

ORIGINAL ARTICLE

Sex selection in India: Why a ban is not justified

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Abstract

When widespread use of sex-selective abortion and sex selection through assisted reproduction lead to severe harms to third parties and perpetuate discrimination, should these practices be banned? In this paper I focus on India and show why a common argument for a ban on sex selection fails even in these circumstances. I set aside a common objection to the argument, namely that women have a right to procreative autonomy that trumps the state's interest in protecting other parties from harm, and argue against the ban on consequentialist grounds. I perform a pairwise comparative analysis of sex selection and its plausible alternatives and argue that that the ban fails to improve the state of affairs relative to a scenario without a ban. The ban makes the situation worse, especially for mothers and their daughters. India should therefore repeal its ban on sex selection.

KEYWORDS

sex selection, India, procreative autonomy, consequentialism, discrimination

1 | INTRODUCTION

Although a few countries allow certain forms of sex selection, often restricted to facilitate family balancing, in most countries it is banned.¹ The practice is especially controversial in many Asian countries, where there are substantial inequalities between the sexes and parents have a strong preference for sons. In this paper I will concentrate on India and explore whether the government is justified in banning sex selection.

I will present a common argument for a ban on sex selection in countries like India. As presented by Wendy Rogers, Angela Ballantyne, and Heather Draper,² this argument holds that governments have an obligation to prevent harms and discrimination, that sex selection in India is harmful and discriminatory, and that the government should therefore ban sex selection. I aim to show that even if a common objection against this argument, that women have a right to procreative autonomy that trumps the state's obligations to

prevent discrimination and other third-party harms, lacks force in the Indian context, the argument for a ban on sex selection still suffers from a structural and devastating weakness. When we ask whether we should ban a practice, it is insufficient to focus narrowly on the moral status of the practice in question and the consequences it brings about. We need to demonstrate that the ban makes the situation better.³ This is rarely done by those arguing for a ban.

While others have argued against a ban on sex selection from a consequentialist standpoint, these analyses have often been rudimentary.⁴ To provide a more structured analysis, I make pairwise comparisons between sex selection and the other options that are available to Indian parents who want sons when sex selection is banned and ask whether these options are preferable, all things considered, to the use of sex selection. These options are black market sex selection, to have

¹Bayefski, M.J. (2016). Comparative Preimplantation Genetic Diagnosis Policy in Europe and the USA and its Implications for Reproductive Tourism. *Reproductive Biomedicine & Society Online*, 3, 41–47.

²Rogers, W., Ballantyne, A. & Draper, H. (2007). Is Sex-Selective Abortion Morally Justified and Should it Be Prohibited? *Bioethics*, 21(9), 520–524.

³Semrau, L. (2017). A Mistake in the Commodification Debate. *Journal of the American Philosophical Association*, 3(3), 354–371, p. 355.

⁴They are rudimentary in the sense that they do not sufficiently balance the costs against the benefits, nor do they look closely into whether the alleged benefits are likely to materialize, see Macklin, R. (1995). *The Ethics of Sex Selection*. *Indian Journal of Medical Ethics*, 3(4), 61–4, p. 63; Sureau, C. (1999). *Gender Selection: A Crime against Humanity or the Exercise of a Fundamental Right?* *Human Reproduction*, 14(4), 867–868.

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children until you have a son, and to aim for the preferred number of children and hope that nature gives you a son. I will focus on the reasons Rogers et al. give for the ban and defend the tentative conclusion that India is wrong to ban sex selection.

