests the hypothesis that the median voter in India is religious, male, conservative, patriarchal, and firmly in favor of religious tradition even when it conflicts with the right against GBV. If true, this implies that India's CEDAW Declaration is a reflection of its median preference. There is nothing epiphenomenal about the nature of India's Declaration. When the India government was confronted with the conflict between the right to freedom of religion and the right against GBV on two occasions immediately prior to CEDAW accession, the median voter dictated the government's preference. Hence, this implies that in 1993 when the Indian government was faced with a similar conflict through the CEDAW's due diligence, it sought to appease its median voter preferences reflected in its Declaration. An affirmative finding to this hypothesis implies that norms can be restructured to make it in the nations' rational interests to comply, providing the keys to unlock the compliance dilemma and secure redress of the endemic violence against women, the implications of which will be discussed in the conclusion.

This Article is organized as follows: Section I deals with the rational choice theory of public international law and its primary contention that norms are indeed epiphenomenal to international life; Section II examines the primary principles on the median voter theorem of Anthony Downs; Section III contains the hypothesis and the research methodology of the current article; Section IV is the empirical section of the article and examines evidence on Roop Kanwar's *sati* in 1987 and the Shah Bano Judgment in 1985 to argue that these two instances are structured on the conflict of rights of the CEDAW's due diligence. The position of the median voter is sought to be traced in these two moments through governmental action and the intersubjective societal preference by using the principles of Downs. This analysis reveals the nature of the median voter and the reasons for the Indian government's preference of the right to freedom of religion over the right against GBV. This Article concludes with the implications of these findings on the epiphenomenal contention against public international law.

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<sup>37</sup> U.N. CEDAW, *supra* note 29, at 12.

## I. THROUGH THE LOOKING GLASS OF RATIONAL CHOICE

What does rational choice analysis entail when applied to perceptions of nations towards public international law? Its primary implication hitherto has been that states' compliance commitments are structured by perceptions of international law as epiphenomenal. Since IR's inception as a discipline, IR scholars have viewed the instruments of international law with skepticism<sup>38</sup> which owes its intellectual heritage to Thucydides who is credited with stating that "the strong do what they can and the weak suffer what they must."<sup>39</sup> IR scholars traditionally have had little time for international law, regarding law as an "epiphenomenon, with rules of international law being dependent on power, subject to short-term alteration by power-applying States, and therefore of little relevance to how [s]tates actually behave."<sup>40</sup> International law has historically just been perceived as "deceitful" language deployed to justify power interests.<sup>41</sup> It is based on the consent of states, which implies domestic matters should presumably not be of any transnational concern.<sup>42</sup> The lack of an international Hobbesist sovereign renders enforceability problematic, demonstrating the inefficacy of international law to international life.<sup>43</sup> While Slaughter and Raustiala argue that this debate has acquired nuance, scholarly discourse continues to grapple with the thesis that norms are epiphenomenal.<sup>44</sup> In 2002, scholars of public international law extensively theorized on rational choice, but failed to consider the rational choice theory of voting and elections, from which they, nevertheless, abstracted.<sup>45</sup>

This premise on the epiphenomenal nature of norms has morphed into human rights compliance<sup>46</sup> and continues to remain its fundamental animating

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<sup>38</sup> Francis A. Boyle, *The Irrelevance of International Law: The Schism between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193, 193 (1980).

<sup>39</sup> Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1937–38 (2002), <http://www.jstor.org/stable/797642> (last visited Oct 13, 2016).

<sup>40</sup> BYERS, *supra* note 33, at 8.

<sup>41</sup> Jack Landman Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective 3* (Univ. of Chi. Law Sch. Chicago Working Paper Series, John M. Olin Law & Economics Working Paper No. 108, 2000).

<sup>42</sup> Louis Henkin, *Human Rights and State Sovereignty Sibley Lecture/Keynote Address*, 25 GA. J. INT'L & COMP. L. 31, 32–33 (1995).

<sup>43</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 236 (1979).

<sup>44</sup> Raustiala & Slaughter, *supra* note 33, at 538, 549.

<sup>45</sup> In 2002, an entire issue of *The Journal of Legal Studies* dealt with this question. But the major argument only considered the abstraction of rational choice theory to international life. Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEG. STUD. S307–S319 (2002).

<sup>46</sup> Harold Hongju Koh, *How Is International Human Rights Law Enforced*, 74 IND. L.J. 1397, 2600 (1998). See generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 4 (2009).

thesis.<sup>47</sup> In the absence of competing explanations for the compliance deadlock over the CEDAW's due diligence, this explanation irrefutably asserts itself by default. A large part of this contemporary debate has taken place around studying CEDAW compliance, also casting doubt on the post-positivist feminist IR contention that the mainstream discipline of IR does not take gender seriously.

In *Do Human Rights Treaties Make a Difference?*, Hathaway argues emphatically that qualitative approaches make it impossible to trace relationships between treaty ratification and state practice because the causes of compliance cannot be separated from other domestic factors that could elide actual causal pathways.<sup>48</sup> This Article argues that a qualitative analysis of CEDAW compliance in India permits a generalizable, testable proposition that has far greater applicability across the South Asian Association of Regional Cooperation (SAARC) region, Africa, and constitutional democracies among the developing nations precisely because of its nuance. Hathaway clumps different principles of human rights on “genocide, torture, fair public trials, civil liberties and the political representation of women” in an attempt to find empirical patterns,<sup>49</sup> yet fails. Applying large-N analysis (i.e., studying the empirical experiences of many countries for generalizable principles on compliance) without contextual detail only reiterates the extant assumption on international life that norms are indeed epiphenomenal. This is as large-N studies lack the depth and intensity that a single experience of GBV can accurately provide. The present Article contends that only a single contextual case study provides nuance through the intensity of GBV that demonstrates the proper principles on human rights compliance.

The next study terms human rights as *The Paradox of Empty Promises*, and argues that the “rising gap between states’ propensity to join the international

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<sup>47</sup> While the question of the relevance of public international law to the discipline of IR began at the inception of IR after World War II, its application to human rights compliance is a relatively new phenomenon that has acquired scholarly prominence in the last decade of the twentieth century. The term “human rights” refers to the corpus of human rights treaties promulgated in the wake of World War II and comprise importantly the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the Convention Against Torture, 1984; the International Convention on the Elimination of All Forms of Racial Discrimination, 1965; the CEDAW; and the Convention on the Rights of the Child, 2000. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>48</sup> Hathaway, *supra* note 39, at 1939.

<sup>49</sup> *Id.* at 1939.

human rights regime and to bring their human rights practice into compliance with that regime *challenges the efficacy of international law and questions the authenticity of states' legal commitment to protect the lives of their citizens.*<sup>50</sup> This study dismisses human rights treaty ratification as mere “window-dressing,”<sup>51</sup> but acknowledges that international global activism exerts an independent compliance pull.<sup>52</sup>

This was supplemented by *Justice Lost: The Failure of Human Rights To Matter Where Needed Most*, which demonstrates that repressor-states are as likely as democracies to ratify the International Covenant on Civil and Political Rights (1966), and the United Nations Convention on the Right Against Torture (1987), in its argument that human rights treaties hardly matter to actual human rights practices.<sup>53</sup>

This paradigmatic position is countered by constructivist scholars who demonstrate the conditions under which norms matter. Harold Justice L concedes that “[i]nternational human rights law is not enforced . . . because human rights norms are vague and aspirational . . . enforcement mechanisms are toothless . . . and because national governments lack the economic self-interest or the political will to restrain . . .” themselves.<sup>54</sup> But nevertheless it develops a concept—“transnational legal process”—that has generated some major studies on compliance.<sup>55</sup> But the question of why norms matter remains to be resolved. Further, Beth Simmons argues that the human rights regime has been brought into effect by governments themselves, while noting that causal evidence remains elusive.<sup>56</sup> Despite absence of a quintessential Hobbesist sovereign, CEDAW norms are enforced against governments through local activism, implying an independent normative pull that influences movements fighting gender oppression.<sup>57</sup>

One of the defining studies is *Activists Beyond Borders: Advocacy Networks in International Politics*, which argues that international norms are diffused into national life through principled transnational advocates.<sup>58</sup> The violence against

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<sup>50</sup> Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1374 (2005).

