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Would the “Optional Protocol” Effectuate India’s Due Diligence Obligation Under the Women’s Convention?

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Abstract

India acceded to the Convention on the Elimination of all forms of Discrimination Against Women with a Declaration (CEDAW) to Article 5(a) stating that it will implement the principle on gender-based equality only to the extent of non-interference in the personal affairs of its religious communities. The due diligence obligation in the CEDAW, which was adopted through General Recommendation No. 19 in 1992, normatively expanded Article 5 to imply an obligation on nation states to redress traditional cultural attitudes that cause gender-based violence. This article argues that the cultural nature of GBV in India converts the Declaration of India into an inconsistent reservation under public international law. This implies that India’s Declaration is an egregious breach of the CEDAW’s due diligence obligation. Accession to the CEDAW’s Optional Protocol is advocated as a solution to this serious breach. Theoretical implications for the three-stage norm life cycle and epiphenomenal norms are presented.

Keywords: Gender-Based Violence (GBV); CEDAW Compliance; International Law; Epiphenomenal Norms; India

Currently, there exists a serious international contention over the implementation of the foremost norm on gender-based violence (GBV), namely the due diligence obligation in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).¹ This principle states, *inter alia*, that traditional cultural attitudes cause GBV, and that states have a duty to prevent, prosecute, and punish all forms of GBV.² The paradigmatic recognition of a right against GBV was mired in international controversy since the inception of the CEDAW in 1979, when it was promulgated by the United Nations (UN) General Assembly. States have advanced severe and egregious reservations – indeed, the largest number of reservations to any human rights treaty ever³ – against implementing a

¹ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 3 (entered into force 3 September 1981).

² *CEDAW General Recommendation No. 19: Violence Against Women*, UN Committee on the Elimination of Discrimination Against Women (1992) [CEDAW General Recommendation 19].

³ Donna J. SULLIVAN, “Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution” (1991) 24 *New York Journal of International Law and Politics* 795; Jennifer RIDDLE, “Making CEDAW universal: A critique of CEDAW’s reservation regime under Article 28 and the effectiveness of the reporting process” (2002) 34 *George Washington International Law Review* 605.

right against GBV, especially when it interferes with the right to freedom of religion. India joins this stand by acceding to the CEDAW with a Declaration stating that it will implement the principle on gender-based equality to the extent of non-interference in the personal affairs of its religious communities.⁴

This article argues that India's Declaration is a breach of the CEDAW's due diligence obligation because the nature of GBV in India indicates that traditional cultural attitudes instigate and promote violence against women. Second, this article argues that the nature and persistence of traditional cultural attitudes is causing GBV, and has converted India's Declaration into a reservation under public international law. What is the solution to this legal infringement? Does the lack of enforceability mechanisms within the international sphere merely make the above legal implication an observation? This article argues that India's Declaration can be normatively retracted by another legal mechanism, namely the Optional Protocol (OP) to the CEDAW. With this suggestion, this article trenchantly contests the standard argument of human rights compliance that norms are epiphenomenal or hardly matter to the state interest. The move to implement principles of public international law into the sphere of GBV should ultimately take place in the restructuring of normative consciousness. Therefore, this article argues that there is a serious breach of the CEDAW by Indian. Accession to the OP would better effectuate the due diligence obligation of India.

This article is organized as follows: first, a brief background on the international contention over the CEDAW's due diligence obligation is explained to contextualize the substance of India's Declaration. Second, the role of culture in causing GBV in India is explained to demonstrate that India's Declaration is, in effect, a serious breach under public international law. This is followed by a section on the nature of reservations and declarations under public international law to make the case that India's Declaration to the CEDAW's Article 5(a) is, in effect, a *de facto* reservation to the CEDAW. Third, a brief overview of the Indian feminist movement is presented to situate the case for accession to the OP within the movement. Finally, the case for India's accession to the OP is presented. This article concludes by presenting some theoretical implications that accession to the OP would entail in terms of epiphenomenal norms as well as the five-stage norm lifecycle of human rights norms.

I. A Brief Background to the International Contention Over the Cedaw's Due Diligence Obligation

One of the major unaddressed empirical puzzles of the international community is the ineffectual compliance with the foremost international legal obligation on GBV.⁵ This is the due diligence obligation under the CEDAW, which states, *inter alia*, that traditional cultural attitudes cause GBV, and imposes an obligation on state parties to the CEDAW to act with due diligence to prevent, prosecute, and punish all forms of GBV.⁶ States have advanced trenchant reservations to the foremost existing principle on GBV on the ground that they cannot intervene in cultural practices that cause GBV.⁷ Legally, this militates against the due diligence obligation, which as a principle has been recognized as *jus cogens* to the international legal order. The due diligence obligation to the CEDAW is similar to the *jus cogens* right against torture under the Inter-American Convention.⁸ This *jus cogens*

⁴ *Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women*, UN Committee on the Elimination of Discrimination Against Women, CEDAW/SP/2010/2 (1 March 2010).

⁵ Riddle, *supra* note 3.

⁶ CEDAW General Recommendation 19, *supra* note 2.

⁷ Michele BRANDT and Jeffrey A. KAPLAN, "The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia" (1995) 12 *Journal of Law and Religion* 105.

⁸ CEDAW Committee & others, *General Recommendation 19, VIOLENCE WOMEN* (1992).

right against torture has been used to hold states accountable for refusing to exercise due diligence in preventing human rights violations against citizens. This was expanded to imply a similar right on states to prevent, prosecute, and punish all forms of GBV under the CEDAW.⁹

The due diligence obligation to the CEDAW came about due to the lack of any principle on GBV at the inception of the CEDAW.¹⁰ This impasse has evolved into marginal and liminal international recognition in the form of General Recommendation (GR) No. 19, which is not a formal principle of public international law but merely a recommendation. It does not carry the same normative efficacy as other principles of public international law. As a result, the Special Rapporteurs to the CEDAW have expanded on the legal interpretation of the CEDAW to justify the right against GBV in terms of basic principles of customary international law, and serve as a principle akin to formal law.¹¹

However, the efficacy of this developing legal principle has been severely eroded by the largest number of reservations on record against its substance.¹² When the CEDAW was promulgated in 1979, states advanced intense legal opposition to implementing the right against GBV when it required affirmative intervention in religious practices that cause GBV. Even though due diligence did not exist in a concrete legal form at the promulgation of the CEDAW in 1979, and the right against GBV emanating from harmful cultural practices was not a legal norm at the time, states deemed it fit to enter reservations against any potential principle imposing obligations upon them to reform religious practices. This was against the concept of culture and its redress within Article 5(a) of the CEDAW. Hence, the obstacles to the evolution of a norm against GBV at the international level have to be considered in light of the opposition from states to such a principle.

This opposition has been explained because the due diligence norm is based on a conflict of rights frame which permits the right to freedom of religion to co-exist with the right against GBV.¹³ The international sphere does not provide a normative resolution for this conflict; most countries in the Global South, including India, South Africa, Turkey, and Israel, have national constitutional principles that permit the right to freedom of religion to co-exist with the right against GBV. While in theory these rights are said to co-exist as equals, national policy and outcomes implicitly privilege the right to freedom of religion even when it causes GBV. In other words, international normative consciousness structuring the relationships between states has not evolved to a recognition that harmful religious practices that cause GBV actually cannot prevail against the legitimate right against GBV. This contention has been an ongoing one between international feminist activists, governmental actors, and the CEDAW Committee.¹⁴ Matters came to a head during the massive crimes of GBV committed during the Balkan conflict in 1992. The focus of international attention on the specific crimes of GBV created the

⁹ Lee HASSELBACHER, "State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection" (2009) 8 *Northwestern Journal of Human Rights* 190.

¹⁰ Andrew BYRNES and Eleanor BATH, "Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women – Recent Developments" (2008) 8 *Human Rights Law Review* 517 at 518.

¹¹ Radhika COOMARASWAMY, Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc.E/CN.4/1997/47/Add.1 (1996); Rashida MANJOO, Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc.A/HRC/14/22/Add.2 (2010).

¹² Riddle, *supra* note 3.

¹³ Sullivan, *supra* note 3.

