

Religion and gender-discriminatory customs that lead society towards female foeticide: A critical appraisal.

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Abstract: Are we following the religions in the true sense in which they were established? It seems not, rather the answer is also very complicated like the question itself. Religions were established to join each other and to keep peace and harmony in society, but we have blended the construction of religions with mischievous customs and practices, and taken the religions in the wrong direction. The customs that we are following today were not started for any immoral purpose and no religion was founded upon the base of immorality. No religious Scripture or Holy book guides us against morality, in fact, almost every religion teaches us similar lessons i.e., not to tell lies, not to steal, not to harm others etc. and these religious principles are embedded in our statute books in the face of different penal laws.

Gender discrimination is the worst outcome of these critical customs that lead society in the wrong direction and the right to life is the most affected fundamental right that was ignored under the shadow of religious freedom. As a consequence, society is rooted in a lot of serious crimes that are growing day by day. State, international institutes, national organizations, and various NGOs played a vital role in removing gender disparity from society. Still, there is a need to reform the social structure for maintaining peace and harmony in society.

Religion

“Religion is a social construct encompassing beliefs and practices which enable people, individually and collectively, to make some sense of the Great Questions of life and death.”¹

David V. Barrett, a British Philosopher

Religion is an organized collection of various customs, cultural systems, beliefs & faith in the existence of God and certain views that correlate the whole of humanity with nature.

¹ David V. Barrett, *The New Believers: Sects, 'Cults' and Alternative Religions*, 2001, p 25

Mostly, each religion has its separate existence, symbols, narratives, and historical scriptures based upon different stories, methods & beliefs to explain the meaning of life, death and recycling of life in this universe. These reasoned beliefs about nature, humanity and the essentials to live life leads to the development of ethics, morality, customs and various social & religious laws in our society. There are more than 4000 religions in the whole world having different customs, festivals, scriptures and beliefs. There is a huge difference in the prayer of different Gods and Goddesses, following their rituals and ceremonies, customs & lifestyle, people's interaction with each other and other social aspects.

“Religion is that belief which binds to the very spiritual nature of men to a supernatural being. It includes belief, worship, devotion, faith etc. and extends to the rituals also. Right to profess religion is the right of a person believing in a particular faith to practice it, preach it and profess it and it is civil in nature.”² Emile Durkheim explains religion and its importance in society very well. He wrote, “If religion has given birth to all that is essential in society, it is because the idea of society is the soul of religion.”³

In his early work, “The Division of Labour in Society”, he defines religion as “the set of beliefs and sentiments of every kind concerning men's links with a being or beings whose nature he regards as superior to his own”. Later on, he recognizes this definition as inadequate in concern to systems of morality, conduct and laws in society. In his last writing, “The Elementary Forms of Religious Life”, Durkheim analyzes religion in the simplest form.

Incorporation of religious customs into personal laws

The outcome of all the religions leads to the development of rights and duties of persons in their routine life. It leads to the development of a systematic way of life for people living under several religious denominations and following a mixture of different religions. People started living in a society and following a particular religion in initial times, felt that they were too much interconnected with their own as well as other religions, so they made some social rules and regulations to live peacefully. They adopt these rules as their way of life inspired by their belief in a particular religion. These rules were later on converted into

² *Most Rev. P.M.A. Metropolitan v. M. M. Marthoma*, AIR 1995 SC 2001 (2026)

³ Bellah, 1973, p. 191 [excerpt from *The Elementary Forms of the Religious Life*]

customs and thereafter laws. So, we can say that religion is directly connected and leads to the emergence of today's laws. Like Hinduism believes in the concept of Dharma, which later on develops as duties and rights of the citizens and is now enshrined in our Indian Constitution also. There are various social ties, contracts, and inter-connections of persons living in a society that pave the way for many customs and slowly becomes an inseparable part of life. Later on, these ties get religious sanctity under various religions and get legal sanctions as well.

The Manusmriti, also known as Manav-Dharma sastras or Laws of Manu, is believed to be the first ancient legal text and constitution among the many Dharma sastras of Hindus. In ancient India, the sages often wrote their ideas in manuscripts on how society should run. It is believed that the original form of Manusmriti was changed as many things written in the manuscript contradicted each other. It was one of the first Sanskrit texts to be translated into English in 1776, by British philologist Sir William Jones, and was used to construct the Hindu Law Code, for the East India Company administrated enclaves.