<sup>51</sup> *Id.* at 1378.

<sup>52</sup> *Id.*

<sup>53</sup> Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407, 410 (2007).

<sup>54</sup> Koh, *supra* note 46, at 1399.

<sup>55</sup> *Id.* at 1408.

<sup>56</sup> SIMMONS, *supra* note 46, at 1.

<sup>57</sup> *Id.* at 371–72.

<sup>58</sup> MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN*

women's movement disseminated its norm in terms of existing human rights discourse which was its greatest innovation.<sup>59</sup>

This theoretical position has been critiqued as a trickle-down approach as CEDAW norms developed at the global level are constantly subject to "appropriation and interpretation" in local contexts, which is its only mechanism of enforceability.<sup>60</sup> This argument was enhanced by a full-scale study of CEDAW compliance that discovered "[a] range of explanatory factors . . . in particular socio-economic prosperity [of a state]; the political system [of a state] and the degree to which women's interests can be represented [in the constitution] and the cultural *affinity between domestic gender norms and the CEDAW principles*."<sup>61</sup> Hence, a major factor impeding compliance is that international gender norms do not reflect local context.<sup>62</sup> But is the conflict of rights frame of the due diligence really disparate from national life? The empirical evidence presented herein is premised on India's historical reaction to confrontation of the due diligence's conflict of rights frame even prior to its CEDAW accession, contesting the argument that norms are top-down and preclude enforceability because of a disjuncture with national life.

#### A. *Contesting the Epiphenomenal Thesis*

All the existing studies on the CEDAW study compliance after its fact, which does not dislodge the epistemological lens that norms are epiphenomenal. The intense nature of GBV has resulted in a compliance deadlock for more than two decades after the adoption of the due diligence, yet the epistemological lens of the compliance literature precludes a solution. The current article departs from the earlier studies which have studied compliance *after* treaty ratification by locating the causes precluding compliance at the two historical moments when India was confronted with a conflict between right against GBV and the right to freedom of religion in 1987 and 1985 *prior to CEDAW accession in 1993*.<sup>63</sup> This

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INTERNATIONAL POLITICS (2014), [https://books.google.com/books?hl=en&lr=&id=JSF8AgAAQBAJ&oi=fnd&pg=PR9&dq=Advocacy+beyond+borders&ots=v93U\\_lmLhb&sig=Pz9mkubMbu4OQIXRd8vQH3E8YQ](https://books.google.com/books?hl=en&lr=&id=JSF8AgAAQBAJ&oi=fnd&pg=PR9&dq=Advocacy+beyond+borders&ots=v93U_lmLhb&sig=Pz9mkubMbu4OQIXRd8vQH3E8YQ) (last visited Dec 7, 2016).

<sup>59</sup> *Id.* at 172.

<sup>60</sup> Susanne Zwingel, *From Intergovernmental Negotiations to (Sub)National Change: A Transnational Perspective on the Impact of CEDAW*, 7 INT'L FEMINIST J. POL. 400, 414 (2005).

<sup>61</sup> Zwingel, *supra* note 14, at 13 (emphasis added).

<sup>62</sup> *Cf.* Zwingel, *supra* note 14 (explaining that global norms only unfold their value in ongoing and collective interpretations and re-interpretations within local practices).

<sup>63</sup> See Rehan Abeyratne & Dipika Jain, *Domestic Violence Legislation in India: The Pitfalls of a Human Rights Approach to Gender Equality*, 21 AM. U.J. GENDER SOC. POL'Y & L. 333, 340 (2012) (describing the legislation that India enacted in 1986 creating the new offense of "dowry death," prohibiting a longstanding religious practice that involved violence against women).

permits an alteration of the epistemological lens on compliance as it demonstrates that the rational choice theory of voting and elections in a democracy perfectly explains the causes behind India's Declaration to CEDAW's Article 5. The following section presents the basic propositions on the median voter in a democracy prior to examining the evidence on the Indian government at two significant historical moments.

## II. THE MEDIAN VOTER THEOREM

One of the basic hypotheses of political science is that majoritarian decision-making reflects median preferences characterized as a "fundamental principle of democracy."<sup>64</sup> The application of economics to public policy-making has helped uncover basic empirical patterns of political structure.<sup>65</sup> McEachern offers a succinct summary of the median voter hypothesis: "[I]f political opinion on a particular issue may be viewed as lying in a single dimension, then competition among political candidates will force them towards the position held by the median voter."<sup>66</sup>

The median voter theorem has its basis in *Condorcet's Jury Theorem*, and states that if there exists two different alternatives in a majoritarian democracy and the identity of the preferred alternative is unknown, majoritarian voting helps determine the preferred alternative.<sup>67</sup> When the population as a whole is required to choose and each individual possesses a vote distinct and separate from the others and as the number of people eligible to vote increases, the votes will coalesce towards the preferred alternative.<sup>68</sup> Hence, this implies that voter preference on the issue of a conflict between the right against GBV and the right to freedom of religion can be determined with accuracy as majoritarian preference is expected to coalesce around the preferred alternative.

In 1929, Harold Hotelling propounded his famous principle of minimum differentiation in *Stability in Competition* and argued that in a two-party democracy party ideologies resemble one another and "each party strives to

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<sup>64</sup> Roger D. Congleton, *The Median Voter Model*, in THE ENCYCLOPEDIA OF PUBLIC CHOICE 707, 712 (2004).

<sup>65</sup> Randall G. Holcombe, *The Median Voter Model in Public Choice Theory*, 61 PUB. CHOICE 115, 115 (1989).

<sup>66</sup> William A. McEachern, *Collective Decision Rules and Local Debt Choice: A Test of the Median-voter Hypothesis*, NAT'L. TAX J. 129, 129 (1978).

<sup>67</sup> David Austen-Smith & Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AM. POL. SCI. REV. 34, 34 (1996).

<sup>68</sup> Nicholas R. Miller, *Information, Individual Errors, and Collective Performance: Empirical Evidence on the Condorcet Jury Theorem*, 5 GROUP DECISION & NEGOT. 211 (1996).

make its platform as much like the other's as possible."<sup>69</sup> This principle draws from economic competition and the tendency of firms to sell identical goods to imitate each other as much as possible.<sup>70</sup> Rather than differentiate themselves, firms tend to locate themselves on a middle position so as to not lose customers to other firms selling similar goods. While this theory has been expanded by the inclusion of price competition,<sup>71</sup> spillover,<sup>72</sup> and labor,<sup>73</sup> Hotelling's principle still constitutes part of the sacrosanct corpus on which the median voter theorem has been propounded within the discipline of political science.<sup>74</sup> Hence, political parties should exhibit a relatively stable position that reveals the median vote on a conflict between the right against GBV and the right to freedom of religion, despite proffering ostensibly different ideologies.

Duncan Black argued that in majoritarian voting systems, the median position exerts a pull on all the voters, such that voters with different preferences on a single issue will usually converge on the median position.<sup>75</sup> This theory applies only when voters exhibit a "single peaked" or a single preference out of multiple options.<sup>76</sup> Therefore, when an issue has just two preferences, majoritarian voting converges on and helps determine the median preference.<sup>77</sup>

All of the above theorems led to Anthony Downs's *An Economic Theory of Democracy* to explain that political parties and incumbent governments in a democracy adopt a preference on an issue, which usually reflects the median voter's position.<sup>78</sup> This study remains a basic tenet of the discipline of political science, has been uncontested for more than half a century and has "spawned a vast literature and has had ramifications throughout the social sciences and in allied disciplines such as law and philosophy."<sup>79</sup>

<sup>69</sup> Harold Hotelling, *Stability in Competition*, in THE COLLECTED ECONOMICS ARTICLES OF HAROLD HOTELLING 50, 54 (1990).

<sup>70</sup> *Id.* at 41.

<sup>71</sup> Gabriel A. Picone, David B. Ridley & Paul A. Zandbergen, *Distance decreases with differentiation: Strategic agglomeration by retailers*, 27 INT'L J. INDUS. ORG. 463, 463 (2009).

