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**INDIA**

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## Introduction

1. ADF International is a global alliance-building legal organization that advocates for religious freedom, life, and marriage and family before national and international institutions. As well as having ECOSOC consultative status with the United Nations (registered name 'Alliance Defending Freedom'), ADF International has accreditation with the European Commission and Parliament, the Organization for Security and Co-operation in Europe, and the Organization of American States, and is a participant in the FRA Fundamental Rights Platform.
2. This report focuses on the right to life of the unborn and the right to freedom of thought, conscience, and religion under international law, and India's failings in promoting and defending these rights.

### (a) Right to Life

#### *Background*

3. The right to life is protected under the Constitution of India of November 1949 (the Constitution). Article 21 of the Constitution states: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'
4. Furthermore, Indian law reflects a recognition of the right to life of the unborn. The Hindu Succession Act 1956 Section 20 provides, 'A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.' However, abortion has been legal in India since 1971. Under Section 3(2) of the Medical Termination Of Pregnancy Act No. 34 of 1971 (the 1971 Act), abortion is allowed until the 12<sup>th</sup> week of pregnancy with the approval of one doctor, and between the 12<sup>th</sup> and 20<sup>th</sup> weeks of pregnancy with the approval of two doctors, if they are of opinion that:
  - (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health; or
  - (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
5. The 1971 Act further contains explanations in relation to situations that are covered under Section 3(2):

Explanation 1.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.
6. In 1994, the Pre-Conception Pre-Natal Diagnostic Techniques Act 1994 (the 1994 Act) was passed by the Indian Government to regulate the use of prenatal diagnostic techniques for detecting genetic, metabolic, and chromosomal

abnormalities, certain congenital malformations, and sex-associated disorders. The 1994 Act clearly specifies in its Preamble that the act is aimed at 'provid[ing] for the prohibition of sex selection, before or after conception' and at 'prevention of their misuse for sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto.'

7. Under Chapter II, Section 3(1) of the 1994 Act, 'no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques.' However, many clinics failed to register accordingly. As per the Ministry of Health and Family Welfare, only a total of 295 court cases for non-registration of clinics have been filed by the concerned appropriate authorities under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act. 206 convictions have been secured under the Act thus far.<sup>1</sup>
8. Nonetheless, the practice of prenatal sex determination is common, leading to sex-selective abortions (female foeticide).
9. According to the 2011 population census, while the sex ratio was assessed at 943 females per 1000 males, the child sex ratio for females was 919 per 1000 males.<sup>2</sup> This was a significant change from the results of the population census in 2001 that estimated the child sex ratio at 927 females per 1000 males.
10. In India there is a general preference for sons over daughters. This preference is caused by the patriarchal structure of society. A daughter is perceived as a burden and a son is considered to be a security for the family. This perception derives from marriage rites and the existence of dowries.<sup>3</sup>
11. The maternal mortality ratio is still high with 174 maternal deaths for 100,000 live births in 2015. Nonetheless, this constitutes an improvement from 2011 when the ratio was 206.<sup>4</sup> India is also struggling with high adolescent pregnancy rates. According to 2005-2006 statistics, the total adolescent birth rate was 90 per 1,000 women between 15 and 19.<sup>5</sup>

#### *Right to Life in International Law*

12. India acceded to the International Convention on Civil and Political Rights (ICCPR) on 10 April 1979 and ratified the Convention on the Rights of the Child (CRC) on 11 December 1992.
13. Article 6(1) of the ICCPR states, 'Every human being has the inherent right to life.' Furthermore, Article 6(5) of the ICCPR states, 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and *shall not be carried out on pregnant women.*' The ICCPR's prohibition of the death penalty for pregnant women implicitly recognizes the right to life of the unborn. As the *travaux*

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<sup>1</sup> Ministry of Health and Family Welfare, Effective Implementation of PNDT Act, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=116303>

<sup>2</sup> Population Census 2011, available at: <http://www.census2011.co.in/sexratio.php>

<sup>3</sup> Christine Myes, Sex Selective Abortion in India, *Global Tides*: Vol. 6, Article 3. Available at: <http://digitalcommons.pepperdine.edu/globaltides/vol6/iss1/3>, 5.

