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## **SEX-SELECTIVE ABORTION AND THE SUBJECT OF DISCRIMINATION**

### **Abstract**

The United Nations estimates that there are currently 140 million ‘missing women’ worldwide, a phenomenon largely attributed to the cultural ‘son preference’. This issue, often referred to by commentators and scholars as ‘gendercide’, raises significant moral and legal questions. The discourse surrounding the appropriate measures to address this issue presents intricate dilemmas. On the one hand, sex-selective abortion predominantly eliminates female fetuses, which should be a grave concern for advocates of women’s rights. On the other hand, imposing restrictions on this practice risks limiting access to abortion more broadly, undermining key justifications for its legality.

This Article offers a comprehensive global analysis of the issue, examining three primary approaches: banning sex-selective abortion while allowing abortion in general, refusing to ban any form of abortion, and viewing all abortions as unacceptable. The analysis is conducted primarily from the perspective of logical consistency, comparing the underlying rationales of these positions and critically evaluating them. Furthermore, the Article explores the concept of replacing biological humanity with the notion of personhood and discusses the principle of non-discrimination as understood in international human rights law.

### **KEYWORDS**

sex selective abortion, human rights, discrimination, personhood

## SŁOWA KLUCZOWE

aborcja selektywna ze względu na płeć, prawa człowieka, dyskryminacja, osobowość

## I. INTRODUCTION

Sex-selective abortion could be described as one of the ‘hard cases’ for advocates of abortion rights, probably compared only with the instances of late-term abortions for non-medical reasons. On the one hand, it reduces the population of women by eliminating mostly female fetuses, which should alarm those who advocate for women’s rights. On the other hand, however, any restrictions on this practice are likely to affect access to abortion in general and undermine some of its crucial justifications. It is difficult to condemn it without portraying abortion as such in a negative light, and both sides of the debate are perfectly aware of this. The discussions in law and policy have been ongoing and no real consensus is in sight. Commentators and scholars not only debate whether sex-selective abortion should be prohibited or how to prohibit it effectively, but first and foremost, they cannot agree on the rationale behind these prohibitions and on who is to be considered the primary subject of discrimination. Historically, practical agreements on the content of human rights have been reached despite underlying disagreements on their sources and origins.<sup>1</sup> The situation at stake, however, appears fundamentally different as the disagreement delves much deeper – to the question of who counts as human and, therefore, who can be a holder of human rights.

This Article begins by providing a global overview of sex-selective abortion and its worldwide consequences. It then proceeds to analyze relevant laws, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), alongside recommendations and guidelines from international bodies. This background serves to introduce the central argument of the Article – that sex-selective abortion can only be condemned if abortion, in general, is deemed to be wrong. To discuss and defend this view, the Article analyzes the positions of those scholars and thinkers who: a) would be willing to ban sex-selective abortion but not abortion in general; b) refuse to ban any

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<sup>1</sup> On the ‘agreement on disagreement’ on sources and origins of human rights during the negotiations on the Universal Declaration of Human Rights see e.g. Robert P. George, ‘Natural Law, God and Human Dignity’ in George Duke and Robert P. George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (CUP 2017) 57. See also Jacques Maritain, *Man and the State* (University of Chicago Press 1951) 76.

kind of abortion; c) regard abortion in general as unacceptable and, therefore, support a ban on sex-selective abortion. It does so from the perspective of human dignity, equality, and consistency of arguments, using to this end the concepts of non-discrimination and personhood.

## II. OVERVIEW OF THE ISSUE

The social preference for children of a specific sex – usually boys – is not a new phenomenon. Historically, this bias has led to practices such as infanticide and mistreatment of girls, even resulting in their premature death.<sup>2</sup> Only recently, however, due to the developments in medical technology, also prenatal sex selection became a widespread and problematic issue. Methods vary and may include preconception methods such as sperm sorting, pre-implantation sex diagnosis and the following implantation of the embryo of a desired sex, or abortions of the fetuses of undesired sex, most often females.<sup>3</sup> For the purposes of clarity, the Article focuses on the last possibility and analyzes only cases when prenatal sex selection is pursued for non-medical reasons. Moreover, even though, on some occasions, women decide to undergo sex-selective abortions because they want to have a daughter instead of a son, this scenario is significantly less common and, therefore, I concentrate on abortions that aim to eliminate female fetuses. Both situations are obviously morally equivalent.

The typical sex ratio at birth ranges from 102 to 106 males per 100 females,<sup>4</sup> but in some instances, ratios as high as 130 have been observed.<sup>5</sup> Sex-selective abortion is most notorious and most prevalent in China and India, which are the two most populous countries in the world, but evidence suggests that it is not only limited to them.<sup>6</sup> China banned sex-selective abortion in 2003, but this measure

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<sup>2</sup> See e.g. Amartya Sen, 'Missing Women – Revisited' (2003) 327 *BMJ* 1297; Shareen Joshi, 'Missing Women and Violent Crimes in India: More Than a Correlation?' (2014) 15 *Georgetown Journal of International Affairs* 35.

<sup>3</sup> UNFPA, *Guidance Note on Prenatal Sex Selection* (2010) <[https://unfpa.org/sites/default/files/resource-pdf/guidenote\\_prenatal\\_sexselection.pdf](https://unfpa.org/sites/default/files/resource-pdf/guidenote_prenatal_sexselection.pdf)> accessed 15 December 2024.

<sup>4</sup> OHCHR, UNFPA, UNICEF, UN Women and WHO, *Preventing Gender-Biased Sex Selection: An Interagency Statement* (2011) <[https://www.unfpa.org/sites/default/files/resource-pdf/Preventing\\_gender-biased\\_sex\\_selection.pdf](https://www.unfpa.org/sites/default/files/resource-pdf/Preventing_gender-biased_sex_selection.pdf)> accessed 15 December 2024.

<sup>5</sup> *ibid.*

<sup>6</sup> John Bongaarts and Christophe Z. Guilmoto, 'How Many More Missing Women? Excess Female Mortality and Prenatal Sex Selection, 1970–2050' (2015) 41 *Population and Development Review* 241.

did not prove to be particularly effective.<sup>7</sup> Given the long-standing one-child policy, relaxed only in 2015, there still remains a strong social preference for boys, especially in rural areas.<sup>8</sup> Similarly, although already in 1994, the Indian Parliament passed the first national law banning sex-selective abortion,<sup>9</sup> there may be as many as 6.8 million fewer girls being born in India by 2030.<sup>10</sup> The problem was also widespread in South Korea (in particular before a ban on revealing a child's sex before birth),<sup>11</sup> Vietnam,<sup>12</sup> Nepal<sup>13</sup> or Taiwan.<sup>14</sup> Moreover, official data show an elevated sex ratio in three post-Soviet states – Armenia (117), Azerbaijan (116) and Georgia (121).<sup>15</sup> In the United States concerns arise mainly in the context of immigrants who, according to some, would be more likely to resort to sex-selective abortions if they were pregnant with girls.<sup>16</sup> The opponents of the ban argue that the prohibitions could lead to racial profiling of Asian American women and placing access barriers on women seeking abortions.<sup>17</sup> In 2012, the House of Representatives debated, but at the end did not enact, the Prenatal Non-Discrimination Act (PRENDA) aimed at banning sex-selective abortions.<sup>18</sup>

<sup>7</sup> Congressional-Executive Commission on China, *Annual Report 2011* (2011) 125.

<sup>8</sup> Xiaojie Wang, Wenjie Nie and Pengcheng Liu, 'Son Preference and the Reproductive Behavior of Rural-Urban Migrant Women of Childbearing Age in China: Empirical Evidence from Cross-Sectional Data' (2020) 17 *International Journal of Environmental Research and Public Health*.

