Chapter 1

INTRODUCTION
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Problem

"Every child comes into this world with the message that God is not yet disappointed with man”, said the great Noble Laureate Rabindranath Tagore. But alas! the girl child. She is hated even before her birth. Nay, she is disliked even when only her idea comes to the mind. So the taboo is set for her in this land of Laxmi and Durga. On birth she is either killed or exploited. We do not expect the question, who a girl child is. Will it be asked by those who have lost the sense of making a difference between a woman and an innocent girl? Yet to speak in legal terms for purposes of this study we take a girl as a girl child who has not exceeded the age of eighteen years.

The girl child in India is facing many torments in the form of sexual abuse, foeticide, infanticide and the like. The practice of female foeticide is really alarming in India. The government has passed a law banning the abortion of female foetuses but, in reality, the practice is still prevalent. And once a girl child is born many parents prefer to do away with her soon after her birth. Discrimination in the choice of a child eventually results in female infanticide. This accounts for nearly 3 million deaths in the country every year. This practice is very common in many parts of the country.

The girl’s need for education, food, love, warmth and care is underestimated and many parents consider it a sheer waste of money. A girl is forced to remain indoors to learn the household chores and this, the parents think, is what would help her in her future life. At a very tender age a girl child becomes a surrogate mother to her younger brothers and sisters whom she has to look after. She is eventually, denied her own freedom and innocence. This sort of discrimination takes place, perhaps, because in the Indian society parents tend to prefer a son because of vague reasons like their entry into
heaven being assured by the birth of a son. Sons are considered an asset whereas daughters a liability. This obviously leads to families investing more on sons than on their daughters. In an average Indian family things like food and dresses are very scarce for women and the girl child. A United Nations Development Programme survey reveals that parents in India spend twice as much on medication for their sons as compared to that for their daughters. Such an attitude aggravates the disparity between the sexes.

The irony of the whole scenario is that all this takes place in a nation where womenfolk are extolled. Although some scriptures say that “where women are respected, there dwells God”, the fact is that the girl child is considered a burden on society. The very concept of equality among the sexes and emancipation of women is still a dream. It is noteworthy that this is not the case only in India but in many other parts of the world where women have to fight for their basic rights.

The U.N. Conference on women held in Beijing in September 1995 was a landmark because – its emphasis was on bringing to light the fact that discrimination against women begins at birth. For the first time there was an official global recognition of the right of the girl child and the need for real emancipation of women through the equitable distribution of the world’s resources. The then first lady of United States of America, Ms. Hillary Clinton struck the right word when she said in her speech, “If there is one message that echoes forth from this conference, it is that human rights are women rights and women rights are human rights”.

But contrary to Hillary’s statement one witnesses throughout the world a gross violation of the rights of the girl child. This is especially true for India where a woman has to bear the cross from cradle to her grave. She has to face lots of hardships for no fault of her own. Perhaps her only crime seems to be her gender. A glance at the newspapers of any day would bring to light this fact that sexual abuse, molestation, child – prostitution, rape, dowry deaths, eve-teasing, stalking, honor killings and abduction abound in our Indian society.
The country has gained a lot in terms of technological advancement and material comforts but it has still not learnt the basic art of treating their women with some amount of dignity and respect.

Perhaps, the greatest irony of modern age is the fact that with the increase in literacy there has been a steady deterioration of moral values in almost every section of society. There is no dearth of social and constitutional laws which forbid the exploitation of women but this has not served as a deterrent. Killing of unborn girls, selling them for prostitution, devadasi system and dowry deaths are not unheard of. All this is a clear indication of the fact that all efforts taken by the government in this regard have not contributed towards improving the standard of the girl child.

Thus in our society the girl child is facing the brunt of violence both physically and psychologically and the very concept of gender equality seems a distant dream. The most horrifying crime against a girl is threat of sexual assault. It is a psychological death for a girl.