¹⁴ Hilary CHARLESWORTH and Christine CHINKIN, "The gender of jus cogens" (1993) 15 *Human Rights Quarterly* 63 at 73.

momentum for activism at the level of the CEDAW Committee to promulgate a principle against GBV. This was not possible when the CEDAW was first drafted in 1979, because of severe and intense opposition by states in the form of legal reservations.¹⁵ Hence, the CEDAW Committee seized upon the international momentum against crimes of GBV during wartime to recognize the obligation of states to prevent, prosecute, and punish acts of GBV during peacetime and in the public sphere. This resulted in the promulgation of a historic recommendation, known as General Recommendation No. 19, which requires states to prevent GBV in terms of pre-existing principles of public international law.¹⁶

Gender has rarely been accorded serious priority in the international sphere.¹⁷ Hence, in 1992, a significant attempt was made to reformulate the right against GBV in terms of the principles of customary international law. The due diligence obligation, which is the foremost and primordial international legal principle on GBV, is simply the obligation of states to prevent and torture from occurring in the domestic sphere and prosecuting the same. The occurrence of domestic violence was analogized to torture in the public sphere. By reason of a legal interpretation, and under the principles of customary international law, the right against torture implied a similar right on states to prosecute GBV in the private sphere.¹⁸ A principle of *jus cogens* is a norm from which derogation is not normally permitted under the doctrines of *opinio juris* and state practice.¹⁹ Similarly, no derogation was implicitly permitted in the right against GBV. However, this significant legal recognition by the CEDAW Committee has run into severe legal opposition by the states against whom it has been directed. The reservations that existed at the inception of the CEDAW militate against the implementation of this principle in practice. States advanced trenchant opposition to implementing this principle during their routine meetings with the CEDAW Committee as they found it would generate severe social opposition and destabilization. Cultures in the Global South, such as India (as this article will demonstrate), are based on religious practices that cause GBV. Hence, states are reluctant to intervene in deeply steeped societal practices that have pervaded their societies since antiquity. The deep rooted and pervasive nature of these practices prevents states from taking bold steps to reformulate these practices when they cause GBV. Since powerful religious lobby groups are in favour of these cultural practices, the international movement against GBV has been waging a significant battle in invoking the obligation of states and propelling them towards reforming the practices of GBV. What is required then is an international normative shift that legitimizes the attempt to reform the cultural and religious practices that cause GBV. The absence of such a normative legitimation at the international level has hitherto permitted states to unequivocally privilege the right to freedom of religion.

The subsequent promulgation of the due diligence obligation in 1992, has been a normative attempt at retracting these reservations by states. The lack of a legal principle on GBV prompted those reservations, but now, once the due diligence obligation has been formulated, there is a tangible international contention between these competing norms. The due diligence obligation is a legitimate rejoinder to the contention over implementing the right against GBV. While the opposition by states to the implementation of a right against GBV was only directed against an implicit norm at the inception of the CEDAW in 1979, the promulgation of GR No. 19 in 1992, has made this opposition

¹⁵ Byrnes and Bath, *supra* note 10 at 518.

¹⁶ CEDAW General Recommendation 19, *supra* note 2.

¹⁷ Hilary CHARLESWORTH, Christine CHINKIN and Shelley WRIGHT, "Feminist approaches to international law" (1991) 85 American Journal of International Law 613 at 614.

¹⁸ CEDAW General Recommendation 19, *supra* note 2.

¹⁹ Charlesworth and Chinkin, *supra* note 14 at 63.

a tangible one: there now exists legitimate contention manifested in a tangible legal form between the massive reservations of nation states and the right against GBV under the due diligence obligation.

Given this contextual history on the contest between the right against GBV and the right to freedom of religion, does the conflict of rights frame of the due diligence obligation mandate priority to state interest or the internationally recognized *jus cogens* right against GBV? Can states be permitted to advance trenchant opposition to the right against GBV? The CEDAW Committee and international feminist movements certainly deem that states cannot accord priority to the right against GBV. The priority of the CEDAW Committee, as witnessed in the reports of the Special Rapporteurs, has been to secure effectuation of the due diligence principle. This article uses this contention between the right against GBV and the right to freedom of religion within the international community to contextualize India's compliance with Article 5(a) of the CEDAW.

A. Contextualizing India's Declaration vis-à-vis the CEDAW's Due Diligence Obligation

When India acceded to the CEDAW, it sought to implement the norm of women's equality through its interpretation known as a "Declaration" under public international law. India ratified the CEDAW in 1993, with the Declaration that it would modify cultural attitudes that promote gender stereotypes only to the extent of non-interference in the personal affairs of its religious communities.²⁰ Article 5(a) of the CEDAW imposes a normative obligation on India to modify "those cultural and social patterns of conduct" to eliminate prejudices based on customs which perpetuate the inferiority of women and promote gender stereotypes harmful to women.²¹ Article 16 imposes an obligation to eliminate discriminatory marriage practices.²² General Recommendation No. 19, otherwise known as the due diligence obligation, adopted in the wake of the Balkan conflict in 1992, expanded the obligation of states under Article 5. It recognized that customary practices in society subordinated women to men, and perpetuated violence, coercion, family abuse, forced marriages, dowry deaths, female circumcision, battering, rape, and mental and sexual violence.²³ It expanded the obligation of states to eliminate violence by protecting women against both public and private actions.

India has stated that it would not interfere in religious practices of gender subordination without the "initiative and consent" of the communities concerned.²⁴ Therefore, India's Declaration provides that it would only modify cultural practices to the extent that they are permitted by its religious communities. This article argues that the substantive nature of GBV in India gives reasonable ground to state that India's Declaration reserves its obligations from interfering in the cultural patterns of religion that cause GBV, which directly violates the due diligence obligation.

This article examines India's Declaration to CEDAW's Article 5(a) as an instance of non-compliance with the due diligence obligation. This case is presented on the basis that cultural attitudes cause GBV in India. This implies that India's Declaration to Article 5(a) of the CEDAW indirectly supports and promotes those cultural attitudes that cause GBV. India is thus implicitly reserving its obligations from interfering in the cultural practices of GBV. This implication is not apparent from a *prima facie* examination of India's

²⁰ UN Committee on the Elimination of Discrimination Against Women, *supra* note 4.

²¹ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, GA Res. 34/180, UN Doc. A/34/46 (entered into force 3 September 1981) [CEDAW], art. 5.

²² *Ibid.*, art. 16.

²³ CEDAW *General Recommendation 19*, *supra* note 2 at para. 11.

²⁴ UN Committee on the Elimination of Discrimination Against Women, *supra* note 4.

Declaration. Its potent implications only become apparent when the institutionalization and systemic perpetration of GBV are cogently analysed.

This further implies that India's Declaration is a substantive derogation from the due diligence obligation. The due diligence obligation calls upon states to intervene in the cultural practices of GBV in terms of public international law principles such as the right to life and the right against torture. India's Declaration, which indirectly supports cultural attitudes of GBV, in effect violates basic precepts of customary international law. On this basis, this article argues that India's Declaration is, in effect, a reservation under public international law. This reservation violates a *jus cogens* norm of the international legal order since the due diligence obligation has been recognized as fundamental to the international legal order. Hence, India's Declaration on account of protecting the cultural practices of violence amounts to a *de facto* reservation under the 1969 Vienna Convention on the Law of Treaties (VCLT).²⁵ This makes India's Declaration a material infringement of an important principle of the international legal order, namely the due diligence obligation under the CEDAW. This is the basis on which the case for accession to the OP will be presented. The cultural patterns of GBV in India will be briefly explained in the following section to ground this argument.

II. The Role of Culture in Perpetrating Violence Towards Women in India

This section first examines the extant evidence on GBV in Indian society from a social science perspective. A phenomenon is examined and an explanation is adduced to explain its persistence.²⁶ While an intricate examination of the extent of GBV is theoretically impossible, an examination of the phenomenon is undertaken to present a macro-structural picture on the nature of cultural attitudes priming the intersubjective atmosphere of GBV in India. This section examines the patterns of GBV to argue that they exhibit cultural norms of subordination, which warrants that the Indian government should take measures in accordance with the CEDAW's due diligence obligation.