In India, sex-selective abortions have been available with the help of ultrasound since the mid-1980s. The abortion law that legalized some forms of abortions in 1971 did not predict the availability of sex selection, and because of worries about the law's being misused, the use of sex selection was banned in 1994 with the Pre-Natal Diagnostic Techniques Act. The law had, however, little effect on the actual use of sex-selective abortions. The law was therefore amended in 2002 with the Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act. Some studies seem to indicate that the amendment has worked to reduce the number of sex-selective abortions.⁵ Sex selection is nevertheless still widespread. It is estimated that approximately 500,000 female fetuses are selectively aborted every year.⁶

The ban on sex selection in India is a ban on the use of technology for sex selection for nonmedical purposes. The ban is aimed at the medical profession, not the parents: doctors, not parents, are the ones who face sanctions if it is violated. For convenience, I will refer to the ban as a ban on sex selection.

There are several ways to perform sex selection. In India, the most common method is to use ultrasound and abort the fetus if it is of the wrong sex. One can also use assisted reproduction, either through sperm sorting or embryo selection, but I will mainly discuss sex-selective abortion. I will assume that the harm an abortion does to the fetus itself is not morally relevant and, more generally, that non-selective abortions are permissible. I admit that these are contested assumptions.⁷

2 | THE ARGUMENT FOR A BAN

The core argument for a ban on sex selection presented by Rogers et al. goes like this:

1. "Societies have an interest in, and a duty to ban harmful practices in order to protect individuals and preserve social stability and security."
2. Societies also have an obligation to prevent "discrimination on the grounds of sex."
3. Sex selection causes harms.
4. Sex selection perpetuates discrimination.

⁵Nandi, A., Deolalikar, A.B. (2013). Does a Legal Ban on Sex-Selective Abortions Improve Child Sex Ratios? Evidence from a Policy Change in India. *Journal of Development Economics*. 103, 216–228, p. 222; Nandi, A. (2015). The Unintended Effects of a Ban on Sex-Selective Abortion on Infant Mortality: Evidence from India. *Oxford Development Studies*. 43(4), 466–482.

⁶Bongaarts, J., Guilmo, C.Z. (2015). How Many More Missing Women? Excess Female Mortality and Prenatal Sex Selection, 1970–2050. *Population and Development Review*. 41(2), 241–269, p. 242.

⁷For a defense of this view, see McMahan, J. (2003). *The Ethics of Killing: Problems at the Margins of Life*. Oxford: Oxford University Press.

5. Therefore, sex selection "should be prohibited by law, and such laws should be enforced."⁸

"Harmful practices" are, according to Rogers et al., practices "where public health is at risk and the harms are serious, [such as] female genital mutilation [or] smoking".⁹ In these instances, the government may be justified in interfering to prevent harms. Similarly, the government may be justified in banning discriminatory practices, such as picking candidates for jobs based on their race or sex. I will assume, along with Rogers et al. that governments have a further duty to prevent practices that *lead* to discrimination, even if the practices themselves are not discriminatory.

I write "may be justified" because a government's duties to prevent harms and discrimination are *pro tanto* duties: duties that have to be weighed against other concerns. If the only way to get rid of discrimination is through measures that will radically interfere with people's privacy, it is not clear that the state should fulfill its duty. Here, we might say, a right to privacy trumps the government's duty to prevent discrimination. With these caveats in mind, I grant the two normative premises, numbers 1 and 2.

What about premise 3, the claim that sex selection causes harms? Despite objections to the contrary by Ruth Macklin, Julian Savulescu, and Edgar Dahl,¹⁰ the evidence clearly suggests that widespread sex selection in India causes harms to third parties, mainly through its impact on the sex ratio: Indian parents who use sex selection overwhelmingly choose to have sons. Murder rates in India are "highly correlated with the female-male ratio in the population."¹¹ Violence against women and violent crime more generally share the same pattern.¹² Systematic sex selection also makes it difficult for men in marriageable age to find a wife, which may create lasting problems because children are the most important source of support for parents in old age.¹³ A surplus of men is also associated with an increase in sexually transmitted infections and the trafficking of women.¹⁴ I take this to be sufficient to show that sex selection causes harm.