<sup>9</sup> Sugandha Nagpal, 'Sex-Selective Abortion in India: Exploring Institutional Dynamics and Responses' (2013) 3 *McGill Sociology Review* 18, 27.

<sup>10</sup> Amrit Dhillon, 'Selective Abortion in India Could Lead to 6.8m Fewer Girls Being Born by 2030' *The Guardian* (London, 21 August 2020) <<https://www.theguardian.com/global-development/2020/aug/21/selective-abortion-in-india-could-lead-to-68m-fewer-girls-being-born-by-2030>> accessed 15 December 2024.

<sup>11</sup> Jinkook Lee and James P. Smith, 'Fertility Behaviors in South Korea and Their Association with Ultrasound Prenatal Sex Screening' (2018) 4 *SSM - Population Health* 10.

<sup>12</sup> Tran Minh Hang, *Global Debates, Local Dilemmas: Sex-Selective Abortion in Contemporary Viet Nam* (2018).

<sup>13</sup> Elina Pradhan and others, 'Determinants of Imbalanced Sex Ratio at Birth in Nepal: Evidence from Secondary Analysis of a Large Hospital-Based Study and Nationally-Representative Survey Data' (2019) 9 *BMJ Open*.

<sup>14</sup> Priti Kalsi, 'Abortion Legalization, Sex Selection, and Female University Enrollment in Taiwan' (2015) 64 *Economic Development and Cultural Change* 163.

<sup>15</sup> Marc Michael and others, 'The Mystery of Missing Female Children in the Caucasus: An Analysis of Sex Ratios by Birth Order' (2013) 39 *International Perspectives on Sexual and Reproductive Health* 97.

<sup>16</sup> Sital Kalantry, 'Sex-Selective Abortion Bans: Anti-Immigration or Anti-Abortion?' (2015) 16 *Georgetown Journal of International Affairs* 140.

<sup>17</sup> Sital Kalantry, *Women's Human Rights and Migration: Sex-Selective Abortion Laws in the United States and India* (University of Pennsylvania Press 2017).

<sup>18</sup> Prenatal Non-Discrimination Act of 2012, H.R. 3541, 112th Cong. (2012).

The result of sex-selective abortions is being described as a problem of ‘missing women’.<sup>19</sup> Some call it ‘gendercide’, the term coined by Mary Ann Warren in her book *Gendercide: The Implications of Sex Selection*.<sup>20</sup> Clearly, ‘gendercide’ intentionally evokes analogies with ‘genocide’ – one of the conducts listed as such in the Rome Statute ‘committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.<sup>21</sup> Warren acknowledges this parallel and writes that:

By analogy, gendercide would be the deliberate extermination of persons of a particular sex (or gender). Other terms, such as ‘gynocide’ and ‘femicide’, have been used to refer to the wrongful killing of girls and women. Nevertheless, ‘gendercide’ is a sex-neutral term in that the victims may be either male or female. There is a need for such a sex-neutral term since sexually discriminatory killing is just as wrong when the victims happen to be male.<sup>22</sup>

Some of the reasons for giving a preference to the male offspring include patri-lineal inheritance, the desire to preserve a family name, reliance on men to provide economic support for the family or to perform funeral rites, and a general tendency to reduce family size while accommodating wishes for sons.<sup>23</sup> In certain regions, there is a cultural necessity to ‘marry off’ girls, which requires a costly dowry and, therefore, families perceive their daughters primarily as a financial burden.<sup>24</sup> According to the UN estimations, currently, there are 140 million missing women around the world as a result of the ‘son preference’, including sex selection.<sup>25</sup>

The societal implications of a male surplus are profound. It is assumed that it may lead to men’s inability to marry and increase their aggression and violence in the community.<sup>26</sup> A study from India suggests that a ‘numerical abundance of males in the local area modestly but significantly increases the likelihood that members of Indian households are victimized by theft, breaking and entering, and assault, and also increases the probability that young women in the community are

<sup>19</sup> Ewelina U Ochab, ‘What Are We Doing About the Issue of Missing Women in 2021?’ *Forbes* (8 January 2021) <<https://www.forbes.com/sites/ewelinaochab/2021/01/08/what-are-we-doing-about-the-issue-of-missing-women-in-2021/?sh=24dad1927ec3>> accessed 15 December 2024.

<sup>20</sup> Mary Anne Warren, *Gendercide: The Implications of Sex Selection* (Rowman & Allanheld 1985).

<sup>21</sup> See a full definition of the crime of genocide: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Art 6.

<sup>22</sup> Warren (n 20) 22.

<sup>23</sup> UNFPA (n 4).

<sup>24</sup> Aparna Mitra, ‘Son Preference in India: Implications for Gender Development’ (2014) 48 *Journal of Economic Issues* 1021.

<sup>25</sup> United Nations Population Fund, ‘Gender Biased Sex Selection’ <<https://www.unfpa.org/gender-biased-sex-selection>> accessed 15 December 2024.

<sup>26</sup> Nigel Barber, ‘The Sex Ratio as a Predictor of Cross-National Variation in Violent Crime’ (2000) 34 *Cross-Cultural Research* 264.

perceived to be harassed'.<sup>27</sup> There is also evidence that sex selection could result in women being trafficked to other regions to be forcibly married or in sharing brides among brothers.<sup>28</sup> Even if the circumstances are not that drastic, additional pressure on women to get married in states with unbalanced sex ratios may still exist.<sup>29</sup> Furthermore, the acceptability of sex-selective abortion sends signals to the community that women are inferior to men and creates the impression that they are less worthy of being provided with adequate resources.

### III. APPLICABLE LAWS AND GUIDELINES

CEDAW, adopted in 1979, does not explicitly address sex-selective abortion, which is likely to be attributed to the limited discourse on the issue at that time. One of its provisions, Article 5(a), may, nonetheless, be applicable to the ongoing debate as it states that the State Parties shall take all appropriate measures 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.<sup>30</sup> Additionally, the Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention) stipulates that 'the use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided'.<sup>31</sup>

Non-binding documents and the opinions of treaty-monitoring bodies also provide significant guidance on the issue. The Human Rights Committee – a treaty monitoring body for the International Covenant on Civil and Political Rights – in one of its General Comments noted that: '[T]he subordinate role of

<sup>27</sup> Scott J South, Katherine Trent and Sunita Bose, 'Skewed Sex Ratios and Criminal Victimization in India' (2014) 51 *Demography* 1019, 1035.

<sup>28</sup> Christophe Z Guilmoto, 'Characteristics of Sex Ratio Imbalance in India and Future Scenarios' (UNFPA 2007) <<https://www.unfpa.org/resources/characteristics-sex-ratio-imbalance-india-and-future-scenarios> accessed > 15 December 2024.

<sup>29</sup> S Anukriti, Maurizio Bussolo and Nistha Sinha, 'Son Preference: Why We Should Care About It' World Bank Blogs (19 October 2021) <<https://blogs.worldbank.org/developmenttalk/son-preference-why-we-should-care-about-it>> accessed 15 December 2024.

<sup>30</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979) 1249 UNTS 13, Art 5(a).