Are not all children alike, equal in dignity and status under the law? Why should there be special mention of right of the girl child? Are their rights assigned on the basis of sex and if so, how are they justified in an egalitarian society? These and other related questions, which we share with Prof. N.R. Madhava Menon, need to be answered before one can identify and analyze the special rights, if any, available only to the girl child.

Discrimination on the basis of sex is a structural factor of all ancient societies. Depending on economic and social progress, different societies have assumed different degrees of equality of status between the male and female members. The legal system retained the discriminatory content at different levels till recently in most societies. This necessitated preferential legal provisions in favour of women and girls in order to achieve egalitarian and democratic aspiration of people.
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The status of the girl child anticipates the status of women in society. How come the girl child is often denied educational opportunities in our average Indian homes? Why should she alone be put to household chores and maintained on a starvation diet? Does she need only lesser care and attention as compared to her brothers? Is she to pay such a heavy price in life because of irrational customs and discriminatory value systems? Why should sexual exploitation of girls continue to exist in the name of religion and culture when the Constitution promises her equal dignity and status? The girl child to be free from undernourishment, illiteracy, exploitative labour and undeserved neglect. When social attitude and practices militate against such inequality in status and of opportunity, law must give preferential right to the girl child to remedy such social disabilities and discriminatory practices.

Many more questions need a consideration in this regard. If abortions are carried out mainly to prevent the birth of girls, does it not warrant special legal provision to prevent such discrimination? If amniocentesis tests are supporting such an action, should they not be regulated by law? If girls are deliberately kept undernourished and illiterate by parents and guardians, should not the law intervene to redeem the equality principle in the accessing of health, education and care? Should not law stipulate special rights for girls to achieve the desired balance in social behaviour? What special protection is needed to ensure dignity of girls at work? How can the ill effects of early motherhood be mitigated by law? What mechanism and arrangements can the legal order develop in order to ensure that the protection to the girl child does not remain on paper only but will get translated into action?

To understand the position of the girl child in India and America, it is necessary to know the features of anti-female menace in these countries. There is a widespread vie among scholars that the best way to judge a nation’s progress is to find out how the nation holds the status of women. Indeed, many writers have equated cultural levels with the types of treatment meted out to
women and have found that there is a strong correlation between law and status of women and low cultural levels of society.\(^1\)

The role of a woman in various walks of life has contributed to the evolution of value which has counted for what may be described as all round progress. Her status is the measuring rod in assessing the standard of culture of any age.\(^2\)

Even today the woman in general and the girl child in particular from the cradle to grave faces all kind of discrimination, harassment, oppression, violence, within the family, at the work places and in the society.

In India, the above account of facts shows, those girls are socialized from their tender age to be dependent on males. The patriarchal system in India made women to live at the mercy of men, who exercise unlimited power over them. In order to ameliorate the condition of women in India Legislature enacted the large volume of enactments and many of these legislations were enacted in colonial period and later on in Independent India.

In spite of having so many enactments dealing with women and judgments of the Supreme Court protecting women, poor condition of women has not been improved and she still faces all types of atrocities and legislature and judiciary some what fails to provide respect to women in society. It is in this perspective that the plight of the girl child and the relevant measures of redressal need to be looked into.

As in America, most of the people would assume that the legal status of women in the United States today is so well established that it is not subject to significant challenges, but American women’s legal status is surprisingly fragile, as its foundation rests on a handful of cases dating from the mid-1960s and a few federal statutes. How well women fare in securing their rights to

\(^1\) D.N. Majumdar; *Races and Cultures of India*, Asia Publishing House, Bombay (1961), p. 251
\(^2\) S. Sengupta; *Women in Indian Folklore*, Indian Publications, Calcutta, (1969), p 6
personal autonomy, equality in the workplace, and more equitable representation in the political process will depend on their willingness to meet persistent social, economic, and political challenges.

