

Decriminalizing Social Sex Selection is a Negation of the Sociological Jurisprudence

Osebor Ikechukwu Monday*

*Department of General studies, Delta State Polytechnic Ogwashi-ukwu, PMB 1030, Nigeria

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*For Correspondence

Osebor Ikechukwu Monday, Department of General Studies, Delta State Polytechnic Ogwashi-ukwu, PMB 1030, Nigeria, Tel: +2348037911701.

E-mail: osebormonday1@gmail.com

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ABSTRACT

The desire to determine the sex of an offspring is as old as man is, and with the improvement in science and technology, doctors could accurately select the sex of a baby. This has generated debate from legal, social, and ethical perspectives, for and against the prohibition of sex selection for social reason in Nigeria. Adopting a critical experimental method, the paper argues that the criminalization of social sex selection is a negation of the sociological jurisprudence in the formation of laws that guides the social actions of the Nigerian people.

INTRODUCTION

The criminalization of sex selection for social reasons is one of the controversial issues in jurisprudence today. With the advancement of science and technology, jurists, legal luminaries, legislators, governments and other institutions could legislate favorably the adoption of "the scientific method." In the study and formation of law, ethics, applied legal philosophy etc., the scientific methods we argue, may not be sufficient for the formation and regulations of laws that guide human behavior in the society; because the law cannot be studied in isolation ^[1]. James argue that with "the application of social sciences to the study, regulations, and formation of law, the society laws will be more effective and strong, because the instruments of social spectrum are included in the formation of law that guides social actions.

The criminalization of sex selection for social reasons by the State Houses of Assembly in Nigeria would be a clear negation of the social sentiments, which is the soul of legal efficacy ^[2]. Okene asserts thus: Out law should be able to effect desirable changes in our value system rather than isolating the status quo. This has to be so in a dynamic society such as ours where the most constant phenomenon is change itself. Regrettably, however, this has not always been so in the Nigerian situation where there are still so much unrealistic and its relevant laws existing in some of our statute.

Ehrlich argues that the real laws of a community are be sought from the community itself not in the legal material but in the customs of the people ^[3].

In this sense, criminalizing sex selection for social reasons, we argue that it fall short the social and cultural grounds of the African people ^[4]. Perhaps, this is a negation of a part from a whole, in the formation of law.

According to Roscoe Pound 'the law is a social engineering'!. Here, he viewed the law as the engine that has many parts, just as the laws that guide the society. The engine needs all its parts to effectively function otherwise it will not produce the required results. In this sense, the sociological approach to law, stresses the inclusion of all social categorizations and the examination of social phenomena, substantive and procedural for the formation of laws will guides the social conducts in the society.

The criminalization of social sex selection in countries like UK, Turkey etc., has demonstrated the denial of the social engineering and basic liberty of the individual. The criminalization of sex selection for social reason will encourage reproductive tourism and disobedience to the laws of the land ^[5].

In the same vein, Ihering a German sociologist saw the law as a social mechanism for the balancing of purposes, motives, and practical interests, of social values and social utility ^[6]. The criminalization of sex selection is a pseudo attempt to place emphasis on the individual rather than individuals to arrive at justice. The paper argues that sex selection for social reasons should be decriminalizing, for sake of family balancing.

Philosophical Foundation of Sex Selection

Sex determination for social reason is as old as man is, in the antiquity; it is believe that male offspring come from the sperm of the right side of the male testicles while the female offspring comes from the left side of female embryo ^[7]. Eugene cites Empedocles that heat gave rise to male children and cold to female offspring. He further affirmed that Democritus of Abdera shares a contrary opinion, that the sex of an offspring is depended on the sperm cell that predominated in the fertilization processes.

Eugene cites Hippon, a pre-Socratic philosopher who argues that the sex of an offspring. Determine by strong and weak sperm cell. For Hippon, a “strong” sperm cell fertilizes an egg in a female uterus, the result is a male child, and the “weaker” cell sperm cell, will produce a female child here, Hippon and Hippocrates holds a similar conceptions about male or female offspring. For Hippocrates argues thus

That female is born {because} of the stronger “element” that overpowered by the abundance of the weaker cell, and vice versa, that the birth of a male offspring is due to the overpowering of the weaker element or the sperm cell.

Furthermore, Eugene cites Aristotle who holds that sex selection is based on the age of the parents and heat as a major contributor to determining the sex of an offspring. He argues thus; for more females are produced by the young and by those verging on old age than by those in the prime of life; in the former, the vital heat is not yet perfect, in the latter it is failing. {Moreover}, those of a moister and more feminine state of body are {wont} beget females, and liquid semen causes this more than a thicker; now all these characteristics come from a deficiency in natural heat.

Similarly, the Chinese gender chart is another natural medium to determine the sex of an offspring. According to a Chinese scholar, the chart is capable of predicting the gender of an unborn child, based on two variables; the baby's month of conception and the mother's age are very significant in predicting the gender of a baby. This is similar to Aristotelian views on sex determination.

