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Is it illegal to abort an unborn baby because of its sex? Not necessarily

The sting that showed clinics agreeing to requests for sex-selective abortion caused outrage. Yet it's far from clear that the practice is always illegal

Sally Sheldon

guardian.co.uk, Tuesday 28 February 2012 13.47 GMT



An abortion sign in Calcutta, India, where sex-selective abortions are common. Photograph: Janet Wishnetsky/Corbis

Several commentators on last week's [revelations](#) about clinics offering abortions on the basis of the sex of the unborn baby have repeatedly claimed that [abortion](#) for sex selection is illegal. But that is far from clear.

Some appear to have confused abortion with embryo selection. The latter is regulated by the [Human Fertilisation and Embryology Act](#) (1990, amended 2008), which prohibits the selection of [embryos](#) on the basis of sex - except where necessary to rule out a sex-linked disorder. It was presumably this that the president of the Royal College of Obstetricians and Gynaecologists had in mind when [he said](#): "Sex selection is illegal in this country and abortion based on the baby's [gender](#) for non-medical purposes is unlawful. Abortion is already heavily regulated in the UK and sex selection is only allowed in very specific conditions such as in the case of hereditary disease as stated in the HFEA Act 2001[sic]". Yet the 1990 Act is not relevant to sex selective abortion so its mention here is, at best, misleading.

Others have noted that the [Abortion Act](#) (1967) says nothing about permitting sex selection. This is true. Yet neither does it make mention of the availability of termination following rape and most people (including the MPs who voted to introduce the 1967 Act) would agree that abortion should be legally available in that case. Rather, the Act offers a defence against the charge of 'unlawful procurement of miscarriage' under the [Offences Against the Person Act](#) (1861), where two doctors believe, in good faith, that one of a number of broad contraindications to pregnancy is present.

One contraindication is that continuing the pregnancy would pose a greater risk to a woman's physical or [mental health](#) than would abortion. The doctor who authorises abortion for a rape victim would rely on the likely harm to her mental health. The legal question at issue here is whether the doctor who authorises a sex selective abortion might ever do likewise.

Imagine a woman with two daughters who comes from an ethnic group that places a

very high value on sons. She and her husband live with her in-laws, who threaten to render them homeless if she gives birth to another girl. Clearly, we might wish that this woman could leave this situation or, better, simply live in a world where such things

do not happen. But while we await that world, a doctor who authorises a termination could make a strong legal case that she had acted in good faith to preserve the mental health of her patient.

From the [highly edited clips available](#), the 'sting' cases appear very different from this scenario. Without having enough information to comment on them in detail, they clearly raise serious questions regarding whether the doctors concerned had gathered sufficient information to form a good faith view of the basis for a termination (or,

indeed, to have been reassured that a woman making such an unusual request was not acting under duress). While the fact that no abortion will have taken place means that no charge of 'unlawful procurement of miscarriage' can be brought, prosecutors may consider whether a charge might lie in conspiracy to commit such an offence or, if notification papers have been falsely completed, in perjury. And, of course, the doctors might face sanction from the General Medical Council.

Notwithstanding the attention given to this story over the past week, there does not seem to be any evidence that requests for sex selective abortions are common. Yet the disparity between the laws regulating abortion and embryo selection in this regard is nonetheless striking. The only plausible explanation (by no means a justification) lies in the substantial recent parliamentary attention given to issues of embryo selection - attention which successive governments have denied to abortion. The result is that we are left with abortion legislation that is badly outdated in numerous respects. It would be unfortunate if recent attention given to the 'sting' were allowed to distract from more

basic inadequacies of the Act. It would be doubly so if this controversy serves to fuel broader agendas to restrict access to the good, safe and lawful abortion services that remain an essential part of women's ability to control their own fertility.

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
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 Contributor

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 **palfreyman**
28 February 2012 3:10PM

Good article. I am dead set against discretionary sex-selective abortion: it usually works against the interests of women, existing or potential. But the law, as you point out, is far from clear on this matter.

Your last sentences are particularly pertinent:

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It would be unfortunate if recent attention given to the 'sting' were allowed to distract from more basic inadequacies of the Act. It would be doubly so if this controversy serves to fuel broader agendas to restrict access to the good, safe and lawful abortion services that remain an essential part of women's ability to control their own fertility.



OirishMartin

28 February 2012 4:01PM

I'm not sure what to think of this. I've often thought that if someone isn't ready to have a child then they should consider termination an option, but that could just as easily be applied to their wish to have one gender over another, something I can't think of any rational justification for.

The best option IMO is to take the issue out of the equation altogether - ban revealing the gender of the foetus until after the abortion limit of 24(?) weeks has elapsed.