The status of women in U.S. society is undergoing tremendous change. In recent years, issues relating to a woman's right to control her reproductive process, affirmative action in the public and private sectors, and equal access to educational opportunities have dominated the public debate. It is clear that legal issues concerning the status of American women – in their personal lives, at school, in the workplace, and at the ballot box – will continue to have a significant impact on women's ability to thrive in the emerging global economy.³

When the twentieth century dawned, the status of women was defined by their role in the family, lack of access to education and work, and complete exclusion from the political process. Societal expectations of a proper middle class woman included marriage, homemaking, and child rearing. Only volunteer activities were permissible outside the home, if family circumstances allowed. For women who were poor, members of minority groups, or living on farms, the roles were somewhat different. These women were expected to work in the fields or in menial jobs under horrendous conditions, while remaining fully responsible for home and children.

Under the common law, women lost their economic independence on marriage and were considered subject to the control and discipline of their husbands, the masters of the household. The concept of "unity of the spouses" regarded husband and wife as one person (the husband), with the married woman loosing any semblance of a separate legal identity.⁴ The husband provided financial support in exchange for the wife's sexual and social

companionship and her domestic service. If a husband physically abused his wife, she had no right to charge him with assault or rape, under the theory that once a woman consented to marriage, with its reciprocal duties, there could be no rape, since rape was defined a sex without a woman's consent.5

As a general rule, most state courts refused to intervene in domestic disputes because they did not want to violate the doctrine of “family privacy.” Such intervention occurred only if the couple had separated or the marriage had broken down. A husband who refused to provide financial support for his wife’s personal needs generally did not face court sanction. Only if a husband refused to pay a third party creditor for household “necessaries” would he face the prospect of a court order. But only a creditor could enforce a case under the necessities doctrine, and most creditors refused to extend credit to married women.6 A woman’s inability to obtain credit in her own name (by law or social practice she had to adopt her husband’s name after marriage) was another reflection of the dependent nature of women’s roles within marriage. Divorces were difficult to obtain and by no means were automatically granted.7

To highlight further the nuances of discrimination scenario in America we may have a look on some relevant aspects of legislative process and judicial decisions. In recent years, the topic of sex discrimination has become a major focus of public attention. This growing interest can be traced in large part to the October 1991 Senate confirmation hearings of the then Supreme Court Justice Nominee Clarence Thomas. The nominee had been accused of sexually harassing Anita Hill, a lawyer who had worked for him at the Department of Education and later at the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing antidiscrimination laws.

UN Convention on the Rights of the Child prohibits discrimination on the basis of sex; girls should be given the same opportunities as boys. Further,

5 Goldstein, Leslie Friedman, Contemporary Cases in Women’s Rights, University of Wisconsin Press, Madison 1994
6 Supra note 27
when the authorities of a state take decisions which affect children, the best interests of children must be primary consideration. The principle relates to decisions by courts of law, legislative bodies, and both public and private social-welfare institutes.

The Universal Declaration of Human Rights, 1948 opens with an assertion of the equal inalienable rights of all members of the human family to inherent dignity and the recognition of the aspiration of the common people for a world that is free from experiences of barbarous acts which have outraged the conscience of humankind.  

In USA, foetus is a “person” within the languages and meaning of the “due process clause” of the Fourteenth Amendment to the United States Constitution. Like Indian Constitution (Art. 21-Right to life), there is, however, no explicit recognition. In *Rosen La. State Board of Medical Examiners*, the court announced that embryonic and foetal life might be protected by the State from destruction by the mother. In protecting the rights of the foetus to survive, on the basis of equality with human beings generally, the state is not violating the rights of the mother.

The practice of sex-selective abortion to permit parents to destroy unwanted female foetuses has become so widespread in the modern world that it is disfiguring the profile of entire countries--transforming (and indeed deforming) the whole human species.