The fact that cultural attitudes undergird the nature of GBV in Indian society is evidenced from the critique advanced against the passing of legislation on domestic violence by India. The major feminist critique against the 2002 Protection from Domestic Violence Act is that it "upholds the sanctity of marriage, protects the husband and even justifies occasional beatings of the wife".²⁷ This legislation is a glimpse into the structural factors that constitute the nature of GBV. Even legislation emanating from the liberal rule of law has not disturbed the structure of cultural patriarchy. Indian society is undergirded by a larger structure of patriarchy emanating from culture, a culture of devoutness to the family and the disproportional nature of expectations from women.²⁸ The ideology of the family in the domestic sphere generalizes and embellishes the images of mothers and wives as financially dependent on men, submissive, non-assertive, and unselfish.²⁹

Dowry deaths or bride burnings continue to remain a major cause of GBV. Dowries emanate from an ancient tradition whereby a new bride was given moveable property by her father known as "*streedhan*".³⁰ Over time, and in conjunction with the emergence

²⁵ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980).

²⁶ Gary KING, Robert O. KEOHANE and Sidney VERBA, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press, 1994) at 7.

²⁷ Huma AHMED-GHOSH, "Chattels of society: Domestic violence in India" (2004) 10 *Violence Against Women* 94 at 94.

²⁸ *Ibid.*, at 95.

²⁹ Ratna KAPUR and Brenda COSSMAN, *Subversive Sites: Feminist Engagements with Law in India* (Sage Publishing, 1996) at 101; Ahmed-Ghosh, *supra* note 27 at 96.

³⁰ Ahmed-Ghosh, *supra* note 27 at 103.

of a modern capitalist consumerist economy, the dowry has been institutionalized into a formal system of harassment and coercion in terms of the demand for property by the bridegroom.³¹ Failure to provide the requisite dowry results in the burning of the bride, usually in the kitchen, orchestrated as a suicide or fire accident. This manifests as one of the most severe forms of GBV prevalent in India today. The dowry is undergirded by a cultural preference to marry daughters into a higher societal class wherein parents undertake obligations in an effort to “get rid of” their daughters.³² As a result, when a daughter experiences severe domestic violence on account of the dowry, support from her natal family is unavailable as she is no longer considered part of her natal household. The return of a daughter to her natal household due to dowry harassment is mired in a traditional culture of shame because she is considered to be an economic liability and a societal outcast.³³ A new bride is measured by her ability to bring in a sufficient dowry. Domestic violence in the context of dowries is defined as the inherent right of men to control and police women’s behaviour.³⁴

The paradigmatic Hindu religious text that undergirds the existence of womanhood in India is the *Manusmriti*. In classic terms, it states that “[i]n childhood a female must be subject to her father, in youth to her husband, when her lord is dead to her sons; a woman must never be independent”.³⁵ Men are usually privileged in Indian culture for their potential to perpetuate the kinship bloodline. Boys are usually privileged in the provision of educational facilities and nutrition over girls. Under Hindu religious doctrines, which is the majoritarian religion in India, women are expected to be subservient to and assist men in the performance of their spiritually liberating duties.³⁶ These cultural expectations primarily cause various forms of GBV, such as dowries, female mortality, feticide, and rape.

The intersubjective cultural atmosphere priming GBV in India is further evident in a survey conducted in 2001. Of the women interviewed, 56 per cent agreed that neglect in homemaking duties or looking after children; failure to maintain the house in proper condition; disrespectful behavior to the husband; failure to bear sons; an insufficient amount of dowry; and not according importance to the husband justified beatings by the husband.³⁷

Another insidious form of GBV, which presents macrostructural implications of cultural traditions is feticide. In India there are only 93 women to every 100 men, well below the world average of 105 women to 100 men.³⁸ Female feticide, or the aborting of female fetuses out of a preference for male progeny, is attributed to the predominantly patriarchal and patrilineal culture of India.³⁹ The precursor to aborting female fetuses through technologically advanced equipment was infanticide.⁴⁰ The problem was acutely reflected in census surveys compiled during the nineteenth century, which discovered that no female babies had been born in several villages.⁴¹ The rising rates of female feticide in India are directly correlated to perceptions of dowry demands. The intersubjective

³¹ Ahmed-Ghosh, *supra* note 27 at 96.

³² *Ibid.*, at 104.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ George BÜHLER, *The Laws of Manu-Translated* (1886), online: Internet Sacred Text Archive <<http://www.sacred-texts.com/hin/manu/manu09.htm>>.

³⁶ Ahmed-Ghosh, *supra* note 27 at 106.

³⁷ *Ibid.*, at 110.

³⁸ Nehaluddin AHMAD, “Female feticide in India” (2010) 26 *Issues in Law and Medicine* 13 at 15.

³⁹ *Ibid.*, at 15.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

patriarchal culture in Indian society fosters and encourages the practice of feticide.⁴² The preference for sons is fostered by beliefs that they will care for aged parents, avoid dowry liabilities (incurred by parents for their daughters), and that males are the breadwinners rather than females.⁴³ The gender gap in India, on account of feticide, is estimated to be 12,618,000.⁴⁴ The number of sex selective abortions occurring in India in 2017 was estimated to be 100,000.⁴⁵ Feticide emanates from religious prescriptions in Hindu religious texts such as the *Dharmasastras* which denigrate the value of women to society.⁴⁶ Larger intersubjective patriarchal structural factors that contribute to feticide are attributed to: the practice of child marriage (restraining the sexuality of pre-pubertal girls through endogamous caste sanctioned marriages), *purdah* (restricting women behind veils), *jauhar* (mass immolation of women prevalent in the north-western parts of India), and *sati* (the burning of widows on the funeral pyre of their husbands).⁴⁷ Ethnographic evidence on the causes for female mortality and feticide are ascribed to a patriarchal preference for sons.⁴⁸ In India, the sex ratio has been on a steady decline since 1991. Common cultural factors that undergird feticide include consecutive pregnancies until the birth of a son and selective consumption of ayurvedic (an Indian herbal medicine) drugs to beget sons.⁴⁹

Four rape cases were watershed events in the history of the rape trajectory of India. These cases are riddled with cultural assumptions, which helps to determine that cultural attitudes cause GBV at an individual level.

First, the brutal gang rape of a 23-year-old physical therapy student on a public transport bus in New Delhi in 2012, catapulted the issue of cultural traditions regarding rape in India. This gang rape highlighted cultural traditions on “misogyny, barbarism, the influence of pornography in valorizing sadomasochistic relations between men and women, the influence of Westernization on women’s dress codes, consumerist culture, hedonism”, and the replacement of the formerly chivalrous relationship structure between men and women by a patriarchal hostile culture.⁵⁰ Some cultural traditions that were potent in causing rape have been ascribed to a larger climate of patriarchy that exerts control over female sexuality through the threat of rape and sexual harassment, dubious ascription of sexual morals, and the blaming of victims by conservative religious factors.⁵¹

The persistence of a structural climate of cultural conditioning around rape is witnessed in the paradigmatic case of the rape of a tribal woman in 1972, which is known colloquially as the “Mathura Case”.⁵² This case highlighted the societal perceptions on rape that were manifested in the judgment rendered by the Supreme Court of India. The judgment stated that Mathura was “habituated to sex”, did not “raise any alarm”, and the “absence of any injuries or signs of struggle on her body” were sufficient for acquittal of the accused.⁵³ The culture conditioning the perpetuation of Mathura’s rape

⁴² *Ibid.*, at 17.

⁴³ *Ibid.*

⁴⁴ Sudip BHATTACHARYA and Amarjeet SINGH, “The more we change, the more we remain the same’: female feticide continues unabated in India” (2017) *BMJ Case Rep.* 1.

⁴⁵ *Ibid.*, at 1.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Vibhuti PATEL, “Campaign against rape by women’s movement in India” (2014) 24 *Deport. Esuli Profughe RivistaTelematica Studi Sulla MemoriaFemminile* 36 at 37.

⁵¹ *Ibid.*, at 37.

⁵² *Tuka Ram and Anr vs State of Maharashtra*, 15 September 1978, 1979 AIR 185, 1979 SCR (1) 810; Laxmi MURTHY, “From Mathura to Bhanwari”, 48(23) *Economic and Political Weekly* 16 at 16.