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rostaylor

28 February 2012 4:10PM

Response to [OirishMartin, 28 February 2012 4:01PM](#)

A Canadian medical editor recently [suggested this](#) - putting it at 30 weeks. I do wonder, though, how such a ban could be enforced if we don't seem able to prevent sex-selective abortion itself.



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bartelbe

28 February 2012 5:25PM

Response to [palfreyman, 28 February 2012 3:10PM](#)

Good article. I am dead set against discretionary sex-selective abortion: it usually works against the interests of women, existing or potential. But the law, as you point out, is far from clear on this matter.

So it would be OK if it were little boys being aborted? Before I get nuked, I'm not pro-life, or some religious nutter. I don't want abortion outlawed, but abortion makes me uneasy and so does the attitude of the pro-choice movement. Abortion isn't a black or white moral issue, it is most definitely a morally murky area. Neither side in this debate acknowledges this.

One side thinks that the women carrying the fetus should have no rights what so ever and the other side thinks that the unborn child shouldn't be considered. Try this thought experiment. You find your mother's old diary, you start reading, you know you shouldn't, but you can't help yourself. Your interested in the time when you were born, what was she was like before you knew her.

You then find an entry about her agonising over whether to have a termination or not. You realise that she is talking about you, you then find that there is another entry were she had booked an abortion, but changed her mind at the last second. Everything you have become, everything that you have ever done could have been wiped out. Your life could never have had existed, and it would have been perfectly legal. Even if you are pro-choice, are

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you saying that it wouldn't give you pause? Affect the relationship with your mother?

An issue that is shades of grey. I think that Jimmy Smit's character on the West Wing summed it up best, abortion should be legal, safe and rare.



OirishMartin

28 February 2012 5:55PM

Response to [rostaylor, 28 February 2012 4:10PM](#)

I suppose it couldn't be verified that the information had actually been exchanged between doctor and patient without violating confidentiality in some way. The point at which the testing procedure itself is carried out could be regulated, but from what I can gather (admittedly not much) frequently these testing procedures are done to measure several issues in tandem (e.g. chromosomal testing can establish the gender but also whether or not there are birth defects). I wouldn't want to necessarily restrict a test just because of one piece of information it can reveal.

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MichaelinDenver

28 February 2012 10:51PM

The latter is regulated by the Human Fertilisation and Embryology Act (1990, amended 2008), which prohibits the selection of embryos on the basis of sex - except where necessary to rule out a sex-linked disorder...

Yet the 1990 Act is not relevant to sex selective abortion so its mention here is, at best, misleading.

I don't get this. Isn't this contradictory?

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ReaderMALAYSIA

29 February 2012 3:16AM

Response to [MichaelinDenver, 28 February 2012 10:51PM](#)

To put it plainly, abortion (covered under UK's Abortion Act 1967) has nothing to do with artificial conception covered under HFEA 1990, amended 2008. Sex selection as a crime is covered only under the HFEA based on assertion of this article's author and similar one in Independent.

This was a good point the author brought up and one I wanted to ask myself, relating to sex selection and fertilisation. Note that UK's HFEA Act is primarily targeted to regulating conception and preventing manipulation deemed undesirable for the goal of making '**made to order babies**'. Sex selection is an integral part of the slippery slope leading to genetically tailored embryos (tailored characteristics etc). Needless to say the intentions, procedures and attention to detail, this encompasses is very elaborate. The social implications are likewise very dangerous.

In sex selection abortion for naturally conceived pregnancies, there is only gender selection bias without any intention of furthering this 'act' to predetermining characteristics of the future infant. The procedure conducted is no different to other

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abortions.

The discrepancy between the two acts is that the newer HFEA act because it draws the line (early) at preventing gender selection is hence gender neutral while the older Abortion Act is not gender neutral (just as it is not predetermining other limits in criteria).

In my personal opinion this is as it should be, if the spirit and purpose of the Abortion Act is to be fulfilled. It by definition and practice is broad and the element of mental distress caused by carrying on with the pregnancy if allowed for many non-medical reasons should also be allowed for gender as a criterion if this is a stress unbearable and wanting termination of pregnancy. I think it is hypocrisy to equate this to female infanticide. The very name gives away that the killing took place to a child already born. In gender selection abortion, while there is gender bias, it acknowledges the reality faced by the mother and the future of the child. This is tackled by change of social attitudes rather than prenatally by preventing an intra-uterine procedure. If this is cause for rejecting an abortion request, that the mother and family must adjust and bear with it, why is the answer different for abortion requests due to other reasons? The whole reasoning of non-medical abortion is disingenuously being brought to question as the trail of discussions from these recent events testify.



