

Commentary

The presumption in favour of liberty: a comment on the HFEA's public consultation on sex selection

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Abstract

In its recently published report 'Sex Selection: Options for Regulation', the Human Fertilisation and Embryology Authority (HFEA) concluded that sex selection for non-medical reasons should not be permitted in the United Kingdom. The HFEA's recommendation to ban sex selection for any but the most serious of medical reasons clearly reflects the majority view of UK citizens. Notwithstanding the general moral consensus against non-medical sex selection, the HFEA's approach to social policy needs to be criticised for betraying the commonly held presumption in favour of liberty.

Keywords: HFEA, procreative liberty, public policy, sex selection

In 2002, the Secretary of State of the United Kingdom had asked the Human Fertilisation and Embryology Authority (HFEA) to conduct a public consultation on sex selection and to advise the Department of Health on issuing appropriate guidelines for public policy. After a detailed review of sex selection techniques and an extensive survey of public attitudes towards sex selection, the HFEA has now finalized a report entitled 'Sex Selection: Options for Regulation' (HFEA, 2003a). The key recommendation of its carefully worded, informed and balanced report is that the British government ought to prohibit sex selection for non-medical reasons.

According to a representative survey of 2615 UK citizens conducted by MORI (Market and Opinion Research International), more than 80% of respondents did not want sperm sorting or preimplantation genetic diagnosis to be made available for non-medical reasons (HFEA, 2003b). In view of the pervasive opposition to sex selection for social reasons, the HFEA's support of a ban on sex selection for any but the most serious of medical reasons will certainly meet with the approval of the British population. From the point of view of public policy, however, the HFEA's stance on sex selection needs to be criticized. In reaching its decision, the HFEA has perspicuously infringed the provisions of the commonly held presumption in favour of liberty.

The presumption in favour of liberty stipulates that each citizen be granted the right to live his life as he sees fit, provided that in doing so he does not violate the rights of others. The legislator may interfere with the free choices of its citizens only to prevent serious harm to others. The presumption in favour of liberty, which is the cornerstone of Western societies, has three important implications. Firstly, the burden of proof is always on those who opt for a legal prohibition of a particular action. It is they who must show that the action in question is going to harm others. Secondly, the evidence for the harms to occur has to be clear and persuasive.

It must not be based upon highly speculative sociological or psychological assumptions. Thirdly, the mere fact that an action may be seen by others as contrary to their moral or religious beliefs does not suffice for a legal prohibition. The purpose of government is not the enforcement of morality, but the prevention of serious harm to others (Hart, 1963; Feinberg, 1984; Epstein, 1998).

The HFEA's serpentine attempt to justify a legal prohibition of non-medical sex selection reveals a clear disregard for all three implications of the presumption in favour of liberty: "In reaching a decision we have been particularly influenced by considerations ... relating to the possible effects of sex selection for non-medical reasons on the welfare of children born as a result, and by the quantitative strength of views from the representative sample polled by MORI and the force of opinions expressed by respondents to our consultation. These show that there is very widespread hostility to the use of sex selection for non-medical reasons. By itself this finding is not decisive; the fact that a proposed policy is widely held to be unacceptable does not show that it is wrong. But there would need to be substantial demonstrable benefits of such a policy if the state were to challenge the public consensus on this issue. In our view the likely benefits of permitting sex selection for non-medical reasons in the UK are at best debatable and certainly not great enough to sustain a policy to which the great majority of the public are strongly opposed. Accordingly we advise that ... selecting the sex of children ... should be restricted ... to cases in which there is a clear and over-riding medical justification" (HFEA, 2003c).

The HFEA's claim that there have to be substantial and demonstrable benefits of social sex selection for the state to challenge the public consensus against its use constitutes a clear breach of the first provision of the presumption in favour of liberty. The mere fact that an over-whelming majority opposes sex selection for non-medical reasons in no way shifts

the burden of proof from those who want to outlaw it to those who want to employ it. It is not for the couples seeking treatment to prove that non-medical sex selection is socially useful, it is for the state to prove that non-medical sex selection is socially harmful. In a society based on the idea of protecting each and everyone's right to life, liberty and property, the burden of proof always rests on the shoulders of the advocates of prohibition and legal coercion.

The HFEA's assertion that the practice of non-medical sex selection would compromise the welfare of the children born as a result is a patent breach of the second provision of the presumption in favour of liberty which stipulates that the evidence for the harms to occur has to be clear and persuasive and must not be based upon highly debatable psychological hypotheses. The frequently expressed concern that sex selected children may be expected to behave in certain gender specific ways and risk being resented if they fail to do so is simply too speculative to warrant legal prohibition. Couples seeking treatment are well aware that sex selection technology will only enable them to ensure the birth of a boy or a girl, not 'to order some Hugh Grant or Julia Roberts'. Thus, unless and until more substantive evidence for the alleged harm to the welfare of children emerges, there is no justification for outlawing sex selection for non-medical reasons.

Finally, the HFEA's evident reliance on the 'widespread public hostility' towards the use of social sex selection violates the third provision of the presumption in favour of liberty which prevents policy makers from prohibiting conduct solely on the grounds that it is contrary to widely held moral beliefs. As already stated, the province of law is not the enforcement of morality, but the prevention of harm to others. Thus, in the

absence of any clear and present danger to the welfare of children, it must be left to the discretion of individual couples whether or not to employ sex selection technology (Savulescu, 1999; McCarthy, 2001; Robertson, 2001; Dahl, 2003).

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