



An Analysis of the Human Rights Implications of Prohibiting Sex-Selective Abortions in Canada

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Abstract: *There is an ongoing debate about penalizing sex-selective abortions. Abortion for sex selection is a discriminatory practice that cannot be left unchecked but a legislation that criminalizes certain reasons for getting an abortion threatens the bodily autonomy of women. This dissertation aims to determine the human rights implications of a legislation criminalizing sex-selective abortions in Canada. The research analyses the effects of sex selection on society and the potential infringement of constitutionally protected rights likely to result from a prohibitive legislation to determine whether criminalization is justified in necessity and proportionality. The research methods consist of a wide review of relevant literature on sex-selective abortions; doctrinal analysis of relevant jurisprudence on rights concerning abortion access; and comparative analysis of existing empirical research on sex ratios at birth and population demographics in Canada and other jurisdictions. The findings show that a law scrutinizing reasons for getting an abortion and prohibiting sex-selective abortions is in violation of section 7 and section 15 of the Canadian Charter of Rights and Freedoms and the violation is unjustified under section 1 of the Charter. The main conclusion of the research is that criminalization of sex-selective abortions, whilst infringing women's rights, fails at reducing sex discrimination. The dissertation proffers better innovative solutions for tackling sex-selective abortions instead of restricting access to abortions and regulating the bodily autonomy of women.*

Keywords: *sex-selective abortions, legislation, sex discrimination, woman, fetus.*

1. INTRODUCTION:

As a daughter, the thought of being ‘unwanted’ or being a ‘burden’ is devastating but that’s how I and many other women feel when society allows termination of potential girls for no reason other than them being the ‘unwanted’ sex. Is a society that allows sex selection through abortion without any consequences, knowing that those pregnancies would not only be carried to term but cherished if those fetuses were potential male children, ‘modern’? The idea that my existence as a daughter is a privilege as opposed to it being a right of every son goes against every fiber of my being. The practice of sex-selective abortions is indisputably barbaric, misogynistic and a threat to sexual equality but this paper argues that criminalizing said practice would be worse.

As a woman, the knowledge that I decide what happens to my body and my uterus is empowering, especially in context to my previous generations’ struggles to humanize and equalize women. ‘Every mother a willing mother, every child a wanted child.’¹ by Henry Morgentaler captures this sentiment of freedom of choice very well, a sentiment shared by most people in Canada. 71% of Canadians believe that a woman should be able to get an abortion if she decides she wants one, no matter what the reason.²

For true sexual equality, women must have unrestricted access to medical abortions as part of their reproductive rights and bodily autonomy.³ The issue becomes more complicated, however, when abortion is utilized for sex selection in furtherance of patriarchal practices against women. An abortion is sex-selective when potential parents after

¹ Henry Morgentaler, The Morgentaler Clinic your choice your right. Online: < <http://www.morgentaler.ca/about.html> >

² DART C-Suite Communicators, ‘A DART & Maru/Blue Voice Canada Poll: Abortion A Canadian Public Perspective after Three Decades’ (February 1, 2020), online (pdf): A DART & Maru/Blue Voice Canada Poll: Abortion < <https://dartincom.ca/wp-content/uploads/2020/01/PostMedia-Abortion-Feb-F-1-2020.pdf> >.

³ Tabitha Powledge, “Toward A Moral Policy for Sex Choice” in Neil G. Bennett, ed, Sex Selection of Children, (New York: Academic Press, 1983) 201.



identifying the fetal sex, abort the pregnancy if the sex isn't of their preference. Where a child is 'unwanted' simply because of its gender, concerns regarding sex discrimination arise. The practice of sex selection, which has been used primarily to abort female fetuses in want of male heirs, proclaims the inferiority of women in society.⁴ Incidentally, a majority of Canadians (84%) oppose abortion where the family does not want the baby to be of a certain sex.⁵

Over the past decade, sex-selective abortion has been discussed in parliament multiple times: In 2012, Mark Warawa, MP for Langley, B.C., introduced Motion 408 calling on the House to condemn discrimination against females occurring through sex-selective pregnancy termination.⁶ This was a private members bill and the sub-committee on private members' business declared it to be non-votable on March 21, 2013. In October 2016, Mark Warawa introduced another similar and unsuccessful motion M-77: A Motion to Protect Girls.⁷ This motion called on parliament to condemn a violent form of gender-based discrimination, known as sex selection. In 2020, Bill C-233 *An Act to amend the Criminal Code (sex-selective abortion)* (Sex-selective Abortion Act) was introduced in the house of commons in the 43rd Parliament by Cathay Wagantall as a private member's bill and it was defeated by a margin of 248-82 on June 2, 2021.⁸ Given that the majority of Canadians seem to oppose sex-selective abortion, it is possible that a similar legislation may be proposed in the future and it is pertinent to examine the human rights implications of criminalizing sex-selective abortion.

In this paper, I examine the human rights implication of a legislative framework that would criminalize sex-selective abortions in Canada. This paper is broken down into four parts. In **Part 2**, I analyze the validity of criminalization of a particular reason for getting an abortion in light of infringement of rights under section 7 and section 15 of the *Charter*. In **Part 3**, I provide the statutory context and empirical data on sex ratios necessary to understand the problem of sex selection and the aforementioned conflict. I also analyze the justification of potential infringement under section 1 of the *Charter* and the effectiveness of criminalization in other jurisdictions and argue that a similar consequence can be expected in Canada along with the discussion of potential consequences, criminalization will have on society. In **Part 4**, I discuss alternative solutions including a ban on early sex determination, optional counseling services, and resources to empower women to reduce sex selection.

2. LITERATURE REVIEW:

Sex-selective abortion is a practice with which potential parents identify the sex of the child and abort the fetus if it isn't of their preference, this practice is used to avoid having daughters all over the world. The debate is surrounding the question of whether a legislative framework should be in place to prohibit the discriminatory practice as a majority of Canadians (84%) oppose legalizing abortion if the family does not want the baby to be of a certain sex.⁹ A conflict arises as criminalization would essentially result in scrutinization of the reasons for getting an abortion, violating the right to bodily autonomy of women and most Canadians (71%) also believe that a woman should be able to get an abortion if she decides she wants one, no matter what the reason.¹⁰

The Problem of Sex-Selective Abortion in Canada

Studies on sex ratio at birth (henceforth referred to as SRB) indicate the prevalence of sex selection through abortion in some ethnicities in Canada. The deflection from natural ratios and an increased number of male children are indicative of medical intervention for sex selection in these communities. The natural SRB is relatively stable across

⁴ Rajendra Kale, "It's a Girl!" – Could be a Death Sentence." (2012) 184:4 CMAJ 387, online (pdf): < <https://www.cmaj.ca/content/cmaj/early/2012/01/16/cmaj.120021.full.pdf>>.

⁵ DART C-Suite Communicators, "A DART & Maru/Blue Voice Canada Poll: Abortion A Canadian Public Perspective after Three Decades" (February 1, 2020), online (pdf): A DART & Maru/Blue Voice Canada Poll: Abortion < <https://dartincom.ca/wp-content/uploads/2020/01/PostMedia-Abortion-Feb-F-1-2020.pdf>>.