<sup>72</sup> J. Myles Shaver & Fredrick Flyer, *Agglomeration Economies, Firm Heterogeneity, and Foreign Direct Investment in the United States*, 21 STRATEGIC MGMT. J. 1175 (2000).

<sup>73</sup> ALFRED MARSHALL, PRINCIPLES OF ECONOMICS: AN INTRODUCTORY VOLUME 271 (8th ed. 1920).

<sup>74</sup> ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 117 (1957); Bernard Grofman, *Introduction to BERNARD GROFMAN, INFORMATION, PARTICIPATION, AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE I* (1995).

<sup>75</sup> Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 26–30 (1948).

<sup>76</sup> *Id.* at 28.

<sup>77</sup> Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POLIT. ECON. 135, 150 (1957).

<sup>78</sup> DOWNS, *supra* note 74, at 140.

<sup>79</sup> Grofman, *supra* note 74 at 1.

Downs defines political parties as a group of men seeking to control the “governing apparatus” by gaining office in a “duly constituted election.”<sup>80</sup> Politicians are motivated “solely in order to attain income, prestige[,] and power” of electoral office, the policies of political parties are created with an eye to maximize votes.<sup>81</sup> Party ideologies develop solely to offset political uncertainties and operate as instruments to maximize votes.<sup>82</sup> Downs notes that political parties are not agents of any social groups but merely act to maximize votes.<sup>83</sup> Party ideology is a reflection of the position “an overwhelming portion of the electorate agree upon and strongly desire” and “no party can gain by opposing passionate majority.”<sup>84</sup> Voters are rational and exhibit concern over political issues. But they do not display great interest in any overarching philosophical *Weltanschauungen* and hence parties can take *ad hoc* or temporary stands on issues as they arise.<sup>85</sup> In fact, “parties are rarely able to adjust their ideologies at exactly the speed which conditions warrant.”<sup>86</sup> It is to be expected that when confronted with a conflict between GBV and freedom of religion, politicians will merely act to maximize votes and their adoption of one side of the issue is not indicative of any overarching *Weltanschauung*.<sup>87</sup> This conceptualization of political parties permits alteration of the conceptual lens of the epiphenomenal thesis because it implies parties will take *ad hoc* positions on the due diligence frame and not one universal position.

For Downs, all issues in a democracy can be broken down into a Left-Right scale, which is linear and ranks voter preferences from a zero to a hundred.<sup>88</sup> Each voter’s preference is single peaked.<sup>89</sup> Downs draws from Hotelling’s principle to state that parties tend to move closer to each other to not lose out on votes, and will “converge” on the middle position.<sup>90</sup> Parties will not necessarily move to a position of moderation but to a position that reflects majoritarian preference and can secure the maximum number of votes.<sup>91</sup> Hence, if the median position on an issue converges on the extreme left or the extreme right with

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<sup>80</sup> DOWNS, *supra* note 74, at 24

<sup>81</sup> *Id.* at 28.

<sup>82</sup> *Id.* at 111.

<sup>83</sup> *Id.* at 97.

<sup>84</sup> *Id.* at 98.

<sup>85</sup> *Id.* at 98; *Weltanschauung* is defined as a particular philosophy or view of life; the world view of an individual or group, Oxford Dictionary, <https://en.oxforddictionaries.com/definition/weltanschauung> (last visited Sep. 8, 2018).

<sup>86</sup> *Id.* at 111.

<sup>87</sup> *Id.* at 98.

<sup>88</sup> *Id.* at 117.

<sup>89</sup> *Id.* at 118.

<sup>90</sup> *Id.* at 117.

<sup>91</sup> *Id.* at 118.

voters predominantly clustered at that end, parties will unhesitatingly move towards that position on an issue.<sup>92</sup>

Further, Downs argues that the basic objective pursued by a democratic government is the act of maximizing votes.<sup>93</sup> Decision-making by an incumbent government is premised on the majority principle<sup>94</sup> as incumbent governments gain or lose votes on the basis of marginal changes in policy. When crafting policy, incumbent governments usually do not make drastic alterations from previously existing policies, but just slight changes.<sup>95</sup> Voters reject policies not on the basis of universalizing philosophies, but merely in terms of how much they disfavor the incumbent policy change from its predecessor.<sup>96</sup> On an issue where there exists only two different alternatives, the government is keenly aware of the choice that is going to be reflected in majoritarian preference in the next election.<sup>97</sup> The government chooses the alternative that the electorate most prefers.<sup>98</sup> Otherwise, the opposition parties would capitalize on this position and take away votes.<sup>99</sup> Theoretically a coalition of opposition can hit on a minority preference that can defeat the incumbent.<sup>100</sup> In this exception, the government adopts the minority preference on the issue, implying that incumbents adopt any policy that maximizes votes.<sup>101</sup> If the opposition party attains power, it is forced to adopt majoritarian preferences or face the prospect of being out of office the next term due to unhappy voters. Therefore, a passionate majority always determines incumbent policies.<sup>102</sup>

The next Section demonstrates that India's CEDAW Declaration was merely a reflection of the government responding as a rational actor to an empirical conflict of the due diligence, implying this position is not fixed but is always subject to marginal change. Hence, theoretically, the government can be made to favor policies prohibiting GBV when its electorate perceives a marginal utility in this direction contesting the argument that epiphenomenal norms are not bound to induce compliance in the foreseeable future. Finally, even though Downs's principle is applicable in the context of a two-party democracy, the

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 52.

<sup>94</sup> *Id.* at 54.

<sup>95</sup> *Id.* at 53.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 54.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 57.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 64.

historical moments of the current article encompasses one electoral tenure of the Indian National Congress (INC) making this an irrelevant consideration.

All these principles demonstrate that it is possible to mathematically discern the nature of the median voter on the conflict between the right against GBV and the right to freedom of religion by examining the behavior of political parties and the incumbent government when they are confronted with an empirical conflict of the due diligence.

The validity of the Downs' principles animate the discipline of political science. This model rendered the previous sociological and psychological positions flawed and provided an answer to political science in the language of economics, which subsequently revolutionized the study of democracy and elections.<sup>103</sup> Congleton argues that Down's simple model of economic decision-making permits easy transmission of knowledge better than complex models.<sup>104</sup> Particularly, the simple model of the median voter is an "engine of analysis" that enables development of hypothesis on complex phenomena, whose simplicity provides all that is needed to grasp reality.<sup>105</sup>

Down's ideas have broadly inspired research traditions on the role information plays in party competition, voter participation choice and models of candidate competition.<sup>106</sup> The concept of uncertainty, which conceptualizes the voter as an investor, has inspired research on voter shortcuts like media analysis, party messages, and campaigns.<sup>107</sup> The concept of thresholds has inspired an argument on electoral and policy inertia.<sup>108</sup> Down's argument that voting is a rationally instrumental act is contested on the basis of empirical observation<sup>109</sup> and group voting.<sup>110</sup> Also, researchers have tried to develop models on voter

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<sup>103</sup> Grofman, *supra* note 74, at 2.

<sup>104</sup> Congleton, *supra* note 64, at 1.

<sup>105</sup> *Id.*

<sup>106</sup> Grofman, *supra* note 74, at 4.

<sup>107</sup> SAMUEL L. POPKIN, *THE REASONING VOTER* 7, 9–10 (1991).

<sup>108</sup> Roger Noll, *Downsian Thresholds and the Theory of Political Advertising*, in *INFORMATION, PARTICIPATION AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE* 37, 43 (Bernard Grofman ed., 1995).

<sup>109</sup> Carole Jean Uhlaner, *What the Downsian Voter Weighs: A Reassessment of the Costs and Benefits of Action*, in *INFORMATION, PARTICIPATION AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE* 67, 67 (Bernard Grofman ed., 1995).

<sup>110</sup> Amihai Glazer, *Political Equilibrium Under Group Identification*, in *INFORMATION, PARTICIPATION AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE* 81, 84 (Bernard Grofman ed., 1995).

prediction,<sup>111</sup> voter behavior,<sup>112</sup> the role of cognition in framing salient issues,<sup>113</sup> and presidential voting.<sup>114</sup>

But there does not exist any qualitative studies tracing empirical patterns of the median voter theorem in the context of gendered compliance in the setting of developing nations. Following the footsteps of the major research traditions, this Article initiates the conversation about the median vote on gender in the context of human rights compliance by testing the median voter hypothesis against the due diligence's conflicts of rights frame in India.