<sup>4</sup> Maternal mortality ratio, available at: <http://data.worldbank.org/indicator/SH.STA.MMRT>

<sup>5</sup> UNFPA, Adolescent Pregnancy: A Review of the Evidence, New York 2013

*préparatoires*<sup>6</sup> of the ICCPR explicitly state, 'The principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was to *save the life of an innocent unborn child*.'<sup>7</sup> Similarly, the Secretary General report of 1955 notes that the intention of the paragraph 'was inspired by humanitarian considerations and by *consideration for the interests of the unborn child*[.]'<sup>8</sup>

14. The protection of unborn life is also found through an ordinary reading of the language in the preamble of the CRC. The preamble states, '[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*.' Article 1 of the CRC defines a child as 'every human being below the age of eighteen years.' This provides an upper limit as to who is a child, but does not provide a lower limit on when the status of 'child' attaches.
15. Providing access to abortion means that more women suffer from abortion-related complications. There are numerous maternal risks associated with abortion. A major study published in the *British Medical Journal* in 2015 concluded that States with 'less permissive' abortion laws 'exhibited consistently lower maternal mortality rates.'<sup>9</sup> Although the study explains these differences in terms of other independent factors rather than in terms of abortion legislation itself, it nevertheless concludes, 'No statistically independent effect was observed for abortion legislation, constitutional amendment or other covariates.'<sup>10</sup> Because abortion legislation has no effect on maternal mortality, abortion need not be legalized to protect women's health. Abortion is further associated with a high risk of haemorrhaging, developing sepsis, and developing injuries to internal organs, including intrauterine perforations.<sup>11</sup>
16. Moreover, abortion can never be safe because it takes the life of the unborn child and harms the mother through the loss of her child. It has also been reported that women who have had abortions are more vulnerable to self-destructive tendencies, depression, and other unhealthy behaviour aggravated by the abortion experience.<sup>12</sup>
17. Therefore, India must focus on protecting the right to life of the unborn and on helping women get through pregnancy and childbirth safely, rather than on ending pregnancies. India must end the practice of sex-selective abortion and must protect

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<sup>6</sup> In accordance with the Article 32 of the Vienna Convention, the *travaux préparatoires* are considered to be a "supplementary means of interpretation."

<sup>7</sup> Report of the Third Committee to the 12th Session of the General Assembly, 5 December 1957. A/3764 § 18.

<sup>8</sup> Report of the Secretary-General to the 10<sup>th</sup> Session of the General Assembly, 1 July 1955. A/2929, Chapter VI, §10.

<sup>9</sup> Elard Koch, Monique Chireau, and Fernando Pliego et. al., *Abortion Legislation, Maternal Healthcare, Fertility, Female Literacy, Sanitation, Violence Against Women and Maternal Deaths: A Natural Experiment in 32 Mexican States*, *BMJ OPEN* 2015:5 e006013, doi:10.1136/bmjopen-2014-006013, p. 1.

<sup>10</sup> *Ibid*.

<sup>11</sup> Gunnel Lindell and Folke Flam, *Management of Uterine Perforations in Connection with Legal Abortions*, *ACTA OBSTET GYNECOL SCAND.* (1995) May 74(5):373-5, available at <http://onlinelibrary.wiley.com/doi/10.3109/00016349509024431>.

<sup>12</sup> David C. Reardon, Philip G. Ney, Fritz Scheuren, Jesse R Cogle, Priscilla K Coleman, Thomas W. Strahan, *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, *SOUTHERN MEDICAL JOURNAL*, (2002) August, 95(8):834-841.

women, girls, and children. In order to reduce maternal mortality and teen pregnancy, India also should provide women with access to knowledge-based education about their bodies, healthy behaviours, and responsible decision-making. India should redirect resources to improve maternal health and medical infrastructure to solve the problem of high maternal and infant mortality rates.