⁶ MP Mark Warawa Introduces Motion to Condemn Discrimination Against Females Via SexSelective Pregnancy Termination, last modified September 27, 2012, http://www.markwarawa.com/media/_mark_in_the_news/mp-mark-warawa-introducesmotion-to-condemn-discrimination-against-females-via-sex-selective-pregnancy-termination.

⁷ Warawa, Mark. Oct. 19, 2016. Warawa Calls on Parliament to join Canadians and world leaders in condemning gender-based violence. <http://www.markwarawa.com/stop-gendercide/m-77/>

⁸ Canada. Parliament. House of Commons. Debates, 43rd Parl., 2d sess., 2020-2021, vol. 149, No. 024, February 26, 2020. Ottawa: Canadian Government Publishing, 1997. Online: open parliament < <https://openparliament.ca/bills/43-2/C-233/>>.

⁹ DART C-Suite Communicators, "A DART & Maru/Blue Voice Canada Poll: Abortion A Canadian Public Perspective after Three Decades" (February 1, 2020), online (pdf): A DART & Maru/Blue Voice Canada Poll: Abortion < <https://dartincom.ca/wp-content/uploads/2020/01/PostMedia-Abortion-Feb-F-1-2020.pdf>>.

¹⁰ Ibid.



human populations: between 1.03 and 1.07 males per female.¹¹ A study by Marcelo L. Urquia, et al., of 5,853,970 singleton live births to Canadian-born and 177,990 singleton live births to Indian-born mothers giving birth in Canada from 1990 to 2011 found that among Canadian-born mothers, male-female ratios were about 1.05 with negligible fluctuations by birth order while among Indian-born mothers, the male-female ratio at the third birth was 1.38 and was 1.66 at the fourth or higher-order births.¹²

In another study of 1,220,933 births with up to 3 consecutive live births from 1993 to 2012 in Ontario showed that the overall male: female ratio was 1.96 for the third live birth among infants delivered by women who immigrated from India and had previously given birth to 2 girls. The male: female infant ratio after 2 girls was 1.77 times higher if the current birth was preceded by 1 induced abortion, 2.38 times higher if preceded by 2 or more abortions, and 3.88 times higher if the abortion was performed after 15 weeks of gestation relative to no preceding abortion.¹³

Consequential and Non-Consequential Effects of Sex-Selective Abortion: Arguments in Favor of Prohibitive Legislation

There are no consequential effects of sex-selective abortions in Canada. The deficit in the expected number of girls among Indian immigrants to Canada in the study period (1990 to 2011) was estimated to be 4,472,¹⁴ which when considered in the larger context does not threaten Canada's population demographics and therefore cannot be considered a public health concern. It is still a discriminatory practice and cannot be overlooked by virtue of the small number of incidences.

Egalitarianism is still a far cry for Canada and its citizens need to pay close attention to not only the consequential effects of this practice but also the influential power it holds in reinforcing orthodox, sexist mindsets: the non-consequential effects of sex selection. Boetzkes contends, if left unregulated, this social evil becomes a public vehicle for the expression of preferring males over females which symbolically repudiates women as moral equals. She argues that acts of sex-selective abortion in a sexist society should be considered as indirect harm to women in a legal sense and action needs to be taken to outlaw this practice.¹⁵

Sex-selective abortion or a fetus being aborted due to a particular characteristic: its gender, intrinsically declares the inferiority of women. Kale while proposing regulations on sex determination submits that this practice is an evil that devalues women and is a type of discrimination of extreme form which should not be ignored just because the number of incidences is diminutive.¹⁶ When SRB is disturbed in a patriarchal society, it can cause an increase in objectification and stereotyping of women as women decrease in the population.¹⁷

If sex selection is prohibited, women will not only be spared from the social pressure to commit female feticide, women being coerced into it by their families will also be protected. Representative Trent Franks while sponsoring the Prenatal Non-discrimination Act in the United States propounded that this practice cannot be left unchecked and a punitive mechanism would give vulnerable women being forced into terminating their children a legal recourse and a right to protect themselves.¹⁸

Prohibiting Sex-Selective Abortion: Ethical and Practical Issues

Abortions for the purpose of sex selection are undeniably problematic and inherently misogynistic but there are several ethical and practical issues with legislation regulating access to abortion services and bodily autonomy of women. The first major concern, the legislation for criminalizing sex-selective abortions will scrutinize all abortions and the reasons behind them. Women's right to choose is threatened by the proposition of criminalization of certain reasons to obtain an abortion which is a direct violation of the fundamental rights of women in Canada.

¹¹ Marcelo L. Urquia, et al., "Variations in male-female infant ratios among births to Canadian- and Indian-born mothers, 1990-2011: a population-based register study" (2016) 4:2 CMAJ E116, DOI: <<https://doi.org/10.9778/cmajo.20150141>>.

¹² Supra note 3.

¹³ Marcelo L. Urquia, et al., "Sex Ratios at Birth after Induced Abortion" (2016) 188:9 CMAJ E181, online: CMAJ <<https://www.cmaj.ca/content/188/9/E181>>.

¹⁴ Supra note 3.

¹⁵ Elisabeth Boetzkes, "Sex-selection and the Charter" (1994) 7 Can. J.L. & Juris. 173 at para. 4

¹⁶ Rajendra Kale, "'It's a Girl!' – Could be a Death Sentence." (2012) 184:4 CMAJ 387, online (pdf): <<https://www.cmaj.ca/content/cmaj/early/2012/01/16/cmaj.120021.full.pdf>>.

¹⁷ April L Cherry, "A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice" (1995) 10:2 Wis Women's LJ 161.

¹⁸ Jennifer Steinhauer, "House Rejects Bill to Ban Sex-Selective Abortions" (31 May 2012), online: The New York Times <<https://www.nytimes.com/2012/06/01/us/politics/house-rejects-bill-to-ban-sex-selective-abortions.html>>.



Canada has unrestricted access to abortion services since the Supreme Court of Canada adjudged that section 287 (then 251) of the criminal code¹⁹ infringed a woman's right to security of the person and was consequently unconstitutional.²⁰

After the Quebec Court of Appeal granted a man (the intended father) an injunction to stop Ms. Daigle from getting an abortion, the full bench of the Supreme court held that the injunction must be set aside because the substantive rights which are alleged to support it are the rights accorded to a fetus or a potential father and those rights do not exist. A fetus is not included within the term "human being" in the Quebec Charter and, therefore, does not enjoy the right to life conferred by s 1.²¹

The second major issue is about physicians singling out immigrant women perceived to be more likely to get abortions for sex selection and denying them access to abortion facilities. According to H. Bindy, imposing penalties on medical practitioners for performing abortions meant for sex discrimination increases the chances of a vulnerable demographic of women being denied essential medical services which ultimately infringes on their human rights.²²

A measure for gender equality cannot be justified if it jeopardizes the well-being of a group of vulnerable women. Women without the option for termination of 'unwanted pregnancies' can also be subjected to malnutrition, physical and psychological violence, and repeated pregnancies until a son is born, which as Bernard Dickens writes "should be understood as disproportionately burdening women with lived experience of gender discrimination"²³.

