

Selective abortion after preimplantation sex selection: An ethical and legal issue in Indonesia

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ABSTRACT

Background: The emerging of sex selection technology in Indonesia is sperm sorting, meanwhile sex selection with Preimplantation Genetic Diagnosis (PGD) methods is not widely used. The use of sperm sorting has bigger chance to fail than PGD, thus potentially cause ethical and legal problems that is selective abortion during pregnancy. The potency for selective abortion is enlarged by Indonesian law that permitting sex selection without distinction of medical and non-medical reasons. There is no special policy to regulate the selective abortion because of sex selection failure.

Aims: This study aims to find out the legal concept of selective abortion after preimplantation sex selection that appropriate to be applied in Indonesia.

Methods: This research is normative research that use analytics method with legal approach and conceptual approach. The research material consists of primary legal material (legislation about sex selection and abortion in Indonesia), secondary legal materials (legal journals, law books, and legal proceedings), and also non-legal materials (journals, books, and health proceedings about sex selection and abortion).

Results: In Indonesia meanwhile in general, abortion is permitted for pregnancy with medical indication and rape victim. Through a statue approach in Indonesia, selective abortion after preimplantation sex selection can be implemented for strong medical reasons. While the failure for non-medical reasons can't be aborted. This regulation contrary with ethics, morals and religion. Selective abortion should not be done because of preimplantation sex selection failure either medical or non-medical reasons.

Conclusion: Selective abortion after preimplantation sex selection both medical and non medical reason contrary with moral, ethical, and religion. Indonesia needs to regulate further policy about selective abortion if there is a failure of preimplantation sex selection.

INTRODUCTION

Sex selection has occurred since some decades that constituted by medical and non-medical reasons which referred to parental preference towards particular gender on children [1]. They have been

done several efforts to get future children like what they desire, for example calculating the fertile period, determining diet/ food intake, timing and positioning during coitus and also using chemical substance [2]. At the old times, children's gender is known after the labor. It often brings disappointment for parents who

expected different gender of their newborn. At that times, male gender is preferred than female because they could be the family's economic backbone, religious leader and so on which increase the parental preference towards male gender. These become one of the murder's reasons for newborn with female gender [3].

As the time goes by, there are technologies such as USG, amniosynthesis, Chorionic Villus Sampling (CVS), and Maternal Blood Test that make parents possible to know their baby's gender at the first and second trimester [4]. This technology is originally used to determine fetus's condition during pregnancy, but now it is becoming an entrance for selective abortion, one of the reason is because gender or known as sex-selective abortion. This situation also develops in China and India which have higher preference towards male gender [5]. Inequality of ratio male compare to female (sex birth ratio) and gender discrimination are starting to happen. Using USG technology, impairment or physically abnormality in fetus can be detected during pregnancy. It becomes a new problem, if a fetus is known to have an impairment during pregnancy, should he/ she be aborted or retained.

Reproductive technology is growing rapidly marked by emerging of Assisted Reproductive Technology (ART) that may help infertile couples who tries to get a child. It also becomes one of the way to get child the desired sex before embryo's implantation. There are two methods in sex selection i.e. sperm sorting and Pre Implantation Genetic Diagnosis (PGD) [6]. Sperm sorting is a method that achieves by separation of X and Y chromosomes in the sperm then reunite with X chromosome from ovum. If the desire sex is female then it will be used X chromosome in the sperm, whereas if the desire sex is male, it will be used Y chromosome in the sperm. The successfulness from that method is approximately 50-85% for female and 50%-65% for male [7].

PGD is another sex selection method which achieve after the conception. By this method, parents could know their embryo's gender then select which one they desire before implant into the uterus. The successfulness of this method is beyond perfect [8]. It is because only embryo with desired gender that will be implanted. Nevertheless, implementation of sex selection using ART has potency that contrary with ethical, legal, and religion. Experts agreed the sex selection using ART only acceptable for medical reasons and not for non-medical reasons. They

argued that sex selection for non-medical reasons is considered to create gender discrimination, selective abortion, baby designer and eugenics [9]. Human Fertilization and Embryology Authority (HFEA) at United Kingdom said that sex selection using ART must be done only for severe disease reasons that associated with sex as Duschene Muscular Dystrophy, unsevere disease such as color blindness is not recommended for sex selection [10].