There is also a solid amount of evidence in favor of premise 4, that sex selection perpetuates discrimination through its effect on the sex ratio. Rather than making women valued because they are scarce, as Macklin and Savulescu suggest, in India a shortage of

⁸This argument and all quotes in it are drawn from Rogers et al., op. cit. note 2, p. 523.

⁹Ibid: 523.

¹⁰Macklin, op. cit. note 4, p. 63; Savulescu, J., Dahl, E. (2000). Sex Selection and Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine. *Human Reproduction*. 15(9), 1879–80.

¹¹Drèze, J., Khera, R. (2000). Crime, Gender, and Society in India: Insights from Homicide Data. *Population and Development Review*. 26(2), 335–352.

¹²Amaral, S., Bhalotra, S. (2017, Oct 20). Sex Ratio and Violence against Women: The Long-Run Effects of Sex Selection in India. New York: SSRN. Retrieved Sept 20, 2019, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3055794.

¹³Das Gupta, M. (2010). Family Systems, Political Systems, and Asia's 'Missing Girls': The Construction of Son Preference and Its Unraveling. *Asian Population Studies*. 6(2), 123–152.

¹⁴Edlund, L. (1999). Son Preference, Sex Ratios, and Marriage Patterns. *Journal of Political Economy*. 107(6), 1275–1304.

women is associated with bad outcomes for women: they have more controlling husbands, experience more domestic abuse, hold less decision-making power, suffer poorer health, and are constrained by more conservative gender roles.¹⁵ These effects might reduce the momentum for social change in the Indian society and explain the slow improvement in women's status.¹⁶ When a large share of the female electorate is "missing," this could also reduce women's clout in politics and make it less likely that their political interests will be successfully represented. Sex selection is therefore likely to perpetuate discrimination and social injustice.

3 | PROCREATIVE AUTONOMY

Although it appears that its premises are true and its conclusion follows from them, the argument for a ban on sex selection will only succeed if it can be successfully defended against a common objection, that parents have a right to procreative autonomy. This is because the normative premises of the argument are only qualifiedly true: the duties they identify are not absolute but *pro tanto*, and this right may trump it. To the extent that having a child of a specific sex is an important part of parents' pursuit of the good life, there is a presumption in favor of including sex selection in their right to procreative autonomy.¹⁷ The right to procreative autonomy may be so important that even substantial harms to third parties are insufficient to justify measures that infringes on this right, such as a ban on sex selection.¹⁸ The procreative-autonomy argument could be framed as a "but" clause to the first two premises of the argument for a ban: The state should protect its citizenry against harms and discrimination, but not by means that would violate parents' rights to procreative autonomy.

However, if the reason we appeal to procreative autonomy is that it allows individuals to live the lives they really want to live, where their actions flow from their own conceptions of the good, it is questionable whether we can ground a right to sex selection in India. For their acts to qualify as autonomous, individuals need to be informed and not under undue pressure from other people or economic and social circumstances.¹⁹ In India, women have weak autonomy. They are dependent on their husbands and their husbands' families and expected to

bring them sons. The use of sex selection may in some cases be outright forced on them, but more commonly their freedom is severely constrained because of the negative consequences that are likely to occur if they choose otherwise. Some women may also suffer abuse and divorce if they fail to deliver a son. Rogers et al. and other proponents of a ban therefore conclude that using sex selection is not (necessarily) what the Indian women who use it really want and that an appeal to procreative autonomy therefore is insufficient to ground access to sex selection in India.²⁰

When we take into account the harms and the increased discrimination that follow from the practice, we have further reasons to doubt that an appeal to procreative autonomy is sufficient to work as a satisfactory objection to the argument for a ban on sex selection.