Another problem with such a legislation is it encroaches on the right of bodily autonomy of women and reduces equality. Restrictions on reproductive freedom and bodily autonomy of women impede the progress modern society has made in terms of equality and threaten the improvement women's rights has made so far. Tabitha Powledge admits that preferring males is unavoidably disparaging females, she nevertheless supports unrestricted access to abortion. For improvement in the status of women as equals, women need to be able to choose what happens to their bodies and obtain abortions without according a justification to anyone else. She adds that the irony of allowing sex-selective abortions is apparent but this position is part of the price of furthering the goal of equal treatment.²⁴

Finally, the strongest argument against prohibitive legislation is that it has been evidently ineffective in curbing the problem of sex-selective abortion in other jurisdictions. Vogel examines the effectiveness of such prohibitions with examples of India and China, which show that not only have SRB continued to rise in these countries, but prohibitive legislation has exacerbated inequality for the countries' most marginalized women.²⁵ Sorbara argues that the phenomenon of son preference is complex and increasingly stringent legal prohibitions have been ineffective in addressing the rising SRB.²⁶

The proposition of prohibitive legislation is short-sighted as sex-selective abortion is a result of patriarchy and social practices that devalue women. To irradicate sex-selective abortion, the notion of son preference needs to be removed instead of restricting the rights of women. In India, the preference for male heirs is rooted in the notion that daughters are a financial burden who will marry and leave while sons will live with their elderly parents and in China, sons are preferred because of their perceived higher earning potential and the ability to provide old-age care.²⁷

Multiple pregnancies and abortions in want of a male child are caused by patriarchy and misogyny, the problem is women being undervalued in most societies including Canada. Jen Gunter aptly asserts, "To ignore the women who

¹⁹ Criminal Code, RSC 1985, c C-46 s 287: Procuring miscarriage- 287 (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and liable to imprisonment for life. Woman procuring her own miscarriage- (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

²⁰ R v Morgentaler, [1988] 1 SCR 30, [1988] 1 RCS 30.

²¹ Tremblay v Daigle, [1989] 2 SCR 530, [1989] 2 RCS 530, [1989] SCJ No 79.

²² H. Bindy and K. Kang, H. Bindy and K. Kang, "Sex-Selective Abortion and the Politics of Race in Multicultural Canada" in ed, Shannon Stettner, "Without Apology: Writings on Abortion in Canada", (Edmonton, Canada: AU Press, 2016) 289 at 292.

²³ Bernard M Dickens, "Can Sex-selection be Ethically Tolerated?" (2002) 28 J. Med. Ethics 335.

²⁴ Tabitha Powledge, "Toward A Moral Policy for Sex Choice" in Neil G. Bennett, ed, Sex Selection of Children, (New York: Academic Press, 1983) 201.

²⁵ Lauren Vogel, "Sex-selective Abortions: No Simple Solution" (2012) 184:3 CMAJ 286, online: CMAJ <https://www.cmaj.ca/content/184/3/286.full?utm_source=TrendMD&utm_medium=cpc&utm_campaign=CMAJ_TrendMD_0>.

²⁶ Carla Sorbara, "Sex-selective Abortion in the Canadian Context" (2014) 22:1 Health L Rev. 40, QL [2014] 22 Health L Rev. No. 1, 40 at para. 14.

²⁷ Yi Zeng, Tu Ping, et al., "Causes and Implications of the Recent Increase in the Reported Sex Ratio at Birth in China" 1993 19:2 Population and Development Review 283.



deliver their eighth girl and will be back for number nine is proof that sex-selective abortion has been twisted to be about abortion and not about sex-selection.”²⁸

2. METHODS:

Literature Review: in favor and against the proposed regulation; feminist literature on sex-selective abortion.

Qualitative analysis of case law and doctrinal analysis of jurisprudence to determine whether criminalization of sex-selective abortion in Canada violates section 7 and/or section 15 of the Canadian Charter and would the violation be justified under section 1 of the Charter.

Comparative analysis of empirical research on effects of legislative regulations on sex-selective abortions in other jurisdictions.

3. DISCUSSION:

Emerging Issues

The ongoing debate has resulted in the subject being discussed in the parliament multiple times. In 2020, Bill C-233 Sex-selective Abortion Act: An Act to amend the Criminal Code (sex-selective abortion) was introduced in the house of commons in the 43rd Parliament by Cathay Wagantall as a private member's bill and it was defeated by a margin of 248-82 on June 2, 2021. Given that majority of Canadians are in favor of similar legislation being passed, it is pertinent to examine the human rights implications of criminalizing sex-selective abortion.

Research Questions that will be discussed in the paper:

- What are the arguments for and against the criminalization of sex-selective abortions in Canada?
- Would the criminalization of sex-selective abortion in Canada violate section 7 and/or section 15 of the Canadian Charter?
- Would the violation be justified under section 1 of the Charter?

4. ANALYSIS:

4.1 DOCTRINAL ANALYSIS OF JURISPRUDENCE: PROPOSED LEGISLATION IN VIOLATION OF CHARTER RIGHTS

Any legislation that violates the Canadian *Charter of Rights and Freedoms*²⁹ (*Charter*) may be found to be unconstitutional and of no force or effect. When determining the constitutionality of legislation, a court will determine, first, whether there has been an infringement of a *Charter*-protected right. Once a violation has been established, the legislation will be considered invalid unless it can be shown that the violation is a reasonable limit demonstrably justified in a free and democratic society as per s. 1 of the *Charter*.³⁰ The analyses in section 2.1 show that a legislative framework penalizing doctors for performing sex-selective abortions would violate section 7 of the *Charter* and the analysis in section 2.2 show that the same is in violation of section 15 of the *Charter* as well.

4.1.1 Section 7 of Charter

A legislation for criminalizing sex-selective abortions will scrutinize all abortions and the reasons behind them. This is a clear violation of the fundamental rights of women in Canada. Under section 7 of the *Charter*, everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.³¹ The SCC held that the right to security of the person in s. 7 is engaged when the state interferes with bodily integrity or when it imposes serious psychological stress on a person in *R v Morgentaler*.³² Even though the proposed legislation only aims to target physicians involved in the practice of sex-selective abortion, the pregnant woman can be charged as a party to the offense and since penal consequences for an established right to

²⁸ Jen Gunter, “Check your privilege and your facts before discussing sex-selective abortion” (12 April 2016) online: Dr. Jen Gunter <<https://drjengunter.com/2016/04/12/check-your-privilege-and-your-facts-before-discussing-sex-selective-abortion/>>.

²⁹ Canadian *Charter* of Rights and Freedoms, Constitution Act, 1982, being Schedule B to the Canada Act (1982) (U.K.), 1982, c. 11 [*Charter*].

³⁰ Mollie Dunsmuir, Abortion: Constitutional and Legal Developments (Ottawa: Library of Parliament, Research Branch, Law and Government Division, 1998) [Current issue review; 89-10E] online: <<https://publications.gc.ca/Collection-R/LoPBdP/CIR/8910-e.htm#E.%20The%20Charter>>.