<sup>31</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 4 April 1997) ETS No 164, Art 14.

women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses'.<sup>32</sup> The Committee on the Rights of the Child, in its Comment on India, recommended strengthening legislation aimed at preventing sex-selective abortion.<sup>33</sup> Similarly, in the ICPD Programme of Action, a nonbinding but nevertheless highly important outcome document of the International Conference on Population and Development (Cairo 1994), States agreed on the need to 'eliminate all forms of discrimination against the girl child and the root causes of son preference, which result in harmful and unethical practices regarding female infanticide and prenatal sex selection'.<sup>34</sup>

The European Parliament in its resolution of 8 October 2013, tellingly titled, 'Gendercide: the missing women?' lamented that 'despite recent legislation against sex-selective practices, girls are to a disproportionate degree the target of ruthless sexual discrimination, often extended to include unborn, predetermined baby girl fetuses, which are aborted, abandoned or killed, for no other reason than the fact that they are female', called on the Commission and the Member States to 'identify clinics in Europe that conduct sex-selective abortions, provide statistics on this practice and elaborate a list of best practices for preventing them' and encouraged the development of 'support mechanisms for women and families that can provide information and advice to women about the dangers and damage of sex-selective practices and to provide counseling to support women who may be under pressure to eliminate female fetuses'.<sup>35</sup> Given the overall activity of the European Parliament, for example, its resolution in which it expressed concern about the *Dobbs* decision,<sup>36</sup> or condemnation of new abortion restrictions in Poland,<sup>37</sup> it would not be reasonable to associate the majority of this institution with the pro-life position; yet it decided to oppose sex-selective abortion in strong

<sup>32</sup> Human Rights Committee, 'General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10, para 3.

<sup>33</sup> Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention' (27 August 2013) UN Doc CRC/C/IND/3-4, paras 86, 264, 268, 275.

<sup>34</sup> International Conference on Population and Development, 'Report of the International Conference on Population and Development' (5–13 September 1994) UN Doc A/CONF.171/13/Rev.1, para 4.16.

<sup>35</sup> European Parliament, 'Resolution of 8 October 2013 on Gendercide: The Missing Women?' (2013) EP Doc P7\_TA(2013)0400.

<sup>36</sup> European Parliament, 'Right to Safe and Legal Abortion Must Be Safeguarded, MEPs Demand' (Press Release, 9 June 2022) <<https://www.europarl.europa.eu/news/en/press-room/20220603IPR32144/right-to-safe-and-legal-abortion-must-be-safeguarded-meps-demand>> accessed 15 December 2024.

<sup>37</sup> European Parliament, 'Polish De Facto Ban on Abortion Puts Women's Lives at Risk, Says Parliament' (Press Release, 26 November 2020) <<https://www.europarl.europa.eu/news/en/press-room/20201120IPR92132/polish-de-facto-ban-on-abortion-puts-women-s-lives-at-risk-says-parliament>> accessed 15 December 2023.

terms. Similarly, the Committee of Ministers of the Council of Europe, in its recommendation to the Member States, urged them to ‘prohibit enforced sterilization or abortion, contraception imposed by coercion or force, and pre-natal selection by sex, and take all necessary measures to this end’.<sup>38</sup> In the same spirit, the Council of Europe’s Commissioner for Human Rights (2012-2018), Nils Muižnieks, in his comment, explicitly called for the criminalization of sex-selective abortions, adding that ‘it is hard to address the problem of sex-selective abortions without being drawn into debates on abortion as such’.<sup>39</sup>

The United Nations Population Fund (UNFPA), in its report on ‘Defying the practices that harm women and girls and undermine equality’, described ‘gender-biased sex selection’ as a human rights violation that affects the rights to equality and non-discrimination, rights against gender stereotyping, the right to be secure in one’s self, the right to be protected from violence and the right to enjoy one’s health.<sup>40</sup> It further specified that ‘a decision to carry to term male but not female fetuses is a reflection of gender discriminatory views that women and girls are worth less than men and boys’.<sup>41</sup> Son preference, according to UNFPA, is linked but not synonymous to gender-biased sex selection as ‘[P]referring to have a son rather than a daughter is not in itself a human rights violation’.<sup>42</sup> The report listed gender-based selection, together with child marriage and female genital mutilation (FGM), as the main forms of gender-based discrimination.<sup>43</sup> In the same vein, UNFPA, in its Guide Note on prenatal sex selection, declared that ‘abortion for the sole purpose of sex selection and the elimination of female fetuses is not acceptable’.<sup>44</sup> It added, however, that ‘it is essential that any new legislation or regulation does not lead to limiting access to otherwise legal abortion’, recommended to ‘avoid legislative limitations for late abortion in second and third trimesters’, as well as ‘avoid any language which assigns the rights of personhood to the fetus – thus, avoid the terms “feticide”, or describing prenatal sex selection as “violence against women” (implying that the fetus is a woman)’.

<sup>38</sup> Council of Europe, Committee of Ministers, ‘Recommendation of the Committee of Ministers to Member States on the Protection of Women Against Violence’ (30 April 2002) Rec(2002)5.

<sup>39</sup> Nils Muižnieks, ‘Human Rights Comment: Sex-Selective Abortions Are Discriminatory and Should Be Banned’ Council of Europe (14 January 2014) <<https://www.coe.int/en/web/commissioner/-/sex-selective-abortions-are-discriminatory-and-should-be-bann-1>> accessed 15 December 2024.

<sup>40</sup> UNFPA, *State of the World Population: Against My Will: Defying the Practices that Harm Women and Girls and Undermine Equality* (30 June 2020) 33 <<https://reliefweb.int/report/world/state-world-population-2020-against-my-will-defying-practices-harm-women-and-girls-and>> accessed 15 December 2024.

<sup>41</sup> *ibid* 35.

<sup>42</sup> *ibid* 43.

<sup>43</sup> *ibid* 36–37.

<sup>44</sup> UNFPA (n 3).

It further advised not to identify sex selection itself as a human rights abuse and to ‘avoid using the Beijing Conference definition of violence against women as including sex selection’.<sup>45</sup>

## IV. ARGUMENT

My central argument presented in this Article is that sex-selective abortion can only be condemned if we deem abortion as such to be wrong. This stance arises from the understanding that the primary subject of discrimination in the case of sex-selective abortion is an actual person of concrete sex, not a potential life. If only potential life was at stake, then having a preference for one sex should not be condemned – at least not to the extent of requiring a woman to carry the burden of pregnancy she does not want for the sake of a more appropriate demographic structure or more favorable conditions in society. To explain and support this argument, I critically discuss, firstly, the position according to which abortion for the purpose of sex-selection should be banned but abortion, in general, remains acceptable, and, secondly, the position of those who claim that abortion, including sex-selective abortion, is morally permissible and should be legal.

## V. TWO MAIN OPPOSITE POSITIONS

### 1. FIRST POSITION: ABORTION AS SUCH IS ACCEPTABLE BUT NOT SEX-SELECTIVE ABORTION

In a 2006 Zogby International Poll, 86% of Americans agreed that sex-selective abortion should be illegal.<sup>46</sup> Similarly, a poll by the Charlotte Lozier Institute found that 77% of respondents answered ‘yes’ to the question, ‘When the fact that the developing baby is a girl is the sole reason for seeking an abortion, do you believe that abortion should be illegal?’<sup>47</sup> However, according to the latest data from the Pew Research Centre, only 37% of Americans think that abortion should

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<sup>45</sup> *ibid.*

<sup>46</sup> Congressional Bills 114th Congress. U.S. Government Publishing Office <<https://www.govinfo.gov/content/pkg/BILLS-114s48is/html/BILLS-114s48is.htm>> accessed 15 December 2024.

<sup>47</sup> ‘Poll: 77% of Americans Support Ban on Sex-Selective Abortion’ Charlotte Lozier Institute (17 May 2012) <<https://lozierinstitute.org/poll-77-americans-support-ban-sex-selective-abortion/>> accessed 15 December 2024.

be illegal in all or most cases.<sup>48</sup> While public opinion surveys can have a margin of error, it is evident that many individuals who generally support abortion rights oppose sex-selective abortion. For instance, Hillary Clinton, a prominent advocate for abortion access, made an interesting comment in this regard when, in her interview for the *New York Times*, she stated:

Obviously, there's work to be done in both India and China, because the infanticide rate of girl babies is still overwhelmingly high, and unfortunately with technology, parents are able to use sonograms to determine the sex of a baby, and to abort girl children simply because they'd rather have a boy.<sup>49</sup>

By linking infanticide to sex-selective abortion, Clinton indirectly challenged the notion of an unrestricted right to abortion on demand. She was clearly not alone in her position. Supporters of the view that abortion is generally acceptable but that sex-selective abortion is not, typically justify their stance in several ways.

a) Sex selective abortion harms society, in particular, women, contributes to the widespread discrimination against them and, therefore, is unacceptable and possibly should be banned.

