
Sex Selection Technology in UK: A Subject of Intense Ethical Debate

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Abstract

This work x-rays the sex selection technology in UK and the debate that has characterized its application by the UK medical practitioners and her residents. The work examines these arguments on both sides whether or not the sex selection technology should be sustained or jettisoned. Worthy to note is that sex selection is commonly divided into two distinct types that is, medical sex selection and non-medical sex selection. It is a dynamic area of discussion, in which the arguments produced by both those who reject the practice, and those who support the practice are well reasoned and persuasive. However, it is maintained by the current UK legislation which is prohibitive to non-medical sex selection hence, this may be subject to future revision, in the light of changing academic, clinical and public opinion.

INTRODUCTION

It is difficult to ignore that modern reproductive medicine is capable of offering reliable sex selection treatment provided by pre-implantation genetic diagnosis (PGD), a procedure that when employed for sex selection, yields a near zero chance of a pregnancy with a foetus of the non-chosen sex.¹ Although the successful growth of sex selection technology represents clear medical and scientific advancement, their use is the subject of intense ethical debate.² Much of this debate led to the Warnock report which took into consideration the whole question about PGD (sex selection) whether it should be under review.³ Further recommendations led to the establishing of an authority such as the HFEA. Accordingly in the UK PGD is regulated pursuant to the issuing of a license by the Human Fertilisation and Embryology Authority according to the Human Fertilisation Embryology Act 2008. The Act establishes a licensing regime in which certain activities can only be conducted by virtue of a licence issued by the Authority and in which other activities are prohibited altogether.⁴ Accordingly, the Act as per Schedule 2 provides that, embryonic sex selection for social reasons (that is for reasons other than disease avoidance) is not allowed in the UK.⁵ Therefore it is important to note that the purpose of PGD (sex selection) is to enable parents to have a child without a genetic impairment, and, in doing so, to avoid moral or other difficulties in the termination of an already-begun pregnancy.⁶ This essay aims to provide a concise argument of the ethical issues that are commonly raised in the UK on non-medical sex selection through pre-implantation

¹ McCarthy D: ' Why Sex Selection Should be Legal:(2001) Journal of Medical Ethics; 27: 302-307

² Heather Strange: Br Med Bull (2010) 94(1): Non-Medical sex selection: Ethical Issues

³ Mary Warnock: Report of the Committee of Inquiry Into Human Fertilisation and Embryology Act (1984): London Her Majesty's Stationery Office

⁴ HFEA Act 2008

⁵ Ibid

⁶ Bobbie Farsides: The Appropriate Extent of Pre-Implantation Genetic Diagnosis: Health Professionals' and Scientists' Views on the Requirement for a 'Significant Risk of a Serious Genetic Condition' (2007) Medical Law Review 15 (3): 320

genetic diagnosis. The work will further discuss the arguments for and arguments against non-medical sex selection which will be compared.

SEX SELECTION: AN OVERVIEW AND THE ARGUMENTS

It is important to note that sex selection is commonly divided into two distinct types that is, medical sex selection and non-medical sex selection (also referred to as sex selection for social reasons).⁷ As earlier mentioned sex selection for social reasons which is banned by the HFEA is contrasted with medical sex selection which is permitted, therefore the aim of sex selection for medical reasons are to avoid creating a child with a sex linked disorder.⁸ For instance the HFEA provides that the reasons as to why there are such regulations is because there are two hundred known sex-linked diseases most of which only affect males.⁹ These diseases vary in severity from colour blindness to haemophilia and Duchenne muscular dystrophy.¹⁰ It can therefore be suggested that sex selection for medical reasons (such as in the cases of sex-linked genetic diseases) is generally viewed as uncontroversial and legal in the European and American law.¹¹ In contrast, the use of sex selection for non- medical reasons (like ' balancing' the gender ratio in a family) is generally illegal in European countries.¹²

However, each country has its own regulations with regards to the use of PGD especially non-medical sex selection, for instance in the United States, non-medical sex selection is not illegal.¹³ It seems that there is no current legal restriction on laboratories offering sex selection for non-medical reasons in the United States.¹⁴ However, non-medical sex selection has received much criticism because it is said that its use is problematic and should be discouraged as it poses unwarranted gender bias, social harm, and results in the diversion of medical resources from genuine medical needs.¹⁵ In addition PGD is also restricted in Australia however Julian Savulescu argues in support of non-medical sex selection.¹⁶ Savulescu argues that non-medical sex selection is not likely to harm the society.¹⁷