FF stands for female child and MM stands for a male child. Example: if a woman of 18 years of age conceives during 15th January 14th February, then she delivers a baby girl. if the same age woman conceives in the month of 15th February/14th March then it is a male child. Likewise, if a woman of 36 years of age conceives in the month of 15th January 14th Feb., then it is a female child and if the same woman conceives in the months of 15th February/14th March or 15th march/14th April, then she delivers a male child. You can calculate and plan so on ^[8].

However, these claims by the ancient Chinese philosophers about sex determination is assume to be highly accurate, but no clinical studies have verify the claim, in my view, it's a myth or probabilities ^[9].

Timing Methods

Timing is another method to determine the gender of an offspring. It has popularly called the Shuttles method. The sperm possesses X and Y chromosome, if the sperm that is carrying X chromosome fertiliese an egg, a girl will be conceived. On the other hand, if the sperm that is carrying Y chromosome fertiliese an egg, a boy will be conceived. Shuttles theorized in 1960 thus

That sperm containing the x (female) chromosome are more resilient than sperm containing the y (male) chromosome. He advocates that intercourse should take place two to four days prior to ovulation before a boy is conceive. {To achieve a female offspring} the cervix should contain a higher concentration of female sperm {X chromosome} capable of fertilization of a girl child (with most of the male sperm already dead) ^[10].

Studies have shown that the sperm with the X chromosome has a longer life span than the Y sperm cell. Perhaps, the male sperm appears to have a higher mobility. Sperm mobility is the ability of the sperm to swim through the reproductive track; it could be view in two ways: the rate of sperm swimming in the reproductive tract, this is referred a forward progression. However, having sexual intercourse at specific times especially close to the ovulation period influences the gender of the baby.

Ericsson Method

Dr. Ronald J. Ericsson in 1975 uses higher concentrations of sperm of the desired sex to increase the likelihood of conceiving the desired sex. Here, the sperm undergoes filtration using the test tube. The x and y chromosome is known to swim down (y) or remain on top (x) in the test tube before the desired chromosome could be artificially inseminated ^[11]. The method has proved to have at least 70-72% success rate for boys and a 69-75% success rate for girls. Currently, approximately 50% of gender selection centers in the United States use the Erickson method for artificial gender selection ^[12].

Ivf/Pgd Technique Ivf and Pre-Implantation Genetic Diagnosis

"In vitro" is a Latin word for "within glass" while fertilized egg referred as embryos. In vitro fertilization is the process of stimu-

lating an egg, using egg stimulant, drugs and the extraction of embryos from the mother's womb, to be fertilizing by the father's spermatozoa. As the embryos, grow through mitosis cell division, they will be separated in order to determine their gender.

In addition, the desire embryo if to be implanted into the mother's uterus, it will be genetically biopsied, with a pre-implantation genetic diagnosis (pgd) in order to increase the fertilization success, and also enable the geneticist to carry studies about the chromosomes, genome, genetic defects, analysis of sex etc.

A REFLECTION OF THE SOCIOLOGICAL JURISPRUDENCE IN THE NIGERIA LEGAL SYSTEM

Science of social sex selection is a reflection of the culture, tradition, religion, civilization, and education of the African people ^[13]. we argue that the criminalization of social sex selection is a negation of the social thinking and belief system of the African people. The Sociological school of law is indeed interested in the workings and application of the law in a social context rather than in an abstract content ^[14].

The isolation of social jurisprudence in the promulgation of the law on sex selection created lacunas, for the workings of laws in our environment; thus, it will affects the workings and formation of law as an instrument of social control. The formulation of law is the embracement of all spectrums that make up in the formation of law. Although, it could be also be argued that society is in a state of flux, it is ever changing and dynamic, so should laws be and flexible to accommodate these changes.

Although, society is define by culture and interactions. Nigerian cultural backgrounds differs from the Chinese people because, its members interact differently. In our view, this is how law is to be frame, to reflecting the culture and custom of its people. Thus, a law, which does not reflect the social sentiment, is not valid. formal Law and may be generally regarded by the people' as not naturally binding. Despite the criminalization of burial in home, the people still indulge in the said act., because it's a social habit among the people of the western part of Nigeria.

In this sense, Nigerian criminal law will not be said be positive to changes, in the social structures and social thinking of the people. Let us look at some of the provisions in the Nigeria criminal law that repudiate the sociological jurisprudence, thinking, and habits of the Nigerian people.

Burial in Dwelling House

Section 246 of the Criminal Code provides for the offense of burial in a dwelling house.

State thus

Any person who without the consent of the president or Governor buries or attempt to bury corpse in any house, building, yard, compound, and garden or within 100 yards of any dwelling house or any open place situated within a township is guilty of a misdemeanor and shall be liable to imprisonment for six month.

It is no longer news that the people of western and the Eastern parts of Nigeria burial their dead right inside their bedrooms or their living rooms in contravention of the above legislation. Any government in Nigeria that could enforce this law should be ready for rebellion and resistant and be ready to kill and imprison as many people as possible.