³¹ Canadian *Charter* of Rights and Freedoms, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act (1982) (U.K.), 1982, c. 11 [*Charter*].

³² *R v Morgentaler*, [1988] 1 S.C.R. 30, para 20, Dickson C.J.C.



security of the person are proposed, s. 7 is involved. Justice Dickson adjudged in the judgment that legalized abortions in Canada,

At the most basic, physical, and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether abortion will be granted inflicts emotional stress. Forcing a woman, by the threat of criminal sanction, to carry a fetus to term unless she meets certain criteria unrelated to her priorities and aspirations, is a profound interference with a woman's body and thus a violation of the security of the person.³³

In *Rodriguez v British Columbia*, it is explained that a state-sanctioned mechanism that creates limitations on a right of a person to deal with their own body may violate s. 7 of *Charter* and the principle of fundamental justice if the limit proposed is arbitrary. The SCC also stated a limit is arbitrary if the objective behind the legislation bears no relation to the limit its implementation will cause.³⁴

If the limitation on access to abortion services to ban sex-selective abortions bears no relation to the objective of the legislation, the legislation will be unconstitutional. As suggested in Bill C-233, the primary purpose of criminalizing sex-selective abortions is the furtherance of equality and irradicating 'discrimination in the earliest stages of life' and the general objective is to increase sexual equality.³⁵

A fetus cannot be afforded protection against sex discrimination because to be discriminated against, one should have a legal right of protection which is absent in the case of fetuses. **Borowski's Challenge**³⁶ consisted of a series of cases which started with former Manitoba Highways Minister Joe Borowski in the Saskatchewan Court of Queen's Bench in 1978 and ended in 1989, with the Supreme Court of Canada (SCC) making it clear that the fetus in the womb is not a person under law and *Charter* protections for 'everyone' does not include fetuses.³⁷ The SCC also held that section 287 (then 251) of the Criminal Code³⁸ infringed a woman's right to security of the person and was unconstitutional.³⁹

After the Quebec Court of Appeal granted a man (the intended father) an injunction to stop the intended mother Ms. Daigle from getting an abortion, the full bench of the SCC adjudicated that the injunction must be set aside as the alleged substantive rights supporting it, does not exist. Those nonexistent rights are of the potential father and the fetus. The fetus is not covered under "human being" in the *Quebec Charter* and the potential father has no say over the bodily autonomy of the woman. The fetus was also held to not enjoy the right to life under s. 1 of the *Quebec Charter*.⁴⁰ There is no existing jurisprudence to justify the status of fetuses as legal persons and that the scope of the term 'everyone' used in the *Charter* doesn't cover fetuses.⁴¹ Considering a fetus, a person would be inconsistent with the aim to accord every person, bodily autonomy and sexual equality as recognized by the SCC in innumerable cases.⁴² Further, it is only persons that are recognized by law who are the subject of legal rights and duties.⁴³ The primary objective is therefore inconsistent with the limit proposed and criminalization of sex-selective abortion is in breach of s. 7. The general

³³ Ibid. at para 22.

³⁴ *Rodriguez v British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 619 McLachlin J.

³⁵ Cathay Wagantall, "The Sex-selective Abortion Act" (2020), online (pdf): <https://d3n8a8pro7vhmx.cloudfront.net/cathaywagantallmp/pages/1170/attachments/original/1585942831/Talking_Points_-_Points_de_discussion_-_The_Sex_Selective_Abortion_Act_-_la_Loi_sur_l%27E2%80%99avortement_en_fonction_du_sexe.pdf?1585942831>.

³⁶ His main argument being a fetus has personhood and legality of medical abortion is in conflict with the Canadian *Charter* of Rights and Freedoms.

³⁷ *Borowski v Canada (Attorney General)* [1989] 1 SCR 342.

³⁸ Criminal Code, RSC 1985, c C-46 s 287: Procuring miscarriage- 287 (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and liable to imprisonment for life. Woman procuring her own miscarriage- (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

³⁹ *R v Morgentaler*, [1988] 1 SCR 30, [1988] 1 RCS 30.

⁴⁰ *Tremblay v Daigle*, [1989] 2 SCR 530, [1989] 2 RCS 530, [1989] SCJ No 79.

⁴¹ *Borowski v Canada (Attorney General)*, [1983] SJ No 784, [1984] 1 WWR 15, 29 SaskR 16;

⁴² *Andrews v Law Society (British Columbia)* 1989 CarswellBC 16, 1989 CarswellBC 701, [1989] 1 SCR 143; *R v Lavallee* 1990 CarswellMan 198, 108 NR 321; *Brooks v Canada Safeway Ltd.* 1989 CarswellMan 160, 1989 CarswellMan 327, [1989] 1 SCR 1219, [1989] 4 WWR 193.

⁴³ *Medhurst v Medhurst* 1984 CarswellOnt 211, [1984] WDFL 622.



objective of criminalization that is furtherance of equality needs to be evaluated in light of the effects of sex selection on society and as discussed further in Part-3, the legislation is counterproductive to furthering sexual equality.

4.1.2 Section 15 of Charter

Section 15 of the *Charter* provides that every individual is equal before and under law and has the right to equal protection and equal benefit of law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age, or mental or physical disability.⁴⁴ S. 15 is designed to remedy any law that imposes unfair limitations on opportunities for people or groups with a historical disadvantage, prejudice, and/or stereotyping.⁴⁵

For a violation of s. 15, three things need to be established: first, there is differential treatment of a particular group in a substantive manner; second, the differentiation is on one of the grounds enumerated in s. 15; third, the differentiation negatively affects the claimant and is discriminatory.⁴⁶ In this section, I examine the effects of criminalizing sex-selective abortion on women of a particular ethnicity and argue that such a legislation will result in discrimination towards them, making criminalization of sex-selective abortion violative of section 15 of the *Charter*.

Foreseeable Consequences of Prohibitive Legislation on a Marginalized Group of Women

The practice of sex selection is not a common practice in Canada but a problem arising from the cultural phenomenon of son preference in some communities.⁴⁷ There is a major concern about physicians singling out immigrant women perceived to be more likely to get abortions for sex selection and denying them access to abortion services. According to H. Bindy, imposing penalties on medical practitioners for performing abortions meant for sex discrimination increases the chances of a vulnerable demographic of women being denied essential medical services which ultimately infringes on their human rights.⁴⁸

A 'measure for gender equality' cannot be justified if it jeopardizes the well-being of a group of vulnerable women. Women without the option for termination of 'unwanted pregnancies' can also be subjected to malnutrition, physical and psychological violence, and repeated pregnancies until a son is born, which as Bernard Dickens sees is disproportionately burdening women with lived experiences of gender discrimination.⁴⁹

Abortion Rights Coalition of Canada takes a stance, being pro-choice means supporting women's bodily autonomy and their right to choose whether to continue a pregnancy or not. The reason for the decision is irrelevant and one doesn't need to personally agree with her decision to support her right. If the familial, financial, or social situation of a woman pressures her to the point where she feels compelled to abort a fetus, her health, life and safety are of paramount importance and that includes giving her an option to abort the fetus safely.⁵⁰

Foreseeable Consequences of Prohibitive Legislation: Unwanted Pregnancies

Sharma et al. point out that 'unwanted' female children who are born due to the unavailability of the choice to abort often face abuse, starvation and neglect at the hands of their caregivers and are treated worse than their male counterparts in most ways. "Parenthetically, banning sex-selective abortion, and with that violence against females in the womb, doesn't stop violence against women in general and thus leaves the larger problem unsolved."⁵¹ Female infanticide by starvation, lack of health care, and nurture is a reality and if the consequence is not as harsh as death, it is a miserable childhood and countless problems arising from it.