4 | A COMPARATIVE ANALYSIS

If procreative autonomy cannot be used as a "but" clause in the argument in favor of a ban on sex selection, Rogers et al. believe the conclusion of their argument stands: Sex selection "should be prohibited by law, and such laws should be enforced."²¹

However, it is not sufficient to weaken the case for procreative autonomy to make the argument for a ban on sex selection work. Other "but" clauses may succeed. Most obviously, even though we cannot be certain that using sex selection is what women would do under ideal circumstances, we can still ask whether it is something they should be free to do in these nonideal circumstances. If a woman has few opportunities available other than using sex selection, she is not as free as she should be, but when evaluating whether a policy improves someone's life, we would make a mistake if we compared it to an ideal society where the background conditions were different. Given that the situation is as it is, she may be made even worse off if she is prevented from using sex selection to make her life better. To know whether it is in Indian women's best interest to have access to sex selection, we need to compare sex selection to the alternatives they have available.

A second reason why the argument presented so far cannot justify a ban, is that for a ban to be justified we need to know whether it is successful in preventing harmful and discriminatory actions, not just that the practice in question is harmful and leads to discrimination. If it is likely that a ban causes more harm and discrimination than it prevents, that ban is arguably not justified. Again, to know whether this is the case, we need to compare sex selection with its alternatives.

There are three main alternatives available to Indian parents if they cannot access sex-selection technologies legally. One is *black-market sex selection*. If we make a sought-after practice illegal, we cannot assume that this will stop people from doing whatever is

¹⁵Amaral, Bhalotra, op. cit. note 12; Hussam, R. (2017, Sept). Marry Rich, Poor Girl: Investigating the Effects of Sex Selection on Intrahousehold Outcomes in India. Cambridge, MA: Harvard Business School Working Paper 18(29). Retrieved Sept 20, 2019, from <https://www.hbs.edu/faculty/Pages/item.aspx?num=53295>.

¹⁶Ghani, E., Grover, A., Kerr, S., Kerr, W. (2016). Will Market Competition Trump Gender Discrimination in India? Policy Research Working Paper Series. 7814. Washington, D.C.: World Bank. Retrieved Sept 20, 2019, from <https://ideas.repec.org/p/wbk/wbrwp/s/7814.html>.

¹⁷Robertson, J.A. (2001). Preconception Gender Selection. *American Journal of Bioethics*, 1(1), 2-9; but see de Melo-Martín, I. (2013). Sex Selection and the Procreative Liberty Framework. *Kennedy Institute of Ethics Journal*, 23(1), 1-18.

¹⁸Savulescu, J. (1999). Sex Selection: The Case for. *Medical Journal of Australia*, 171, 402-5; Savulescu, J. (2001). In Defense of Selection for Nondisease Genes. *American Journal of Bioethics*, 1(1), 16-19.

¹⁹Rogers et al., op. cit. note 2, p. 521. More generally, see Dworkin, G. (2015). The Nature of Autonomy. *Nordic Journal of Studies in Educational Policy*, 2, 7-14.

²⁰Rogers et al., op. cit. note 2, p. 523; Bumgarner, A. (2007). A Right to Choose? Sex Selection in the International Context. *Duke Journal of Gender Law & Policy*, 14, 1289-1310, p. 1306.

²¹Rogers et al., op. cit. note 2, p. 520.

banned. Often, we end up creating a black market where people can get what they want. And as I have already mentioned, the consensus is that many Indian women are indeed using sex selection illegally. Another option is to continue to have children until nature gives you a son. This *continuing method* is also a common practice in India. According to a recent estimate, it has created 21 million “unwanted girls” under the age of 25.²² These girls would not have been born if their parents got a son as the first or second child. There is one last alternative to the use of legal sex selection. Parents may hope to have a son, but if the *natural lottery* gives them only girls, they will leave it at that. This is the primary aim of a ban on sex selection, and when people support a ban, they do so because they expect this to be the result. Unfortunately, because of the strong son preference among Indian parents, the black market and the continuing method are the two main alternatives to sex selection.

I will now explore how these alternatives compare for women in their capacity as mothers, for their children and other third parties.

