

AN INVESTIGATION INTO HOW THAILAND SHOULD RESPOND TO  
NON-MEDICAL PREIMPLANTATION SEX SELECTION

by

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## **Abstract**

### **An Investigation into How Thailand Should Respond to Non-medical Preimplantation Sex Selection**

Pimpatsorn Natipodhi

This thesis examines the issue of non-medical preimplantation sex selection in Thailand, focusing on the prohibition of non-medical sex selection under Section 18 of the Protection of a Child Born by Medically Assisted Reproductive Technology Act B.E. 2558 (the 2015 ART Act). It delves into various ethical and socio-legal issues such as individual reproductive autonomy, privacy, the right to respect for private and family life, and gender equality. The thesis comprehensively explores the competing rights and interests surrounding the practice of non-medical preimplantation sex selection, with the aim of assessing the current prohibition within the Thai legal framework and proposing informed recommendations for the existing law. Employing a mixed research methodology, the thesis gathers sufficient and insightful information crucial for the main analysis. It ultimately advocates for the continuation of the current prohibition on non-medical preimplantation sex selection as outlined in the Thai 2015 Assisted Reproductive Technology (ART) Act. This work contributes original insights to several fields, including law and medical ethics, socio-legal studies, international human rights concerning reproductive autonomy, and gender equality.

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*For Mom and Dad*

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# CHAPTER ONE: INTRODUCING THESIS QUESTION AND THE OVERARCHING FRAMEWORK

## 1. Introduction to The Problem

In the past, reproductive autonomy simply referred to the freedom to decide whether to try and reproduce, with whom, when and where.<sup>1</sup> With today's technological and medical advancements, the issue now includes questions of whether reproductive autonomy should cover the areas of buying and selling gametes and embryos, designing babies in a lab and 'saviour siblings' (creating children to act as a donor match for an existing child's illness).<sup>2</sup> One of the highly debated issues is sex selection for non-medical reasons, also referred to as personal or social sex selection. It has become more accessible and easier to obtain non-medical sex selection and this development has raised challenging human rights questions.<sup>3</sup>

Sex selection generally refers to ranges of medical methods to choose or influence the sex of a baby. In principle, the practice of sex selection can be prior to conception, during pregnancy, or even after birth (also known as infanticide). Several routes are available for parents who wish to choose the sex of their baby prior to the implantation. Noted that implantation is a process in which a developing foetus/ embryo makes contact with the uterine wall and remains attached to it until birth<sup>4</sup>. Pre-implantation sex selection occurs prior to the embryo contacting the uterine wall. In this regard, there are several routes for parents to select the sex of the baby including methods such as IVF (in-vitro fertilisation), IUI (intrauterine insemination), sperm sorting, and, arguably the most successful and effective procedure, PGD (pre-implantation genetic diagnosis).<sup>5</sup>

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<sup>1</sup> Stephen Wilkinson, 'Sexism, Sex Selection and 'Family Balancing'' (2008) 16(3) Medical Law Review 369, 389 <<https://doi.org/10.1093/medlaw/fwn013>> accessed 18 October 2022

<sup>2</sup> N R Ram, 'Britain's New Preimplantation Tissue Typing Policy: An Ethical Defence' (2006) 32(5) J MED ETHICS 278, 282 <https://doi.org/10.1136%2Fjme.2004.011213>> accessed 17 October 2022

<sup>3</sup> Human Genetics Commission, *Making Babies: Reproductive Decisions and Genetic Technologies* (HGC, 2006) 19 <http://hdl.handle.net/10822/508441> accessed 17 October 2022

<sup>4</sup> Justin M Wolter, 'The Process of Implantation of Embryos in Primates' (*The Embryo Project Encyclopedia*, 27 April 2022) <<https://embryo.asu.edu/pages/process-implantation-embryos-primates>> accessed 3 November 2022

<sup>5</sup> Pimpatsorn Natipodhi, 'The Practice of Sex Selection in Asia Region' (2016) ASLI Working Paper No.034, 3 <[www.law.nus.sg/asli/pub/wps.htm](http://www.law.nus.sg/asli/pub/wps.htm)> accessed 17 October 2022

In Thailand, the existing law that deals with the issue of sex selection, the Children Born Out of Assisted Reproductive Technology Protection Act B.E.2558 (2015), sheds very little light as to how the relevant stakeholders—legal regulators, assisted reproductive technology physicians, individuals, and couples wanting to have a child—should approach non-medical sex selection<sup>6</sup>. Despite the critical nature of the issue, the Act's prohibition of non-medical sex selection is conveyed in a notably brief manner, encapsulated within a single sentence that bans the practice but fails to provide further guidelines or clarity on the subject. Arguably, the current sex selection law, which prohibits non-medical sex selection, still contains many loopholes, which are discussed later in Chapter Two, such loopholes render the law ineffective when it comes to prohibiting pre-implantation sex selection for non-medical reasons. Furthermore, non-medical sex selection raises challenging questions on human rights. In other words, on one hand, opponents of non-medical sex selection argue that the practice itself is deemed as inherently sexist and fortifies gender inequality.<sup>7</sup> On the other hand, supporters of such practice claim that sex selection falls under the realm of reproductive rights and that reproductive choices within the individual's zone of privacy.<sup>8</sup> Given the human rights tensions at the heart of non-medical sex selection, this thesis investigates whether the prohibition should remain. Employing a synthesis of research methods, the thesis posits that, instead of rescinding the extant prohibition, the current prohibition on non-medical preimplantation sex selection, as prescribed under Thailand's Children Born Out of Assisted Reproductive Technology Protection Act 2015, should be upheld.

Section 18 of the ART Act prohibits 'an act understanding as sex selection' during medically assisted reproductive technology treatment. The provision, in effect, forbids sex selection treatments that can be carried out using ART technology. Despite the legal prohibition, sex

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<sup>6</sup> 'Non-medical' refers to actions or decisions not based on health or therapeutic reasons. Specifically, when discussing sex selection, non-medical reasons involve choosing the sex of a child based on personal preferences, societal pressures, or cultural norms, rather than to prevent or treat genetic diseases or medical conditions.