⁵³ *Ibid.*, at 16.

in police custody was evident in a letter sent by activists to the Supreme Court of India, which highlighted the poor socio-economic condition of the victim, the paucity of awareness of legal rights and access to pro bono services, and a “fear complex” of a high and mighty police force by vulnerable sections of society.⁵⁴ In 1975, a report by the Committee on the Status of Women in India stressed the need for a radical transformation of societal attitudes and structure prevalent to encapsulate a change in the traditions of rape and sexual harassment.⁵⁵

The Bhanwari rape case in 1992, was an incident wherein a social worker who belonged to a lower caste was gang raped by five upper caste men in Rajasthan.⁵⁶ Bhanwari was confronted with an inadequate legal system that refused to recognize her rape by upper caste men, undergirding cultural perceptions surrounding rape in Indian society.⁵⁷ In 2005, a 28-year-old woman, Imrana, was subject to forcible rape by her 69-year-old father-in-law. The cultural traditions surrounding rape was self-evident in the act of the village Panchayat (head council) which invalidated her marriage to her husband.⁵⁸ Furthermore, local Islamic leaders decreed that Imrana marry her rapist and treat her husband as her son.⁵⁹ Luckily, at this time, the women’s movement galvanized to secure Imrana a modicum of justice and her perpetrator was convicted and was sentenced to ten years imprisonment.⁶⁰

The above cases have been recognized as critical junctures in the history of rape and highlight the cultural conditioning of rape in Indian society. Therefore, the failure of the Indian State to intervene in the cultural traditions of GBV is, in effect, a refusal to intervene in the various forms of GBV itself.

Another major form of GBV that presents macro structural cultural implications is widowhood. The institutionalized pattern of ascetically imposed widowhood in India clearly exhibits cultural patterns. There are estimated to be 40 million widows in India.⁶¹ Widows are colloquialized as “bitches” and “husband eaters”.⁶² Widows are held primarily responsible for their husband’s death and have a lot of social and physical restrictions imposed on them. A widow is forced to “uglify” herself as she poses a threat to the endogamous caste structure endemic in Indian society.⁶³ Widows self-impose dietary restrictions and are prevented from consuming foods like “onion, garlic, pickles, potatoes and fish”, resulting in high mortality.⁶⁴ Societal perceptions castigate a widow for imposing familial burdens and she is viewed as a natural aspersion on marriage.⁶⁵ The behavior of Hindu widows emanates directly from patriarchal Hindu traditions which construes the epitome of wifely devotion in service to her husband.⁶⁶ A widow undertakes ritual fasting

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at 17.

⁵⁶ *Ibid.*, at 16.

⁵⁷ *Ibid.*

⁵⁸ Renae SULLIVAN, “Sexual Violence in India: The history of Indian women’s resistance” (2015) 11 *McNair Scholars Research Journal* 15 at 73.

⁵⁹ Pervez Iqbal SIDDIQUI, “Father-in-law gets 10 yrs for Imrana rape” *The Times of India* (20 October 2006), online: *The Times of India* <<https://timesofindia.indiatimes.com/city/lucknow/Father-in-law-gets-10-yrs-for-Imrana-rape/articleshow/2210881.cms>>.

⁶⁰ Sullivan, *supra* note 58 at 73.

⁶¹ Dipti Mayee SAHOO, “An analysis of widowhood in India: A global perspective” (2014) 2 *International Journal of Multidisciplinary and Current Research* 45 at 45.

⁶² *Ibid.*, at 45.

⁶³ *Ibid.*, at 46.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ A. Judith CZERENDA, “The Meaning of Widowhood and Health to Older Middle-Class Hindu Widows Living in a South Indian Community” (2010) 21 *Journal of Transcultural Nursing* 351 at 351.

to preserve the longevity of her husband's wife. Hindu doctrine imputes responsibility on the wife's past karma if her husband predeceases her.

From the examples above, the nature of GBV in Indian society demonstrates that cultural patterns undergird the traditional nature of gender-based subordination. Many acts of GBV are intrinsically mired in cultural practices that directly tie into the mandate imposed by the due diligence obligation in the CEDAW. Feticide is fostered by a traditional belief in the desirability of sons. Dowry violence emanates from the patriarchal structure of the marriage system. Female mortality, as shown above, derives from larger patterns of privileging sons over daughters in basic care. Indian women are raised in an intersubjective atmosphere that devalues their contribution to the family. Husbands possess the inherent right to violently criticize and coerce women for poor homemaking skills. The patriarchal intersubjective atmosphere prevalent in India fosters negative attitudes towards the perception of womanhood and devalues the birth of girls. Certain intrinsic practices of Hindu society, such as *sati*, validate the argument that a patriarchal cultural conditioning directly perpetrates violence against women. Therefore, cultural practices directly foster and perpetrate the nature of GBV against Indian women.

This demonstrates that India's Declaration to the CEDAW reserving its obligations from intervening into cultural practices indirectly promotes and fosters the culture of patriarchal subordination that engenders violence against women. The cultural basis of GBV in Indian society has, in effect, converted India's ostensibly innocuous Declaration into a deep-rooted derogation of a principle of public international law. The due diligence obligation to GR No. 19 clearly states that "traditional attitudes by which women are regarded as subordinate to men ... perpetuate widespread practices involving violence".⁶⁷ This obligation describes family violence as an "insidious form of violence against women".⁶⁸ As a result, this obligation mandates state parties to undertake steps to eradicate violence against women. It is submitted that the nature and persistence of GBV in the Indian subcontinent, as evidenced from the extract above, shows that India's Declaration to the CEDAW is insincere. Cultural attitudes and expectations openly contribute to and foster violence against women. India's Declaration reserving its obligations from interfering into cultural patterns of violence is a direct derogation of the due diligence obligation.

Furthermore, the right to be free from violence has been enshrined in terms of basic precepts of customary international law. GR No. 19 clearly states that the right against GBV derives from "human rights and fundamental freedoms under general international law".⁶⁹ They include the right to life, the right against torture, and the right to life and liberty.⁷⁰ As a result, the nature of GBV in Indian society emanating from cultural patterns of patriarchal subordination has converted India's Declaration to Article 5(a) of the CEDAW into a breach of the canons of public international law.

The following section explains the concept of reservations and declarations under public international law to ground the argument that India's Declaration is ostensibly a reservation for its serious breach of the due diligence obligation under the CEDAW.

III. Reservations and Declarations Under Public International Law

States are permitted to qualify the application of treaty obligations through interpretive statements known as "Reservations, Declarations and Understandings" (RUDs).⁷¹ A

⁶⁷ CEDAW General Recommendation 19, *supra* note 2.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Ann Elizabeth MAYER, "Reflections on the proposed United States reservations to CEDAW: Should the constitution be an obstacle to human rights" (1995) 23 *Hastings Constitutional Law Quarterly* 727 at 731-2.

reservation is defined by the VCLT as a “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, whereby, it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to the State”.⁷² States are permitted to enter into reservations and modify the applicability of the legal obligations of treaties subject to the conditions stated in them. Article 19 (a) of the VCLT permits all reservations unless they have been prohibited by the treaty.⁷³ Article 19(b) further clarifies that if the treaty specifically excludes the reservation under question, then the reservation concerned is prohibited.⁷⁴ Article 19(c) prohibits a reservation that is “incompatible with the object and purpose of the treaty”.⁷⁵ Rather than making an inconsistent declaration, the state should decline to enter into a treaty.

Further, states also qualify their comprehension of certain treaty provisions by issuing “Declarations”. A declaration is a statement where the state issues an interpretation of the applicability of certain legal provisions.⁷⁶ While a reservation technically limits the legal obligation, a declaration qualifies the state’s implementation of the same. However, the distinction between a reservation and a declaration under public international law is a hotly contested issue.⁷⁷ Scholars have frequently asserted and recognized that states might disguise their reservations as an interpretive statement to escape the effect of legal obligations.⁷⁸ While there is an ostensible legal difference between reservations and declarations, states frequently use interpretive statements when they actually intend to make a reservation.⁷⁹ It is submitted that India has camouflaged its reservation to the CEDAW as a declaration because of the nature and intensity of traditional cultural attitudes causing GBV in Indian society. The nature of GBV in India indicates a serious derogation of the due diligence obligation, and this makes India’s Declaration tantamount to a reservation.