The first argument opposing sex-selective abortion but not abortion as such might be called 'an argument from discrimination'. It presupposes either at least some value of the fetus or the importance of social values that would be violated in sex-selective abortion. This position suggests that the autonomy of a woman in her abortion decision is not absolute, and for the good of a wider community, some restrictions could be justified. According to Catharine A. MacKinnon:

(...) aborting female fetuses may further erode women's power as women make up less and less of the population. On the one hand, it is difficult to say why the reason for the abortion decision should matter until those who prescribe what matters live with the consequences the way the mother does, or until women can make such decisions in a context of equality. At the same time, in a context of mass abortions of female fetuses, the pressures on women to destroy potential female offspring are tremendous and oppressive unless restrictions exist.<sup>50</sup>

In the same vein, Sital Kalantry admits that:

<sup>48</sup> Hannah Hartig, 'About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases' Pew Research Center (13 June 2022) <<https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/>> accessed 14 December 2024.

<sup>49</sup> Ma Mark Landler, 'A New Gender Agenda' *New York Times* (23 August 2009) <[https://www.nytimes.com/2009/08/23/magazine/23clinton-t.html?\\_r=2&sq=hillary%20clinton&st=nyt&scp=6&pagewanted=all#](https://www.nytimes.com/2009/08/23/magazine/23clinton-t.html?_r=2&sq=hillary%20clinton&st=nyt&scp=6&pagewanted=all#)> accessed 15 December 2024.

<sup>50</sup> Catharine A MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 *Yale Law Journal* 1281, 1317.

Feminists are caught between a rock and a hard place in regard to sex selection – they want to preserve a woman’s right to choose, and, at the same time, they do not want to take positions that suggest that a pre-viability fetus or embryo has a right to life.<sup>51</sup>

Kalantry adopts a cautious stance regarding sex-selective abortion bans, emphasizing that such prohibitions can impede general access to abortion services. She contends that restrictions may be warranted in specific contexts where evidence demonstrates that sex-selective abortion practices harm women and girls, and she highlights the adverse consequences of a male surplus. In her opinion, no general conclusions should be drawn on the basis of how sex selective abortion is practiced in other countries.<sup>52</sup>

Similarly, April Cherry recognizes sex-selection as an issue impacting women as a class. She acknowledges that:

[E]ven many feminists who have argued against the legal regulation of sex-selective abortion have recognized that the principle of freedom of choice must be secondary to the principles of social fairness and equal protection if women’s subordination is to be reduced or eradicated.<sup>53</sup>

Tabitha Powledge expresses her opposition to sex selection in even stronger terms, arguing that:

[W]e should not choose the sexes of our children because to do so is one of the most stupendously sexist acts in which it is possible to engage. It is the original sexist sin (...) To destroy an extant fetus for this reason is more morally opprobrious than techniques aimed at conceiving a child of a particular sex but there are both deeply wrong.<sup>54</sup>

Thus, it can be concluded that those who believe sex-selective abortion is wrong due to its impact on the well-being of women as a group do not view abortion solely as a matter of personal choice. Instead, they recognize the broader societal implications of the practice.

b) Women in certain cultures and circumstances are pressured to have an abortion when they discover that they are pregnant with a girl, and therefore, sex-selective abortion should be banned to avoid that pressure.

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<sup>51</sup> Kalantry (n 17) 51.

<sup>52</sup> *ibid.*

<sup>53</sup> April L Cherry, ‘A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice’ (1995) 10 Wisconsin Women’s Law Journal 161, 217.

<sup>54</sup> Joni Danis, ‘Sexism and “The Superfluous Female”’: Arguments for Regulating Pre-Implantation Sex Selection’ (1995) 18 Harv Women’s LJ 219, 241 (quoting Tabitha M Powledge, ‘Unnatural Selection: On Choosing Children’s Sex’ in Helen Holmes and others (eds), *The Custom-Made Child* (Humana Press 1981) 193, 196).

Another argument could be called a ‘pressure argument’. In certain cultural contexts, a woman pregnant with a girl may face familial pressure to abort in order to conceive a son. She may fear that her daughter will face harm that a son would not and worry about being ostracized by her community if she gives birth only to daughters. In extreme cases, she might be abandoned by her husband and left without financial support. These pressures can lead women to internalize societal norms that value male offspring over female, reinforcing the inferior status of girls.<sup>55</sup>

The idea that sex-selective abortion should be banned as a part of the strategy to combat gender stereotypes emphasizes the pedagogical or ‘educative’ function of law.<sup>56</sup> It must be noted here that the enforcement, as we can observe in China or India, which officially ban abortion on the grounds of sex but the practice nonetheless remains widespread, would be highly problematic. It is, indeed, likely that women would not reveal the real reasons for their decisions in the abortion requests.<sup>57</sup> The proposals to prohibit doctors from informing the parents about the sex of their child also do not appear to be the adequate solution as, firstly, communicating this information may be very subtle, even non-verbal, and, secondly, the majority of parents who would like to know whether they are expecting a boy or a girl do not want to use this knowledge for the purpose of abortion and it would not be fair to deny them this opportunity.<sup>58</sup> Despite these challenges, bans on sex-selective abortion are not entirely without merit due to the law’s educative role in shaping societal norms. For example, in Europe, Sweden, Norway, and Iceland adopted the so-called ‘Nordic model’, which makes it illegal to buy sex (but not to ‘sell’ it).<sup>59</sup> The aim of this law is certainly not to identify and punish every case of buying sex but rather to create the social norm pursuant to which there are some of the most intimate acts that cannot be commodified.

Furthermore, the argument that sex-selective abortions should be banned to avoid, to the extent possible, social pressure on women to undergo them can also be supported by the claim that a woman’s choice in this situation is never autonomous, as the choices she considers are necessarily restricted by systemic discrimination.<sup>60</sup> In that regard, the protective function of law would be in play,

<sup>55</sup> See Anukriti, Bussolo and Sinha (n 29).

<sup>56</sup> On the educative role of law, see e.g. Brian Burge-Hendrix, ‘The Educative Function of Law’ in Michael Freeman and Ross Harrison (eds), *Law and Philosophy* (OUP 2007) 243.

<sup>57</sup> See Lauren Vogel, ‘Sex-Selective Abortions: No Simple Solution’ (2012) 184 *Canadian Medical Association Journal* 286.

<sup>58</sup> *ibid.*

<sup>59</sup> See e.g. ‘What is the Nordic Model?’ (Nordic Model Now, 16 December 2023) <<https://nordicmodelnow.org/what-is-the-nordic-model/>> accessed 15 December 2024.

<sup>60</sup> Wendy Rogers, Angela Ballantyne and Heather Draper, ‘Is Sex-Selective Abortion Morally Justified and Should It Be Prohibited?’ (2007) 21 *Bioethics* 520.

and introducing abortion restriction would aim to protect a woman from making a choice that is not her own. Interestingly, however, this line of thinking does not have to be limited only to sex-selective abortions. It extends to teenagers who face family pressure to terminate their pregnancy, women indirectly (or directly) coerced by their partners to abort, or women whose employers in a subtle (or not so subtle) way let them know that they would be a burden for the company. Whether and to what extent abortion legislation can protect women from these risks is a topic for a separate discussion.

c) Abortion is acceptable when carrying the pregnancy to term or having any child would overwhelmingly burden a woman who does not consent to that sacrifice. There is no difference between a pregnancy with a female or male fetus and little objective difference in raising a female or male child and, therefore, the preference for a particular sex cannot constitute a legitimate reason for abortion.