### III. HYPOTHESIS

Based on the median voter theorem, this Article hypothesizes that when confronted with an empirical conflict of rights frame between the right against GBV and the right to freedom of religion, the behaviors of the incumbent Indian government and political parties should coalesce on the median voter. This would accurately reveal the nature of the median voter to be religious, male, conservative, patriarchal, and firmly in favor of religious attitudes even when they conflict with the right against GBV. It follows that the compliance commitment of the Indian government to the CEDAW is a direct continuation of its historical reaction when confronted with a conflict between the freedom of religion and the right against GBV. Since, the conflict of rights frame is a two-dimensional issue, with the right to freedom of religion on the right and the right against GBV on the left, it is to be expected that voters in India exhibit a preference for one side. Further, in the absence of survey data measuring this preference,<sup>115</sup> the behaviors of the incumbent government and political parties are expected to be accurate proxies for the median position, which contributes to a feminist insight that will help argue for a reformulation of the international norm on GBV.

The empirical confrontation between the liberal sphere representing the right to freedom of gender-based equality and traditional, cultural attitudes emanating

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<sup>111</sup> John Ferejohn, *The Spatial Model and Elections*, in INFORMATION, PARTICIPATION AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE 107, 108 (Bernard Grofman ed., 1995).

<sup>112</sup> JAMES M. ENELOW & MELVIN J. HINICH, *THE SPATIAL THEORY OF VOTING* 2 (1984).

<sup>113</sup> Thomas H. Hammond & Brian D. Humes, "What This Campaign Is All about Is . . .": A Rational Choice Alternative to the Downsian Spatial Model of Elections, in INFORMATION, PARTICIPATION AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE 141, 142 (Bernard Grofman ed., 1995).

<sup>114</sup> Arthur H. Miller & Martin P. Wattenberg, *Throwing the Rascals Out: Policy and Performance Evaluations of Presidential Candidates, 1952-1980*, 79 AM. POL. SCI. REV. 359, 360 (1985).

<sup>115</sup> The following Section explains the lack of survey data and the rationale for the current Article's research design in greater detail.

from religious precepts are potentially generalizable across South Asia to Pakistan, Bangladesh, Sri Lanka on account of these regions being undergirded by a common culture of patriarchy.<sup>116</sup> Further, traditional, cultural attitudes causing GBV can be witnessed in many jurisdictions in Africa.<sup>117</sup> This indicates that the median voter theorem hypothesis is generalizable across the developing nations and a potential solution to the compliance dilemma over the CEDAW's due diligence. However, the scope of the current Article is limited to India.

#### A. *Research Methodology*

In the absence of explicit survey data measuring the nature of the median voter in India, this Article relies on newspaper reports as primary evidence to reconstruct the nature of the median voter vis-à-vis India's CEDAW Declaration. The rationale is that in 1987, the Indian feminist movement was still in its incipient state and there does not exist any survey measuring the median voter. Arguably the current article only discerns the nature of the median voter in the late 1980's. But the fact that GBV remains an endemic feature of the Indian society and there has been no change in the position of the Indian government on its CEDAW Declaration points to the possibility that these attitudes remain stable till the present day. These reports provide important tidbits of information that permit an empirical piecing together of the nature of the median voter on the conflict between the right against GBV and the right to freedom of religion. Undoubtedly, the present Article requires supplementation by an empirical survey designed to capture the attitudes of the present-day median Indian voters. In the absence of empirical survey, this Article hopes to propound this hypothesis as the first step. Further, in the absence of survey data measuring the preference of the median voter in 1985 and 1987, this Article deliberately utilizes Downs' principles explained previously, to qualitatively trace the median voter position.<sup>118</sup>

This research is hampered by the fact that Indian newspapers do not possess electronic news archives prior to 1990. Hence, the primary sources used are limited to the international newspaper sources available on ProQuest between 1986–1988. Also, it is impossible to obtain the posters of the political parties in Deorala in 1987, except through the only available feminist investigative

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<sup>116</sup> Radhika Coomaraswamy, *Human Security and Gender Violence*, 40 *ECON. & POL. WKLY.* 4729, 4730 (2005).

<sup>117</sup> C. C. Nweze, *Domestication of DEDAW: Points to Consider for Customary Laws and Practices*, in *WITHOUT PREJUDICE: CEDAW AND THE DETERMINATION OF WOMEN'S RIGHTS IN A LEGAL AND CULTURAL CONTEXT* 49, 71 (Meena Shivdas & Sarah Coleman eds., 2010).

<sup>118</sup> DOWNS *supra* note 74, at 140.

journalist report that is available online.<sup>119</sup> The report was prepared by the Bombay Union of Women Journalists in Deorala in October 1987, a few weeks subsequent to Roop's *sati*.<sup>120</sup> Hence, the feminist case that the median voter is Hindu, male, patriarchal, and firmly in favor of the religious attitudes that cause GBV will be demonstrated on the basis of Downs' principles.

#### IV. EMPIRICAL EVIDENCE: WHAT IS THE NATURE OF THE MEDIAN VOTER IN INDIA?

In 1987 and 1985, the Indian government was confronted with an empirical conflict of the CEDAW's due diligence between the right to freedom of religion and the right against GBV through Roop's *sati* and the Shah Bano judgment of the Supreme Court of India.<sup>121</sup> This Article examines the empirical conflict of rights situation in 1987 and then 1985, in order to trace the moments in time that were as close as possible to India's CEDAW Declaration in 1993.

##### A. *The Intersubjective Patriarchal, Religious Atmosphere That Primed the Sati of Roop*

A reconstruction of the moments of Roop's *sati* permits discernment of the median voter in India through three empirical trails—the intersubjective patriarchal atmosphere of the immediate society, the behavior of political parties and the incumbent government. This Article argues that these empirical trails confirm that the Indian voter is male, religious, patriarchal, and firmly in favor of religious attitudes that propagate GBV. First, the intersubjective social environment that permitted Roop's *satis* to take place publicly in the presence of thousands of witnesses shows the pervasive grip of the sanctity of the Hindu religious practices that sanction the burning of a widow on the funeral pyre of her husband as an act of ultimate wifely chastity. Second, politicians created political capital in an attempt to capture a vote-bank. They organized and led religious processions that advocated *sati*, clearly kowtowing to their median

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<sup>119</sup> Madhu Kishwar & Ruth Vanita, *The Burning of Roop Kanwar*, 42 MANUSHI 15, 15 (1987), [http://www.manushi-india.org/pdfs\\_issues/PDF%20files%2042-43/15.%20The%20Burning%20of%20Roop%20Kanwar.pdf](http://www.manushi-india.org/pdfs_issues/PDF%20files%2042-43/15.%20The%20Burning%20of%20Roop%20Kanwar.pdf).

<sup>120</sup> This Article deliberately uses the first name of Roop Kanwar to capture the unique cultural tendencies of Indian society where people usually go by first names. Family names are a relatively recent colonial invention and were meant to secure Western standardization. It seems appropriate to the memory of Roop to refer to her first name and separate it from the patriarchal connotations of the family which is the primary instrumentality of patriarchy, which also captures the intense personal nature of her suffering in her final moments on the funeral pyre of her husband Maal Singh.

<sup>121</sup> Radhika Coomaraswamy, *Human Security and Gender Violence*, 40 ECON. & POL. WKLY. 4729, 4730, 4733 (2005); Mohd. Ahmed Khan v. Shah Bano Begum & Ors., (1985) 3 SCR 844, 846 (India).

voter. They could not have done so *a priori*. This action demonstrates that there existed a deep-seated religious patriarchal tradition that rose to the surface at the time of Roop's *satis* and which was manipulated by the politicians. Third, the widespread social support for Roop's *satis* prevented the incumbent government from openly opposing this religious constituency. The incumbent government genuinely feared losing votes if it openly condemned the event, thereby demonstrating the domestic rational choice considerations that precluded it from privileging the norm against GBV. An exploration of the above trails follows.