One of the main arguments in favor of unrestricted access to abortion is that every child born should be a wanted child. Is forcing female fetuses into existence when they are unwanted by their families really in furtherance of attaining

⁴⁴ Canadian *Charter* of Rights and Freedoms, s 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act (1982) (U.K.), 1982, c. 11.

⁴⁵ *Law v Canada*, [1999] 1 SCR 497 42, 170 DLR (4th) 1.

⁴⁶ Timothy Caulfield, Marie Hirtle & Sonia LeBris, "Regulating NRGTS: Is Criminalization the Solution for Canada?" (1997) 18 Health L. Can. 3.

⁴⁷ Marcelo L. Urquia, et al., "Variations in male-female infant ratios among births to Canadian- and Indian-born mothers, 1990-2011: a population-based register study" (2016) 4:2 CMAJ E116, DOI: <<https://doi.org/10.9778/cmajo.20150141>>.

⁴⁸ H. Bindy and K. Kang, H. Bindy and K. Kang, "Sex-Selective Abortion and the Politics of Race in Multicultural Canada" in ed, Shannon Stettner, "Without Apology: Writings on Abortion in Canada", (Edmonton, Canada: AU Press, 2016) 289 at 292.

⁴⁹ Bernard M Dickens, "Can Sex-selection be Ethically Tolerated?" (2002) 28 J. Med. Ethics 335.

⁵⁰ Abortion Rights Coalition of Canada, "Your Voice for Choice" (November 2020), online (pdf): Abortion Rights Coalition of Canada <arcc-cdac.ca>.

⁵¹ B.R. Sharma, N. Gupta, and N. Relhan, "Misuse of prenatal diagnostic technology for sex-selected abortions and its consequences in India", (2007) 121:11 Public Health, 854.



gender equality? The proposed law does not account for the maltreatment, malnutrition, and neglect the girls born would face, establishing further that the said legislation is not about equality or protection of the girl child but is about restricting access to abortion.

To force a vulnerable woman who cannot protect her fetus, facing societal and familial pressure to abort it, by law to carry the fetus to term while knowing that the woman and the daughter born will be oppressed and abused further and will be worse off is barbaric.

As sex selection is a known phenomenon in particular ethnic communities, a legislation criminalizing sex-selective abortions degrades women of those ethnicities by practically forcing physicians to block their access to abortion services and taking away their right of bodily autonomy, right to security of a person and dignity. Prohibiting sex-selective abortion also disproportionately burdens women of particular ethnicities with the problem of sex discrimination as they are forced into repeated pregnancies. Penalizing sex-selective abortions is, therefore, in violation of s. 15 of the *Charter*.

4.2 ANALYSIS OF JUSTIFICATION OF VIOLATION OF *CHARTER* RIGHTS UNDER SECTION 1 OF *CHARTER*

It is now established that prohibition on sex-selective abortions will violate section 7 and section 15 of the *Charter* and now, in Part 3, I will analyze whether said violations are justified under section 1 of the *Charter*. Examining the violation with regard to a reasonable limit demonstrably justified in a free and democratic society as per s. 1 of *Charter* involves assessing four questions:

1. Substantial objective: Whether the objective of the proposed legislation or legislative purpose is pressing and substantial to warrant overriding a constitutionally protected right or freedom.
2. Proportionality: Whether the means and benefits of the legislation are proportional to the deleterious effects caused by the legislation.
3. Rational connection test: Whether the legislation and the means proposed are rationally connected to the objective.
4. Least intrusive means: Whether the means employed cause the least infringement.⁵²

Even if one of the criteria fails, the legislation cannot be saved under section 1 but for the sake of completion, I will examine all four and find that the proposition of prohibiting sex-selective abortions is in violation of section 1.

4.2.1 Substantial Objective and Proportionality of Penalizing Sex-Selective Abortion: Assessing the Justification for Infringement of Rights

To examine substantial objective, the effects of the practice must be considered and since fetuses are not persons of interest to be afforded protection, sex selection needs to be assessed in the light of its effects on women.

Consequential Effects of Sex-Selective Abortion on Women as a Social Group

Studies on sex ratio at birth (henceforth referred to as SRB) indicate the prevalence of sex selection through abortion in some ethnicities in Canada. The deflection from natural ratios and an increased number of male children are indicative of medical intervention for sex selection in these communities. The natural SRB is relatively stable across human populations: between 1.03 and 1.07 males per female.⁵³ A study by Marcelo L. Urquia, et al., of 5,853,970 singleton live births to Canadian-born and 177,990 singleton live births to Indian-born mothers giving birth in Canada from 1990 to 2011 found that among Canadian-born mothers, male-female ratios were about 1.05 with negligible fluctuations by birth order while among Indian-born mothers, the male-female ratio at the third birth was 1.38 and was 1.66 at the fourth or higher-order births.⁵⁴

In another study of 1,220,933 births with up to 3 consecutive live births from 1993 to 2012 in Ontario showed that the overall male: female ratio was 1.96 for the third live birth among infants delivered by women who immigrated from India and had previously given birth to 2 girls. The male: female infant ratio after 2 girls was 1.77 times higher if the current birth was preceded by 1 induced abortion, 2.38 times higher if preceded by 2 or more abortions and 3.88 times higher if the abortion was performed after 15 weeks of gestation relative to no preceding abortion.⁵⁵

Sex-selective abortion becomes a public health concern when the population of males exceeds the female population significantly. The deficit in the expected number of girls among Indian immigrants to Canada in the study

⁵² R v Oakes, [1986] 1 SCR 103 at paras. 69-71.

⁵³ Marcelo L. Urquia, et al., "Variations in male-female infant ratios among births to Canadian- and Indian-born mothers, 1990-2011: a population-based register study" (2016) 4:2 CMAJ E116, DOI: <<https://doi.org/10.9778/cmajo.20150141>>.

⁵⁴ Ibid.

⁵⁵ Marcelo L. Urquia, et al., "Sex Ratios at Birth after Induced Abortion" (2016) 188:9 CMAJ E181, online: CMAJ <<https://www.cmaj.ca/content/188/9/E181>>.



period (1990 to 2011) was estimated to be 4,472,⁵⁶ which when considered in the larger context does not threaten Canada's SRB or its population demographics.

In 2020, the sex ratio (number of males per 100 females) is 108.18 and 105.07 for India and China respectively while the sex ratio in Canada is 98.5,⁵⁷ making sex selection and son preference a public health concern in India and China but not in Canada. Thence, a law infringing on a constitutionally protected right of women as a means to regulate sex selection cannot be justified based on the consequential effects of sex-selective abortion in Canada.