See Aghajanova L and Valdes CT, 'Sex Selection for Nonhealth-Related Reasons' (2012) 14(2) *The Virtual Mentor* 105 <<https://doi.org/10.1001/virtualmentor.2012.14.2.ccas3-1202>> accessed 31 March 2024

<sup>7</sup> Heather Strange and Ruth Chadwick, 'The ethics of nonmedical sex selection' (2009) 18(3) *Health Care Analysis* 252, 266 <<http://dx.doi.org/10.1007/s10728-009-0135-y>> accessed 17 October 2022

<sup>8</sup> John A Robertson, 'Gender variety as a valid choice: A comment on the HFEA-response to Edgar Dahl's 'The presumption in favour of liberty'' (2004) 8(3) *Reproductive Biomedicine Online* 270 <[https://doi.org/10.1016/S1472-6483\(10\)60908-X](https://doi.org/10.1016/S1472-6483(10)60908-X)> accessed 17 October 2022

selection option is still available across both private and public fertility facilities in Thailand. The increasing growth of sex selection industry<sup>9</sup> further points towards a careful consideration and potential need for legal reform. Undertaking an analysis that squarely confronts the human rights challenges is warranted.

This chapter is designed to lay the groundwork for a comprehensive exploration of the many issues surrounding non-medical preimplantation sex selection, setting the stage for more detailed discussions in subsequent chapters. It is structured into several main parts, each contributing to a foundational understanding necessary for delving into the complex dimensions of this topic.

The initial section delves into the most prevalent methods of sex selection currently in practice, with a particular emphasis on preconception and preimplantation techniques. This focus is intended to provide a clear understanding of the processes and technicalities involved, thereby equipping the reader with the essential background knowledge on these practices. The subsequent section examines sex selection debates through the lens of International Human Rights Law (IHRL), using its global framework to explore the ethical and human rights issues involved. By grounding the analysis in IHRL, the thesis aims to offer a nuanced perspective on the conflicts and controversies within reproductive rights and gender equality pertaining to sex selection. The chapter then proceeds to examine the complexities of non-medical sex selection using a human rights-based approach. It discusses the conflict

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<sup>9</sup> Byron Kaye and Khettiya Jittapong, 'In Thailand, Baby Gender Selection Loophole Draws China, HK Women to IVF Clinics' *Reuters* (Bangkok, 15 July 2014) <<https://www.reuters.com/article/us-thailand-ivf-gender-selection/in-thailand-baby-gender-selection-loophole-draws-china-hk-women-to-ivf-clinics-idUSKBN0FK2H020140715>> accessed 17 October 2022; 'Fertility tourism: The choice is yours in Thailand' *The Economic Times* (Bangkok, 7 August 2006) <<https://economictimes.indiatimes.com/news/international/fertility-tourism-the-choice-is-yours-in-thailand/articleshow/1863291.cms>> accessed 17 October 2022; TTRweekly Staff 'Medical tourism network gets underway' *Thailand Medical Tourism Cluster's Blog* (Bangkok, 2 July 2010) <<https://thailandmedicaltourismcluster.wordpress.com/tag/thai-hotels-association/>> accessed 17 October 2022; Emanuele Pizzurno, Fernando G Alberti, Jessica D Giusti, and Fabio Papa, 'Competitiveness policies for medical tourism clusters: Government initiatives in Thailand' (2014) 7(3) *International Journal of Economic Policy in Emerging Economies* 281, 309 <<http://dx.doi.org/10.1504/IJEP.2014.065252>> accessed 17 October 2022; Wariya Pattharapinyophong, 'The Opportunities and Challenges for Thailand in Becoming the Medical Tourism Hub of the ASEAN Region' (2019) 6(1) *Journal of Management Sciences* 2 <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjQq5-S6-b6AhWuoGMGHWBoA4IQFnoECBoQAQ&url=https%3A%2F%2Fso03.tci-thaijo.org%2Findex.php%2Fmsj%2Farticle%2Fdownload%2F204141%2F142261%2F629045&usg=AOvVaw36EbMSqvllyq\\_MBhF66p1Q](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjQq5-S6-b6AhWuoGMGHWBoA4IQFnoECBoQAQ&url=https%3A%2F%2Fso03.tci-thaijo.org%2Findex.php%2Fmsj%2Farticle%2Fdownload%2F204141%2F142261%2F629045&usg=AOvVaw36EbMSqvllyq_MBhF66p1Q)> accessed 17 October 2022

between reproductive autonomy and gender equality, the societal and ethical impacts of sex selection, and supports maintaining the ban in Thailand to promote social welfare and ethical practices in reproductive technologies. The goal is to propose a balanced framework that respects individual choices while safeguarding societal and ethical standards.

The final part of the chapter outlines the research methodology that underpins the thesis, incorporating doctrinal analysis, case studies, and empirical research. This mixed-methods approach is intended to provide a robust foundation for the analysis, blending theoretical exploration with empirical insights. Furthermore, an overview of the thesis structure is presented, outlining the content and aims of the subsequent chapters. This roadmap is crucial for guiding the reader through the intricate discussions that follow, ensuring a coherent progression from the general to the specific aspects of non-medical preimplantation sex selection.

It is important to note that feminist scholarship has played an important role in exploring the societal and ethical aspects of reproductive practices, especially by examining how social norms and power structures shape decisions and reinforce inequality.<sup>10</sup> These contributions are vital to comprehending the complexities of non-medical preimplantation sex selection and enrich the human rights-based approach adopted in this thesis.<sup>11</sup>

A foundational perspective in this discourse is provided by Michele Goodwin in *'Black Markets: The Supply and Demand of Body Parts'*. Goodwin critically examines the commodification of human tissues and organs, extending her analysis to reproductive technologies. She argues that these technologies are often entangled in systems of profit and exploitation, which commodify human life and create ethical challenges.<sup>12</sup> This perspective is particularly relevant to this thesis's critique of non-medical sex selection, as the practice inherently involves placing value on specific biological traits, such as sex, for personal or societal gain. By highlighting how commodification reduces human embryos to marketable

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<sup>10</sup> Susan M. Wolf, *Feminism and Bioethics: Beyond Reproduction* (Oxford University Press, 1996)

<sup>11</sup> Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *American Journal of International Law* 379 <<https://doi.org/10.2307/2997996>> accessed 4 December 2024

<sup>12</sup> Michele Goodwin, *Black Markets: The Supply and Demand of Body Parts* (Cambridge University Press, 2006) <<https://doi.org/10.1017/9781107051041>> accessed 4 December 2024

entities, Goodwin’s work raises profound questions about dignity, equality, and justice.<sup>13</sup>, Her insights strengthen the argument that non-medical sex selection reinforces systemic inequalities—specifically, the unequal treatment of individuals based on gender and socioeconomic status—by embedding commercial interests and gendered biases within reproductive decision-making. Additionally, Wolf’s discussion on the commodification of human parts establishes a framework that intersects medical tourism, commercialisation, and resources allocation. This framework also offers another important lens for the commodification of reproductive services explored later in this chapter (Heading 3.7 Medical Tourism and Allocation of Medical Resources)