Therefore it can be suggested that non-medical sex selection is regarded as ethically problematic and cites harms to individuals and the society, which would slide towards an era of 'eugenics' and 'designer babies'.¹⁸ Should technology be refined it might be possible in the future to select embryos that can be tested for positive traits such as intelligence and athletic ability.¹⁹ This suggests that at some future time if it would be possible legally and medically, selections may be made not only to achieve traits a niche group perceives as desirable and

⁷ Strange Supra note 2

⁸ HFEA Act 2008

⁹ HFEA, Code of Practice, 8th Edition (2009)

¹⁰ HFEA, Sex Selection (Consultation Document) (2002) at 7

¹¹ Richard V. Grazi, Joel B. Wolowelsky and David J. Krieger: ' Sex Selection by Pre-implantation Genetic Diagnosis for Non-medical reasons in Contemporary Israeli Regulations: (2008) Cambridge Quarterly of Healthcare Ethics 17

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Ethics Committee of the American Society of Reproductive Medicine: Sex selection and pre-implantation genetic diagnosis : Fertility and Sterility 1999 ; 72 (4): 595-7

¹⁶ Jullian Savulescu: ' Sex Selection': the case for Medical Journal for Australia (1999);171:373-375

¹⁷ Ibid

¹⁸ Guy Kahane: Book Review: Choosing Tomorrow's Children: The Ethics of Selective Production (2001) Medical Law Review 19 (2): 334

¹⁹ R. Mykitiuk and I. Karpin: Going out on a Limb; Prosthetics, Normalcy and Disputing Therapy Enhancement Distinction, (2008) Medical Law Review 16 (3):413

normal.²⁰ It is important to note that the rise of pre-implantation genetic diagnosis techniques and other methods to select embryos, raises more controversial questions.²¹ The main question that is of controversy is whether reproductive freedom includes the right to determine what kind of children to have.²²

Traditionally, reproductive autonomy meant simply the freedom to decide whether to try and reproduce, with whom, when and where.²³ Therefore determining the content and scope of the right to procreate is highly important due to its broad application.²⁴ Brazier maintains that although women may have desires, the desire to have children is the only one which gets the status of a right.²⁵ However Shanner argues that while rights are helpful in a political or legal context to protect individuals and families from governmental intrusion, the rights concept is problematic, inadequate and inappropriate to describe the legal and moral status of claims for assisted reproduction.²⁶ The main controversy that arises is in regard to the question of whether the right to procreate is distinct from the right to use non-coital methods of reproduction like sex or gene selection through pre-implantation genetic diagnosis (sex selection), whether for medical reasons or social reasons.²⁷ While it could be the aim to strive to encourage autonomous decision making, it should be important to note that there may be problems with unfettered and unregulated choices.²⁸

Therefore as well as its intrinsic interest, sex selection serves as an illuminating example from a much wider set of questions about the legitimacy of certain reproductive choices, and about the extent to which the law should constrain procreative liberty.²⁹ Accordingly non-medical sex selection is a topic where public policy and the law are closely related because more often than not the reasoning offered by policy makers and lawmakers for allowing or prohibiting particular forms of sex selection is essentially an ethical argument.³⁰ At one extreme, some think that all sex selection is wrong and should be banned, although those who take this line are often driven mainly by quite general considerations for example the destruction of embryos or the wrongness of playing God rather than objections applying uniquely to sex selection.³¹ On the opposite end there are the libertarians who may favour non-medical sex selection.³² The foundation for many of the arguments made in support of non-medical sex selection is provided by principles.³³ This can be described as a systematic approach to practical moral reasoning, which recommends the considered balancing of respect of four core principles autonomy, beneficence non-maleficence and justice.³⁴ Thus, in direct contrast, supporters believe that non-medical sex selection is morally permissible and they support the legalization of the practice, commonly arguing for greater respect for parental autonomy, and against state

²⁰ I Karpin: 'Choosing Disability: Pre-implantation Genetic Diagnosis and Negative Enhancement' (2007) *Journal of Law and Medicine* 80

²¹ Daniel Sperling: 'Male and Female He Created Them': Procreative liberty, its conceptual Deficiencies and the legal right to access fertility care of Males: (2011) *International Journal of Law in Context*, 7

²² Ibid

²³ Stephen Wilkinson: Sexism, Sex Selection and 'Family Balancing': (2008) *Medical Law Review* 16 (3): 369:

²⁴ Sperling Supra note 21

²⁵ Margaret Brazier: *Regulating the Reproduction Business* :(1999) 7 *Medical Law Review* 166, 172

²⁶ Laura Shanner: 'The Right to Procreate: When Rights Claims go Wrong', 1994 *McGill Law Journal* 40 823-74

²⁷ Andrew B. Coan: 'The Future of Reproductive Freedom', (2011) *Social Science Research Network Electronic Paper No 144*

²⁸ Human Genetics Commission, *Making babies: 'Reproductive Decisions and Genetic Technologies* (2006)

²⁹ E. Jackson, 'Degendering Reproduction' (in press)

³⁰ Wilkinson Supra note 13

³¹ Ibid

³² Ibid

³³ Strange Supra note 2

³⁴ Ibid

infringement of reproductive rights.³⁵ Certain points in the debate between supporters and critics will not be easily surmounted because there is an existing deep and persuasive contrast in perspectives.