5 | MOTHERS ARE MADE WORSE OFF

If a ban on sex selection is to make women in their capacity as mothers (or potential mothers) better off, they need to be freed to do what they really want to do, or at least to do something they would rather do. If, when sex selection was legal, women who would have preferred not to use it were pressured into using it anyway, the ban may enable them to do something they would rather do.²³ To see whether this is the case in India, let us look at the alternatives to sex selection in turn.

Unsurprisingly, if women continue to use sex selection despite its illegal status, the ban does not make them better off. In fact, it makes them worse off, as black-market abortions often are more expensive and may be more dangerous. In India, between 4,500 and 6,500 women die each year as a result of unsafe abortions.²⁴

Women who, because of the ban, use the continuing method instead of sex selection are made better off in one respect: they are spared one or more abortions they do not want. However, instead of unwanted abortions, they get unwanted births and unwanted children. This outcome is unlikely to be better. Every additional month of pregnancy and every additional birth a woman goes through involves additional risk to her life and health.²⁵ Additional children also reduce a woman's ability to participate in the labor force and add to the demands

on her resources, which are often limited.²⁶ Using the continuing method is therefore likely to be worse than sex selection would be if it were legal.

What about the option of settling for having only girls? Even this scenario looks less appealing. First of all, women may risk abuse and divorce if they cannot deliver a son. As divorced women in India have a staggering death rate,²⁷ this is an outcome that is far worse than the ones involved in sex selection. Indian women also have economic reasons to favor sex selection over the natural lottery. The dowry system, where the bride's family is expected to pay the groom's, makes girls a liability and boys a source of income. Even though dowries have been banned since 1961, the system remains widespread.²⁸ In rural India, a daughter's dowry can cost her parents' household two thirds of its total assets²⁹; nationwide, a dowry is typically more than the bride's family's annual income—by a factor between three and four.³⁰ Since girls move to live with the family of the men they marry, they are often seen as a “double loss”: They are an economic cost and they are often not there to help their parents when the latter get old. The dowry and patrilocality are not only unjust, they also provide parents with prudential reasons to use sex selection. So does the fact that many Hindus believe sons are necessary participants in funeral rituals. In sum, it is better for women in their capacity as mothers to be legally free to use sex selection if the alternative is to only have girls.

6 | CHILDREN ARE MADE WORSE OFF

Mothers are not the only ones that are affected by a ban: so are their children. Black market sex selection benefits no one and harms some. To the extent that women suffer from an additional risk to their life and health when using black market sex selection, that may have a negative effect on their children as well. What about the natural lottery?

Julian Savulescu argues that sex selection may be better for the children than the natural lottery. The reason is that men are expected to live better lives than women in India, so when parents can choose to have sons rather than daughters, more children will end up living better lives.³¹ On the other hand, it may be better, as Michael Sandel argues, for the children if their parents do not use sex selection to have the children they want, as the act of choosing

²²Jayachandran, S. (2018, February 25). Unwanted: 21 Million Girls. *The Indian Express*. Retrieved Sept 20, 2019, from <https://indianexpress.com/article/opinion/columns/unwanted-21-million-girls-economic-survey-5075935>. Unwanted girls and missing women are related in the sense that the easier sex selection becomes, the fewer unwanted girls will be born and the more women will be missing, and vice versa. Both are also (at least partly) caused by Indian parents' preference for sons.

²³Dworkin, G. (1982). Is More Choice Better than Less? *Midwest Studies in Philosophy*, 7, 47–61.

²⁴Stillman, M., Frost, J.J., et al. (2014). Abortion in India: A Literature Review. New York: Guttmacher Institute, p. 14. Retrieved Sept 20, 2019, from <https://www.guttmacher.org/report/abortion-india-literature-review>.

²⁵This risk increases with the number of children they give birth to. *Ibid.*

²⁶*Ibid.*

²⁷Anderson, S., Ray, D. (2015, Aug). Missing Unmarried Women. Working Paper. 21511. Cambridge: National Bureau of Economic Research. Revised March 2018. Retrieved Sept 20, 2019, from <https://www.nber.org/papers/w21511>.