Building on this foundation, Rayna Rapp’s *Testing Women, Testing the Foetus: The Social Impact of Amniocentesis in America*’ explores the societal dynamics that shape reproductive choices, offering a complementary perspective.<sup>14</sup> Rapp’s analysis illustrates how medical technologies, far from being neutral tools, are shaped by and reinforce cultural and gendered expectations. For example, she examines how societal preferences for certain traits, including sex, create pressure on individuals to make reproductive decisions that align with these norms.<sup>15</sup> This analysis also connects to broader concerns, discussed later in this chapter (Heading 3.6 The Children’s Wellbeing Consideration) about placing societal expectations on children to embody specific traits or behaviours based on these decisions. For instance, as discussed later under Heading 3.6, the thesis highlights how non-medical sex selection can result in children being valued primarily for the fulfilment of parental preferences or societal ideals, rather than being appreciated as individuals. These concerns further reinforce this thesis’s argument for prohibiting non-medical sex selection.

Accordingly, the above perspective can be directly applied to non-medical sex selection, as it both reflects and reinforces gendered biases. By exposing the societal harm inherent in practices that perpetuate and uphold discriminatory norms, Rapp’s insights provide

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<sup>13</sup> Michele Goodwin, *Black Markets: The Supply and Demand of Body Parts* (Cambridge University Press, 2006) <<https://doi.org/10.1017/9781107051041>> accessed 4 December 2024

<sup>14</sup> Rayna Rapp, *Testing Women, Testing the Foetus: The Social Impact of Amniocentesis in America* (Routledge, 2000)

<sup>15</sup> Rayna Rapp, *Testing Women, Testing the Foetus: The Social Impact of Amniocentesis in America* (Routledge, 2000)

compelling support for this thesis's argument in favour of robust legal regulation to address these challenges.

Further enriching this discourse, Susan M. Wolf's *'Feminism and Bioethics: Beyond Reproduction'* provides a bioethical framework for evaluating how reproductive technologies intersect with systemic inequalities. Her critiques the commodification of reproduction and underscores the tension between advancing individual autonomy and addressing societal welfare- a key issue explored in this thesis when considering whether to prohibit practices like non-medical sex selection. Wolf's analysis demonstrates how practices like sex selection, even when framed as exercises in personal choice, can exacerbate social hierarchies and inequities.<sup>16</sup> This perspective also highlights the problematic nature of relying on autonomy as a basis for permitting such practices- a point this thesis argues by examining how the emphasis on individual autonomy can overlook the broader societal harms caused by non-medical sex selection. This aligns with the thesis's emphasis on maintaining a human rights-based framework that protects against the systemic harms perpetuated by such practices. Wolf's work thus underscores the necessity of ethical reproductive practices that consider their broader societal implications.

Expanding the focus to legal frameworks, Emily Jackson's *'Regulating Reproduction: Law, Technology, and Autonomy'* offers a critical feminist analysis of how laws shape the ethical landscape of reproductive decision-making.<sup>17</sup> Jackson argues that regulatory policies must balance individual autonomy with societal welfare, presenting a model for navigating the ethical tensions inherent in practices like non-medical sex selection.<sup>18</sup>

Jackson's critique of the laissez-faire approach to reproductive technologies in certain jurisdictions highlights the importance of enforceable regulations to safeguard against societal harms. She emphasises that without adequate oversight, unregulated reproductive practices can lead to the commodification of reproduction and the reinforcement of gender

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<sup>16</sup> Susan M. Wolf, *Feminism and Bioethics: Beyond Reproduction* (Oxford University Press, 1996)

<sup>17</sup> Emily Jackson, *Regulating Reproduction: Law, Technology, and Autonomy* (Hart Publishing, 2001)

<sup>18</sup> Emily Jackson, *Regulating Reproduction: Law, Technology, and Autonomy* (Hart Publishing, 2001)

biases, which contribute to systemic inequalities.<sup>19</sup> This underscores the necessity of regulatory frameworks that not only respect individual choices but also consider the broader societal implications of reproductive technologies.

By advocating for a balanced approach that integrates individual rights with societal welfare, Jackson provides a compelling argument for the implementation of robust legal regulations in the realm of reproductive technologies. Her insights are particularly relevant to the discussion of non-medical sex selection, as they highlight the ethical and social consequences of permitting such practices without adequate oversight. Therefore, Jackson's work supports the thesis's position that maintaining the prohibition on non-medical preimplantation sex selection in Thailand is crucial for advancing gender equality and safeguarding societal interests.

In light of the above, their insights significantly enhance the human rights-based approach. By focusing on international human rights law and the Thai legal system, this thesis addresses the legal and ethical dimensions of sex selection within a universally applicable framework that supports regulatory policy development. This approach allows for a focused analysis of the practice's implications while recognising the broader contributions of feminist scholarship, particularly in critiquing systemic gender inequalities and commodification.

## 2. Methods of Sex Selection

The desire to choose the sex of one's offspring is commonly recognised<sup>20</sup>, and despite the unavailability of the technologies which allow the parent to preselect the sex of their babies prior to conception in the past, it is now possible to gain an access to technology that enables and ensures the desired results of sex selection.

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<sup>19</sup> Emily Jackson, *Regulating Reproduction: Law, Technology, and Autonomy* (Hart Publishing, 2001)

<sup>20</sup> Dorothy C Wertz and John C Fletcher, 'Prenatal diagnosis and sex selection in 19 nations' (1993) 37(11) *Social Science & Medicine* 1359, 1366 <[https://doi.org/10.1016/0277-9536\(93\)90166-2](https://doi.org/10.1016/0277-9536(93)90166-2)> accessed 17 October 2022; H Statham, J Green, C Snowdon and M France-Dawson, 'Choice of baby's sex' (1993) 341(8844) *Lancet* 564 <[https://doi.org/10.1016/0140-6736\(93\)90331-A](https://doi.org/10.1016/0140-6736(93)90331-A)> accessed 17 October 2022; J Savulescu, 'Sex selection: the case for' (1994) 171(7) *The Medical Journal of Australia* 373 <<https://doi.org/10.5694/j.1326-5377.1999.tb123697.x>> accessed 17 October 2022; C L Ten, 'The use of reproductive technologies in selecting the sexual orientation, the race, and the sex of children' (1998) 12(1) *Bioethics* 45, 48 <<https://doi.org/10.1111/1467-8519.00091>> accessed 17 October 2022; Dorothy C Wertz and John C Fletcher, 'Ethical and social issues in prenatal sex selection: a survey of geneticists in 37 nations' (1998) 46(2) *Social Science & Medicine* 255, 273 <[https://doi.org/10.1016/S0277-9536\(97\)00159-7](https://doi.org/10.1016/S0277-9536(97)00159-7)> accessed 17 October 2022