## **(b) Right to Freedom of Thought, Conscience and Religion**

### *Background*

18. Freedom of religion or belief is protected in the Constitution. Article 25 of the Constitution states:

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

19. Article 15(1) indicates, 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.'

20. Furthermore, the Preamble to the Constitution recognizes that the Constitution secures 'liberty of thought, expression, belief, faith and worship' for all citizens.

21. Despite the express constitutional protection of freedom of religion or beliefs, this freedom is significantly restricted. In the states of Orissa, Madhya Pradesh, Chattisgarh, Arunachal Pradesh, Gujarat and Himachal Pradesh anti-conversion laws criminalize conversion from one religion to another. For example, the Freedom of Religion Act 2006 passed in Himachal Pradesh states:

No person shall convert or attempt to convert, either directly or otherwise, any person from one religion to another by the use of force or by inducement or by any other fraudulent means nor shall any person abet any such conversion.

### *International Law*

22. Article 18 of the ICCPR protects the right to freedom of thought, conscience, and religion. As confirmed by the Human Rights Committee in its General Comment No.22, this right includes the 'freedom to have or to adopt a religion or belief of [one's] choice,' and the right to 'replace one's current religion or belief with another or adopt atheistic views, as well as the right to retain one's religion or belief.'<sup>13</sup> Article 18(2) of the ICCPR states, 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.' The HRC interprets this to include 'the use of threat of physical force or penal sanctions' and policies and practices that 'restrict[] access to education, medical care, [and] employment.'

23. The anti-conversion law limiting freedom to adopt a religion or belief of one's choice prevents people from professing and practising their faith freely, as guaranteed under international law. This further violates Articles 2 and 26 of the ICCPR, namely, the guarantee of equal rights and freedom from discrimination on the basis of religion, and Article 27, guaranteeing the rights of religious minorities to profess and practise their faith.

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<sup>13</sup> Human Rights Committee in its General Comment No.22, 5.

24. The United Nations Special Rapporteur on Freedom for Religion or Belief has stated:

While these laws appear to protect religious adherents only from attempts to induce conversion by improper means, they have been criticized on the ground that the failure to clearly define what makes a conversion improper bestows on the authorities unfettered discretion to accept or reject the legitimacy of religious conversions. All of these laws include in the definition of *use of force* any 'threat of divine displeasure or social excommunication.' Moreover, the terms *inducement* or *allurement* are defined to include the offer of any gift or gratification, either in cash or in kind, as well as the grant of any benefit, either pecuniary or otherwise. These broad and vague terms might be interpreted to cover the expression of many religious beliefs. In addition, some provisions are discriminatory in giving preferential treatment to re-conversions, for example by stipulating that returning to the forefathers' original religion or to one's own original religion shall not be construed as conversion.<sup>14</sup>

25. Article 18 of the ICCPR does not permit any limitations on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in Article 19(1). In accordance with Articles 18(2) and 19, no one can be compelled to reveal his thoughts or adherence to a religion or belief.<sup>15</sup>

### **(c) Recommendations**

26. In view of the above, ADF International recommends the following:

- Take steps to follow national and international obligations to protect the right to life from conception to natural death;
- Work to end abortion in accordance with international obligations to protect the life of the unborn;
- Work to end sex-selective practice of abortion;
- Introduce additional safeguards on abortion services, e.g., mandatory counselling and waiting periods prior to undergoing abortion;
- At a minimum, maintain the requirements for obtaining an abortion;
- Although maintenance of public order is a state responsibility, issue an advisory to the state governments to repeal the anti-conversion laws;
- Guarantee the right to freedom of right to freedom of thought, conscience, and religion in accordance with international law.

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<sup>14</sup> HRC, Report of the Special Rapporteur on freedom of religion or belief, Mission to India, A/HRC/10/8/Add.3, 48.

<sup>15</sup> Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).