Finally, we might consider the ‘no additional sacrifice’ argument, which draws a distinction between legitimate and illegitimate reasons for abortions and, therefore, to a certain extent, it acknowledges the value of a fetus – although, in many circumstances, it does not place it above the autonomy of a woman. One of the core arguments in favor of abortion is that even a significant value of the fetus’ life cannot prevail over the autonomy of a woman who should not be compelled to make sacrifices and carry the burdens of pregnancy she does not desire. In *Roe v Wade*, the majority of the United States Supreme Court stated:

[S]pecific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>61</sup>

The burdens described by the Court in *Roe v Wade* apply equally to pregnancies regardless of the fetus’s sex, just as they apply to pregnancies irrespective of the child’s race. As Dr. Puneet Bedi, who himself performs early abortions and abortions for medical reasons, states: ‘[Y]ou can choose whether to be a parent. But once you choose to be a parent, you cannot choose whether it’s a boy or girl, black or white, tall or short’.<sup>62</sup> Thus, the only case that would be substantially

<sup>61</sup> *Roe v Wade*, 410 US 113, 153 (1973).

<sup>62</sup> Mara Hvistendahl, *Unnatural Selection: Choosing Boys over Girls, and the Consequences of a World Full of Men* (PublicAffairs 2011) 46.

different is being pregnant with a child with a serious illness or disability, described in greater detail in the subsequent section of the Article.

## 2. SECOND POSITION: ABORTION IS ACCEPTABLE, INCLUDING SEX-SELECTIVE ABORTION

Proponents of this position most often motivate it by claiming that bans on sex-selective abortion will lead to a ‘slippery slope’ scenario and endanger access to abortion as such.<sup>63</sup> They also express concern that bans on sex-selective abortions ‘are part of a hidden agenda by anti-choice groups’.<sup>64</sup> While some may personally believe that sex-selective abortion is morally wrong, they prioritize upholding the principle of complete autonomy for women and prefer to allow the practice rather than risk compromising this principle. Thus, we can observe attempts to find a way to express condemnation of gender discrimination without opposing sex-selective abortions although they have been repeatedly recognized to be an instance of such discrimination.<sup>65</sup> In adopting this approach, proponents typically invoke the following arguments.

a) Abortion is, first and foremost, a personal choice that affects the life of a concrete woman. It is unacceptable to require a sacrifice pertaining to such a personal sphere for the good of society or even the good of all women as a group.

According to this perspective, all abortions fall within the category of private choices, and even though some members of society will consider sex-selective abortions to be harmful to the concept of equality, they should not be prohibited. Sital Kalantry draws an analogy between sex-selective abortion and a situation in which a man refuses to talk with a woman because of her perceived inferiority. She agrees that such behavior is a manifestation of gender discrimination but she does not see a possibility of any legal intervention here.<sup>66</sup> In the same vein, Sherry Colb and Michael Dorf argue that if a racist person does not want to have sex with

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<sup>63</sup> See e.g. Anne O’Rourke, ‘A Legal Political Assessment of Challenges to Abortion Laws by Anti-Choice Activists in Australia and the Progression of Abortion Law in Australia and the United States’ (2022) 70 *Am J Comp L* 162.

<sup>64</sup> Center for Reproductive Rights, *Statement of Policies and Principles on Discrimination against Women and Sex-Selective Abortion Bans* <[https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Statement%20on%20Sex%20Selective%20Abortion%20Bans%20FIN\\_1.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Statement%20on%20Sex%20Selective%20Abortion%20Bans%20FIN_1.pdf)> accessed 15 December 2024.

<sup>65</sup> See e.g. Amnesty International, ‘Amnesty International’s Updated Abortion Policy: FAQs’ (28 September 2020) <<https://www.amnesty.org/en/latest/news/2020/09/amnesty-updated-abortion-policy-faqs/>> accessed 15 December 2024.

<sup>66</sup> Kalantry (n 17) 63.

another individual because of their race, this is immoral and offensive but not illegal, nor should it be.<sup>67</sup>

This line of reasoning, while deeply individualistic, is not surprising in the contemporary world. The notion of shaping one's life and making intimate choices for the common good of the community seems to be a relic of the past for much of society. Even though many developed countries are facing demographic crises, it is rare to find anyone who would tell a specific woman that she should have a child to help alleviate this issue.

b) Women who experience the pressure of having a son will be additionally burdened if they are deprived of the possibility to resort to legal sex-selective abortion.

Interestingly, some commentators, despite recognizing the pressure on women to undergo sex-selective abortion, argue that this pressure is not a reason to ban the practice but rather a reason to permit it. For instance, Johanna Westeson, Regional Director for Europe of the Center for Reproductive Rights, recalling situations in which women are punished if they give birth to girls, states that in this context, abortion is rational.<sup>68</sup> Kate Greasley goes even further, suggesting that when the pressure is severe enough to jeopardize a woman's mental health, sex-selective abortion could fall within the health exception.<sup>69</sup> She implies that sex-selective abortion in this way may be legal in the United Kingdom under the terms of the Abortion Act 1967, according to which no criminal liability shall attach to 'someone performing an abortion where two doctors form an opinion in good faith that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman'.<sup>70</sup> Sally Sheldon provides a similar perspective, illustrating the point with the following example:

Imagine a woman with two female children who comes from an ethnic group which places a very high value on sons. She and her husband live with her in-laws, who threaten to throw them out if she gives birth to another daughter. Imagine another whose husband beats her and tells her that she will be subject to far worse violence if she gives birth to a daughter. In each of these situations, we would wish for the

<sup>67</sup> Sherry F Colb and Michael C Dorf, *Beating Hearts: Abortion and Animal Rights* (Columbia University Press 2016) 88.

<sup>68</sup> Johanna Westeson, 'Rights-Based Approach to Sex-Selection' (Center for Reproductive Rights, 23 January 2012) <<https://reproductiverights.org/intlawgrrls-rights-based-approach-to-sex-selection/>> accessed 15 December 2024. ('We're all outraged by the practice, but without much knowledge, it's easy to call for its prohibition. In reality, there are many circumstances in which women are severely punished if they give birth to girls, and in that context, an abortion is rational'.)

<sup>69</sup> Kate Greasley, 'Is Sex-Selective Abortion against the Law?' (2016) 36 *Oxford J Legal Stud* 535.

<sup>70</sup> *ibid* 539.

woman to be able to leave an abusive situation or, better, to live in a world where such things do not happen. But while we wait for that world, a doctor who authorizes a termination in such circumstances could make a strong legal case that she had acted in good faith to preserve the mental health of her patient.<sup>71</sup>

Given the definition of health adopted in *Doe v Bolton* in which the U.S. Supreme Court stated that when it comes to health ‘the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient’, it would not be impossible to imagine a similar argument developed in the United States before the *Dobbs* decision.<sup>72</sup> Even independently from its relation to mental health, it is undeniable that the pressure on women to undergo sex-selective abortions exists, and that fact prompts some to argue that only a woman can decide if she is able to bear this pressure or if she chooses to avoid it resorting to abortion.

c) Only a concrete woman can decide what is a legitimate reason for her to have an abortion, and the difference in burdens cannot be evaluated externally.

Although *prima facie* choosing abortion because the fetus is of the unwanted sex demonstrates the conviction that one sex is better than the other, one could imagine the situation when these two do not have to be equivalent. For instance, a woman may desire to have a son when she already has a daughter or daughters to balance her family or she may have past traumas associated with one sex. If we accept the view that a fetus is not a person (does not have any rights) and, therefore, the autonomy of a woman should always prevail, then even abortion chosen for most ‘trivial’ reasons should not be banned.