Sex selection can be carried out at three stages, namely, preconception, preimplantation, and prenatal (this last stage is also known as sex selective abortion).<sup>21</sup> For the purpose of this thesis, only two types of sex selection practices will be considered: (i) preconception sex selection and (ii) preimplantation sex selection. The reason for not considering pre-natal stage is to eliminate or at least minimise the concerns and arguments regarding abortion. With regards to abortion, whether it is abortion or sex selective abortion, this raises questions on the moral and legal status of the foetus.<sup>22</sup> More importantly, the issue of sex-selective abortion has been extensively discussed in existing scholarship<sup>23</sup>, while the topic of preconception and preimplantation sex selection remains relatively novel and has not been significantly explored. The limited availability of comprehensive studies on preconception and preimplantation sex selection is a primary motivator for this thesis to narrow its research interest specifically to these practices. Furthermore, the thesis primarily concentrates on non-medical preimplantation sex selection for several compelling reasons. First, the technological advancements in ARTs have made preimplantation sex selection more accessible, raising ethical, legal, and social questions that have yet to be fully addressed. Second, focusing on preimplantation sex selection allows for a deeper understanding of the implications of these

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<sup>21</sup> G de Wert and W Dondorp, 'Preconception sex selection for non-medical and intermediate reasons: ethical reflections' (2010) 2(4) *Facts Views Vis Obgyn* 267, 277 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4086011/>> accessed 20 October 2022

<sup>22</sup> Kate Greasley, *Arguments on Abortion: Personhood, Morality, and Law* (OUP 2017)

<sup>23</sup> April L Cherry, 'A Feminist Understanding of Sex-selective Abortion: Solely a Matter of Choice' (1995) 10(2) *Wis Womens Law J* 161, 223 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/wiswo10&div=12&id=&page=>> accessed 17 October 2022; Dorothy C Wertz and John C Fletcher, 'Ethical and social issues in prenatal sex selection: a survey of geneticists in 37 nations' (1998) 46(2) *Social Science & Medicine* 255, 273 <[https://doi.org/10.1016/S0277-9536\(97\)00159-7](https://doi.org/10.1016/S0277-9536(97)00159-7)> accessed 17 October 2022; Miriam Ticktin, 'Culture or inequality in sex-selective abortion? A response to Sawitri Saharo' (2005) 5(2) *Ethnicities* 266 <<https://doi.org/10.1177/146879680500500206>> accessed 17 October 2022; Ashley Bumgarner, 'A right to choose?: Sex selection in the international context' (2007) 14(1289) *Duke Journal of Gender Law & Policy* 1289 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1139&context=djglp>> accessed 17 October 2022; Julie Zilberberg, 'Sex-Selective Abortion for Social Reasons: Is it ever Morally Justifiable? Sex selection and restricting abortion and sex determination' (2007) 21(9) *Bioethics* 517 <<https://doi.org/10.1111/j.1467-8519.2007.00598.x>> accessed 17 October 2022; Wei Xing Zhu, Li Lu, and Therese Hesketh, 'China's excess males, sex selective abortion, and one child policy: analysis of data from 2005 national intercensus survey' (2009) *BMJ* 338 <<https://doi.org/10.1136/bmj.b1211>> accessed 17 October 2022; Jing-Bao Nie, 'Limits of state intervention in sex-selective abortion: the case of China (2010) 12(2) *Culture Health Sex* 205 <<https://doi.org/10.1080/13691050903108431>> accessed 17 October 2022; Seema Mohapatra, 'False Framings: The Co-opting of Sex-Selection by the Anti-Abortion Movement' (2015) 43(2) *Journal of Law, Medicine & Ethics* 270 <<https://doi.org/10.1111/jlme.12242>> accessed 17 October 2022; Lisa Eklund and Navtej Purewal, 'The bio-politics of population control and sex-selective abortion in China and India' (2017) 27(1) *Feminism & Psychology* 34 <<https://doi.org/10.1177/0959353516682262>> accessed 17 October 2022

technologies on societal norms and individual choices, which are rapidly evolving. This approach also enables an examination of the regulatory frameworks that govern these practices and their effectiveness in balancing ethical considerations with reproductive autonomy. More precisely, the thesis predominantly explores the issues and ramifications pertaining to preimplantation sex selection, aiming to contribute valuable insights and recommendations to a field that is at the forefront of reproductive ethics and law.

The following section outlines two methods of sex selection that are commonly employed. These are namely sperm sorting, which is a preconception sex selection method, and sex selective embryo transfer, which is regarded as preimplantation sex selection.

## 2.1 Sperm Sorting

Sperm separation or sperm sorting is a technology that is not as expensive as sex selective PGD/IVF treatment but is also less effective. Sperm sorting is not a diagnostic medical tool. In other words, it was created specifically for the purpose of sex selection. There are several techniques to yield the desired results, with varying effectiveness. Nonetheless, all methods purport to separate the Y chromosome-bearing-sperm from the X chromosome-bearing-sperm. The only proven sperm sorting method that can provide a statistically likely successful sex selection is the patented 'Microsort' flow cytometry technology. This innovation involves staining the sperm with a fluorescent dye and passing them through a laser beam, a process which helps reveal the difference in DNA content between chromosome X and Y that gives a measurable difference in fluorescence. Although such technology was limited in its capacity in the past in a way that the practice could only be applied with intracytoplasmic sperm injection (ICSI)<sup>24</sup>, at present, the method has been so much improved that it can also be

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<sup>24</sup> ICSI is a process where the selected sperm is injected directly into the egg and once the egg is successfully fertilised, the fertilised egg is then implanted into the mother's uterus. See Lodovico Parmegiani, Graciela Estela Cognigni, and Marco Filicori, 'New Advances in Intracytoplasmic Sperm Injection (ICSI)' (2012) in Bin Wu (ed) *Advances in Embryo Transfer* (InTechOpen 2012) <<http://dx.doi.org/10.5772/39227>> accessed 20 October 2022

combined with IUI (intrauterine insemination)<sup>25</sup> The reported success rate ranges approximately between 83-92%.<sup>26</sup>