²⁸The government is criticized for not enforcing the law, see Manchandia, P. (2005). Practical Steps towards Eliminating Dowry and Bride-Burning in India. *The Tulane Journal of International and Comparative Law*, 13, 305–319.

²⁹Rao, V. (1993). The Rising Price of Husbands: A Hedonic Analysis of Dowry Increases in Rural India. *Journal of Political Economy*, 101(4), 666–677.

³⁰Borker, G., et al. (2018, February 5). Wealth, Marriage, and Sex Selection. Working Paper. Retrieved Sept 20, 2019 from <http://www.janeckhout.com/wp-content/uploads/WMS.pdf>.

³¹Savulescu (1999), op. cit. note 18.

the sex of the child may demonstrate an attitude that is contrary to good parenting: Good parents should arguably love their children unconditionally.³²

Sandel's argument could also count in favor of the continuing method, because then at least women do not have abortions just because they expect the child to be of the wrong sex. However, to have girls as means to get a son, is clearly not an act of unconditional love, and the consequences are likely to be much worse. Parents who have daughters because they decided to keep having children until they had a son are likely to neglect their girls and treat them as regrettable means toward the desired end, a son. This increases the likelihood that these girls suffer and die. When Indian parents use the continuing method, they end up distributing the food unevenly and spending less on their daughters' medical treatment, which is shown to stunt girls' growth, worsen their health and reduce their cognitive ability.³³ This treatment has deadly consequences. In a recent paper, Anukriti et al. estimates that "60,879 excess postnatal female child deaths were averted each year" as a consequence of Indian women's access to sex-selective abortions from the mid-1980s.³⁴ One of the reasons for this reduction in deaths is that girls are treated better when parents can choose sex selection rather than the continuing method.³⁵ Disregard for girls is not the only explanation for the unequal investment in children of different sexes, however. When parents use the continuing method instead of sex selection, more children have to share the same amount of resources, resulting in a smaller share for each child even if the girls get as much as the boys.³⁶

It might, however, be argued that even though unwanted girls are treated badly, it is better for them to be brought into existence than not to get the chance to live at all. This is one sense correct. Many of the girls that are not born when parents have access to sex selection would have had lives worth living. However, many of the girls who are born because of the continuing method are born to lives of underinvestment, hunger, sickness, and early death, and these lives are arguably not worth living. We could also question the notion that it is bad not to bring new people into existence. Although we would not want to say, as Rogers et al. put it, "that female children are such a worthless burden that their births should be prevented," we do not normally treat hypothetical children's nonexistence as a loss.³⁷

7 | THIRD PARTIES

What about third parties? Here the alternatives to sex selection seems to be preferable. As shown above, sex selection causes substantial harms to third parties through its effect on the sex ratio. These harms include violence, crime, a shortage of available brides, a reduction in women's autonomy within the household, and increased discrimination. If more parents would accept what the natural lottery gave them, it would improve the sex-ratio imbalance and thus be better with respect to the harm argument and the discrimination argument. The same is, in one respect, true for the continuing method, since it does not directly contribute to the sex ratio imbalance.³⁸

Unfortunately for the argument in favor of a ban on sex selection, many Indian parents choose the black market, which is just as harmful to third parties as legal sex selection. The best estimates we have indicate that the ban has had little effect on the use of sex selection.³⁹ Admittedly, if the ban is enforced more strictly, as suggested by Rogers et al. and others, that could change. Some recent studies suggest that the amendment of the law in 2002 has led to a reduction in the number of female fetuses that are aborted.⁴⁰ The effect is, however, small compared to the 500,000 sex-selective abortions that are performed annually.⁴¹