Moreover, it could be argued that any requirement to provide reasons for one’s abortion is demeaning as it requires sharing intimate details of one’s life with strangers. If one opposes any restrictions such as parental consent, spousal notification, or waiting periods on the grounds that they undermine a woman’s moral agency, then it follows that a woman should be the sole arbiter of her pregnancy decisions. April Cherry argues that:

(...) the refusal of society, through law, to protect and support women’s ability to make and carry out reproductive decisions, including a decision to abort a fetus because of its sex, also seems to derive from the deontological ethical consequences of the view that a fetus is a person, which equates the moral status of the fetus with the moral status of the pregnant woman.<sup>73</sup>

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<sup>71</sup> Sally Sheldon, ‘Abortion for Reason of Sex: Correcting Some Basic Misunderstandings of the Law’ (2016) 37 *Abortion Review* 2 <[https://kar.kent.ac.uk/29453/1/AR\\_issue\\_37.pdf](https://kar.kent.ac.uk/29453/1/AR_issue_37.pdf)> accessed 15 December 2024.

<sup>72</sup> *Doe v Bolton*, 410 U.S. 179, 192.

<sup>73</sup> Cherry (n 53) 209.

This position does not necessarily assert the absence of any moral significance of the fetus but rather contends that he or she lacks independent rights. In contrast, a woman possesses established rights, and thus, her autonomy takes precedence over concerns regarding potential harm to the child.<sup>74</sup>

## VI. A RESPONSE TO BOTH POSITIONS AND THEIR SUPPORTING ARGUMENTS

A response to both positions – the one rejecting sex-selective abortion but not abortion in general and the one accepting abortion, including sex-selective abortion – as well as their supporting arguments – is provided primarily from the perspective of consistency.

Argument 1.1 presupposes either some intrinsic value of the fetus or the significance of societal values that would be undermined by sex-selective abortion. It suggests that a woman's autonomy in her abortion choice is not absolute and that some restrictions could be justified for the greater good of the wider community. This position appears reasonable only if the fetus is considered a life with inherent value, not merely a potential being. Otherwise, it would be unjust to expect a woman to forgo an abortion and endure the burdens of pregnancy and childbirth solely to prevent potential negative effects on others – such as a more sexist and patriarchal society, increased violence, or a demographic imbalance affecting men's ability to find female partners. If the value of the fetus is to be disregarded, then argument 2.1 appears more persuasive, as it acknowledges the unacceptability of requiring a woman to make such a significant personal sacrifice.

Arguments 1.2 and 2.2, in discussing the problem of pressure on women, reach two opposite conclusions – one of them perceives it as a reason to ban sex-selective abortions and the other as a reason not to do it. *Prima facie*, both of them seem to ignore the question of the fetus and focus only on the well-being of a woman. Argument 1.2 highlights the pedagogical and educative role of law in shaping culture and protecting the vulnerable, akin to the Nordic model that prohibits the sale of sex to discourage prostitution. This approach, however, makes sense only if the issue at hand is not morally neutral – lawmakers under the Nordic model do not see prostitution as such. Law, in general, is primarily concerned with the pressure to do things that are considered bad or immoral. The proposition included in argument 2.2, on the other hand, seems to ignore not only a fetus but also to abandon the woman's interest, including the right to make

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<sup>74</sup> *ibid* 210.

autonomous decisions about her pregnancy. The reasoning that social preference for boys is so entrenched that abortion access should serve as an immediate remedy is surprising, especially when compared to responses to female genital mutilation (FGM), which the UNFPA lists as another form of gender discrimination.<sup>75</sup> Like sex selection, FGM is rooted in harmful gender stereotypes, and non-conformity can lead to social pressure, exclusion, or even violence. Nonetheless, few commentators would argue that such social pressures justify not prohibiting FGM.

Finally, the deepest contrast lies between arguments 1.3 and 2.3. Argument 1.3 differentiates between legitimate and illegitimate reasons for abortion, thereby implicitly acknowledging the value of the fetus, even if it does not always place this value above a woman's autonomy. In contrast, argument 2.3 affords a woman practically unrestricted autonomy, prioritizing her will over the welfare of the fetus in nearly all circumstances – though, as argument 1.2 points out, the nature of this will and autonomy is debatable. To critically evaluate these positions, it is essential to acknowledge that abortion constitutes an act intrinsically related to the fetus, whose status or rights, or lack thereof, cannot be ignored. While argument 1.3 appears more aligned with majority opinion, recognizing some value in the fetus, argument 2.3 arguably prevails in terms of consistency. The merits of these positions are further examined in the subsequent section of this Article, which delves into the concept of fetuses as potential or actual persons.

## VII. THE ANALOGY BETWEEN SEX-SELECTIVE ABORTION AND ABORTION ON THE BASIS OF DISABILITY

A noteworthy analogy may be developed between abortion on the basis of sex and abortion on the basis of disability if we assume, for the sake of argument, that a woman desires to be pregnant but not with a child with certain characteristics. Both types of abortion are possible due to the advances in technology and the ability to recognize disability or sex before a baby is born. Jeremy Williams argues that if one is committed to a pro-choice stance with regard to selective abortion due to disability, he would be unable to justify the prohibition of sex-selective abortion, and further asks about the scope of a woman's right to choose when it comes to the use of abortion as a means of selecting against unwanted fetal traits.<sup>76</sup> Williams acknowledges that opponents of sex-selective abortion might advocate for additional restrictions on abortions on the basis of disability, but he

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<sup>75</sup> See *An Interagency Statement* (n 4).

<sup>76</sup> Jeremy Williams, 'Sex-Selective Abortion: A Matter of Choice' (2011) 31 *Legal Philosophy* 125.

firmly asserts that ‘any such new restrictions would be unacceptably onerous for women’.<sup>77</sup>

Considering the sex-disability analogy, opponents of sex-selective abortion argue that it prevents the birth of females, thereby impeding progress toward gender equality. Similarly, some disability rights advocates contend that abortion based on disability eliminates individuals who could champion the rights of people with similar conditions, leading to unequal treatment.<sup>78</sup> When the presence of women or persons with disabilities is reduced in a given environment their distinctive needs may start to be ignored and the resources are not allocated to meet them.<sup>79</sup> Additionally, women may face pressure from others, particularly their partners, to undergo an abortion if the fetus is of an undesired sex or has a disability. In certain cultural contexts, women could fear that their daughters will face greater disadvantages compared to their sons, much like they might worry that their disabled children will encounter more significant challenges than healthy ones.

Interestingly, public opinion varies significantly in its judgment of these two kinds of abortion. Most people would consider sex-selective abortion to be less acceptable than abortion in general<sup>80</sup> and abortion on the grounds of disability more acceptable than abortion in more typical circumstances.<sup>81</sup> This likely stems from the perception that raising a child with a disability presents a greater burden for parents compared to raising a child of an undesired sex, which is generally not seen as particularly burdensome. Perhaps, the fact that knowing the sex of the fetus makes it easier for us to identify with him or her and develop an emotional bond is also of significance. Nevertheless, one may imagine that in a specific cultural context, raising only girls would be more difficult than having a child with Down syndrome in another environment. Similarly, the disadvantages girl-child would suffer could be greater than the obstacles individuals with Down syndrome face, especially in light of the data according to which they are generally satisfied with their lives.<sup>82</sup>

Reflecting on the issue of motivation for abortion from another perspective and the reason why sex-selective abortion is widely opposed, perhaps it would be useful to make a comparison with aggravated homicide, that is, homicide

<sup>77</sup> *ibid* 128.

<sup>78</sup> *ibid* 127.