Non-Consequential Effects of Sex-Selective Abortion on Women as a Social Group

Even though a sex-selective abortion cannot be considered a public health problem, it is a discriminatory practice. Egalitarianism is still a far cry for Canada and close attention needs to be paid to not only the consequential effects of this practice but also the influential power it holds in reinforcing orthodox mindsets: the non-consequential effects of sex selection. Boetzkes contends, if left unregulated, this social evil becomes a public vehicle for the expression of preferring males over females, "symbolically repudiating women as moral equals." She argues that acts of sex-selective abortion in a sexist society should be considered as indirect harm to women in a legal sense and action needs to be taken to outlaw this practice.⁵⁸

Sex-selective abortion or a fetus being aborted due to a particular characteristic: its gender, intrinsically declares the inferiority of women. Kale while proposing regulations on sex determination submits that this practice is an evil that devalues women and is a type of discrimination in an extreme form that should not be ignored just because the number of incidences is diminutive.⁵⁹ When SRB is disturbed in a patriarchal society, it can cause an increase in objectification and stereotyping of women as women decrease in the population.⁶⁰

These arguments/proposed benefits of criminalizing sex-selective abortions call for infringement of women's autonomy in the interest of furtherance of equality but striving for moral equality does not outweigh the harm that would be caused to women with the proposed restrictions on abortion rights. As sex-selective abortion poses no threat to public health and only affects a small population, there is no substantial objective for the proposed legislation. As discussed in Part 2.2, the effects of such a prohibition will be largely negative and the effects of sex selection do not justify the foreseeable harm.

4.2.2 Objective of a Law Prohibiting Sex-Selective Abortion in Canada: Parliamentary Discussion on Bill C-233

For the analysis, I am assuming any proposed law prohibiting sex-selective abortion will be similar in objective as Bill C-233 and the parliamentary debate shows that the objective is not even furtherance of equality but limiting women's bodily autonomy. Several Members of the Parliament (MPs) spoke on Bill C-233 on May 28, 2021, during its first reading in the house of commons. MP Christine Normandin Saint-Jean, QC posited that Bill C-233 needs to be examined and seen as a framework with the long-term goal of chipping away abortion rights and making abortion facilities harder and harder to access. MP Niki Ashton Churchill—Keewatinook Aski, MB opined that the sole purpose of this bill is to restrict the reproductive rights of the people of Canada by trying to introduce penalization for abortion procedures. Jennifer O'Connell Parliamentary Secretary to the Minister of Health pointed out that this bill is not about equality and the members introducing it are already aware of that. She added that no one would support sex-selective abortions, but this proposition is an unacceptable solution.⁶¹ This remained the majority opinion: the objective of the proposed bill was not to irradicate sex-selective abortion but to regulate access to abortion services.

Conversely, conservative party members in support of the bill such as MP Tamara Jansen Cloverdale—Langley City, BC rose in favor of the bill with the opinion that the discussion is about equality and the protection of women being coerced into aborting their fetuses, simply because her child is a girl. She added termination of pregnancy solely because of the sex of the fetus was opposed by 82% of Canadians polled in 2019. Kelly Block Carlton Trail—Eagle Creek, SK argued that Canada has always stood up for the rights of those who cannot defend themselves and this is a

⁵⁶ Supra note 29.

⁵⁷ Department of Economic and Social Affairs Population Dynamics, "World Population Prospects 2019" (28 August 2019), online: United Nations <<https://population.un.org/wpp/Download/Standard/Population/>>.

⁵⁸ Elisabeth Boetzkes, "Sex-selection and *Charter*" (1994) 7 Can. J.L. & Juris. 173 at para. 4

⁵⁹ Rajendra Kale, "'It's a Girl!' – Could be a Death Sentence." (2012) 184:4 CMAJ 387, online (pdf): <<https://www.cmaj.ca/content/cmaj/early/2012/01/16/cmaj.120021.full.pdf>>.

⁶⁰ April L Cherry, "A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice" (1995) 10:2 Wis Women's LJ 161.

⁶¹ Canada. Parliament. House of Commons. Debates, 43rd Parl., 2d sess., 2020-2021, vol. 149, No. 024, February 26, 2020. Ottawa: Canadian Government Publishing, 1997. Online: open parliament <<https://openparliament.ca/bills/43-2/C-233/>>.



form of discrimination that needs proactive measures against it.⁶² The intent of this bill as expressed by the majority was to limit women's rights and it paid no attention to the root cause of the problem of sex-selective abortions which is a result of the cultural phenomenon of son preference.

4.2.3 Rational Connection Test: Comparative Analysis of Empirical Research on Effects of Legislative Regulations on Sex-Selective Abortions in Other Jurisdictions

The strongest argument against prohibitive legislation is that it has been evidently ineffective in curbing the problem of sex-selective abortion and that reducing sex-selective abortions and furthering equality cannot be achieved by criminalizing the practice.

Increase in SRB in India Despite a Legislation Prohibiting Prenatal Sex Determination and Sex-Selective Abortion: Social and Economic Reasons and Interesting Trends of SRB in China

Vogel examines the effectiveness of such prohibitions with examples of India and China, which show that not only have SRB continued to rise in these countries, but prohibitive legislation has exacerbated inequality for the countries' most marginalized women.⁶³ Sorbara, while reviewing sex-selective abortion laws, found that the phenomenon of son preference is complex and increasingly stringent legal prohibitions have been ineffective in addressing the rising SRB.⁶⁴ Sex determination has been illegal in India since 1994 and male to female ratio of India continues to rise.⁶⁵ Female feticide is the result of a patriarchal society with a son preference and unless the root cause is addressed, prohibitive legislation will continue to remain ineffective.

Even though the SRB is on the rise despite government efforts in China, a few regions that saw improvement were the ones where economic incentives were offered to families who gave birth to girls through the "Care for Girls" campaign.⁶⁶

Improved SRB in South Korea: Social Change Vs. Individual Change

South Korea despite having distressing SRB figures in the past, successfully improved its male to female ratio by focusing on economic incentives and public awareness which focused on diffusion of new values and altering social norms that supported son preference, bringing forth a social change that increased equality and the perceived value of daughters in families, organically reducing sex-selection and female feticide in the society.

The findings of the study conducted by Woojin Chung and Monica Das Gupta showed that societal change is key for the decrease in son preference and it played a major role in comparison to individual change. Between the years of 1991 and 2003, son preference reduced significantly in South Korea and 75% of the decline in son preference can be attributed to changing social norms sweeping across the population which suggests that the success behind this decline can be largely attributed to "triggering normative change within the society as a whole". The changed norms increased women's social and economical value, bringing their status closer to men's. This was possible largely via impact on social norms, rather than a change at the individual level.⁶⁷

These examples show how prohibitive legislation restricting individual rights is ineffective in improving SRB ratios or male to female ratios in the population and, how such legislations rather increase the oppression of women in a patriarchal society. Additionally, as seen in South Korea, social change is an effective solution to reduce sex-selective abortion. If a legislation fails to achieve its primary objectives in other jurisdictions whilst having a harmful countereffect, it is unsound to propose a similar law for Canada.