It is impossible to grasp the intensity of the murder of Roop without comprehending its intersubjective context. *Sati* is embedded in the ancient Hindu patriarchal traditions that permeate with textual injunctions outlining a system of strict sexual control and monogamous chastity,<sup>122</sup> mediated with misogynistic conceptualizations that link the subordination of women to divine self-realization—the ultimate purpose of Hindu metaphysical doctrine.<sup>123</sup>

Roop was an eighteen-year-old girl who had been married for just eight months to Maal Singh.<sup>124</sup> Allegedly, in September 4, 1987, she was forcibly consigned to his funeral pyre.<sup>125</sup> The death of her husband is attributed to an intentional overdose of anti-depressants, covered up as a case of gastroenteritis.<sup>126</sup> Roop was dutifully present at his deathbed.<sup>127</sup> Thereafter, details are obfuscated.

In November 1987, a court was told on pain of perjury that she was “forced” into the funeral pyre<sup>128</sup> by her brothers-in-law armed with swords, covered to her shoulder with firewood.<sup>129</sup> A witness recalls what happened at the cremation ground, “I saw Roop dressed in bridal make-up. . . . There were about 900 people

<sup>122</sup> Translation of the primary Hindu text that articulates these principles, the Manusmriti and particularly, its Chapter IX is available in *The Laws of Manu*, in 25 SACRED BOOKS OF THE EAST (George Bühler trans., 1886), <http://www.sacred-texts.com/hin/manu/manu09.htm>.

<sup>123</sup> Stein, *supra* note 21, at 255.

<sup>124</sup> *Kin Killed Widow, India Court Told*, L.A. TIMES, Nov. 23, 1987, at 12.

<sup>125</sup> *Uproar Over Rajput “Sati”*: *Wife Emulates Herself on Husband’s Funeral Pyre*, HINDUISM TODAY (Dec. 1987), <https://www.hinduismtoday.com/modules/smartsection/item.php?itemid=472> [hereinafter *Uproar Over Rajput “Sati”*].

<sup>126</sup> PADMA PRAKASH ET AL., TRIAL BY FIRE: A REPORT ON ROOP KANWAR’S DEATH 3, 8–9 (1987). *But see* JOHN S. HAWLEY, *Sati, THE BLESSING AND THE CURSE* 7 (1994) (“On September 3, Mal Singh died suddenly from a malady that has been variously diagnosed as acute gastroenteritis, a burst appendix, and suicide by poisoning.”)

<sup>127</sup> PRAKASH ET AL., *supra* note 126, at 3.

<sup>128</sup> According to Hindu ritual practice a dead corpse is disposed in a funeral pyre constructed of combustible material like firewood, sandalwood and the flame has to be repeatedly stoked. Aarti Dhar, *Making Funeral Pyres Eco-friendly*, HINDU, May 15, 2005, at 1.

<sup>129</sup> *Kin Killed Widow, India Court Told*, *supra* note 124.

[present]. . . [i]t took an hour for the preparation of the pyre.”<sup>130</sup> This indicates that Roop’s family made a public and social decision to consign her to the pyre and the word spread, attracting this huge crowd. Roop was reported as swaying on her walk to the funeral pyre, strongly indicating administration of opium, which is common for *sati*.<sup>131</sup>

The *Los Angeles Times* reported that “[a]t one point, the fire went out and Kanwar tried to free herself . . . but she was forced back. . . . [and] her cries were allegedly drowned out by shouts from about 400 villagers who had gathered to watch.”<sup>132</sup> Witnesses cautiously reported that Roop was heard screaming “Mummy, Papa” in English when the fire of the funeral pyre briefly died down and had to be relit, which was courteously undertaken by her brothers-in-law surrounding the pyre who made her escape virtually impossible.<sup>133</sup>

The close relationship of the former British Empire with India has resulted in a naturalization and “native” acclimatization of the English language in everyday intimate realities like within the family.<sup>134</sup> English terms permeate seamlessly in everyday Indian culture and are a common form of address.<sup>135</sup> The fact that Roop used English terms in what was probably a half-burnt and unconscious state indicates this could be a normal form of address for her parents. This also indicates that Roop was well-educated, and that her family was an average middle-class family.<sup>136</sup> Yet her family was deeply conditioned by the intersubjective patriarchal, Hindu religious atmosphere. Roop was married off at the age of eighteen, in accordance with ancient Hindu religious prescription that cautions prepubescent marriages as a way of restraining female sexuality.<sup>137</sup> In the immediate aftermath of Roop’s death, her family members affirmed that her death was an “honor.”<sup>138</sup> Evidence does not exist to determine if this was a voluntary or a coerced statement. Her family was not informed of

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<sup>130</sup> *Uproar Over Rajput “Sati”*, *supra* note 125.

<sup>131</sup> *Id.*; PRAKASH ET AL., *supra* note 126, at 7.

<sup>132</sup> *Kin Killed Widow, India Court Told*, *supra* note 128.

<sup>133</sup> PRAKASH ET AL., *supra* note 130, at 6–7.

<sup>134</sup> Vasudha Bharadwaj, *Language of Nationhood: Political Ideologies and the Place of English in 20th Century India*, at vi–vii (2010) (unpublished Ph.D. dissertation, University of Rochester); *see also* Vineeta Chand, *[v]at is Going On? Local and Global Ideologies about Indian English*, 38 LANGUAGE SOC’Y 393, 405 (2009).

<sup>135</sup> Zacharias Thundyil, Paper presented at the Michigan Linguistic Society Meeting: Facts about Current Indian English (Oct. 3, 1970), at 25.

<sup>136</sup> HAWLEY, *supra* note 126, at 116; *see also* Kishwar & Vanita, *supra* note 119, at 16.

<sup>137</sup> Uma Chakravarti, *Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State*, *ECON. & POL. WKLY.* 579, 579 (1993); PRAKASH ET AL., *supra* note 1126, at 3; *see also* HAWLEY, *supra* note 126, at 119.

<sup>138</sup> Ruth Vanita, *India: Widow Burning Revived*, 18 OFF OUR BACKS 12, 13 (Mar. 1988).

Roop's apparently "voluntary" decision and were not present at the site of her burning.<sup>139</sup> The very fact that a well-educated 18-year-old wife was allowed to burn in accordance with an ancient Hindu custom demonstrates the pervasive grip that these pernicious traditions possess in the Indian psyche. Hence, it is to be noted that following the ancient Hindu religious prescriptions mandating GBV is an inherent facet of the Indian middle class strongly indicating its median connotations.

This is supplemented by the fact that Roop's in-laws were perceived to be of middle class status.<sup>140</sup> The report by the independent feminist inquiry attributed this status to Roop's father-in-law being a school teacher and her husband being trained in the sciences.<sup>141</sup> Particularly, this report comments on the "prosperity" of Deorala, which is comprised of upper-castes including the *Rajput* caste<sup>142</sup> to which Roop belonged.<sup>143</sup> The village exhibited normal consumer goods and signified a marked absence of any debilitating signs of poverty common to the subcontinent.<sup>144</sup> Hence, Roop's use of English in her final moments viewed in conjunction with the middle class status of her natal and patrilineal family indicates that Hindu patriarchy still grips the Indian intelligentsia and accurately throws light on the median position. If the educated middle class is in the pervasive grip of Hindu patriarchy, then this is an accurate indicator on the rest of society.

Further, Roop's murder was a public spectacle conducted in the presence of thousands of spectators none of whom dared interfere or assist the besieged Roop.<sup>145</sup> Instead, some villagers kept reiterating the fear of being cursed.<sup>146</sup> Could Roop's *sati* have occurred *sans* social support? The pervasive occurrence of dowry deaths with the "tacit approval" of society<sup>147</sup> demonstrates the general social endorsement of murdering a wife, affording an empirical glimpse on the Indian electorate in 1987.<sup>148</sup>

On September 10, 1987, a *chunari mahatsav*, an event where Roop's bridal veil was burned to symbolically commemorate her death, took place in the

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<sup>139</sup> *Id.*

<sup>140</sup> Kishwar & Vanita, *supra* note 119, at 16; *see also* HAWLEY, *supra* note 126, at 116.