<sup>79</sup> See e.g. Christopher Gyngell and Thomas Douglas, ‘Selecting against Disability: The Liberal Eugenic Challenge and the Argument from Cognitive Diversity’ (2018) 35 *Journal of Applied Philosophy* 319.

<sup>80</sup> See *supra* n. 46, 47, 48.

<sup>81</sup> See Sally Sheldon and Stephen Wilkinson, ‘Termination of Pregnancy for Reason of Foetal Disability: Are There Grounds for a Special Exception in Law?’ (2001) 9 *Med L Rev* 85.

<sup>82</sup> Brian G Skotko, Susan P Levine and Richard Goldstein, ‘Self-Perceptions from People with Down Syndrome’ (2011) 155A(10) *American Journal of Medical Genetics Part A* 2360.

motivated by, for example, sexism, racism or homophobia. Although to a victim, this distinction would make little difference, the lawmakers could additionally condemn the motivation in criminal statutes.<sup>83</sup> Needless to say, if this analogy is supposed to make sense, it would be necessary to classify abortion as a wrongful act, even amounting to homicide. Moreover, this reasoning could be extended to the case of abortion based on disability – if targeting someone because of their sex is unacceptable, it should also be unacceptable because of one's state of health.

To render this comparison reasonable, a fetus must be likened to an already-born human being, such as an infant who is legally protected. Kate Greasley states that 'no doubt, a practice of selectively terminating Down's Syndrome human beings post-birth would be regarded as horrifyingly barbaric'.<sup>84</sup> Indeed, the vast majority of the general public would probably agree with her. Nonetheless, some scholars argue that infants, like fetuses, are not actual persons and, thus, killing them should be permissible.<sup>85</sup> For them, the most relevant factor is not the intrinsic value of a child but whether he or she is wanted by the parents or, possibly, other members of society who would be potentially willing to assume care responsibilities which becomes more difficult for children with disabilities. This debate, therefore, eventually centers on whether a fetus or infant possesses the right to life by virtue of their humanity alone or whether they must meet additional criteria for personhood.

### VIII. ACTUAL OR POTENTIAL PERSONS? DOES PERSONHOOD MATTER?

At the outset, it must be said that if sex-selective abortion constitutes a form of discrimination against women, it is necessary to ask who is the primary object of this discrimination, as it is only possible to discriminate against persons. In the words of Christopher Kaczor 'to discriminate between non-persons, for example, plucking the red roses, but leaving the white, is not ethically problematic in itself, since these plants do not have rights nor do they merit equal respect as persons'.<sup>86</sup> He continues stating that 'some arguments against SSA (sex-selective abortion)

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<sup>83</sup> Kate Greasley, *Arguments about Abortion: Personhood, Morality, and Law* (OUP 2017) 223–244.

<sup>84</sup> *ibid* 229.

<sup>85</sup> See e.g. Alberto Giubilini and Francesca Minerva, 'After-Birth Abortion: Why Should the Baby Live?' (2012) 39 *Journal of Medical Ethics* 261.

<sup>86</sup> Christopher Kaczor, *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice* (Routledge 2011) 195.

only make sense on the implicit assumption that the human fetus is a person with rights, but this premise renders problematic not just SSA but abortion generally'.<sup>87</sup>

In this context, Mary Anne Warren famously distinguishes five criteria for personhood: 1. consciousness (of objects and events external and/or internal to the being), and in particular the capacity to feel pain; 2. reasoning (the developed capacity to solve new and relatively complex problems); 3. self-motivated activity (activity which is relatively independent of either genetic or direct external control); 4. the capacity to communicate, by whatever means, messages of an indefinite variety of types; 5. the presence of self-concepts, and self-awareness, either individual or racial, or both.<sup>88</sup> We may notice that newborns, just like fetuses, probably lack these characteristics. Peter Singer agrees and proposes that in order to be a person, an individual shall develop rationality, autonomy, and self-consciousness, and, therefore, killing a newborn would not be equivalent to killing a rational, autonomous, and conscious adult.<sup>89</sup>

According to Warren, even though fetuses are biologically human and belong to the human species, they do not possess moral rights as one needs to have the capacity for sentience to possess them and they lack it, at least in the early stages of their development.<sup>90</sup> Therefore, since a woman, unlike a fetus, has moral rights, including the right to defend her physical integrity, her abortion 'does not require any special justification, such as financial hardship or the risk of damage to the woman's mental or physical health'.<sup>91</sup> Addressing the late abortion and infanticide Warren admits that, at some point, a fetus begins to develop 'some capacity for sentience' but according to her 'even a sentient fetus is not a person' because it does not yet have a capacity for reason, self-awareness or other mental capacities.<sup>92</sup> She notes that 'the mental capacities of fetuses are certainly not more sophisticated than those of newborn infants', although she tries to take a cautious position on infanticide, saying that infants may be treated 'as having the same basic moral rights as the rest of us, as long as this can be done without violating the basic moral rights of persons'.<sup>93</sup> The good reason for such a treatment may be empathy and affection for babies (one's subjective feelings) or their potentiality to become

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<sup>87</sup> *ibid* 198.

<sup>88</sup> Mary Anne Warren, 'On the Moral and Legal Status of Abortion' (1973) 57 *Monist* 43.

<sup>89</sup> Peter Singer, *Practical Ethics* (3rd edn, CUP 2011) 160. ('In Chapter 4, we saw that the fact that a being is a human being, in the sense of a member of the species *Homo sapiens*, is not relevant to the wrongness of killing it; instead, characteristics like rationality, autonomy and self-awareness make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings or any other self-aware beings'.)

<sup>90</sup> Warren (n 20) 92–94.

<sup>91</sup> *ibid* 96.

<sup>92</sup> *ibid* 97–98.

<sup>93</sup> *ibid* 100–101.

a person, but ‘in the absence of decent foster care for infants whose parents cannot care for them, the prohibition of infanticide causes more harm than good’.<sup>94</sup> Hence, for Warren, ‘early sex-selective abortion is morally no more problematic than preconceptive sex-selection’ and ‘sex-selective late abortion is an instance of gendercide, even though it is not an instance of murder’.<sup>95</sup> She appears to struggle with articulating the position that sex-selective abortion is intrinsically sexist and that sexism must be unequivocally condemned, without asserting that abortion, at least under certain circumstances, is morally objectionable and potentially warranting prohibition.<sup>96</sup>

In the first place, however, it does not appear right to separate the morality of abortion itself from the morality of sex-selective abortion because, in all the considerations related to the procedure, the moral status of the fetus must be of the uttermost importance. Indeed, the term ‘termination of pregnancy’ is sometimes used as a synonym to ‘abortion’, but there are also some cases in which, even though technically pregnancy has been terminated, abortion is still considered ‘failed’ if a fetus is born alive, particularly at the later stages of pregnancy.<sup>97</sup> Hence, he or she always remains the primary object of action. As mentioned earlier, if a fetus is not a separate being with his or her own rights, including the fundamental right to life, then it is not reasonable to argue that a woman should be morally obliged to shape her family in a way that would be beneficial for a larger community, even women as a group, especially if this requires from her a significant sacrifice of continuing pregnancy she does not desire. Therefore, the discussion on fetal personhood and the extent to which it conditions the right to life of a fetus remains crucial.

All of us have periods of time in our lives when we do not fulfill Warren’s criteria of personhood (consciousness, reasoning, self-motivated activity, the capacity to communicate, the presence of self-concepts and self-awareness) – for example, when we sleep, are under anesthetic or, in more extreme circumstances,

<sup>94</sup> *ibid* 104–105.

<sup>95</sup> *ibid*.

<sup>96</sup> *ibid* 88.