JewellyBird

29 February 2012 8:10AM

@bartelbe.

Do you really suppose that those of us who fully support a woman's right to choose have not realised that that also means that our mothers might have chosen to abort us?

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christinej

29 February 2012 9:25AM

Response to [bartelbe, 28 February 2012 5:25PM](#)

Well I would have been amazed that she chose to go through with it ... I guess and to have me (hmmm bad choice methinks - imagine the lovely, biddable, succesful child she might have had, but we make those choices and that is that).

I do think that if I had read that and realised that my mother had chosen to have me (despite presumably a set of difficult circumstances - rather than the ideal 'we are trying for a baby' scenario) it would only make me love her more, if you are implying it would make me love her less - I can't see how that could be the case but perhaps that is just me.

I fully support every woman's right to choose.

I cannot see the point of bringing in yet another unwanted child into this world.

That said, it is NEVER going to be an easy decision - I don't care how legal or illegal it is.

The decision itself is always going to be hard. Living with the

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
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after-effects of that decision is likely to be hard too - whether you have aborted or kept the child. The misery is finding yourself in the position of being pregnant when you do not want to be.

And weirdly enough for myself I don't think it is exactly morally wrong but rather spiritually sinful to abort but we all do spiritually sinful things all the time - I also think it is spiritually sinful to live in a world where people are starving and I have more than enough but don't share it. I understand it is deemed spiritually sinful to have sex outside marriage and with a view to non-procreation (hence contraception being condemned by the Catholic church) - which has the direct consequence of abortion doesn't it?

It may be deemed spiritually wrong - but morally there are a million justifications you can make as to why an abortion is the better option than the giving birth one - although I am equally against "forced" abortions such as happened in China. My position remains that of being pro-choice BOTH ways (or rather against being forced either way).

 **palfreyman**
29 February 2012 12:45PM

Response to [bartelbe, 28 February 2012 5:25PM](#)

Good article. I am dead set against discretionary sex-selective abortion: it usually works against the interests of women, existing or potential. But the law, as you point out, is far from clear on this matter.

So it would be OK if it were little boys being aborted? Before I get nuked, I'm not pro-life, or some religious nutter. I don't want abortion outlawed, but abortion makes me uneasy and so does the attitude of the pro-choice movement. Abortion isn't a black or white moral issue, it is most definitely a morally murky area. Neither side in this debate acknowledges this.

Not sure how you got that from my statement "I am dead set against discretionary sex-selective abortion".

And I believe I am right also in pointing out that it usually works against the interests of women, simply because usually it is female foetuses being aborted, not male. That was not a moral judgement claiming we need to abort an equal number of male foetuses to "even up" things, but just to point out that, in countries where (through sex-selective abortion, female infanticide, neglect etc) where there are more men than women, women tend, instead of gaining greater rights/autonomy, to be further commoditised so that they have even less right to choose how their lives go. The sad thing is this is the situation in the world's two largest countries - China and India, both of which, contrary to standard demographics, have more men than women.

Yes, I tend to think of abortion primarily in terms of women's rights - not just because it is their bodies and should be their choice, but also, as I pointed out in the previous paragraph,

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because of the wider social impact in terms of the status of women in societies.

I agree that abortion is not a black and white issue: the problems surrounding it are different in the States from the UK, and both of them have a different set of problems from, say, India. Perhaps we need to have different ways of looking at the issue in different societies...

Still not going to stop me thinking that priority should be given to the woman, and her right to have an abortion should she so desire. I know it's not easy, and I know people will (as do I) have qualms about the foetus(es) concerned, but I know where I stand on this and the reasons for it.

FWIW, even if it isn't obvious from my writing and handle, I'm male.



banzjd

29 February 2012 3:14PM

If I had to choose I'd much prefer it if sex selection happened at the embryonic stage. I find it amazing that this is unlawful, while aborting a much more developed foetus is.

In Canada, however, I do believe it would be much easier to enforce the law. There is not the option of a private doctor. All are paid by the state and thus much less vulnerable to the temptation a private patient might pose.

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banzjd

29 February 2012 11:15PM

Response to [banzjd, 29 February 2012 3:14PM](#)

I find it amazing that this is unlawful, while aborting a much more developed foetus is.

should have been:

I find it amazing that this is unlawful, while aborting a much more developed foetus is **not**.

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SamSSSS

2 March 2012 9:18AM

Response to [OirishMartin, 28 February 2012 4:01PM](#)

The best option IMO is to take the issue out of the equation altogether - ban revealing the gender of the foetus until after the abortion limit of 24(?) weeks has elapsed.

But the gender is not identified by a doctor, rather by a sonographer.

As far as I know, anyone can buy an ultrasound machine.

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