Therefore it is important to note that the arguments against non-medical sex selection is often more reasoned and persuasive.³⁶ Many critics of non-medical sex selection consider it as being ethically problematic, and they commonly site harms to individuals and society, the potential reinforcement and propagation of sexism and the possibility of sliding towards an era of eugenics and ‘designer babies’ as reasons for rejecting the practice.³⁷ So, what is the sexism argument for allowing non- medical sex selection?³⁸

Berkowitz and Snyder argue that non-medical sex selection exemplifies sexism in its purest most blatant form, and because of this it is believed, it has the capacity to cause widespread social harm.³⁹ Critics believe that because of the harms that are likely to be caused, legislative authorities have the control in curbing reproductive rights and liberties in this case.⁴⁰ This is because wider, more important social goals such as eradication of sexism and the promotion of gender equality are at risk.⁴¹ In addition Neil Levy argues that sex selection would often be motivated by a sexist attitude that merits moral condemnation.⁴² It seems that there are serious ethical problems concerning sex selection for non-medical reasons.⁴³

Critics base their argument on the belief that male and female children are equally valuable and capable, they believe that social roles ought not to be dictated by sex or gender.⁴⁴ The main claim is that the motives of would be sex selectors are suspect because sex selection cases preferences are frequently driven by sexist views.⁴⁵ For there is an important distinction between preferring to have a child of a particular sex and believing that sex to be superior.⁴⁶ In addition Wilkinson also points out that, prohibitions on sex selection need to be assessed against a cultural context.⁴⁷ Thus, in some cultures, where there is strong preference for males, allowing sex selection would have pernicious social effects, and therefore prohibition could be upheld.⁴⁸

Berkowitz and Snyder also believe that non-medical sex selection directly threatens the psychological welfare and future liberties of the resulting child, and this is their second core reason for rejecting the practice.⁴⁹ However Savulescu argues that non-medical sex selection does not pose a particularly significant risk of psychological harm, to either the parents or the child.⁵⁰ However, non-medical sex selection forces gendered social stereotypes upon children

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ Wilkinson Supra note 9

³⁹ Jonathan Berkowitz and Jack Synder, ‘Racism and Sexism in Medically Assisted Conception’ (1998) 12 Bioethics 25

⁴⁰ Strange Supra note 2

⁴¹ J. Berkowitz and J. Snyder Supra note 37

⁴² N Levy: Against Sex Selection (2007) 100 Southern Medical Journal 107

⁴³ David Gomez: The Special Status of the human Embryo in the regulation of assisted conception and research in the United Kingdom 2011, Medical Legal Journal of Ireland 17(1)

⁴⁴ Berkowitz and Snyder Supra note 37

⁴⁵ Wilkinson Supra note 9

⁴⁶ Ibid

⁴⁷ Stephen Wilkinson: Choosing Tomorrow’s Children: The Ethics of Selective Reproduction (Oxford University Press , 2010): pg 288

⁴⁸ Ibid

⁴⁹ Berkowitz and Snyder Supra note 37

⁵⁰ Jillian Savulescu: ‘ Sex Selection’: the case for Medical Journal for Australia (1999);171:373-375

from the moment of their creation.⁵¹ It is significant that heightened levels of parental expectation (to conform to gendered roles), will psychologically harm children who wish to express their sex or gender in an unexpected manner.⁵² Therefore critics such as Berkowitz, Snyder and Wilkinson have demonstrated that the child's future ought not to be discounted.⁵³ Therefore it can be suggested that Berkowitz and Snyder provide us with persuasive reasons for rejecting non-medical sex selection on ethical grounds.⁵⁴

However many supporters of non-medical sex selection, continue to defend the practice against accusations of sexism by invoking the concept of 'family balancing'.⁵⁵ Accordingly, 'Family Balancing' is not mentioned in the current Code of Practice and is therefore not distinguished from other 'social' reasons to sex select.⁵⁶ First of all what exactly is 'family balancing'?'⁵⁷ The broadest definition says that it is having a family which has children of both sexes or to replace a dead child with a child of the same sex.⁵⁸ Accordingly Wilkinson argues that it is hard to uphold sex selection for the purposes of sex balancing but still forbid more direct sex selection.⁵⁹ A good illustration emerged from one famous case the Mastertons were keen to have another daughter using embryonic sex selection.⁶⁰ Despite their interest none of the clinics were willing to carry out the procedure having in mind the ban on 'social' sex selection.⁶¹