## 2.2 Sex Selective Embryo Transfer

This category includes Preimplantation Genetic Screening (PGS) of IVF embryos, which is a technology aimed at improving IVF outcomes, and Preimplantation Genetic Diagnosis (PGD). PGS screens for chromosomal abnormalities in the embryo. By examining all 24 chromosomes (22 autosomes plus X and Y) and detecting and evaluating any possible gains or losses of chromosomes (known as aneuploidy), PGS increases the chances for parents to have a healthy baby as well as allowing them to know the sex of the embryos prior to implantation.<sup>27</sup>

While very similar to PGS, PGD is a process for screening single cells from embryos for genetic disease or hereditary chromosomal abnormalities. The purpose of PGD is to identify abnormal embryos so that they can be de-selected and not transferred to the patient's uterus, increasing the chance of having a healthy, disease-free baby.<sup>28</sup> PGD is a way of attempting to ensure that a child will not be born with an apparent undesirable genetic condition. This is available to the individuals and couples who undergo in vitro fertilisation treatment. Though a complete successful result of this method cannot be guaranteed, this technique essentially enables parents to have a child without a genetic impairment.<sup>29</sup> Nevertheless, upon focusing on the issue of sex selection, PGD is an effective and reliable biomedical method that can almost guarantee a zero possibility of pregnancy with a foetus of the non-chosen sex due to

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<sup>25</sup> IUI is described as a process which prepared sperm is injected and placed in the womb close to the time of ovulation.

See R Quintana, M Tiveron, F Garcia, L Kopcow, C Bisioli, and E Young, 'Intrauterine insemination (IUI), in vitro fertilization (IVF) and intracytoplasmic sperm injection (ICSI) in human immunodeficiency virus (HIV) serodiscordant couples: results and perspectives' (2002) 78(1) American Society for Reproductive Medicine <[https://doi.org/10.1016/S0015-0282\(02\)03684-1](https://doi.org/10.1016/S0015-0282(02)03684-1)> accessed 20 October 2022

<sup>26</sup> Joseph D Schulman and David S Karabinus, 'Scientific aspects of preconception gender selection' (2005) 10 (Suppl 1) *Reprod Biomed Online* 111, 115 <[https://doi.org/10.1016/s1472-6483\(10\)62217-1](https://doi.org/10.1016/s1472-6483(10)62217-1)> accessed 17 October 2022

<sup>27</sup> 'Gender selection through embryo screening' (*RSMC Reproductive Sciences Medical Center*) <<https://fertile.com/gender-selection-through-embryo-screening/>> accessed 18 October 2022

<sup>28</sup> 'The difference between PGD and PGS' (*Fertility Centres of New England*, 2 December 2013) [http://www.fertilitycenter.com/fertility\\_cares\\_blog/the-difference-between-pgd-and-pgs/](http://www.fertilitycenter.com/fertility_cares_blog/the-difference-between-pgd-and-pgs/) accessed 18 October 2022

<sup>29</sup> Rosamund Scott, 'Choosing between Possible Lives: Legal and Ethical Issues in Preimplantation Genetic Diagnosis' (2006) 26(1) *Oxford Journal of Legal Studies* 153, 178 < <https://www.jstor.org/stable/3600545>> accessed 18 October 2022

the fact that upon this particular procedure, the sex of the embryo will be identified as certain chromosomal or genetic disorders are linked to certain sexes.

### 3. Assessing Sex Selection Debates through the Prism of International Human Rights Law

Given the complex ethical, cultural, and legal dimensions surrounding sex selection, it is crucial to first consider the issue through the lens of International Human Rights Law (IHRL) before examining Thai domestic law. As Thai law on this issue is brief and concise, turning to IHRL provides greater clarity on the human rights tensions with pre-implementation sex-selection. This approach is underpinned by the global nature of human rights, which transcend national boundaries, providing a universally accepted framework for evaluating the rights involved. By grounding the thesis's analysis in IHRL, it aims to develop an analytical framework that both acknowledges the importance of human rights and seeks to balance and resolve rights conflicts. This foundational focus on IHRL ensures that the thesis's conclusions are based on a globally recognised set of principles, setting the stage for a detailed exploration of Thai law in the subsequent chapter.

Before proceeding to examine the debates on sex selection through the framework of IHRL, it is imperative to draw attention to the term 'sex' and 'gender'. Throughout the above paragraphs, the thesis only uses the term 'sex' and not 'gender' when discussing the issue of sex selection. Although the term gender selection is used in other literatures, these two terms should not be used interchangeably. 'Sex' in this context should be only regarded to the biological traits. Given current debates on the fluidity of gender<sup>30</sup>, it would be impossible to ensure the 'gender' of the baby.

Sex refers to the biological aspects of being male and female. To be more specific, certain scholars referred to sex as an anatomical and physiological make up which includes

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<sup>30</sup> Judith Butler, *Gender Trouble: Feminism and the subversion of Identity* (Taylor and Francis 2011) <<https://www.perlego.com/book/1607112/gender-trouble-feminism-and-the-subversion-of-identity-pdf>> accessed 18 October 2022; Chris Beasley, *Gender and Sexuality: Critical Theories, Criminal Thinkers* (Sage 2005) Siwotcha Chaiyong, 'Promoting gender identity acceptance' (*Bangkok Post*, 20 April 2021) <<https://www.bangkokpost.com/life/social-and-lifestyle/2102375/promoting-gender-identity-acceptance>> accessed 18 October 2022

‘chromosomal sex, gonadal sex, hormonal sex, internal reproductive organs and external genitalia’.<sup>31</sup> Nevertheless, it should also be noted that sex is complex as sometimes individuals are born with genital that does not fit within traditional categories.<sup>32</sup> Gender, on the other hand, generally refers to behavioural, social, and psychological characteristics of men and women.<sup>33</sup> Furthermore, gender is sometimes described as ‘the repeated stylisation of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being.’<sup>34</sup> Essentially, gender is the term which was often used in the first half of the twentieth century to refer to those sexual behaviours that were more or less associated with men and women.<sup>35</sup> Nowadays, gender relates to the social and cultural organisation of the sexes, recognising more than just a binary of man-woman<sup>36</sup>, which is not only related to biological sex and may be subject to change over time.<sup>37</sup>

Even though many texts discuss gender selection and sex selection in a way that might suggest that the two terms are identical and can be used interchangeably, nonetheless, for the purpose of this study, it is important that the differences between sex and gender must be clearly recognised. In other words, with respect to the issue of preconception and preimplantation sex selection considered in this thesis, these practices mainly concern a medically assisted stage where the fertilised egg (embryo) is created and implanted into the