Even in the United States, the boy-girl sex ratio at birth for Asian-Americans is now several unnatural percentage points above the national average. So sex-selective abortion is taking place under America’s nose. Looking at data from the 2000 U.S Census, researchers noticed a strange phenomenon. The U.S.-born children of Chinese, Korean, and Asian Indian

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9 380 F. Supp. 1217 (ED La 1970). In *Abele v Markle* (1972), the court, however, invalidated a statute protecting human life from the moment of conception by failing to find a compelling State interest in it, reasoning on the basis of the mother’s right to privacy.
parents tended to be male. The researchers, Douglas Almond and Lena Edlund, called this "son-biased sex ratios."\textsuperscript{10}

In the United States and a few other prosperous, technologically advanced nations, methods of sex selection that are less intrusive or more reliable than older practices are now coming into use. Unlike prenatal testing, these procedures generally are applied either before an embryo is implanted in a woman’s body, or before an egg is fertilized. They do not require aborting a fetus of the “wrong” sex.

These pre-pregnancy sex selection methods are being rapidly commercialized — not, as before, with medical claims, but as a means of satisfying parental desires. For the assisted reproduction industry, social sex selection may be a business path toward a vastly expanded market. People who have no infertility or medical problems, but who can afford expensive out-of-pocket procedures, are an enticing new target.

The new technologies of sex selection (and, perhaps, their potential profits) have prompted some bioethicists to argue in favor of allowing parents to choose their offspring’s sex. As in past debates on other assisted reproductive procedures, they frame their advocacy in terms of “choice,” “liberty,” and “rights.” John Robertson, a lawyer and bioethicist close to the fertility industry, is one of the leading proponents of this approach.

There are also large numbers of South Asians living in European and North American countries, and sex selection ads in \textit{India Abroad} and the North American edition of \textit{Indian Express} have specifically targeted them.\textsuperscript{11} South Asian feminists in these communities fear that sex selection could take new hold among immigrants who retain a preference for sons. They decry the numerous ways it reinforces and exacerbates misogyny, including violence against women who fail to give birth to boys. If these practices are

\textsuperscript{10}http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/04/06/choosing_to_eliminate_unwanted_daughters/

unacceptable — indeed, often illegal — in South Asia (and elsewhere), should they be allowed among Asian communities in the West?

One of the latest high-tech sex selection methods to appear in the U.S. is a sperm sorting technique which is marketed as a way to achieve "family balancing" or "family completion." Demographers and women's rights groups are concerned that an increased acceptance of gender selection in the U.S. will serve to exacerbate the problem in countries where "son preference" prevails.

Scientific development and technological advancements are expected to be pursued by man for general human good, but unfortunately in present times some specific technological know-how is leading to greater abuse on humanity. One such case is the sex determination through scientific methods resulting in female foeticide. This is commonly known as sex-selection.

Sex ratio is an important social indicator to measure the extent of equity between the male and female members of society at a given point of time. India is one of the few countries in the world where men outnumber women. According to the Census 2001, sex ratio in India is lowest amongst the ten most populous countries in the world, viz. China, Bangladesh, Indonesia, Nigeria, Japan, Brazil, USA, Russia and Pakistan.\(^{12}\)

In India the girl child is treated as a liability, a curse. Because of our socio-economic conditions, she always suffers, sometimes even when she is in her mother's womb. Due to gender bias she is treated as an inferior being. Economic constraints always create a hurdle for the girl child as well as for her parents. They have to pay the "groom price" for her daughter. So in India majority of the people do not like to have a girl child. Alarming percentage of our society goes to abort the female foetus or sometimes to kill their baby girl within a short period of her birth. In the 61\(^{st}\) years of Independence still the right to life of the girl child is not protected. How can we claim to be

independent, civilized and honouring the right to life of a girl child guaranteed under Article-21 of the Indian Constitution!