The designation of an interpretive statement by the state is not the standard used by legal scholars in evaluating such statements. International legal scholars generally distinguish between reservations and declarations on the basis of the substantive content of the provision affected.⁸⁰ If the statement substantively limits state obligations under the treaty, it amounts to a reservation. Conversely, if the statement serves to clarify or clear some obscurity peculiar to that state’s national system, then the statement is classified as a declaration. Therefore, a reservation is a derogation from the norm enshrined in the treaty and substantively modifies the applicability of that norm to the state.⁸¹ It was easily identifiable when the state expressly excluded the applicability of a treaty norm to its state practice.

On the other hand, a reservation is harder to distinguish when it is camouflaged as a declaration. It is submitted that the substantive effect of India’s Declaration to Article 5(a) of the CEDAW is a derogation of the due diligence obligation, which is derived from

⁷² *Ibid.*, at 731.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, at 732.

⁷⁷ Ian McTaggart SINCLAIR and Ian Robertson SINCLAIR, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984); Mayer, *supra* note 71 at 733.

⁷⁸ Article 38(1)(d) of the Statute of the International Court of Justice recognizes the opinion of international scholars as an extant source of law. Hence, on doubtful questions, *opinio juris*, or the opinion of scholars in the field of public international law prevails. See Gennady DANILENKO, *Law-Making in the International Community* (Springer, 1993) at 15.

⁷⁹ Mayer, *supra* note 71.

⁸⁰ *Ibid.*

⁸¹ Frank HORN, *Reservations and Interpretative Declarations to Multilateral Treaties* (Amsterdam, New York, Oxford, Tokyo: North-Holland, 1988) at 5; Mayer, *supra* note 71 at 733.

principles of customary international law. Traditional cultural attitudes undergird the nature of GBV in Indian society, which undercuts the obligations of the Indian nation state *vis-à-vis* the due diligence obligation. The substantive implication of the nature of GBV in India is thus a derogation of the due diligence principle, which is a breach of the canons of public international law.

Further, scholars noted that it was an extremely fine distinction when the states themselves were unsure of the nature of their interpretive statements.⁸² Obscure statements tend to be the result of a state qualifying its obligations with a reference to domestic legislation. When states declared that the treaty would be applicable only to the extent that it did not interfere with domestic legislation, it created a situation of obscurity as no framework of reference was provided for interpretation. Other states had no way of measuring the effect of this statement as states did not often provide the standards against which the norms would be implemented. It is submitted that India's Declaration obfuscates India's obligations: by preventing interference into religious practices, India has obscured its obligations *vis-à-vis* the cultural nature of GBV. This indirectly fosters the larger intersubjective cultural atmosphere that promotes and instigates GBV.

Therefore, it is submitted that India has sought to avoid its due diligence obligation, contrary to the object and purpose of the CEDAW, by submitting an inconsistent Declaration that it would not interfere in the cultural practices of GBV or modify its cultural stereotypes to ensure gender equality. The persistence of cultural attitudes perpetrating violence against women in India amounts to a *de facto* reservation made by the Indian State regarding its due diligence obligation. Cultural attitudes perpetuate violence against women by fostering gender inequality. This reduces India's so-called Declaration to an inconsistent reservation. Hence, India's Declaration amounts to a reservation under public international law. India's Declaration protects the cultural attitudes that cause GBV. This is the basis on which the case for accession to the OP will be presented. Prior to that, the nature of the feminist movement in India will be briefly examined to situate the case for the OP within the movement.

IV. The Indian Feminist Movement *Vis-À-Vis* the Optional Protocol

The gender consciousness that has been recognized as the central element of feminist mobilization emerged in India in the 1970s, when women began mobilizing on the issues of bride burning and rape.⁸³ Recognizing that the legal mechanisms afforded them scant relief, the women's movement first demanded extensive legal protection and procedural reforms in dealing with issues of rape and dowry violence.⁸⁴ Simultaneously, women realized their collective power to enforce structural change and mobilized to form women's groups and counselling centres, which were established for the first time in India. Modelled on the second wave of feminism in the United States, these movements challenged the traditional conceptualizations of womanhood that had subjugated women for centuries. This led to the government establishing anti-domestic violence cells, and women's issues were slowly introduced into sociological research. Also, several non-governmental organizations (NGOs) coalesced on securing the rights of women and focused on economic security. Over time, women's issues occupied prime time in

⁸² See Danilenko, *supra* note 78.

⁸³ Patricia GURIN, "Women's Gender Consciousness" (1985) 49 *Public Opinion Quarterly* 143; Flavia AGNES, "Women's Movement within a Secular Framework: Redefining the Agenda" (1994) 29 *Economic and Political Weekly* 1123 at 1123.

⁸⁴ Agnes, *supra* note 83 at 1123.

party primaries.⁸⁵ The major demands of the feminist movement included, *inter alia*, reforming the personal status laws that fostered gender inequality. Hence, the Indian feminist movement was imbued with a normative concern to secure legal rights for women. Accession to the OP can thus be situated within this normative framework.

Ever since India acceded to the CEDAW in 1993, with its Declaration (or reservation) to Article 5, feminists in India have been trying to get the state to actively intervene in its cultural practices to remove gender stereotypes.⁸⁶ Since the Indian feminist movement has been based on securing legal rights for women, accession to the OP is seen as a positive step in this movement.⁸⁷ Feminists focus on enforcing the due diligence obligation. The CEDAW mechanism, through which the International Women's Action Watch encourages domestic activism to secure compliance, regularly sponsors NGOs to submit alternative reports on the real level of CEDAW implementation, known as "shadow reports".⁸⁸ Hence, one branch of the feminist movement has been strongly concerned with submitting these alternative reports as a means of demonstrating the actual level of compliance. They have documented that India's Declaration currently violates its right to equal protection. A refusal to interfere in the personal status laws of communities perpetuates discriminatory practices and is, hence, a violation of constitutional guarantees.⁸⁹ The feminist movement documented that India does not have any legislation that is as overarching as the definition in the CEDAW.⁹⁰ Article 1 of the CEDAW, drawing from previous feminist critiques that international law failed to protect women from discrimination in the private sphere, imposes an obligation on states to protect women from all practices whose "effect and purpose" is to discriminate against women.⁹¹ Feminists have been strongly urging India to pass legislation that defines discrimination based on the CEDAW. Also, they have documented instances of manual scavenging, and have challenged government officials to produce evidence in support of the government's refutations.⁹² Further, feminists have particularly argued that the persistence of violence against women negates the constitutional guarantee of equality. They were instrumental in pressurizing the government of India to set up a National Commission on Women to deal with issues of domestic violence, rape, child sexual abuse, and assault.⁹³ They have fought for effectuating the obligation on eliminating gender stereotypes in education and in the public sphere. Feminists repeatedly lobbied the Law Commission of India to recognize marital rape (it is still unrecognized by the Indian Penal Code, which was drafted by the British in 1870, which is still in force to the present date).⁹⁴ They have also argued before the CEDAW Committee that feticide is a "crime against humanity"

⁸⁵ Flavia AGNES, Sudhir CHANDRA and Monmayee BASU, *Women and Law in India: An Omnibus Comprising Law and Gender Inequality: The Politics of Women's Rights in India, Enslaved Daughters: Colonialism, Law and Women's Rights; and Hindu Women and Marriage Law: From Sacrament to Contract* (Oxford University Press, 2004).

⁸⁶ *Ibid.*; National Alliance of Women, "India: Second NGO Shadow Report on CEDAW" (November 2006), online: Partners for Law in Development <http://pldindia.org/wp-content/uploads/2013/06/CEDAW_Second-Shadow-report_2006.pdf>.

⁸⁷ Agnes, *supra* note 83.

⁸⁸ Sally Engle MERRY, "Constructing a Global Law-Violence against Women and the Human Rights System" (2003) 28 *Law and Social Inquiry* 941.

⁸⁹ National Alliance of Women, *supra* note 86.

⁹⁰ *Ibid.*, at 7.

⁹¹ Charlesworth and Chinkin, *supra* note 14 at 69; CEDAW, art. 1.

⁹² National Alliance of Women, *supra* note 86 at 8.

⁹³ Shirin M. RAI, *The National Commission for Women: The Indian Experience* (Routledge, 2018).

⁹⁴ Saptarshi MANDAL, "The impossibility of Marital Rape: Contestations around Marriage, Sex, Violence and the Law in Contemporary India" (2014) 29 *Australian Feminist Studies* 255.

under the Rome Statute, and to the International Criminal Court.⁹⁵ Hence, the efforts of feminists have been directed towards making India protect the right against gender-based discrimination guaranteed under the CEDAW.