The ban has also led many Indian women to believe that all abortions are illegal. Although this could arguably be counteracted by information campaigns, it seems difficult for such campaigns to be successful given that studies suggest that approximately 85 percent of men and women believe abortions are illegal. The ban has also led to restrictions on women's access to regular abortions and unrelated health services.⁴²

As long as parents have a strong preference for sons the most likely alternative to black market sex selection is the continuing method. This method comes with its own problems for third parties. We saw in the previous section that parents who use the continuing method invest less in their daughters than do parents who use sex selection or simply accept the results of the natural lottery. This also affects third parties. When girls as a group receive less parental investment, it is likely to reduce both economic growth and the likelihood of a much-needed social change towards a more gender-equal society. This effect is enhanced by the negative effect higher fertility rates are expected to have on economic growth and female empowerment.⁴³ A larger population also puts an unfortunate strain on the environment and scarce resources like clean water. While the total effect on third parties is difficult to assess, it is clear that sex selection and the continuing method both lead to significant harms to third parties.

³²Sandel, M.J. (2007). *The Case against Perfection: Ethics in the Age of Genetic Engineering*. Cambridge, MA: Harvard University Press.

³³Jayachandran, S., Kuziemko, I. (2011). Why Do Mothers Breastfeed Girls Less than Boys: Evidence and Implications for Child Health in India. *Quarterly Journal of Economics*. 126(3), 1485–1538. For more references, see Anukriti, S., Bhalotra, S., Tam, H. (2019, June 7). On the Quantity and Quality of Girls: Fertility, and Parental Investments, and Mortality. Boston: Boston College. Retrieved Sept 20, 2019, from <https://www2.bc.edu/s-anukriti/missinggirls.pdf>.

³⁴They have data for births until 2006.

³⁵Anukriti et al., op. cit. note 32, p. 3. But see Nandi op cit. note 5, for a somewhat contrary opinion. He argues that the law from 1996 has not increased mortality rates among girls.

³⁶Jayachandran, op. cit. note 22.

³⁷Rogers et al., op. cit. note 2, p. 522. Regarding the badness of non-existence, see McMahan, J. (2013). Causing People to Exist and Saving People's Lives. *Journal of Ethics*. 17(1–2), 5–35.

³⁸Jayachandran, op. cit. note 22.

³⁹Bongaarts, Guilmo, op. cit. note 6, p. 242.

⁴⁰Nandi, Deolalikar, op. cit. note 4, p. 222; Nandi, op. cit. note 31.

⁴¹Bongaarts, Guilmo, op. cit. note 6, p. 242.

⁴²Stillman et al., op. cit. note 24, p. 14, 28, 38.

⁴³Anukriti et al., op. cit. note 31, p. 6.

8 | A BAN IS NOT JUSTIFIED

As we have seen, when parents engage in black-market sex selection and the continuing method, it arguably makes the situation worse overall. And the natural lottery comes with a significant cost to women in their capacity as mothers, because of the unfortunate circumstances Indian women find themselves in. For these reasons, I suggest that the argument fails to justify a ban on sex selection in India.

There are, however, other arguments that could help justify a ban. One could hope, as Rogers et al. seem to do, that people's attitude toward women will change for the better if sex selection is banned. While a plausible speculation, the evidence does not seem to bear this out. The ban has been in place since 1994, with few attitudinal changes to show for it.⁴⁴ The main reason why the ban fails to change people's preferences and behavior is arguably that the unjust background conditions make it rational for parents to strongly favor sons over daughters.

It may be that a ban should be preferred because it has symbolic value, because the state expresses that the collective does not endorse sex selection and that women are valued on par with men.⁴⁵ But again, the continuing method fares no better; it might even be worse. When girls are treated as mere means, receive less investment, and sometimes die from lack of treatment and nutrition, this expresses a negative valuation of women to at least the same degree as sex selection. Admittedly, one could say that when parents use the continuing method it is their behavior that expresses a negative valuation of women, while if the government were to remove the ban on sex selection, it would be the collective doing the expressing. However, when women themselves and their daughters suffer from the ban to the degree that they do, what the ban actually expresses is up for interpretation. The ban could be interpreted as expressing that the state does not sufficiently take into account the interests of all women and thus that the collective is sexist. Even if the ban expresses what we want it to express, expressing that message surely seems like a small upside compared to the significant burdens the ban imposes on Indian parents and their daughters.