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<sup>31</sup> Rodolfo Rey, Nathalie Josso, and Chrystele Racine, ‘Sexual Differentiation’ in KR Feingold, B Anawalt, A Boyce, et al (eds) *Endotext [Internet]* (MDText.com 2000) <<https://www.ncbi.nlm.nih.gov/books/NBK279001/>> accessed 20 October 2022

<sup>32</sup> S Ahmed, S Morrison, and I Hughes, ‘Intersex and gender assignment; the third way?’ (2004) 89(9) *Arch Dis Child* 847 <<https://doi.org/10.1136%2Fadc.2003.035899>> accessed 18 October 2022

<sup>33</sup> Jayde Pryzgodna and Joan C Chrisler, ‘Definitions of gender and sex: The subtleties of meaning’ (2000) 43(7-8) *Sex Roles: A Journal of Research* 553, 569 <<https://psycnet.apa.org/doi/10.1023/A:1007123617636>> accessed 18 October 2022

<sup>34</sup> Judith Butler, *Gender Trouble: Feminism and the subversion of Identity* (Taylor and Francis 2011) <<https://www.perlego.com/book/1607112/gender-trouble-feminism-and-the-subversion-of-identity-pdf>> accessed 18 October 2022

<sup>35</sup> S Ahmed, S Morrison, and I Hughes, ‘Intersex and gender assignment; the third way?’ (2004) 89(9) *Arch Dis Child* 847 <<https://doi.org/10.1136%2Fadc.2003.035899>> accessed 18 October 2022

<sup>36</sup> Note that the term ‘men’ and ‘women’ present here may be too binary. In other words, gender is now more and more recognised as being fluid with the understanding that gender is not binary *i.e.* only and always male or female - men or women. Judith Butler advanced this thinking that gender is socially constructed and not necessarily tied to physical sex characteristics.

<sup>37</sup> Maja Kirilova Eriksson, *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff 2000); José E Alvarez, *The Boundaries of International Law: A Feminist Analysis* by Hilary Charlesworth and Christine Chinkin (Manchester University Press 2000) (2001) 95(2) *American Journal of International Law* 495, 464 <<https://doi.org/10.2307/2661427>> accessed 18 October 2022

woman's uterus. Hence, the term 'sex' in this context can only be directed to the biological characteristics of the baby as one cannot handpick and guarantee the baby's 'gender', a term which conveys an array of attributes associated with social, psychological, and behavioural traits of the expected child which are developed after the post-natal stage. Nevertheless, the issues associated to gender are taken into account upon considering the human rights implications of non-medical preimplantation sex selection, as a desire for a child of certain gender is a motivating factor for many in choosing to undergo non-medical sex selection.

In essence, the debate on sex selection brings to light a range of legal and ethical arguments, all deeply rooted in human rights concerns. Both proponents and opponents of non-medical sex selection draw on human rights principles, with the former group emphasising family balancing and reproductive autonomy, while the latter raises issues of gender equality, the potential for eugenics (a severe violation of the right to equality), and the undermining of reproductive autonomy<sup>38</sup>. By analysing these arguments either for or against—family balancing, reproductive autonomy, eugenics, gender equality, the harms of skewed sex ratios at birth, children's wellbeing, and the implications of medical tourism—through the prism of IHRL, the chapter gains insight into how to address and prioritise conflicting rights. Framing these discussions within the context of IHRL allows for a deeper understanding of policy, law, and ethical implications, ensuring that any regulatory or legal frameworks, particularly within the Thai context, are in line with international human rights standards.

### 3.1 Family Balancing

The concept of family balancing, it is evident that its direct link to International Human Rights Law (IHRL) is not immediately apparent.<sup>39</sup> This observation underscores the importance of

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<sup>38</sup> Opponents of non-medical sex selection argue that allowing this practice undermines reproductive autonomy by promoting societal norms and biases that influence individuals' and couples' decisions in choosing the sex of their child. Reproductive autonomy is centred on the idea that individuals should have the freedom and capacity to make informed, voluntary decisions about their reproductive lives, free from coercion or external pressures. When non-medical sex selection is permitted, it can perpetuate gender biases, leading to a preference for one sex over the other based on cultural, social, or familial pressures. This societal influence can constrain personal choice, making decisions about the sex of a child less about individual autonomy and more about conforming to external expectations, thereby eroding the principle of reproductive autonomy. See Browne TK, 'How Sex Selection Undermines Reproductive Autonomy' (2017) 14(2) *Journal of Bioethical Inquiry* 195–204 <<https://doi.org/10.1007/s11673-017-9783-z>> accessed 31 March 2024

<sup>39</sup> Shahvisi A, 'Engendering Harm: A Critique of Sex Selection For "Family Balancing"' (2018) 15(1) *J Bioeth Inq* 123 <<https://doi.org/10.1007/s11673-017-9835-4>> accessed 31 March 2024

weaving relevant human rights considerations into subsequent sections of this discussion. Notably, the practice of family balancing intersects with key human rights issues, including the right to privacy and the right to family life, as recognised under IHRL. These rights highlight the importance of upholding individuals' and parental autonomy in making informed decisions concerning their families, free from undue external influence. Furthermore, it's imperative to introduce the principle of the best interests of the child (discussed under this chapter as titled 'Children's Wellbeing Consideration'), a cornerstone of IHRL, which argues against the imposition of fixed gender roles and expectations on children, advocating for their rights to develop their own identities.<sup>40</sup>

In this discussion on family balancing, it is also important to note that related IHRL considerations, such as autonomy, privacy, gender equality, and the child's best interest, will be further explored in subsequent parts of this chapter.