<sup>141</sup> Kishwar & Vanita, *supra* note 119, at 16.

<sup>142</sup> The *Rajput* caste is the warrior caste within the Indian society.

<sup>143</sup> Kishwar & Vanita, *supra* note 119, at 16.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 15.

<sup>146</sup> *Uproar Over Rajput "Sati"*, *supra* note 125.

<sup>147</sup> Kishwar & Vanita, *supra* note 119, at 1.

<sup>148</sup> Undoubtedly, it seems like the mixing of the messages on gender-subordination with aspects of the metaphysical is another patriarchal masterstroke that permeates extant Indian society today. *See id.* at 15.

presence of 100,000 spectators despite a governmental ban;<sup>149</sup> another report estimates it at 300,000.<sup>150</sup> “Many politicians offered prayers . . . They included the State Janata Party chief, Kalyan Singh; Rajendra Singh Rathore, state chief of Yuva Janata, the party’s youth wing[;] and Deependra Singh Shekhawat, a former member of the state Assembly.”<sup>151</sup> Plans for building a temple had collected \$120,000.<sup>152</sup> The temple was constructed in November, pulled down, but reconstructed.<sup>153</sup> The state government of Rajasthan flooded Deorala with its officers at the *mahotsav*, (which was the religious ceremony celebrating the *sati* of Roop), enabling the villagers to pray in peace.<sup>154</sup> Hence, the government’s lukewarm response to Roop’s *sati*, failure to exercise due diligence and prosecute the accused, and open support of the religious lobby incontrovertibly indicates the government’s perception of the religious, conservative, male, Indian median voter. On the basis of Downs’s principle, it is possible to conclude that if the Indian Government’s behavior was in favor of the religious lobby, then incontrovertibly this indicates the median voter to be located at this point.

On September 22nd, a feminist journalist team visited Deorala and observed a group of boys chanting slogans modeled on political slogans at the site where Roop’s *sati* took place.<sup>155</sup> Some examples were: “*Sati ho to kaisi ho? Roop Kanwar ke jaisi ho. Jab tak suraj chand rahega Roop Kanwar tera naam rahega.*”<sup>156</sup> The examples transliterate to mean that Roop’s name will live on like the sun and moon. This chant was modeled on a slogan praising the prime minister Rajiv Gandhi and Indira Gandhi, “*Desh ha neta kaisa ho Rajiv Gandhi (X, Y, Z) jaisa ho.*”<sup>157</sup> Another slogan was based on an anti-cow slaughter slogan of a right-wing, Hindu political party: “*Desh dharam ka nata hai. Sati hamari mata hai.*”<sup>158</sup> This transliterates as veneration of *sati* as the primordial mother of the Indian nation.

The report identifies how the regional wings of the major national party, the Bharatiya Janata Party (BJP), pandered to the *Rajput* lobby by accusing the

<sup>149</sup> Modhumita Mojumdar, *Throgs Honor Goddess at Site of Sati*, INDIA ABROAD, Nov. 27, 1987, at 30.

<sup>150</sup> Lata Mani, *Multiple Mediations: Feminist Scholarship in the Age of Multinational Reception*, 13 WOMEN LANG. 56 (1990).

<sup>151</sup> Mojumdar, *supra* note 149.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See Kishwar & Vanita, *supra* note 119, at 22.

<sup>155</sup> *Id.* at 16; “*Glorification of Sati*” *Outlawed in India*, HINDUISM TODAY (Dec. 1988), <https://www.hinduismtoday.com/modules/smartsection/item.php?itemid=583>.

<sup>156</sup> “*Glorification of Sati*” *Outlaws in India*, *supra* note 155.

<sup>157</sup> Kishwar & Vanita, *supra* note 119, at 17.

<sup>158</sup> *Id.*

women of being disrespectful toward Hindu culture, frequenting bars, and living in general debauchery.<sup>159</sup> It is important to note that this empirical information reveals that there exists a pervasive, patriarchal element in society, and the state leader is merely drawing upon this frame as opposed to anything else. The fact that the state political party feels compelled to conduct rallies condemning the activism of women demonstrates that there exists a conflict between traditional religious attitudes and the right against GBV. It indicates, however, that the Government is pandering to the constituency of traditional religious attitudes.

In December 1987, a religious leader and former member of Parliament, Swami Agnivesh, was arrested for demonstrating against the *sati* in Deorala.<sup>160</sup> Agnivesh was also challenged to a verbal duel by another religious leader, Jagatguru,<sup>161</sup> which indirectly implicates societal opinion. A member of Parliament who saw fit to agitate against *sati* reveals his perception of the median voter.

On September 22, 1988, Roop's father, Maan Singh, and father-in-law, Sumer Singh, organized a gathering of 3,000 people; and the *Rani Sathi Staal*, a *sati* temple in Deorala, collected \$12,000 in donations for a public religious event commemorating Roop's death anniversary.<sup>162</sup> Despite a Supreme Court ban-order, "50,000 members of society including politicians attended" again.<sup>163</sup> The fact that the *sati* incident provoked "immediate outrage across India"<sup>164</sup> and engaged the intelligentsia, members of feminist organizations, religious leaders, and political leaders demonstrates its salience to the Indian electorate.<sup>165</sup>

Could political parties have organized rallies or mobilized support without a pre-existing, tacit social base favoring religion over gender equality? Downs's theory supports the finding that political parties and governments perceive that the majority preference favors religious tradition and provides a rational opportunity to exploit votes. The median voter's preference for the ancient Hindu rationalization of *sati* could not have been possible unless these patriarchal, religious tendencies were deeply entrenched in the Indian psyche. Down's theory lends support to the argument that the incumbent government

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<sup>159</sup> PRAKASH ET AL., *supra* note 126, at 9.

<sup>160</sup> I. Gopalkrishnan, *State Finds Banning Sati Veneration Difficult Task*, INDIA ABROAD, Jan. 29, 1988, at 11.

<sup>161</sup> Shantanu Ray, *Arrest of Anti-Sati Swami Forestalls A Verbal Duel*, INDIA ABROAD, Sep. 9, 1999, at 27.

<sup>162</sup> "Glorification of Sati" *Outlawed in India*, *supra* note 155.

<sup>163</sup> Mojumdar, *supra* note 153; Mani, *supra* note 149.

<sup>164</sup> "Glorification of Sati" *Outlawed in India*, *supra* note 155.

<sup>165</sup> Gopalkrishnan, *supra* note 160.

and politicians supported the pro-*sati* lobby only because they accurately perceived their median voter to be located there. The prevalent attendance of prominent members of society coupled with pervasive public acclamation represented by this massive gathering once again incontrovertibly indicates the median position to be firmly in favor of the Hindu religious practices that motivate GBV.

Yet another factor that demonstrates the median position of the Indian voter is the widespread social activity to glorify *sati* or create a cult around the practice.<sup>166</sup> The independent feminist report on Roop's *sati* has identified that the glorification could be purely attributed to rational politicians exploiting an election opportunity.<sup>167</sup> This report has empirically identified that politicians have attempted to capitalize on this votebank.<sup>168</sup> Apart from confirming the interpretation of the Indian Government's reaction to be in accordance with the median voter theorem, it appears the feminist report attempts to raise social consciousness by arguing that religious attitudes are not entrenched but are merely cynically exploited by politicians.<sup>169</sup> The feminist report notes that it is not rustic ignorance, but conscious exercise of deliberation that kept alive the religious traditions that emerged to glorify *sati* in the aftermath of Roop's burning.<sup>170</sup> This Article argues, however, that this report's hypothesis requires reformulation in accordance with Downs's theory. The evidence reasonably supports the idea that politicians only exploit those sentiments that are exhibited by the median voter. This then is evidence that this section of the Indian electorate exhibits deep reverence for those cultural traditions that openly promote GBV? Undoubtedly the politicians did their best to capitalize on the fervor, but was it their sole creation? Can politicians create something new in the wake of this historical moment? It seems like these religious sentiments were deep-rooted and negate the feminist scholars' contention that rational politicians created and then exploited these sentiments. If politicians are assumed to behave exactly in the manner posited by Downs, then it follows by implication that they are conforming to his model and catering to the median voter's preference. By implication, the politicians' behavior demonstrates the attitude of the median Indian voter, even though the feminist report is an explicit counterargument to this idea.<sup>171</sup> But presenting a scientific, empirical truth will enable a stronger feminist position as it will permit mathematical measurement of the median

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<sup>166</sup> "Glorification of Sati" Outlawed in India, *supra* note 155.