It is submitted that accession to the OP would strengthen the mandate of the feminists because it would permit victims of violence to petition the CEDAW Committee directly. The only effective legal means of countering this inconsistent Declaration is for Indian feminists to argue for accession to the OP. The Hobbesian state of anarchy that primes the international sphere can be overcome by a concrete instrument of public international law. Accession to the OP can foster a normative retraction of India's inconsistent Declaration to the CEDAW. It will force the Indian government to set up a series of mechanisms to address the numerous complaints of the cultural causes of GBV. This can normatively overcome the inconsistent reservation advanced by the Indian state. Therefore, accession to the OP would provide an effective means of countering this inconsistent declaration, *aka* reservation, by bringing the persuasive power of norms to bear on executive state action.

The legal argument that the persistence of cultural patriarchy reduces India's Declaration to a reservation demonstrates that the Indian State has deployed rhetoric to limit its legal obligations. Hence, the argument for accession to the OP contributes to the feminist effort to persuade the Indian State to fulfil its due diligence obligation under the CEDAW. Given the burgeoning incidents of violence against women, an argument that examines India's case to accede to the OP is hoped to contribute to effectuating the state's obligation to modify its cultural stereotypes in accordance with its CEDAW obligations. The following section will present the normative case for accession to the OP.

V. The Optional Protocol

The OP was primarily formulated in response to the recognition of the weak mechanisms of enforcement of the CEDAW. The CEDAW was drafted in the aftermath of the Second World War when human rights acquired significance only when they were promoted by a group of hegemonic states.⁹⁶ The CEDAW has been structured to only ensure a weak intervention into state practice to reorder behaviour. It presumes domestic structures of enforcement, imposes obligations on states, and has, arguably, one of the weakest systems of enforcement of the human rights treaty body. The weakness of its institutional efficacy can be discerned from the fact that it was initially berated as the "poor cousin" of human rights treaties as it was originally administered by the Division for the Advancement of Women at the UN.⁹⁷ It was not recognized as part of the overarching human rights protection system of the UN.⁹⁸ In 2008 the CEDAW Committee was placed under the Office of the High Commissioner for Human Rights, moved its headquarters to Geneva, and assumed its place with the other treaties of the human rights regime.⁹⁹ The weak monitoring mechanisms have been frequently criticized for their inability to enforce compliance. The realization of the universality of rights under the CEDAW is administratively blocked due to the overdue submission of state reports, huge backlogs,

⁹⁵ National Alliance of Women, *supra* note 86 at 17.

⁹⁶ 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 (CEDAW)" (2005), online: <<https://d-nb.info/97814287X/34>>.

⁹⁷ Andrew C. BYRNES, "The Other Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women" (1989) 14 *Yale Journal of International Law* 1 at 57.

⁹⁸ *Ibid.*, at 57.

⁹⁹ Neil ENGLEHART and Melissa K. MILLER, "Women's Rights, International Law and Domestic Politics: Explaining CEDAW's Effectiveness" (2011) APSA 2011 Annual Meeting Paper, 5.

and the decrease in complaints by individual victims of violence.¹⁰⁰ The main problem with implementation has been the inadequate submissions of state reports. While state reports are theoretically meant to be an honest self-appraisal of actual compliance, they have been found to be mere reiterations of constitutional provisions, or supporting legislations, and/or justifications for existing executive and legislative measures as evidence of complete compliance.¹⁰¹ Compliance is also precluded by the absence of reciprocity between states under human rights treaties.¹⁰² Article 29 of CEDAW, which permits states to refer outstanding disputes to the International Court of Justice, has been subject to the greatest number of reservations.¹⁰³

The “UN Human Rights Treaty System” was established through the Universal Declaration of Human Rights (UDHR), instituted in 1948.¹⁰⁴ This system permitted any UN member state to undertake legally binding obligations to secure, respect, and promote fundamental rights guaranteed by the UDHR. This evolved into a core of nine treaties that comprise the human rights system; including the covenant on civil and political rights, on economic rights, on child rights, the rights of migrant workers, on torture, and on racial discrimination.¹⁰⁵ The CEDAW is a manifestation of the core obligations to protect human rights in the international sphere.

However, the CEDAW is a promotional regime that does not create binding international standards structured in the material interests of the states.¹⁰⁶ The submission of state reports was previously noted for its weak enforceability. The CEDAW Committee, under Article 17, is only allowed to make suggestions and recommendations. Compliance with the CEDAW depends entirely on the state, and the Committee is hampered by the fact that it could meet only in two three-week sessions every year. This has resulted in huge delays and backlogs in the consideration of state reports.

Recognizing that the weak enforcement mechanisms of the CEDAW has failed to adequately secure the rights of women, and that the CEDAW had the greatest number of reservations among human rights treaties, the Committee issued a recommendation urging all states that had issued reservations to modify them or retract them.¹⁰⁷ The Committee was particularly concerned that the RUDs issued by states significantly violated the purposes of the Convention. Further, the World Human Rights Conference in 1993, recognized the large number of reservations to the CEDAW and urged states to retract them.¹⁰⁸

As a result, the Commission on the Status of Women, which was established in 1946 to develop mechanisms to protect women from discrimination, created a working group to deal with the weak enforcement of the CEDAW.¹⁰⁹ This group recommended the adoption of an OP to effectuate the enforcement of the CEDAW. The instrument it proposed drew from the negotiating history of the CEDAW when many states were concerned with the

¹⁰⁰ Anne F. BAYEFSKY, “Making the human rights treaties work” (1994) 26 *Studies in Transnational Legal Policy* 229 at 234.

¹⁰¹ *Ibid.*, at 240.

¹⁰² Daniel W. HILL Jr., “Estimating the Effects of Human Rights Treaties on State Behavior” (2010) 72 *The Journal of Politics* 1161 at 1163.

¹⁰³ Riddle, *supra* note 3 at 626.

¹⁰⁴ Englehart and Miller, *supra* note 99 at 1.

¹⁰⁵ *Ibid.*, at 1.

¹⁰⁶ Jack DONNELLY, “International Human Rights: A Regime Analysis” (1986) 40 *International Organization* 599 at 614 (1986); Zwingel, *supra* note 96 at 48.

¹⁰⁷ Felipe Gomez ISA, “The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women’s Human Rights” (2003) 20(2) *Arizona Journal of International and Comparative Law* 291 at 302.

¹⁰⁸ Englehart and Miller, *supra* note 99 at 1.

¹⁰⁹ Isa, *supra* note 107 at 304.

establishment of an enforcement mechanism. During the deliberations of the working group on the specific structure of the OP, some states suggested reforming the CEDAW, while others recommended a separate procedure similar to the one applicable to the International Covenant on Civil and Political Rights.¹¹⁰ The latter suggestion ultimately prevailed. The central element of the OP to the CEDAW is the right to directly petition the Committee, which was recommended as far back as 1991, in a meeting held by the Division for the Advancement of Women.¹¹¹ The UN General Assembly adopted Resolution 1995/29, in which it directed the Economic and Social Council, under which the Commission of the Status of Women is positioned, to open negotiations for the OP.¹¹²

The OP includes provisions for direct petition and an *ex officio* inquiry procedure where the Committee can directly investigate a matter of discrimination. Article 1 of the OP establishes the jurisdictional competence of the Committee to receive communications on violations.¹¹³ Article 2 permits the receipt of complaints from individual victims as well as organizations. When complaints are filed by an organization, it should generally be made with the victim's consent unless the organization can justify acting on the victim's behalf without her consent.¹¹⁴ India, during the course of negotiations, only sought to clarify that the meaning of consent would not go against the wishes of the victim by respecting her right to privacy.¹¹⁵ Further, the Committee would accept communications on all the substantive rights of the Convention. The complaint, referred to by the OP as a "Communication" must be made in writing and can only come from a country that is a party to both the CEDAW and the Protocol.¹¹⁶ The acts referred to by the Communication should have occurred after accession. On receipt of a complaint, the Committee would first ask the state concerned to take interim measures.¹¹⁷ The second step in considering the complaint is to make a detailed appraisal after determining its admissibility, which would be confidentially communicated to the state concerned.¹¹⁸ The state concerned is then given six months to file a reply.¹¹⁹ The Committee is also entitled to conduct private sessions to satisfy the rules of procedural fairness.¹²⁰ Thereafter, the Committee makes a determination on the issue and transmits it to all the parties. A state is required to submit a report on the specific measures taken to address the situation within six months of receiving the communication.¹²¹

Furthermore, one of the most innovative mechanisms of the OP is the inquiry procedure. India "vehemently" opposed the institution of this procedure as an alleged violation of the sovereignty of countries.¹²² Nevertheless, it was incorporated into the OP. Summarily, this procedure confers on the Committee the power to take cognizance of "grave and systematic violations of the rights of women".¹²³ The Committee was empowered to demand cooperation from the state in gathering information on the issue. Once the state had submitted its report, the Committee would consider the issue and depute

¹¹⁰ *Ibid.*, at 305.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, at 306.