Sex selection using ART also develops in Indonesia both medical and non-medical reasons. Another reason that develop is parental preference to have a child with particular gender that different with the last one (family balancing). They suggested that an ideal family is the one which have children both male and female. In several regions, there are some ethnics/ local indigeous that prefer to particular gender. For example, Batak people in North Sumatra prefer male gender [11]. In that society, the position of male is considered higher than female (patrilineal system). Conversely, for Minangkabau people in Padang, West Sumatera, prefer female gender than male due to descendant of the family is determined by female or matrilineal system [12]. Gender preference in some regions and ethnic could affect the Sex Birth Ratio (SBR) balancing. Although, there are no reports of significant effect from SBR increasing in Indonesia [13].

Recent sex selection method using ART that develop in Indonesia is sperm sorting method, whereas PGD not commonly used because of human resource and technology limitation. Indonesia has legalized sex selection both medical and medical reasons, but this regulation permitted for second child and so on. This policy is regulated by Government Regulation No.61 Article 44, 2014 on Reproductive Health [14]. Failure in using sperm sorting as a sex selective method was large enough, it can caused selective abortion in pregnancy if the gender of children not in line with parents expectation.

The problem is when sex selection failure due to medical and non-medical reasons. Sex selection due to medical reasons such as Duchene Muscular Dystrophy disease that fails can cause ethical, moral, and religion problems. Can the fetus be aborted if it has different gender than parent's expectation? Indonesia has regulations about abortion but has no specific regulation about selective abortion after sex selection failure.

METHODS

This research is normative research that use analytics method with legal approach and conceptual approach. The research material consisted of primary legal material (legislation about sex selection and abortion in Indonesia), secondary legal materials (legal journals, law books, and legal proceedings), and also non-legal materials (journals, books, and health proceedings about sex selection and abortion).

REGULATION OF ABORTION AND SELECTIVE ABORTION IN INDONESIA

Since 2001, People's Consultative Assembly of the Republic of Indonesia (MPR-RI) had issued a Decree of People's Consultative Assembly of the Republic of Indonesia (MPR-RI) No. VI/MPR/2001 on the Ethics of Nation Life. The inception of this Decree was influenced by the weak understanding of the ethics in having a nation, a state, and religion. The reasons were the emergence of some anxiety of the nation unity and the existing setback of the implementation of nation life ethics. It could be seen from some prolonged social conflicts, the lack of manners and nobility in social interaction, the weakening of honesty and trusted attitude in nation life, the abandonment of rule of law and regulation, which were caused by some factors either from inside or outside the country.

Liberalism values had entered and become a freedom campaign which was increasingly massive, including in the application of the allowed abortion for sex selection reason. This Decree had given a base for the inception of the next generation that was Government Regulation No. 61 Article 44, year 2014 on Reproductive Health. In Chapter IV of Government Regulation No. 61 year 2014, it is regulated the Medical Emergency Indicators and Rape as an Exception for the Disallowance of Abortion.

Abortion is only allowed with some strict requirements, which are only two conditions: first, a pregnancy as the result of act of rape, when the gestational age is 40 days or less, and second, because of medical emergency indication. The examples of medical emergency indicators are the pregnancy can threaten the mother's life and/ or threaten the infants' health because of genetic disorder which can make the infant difficult to live outside the womb. However, for the last condition there are still some different opinions. Abortion procedure was done after the approval from minimal 2 specialist and another expert like forensic expert, religion expert, and psychologist.

Besides that, a counseling and informed consent were done by the patient before and after abortion.

Indonesia has no specific regulation for selective abortion due to sex selection failure. Meanwhile, according to the statute approach of abortion's regulation in Indonesia, selective abortion after preimplantation sex selection can be done only for sex selection by medical reason. Selective abortion after preimplantation sex selection with non-medical reason should be prohibited. In practice, there is a controversy with the regulation including the ethical, moral, and religion perspectives.