“I observe, refraining from killing any living beings.

I observe, refraining from taking what does the owner not give.

I observe, refraining from committing sexual misconduct.

I observe, refraining from telling lies.

I observe, refraining from taking any intoxicant or drug.”⁴

PANCHA-SILA, the path of Nirvana directed by Gautam Buddha, prohibits killing any living being, stealing anything, adultery, cheating and fraud, or taking any intoxicant or drugs. These five precepts referred to as 'PANCHA-SILA', are based on the principle of morality and equality converted into Buddhism customs and traditions later on and now embedded in our laws. The core teachings of Moses via the Ten Commandments also direct us to the path of morality and more or less, the teachings of Jesus Christ are also in the same parlance as Moses.

Guru Nanak Dev Ji, the first Sikh Guru is known for his social, spiritual, and political beliefs based on love, virtue, equality and fraternity. The teachings of Guru Nanak Dev Ji

⁴ Pancha-Sila

are inscribed in the Guru Granth Sahib as guiding principles for not just Sikhs but other religions and communities too. Guru Nanak Dev Ji's teachings help everyone to lead a more wholesome life. According to Guru Ji, kindness and compassion could positively influence and change the whole world. Guru Ji taught all of us a great lesson about inner strength. He said one should always raise their voice against the wrong. He always stood for the rights of women. In one of his earlier verses, he demanded an equal place for women in society by saying, "why disrespect the one who gives birth to the majestic kings of the world".

Codification of personal laws

As the whole society started transforming into a civilized one, people felt the need for civil laws to regulate the whole society in a justified way. The whole world was divided into different continents, different countries, different states and then different tribal areas and societies. Different countries develop their different civil laws applicable to them as per their needs, geographical areas, customs and social contracts. The basis of all these personal laws was ethics and morality. Moral principles guide all religions that set the standard for what is the right thing to do and what should be prohibited. More or less, all religions are based upon these ethical principles, although their preachers may agree or not with another religion and may their way to live life is different from another religion, the destination of all religions is almost the same i.e., 'to live a peaceful life in a justified manner without disturbing anybody else'. Morality must be read in a broader sense than religion as it is a similar genre to all religions. Morality and religion are not synonymous. Morality doesn't depend upon religion, whereas religion may depend upon morality. The five major and oldest world religions (Hinduism, Islam, Christianity, Buddhism and Judaism) have a sense of community in common. A sense of community unites the people which gives them a unique identity and they passed down a number of rituals and traditions from generation to generation.

Indian Constitution provides freedom of religion and saves the customary laws which are not inconsistent with the Constitutional provisions. As there are different religions, there are no uniform personal laws. Each religion has its own set of principles and way of regulating its customs. Hindu code was codified in 1955 & 1956 by which four different statutes came into force related to marriage, divorce, maintenance, guardianship and

succession. Islamic communities are regulated by Shariat Act passed in 1937. Laws related to the Parsi community are codified in Parsi Marriage and Divorce Act 1936.

Conflicting religious practices

Our society is a male dominating society, having a patriarchal character in deep roots. Followers of various religions are practicing a lot of customs as per their traditions. Due to unequal treatment of women and other gender-discriminatory causes, some of these customary practices prevailing in our society seem unconstitutional or morally wrong on their faces.

Several practices like sati, triple talaq, ex-communication, sunnat, nikah halala, and entry of women in temples and mosques were challenged in the courts from time to time. Out of these practices, some are declared an integral part of that religion while others are either under consideration or declared not essential for the existence of that religion, and in consequence, declared unconstitutional.

Customs in the Hindu religion related to last rites

The ceremonies of last rites are different among different personal laws. In the Hindu religion, only men are allowed to perform last rites. Although it is not prohibited in any Hindu scriptures except in some verses of Manusmriti, the custom of performing the last rites among Hindus is highly gendered biased leading to gender discrimination at a deeper level.