<sup>167</sup> Kishwar & Vanita, *supra* note 119, at 16.

<sup>168</sup> *Id.* at 20.

<sup>169</sup> *See generally id.*

<sup>170</sup> *See* PRAKASH ET AL., *supra* note 126, at 20–21.

<sup>171</sup> Mojumdar, *supra* note 149.

Indian electorate and bolster the feminist contention that the majority of the Indian population exhibits religious attitudes that motivate GBV.

Further, on November 10, the state government passed an ordinance to punish abetment to *sati* “through cross voting with only 81 of the 115 members of the Congress party and 35 of 85 opposition members being present.”<sup>172</sup> This ordinance became central legislation in 1988.<sup>173</sup> A documentary prepared in 1988, on the anniversary of Roop’s death, characterized the Indian Government’s reaction as “deafening silence,”<sup>174</sup> indirectly implicating its lukewarm legislation and efforts to prosecute the parties accused in Roop’s murder.<sup>175</sup>

It should be noted that the Indian Government did pass legislation which provided a feeble punishment of just up to one year’s imprisonment for aiding and abetting *sati*.<sup>176</sup> But, if norms were epiphenomenal, what caused the Indian government to pass any legislation, however lukewarm, to punish abetting *sati*? It seems like the government was independently influenced by the normative ideal of gender-based equality. Only this theory seems to explain the puzzle of legislation on *sati* given the government’s contradictory behavior based on its perception of the median, thus countering the argument that the norm of gender-based equality is epiphenomenal. In fact, the government passing legislation on this matter lends credence to the interpretation of the Indian government’s behavior on the basis of Downs. If feminist activism can induce any change, however marginal, in the perception of the common voter, it would be possible to influence the reaction of the Indian government. Formulating the compliance behavior of governments on the basis of the epiphenomenal contention precludes a solution to the compliance dilemma. Only careful consideration of gendered compliance enables alteration of the standard contention that all non-compliance with all norms at all times are epiphenomenal. If at this time, even at the height of Indian support for *sati*, the Indian government felt compelled to pass legislation prohibiting the glorification of *sati*, then a change in the median position can induce more substantial change. This possibility implies that the democratic government of even one of the worst places to be a woman can be

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<sup>172</sup> *Id.*

<sup>173</sup> Gopalkrishnan, *supra* note 160.

<sup>174</sup> Ela Dutt, *Film Group Learning Ropes in N.Y.*, INDIA ABROAD, Feb. 17, 1989, at 33.

<sup>175</sup> This legislation was unable to secure prosecution of Roop’s father-in-law and brother-in-law. The brother-in-law was fifteen-year-old when he lit the funeral pyre on which Roop was forcibly consigned. In 1999 a Rajasthan High Court acquitted all the accused for lack of evidence. See PTI, *All Accused in Roop Kanwar Case Acquitted*, TIMES OF INDIA (Jan. 31, 2004) <https://timesofindia.indiatimes.com/india/All-accused-in-Roop-Kanwar-case-acquitted/articleshow/467759.cms>.

<sup>176</sup> Gopalkrishnan, *supra* note 160.

induced to comply with the CEDAW on the basis of its perception of the median voter. This finding unequivocally negates the contention that norms are epiphenomenal. Rational choice theory of voting and elections helps identify the causes behind the apparently epiphenomenal nature of human rights norms, simultaneously negating the contention of feminist IR—that the mainstream discipline of political science is patriarchal and hegemonic—as one of the fundamental principles of political science enables discernment of a solution to the world's largest compliance deadlock and provides a positive thrust for the feminist movement.

### *B. The Shah Bano Judgment*

In 1985, a Muslim divorcée, Shah Bano, secured marginal alimony from the Supreme Court of India against her lawyer-husband who divorced her arbitrarily in accordance with the prevailing *Sharia* law after forty-three years of marriage.<sup>177</sup> The divorce occurred in 1975 and she appealed to the Supreme Court claiming destitution.<sup>178</sup> The decision rendered by Chief Justice Chandrachud granted alimony of forty U.S. dollars a month, and critiqued the patriarchal precepts of Islam.<sup>179</sup> This ruling provoked a controversy amongst the Muslim religious leaders.<sup>180</sup> Millions of Muslims demonstrated across India and burnt effigies of the Hindu judge and termed this “blatant interference” in religious affairs.<sup>181</sup>

Syed Abdullah Bakhari, Imam of Delhi's largest mosque, immediately responded: “We don't recognize this decision. We will not accept such a direct interference with Muslim personal law.”<sup>182</sup> This provoked a national furor leading to fiery demonstrations against the judgment.<sup>183</sup> The Prime Minister, Rajiv Gandhi, was reportedly lobbied by feminist activists and religious leaders about possible parliamentary action on the Shah Bano Judgment.<sup>184</sup> The feminists did not want the Prime Minister to take any action upsetting the grant

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<sup>177</sup> Carol Anne Douglas, *Indian Muslim woman's legal victory jeopardized*, 16 OFF OUR BACKS 13, 13 (Mar. 1986).

<sup>178</sup> *Id.* at 13.

<sup>179</sup> *Id.*; Josh Goodman, *Article: Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel*, 32 HASTINGS INT'L & COMP. L. REV. 477, 499 (2009). The amount refers to the amount and value of U.S. dollar in 1985.

<sup>180</sup> Elisabeth Bumiller, *The Moslem Divorce That Is Splitting All India*, WASH. POST, May 4, 1986, at C3.

<sup>181</sup> *Id.*

<sup>182</sup> Douglas, *supra* note 177, at 13.

<sup>183</sup> Steven R. Weisman, *Dispute Over a Moslem Divorce Ensnarls Gandhi*, N.Y. TIMES, Feb. 9, 1986, at A3.

<sup>184</sup> *Id.*

of maintenance to Shah Bano. Whereas the Muslim clerics wanted Parliament to pass laws to keep these religious matters out of the purview of the secular laws of the land. There was concern in the Prime Minister's party about *en masse* defections of Muslims who organized their own political party.<sup>185</sup> This forced Mr. Gandhi to introduce a bill in Parliament which was characterized by a newspaper as "grubbing for the Moslem vote is the reverse of the coin that says you are being sensitive to Moslem feelings."<sup>186</sup> This statement indicates that the government was trying to please the median voter preference for traditional religious attitudes on Islam. In other words, the Bill identified the location of the median voter in India to be in favor of the traditional, religious attitudes that cause GBV, which in itself indicates the median voter's position. The issue was also termed a "major constitutional and political issue," with one female Dandavate politician describing the atmosphere as "charged with communal tension."<sup>187</sup> This indicates the widespread median preference on the Shah Bano Judgment to be firmly in favor of the traditional attitudes that opposed the grant of maintenance by the secular court. This judgment instigated Hindu-Muslim riots in New Delhi and led to the downfall of the Indian National Congress in the states of Jammu and Kashmir.<sup>188</sup> These agitations forced the Gandhi government to pass a law in 1985 that subjected alimony to the Sharia, which took it out of purview of secular law and effectively annulled Shah Bano's victory.<sup>189</sup>

The above analysis indicates that the Indian government caved to pressure by its minority religious constituency. The Indian government anticipated that it would lose its votes and popularity if it angered the Muslim community. The agitations over the Shah Bano Judgment provoked a major crisis in Indian society which by itself indicates that it is a major issue in the Indian electorate. Hence, implicitly the behavior of the government passing legislation overturning the Supreme Court's grant of maintenance to Shah Bano implies the government's perception of the median voter in India. In the absence of any survey data, the behavior of the Government of India and Indian society permits inferences on the nature of the median voter in India by using the theory of Downs (1954). When confronted with a conflict between gender-equality and

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<sup>185</sup> *Id.*

<sup>186</sup> Douglas, *supra* note 177, at 13.