MORAL PERSPECTIVE OF SELECTIVE ABORTION

Indonesia is one of eastern countries which always uphold morality values based on religious dogma and local wisdom which exist and develop in society. The meeting of religion and local wisdom will present a value which is embraced as a state fundamental norm that is Pancasila, five principles, a different value with most western countries, liberalism. Liberal approaches to the abortion practice for sex selection tends not to mind it. It precisely contradicts to Pancasila.

There are many positive values insides Pancasila, which are unraveled in its moral principles, including on Divinity, Humanity, Unity, Democracy, and Social Justice. These existing values are the Indonesian's views of life which has become the reflection of Indonesian's personality.

(1) Divinity

It contains the meaning religions that become the references in social, nation and state life. Indonesia admits 6 (six) religions which are embraced by its population, including Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. These six religions admit that an infant is going to born and life is a God's will, human being does not have any rights to end the infant's life, moreover abortion for sex selection failure.

(2) Humanity

The values of humanity values contained in Pancasila teach Indonesian nation to live humanist. At the one end of parents' rights, there is infant's right exist which also should be respected, even it is a natural rights, the rights to live. Therefore abortion for sex selection reason is not justified. There are agreements that abortion due to failure of sex selection will lead to human engineering.

(3) Unity

Unity values give us a guideline in life to continuously unite, gives priority to unity and harmony for all Indonesia people who have different religion, ethnic, language, and culture. Nation is a communion of common living among the elements which construct the nation, in the form of ethnics, races, groups, classes, or religious groups. These differences should not be sharpened which are able to create some conflict and hostility, but should be directed on a mutualism synthesis, that is a unity in common life in order to realize the common goals. The implementation of unity value is imbued by the Divinity and Humanity principles. It contains a value that Indonesian nationalism is a religious nationalism that is a nationalism which has the moral of Believe in the One and Only God, a humanist nationalism that upholds human dignity and prestige as God's creatures. Subjectively, at the context of abortion for sex selection reason, there are some different perspectives that should be placed in a religious and humanist frame. Thus, there are not any justifications for the abortion for sex selection reason can be accepted.

(4) Deliberation (democracy) principles

Abortion is an action which socially cannot be accepted in Indonesia. The democracy principles have some teachings for the good of all Indonesia people. Deliberation also means democracy, where the result of democracy can be determined by the owned regulation. Until now, there are no regulations which allow the abortion for sex selection reason.

(5) Social justice principles

The explanation for this principle in rejecting abortion is similar to the explanation which is explained at the beginning. At the context of Pancasila, the social values are imbued by Divinity, Humanity, Unity, and Deliberation (Democracy).

ETHICAL ASPECT OF SELECTIVE ABORTION

Ethics is always related to some values which have source in mind that functions in encouraging and directing human's attitude and behavior. Value as a system is a form of culture. Social norms are common habits which become a criterion of behavior in such society group and such borderline. Norms will develop along with its society's social agreements. Ethics is generally understood as the discipline which can act as the performance index or reference for our control system. Ethics is a kind of discipline which

discusses on either morality or human as long as related to morality. Ethics is a discipline that explores moral behavior [15]. Ethics gives a standard that regulates human's association in his social group. It is embodied in the form of behavioral values which are systematically made base on the existing moral principles; and when they are needed, they will be able to be functioned as a tool to control all kinds of action that are logically-common sense considered deviate. Thus, ethics is a reflection or self-social control. Each discipline has its own ethics, including biomedical. It has its own ethical value which belongs to professional ethics.

The dilemma in medical field, could be solved by bioethics review or biomedical ethics. In the beginning, bioethics is introduced by Van Renssaealer Potter, a biology expert in cancer and a professor in Wisconsin University. In his research, Potter said that bioethics is a new major of knowledge which compares biological science with human value system from ethics. As a final destination from this new major, he saw "not only to enrich individual lives but to prolong the survival of human species in an acceptable form of society" [16]. As in another branch of applied ethics, in biomedical ethics, it is also using some different methods and approaches. However, Tom Beauchamp and James Childress introduced a method in their book, with title Principle of Biomedical Ethics (1979). That method consist of four basic principles i.e. beneficence, autonomy, non-maleficence, and justice [17].