The Hindu religion is focused on reincarnation; a belief that when someone dies, the soul is reborn in a different form. Followers of the Hindu religion believe that though the physical body dies, their soul remains and continues to recycle till it settles upon its true nature. This could take several lifetimes, and with each other death, they attempt to manoeuvre nearer to 'Brahma', the Hindu God. In addition, they believe their soul's next incarnation can depend upon the actions throughout their previous life, this can be additionally referred to as 'Karma'.

After death, Hindus believe that the physical body serves no purpose, and therefore does not need to be preserved. They choose to cremate their loved ones as they believe it's the quickest way to release the soul and help with reincarnation. Historically, Hindu cremations would take place on the Ganges River, India, and the family would carry the casket to the

crematorium site. Nowadays, Hindus are cremated locally, and most funeral directors can accommodate the traditions and rituals of Hindu cremation.

Pind Daan and Shradh:

‘Pind Daan’ is an offering to the dead elders. It mainly consists of cooked rice mixed with black sesame seeds. Small dumplings of this mixture are offered to crows. These birds are believed to be the representatives of Yama (God of death) or the agents of the dead.

‘Shradh’ is a ritual that showcases one's unconditional dedication to his/her dead relatives. It is derived from two Sanskrit words - *Sat* (truth) and *Aadhar* (basis). Therefore, it refers to the act of offering sincere prayers to those who have departed. Moreover, it means an offering made with utmost *Shraddha* or devotion. The 16 days of ‘Pitru Paksha’ are ideal for penance, meditation, asking for forgiveness from the dead relatives, performing *Tarpanam* and *Shradh* and offering the *Pind Daan*. Therefore, one must maintain celibacy and lead a life with utmost simplicity during these 16 days. Consumption of onion, garlic and meat is strictly prohibited.

During *Pitru Paksha*, *Tarpan* and *Shradh karma* are performed for the well-being of the souls of the deceased family member. Generally, the ritual is performed by the eldest or the youngest son. But in their absence, other household members are allowed to perform *Tarpan* to their ancestors.

However, observing such rituals requires precision and discipline. As per the holy Hindu scriptures, there are definite rules about who can and who cannot perform the rituals of *Tarpan*, *Pinddaan* and *Shradh karma*.

These are the rules:

- As per the Hindu scriptures, the eldest son holds the right to perform *Shradh karma* with *Tarpan* or *Pinddaan* to the ancestors.
- If the son is married, he can perform *Shradh* with his wife.
- If the eldest son is not alive, the younger son is allowed to perform *Pinddaan*, *Tarpan* and *Shradh karma*.

- In the absence of the son, the grandson performs *Shradh karma*.
- If one does not have a son, siblings are supposed to perform *Shradh karma*.
- If the deceased person only has daughters, the daughter's son has the right to perform *Shradh karma*.

Significance of Pinddaan in Hindu religion:

To bring salvation to departed souls, Pinddaan is a mandatory thing for all Hindus and Hinduism followers. It is believed that no work can be successfully performed without the blessing of ancestors and doing Pind Daan brings the blessings of the forefathers. By performing the rituals as per ancient texts and paying homage to the deceased ancestors, the dead soul attains moksha (salvation). The performing of Pind Daan as per the specific rituals at Gaya, Haridwar, Badrinath, Kurukshetra, and Allahabad is considered auspicious. Gaya being on the top of the list has much significance when it comes to Pind Daan. The soul could be freed from the agonies of hell and sent to heaven by performing Gaya-Shraddha or Pind Daan in Gaya. As per mythological scriptures, Lord Rama offered Pind Daan to his father Dasharatha at this place. It is believed that Lord Rama belonged to Treta Yuga. This yuga covered 12,96,000 mortal years. After Treta, came Dwapar yuga covering 8,64,000 mortal years. This is the Kali-yuga. This period is to cover 4,32,000 mortal years. In such a situation Rama came to Gaya for offering to his deceased father more than 12 lakhs years ago. And the Pind Daan in Gaya practice for the salvation of a soul was in vogue for a long and still continues to be an integral part of Hindu mythology. It is believed that this place has been blessed by purification powers. Hindus traditionally come here to perform Pind Daan to honour their parents or ancestors. Some people also come here to perform the last rites. By doing so, they help their family members to attain Moksha. It is believed that if any person departed from the Earth, his soul is wandering and they did not get peace until any family member don't perform Gaya Shraddha or Pind Daan for him. It is also believed that if any person sacrifices his life by any means, then he or she first of all enters the Prait yoni then enters Pitar yoni and after doing Pind Daan or Gaya Shraddha they got Moksha under the foot of Lord Vishnu in Gaya.