<sup>187</sup> Sheila Tefft, *Alimony Issue Splits Moslems, Triggers Rifts Throughout India*, CHI. TRIB. (Mar. 16, 1986), <https://www.chicagotribune.com/news/ct-xpm-1986-03-16-8601190670-story.html>.

<sup>188</sup> *Id.*

<sup>189</sup> ZOYA HASAN, *Gender Politics, Legal Reform, and the Muslim Community*, in *APPROPRIATING GENDER: WOMEN'S ACTIVISM AND POLITICIZED RELIGION IN SOUTH ASIA* 71 (Patricia Jeffery & Amrita Basu eds., 1998).

religion, the government was compelled to choose the latter because of an intense concern with appeasing voter preference that reflects the median position on this issue.

It should be noted that both of the above empirical instances evoked national outrage and discussion, implying that GBV provokes heated passion and national emotion across India. This gives sufficient ground to claim that India, when it issued its CEDAW Declaration in 1993, was confronted with an empirical conflict with the due diligence principle and the Declaration was merely an extension of government's behavior as a rational actor. India limited its obligations *vis-à-vis* modifying religious practices only because it did not want to offend median sensibilities, giving no indication on the epiphenomenal nature of norms.

### CONCLUSION

This Article argued that two historical moments in 1985 and 1987 created an intersubjective reality that influenced the Indian government's interpretation of its CEDAW obligation. Then, it demonstrated that the behavior of the government accords more with the rational choice theory of voting and elections propounded by Anthony Downs than with any assumptions on the epiphenomenal nature of norms. This confrontation is termed "historic" by this Article because there is nothing new about this tension, and nothing that exclusively privileges international law in capturing this conflict. Global gender norms are not fundamentally different from domestic contexts. In the above case study, they could be historically witnessed in India. The frame of the due diligence principle is based on the material experiences of nations, implying that the factors precluding compliance cannot be located in abstract assumptions of international law but must be deeply contextual and based on the contingent experiences of nations.

On the two previous historical moments, the Indian government preferred the median voter's position even when it was religious, male, patriarchal, and firmly in favor of the religious attitudes that contribute to GBV. Then, it is plausible to conclude that when India was confronted subsequently by a similar empirical conflict in 1993 with the CEDAW and Article 5(a), which the due diligence obligation normatively expanded to include a right to be free from GBV, the Indian government issued a declaration protecting cultural traditions based on its accurate intersubjective perception of its median voter.<sup>190</sup> Hence,

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<sup>190</sup> U.N. Doc. CEDAW/SP/2010/2, *supra* note 4.

India's Declaration to the CEDAW's Article 5(a) emanates from the Indian median voter's attitude rather than any perception that norms are epiphenomenal. The rational theory of voting perfectly explains the manifestation of non-compliance. Theoretically, this implies that if the median voter's position undergoes a change through normative infusion of the feminist ideals of emancipation, then this might force the Indian government to retract its Declaration. Hence, the epiphenomenal contention does not permit the restructuring of normative consciousness, on the basis of the right to gender-based equality, apart from incorrectly characterizing the nature of India's Declaration.

Further, on the basis of Roop's case, this Article contends that the median voter position influenced India's Declaration to CEDAW's Article 5(a). The evidence indicates that the rational choice theory of voting and elections influenced the government's decision to issue a declaration located closer to the median voter's position regarding the conflict between the right to be free from GBV and the right to freedom of religion. Though India has structured its Reservation in terms of the laws of its minorities,<sup>191</sup> the evidence on the above two historical moments indicates that the Indian median position could be characterized as Hindu, male, patriarchal, and firmly in favor of the religious traditions that contribute to GBV. This implies that India's Declaration indirectly protects the majoritarian Hindu religious attitudes that are factors to GBV despite being structured in terms of the *Shari'a*. Further, determining the median voter position on the continuum between the right to be free from GBV and the right to freedom of religion reveals India's Declaration as an empirical manifestation of the compliance deadlock over the Reservation to the CEDAW's due diligence principle. India has indirectly protected the cultural and patriarchal practices emanating from religion, which is camouflaged by the language of the Declaration itself.

Perhaps it may be argued that nations fear their electorates in implementing the norm as is. This further implies that gender is not irrelevant to state interests but very much material to it. If gender considerations can actually prevent compliance because of a perception of the median voter position, then this also refutes the contention of feminist IR theorists that gender is irrelevant to state interests. Gender considerations materially affect the median voter and therefore the government's calculations.

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<sup>191</sup> 8. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, INDIA, at 6, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf>.

This Article contests the IR theorists' view of gender oppression in international relations as patriarchal and hegemonic. It seems that the IR theorists' view only partially explains the causes of non-compliance with the due diligence principle. The more cogent explanation rests on a government's perception of its median voter. Postulating the causes of non-compliance in terms of the median voter hypothesis also enables the conclusion that the median preference is potentially variable and a new median could emerge as a result of feminist activism. This principle requires testing across other geopolitical regions where GBV is prevalent to determine its veracity. Further, postulation of non-compliance in terms of patriarchal IR does not permit variation of this preference. It remains fixed and static whereas, postulation in terms of the more accurate median voter theorem enables variation in favor of a feminist solution. Hence, the tools of mainstream political science are inherently necessary and relevant to address GBV.

Roop was educated in an English-language school professing a connection to liberal Enlightenment. Yet, this could not dispel the religious fervor surrounding *sati* attesting to a need for a concerted force like the Government to affirmatively re-create a modern, liberal, intersubjective reality that contests the eschewing of the state by post-positivist feminist IR theorists.

The finding on the nature of the median voter as conservative, patriarchal, and religious also counters the paradigmatic Hindu right-wing position that the Hindu religion is somehow progressive than "retrogressive" Islam. The Hindu right-wing political movement asserts that Hinduism possesses progressive attitudes towards women because of the presence of codified Hindu laws, which makes it more progressive than Islam.<sup>192</sup> As a result, this argument is used to foster Hindu-Muslim hatred in India which is simmering just below the surface. The Partition of India into Hindu India and Muslim Pakistan and the Hindu Muslim riots in the wake of the Babri Masjid Demolition are evidence of this tension.<sup>193</sup> Hence, the right-wing Hindu movement firmly believes in the existence of a Hindu India solely on the basis of what it claims are progressive gendered attitudes within Hinduism. However, feminists in India have trenchantly called-out this false allegation by arguing that the Hindu religion is in fact more potent towards women than the Sharia.<sup>194</sup> This Article furthers this

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<sup>192</sup> Flavia Agnes, *Hindu Men, Monogamy and Uniform Civil Code*, 30 *ECON. POLIT. WKLY.* 3238, 3238 (1995).

<sup>193</sup> PAUL R. BRASS, *THE PRODUCTION OF HINDU-MUSLIM VIOLENCE IN CONTEMPORARY INDIA* 5-6 (2011).

<sup>194</sup> Flavia Agnes, *Women's Movement within a Secular Framework: Redefining the Agenda*, 29 *ECON. & POL. WKLY.* 19, 1123, 1125 (1994).

feminist stand by demonstrating that the median voter in India is actually Hindu, patriarchal, male and firmly in favor of the Hindu religious traditions that cause GBV. Clearly, this finding implies that the Hindu religion does not possess progressive attitudes on gender. If anything, it possesses the most retrogressive of attitudes favoring GBV.<sup>195</sup> The evidence clearly indicates that Hindu traditions are retrogressive, ancient, backwards, and openly contribute to GBV. Hence, the right-wing Hindutva allegations require restructuring prior to making unsound allegations against the minority Islam.

Finally, this Article stands in testimony of the importance of appreciating the intense sufferings that accompany GBV and demonstrates that such concern helps illuminate international relations and rational choice theory of voting and elections. This Article calls on scholars and researchers of all disciplines and schools of thought to identify with the global movement condemning violence against women and appreciate its relevance to all disciplines and walks of life, and to fight for the total eradication of gender oppression from the hearts and minds of the people who perpetrate it.

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<sup>195</sup> See *id.* at 1123.