Would the state be justified in enforcing the ban more strictly, so as to push more Indian parents to use the natural lottery or the continuing method? At first sight, this seems unreasonable, as it would impose a substantial burden on two of the groups that are not given their due, mothers and their girls. However, it could be justified on the grounds that those who cause harms forfeit their right to avoid having an otherwise unreasonable burden imposed on them by a policy that seeks to prevent these harms from occurring. As the harm argument demonstrates, there is no doubt that women who use sex selection cause severe harms to third parties. When considered in the context in which women make their choice, however,

this justification seems mistaken. Women use sex selection to make the best of their situation in an unjust society. The root cause of the problems is therefore the way the society is structured, and this is arguably the responsibility of society at large. In this context, it seems unreasonable to say that women who use sex selection forfeit their right not to be unreasonably burdened. Thus, this argument fails to provide a case for a stricter enforcement of the ban.

Even if the ban, standing alone is unjustified, could it be the case that India would be justified in banning sex selection if it did so as part of a larger policy package that aimed to make it more lucrative to have girls? That aim might be pursued by directly subsidizing girls, by implementing policies that empower women, or by changing the background conditions so that daughters do not impose significant costs on their parents.

Let me first say that packaging a harmful practice together with beneficial practices is clearly insufficient to make it the case that the harmful practice should be considered beneficial. In this case, the beneficial practices would be doing all the work. The contribution of the ban would be to make things worse relative to a similar policy package that excludes the ban. For this *cumulative-effect argument* to be able to justify a ban, it needs to be shown either that the ban is necessary for the success of the other policies or that the other policies would make a ban more effective and less harmful than the current ban is. Let me address these possibilities in turn.

One of the few ways a ban could increase the success of policies that improve the status of women or make it more lucrative to have girls would be if a ban on sex selection itself communicated, or could be used as an opportunity to communicate, that parents should be glad to have girls. While we should not exclude the possibility that this could be made more effective, a cause for concern is that this general strategy has failed to bring significant results in the 25 years the ban has been in place. This failure is not surprising. As long as having a son is rewarded to the extent that it is, efforts to communicate that girls should be valued equally is likely to fail to bring about the desired outcomes.

This suggests another way the cumulative-effect argument could work. If other policies could weaken the son preference by making it more attractive to have girls, then a ban might be able to deter people from using sex selection. However, this version of the cumulative-effect argument is at best an argument for banning sex selection *after* these other policies have had the intended effect. Because of the ban's negative impact on mothers and their daughters, we should avoid using it as long as it is not necessary to produce the intended effects.

I will end with a general lesson from the comparative analysis performed in this paper: Even if we can point to several morally problematic aspects with a practice, we should not jump to the conclusion that we are justified in banning it. Whether we should, depends on a comparative analysis that looks closely at every plausible alternative. Only that way can we form a justified opinion of whether a ban is likely to direct the behavior in a better direction. This way of approaching the problem is not only fruitful in the case of sex

⁴⁴Jaitley, A. (2018, Jan). Economic Survey 2017: Volume I, Chapter 7: Gender and Son Meta-Preference: Is Development Itself an Antidote? New Delhi: Department of Economic Affairs, Finance Ministry of India. Retrieved Sept 20, 2019, from <https://econpapers.repec.org/RePEc:ess:wpaper:12445>.

⁴⁵Rogers et al., op. cit. note 2, p. 523.

selection. I hope the comparative method can be used to think more clearly about many contested issues.

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CONFLICT OF INTEREST

No conflict of interest declared.

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