Custom leading to gender injustice:

Traditional Hindu followers believe that only a son can perform the last rites of his father and this is one of the several ways to get moksha. These rules are gender discriminatory and the root cause of the declining sex ratio, which consequentially leads to female-foeticide. In 2009, an unprecedented incident happened in Siddhpur, a town of Gujrat state, in which 37 years old unmarried woman named 'Hetal Modi' challenged this male prerogative and has become the news everywhere. Hetal insisted on the last rites of her father but "there were a lot of Brahmins and even local families who warned Hetal that she would be doing a disservice to my father by offering the Pind-Daan as the ritual performed by a daughter would do no good to his soul. Hetal was insistent that if the love of his daughter did not touch his soul, what else would?"⁵

After this incident, priests at Siddhpur said that more women are coming forward now to light the funeral pyre of their parents, but Hetal has been the only one to offer Pind Daan. No girl before her or after her has offered Pind Daan. But times are changing and society is acknowledging the role of a daughter. Jigna Mehta, a social activist working against the female foeticide in north Gujrat, said that "nowadays society had started realizing that daughters and sons are equal, any child who loves will rest his or her parent's soul in peace and not just sons".

Moreover, after the amendment of the 2005 Hindu Laws, daughters are treated equally to sons to get a share in their parents' property. This amendment to Hindu laws already had initiated a step ahead to remove gender discrimination, but still, there are a lot of things that must be changed to provide equal status and respect to women in society.

Effect of gender discriminatory customs in society

Due to the above-discussed gender discriminatory religious customs and the construction of a patriarchal form of society, people got engaged in illegal and criminal activities. These customs resulted in practice of a dowry system, sexual harassment of women in the workplace, acid attacks, honour killings and female foeticide and these serious crimes have hijacked society in such trouble that seems totally impossible to fix today. Disparity with women is increased in such a way that people didn't want to give birth to a girl child in

⁵ Source: <https://timesofindia.indiatimes.com/city/ahmedabad/woman-performs-pind-daan-for-father/articleshow/5007022.cms> visited on 20.12.2021

their families and society is indulged in the practice of female foeticide to restrict the birth of girl children. The status of women in society is derogatory both ways i.e., after birth and before birth. The discrimination against women on several platforms in society is bad, but the killing of the fetus in the womb is too much and it is intolerable. The irony is that not only illiterate persons but literate persons are also involved in female foeticide.

Fall in sex-ratio

Due to males dominating cultural society, women's discriminatory customs and the practice of female foeticide, the sex ratio had declined that had created an imbalance in the proportion of the number of females in comparison to males. In 2011-13, It was revealed through a population census that the sex ratio of India was 909 females per 1000 of males and in 2015 -17, it has skewed downwards to 896 females per 1000 of males. The survey conducted by Sample Registration System showed that Chhattisgarh has the highest sex ratio at 961, while Haryana has recorded the lowest sex ratio at 831, which compels us to think about the issue seriously.

Need for social reformation

Some social reforms make it possible to remove the evils of the society like 'Sati Pratha' & 'Child marriage practices' etc. A social activist named "Raja Ram Mohan Roy" was born in 1772 and he plays a pivotal role to eradicate social evils like Sati and Child marriage prevailing at that time in society. He founded the "Brahmo Sabha" which was a social reform & religious movement in Indian history. But it takes hundreds of years to get the sympathy of the people and authenticity from society. After struggling for seven decades, our society is still entangled in many such practices which should be tested through the scanner of the Constitution, because one part of society wants to abolish all such practices which are derogatory to some communities or inhumane in nature but the followers of that religion i.e. the other part of the society, claims that these practices are integral and essential part of their religion hence should be protected under constitutional freedom given in Art – 25 & 26. Now the question before the society is who will resolve these sensitive issues and how? Especially when both the state organs i.e., legislation and judiciary remained failed to tackle and resolve these critical issues. There is a need to look deep inside the matter, to resolve these issues with the concurrence of society as it is the main hindrance in the development of any nation. Without resolving our social issues, our Legislation cannot