The abuse of the girl child has been a common phenomenon in Indian society. Family is the first institution where most of the girls first experience physical assault, violence and hatred. The parents and other members of the society assault girl children because they know that chances of being prosecuted are nil. She is persecuted as a child labour, a child bride and as a child widow. She is ‘dammed’ before the word go. She is a burden, a curse, and a liability. She is used, abused, misused, married and murdered. Sure, we do have laws but she is guilty of a ‘crime’ – a crime undefined in the Indian Penal Code – the crime of being born as a girl in India.\(^\text{13}\)

Gender bias and deep rooted prejudice and discrimination against the girl child and preference for male children have led to female foeticide and female infanticide.

Even if a girl child is allowed to be born, discrimination and gender bias are evident from day one. She is denied adequate nourishment and health care as given to male siblings. In India females receive only 88 percent of the required nutrition intake compared to boys.\(^\text{14}\) Therefore, the percentage of undernourished girls and female mortality’s much higher than that of boys. The higher mortality rate in respect of female children as compared to male children is attributed not only to the lack of nutritious food and inadequate medical care but also to the premature withdrawal of medical attention. A girl is also given less amount of breast-feeding and sometimes even denied non-vegetarian food. As a result girls grow up into adulthood weak and undernourished. After marriage, they give birth to underweight babies and most of them being denied post natal care remain weak and frail throughout their lives, prone to diseases and early death. There are cases of mothers who dare not ensure the survival of their girl children given the fact that the family will eventually have to pay if

\(^\text{13}\) A. Bajpai; “Rights of the Girl Child”, Rights of the Child, Published by NLSIU, Banglore, p.118
\(^\text{14}\) The Hindustan Times, July, 23, 1997
the girl grows up and marries, apart from the fact the society very rarely cares for its women folk. Therefore, the death of a girl is an event; the loss of a son is a disaster. Similarly there is gender bias against a girl’s education. There is a huge gap between the participation rates of boys and girls in elementary education. Gender disparity, particularly in rural areas, reflect the discriminatory social attitude with respect to the girl child. Statistic show that nearly one third of girls who enroll for formal education in class I, drop out before reaching class II. In non-formal education centres, girls form only one third of the total enrollment. This is because girls are burdened with domestic responsibilities from an early age and the parents also feel that as pending money on a girl’s education is a wasteful expenditure when she cannot bring monetary benefit in return, as eventually she will have to be married off.

Everyone has heard stories about predators lurking online, searching for young children on whom to prey. The sorry truth is that the problem is growing increasingly severe. Fingers are pointing in every direction; no one really knows where to place the blame.

The Choice of Topic

Having been a student of human rights law in India and abroad, I have great interest in issues related to human rights. Looking from that perspective, gender discrimination is the foremost problem for India. This has been the biggest obstruction to modernization of the country resulting in the gray areas, silent spaces and wants in achieving equality in a land of hierarchy. Therefore, this topic was selected for research. Comparative study with a developed country can definitely be fruitful in identifying the causes of concern and solutions to the problems.

The Need for Study

In view of the above description of realities there is a need for having a serious study of the whole scenario, to identify the main issues and find out solutions to the problems. There are certain studies on Indian scenario and separately on American position, but there is need for a comparative view of
the position. This is more important from Indian point of view, because India can benefit from the American experiences, who have been battling for the right position of the women for long now and seems to have achieved certain mileage.

Hypothesis

The hypothesis and research variables of the present research work has been premised on the following formulation:

1. The crisis faced by the girl child is prevalent because of the male chauvinistic tendencies and patriarchal mindset of the Indian people.
2. Some religious quarters have created some beliefs and norms quite adverse to the equitable position of the girl child which is very difficult to crack.
3. Modernization forces are not able to advance a value based movement to overtake the traditions and to prevent degradation of values.
4. There is lack of experience and mechanism in dealing with the problem of child abuse with new dimensions.
5. The problem enhanced due to technical support.