¹¹³ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 6 October 1999, 2131 U.N.T.S. 83 (entered into force 22 December 2000) [CEDAW Optional Protocol], art. 1.

¹¹⁴ *Ibid.*, art. 2.

¹¹⁵ Isa, *supra* note 107 at 313.

¹¹⁶ CEDAW Optional Protocol, art. 3.

¹¹⁷ *Ibid.*, art. 5.

¹¹⁸ *Ibid.*, art. 6.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, art. 7.

¹²¹ Donnelly, *supra* 106 at 30.

¹²² Isa, *supra* note 107 at 316.

¹²³ CEDAW Optional Protocol, art. 8.

one of its members to study the issue and make recommendations.¹²⁴ It could also visit the concerned territory, with the consent of the state, to investigate the issue. The state is once again obligated to submit a report on compliance with the recommendations and has a period of six months to submit its response. Unfortunately, the state has an “opt-out clause”: states can declare themselves not to be bound by the OP if they so wish.¹²⁵ However, the Protocol absolutely forbids any reservations.

It is submitted that accession to the OP would allow feminists in India to directly petition the CEDAW Committee on behalf of victims of cultural violence. Martha Nussbaum’s argument on the use of law to attain sex equality in India demonstrates that international instruments provide certain essential tools for movements to fight for social equality, which helps them when they try to equalize previously unequal power relations.¹²⁶ She conceptualized international instruments as pieces of public opinion that would aid activists in their political struggles and assist their movement for social change.¹²⁷ In a study of the evolution of the constitutional doctrine of sex equality in India, Nussbaum concluded that feminist jurisprudence does not exist to influence judges.¹²⁸ While the Indian judiciary recognizes the presence of unequal laws, the existence of the right to freedom of religion precludes it from meaningfully implementing the doctrine of gender equality.¹²⁹ Hence, it is submitted that, in the absence of such a feminist grounding, it is essential that feminists create this jurisprudence by an international jurisprudential organization – the CEDAW Committee.

Since the Committee would issue decisions only with the consent of the Indian State, it could provide the much needed feminist grounding for Indian judges. The quintessential case, for which the Indian judiciary was denigrated for overlooking the rights of minorities in upholding the rights of women, was *Mohd. Ahmad Khan v. Shah Bano*, where a Muslim woman demanded maintenance after she was unceremoniously abandoned by her prominent lawyer husband after forty-four years of marriage.¹³⁰ Since Muslim law does not prescribe alimony, she petitioned for alimony under the secular Criminal Procedure Code which permitted the same. The Supreme Court granted her the relief and commented on the patriarchal precepts of Islamic law which denied women equality.¹³¹ This provoked a communal furore, and the Muslim political constituency pressured the government to pass laws that precluded all Muslim women from claiming alimony under the secular Criminal Procedure Code. Instead, Muslim women would henceforth be subject to the whims and caprices of the husband. They would only be entitled to a “reasonable” maintenance as was prescribed under Sharia (Islamic) law, instead of prescriptions under the secular code.¹³² This was a big setback for the rights of women and the Court was precluded from meaningfully reforming the personal status laws to reflect gender equality. Hence, it is submitted that a secular, feminist jurisprudence articulating the rights of women on the basis of international law would break this political deadlock and secure the rights of women. The OP would provide the means and the incentive for India to develop a separate feminist jurisprudence that can properly

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, art. 10.

¹²⁶ Martha C. NUSSBAUM, “India: Implementing Sex Equality Through Law” (2001) 2 *Chicago Journal of International Law* 35.

¹²⁷ *Ibid.*, at 58.

¹²⁸ *Ibid.*, at 55.

¹²⁹ *Ibid.*, at 46.

¹³⁰ *Mohd. Ahmad Khan v. Shah Bano Begum and Others*, 23 April 1985, 1985 AIR 945.

¹³¹ Catharine A. MACKINNON, “Sex equality under the Constitution of India: Problems, prospects, and ‘personal laws’” (2006) 4 *International Journal of Constitutional Law* 181 at 192.

¹³² Section 3(a), *The Muslim Women (Protection of Rights on Divorce) Act* (1986).

conceptualize and articulate the rights of Indian women against GBV by providing the venue for jurisprudential evolution in this area.

Additionally, the CEDAW has been actively incorporated into domestic political processes through the activism of feminist lawyers.¹³³ In the case of *Vishaka v. State of Rajasthan*, the Supreme Court of India accepted the petitioner's argument that the protections of the right to life under Article 21 of the Indian Constitution extended to the rights of women under the CEDAW.¹³⁴ Under Indian constitutional law, the doctrine of standing (as understood in the United States of America) has been expanded to permit people affected by violations of bills of rights to directly petition the court to redress their grievances through "Public Interest Litigation petitions" (PILs).¹³⁵ In this case, the petitioner was able to get a constitutional interpretation that the CEDAW was part of Article 21 of the Constitution.

Since the court has done away with the traditional adversarial proceedings and constitutes expert committees to aid in determining the PILs, the jurisprudence of the OP Committee could be readily incorporated into domestic law by feminists working on PILs.¹³⁶ Courts appoint *amicus curiae* to present all the relevant facts of the case instead of a mere representation during PIL proceedings, and the presence of a ready jurisprudence though the OP Committee would greatly aid the court in arriving at decisions on the basis of a common consensus of gender-based equality adopted out of common world consensus, i.e. the OP. Since the Supreme Court has compelled executive action through PILs in the absence of legislation, feminists could inundate PIL committees with the jurisprudence of the OP, which would provide the *ratio decidendi* for securing gender equality. The presence of extant gender jurisprudence in the form of OP jurisprudence would also be readily seized by the Court to articulate gender rights.

Therefore, the failure of India to implement its due diligence obligation entails a failure of those rights protected under Article 21. The apparent non-enforceability of the CEDAW's due diligence obligation can only be effectively countered by accession to the OP. While, ostensibly, it would only entail the government of India to submit reports, the recommendations of the Committee could prove invaluable since they can be enforced under Article 32 petitions. Feminists can argue that the lack of enforceability of the due diligence obligation, which has fostered violent cultural practices, has also deprived women of their constitutional rights. Hence, accession to the OP would supplement the present efforts of feminists to protect women from cultural violence. The decisions of the CEDAW Committee would provide jurisprudential ammunition which could be integrated through a platform of activism into the Indian domestic system. By repeatedly raising acts of violence to the CEDAW Committee, feminists can bring the discourse of women's rights towards constitutional doctrine.

The major argument against accession to the OP could be that it may impact on the sovereignty of India. However, the fact that India's compliance with the CEDAW through its Declaration is perfunctory and, at best, severely erodes its legitimacy in the community of states. Under the guise of protecting its religions from non-interference, the Indian government is violating a norm recognized as *jus cogens* in its relationships with other states. This delegitimizing move can be overcome by a positive and gendered diplomacy that recognizes the illegitimacy of India's Declaration, and voluntarily retracts it and

¹³³ Nussbaum, *supra* note 126 at 55.

¹³⁴ *Ibid.*, at 56.

¹³⁵ Jamie CASSELS, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 American Journal of Comparative Law 495 (1989).