make smooth and uniform laws, which is the demand of society now. P. B. Sawant, J. has written in golden words, “Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. ‘But religious practices violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression.’ Therefore, a unified code is imperative both for the protection of the oppressed and the promotion of national unity and solidarity. But the first step should be to rationalize the personal law of the minorities for the purpose of developing religious and cultural amity.”⁶ Religious endowments want full freedom to perform all such practices, which they are running under the sacred faith of their religion & for the satisfaction of their inner soul, and on the other hand, State wants to impose restrictions upon those practices which are inhumane in nature or seems to be unconstitutional, when seen by removing the religious mask and spectacles. There is a direct clash between these two for the continuity of religious practices and to save the fundamental rights of people and there is a need to understand various legal theories which help in the evolution of laws in society. Theory of Natural Law, Historical School of Law, Analytical School of Law, Sociological School of Law and Analytical School of Law helps us to better understand these concepts. “Aristotle, Socrates, Plato & Henry Drummond”⁷ favours the natural law theory whereas “Roscoe Pound” works for “Sociological School”⁸ and there is a wide difference between these theories for cycling of our sociological structure.

International approach to human rights

According to the Universal Declaration of Human Rights, “Everybody has the right to freedom of thought, faith, conscience and religion; this right includes freedom to change his religion or belief...”⁹. Article-18(1) of the International Covenant on Civil and Political Rights also supports the universally accepted version of “freedom to adopt, change or renounce a religion or belief”. As per UN Human Rights, “the freedom of religion includes the freedom to choose a religion or belief, the right to replace one’s current religion or belief

⁶ *In re: Sanjiv Datta, Dy. Secy., Ministry of Information & Broadcasting*, (1995) 3 SCC 619, para 20

⁷ Henry Drummond, *Natural Law in the Spiritual World* (Wildside Press, United States, 2012).

⁸ Roscoe Pound, *Interpretations of Legal History* (Harvard University Press, Cambridge, 1946).

⁹ Universal Declaration of Human Rights 1948 (UDHR), Article 18

with another and it also includes to adopt atheistic views, as well as the right to retain one's religion or belief." The freedom of religion, conscience or belief is also guided by the relevant articles of the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the elimination of All Forms of Racial Discrimination against Women, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention relating to the Status of Refugees, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In addition, the freedom of religion is also guided by relevant resolutions of the General Assembly and other organs of the United Nations, the Human Rights Council, as well as relevant jurisprudence of the treaty bodies and provisions of international humanitarian law. These Covenants and guidelines also provide that no person would be enforced to adopt, change or renounce any religion or belief of his choice and no one shall be subject to coercion that would impair his freedom to have or to adopt a religion or belief of his choice.

The freedom of religion is taken in a much broader sense by Human Rights Committee and they have declared that it includes the freedom to manifest religion or belief in worship, observance, practice and teachings which covers a broad range of acts in its affairs. The concept of practicing and worshipping a religion extends to acts of ritual ceremonies, various other practices integral to such ceremonies, buildings and places of worship, the display of objects and symbols, method of performing the rituals, observance of holidays and days of rest. The religious concept also covers customs, dietary regulations, the distinctive wearing of clothes, participation in various ceremonies and rituals which are associated with certain stages of life, use of distinctive language, freedom to choose their religious leaders, priests and teachers, freedom to prepare, publish and distribute religious texts or books, freedom to establish and maintain religious schools and institutions, freedom to organize seminars etc.

Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR,1950)¹⁰ has similar provisions for freedom of religion and it describes, "everybody has right to profess their religion including the right to change his religion and to manifest his belief or religion for practice and observance, worshipping or teaching.