Offense on Bigamy

The word bigamy refers as "the act of marrying one person while legally married to another. This definition is similar to what the Criminal code describes as bigamy when it provides thus:

Any person who has a husband or wife living marries in any case in which such marriage is void (...) due to its taken place during the lifetime of such husband or wife is guilty of a felony and is liable to imprisonment for seven years ^[15].

Section 370 provides that: Any person who has a husband or a wife leaving marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife is guilty of a felony and is liable to imprisonment for seven years.

A survey of the above provision, a man married under the Marriage Act often takes more wives under the customary law. Although this is contrary to the law, our society which is polygamous conscious often condones this-offense. The truth is that this law of bigamy is honored in Nigeria with it breaches instead of observance, simply because it does not take into consideration the ways of life of an average Nigerian man just as the criminalization of social sex selection. Today some men who contracted marriages under the marriage act unlawfully contract some illegal marriages under the customary law, their legal or monogamous wives do become helpless and forced by the circumstance of fear or social blackmail to accept and sometimes cohabit under the same roof aswife ^[16]. This practice is a de facto amendment of the bigamy law.

Attempted Suicide

Section 327 of the criminal code provides that

Any person who attempts to kill himself is guilty of a misdemeanor, and is liable to imprisonment for one year. Jurists have

argue that the above provision should be abolish; imprisonment or incarceration can never be the answer to a person who is psychologically depressed or brainwashed to attempting suicide because he has lost the will power to make the necessary adjustment to his changing environment. There is no known case in Nigeria where attempted suicide has been prosecuted ^[17].

Law on Street Begging

Section 249b of the criminal code provides

Every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do; shall be guilty of a simple offense, and shall be liable to imprisonment for one month ^[18].

It is no longer news that in the northern part of Nigeria, Street begging is a serious business among the “alamazeri” homeless young boy and girls. An attempt to enforce this provision, the government should be able to build large prisons that could accommodate millions of northern “alamazeris” in Nigeria and be ready to facing rebellion and resistant among this people as soon as possible.

However, some scholars may argue that the above provisions are beautiful laws that control social actions, but is breach than appreciated. Social sex selection for social reasons, however, fall short within the scope of social behavior of the African people. We argue sex selection for social reason should not be criminalize but approved for family balancing.

Why the Criminalization of Sex Selection for Social Reason?

In African societies, parents always anticipate for a balanced-family of sexes. It is a common belief among Africans that families with balance number of sexes are the best couples' could have. The reasons as argue in some quarters are to enable parent experiencing the rearing of both sexes because of their psychological makeup ^[19]. Guido would say; that the rationale behind social sex selection for gender balancing is, something extra rewarding in rearing children of both sexes ^[20]. How could family balancing be justified? First is to strive for a balance, means a critical attempt to fill in the gaps generated by nature. Here, if nature balances the sex ratio within a family-hood, there is no need to strive for a balance. Therefore, to strive for a balance, explore the following principle; thus

The idea of sex selection as a means of establishing a balance has several implications (...) (i) Sex selection is unacceptable when the family is balanced. {It is wrong for sex selection} when there are equal numbers of children of both sexes ^[21].

A fervent adoption of the above principle helps to reject sexism because parents would be striving for a balance instead of the demand for same sex of the existing children. Here there is little or no room for discrimination. The above conditions for family balancing are overrule only when sex selection is practice to avoid sex linked genetic diseases because the health and welfare of individuals are more important to the principles of family balancing. Scholars have also argued through critical questions raised, thus; can a man who has three sons in a previous marriage get approval for sex selection for his first child in his second relationship. Can we refer to his three sons to prove a bias? We argue that the immediate family children should be a major object of consideration in the application of social sex selection, regardless of the previous relationship because it is difficult to create a balance in a frequently changing configuration. The critical exploration of social Sex selection could further help to reduce the potential dangers that are associated with sex ratio imbalance in the society. Guido further argue thus

Even in developing countries with a strong son preference, the introduction of sex selection for family balancing could have a positive effect. If parents know that they can choose the sex of the second or third child, they may feel less pressure for the first and second pregnancy.

Warren, coming from the feminist point of view accuses sex selection practice as inherently sexist. Guido cites Holmes, further argued against this practice 'to pick a male is to declare males more valuable and females less so, which in turn perpetuates the preference' ^[22]. We argue that this assertion does not hold on family balancing because the desire to balance both sexes in the family hood does not necessarily imply sexist motivation, inequality, discrimination, or preference but to experiencing the rearing of the both sexes.

Another critique on sex selection is that it interferes with nature ^[23]. If nature could balance both sexes in a family hood, there could be no need to strive for a balance. Therefore, human distortions over nature are his desire for satisfaction and pick a balance. To be candid all human explorations are gear towards the distortion of nature, which could be positive or negative distortions. Commodity argument is another critique on social sex selection, here, it means a clear attempt to make the child as a means to an end and a product of commodity, which could be achieve through the design of human characteristics.

Well, for the now there is no clear evidence to achieving the designed children, maybe subsequent practice could lead to it in the future. In this sense, we argue that the criminalization of social sex selection is a pure negation of the sociological jurisprudence and that social sex selection be decriminalize for family balancing.

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