4.2.4 Rational Connection Test and Least Intrusive Means: Possible Consequences and Implications of a Legislation Prohibiting Sex-selection in Canada

⁶² Supra note 27.

⁶³ Lauren Vogel, "Sex-selective Abortions: No Simple Solution" (2012) 184:3 CMAJ 286, online: CMAJ <https://www.cmaj.ca/content/184/3/286.full?utm_source=TrendMD&utm_medium=cpc&utm_campaign=CMAJ_TrendMD_0>.

⁶⁴ Carla Sorbara, "Sex-selective Abortion in the Canadian Context" (2014) 22:1 Health L Rev. 40, QL [2014] 22 Health L Rev. No. 1, 40 at para. 14.

⁶⁵ It is illegal to use any technique to identify the sex of a foetus after conception in India since 1994 when the Parliament of India enacted the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994 also known as the Prohibition of Sex-selection Act.

⁶⁶ James Childress, et al., "Public Health Ethics: Mapping the Terrain" (2002) 30:2 JL Med & Ethics 170 at 172.

⁶⁷ Woojin Chung and Monica Das Gupta, "The Decline of Son Preference in South Korea: The Roles of Development and Public Policy" (2007) 33:4 Population and Development Review 757.



Ethical Implications of Moral Policing of Reasons for Getting an Abortion

For true equality, a woman should have an absolute right to make decisions about her body. An important problem with such legislation is it encroaches on the right of bodily autonomy of women and reduces equality. Restrictions on reproductive freedom and bodily autonomy of women impede the progress modern society has made in terms of equality and threaten the improvement women's rights has made so far.

There are different moral stances on abortion, ranging from 'pro-life': abortion should never be allowed to 'pro-choice': complete unrestricted access to abortion but a majority of Canadians identify as pro-choice that is, they believe that a woman should be able to get an abortion if she decides to get one and the reasons for the same doesn't matter.⁶⁸ Tabitha Powledge admits, "to prefer males is, unavoidably, to denigrate females,"⁶⁹ she nevertheless supports unrestricted access to abortion. For improvement in the status of women as equals, women need to be able to choose what happens to their bodies and obtain abortions without according a justification to anyone else. She says, "I recognize its irony but view this position as part of the price of furthering the goal of equal treatment."⁷⁰

Is restricting the basic human rights of women to protect the abstract rights of female fetuses actually in furtherance of the goal of equality? Infringing the right to security of a person and bodily autonomy to reduce sex discrimination is an oxymoron. Prohibitive legislation will do the opposite of what it is intended to do. In the larger context, the restriction is more harmful to women's equality than allowing the misuse of freedom.

Practical Issues with Scrutinizing the Reason for Getting an Abortion

Vandenbeld, Parliamentary Secretary to the Minister of National Defence, speaking on Bill C-233, at second reading in the parliament showed concern over the likelihood of women being made accessory to the criminal offense even though the legislation is aimed ostensibly at doctors. Women's right to choose is threatened by the proposition of criminalization of certain reasons to obtain an abortion which is a direct violation of the fundamental rights of women in Canada. Something completely unacceptable and plain wrong.⁷¹

Currently, women do not need to provide a reason for an abortion, if a particular reason is penalized, the physicians will be forced to scrutinize why women are accessing a rightful medical service, which is a regressive step, away from equality being presented as progress.

Apart from the fundamental breach of the right to security of a person, assessing the reasons for abortion is practically impossible. Imposing penalties on medical practitioners for performing abortions meant for sex discrimination increases the chances of some women (perceived to be at a higher risk of performing sex-selective abortions) being denied essential medical service and others being questioned extensively about it.⁷² For this regulation to work, women would be required to discuss their private lives in depth which is a violation of the right to privacy and the encroachment on the bodily autonomy of women diminishes equality further.

Conclusively, the objective of a legislation for the criminalization of sex-selective abortions is not the furtherance of equality but controlling bodily autonomy, not substantive enough to justify the breach of constitutionally protected rights. For the sake of completion of the analysis, even if the objective is assumed to be equality, the means proposed are also disproportional to the objective as the consequences of sex-selective abortions do not justify extensive human rights infringements. The suggested means (penalization) have failed in other jurisdictions and are likely to fail in Canada as well, meaning thereby, there is no rational connection between achieving equality and reducing sex selection and restricting abortion access. As discussed in Part 4, better solutions are possible. If better solutions with lesser infringement are likely to be more effective, then restricting abortion rights is not the least intrusive method and therefore a prohibitive legislation cannot be saved under section 1 of the *Charter*.

5. RESULT:

A legislation for criminalizing sex-selective abortions will scrutinize all abortions and the reasons behind them. This is a clear violation of the fundamental rights of women in Canada. Under section 7 of the *Charter*, everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice and the aforementioned legislation is violative of Section of the *Charter*. The effects of criminalizing sex-selective abortion on women show that such a legislation will result in discrimination towards them,

⁶⁸ Supra note 1.

⁶⁹ Tabitha Powledge, "Toward A Moral Policy for Sex Choice" in Neil G. Bennett, ed, *Sex Selection of Children*, (New York: Academic Press, 1983) 201.

⁷⁰ Ibid.

⁷¹ Supra note 27.

⁷² H. Bindy and K. Kang, "Sex-Selective Abortion and the Politics of Race in Multicultural Canada" in Shannon Stettner, ed, *Without Apology: Writings on Abortion in Canada*, (Edmonton, Canada: AU Press, 2016) 289 at 292.



making criminalization of sex-selective abortion violative of section 15 of the *Charter*. Said violations are not justified under section 1 of the *Charter* to a reasonable limit demonstrably justified in a free and democratic society as per s. 1 of *Charter*.

6. RECOMMENDATIONS: ALTERNATIVE SOLUTIONS :

As established, the criminalization of sex-selective abortions will be violative of the *Charter* and it is important to discuss alternative solutions for reducing sex-selective abortion.

6.1 Root Cause of Sex-Selective Abortions

It is crucial to look at the actual causation behind the problem to understand whether the proposed legislation/alternative solutions will be fruitful in curbing those root causes before proposing solutions for the complex issue. As seen in the case of South Korea, sex-selective abortions were influenced by social change instead of individual change and as seen in India, prohibition on sex determination has failed to solve the problem of female feticide.⁷³

Sex-selective abortion is a result of patriarchy and social practices that devalue women. Families with no sons or 'too many' daughters can face social stigma and economical disadvantages in these cultures. H. Bindy argues that to irradicate sex-selective abortion the notion of son preference needs to be removed instead of restricting the rights of women. For instance, in Indian culture, the preference for male heirs is rooted in the notion that daughters are a financial burden who will marry and leave to support their husband's families while sons will live with their elderly parents providing financial support and care. Female feticide, female infanticide, technology-supported selective embryo implantations, and sperm selection are all practices to reduce the 'burden' of daughters, traceable to patriarchal traditions prevalent in South Asian communities.⁷⁴ In China, sons are preferred because of their perceived higher earning potential and the ability to provide old-age care.⁷⁵

These practices cause women to be seen as an economic burden and as socially and spiritually inferior to men, perpetuating female feticide in these cultures. Jen Gunter aptly asserts that ignoring women who deliver multiple girls is proof that sex-selective abortion has been twisted to be about abortion and not about sex selection. Women's worth being perceived as less than men's leads to son preference which causes sex-selective abortion, and the problem of inequality needs to be solved first.⁷⁶

To effectively irradicate the practice of sex-selective abortion, women of the ethnicities with this problem need to be uplifted and empowered, this change will be gradual, but it will be genuine and permanent. Leaving those women with no choice other than to bear unwanted daughters does a disservice to both generations and does little in terms of promoting equality.