With respect to family balancing argument, the term 'family balancing', whilst not being precisely defined, can generally refer to a preference for families to have children of both sexes. Furthermore, it is argued that a 'balanced family' implies a scenario where parents already have children predominantly of one sex and would like to have a child of the opposite sex in order to 'complete' or 'complement' their family.<sup>41</sup> Also, many who are in favour of allowing non-medical sex selection posit that since 'balanced family' or 'gender variety' is the primary value to parents rather than the superiority of one sex, the concept of family balancing should not be regarded as discriminatory.<sup>42</sup> Furthermore, there are some assertions arguments claiming that sex diversity is purportedly essential towards children's development. According to the findings from the 2013 UK Office for National Statistics study,

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<sup>40</sup> McGowan ML and Sharp RR, 'Justice in the Context of Family Balancing' (2013) 38(2) Science Technology & Human Values <<https://doi.org/10.1177/0162243912469412>> accessed 31 March 2024

<sup>41</sup> Stephen Wilkinson, 'Sexism, Sex Selection and 'Family Balancing'' (2008) 16(3) Medical Law Review 369, 389 <<https://doi.org/10.1093/medlaw/fwn013>> accessed 18 October 2022

<sup>42</sup> Edgar Dahl, 'No country is an island: comment on the House of Commons report Human Reproductive technologies and the law' (2005) 11(1) Reprod Biomed Online 10 <[https://doi.org/10.1016/s1472-6483\(10\)61288-6](https://doi.org/10.1016/s1472-6483(10)61288-6)> accessed 18 October 2022; Edgar Dahl, 'Preconception gender selection: a threat to the natural sex ratio?' (2005) 19(Suppl 1) Reprod Biomed Online 116 <[https://doi.org/10.1016/s1472-6483\(10\)62218-3](https://doi.org/10.1016/s1472-6483(10)62218-3)> accessed 18 October 2022; Edgar Dahl, 'The 10 most common objections to sex selection and why they are far from being conclusive: a Western perspective' (2007) 14(Suppl 1) Reprod Biomed Online 158 <[https://doi.org/10.1016/S1472-6483\(10\)60752-3](https://doi.org/10.1016/S1472-6483(10)60752-3)> accessed 18 October 2022

it contains claims such as ‘it is socially unhealthy for a child to grow up with siblings exclusively of the same sex, since present day society increasingly involves people of both genders interacting together, both at work and play’<sup>43</sup>, suggesting that having a brother or a sister is good for the other siblings in the family. Additionally, in a study on risk preference and sibling sex composition in a family, the findings from this study suggest that having a sibling of the opposite sex might contain desirable aspects and benefits to the family.<sup>44</sup>

Nonetheless, ‘family balancing’ argument is said to be a convenient rhetorical rebranding of sex selection<sup>45</sup>, of which it could prompt the question of whether such re-branding might be designed to conceal sex discrimination. The term ‘family balancing’ contains positive values and now commonly employed as key advertising term within the marketing of sex selection. With such particular wording, it is noted that its concept accordingly establishes a novel social reality and perception in which the ‘unbalanced family’ is framed and viewed as problematic.<sup>46</sup>

Supporters of non-medical sex selection argue that despite the concern of sexism, which is considered potential harms from such practice, they believe that family balancing sex selection does not give rise to a risk of severe harm because it does not pose issues of gender bias and skewed sex ratios.<sup>47</sup> To elaborate, various family balancing advocates claim that couples who undergo non-medical preimplantation sex selection treatment choose girls and boys equally *i.e.* no strong preference of boys over girls.<sup>48</sup> Apparently, this rationale seems to

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<sup>43</sup> ‘Family size in 2012’ (*Office for National Statistics*, 25 March 2013) <<http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/family-demography/family-size/2012/family-size-pdf.pdf>> accessed 18 October 2022

<sup>44</sup> Vegard Sjurseike Wiborg, ‘Risk preferences and sibling sex composition’ (2022) *Applied Economics Letters* <<https://doi.org/10.1080/13504851.2022.2042464>> accessed 18 October 2022

<sup>45</sup> Whittaker A, ‘Reproduction opportunists in the new global sex trade: PGD and non-medical sex selection’ (2011) 23(5) *Reprod BioMed Online* 609, 617 <<https://doi.org/10.1016/j.rbmo.2011.06.017>> accessed 18 October 2022

<sup>46</sup> Søren Holm, ‘Like a frog in boiling water: the public, the HFEA and sex selection’ (2004) 12(1) *Health Care Anal* 27, 39 <<https://doi.org/10.1023/b:hcan.0000026651.97696.7b>> accessed 18 October 2022

<sup>47</sup> Harris J, ‘Sex Selection and Regulated Hatred’ (2005) 31(5) *Journal of Medical Ethics* 291 <<http://www.jstor.org/stable/27719400>> accessed 31 March 2024; Robertson JA, ‘Preconception Gender Selection’ (2001) 1(1) *American Journal of Bioethics* 2 <<https://doi.org/10.1162/152651601300048143>> accessed 31 March 2024; Savulescu J and Dahl E, ‘Sex Selection and Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine’ (2000) 15(9) *Human Reproduction* 1879 <<https://doi.org/10.1093/humrep/15.9.1879>> accessed 31 March 2024

<sup>48</sup> Milliez JM, ‘Sex Selection for Non-medical Purposes’ (2007) 14 Suppl 1 *Reproductive BioMedicine Online* 114 <[https://doi.org/10.1016/S1472-6483\(10\)60742-0](https://doi.org/10.1016/S1472-6483(10)60742-0)> accessed 31 March 2024; Strange H, ‘Non-medical Sex

perceive the potential harm of sex selection in terms of sex/gender bias. As family balancing leads to the outcome of families with equally/proportionately numbers of boys and girls, family balancing sex selection is hence viewed as an approach which actually prevents imbalance in sex ratios.<sup>49</sup> Additionally, some family balancing advocates argue further that such practice cannot be considered as sexist, claiming that *'if a practice is not motivated by judgements or evaluations that one gender is superior to the other, or does not lead to discrimination against one gender, it is not sexist'*<sup>50</sup>. Evidently, such line of reasoning views sexism in terms of gender supremacy, domination, and prioritising of men over women, and prioritises the intent of the decision-maker, therefore arguing that family balancing sex selection is not sexist because both male and female children are chosen. Notably, such perception of sexism as supremacy and male dominance is rather narrow and potentially attracts a lot of criticism and ignores potential unequal outcomes regardless of any subjective motivations.