¹⁰ https://www.echr.coe.int/documents/convention_eng.pdf visited on 22.08.2021

In 1975, 35 European countries mutually agreed to sign an agreement named Helsinki Accords, also known as The Helsinki Final Act or Helsinki Declaration enacted for the purpose of improving the political relations between the Soviet Bloc i.e., the group of socialist states in Central and Eastern Europe, Southeast Asia and East Asia under the influence of the ideology of Soviet Union. This Accord contains ten principles and the 7th principle was enacted for the purpose of providing respect to fundamental freedoms and human rights including the freedom of conscience, thought, belief and religion. Although this Accord is not enforceable, as it was enacted by 35 big European countries, it leaves the marks of great impact upon the whole humanity of all nations. Another reason for the importance of this Accord is enlarging the scope of human rights which are not restricted to any religion or religious group only but include the individual belief or thought of the person himself. 7th Principle of the said Accord describes that all the participating states shall respect all fundamental freedoms and human rights including the freedom of conscience, thought, belief and religion and all the states shall not make any discrimination specifically with respect to sex, race, language or religion.

UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 are more advanced and elaborative in describing religious freedom and human rights and it imposes some limitations upon one's right to manifest his or her own religion or belief. Under this Declaration, prescribed religious freedom is not absolute and is subject to various laws which are necessary to protect public safety or order, health or morals or fundamental rights and freedoms.

Role of international institutes to remove discrimination on the basis of religion, belief or gender

Article 26 of ICCPR¹¹ describes that all persons are equal before the law and every person is entitled without any discrimination to the equal protection of the law. This article further illustrates that the law shall prohibit any kind of discrimination on any ground such as religion and it guarantees to every person equal and effective protection against any such discrimination. Article 27 of the same covenant describes that any person, belonging to any religious, ethnic or linguistic minority group, shall not be denied the right to enjoy their own culture, to profess and practice their own religion and to use their own language within their community and with the other members of their group. Article 2(1) of the Declaration

¹¹ International Covenant on Civil and Political Rights, 1966

of the General Assembly states that no one shall be subject to discrimination by any state, institution, person or group of persons on the ground of religion or belief. Article 3 of this declaration explains that “discrimination between human beings on the grounds of religion or belief is derogatory to the human dignity and contrary to the principles of the Charter of the United Nations. Any such discrimination must be condemned as a violation of fundamental human rights proclaimed in the Universal Declaration of Human Rights and enunciated in International Covenants on Human Rights and it causes disruption to friendly and peaceful relations between nations”. Article 30 of CRC i.e., ‘The Convention on the Rights of the Child’ describes that “a child belonging to a minority group or related to indigenous groups shall not be denied the right to profess and practice his or her own religion, to enjoy his or her own culture or to use his or her own distinctive language”. Article 18(4) of ICCPR illustrates the rights of parents in relation to freedom of religion or belief. By this Article, public schools cannot impart education of a particular religion and are prohibited to promote a particular religious belief unless the provisions are non-discriminatory and accommodate the wishes or consent of parents and guardians.

Further, these Covenants, Accords, Acts, and Declarations elaborate and make an obligation upon the states to enact the laws which provide proper remedies to those persons whose fundamental rights or freedoms have been violated or impaired by any discrimination based on religion, race, sex, language or caste.

Conclusion & Suggestions

In regards to resolving the issue of gender-discriminatory customs in society and making the culture gender-neutral, we need to give equal treatment to women at every footstep compared to men. Furthermore, we should respect the women, maintain their dignity and construct a women-friendly environment in work offices. The state is providing free education to girl children up to matriculation level, it should be given up to graduation level. Punjab state has initiated a scheme under the name of “Beti Bachao, Beti Pado” to encourage girls’ education. Under the provisions of the Right to Education Act 2009, the Indian parliament has also made it mandatory to provide compulsory education to all children aged between 6 to 14 years. We should initiate more such schemes to remove gender disparity from society. Giving equal opportunities to women in jobs is another way to raise the standard of living for women. In our legislation and judiciary, the representation

of women is too much less. Until we provide the mechanism for equal representation of women in state institutes governing the whole country, it seems impossible to resolve these issues. Female foeticide is a serious crime. By spreading awareness in society through seminars, academic conferences and initiatives of social institutions, we can reduce the ratio of these crimes.