6.2 Postponing Disclosure of the Sex of the Fetus: a Potential Solution?

Rajendra Kale suggests that the sex of the fetus is medically irrelevant information and if it leads to female feticide even in a small number of instances, its disclosure should be prohibited by law until later in pregnancy. He asserts that a pregnant woman being told the sex of the fetus at ultrasonography, at a time when an unquestioned abortion is possible, aids female feticide. Because the sex of the fetus is not required to impart proper care to the pregnant person, the doctors should be prohibited from testing for the sex altogether till 30 weeks of pregnancy because then abortion is almost impossible to go unquestioned as a possible solution to sex-selective practices.⁷⁷

The sex of the fetus can be determined as early as eleven weeks of pregnancy.⁷⁸ There are unverified claims that home tests can accurately determine the test of the fetus as early as 8 weeks of pregnancy.⁷⁹ Executing a prohibition on sex determinative information can be difficult when private clinics, clinics in other countries and home tests are still

⁷³ Supra note 38 and 42.

⁷⁴ Supra note 22 at 289.

⁷⁵ Yi Zeng, Tu Ping, et al., "Causes and Implications of the Recent Increase in the Reported Sex Ratio at Birth in China" 1993 19:2 Population and Development Review 283.

⁷⁶ Jen Gunter, "Check your privilege and your facts before discussing sex-selective abortion" (12 April 2016) online: Dr. Jen Gunter <<https://drjengunter.com/2016/04/12/check-your-privilege-and-your-facts-before-discussing-sex-selective-abortion>>.

⁷⁷ Supra note 35.

⁷⁸ M. Bronshtein, et al, "Early determination of fetal sex using transvaginal sonography: Technique and pitfalls" (1990) 18:4 JCU 302, DOI: <<https://doi.org/10.1002/jcu.1870180414>>.

⁷⁹ Ashley Marcin, "How Soon Can You Find Out the Sex of Your Baby?" (2020), online: healthline <<https://www.healthline.com/health/pregnancy/when-can-you-find-out-sex-of-baby#:~:text=Since%20an%20ultrasound%20creates%20an,as%20early%20as%2014%20weeks%20.>>.



easily accessible. The proposition that a woman is not entitled to her medical information is unsound, as the SCC has established that,

medical results belong to patients, and that health professionals possess information not as owners but as trustees and, must make it available to patients who request it.⁸⁰

Kale also recognizes that women of all ethnicities will have to temporarily compromise their right to medical information in this context and be understanding and willing for the implementation of a policy to disclose fetal gender information only after 30 weeks of gestation.⁸¹

Vogel points out that if professional directives are issued by medical institutions against sex determination or disclosure of information regarding the same, the practical guidance the physicians will be left with will not be enough to navigate discouraging sex-selective abortion while respecting a woman's right to her own medical information.⁸² Can a society pushing towards equality withhold medical information of a pregnant woman that she wants and is entitled to? This solution not only infringes on a basic right to one's medical information but has also failed to improve SRB in India⁸³ and is thus an ineffective solution to sex selection.

6.3 Resources to Protect and Empower Women being Coerced into Sex-Selective Abortion

A woman being coerced into terminating a fetus is in a vulnerable situation and the threat of being prosecuted under the suggested legislation penalizing sex-selective abortion will only deter her from seeking help. A law, program or activity with the object of amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of sex can be made in Canada.⁸⁴ The decision to terminate a fetus rest solely on the woman carrying it, the morality of the reason for her decision does not take away her human right to access to abortion but a mechanism is needed to check whether a woman is being coerced into terminating the child.

One possible solution can be the availability of optional counseling services at every clinic with abortion facilities. Services that do not involve asking the women intrusive questions regarding their reasons for getting an abortion but discussing how one possible reason for some abortions might be sex-selective discrimination and then letting the women make an informed decision.

Discussion of availability of women shelters, readily available government and non-government resources to help women separate from the aggressor, coercion being a criminal offense, and availability of financial, medical, and legal aid in case the woman needs help is both ethically and practically better than a legislation restricting access to the medical procedures. Other than that, social programs for gender equality and empowerment of women in cultures where sex-selective abortion is prevalent will be effective. All these measures will be in favor of women and promote equality, inherently reducing son preference and reducing the problem of sex-selective abortion. These measures will bring social change and also cause lesser intrusion, constrain and infringement of rights than a legislation aiming to regulate, scrutinize and restrict access to medical abortions and bodily autonomy of women whilst disguising it as promoting equality between the sexes.

7. CONCLUSION:

The scope of public health goals in the context of sex-selective abortion in Canada does not justifiably warrant a regulatory mechanism that regulates access to abortion services and scrutinizes the reasons for getting an abortion.

The objective of the proposed legislation is said to be the furtherance of equality among the sexes but the means to be employed for the same (criminalizing sex-selective abortions) are very unlikely to achieve that objective. A prohibitive law does not meet the legal, moral, or ethical conditions of effectiveness, least infringement, and proportionality to be an acceptable solution for this problem.

The criminalization of sex-selective abortions requires intrusive regulation of abortions in general. The proposed law might esthetically look like a progressive step towards equality but is counterproductive, regressive, and short-sighted in the sense that it will be used to limit the bodily autonomy of women and infringe on the constitutionally protected right to security of a person, which is inherently sexist and disempowering.

⁸⁰ *McInerney v MacDonald* 1992 CarswellNB 63, 1992 CarswellNB 247, [1992] 2 SCR 138, [1992] SCJ No. 57.

⁸¹ *Supra* note 34.

⁸² Lauren Vogel, "Sex-selection migrates to Canada" (2012) 184:3 CMAJ E163, DOI: <<https://doi.org/10.1503/cmaj.109-4091>>.

⁸³ *Supra* note 33.

⁸⁴ Canadian *Charter* of Rights and Freedoms, s 15(2), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act (1982) (U.K.), 1982, c. 11.



The primary concern about the practice of sex-selective abortions is its discriminatory nature but sex-selective abortion is not causing sex discrimination and gender inequality, gender inequality is causing sex-selective abortions. Trying the simple solution of criminalizing the practice has been and will be ineffective unless the real problem of son preference is addressed.

Striving for social and financial empowerment of women in cultures with prevalent son preference and misogyny will further the aim of gender equality, bring the value of daughters closer to that of sons and organically reduce the instances of a fetus being aborted due to its gender whilst not penalizing women's right to privacy and bodily integrity and personal choices.

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