(1) Beneficence

Selective abortion because of a sex selection failure not a good thing, even it aims to prevent a newborn lived with X-linked disease. Several experts said that thing not so different with a eugenic process which not permitted a fetus with genetics impairment to live. Even more, if the sex selection aimed just because a non-medical reason based on parental desired. Intervention of the embryo and life based on parental desired only, contradict with beneficence principal.

Selective abortion because of medical sex selection failure also made a devaluation on disability patient. Fetus with genetics disease will regarded as a physically imperfect human. Although, the fetus probably has a good mental, spiritual and intelligence in their development. In this context of benefit, sex selection has more *mudharat* (inappropriateness) than giving some benefits. Therefore it tends to contradict with the bioethical principles.

Opening access for selective abortion should become an attention in ART process. Parents who did sex selection at their child should agree with all agreement in informed consent. Before and after sex selection procedure counseling should be done, thus the parents can accept whatever the result. No demand or re-intervention to the embryo which already implanted to the uterus. Development study must be addressed wisely for humanity of human in contrast with embryo's devaluation and human especially because of genetic and physic. In Hipocrates Oath which becoming the basic oath told that a doctor should appreciate life since conception [18].

(2) *Autonomy*

Autonomy is patient rights to decide their destiny or medical decision. In basic principal of bioethics, autonomy has the highest power compare with another principal. This principal underlies several people to agree and fight for the selective abortion because of sex selection failure. Those parents who agree said that sex selection is a right as same as their right to reproduce and have a descent, postpone to have a child, decide and determine the number of children that they desired. They also said that desire to get child's gender is one of the autonomous rights of parents to be cherished and respected. Desire for particular gender caused by social, economic, the tendency towards a particular gender reasons are some reasonable and humane things. However, the effort to get that thing is limited through the origin ways such as timing the coitus, food diet and using chemical substance.

Intervention to the embryo candidate followed by selective abortion is contradicted with moral. If it is left behind, it will be a eugenics process and baby designer, where children will only be parental production commodity and preferences. In contrast, we must pay attention to children and their human rights. It is better, if the parent's freedom and autonomy right are not use to rob the children's rights and freedom.

There is a genre which is used as an approach to analysis the morality issues. Hedonism is an ethical theory which emphasizes that according to his nature, human being tends to seek for some pleasures and tries to avoid some displeasure. Hedonism even encloses the pleasures into morality. Consequently, hedonism will contain a kind of egoism because it only accentuates his own interest. Autonomy contexts should not be given to adults only, but also to infants in the womb who have had a life and had the rights to

live. Abortion precisely is seizing the infants' autonomy rights to live. Thus, at this context, abortion because of sex selection reason cannot be bioethically accepted.

(3) *Non maleficence*

In the world of medicine, there is a Latin slogan that closed with this principal "primum non nocere" the first thing is do not harm [16]. The medicine procedure that aims to provide benefits and minimize the patient's risks. This also applied for selective abortion caused by sex selection failure. Preventing a fetus to have an X-linked disease does not mean restricting their right to born. If medical sex selection was failed, we should expand the medical technologies to help that child to improve his/ her quality, life expectancy and productivity. Several experts are asking, if the technology always develops to get a perfect child, why it does not develop to accomplish and facilitate a less perfect child?

Principally, sex selection is merely an elementary activity to make a preference, not a required thing. Abortion should not be something which is done because of sex selection reason. Because abortion which is done for sex selection reason truly ignores the risk effect reduction on the infant. Removing a life infant is a dangerous action. Thus, bio-ethically, abortion because of sex selection reason is completely not allowed because it is non-maleficence. This precisely contradicts to the bio-ethics.

(4) *Justice*

Sex selection because of non-medical reasons such as desired towards a particular gender (gender discrimination) breaks the equity or justice principal. There are many cases of gender discrimination that tend to accentuate and feature the male, thus the female becomes an inferior like what has been happened in India and China. Parents should not distinguish and make a different perspective with their male or female children. Even though in family balancing case, where parents desire to have different child's gender with their recent child's gender, but in principle, having children with the same gender either male or female is not an abnormal situation which needs to intervene. Like genetically disease, it is a natural selection process.