¹³⁶ Avani Mehta SOOD, "Gender justice through Public Interest Litigation: Case Studies from India" (2008) 41 Vanderbilt Journal of Transnational Law 833 at 839.

supplements it by acceding to the OP. It is beyond the scope of this article to articulate the conditions of effectuating the OP in India, except by stating that it should be done by coordinating the Indian Supreme Court and other supreme courts in the South Asian Association for Regional Cooperation (SAARC) region with the CEDAW Committee. Such a move will bolster India's pioneering effort at gendered diplomacy in the international community. India's accession to the OP can serve as an important way of reconstituting the relationships between nation states on the basis of gender rather than Hobbesian anarchy. Hence, accession to the OP in no way derogates from India's sovereignty. On the contrary, it will enable India to emerge as a significant player on gendered politics in the international arena.

Hence, India has to seriously acknowledge the nature of its CEDAW Declaration and its role in indirectly causing violence against women. Its Declaration implicitly protects the cultural and religious attitudes that cause GBV. The Indian Constitution professes a commitment to being a secular state. Hence, a Declaration which protects the state from interference in cultural practices of GBV should be immediately retracted. Accession to the OP will provide an important venue to agitate on this issue. Accession to the OP is envisaged as yet another legal procedure whereby the domestic GBV jurisprudential mechanism can be coordinated with the international complaints mechanism. This will provide a mechanism for India to engage in gendered diplomacy on the world stage, and even take the lead in gendered diplomacy amongst nations in South Asia and Africa. Accession to the OP will permit India to demonstrate its serious commitment to the instruments of public international law. It will generate positive international sentiment on its commitment to resolving GBV. It will enable the formulation of an exclusive policy on GBV and demonstrate the complexities of combatting GBV to the international community. The international community does not often comprehend the difficulties that are generated from redressing GBV in a society such as India, which is riddled with cultural complexities. Accession to the OP will provide an important platform for India to agitate on these issues and communicate them to the international community. Therefore, accession to the OP is essential for India to emerge as a world player on the scene of international gendered diplomacy.

VI. Theoretical Implications

Scholars of norm effectuation within the discipline of political science have recognized that nations comply with norms through a three-stage causal cycle: the "instrumental adaptation" of human rights treaties by nation states; "processes of moral consciousness raising, argumentation, dialogue and persuasion"; and "processes of institutionalization and habitualization".¹³⁷ However, this article presents arguments to demonstrate that this causal order is problematic. Political science has not considered the dynamic mediation of norms in a specific and tangible international experience such as compliance with the CEDAW's due diligence obligation. The causal cycle above argues that norm effectuation takes place after treaty accession. However, this article argues that norm effectuation and treaty ratification could be a reciprocal causal chain. There is insufficient evidence to indicate that one is antecedent to the other. In India, accession to the OP to the CEDAW is essential to effectuate India's compliance with the due diligence obligation. Treaty accession causes normative effectuation as witnessed in the jurisprudence of the Indian Supreme Court. The illegality of India's Declaration to Article 5(a) of the

¹³⁷ Thomas RISSE and Kathryn SIKKINK, "The socialization of international human rights norms into domestic practices: introduction" in Thomas RISSE, Stephen C. ROPP, and Kathryn SIKKINK, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999), 5 at 66.

CEDAW can be substantively contested by using the effectuation procedures under the Indian Constitution. Accession to the OP will create the normative and jurisprudential leverage for the Indian feminist movement to carry forward the movement against harmful, cultural practices of GBV. While this may seem another ineffective legal endeavour, it holds the potential for a normative restructuring of the Indian consciousness against harmful majoritarian cultural practices of GBV. Hence, this article argues against norms that are epiphenomenal to state interests by demonstrating the material importance of public international law to gendered oppression. In India, the institutions of the state, like the judiciary, have incorporated the principles of the CEDAW in its constitution. This implies that norms are not epiphenomenal to the normative consciousness of the India psyche. They fundamentally alter perceptions, hence more instruments against GBV need to be promulgated at the international level.

Furthermore, the lack of a normative hierarchy between the right to freedom of religion and the right against GBV under the CEDAW reaffirms the position of those who claim that norms are usually epiphenomenal to state interests.¹³⁸ This places the central puzzle of the causes of compliance with the due diligence at the intersection of the nature of the relationship between public international law and international relations.¹³⁹ The approach of this article specifically draws upon the vibrant intersection between public international political science to fully present its arguments. International political science hardly matters to resolving the severe and intensive problems of human rights compliance. This article demonstrates that a precept of public international law – namely, the CEDAW’s due diligence obligation – is actually imminent to resolving the situation of gender-based oppression. It provides the normative arsenal to contest the superstructure of patriarchal cultural violence in India.

Sceptical international law scholars may question the relevance of a principle of international law to redress the endemic cultural patriarchy in India. However, significant feminist breakthroughs have come about through a restructuring of normative consciousness. India’s accession to the CEDAW has stimulated path-breaking feminist consciousness that juxtaposes the experiences of GBV at the local level with the dynamic international level. This development is something that is unaccounted for by major Western scholarship on CEDAW compliance.¹⁴⁰ Some Western scholars assume that the effect of the CEDAW on states’ compliance is only marginal.¹⁴¹ However, the nature of GBV in Indian society makes it imminent to enable India’s accession to the OP. The CEDAW has secured substantive diffusion into the normative jurisprudence and has been incorporated as part of the basic law of the land under Article 21 of the Indian Constitution. If this is so, then feminist agitation over accession to the OP will secure significant normative benefits. Scholars like Merry and Zwingel attribute a marginal and liminal effect to the CEDAW.¹⁴² Merry castigates the reference of culture by the CEDAW Committee as static, implying the irrelevance of the CEDAW to resolving the situation of GBV. Zwingel argues that there is variance with domestic contexts and international gender norms. Unless domestic norms reflect the global gender norm, compliance is not possible. This article argues that the cultural patterns of GBV in India give ground to reformulate these primarily Western propositions. The cultural patterns of violence in India give reasonable ground to state that India’s

¹³⁸ Sullivan, *supra* note 3.

¹³⁹ Francis A. BOYLE, “Irrelevance of International Law: The Schism between International Law and International Politics” (1980) 10 California Western International Law Journal 193.

¹⁴⁰ Zwingel, *supra* note 96.

¹⁴¹ Emilie M. HAFNER-BURTON and Kiyoteru TSUTSUI, “Human Rights in a Globalizing World: The Paradox of Empty Promises” (2005) 110 American Journal of Sociology 1373; Beth A. SIMMONS, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).

¹⁴² Merry, *supra* note 88; Zwingel, *supra* note 96.

Declaration to Article 5(a) of the CEDAW is in substantive derogation of the due diligence obligation. Accession to the OP is essential to contest the substantive derogation of India's compliance commitments. While it seems to be another ineffective legal procedure, it is an important way of enforcing India's due diligence obligations under the CEDAW.

VII. Conclusion

This article argues that the due diligence obligation under the CEDAW mandates the intervention of the Indian State into its cultural practices to secure the rights of women against violence.¹⁴³ This article also argues that the persistent cultural attitudes that perpetuate violence against women in India has reduced India's inconsistent Declaration to a "Reservation" under public international law. India's failure to fully realize this obligation was adduced from evidence showing cultural patriarchy in India. By examining the case for India to accede to the OP, the enforceability of India's due diligence obligation under the CEDAW by the ratification of another instrument was examined. Accession is important, especially when India's *de facto* reservation to the CEDAW can only be countered by accession to the OP.

Hence, this article examines the case for accession to the OP to effectuate the CEDAW's due diligence obligation in India. It is argued that the persistence of cultural patriarchy has led to violence against women and deprived them of their rights under the CEDAW. India's reluctance to modify its cultural practices converted its Declaration under Article 5(a) to a reservation under public international law. As the Indian feminist movement has been concerned with inducing the Indian government to intervene in its cultural practices, accession to the OP is examined as a possible step in this process.

In conclusion, it is submitted that the jurisprudence of the CEDAW Committee under the OP would supply the Indian judiciary with much needed feminist jurisprudence and slowly introduce the equality of women into normative constitutional discourse, eventually creating the momentum for the eradication of cultural patriarchy in Indian society.

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¹⁴³ Judith WYTENBACH, "Violence against Women, Cultural/Religious Traditions and the International Standard of Due Diligence" in Carin BENNINGER-BUDEL, ed., *Due Diligence and Its Application to Protect Women from Violence* (Brill, 2008), 223 at 226.

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