PREFACE

Abortion is one of the most controversial issues in the world today. It is said to occur when the life of the foetus or embryo is destroyed in the woman's womb or the pregnant uterus empties prematurely.

Till later half of the last century abortion was strictly prohibited and considered to be a crime, except when performed to save the life of the pregnant woman. However, ever since mankind got knowledge of its reproductive system and procreative capacity it has tried to control reproduction to regulate the births and to have children only when desired. With the stringent law on abortion and legal sanction for the aforesaid act not available, most of the women would go to back street abortionists; consequently the rate of maternal mortality resulting from such illegal abortions had been considerable as these abortions were being performed mostly by unqualified people under unhygienic conditions. These circumstances culminated into and became a driving force for a movement for abortion reform worldwide.

United Kingdom liberalized its abortion law through the Abortion Act, 1967 which generally permitted abortion if a pregnancy is unwanted due to the fear of malformed birth.

The Irish constitution prohibits the termination of pregnancy. However, the Irish Supreme Court held that the abortion is permissible in the State where the continuation of the pregnancy poses a real and substantial risk to the life, as opposed
to the health of the mother and where such a risk could not be averted except by means of an abortion. Moreover a substantial risk to the life of the mother included a risk of suicide. [Attorney General v. X and Others]

The U.S. Supreme Court in its famous Roe and Doe decision in 1973, establishes the basic law governing abortion in United States of America. The court held that abortion was a constitutional right and the State could only abridge after the first six months of pregnancy. The right to privacy includes the right to abortion. Since abortion is a fundamental right, State regulation must meet the “strict scrutiny” standard, which means the State must show that it has a “compelling interest” in having the law: the word “person” in the Fourteenth Amendment, does not apply to unborn. The State has an important interest in both preserving the health of the pregnant woman and in protecting foetal life. The States’ interest in maternal health becomes compelling at three months whereas it becomes compelling in foetal life at viability i.e. six months. The State may not regulate abortion at all during the first trimester. The State may regulate abortion during the second three months, but only for the protection of the women’s health. The State may regulate or ban abortion during the third trimester to protect foetal life.

Abortion in India was exclusively governed by the restrictive law of the Indian Penal Code upto 1971. The same was liberalized by the Parliament with the enactment of Medical Termination of
Pregnancy Act, 1971. This liberalized abortion law is unique in the sense that it is the only legislation in the world where the failure of contraceptive has been legally accepted as valid ground [to control the menace of population explosion in India] for abortion apart from medical, eugenic, humanitarian and socio-economic grounds. The medical advancement and scientific developments like ultrasonography, amniocentesis and chorionic villus sampling developed to detect the genetic abnormalities in the foetus sufficient early in pregnancy. So that if required the foetus can be aborted. Incidentally apart from detecting the serious mental and physical defects in the unborn these techniques could also reveal the sex of the foetus. The dowry system, hatred against women and son's preference in society paved the way to use or rather misuse these sophisticated techniques to get rid of female even before birth within the permissive limits of liberalized abortion law. Viewed female foeticide as the ultimate cruel step in tragic drama of female life, the Government of India enacted the Pre-natal Diagnostic Techniques Act, 1994 to regulate and prevent the pre-natal diagnostic techniques to curb the evil of female foeticide.

However, the mechanical reading of the Act, of 1994, which though does not expressly, prohibits pre conceptual sex-selections because it is not technically defined in the Act, as pre-natal. The doctors with the help of modern techniques destroy the female chromosomes and allow only the male chromosomes to fertilize
without any fear of law as they insists that their act is pre-conceptual and not pre-natal, hence do not violate the provisions of PNDT Act, 1994. To meet these challenges, the Parliament on 20th December 2002, amended the Act of 1994 in the form of P.C & PNDT (Prohibition of sex selection) Act, 2002 to prevent these evils against female gender.

The liberalized abortion laws permit the termination of pregnancy before viability for mere asking. However, the Constitution of those countries that liberalize Abortion Law guarantees the protection to every person against the deprivation of life, liberty and property without due procedure of law. So the controversy is whether or not the Fourteenth Amendment of American Constitution protects the unborn child. Like wise provisions of Article 21 of Indian Constitution accommodate an unborn within the definition of 'person'. But an unborn is not protected of being destroyed without reason under the MTPA, though is guaranteed by the Constitution to protect every person. Thus there is a need of either an amendment in Article 21 or a separate legislation declaring that unborn child is not included within the definition of person in order to save the MTPA of being declared unconstitutional.