<sup>97</sup> See e.g. Adam Eley and Jo Adnitt, ‘The Failed Abortion Survivor Whose Mum Thought She Was Dead’ (BBC, 5 June 2018) <<https://www.bbc.com/news/health44357373>>; Derek Scally, ‘German Man Who Survived Abortion Dies Aged 21’ (The Irish Times, 9 January 2019) <<https://www.irishtimes.com/news/world/europe/german-man-who-survived-abortion-dies-aged-21-1.3752247>>; Testimony of Gianna Jessen, ‘Surviving a Failed Abortion When She Was a Baby’ (Committee on the Judiciary, House of Representatives, 9 September 2015) U.S. Government Publishing Office <https://www.govinfo.gov/content/pkg/CHRG-114hhrg96052/html/CHRG-114hhrg96052.htm> all accessed 15 December 2024; Testimony of Gianna Jessen, ‘Surviving a Failed Abortion When She Was a Baby’ (Committee on the Judiciary, House of Representatives, 9 September 2015) U.S. Government Publishing Office <<https://www.govinfo.gov/content/pkg/CHRG-114hhrg96052/html/CHRG-114hhrg96052.htm>> all accessed 15 December 2024.

in a coma. Except for severe cases of coma, these situations are temporary, and the passage of time is sufficient for individuals to regain ‘full personhood’. Time is also precisely what a fetus needs to develop his or her capacities. One may argue that the crucial factor distinguishing a person who temporarily lacks consciousness from a fetus is that the former has already been conscious, which never occurred to the latter. Stephen Schwartz and Ronald Tacelli offer a noteworthy response to that claim.

Imagine the case of two children. One is born comatose, and she will remain so until the age of twelve. The other seems healthy at birth, but as soon as she comes briefly to possess the concept of a continuing self, she, too lapses into a coma from which she will not emerge until the age of twelve. Can anyone seriously hold that the second child is a person with a right to life, but the first child not? In one case, that moment of self-awareness will come only after twelve years have elapsed. In the other, it will return. In both, it will grow and develop. Picture the two of them lying side by side. Almost twelve years have passed. Would it not be absurd to say that only one of these two children lying unconscious there before you is a person? That there is some essential difference between them?<sup>98</sup>

This illustration underscores that conditioning one’s dignity and value on his capacities does not appear morally acceptable. Neither does conditioning them on the feelings and attitudes of the others, as Warren does, distinguishing between those who are wanted and ‘unwanted’. If human dignity is intrinsic, such a distinction contradicts that principle. Moreover, circumstances can change, and those who were once wanted and cherished can easily become ‘unwanted’. Should their value then diminish? Consider an adult who has no one to mourn their passing. If that person were killed in their sleep and, assuming there is nothing after death, never realized what had happened, could such a killing be deemed morally neutral since no ‘actual person’ would suffer as a result? Few criminal courts would accept this line of reasoning.

Being human, in the words of Calum Miller, is an ‘all or nothing affair’ as one may be stronger or weaker, taller or smaller, more or less intelligent but it would be difficult to declare that one is more human than another.<sup>99</sup> Analyzing the criteria of personhood, it is unclear in what way they should be measured and whether the right to life may come in degrees – for example, whether someone who fulfills four of these criteria but lacks the capacity to communicate has a lesser right to life

<sup>98</sup> Stephen D Schwarz and Ronald K Tacelli, ‘Abortion and Some Philosophers: A Critical Examination’ (1989) 3 *Public Affairs Quarterly* 81, 89.

<sup>99</sup> Calum Miller, ‘Human Equality Arguments against Abortion’ (2023) 49 *J Med Ethics* 717. See also Article 1 of the Universal Declaration on the Human Genome and Human Rights (11 November 1997) (‘The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity’).

than someone who fulfills all five, or whether an individual with a better ability to reason should have his right to life protected to a greater extent. Their fulfillment also varies depending on the specific circumstances in which one finds himself, most commonly his age and state of health. Furthermore, the fact that these criteria are developed by those who hold more power – academically, intellectually or politically – than most of the population to whom they apply raises additional concerns about their arbitrariness. An average person does not reflect too much on the rational capacities of an infant or the level of his self-awareness but rather accepts them as typical for that age and is mostly preoccupied with satisfying his basic **biological and human needs** by feeding and nurturing him.

It is, indeed, true that although most of the domestic legal systems provide certain protections for the fetus, it is rare to establish them on the level equal to the protection of those already born. Notably, however, international human rights law does not distinguish between protection for those who are ‘persons’ and those who are ‘human beings’ and, instead, operates with terms such as ‘everyone’, ‘person’, and ‘all human beings’ interchangeably.<sup>100</sup> The Universal Declaration of Human Rights, adopted as a response to the atrocities of World War II, speaks about ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’.<sup>101</sup> Also, the International Covenant on Civil and Political Rights states that every **human being** has the inherent right to life.<sup>102</sup> Conditioning the right to life on the ability to meet – rather arbitrary – criteria for personhood could be particularly risky in light of the unique nature of that right.<sup>103</sup> It may be described as a ‘right to existence’ and, thus, denying it equals the denial of all other rights. On the other hand, the possible restrictions on autonomy do not lead to similarly radical consequences.

Finally, it is crucial to discuss the consequences of the assertion that the primary objects of discrimination in sex-selective abortion are unborn females from the perspective of international anti-discrimination law. The Inter-American Court of Human Rights repeatedly affirmed that non-discrimination obligation in

<sup>100</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

<sup>101</sup> G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* (10 December 1948).

<sup>102</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (16 December 1966), Art 6. Emphasis added.

<sup>103</sup> Tellingly, genetic and biological humanity can be established by purely scientific means. ‘Personhood’, on the other hand, requires justifying its criteria with underlying ideology.

international law entered the realm of *jus cogens*.<sup>104</sup> If we were to agree that the primary object of discrimination in sex-selective abortion is an unborn female child, then states would have to prohibit it as non-discrimination constitutes an obligation of immediate effect.<sup>105</sup> Moreover, they would have to grant protection to the unborn human beings without introducing additional criteria of personhood – as a natural consequence of the fact that if an individual is worthy of protection from discrimination, he or she must also be worthy of protection from his or her violation of the right to life.

## IX. CONCLUSION

In the analysis of the problem of sex-selective abortions and arguments in favor and against its prohibition, those opposing the bans appear to be more consistent – but only if we deny the inherent value and dignity to fetuses in general. Paradoxically, in the contemporary abortion debate, the question about **their** status is often overlooked. The main way to deny them this value is to claim that only **persons**, as opposed to genetically and biologically human beings, possess it and to establish the criteria of personhood that they do not fulfill. This, however, as discussed in the Article, comes with serious consequences for the most vulnerable groups of people and does not find support in international human rights law. Hence, if the presumptions that a) sex-selective abortion constitutes gender discrimination, b) the primary object of abortion is the fetus whose fate is directly at stake,<sup>106</sup> c) it is only possible to discriminate against human beings who have inherent worth and dignity – are true, then abortion in general should be deemed unacceptable.

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<sup>104</sup> Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion OC-18/03, Inter-American Court of Human Rights, 17 September 2003), para 103. *Atala Riffo and Daughters v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 239 (24 February 2012) para 79. *Jus cogens* is defined as ‘a rule or principle in international law that is so fundamental that it binds all states and does not allow any exceptions’. ‘*Jus cogens*’, *Oxford Reference* (9 March 2004) <<https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100027487>> accessed 15 December 2024.

<sup>105</sup> See e.g. CESCR, ‘General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (Art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2 July 2009) UN Doc E/C.12/GC/20 para 7.

<sup>106</sup> There is no substantial difference between the burden of pregnancy with a boy or a girl for a woman who is pregnant, so it cannot be said that her interests are at stake analogously to other abortion situations. It does not mean, of course, that her good and well-being can in any way be ignored in decision-making on this issue.

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