However, the argument in favour of 'family balancing' sex selection is that this form of sex selection is less likely to cause population sex differential an imbalance than other kinds.⁶² Thus, if sex selection were restricted to family balancing it would not significantly alter the overall sex ratio.⁶³ This approach does not depend upon a belief in the superiority of one sex, and since it is the promotion of gender balance that is not of primary value to sex selecting parents, the supporters claim that it is not sexist, that is family balancing is claimed to have to overcome some of the moral criticisms aimed towards non-medical sex selection.⁶⁴ As much as 'family balancing' concept may claim to avoid sex supremacist, it may not be able to avoid the problems associated with sex and gender stereotyping.⁶⁵ Berkowitz and Snyder argue that stereotyping is sexist in that it presumes that one sex is better than the other, or more appropriately suited for certain social tasks.⁶⁶ Critics claim that these children are particularly vulnerable to the pressure of exceptionally heightened levels of parental expectation to conform to gendered roles which is likely to cause psychological harm.⁶⁷ It can therefore be suggested that family balancing is no less sexist or socially harmful than unfettered sex selection.⁶⁸ It

⁵¹ Strange Supra note 2

⁵² J. Berkowitz and J. Snyder, Supra note 37

⁵³ J. Berkowitz and J. Snyder, 'Racism and Sexism in Medically Assisted Conception' (1998) 12 *Bioethics* 25; Stephen Wilkinson: *Medical Law Review* (2008) 16 (3): 369: Sexism, Sex Selection and 'Family Balancing'

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ HFEA, Code of Practice

⁵⁷ Wilkinson Supra note 9

⁵⁸ Jonathan Herring: *Medical Law and Ethics* (4th Edition Oxford University Press 2012): 392

⁵⁹ Stephen Wilkinson: 'Choosing Tomorrow's Children: The Ethics of Selective Reproduction, (Oxford University Press 2010): 288

⁶⁰ Kahane Supra note 18

⁶¹ G. Harris: ' Grieving Couple Fight to Choose Sex of Next Baby' , (2000) *The Times*

⁶² HFEA, Sex Selection (consultation document) (2002)

⁶³ Ibid

⁶⁴ Strange Supra note 2

⁶⁵ Ibid

⁶⁶ J. Berkowitz and J. Snyder Supra note 37

⁶⁷ Strange Supra note 2

⁶⁸ Ibid

seems that the family balancing argument is not persuasive enough to uphold reasons for non-medical sex selection.

One question that needs to be addressed is whether, there could be consequences of sex differentials specifically in the UK if there unfettered non-medical sex selection ('social')?⁶⁹ The reservation against sex selection for non-medical reasons is often based on the assumption that it will invariably lead to a serious distortion of the sex ratio.⁷⁰ Recent studies in the UK showed that no significant overall preference for one sex over the other although a disproportionately high percentage of those who are actively seeking non-medical sex selection were from ethnic populations originating from outside Europe for instance sex selection would distort the ratio in Asia.⁷¹

CONCLUSION

In conclusion the above arguments against non-medical sex selection, which detail the harms that are likely to be caused, are persuasive.⁷² Therefore this leaves open the question whether non-medical sex selection should be permitted as the debate over the ethics of this selection is on-going.⁷³ Many of the arguments made in defence of the practice depend upon socially contingent conceptions of sex and gender that are easily undermined.⁷⁴ It is a dynamic topic of discussion, in which the arguments produced by both those who reject the practice, and those who support the practice are well reasoned and persuasive.⁷⁵ However, it is maintained by the current UK legislation which is prohibitive to non-medical sex selection however, this may be subject to future revision, in light of changing academic, clinical and public opinion.⁷⁶ In addition with the rise of pre-implantation genetic diagnosis techniques and other methods to select embryos there is the possibility of change.⁷⁷ This change could include PGD for future generations such that they will become more economically viable to, and more commonly used for the possibility of selection for non-medical reasons.⁷⁸

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⁶⁹Wilkinson Supra note 9

⁷⁰J. Berkowitz and J. Snyder Supra note 37

⁷¹Wilkinson Supra note 9

⁷²Ibid

⁷³Strange Supra note 2

⁷⁴Ibid

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⁷⁶HFEA 2008

⁷⁷Sperling Supra note 14

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