RELIGION ASPECT OF SELECTIVE ABORTION

Indonesian Moslem Scholars Council had issued a special *fatwa* (instruction) on abortion in 2005. This *fatwa* which followed up the Government Regulation

No. 61 year 2014 regulated on the Medical Emergency Indicators and Rape as an Exception for the Disallowance of Abortion. The *Fatwa* Committee of Indonesian Moslem Scholars Council decided that principally abortion is prohibited, especially on the pregnancy as the result of fornication.

Abortion can be permitted because the presence of good things which are emergency or intent in nature. The intended emergency condition is pregnant woman who suffers severe physical illness, such as advanced cancer, TBC with caverna, and other severe physical diseases that should be determined by the doctors. Abortion is also permitted if the pregnancy can threaten the mother's life. In an intent consideration, abortion is permitted in such conditions. First, the infant which is conceived has been detected for having genetic disorder, which is difficult to be healed when it is born later. Second, a pregnancy as a result of rape which is determined by an authorized team, including the victim, doctor team, and ulema. The requirements for abortion because of rape is that the age of the infant is not more than 40 days.

The *fatwa* of law in Indonesia is different with the *Fatwa* Committee of Kingdom of Saudi Arabia. Although there are some indications of infant abnormalities and disability detected which feared after the birth, the *Fatwa* Committee of Saudi Arabia still refuses abortion. The committee has an opinion that this medical information is still predictive in nature.

To prevent negative access like eugenics and baby designer, Indonesia's Government should make a more clearly further regulation and detailed about selective abortion that only done if there is a preimplantation sex selection failure. In establishment the regulation, it needs discussion and cooperation from several elements, like a doctor, law experts, religion experts, forensic experts and psychologist who will make a regulation that walk through the ethics, norm and religion in Indonesia. Actually sex selection technology with PGD method, should start to develop in Indonesia, because it has minimal failure number. This will reduce the repeating intervention in human and preventing the selective abortion risk during pregnancy even though implementation fee is more expensive than compared with sperm sorting.

LEGAL CONCEPT OF SELECTIVE ABORTION IN INDONESIA

Indonesia legalized sex selection using assisted reproductive technology both medical and non-

medical reasons [14]. This regulation is contrary with ethics, morals, and religion primarily for sex selection with non-medical reasons. It is also increases one of negative effects of sex selection failure i.e. selective abortion.

There is a case that related with sex selection failure in Indonesia. This case happened in Surabaya in January, 2017. The patient expected to get son child, but the reality the child was girl. Moreover, the child suffers from gastrointestinal disorder, thus patient accused the doctor. Although selective abortion did not happen in this case, but there was a potency to the abortion.

According to statue approach of abortion in Indonesia, sex selection with medical reasons can be done in Indonesia and sex selection with non-medical reasons should be prohibited. The approval of abortion due to sex selection failure is contradictory with ethics, moral, and religion in Indonesia. Selective abortion due to sex selection failure should be prohibited both medical and non-medical reason. This is because repeat intervention to embryo and fetus can lead human engineering.

Sex selection failure by medical reasons can cause genetic defects. However, assessing the degree of disability is important. Fetus with genetic defect or disability should receive the attention and facilities from government, thus can increase the productivity and survival of people with the disabilities rather than to reducing the disability people through selective abortion.

CONCLUSION

Indonesia has no specific regulation about selective abortion after sex selection failure, both medical and non-medical reasons. According to statue approach, selective abortion after sex selection failure due to medical reasons can be done, but Indonesia doesn't legalize selective abortion after sex selection failure due to the non-medical reasons. This regulation is contrary with moral, ethics, and religion in Indonesia. Selective abortion after sex selection failure both medical and non-medical reason should be prohibited because it can lead to human engineering. Therefore, if necessary, Indonesia may need to regulate the selective abortion policy further to synchronize the sex selection practice and ethics and norm in Indonesia.

CONFLICT OF INTERESTS

None declared.

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