Objectives and Scope of the Study

The present research study tends to achieve the following objectives and puts forward an agenda for academicians, policy makers and highest legislative establishment to incorporate thereof in their pursuit for making available gender justice to the children of lesser God, i.e. girl child:

1. The study is an effort to understand the problem of the girl child, of course with emotional touch as is generally done, but with due scientific methods to find out its real roots.
2. The causes of the problem would be examined in a comparative perspective.
3. Due focus will be put on the technological aspect which has multiplied the problem manifold.
4. Blending of ethics and law is sought to make implementation of laws more effective.
5. The efforts made so far will be given another look to find out measures for improving the existing situation. The study would be confined to India and the US only.

**Methodology**

This research work is based on doctrinal methodologies and relied on primary and secondary sources. Primary sources include-

1. Statutory enactments;
2. Judicial pronouncements;
3. Reports

Secondary sources include -

1. Official documents
2. Books and other published and unpublished works.

**Chapterisation**

The first chapter has been titled as *Introduction* whereunder the entire research study with its collaterals has been prefaced. In order to avoid abruptness the Chapter of the research deals with statement of problem, the choice of topic, the need for present study, hypothesis, objectives and scope of the study, and research methodology.

The *Second Chapter* of the research documents the historical background of the discrimination against women in general and the girl child in particular, in India and US. The orientalists have always been very vehement in upholding the place of women in the Indian society whereas occidentalists have not lagged behind. However, history bears the testimony of the fact that women and girl child have been decimated to the non-existent level in terms of their soci-economic, lego-political and geo-cultural identity in India. On the other hand they waddled through the ebbs and tides of discrimination in the hierarchy of human existence.
The **Third Chapter** deals with the menace of foeticide and laws and policies related to the issue. The chapter discusses in detail the problem of foeticide, legal status of the unborn child, termination of pregnancy law and the provisions of Indian Penal Law. The chapter also offers a critique to existing laws along with an analytical appreciation of cases law thereupon and probable suggestive deliberations have also been put forward for further improvement upon.

The **Chapter Fourth** deliberates American response to foeticide disaster. It includes discussion on major decisions of the American Supreme Court relating to abortions, emerging sex-selection trends and ethical, social, psychological and legal issues which heralded debates over sex-selection in American society. There are certain more pressing issues which have further downgraded the vulnerable position of the females by setting a trend in American society of selecting mostly male babies for *In Vitro* Fertilization (IVF). This has aggravated the situation to crisis proportion.

Pre-natal diagnostic techniques, hazards and regulation have been discussed in the **Fifth Chapter**. The Pre-Natal Diagnostic (Prevention and Control) Act 1994 Amended in 2002 has been discussed in depth. It is the irony of the fate that scientific and technological advancements are meant for the sustainable human development but, unfortunately, these scientific gadgets and innovations are being flagrantly employed for dehumanizing the half of the humanity. Finally, the flaws in the PNDT Act have been critiqued.

The **Sixth Chapter** dwells upon the causes and methods of female infanticide and the penal and constitutional provisions against these kinds of killings. The chapter also reflects upon the serious problem of declining sex ratio with analysis of laws and judicial responses to the right to life of the girl child in India whereas this problem is seen non-existent in American society.

Institutionalised abuse such as the child prostitution and the laws relating to combat this social evil are dealt with in **Seventh Chapter**. This
chapter also deals with the laws and human rights provisions for protection of
girl child against tormenting assaults like sexual abuse, within and outside
home. The working of the governance institutions and reflection thereof on the
protection, preservation and promotion of human rights of the girl child in
Indian society has been critically examined. Although, American orientations
of human rights of girl child are far ahead in terms of accessibility,
acceptability and accountability which still remains a distant dream at our
home turf. The chapter further discusses social oppression and legal
deprivation faced by the girl child.

The Conclusion and Suggestions for overall protection of the rights of
the girl child have been cumulatively provided having been analysed, examined
and evaluated thereunder. This also brings out an agenda for realizing the aims,
goals and objectives formulated in the hypothesis which can materialise the
pragmatic and result oriented changes at the threshold of protection of rights of
girl child provided it is incorporated in any legislative exercise in future.