One of the criticisms arising from such narrow narrative is that it only thinks of sexism as form of sex/gender-based hierarchy that leads to conclusive preference of one sex over the other and selecting the preferred sex accordingly.<sup>51</sup> Notably, the concept of male supremacy is part of a larger dynamic of gender essentialism. Gender essentialism's core belief is that there are two distinctive types of people: men and women and they are inherently different- physically and psychologically. Therefore, men and women are supposed to fulfil different roles in society<sup>52</sup>. This line of reasoning reflects the concept of gender stereotyping *i.e.* a presumption that only children of particular sex are capable of certain roles and actions.<sup>53</sup> In this regard,

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Selection: Ethical Issues' (2010) 94(1) British Medical Bulletin 7 <<https://doi.org/10.1093/bmb/ldq002>> accessed 31 March 2024

<sup>49</sup> Savulescu J and Dahl E, 'Sex Selection and Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine' (2000) 15(9) Human Reproduction 1879 <<https://doi.org/10.1093/humrep/15.9.1879>> accessed 31 March 2024

<sup>50</sup> Robertson JA, 'Preconception Gender Selection' (2001) 1(1) American Journal of Bioethics 2 <<https://doi.org/10.1162/152651601300048143>> accessed 31 March 2024

<sup>51</sup> Hendl T, 'A Feminist Critique of Justifications for Sex Selection' (2017) 14(3) Journal of Bioethical Inquiry 427 <<https://doi.org/10.1007/s11673-017-9797-6>> accessed 31 March 2024

<sup>52</sup> J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 33; C Fine, *Delusions of Gender: How Our Minds, Society, and Neurosexism Create Difference* (W W Norton & Company 2010); A Fausto-Sterling, *Sex/Gender: Biology in a Social World* (1st edn, 2012)

<sup>53</sup> Werz DC and Fletcher JC, 'Sex Selection through Prenatal Diagnosis' in Helen B Holmes and Laura Purdy (eds), *Feminist Perspectives in Medical Ethics* (Indiana University Press 1992) 240,253; Berkowitz JM and Snyder JW, 'Racism and Sexism in Medically Assisted Conception' (1998) 12(1) Bioethics 25-44 <<https://doi.org/10.1111/1467-8519.00090>> accessed 31 March 2024; Browne TK, 'How Sex Selection

gender stereotyping arguably harms children by subjecting them to the expectation that they will embody stereotypical gender roles deemed appropriate for their sex.<sup>54</sup>

The coercion of gender roles onto family balancing sex selected children, as argued above, falls in line with an argument that family balancing can in fact reproduce sexism in the form of both gender supremacy and gender stereotyping.<sup>55</sup> In other words, such notion points out that the parents may not select the sex of their intended children based on differences of rearing experiences but on traits related to the gender roles in which boys and girls are socialised and expected to perform, of which can evidently be motivated by sexist attitudes.<sup>56</sup>

Furthermore, there is an argument stating that the very association of traits interpreted as sex with a certain gender role prior to conception is a form of sexism that can lead to harm.<sup>57</sup> It is noted that selecting for a preferred sex of the child based on a test for chromosomes means assuming that an embryo with e.g. XX chromosome will necessarily perform a role attributed to females and possess the associated traits and behaviours whilst the XY chromosome will perform a role traditionally attributed to males. In this respect, sex selection is based on a biologically deterministic binary understanding of gender which reinforces gender essentialism as well as gender stereotyping.<sup>58</sup> Moreover, the problematic aspect of the biologically deterministic interpretation of sex/gender lies in its assertion of the existence of only two distinct sexes/genders (male and female), considering them as binary opposites that are connected through conventional heterosexuality. This perspective also suggests that female gender is a natural consequence of female sex, and vice versa. Essentially, the

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Undermines Reproductive Autonomy' (2017) 14(2) Journal of Bioethical Inquiry 195–204 <<https://doi.org/10.1007/s11673-017-9783-z>> accessed 31 March 2024

<sup>54</sup> Hendl T, 'A Feminist Critique of Justifications for Sex Selection' (2017) 14(3) Journal of Bioethical Inquiry 427 <<https://doi.org/10.1007/s11673-017-9797-6>> accessed 31 March 2024

<sup>55</sup> Wilkinson S, 'Why I Wrote...Choosing Tomorrow's Children: The Ethics of Selective Reproduction' (2010) 5(1) Clinical Ethics 46, 50 <<https://doi.org/10.1258/ce.2010.010001>> accessed 31 March 2024

<sup>56</sup> Wilkinson S, 'Why I Wrote...Choosing Tomorrow's Children: The Ethics of Selective Reproduction' (2010) 5(1) Clinical Ethics 46, 50 <<https://doi.org/10.1258/ce.2010.010001>> accessed 31 March 2024

<sup>57</sup> Rothman BK, 'Ideology and Technology: The Social Context of Procreative Technology' (1998) 65(3) The Mount Sinai Journal of Medicine, New York 201, 223; Seavilleklein V and Sherwin S, 'The Myth of the Gendered Chromosome: Sex Selection and the Social Interest' (2007) 16(1) Cambridge Quarterly of Healthcare Ethics 7, 19 <<https://doi.org/10.1017/S0963180107070028>> accessed 31 March 2024; Mudde A, "'Before You Formed in the Womb I Knew You": Sex Selection and Spaces of Ambiguity' (2010) 25 Hypatia 553, 576 <<https://doi.org/10.1111/j.1527-2001.2010.01111.x>> accessed 31 March 2024

<sup>58</sup> Hendl T, 'A Feminist Critique of Justifications for Sex Selection' (2017) 14(3) Journal of Bioethical Inquiry 427 <<https://doi.org/10.1007/s11673-017-9797-6>> accessed 31 March 2024

biologically deterministic perspective on gender assumes that children naturally align with the gender assigned to them at birth and conform to behaviours expected of that gender. This standpoint presupposes that women and men can only be categorised into two separate and uniform groups, each possessing inherent gender-specific traits. Consequently, this perception of gender implies individuals with normative body characteristics, fixed gender identities, and predetermined sexual orientations, of which such imposition of gender essentialism effectively reinforces discriminatory attitudes towards gender.

To elaborate, the binary interpretation of sex/gender roles coupled with the assumption of their inherent biological underpinning presents concerns due to its limited allowance for diversity, ambiguity, and deviations from established norms. This viewpoint fails to acknowledge the intricate and varied nature of human physical embodiment and the spectrum of gender expressions that exist.<sup>59</sup> Consequently, this perspective side-lines children who do not conform to conventional expectations regarding sex, including those with intersex traits, as well as in terms of gender, encompassing transgender and genderqueer children. Additionally, it also disregards children who identify with their assigned gender but express themselves in a manner that diverges from traditional gender norms.<sup>60</sup>

Seemingly, the rationale behind advocating for sex selection to achieve 'balanced family' rests on the assumption that diversity within the family is attained by having children of both opposite sexes. This assumption is rooted in the belief of intrinsic gender distinctions between the sexes. Nevertheless, true gender diversity could be present when children are empowered to embrace identities, behaviours, or interests that transcend conventional gender norms and thus destabilises the family balancing rationale.

### 3.2 Reproductive Autonomy

Advocates of reproductive autonomy underscore the pre-eminence of parental choice, particularly within the context of non-medical sex selection, championing the notion that

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<sup>59</sup> Gilbert MA, 'Defeating Bigenderism: Changing Gender Assumptions in the Twenty-First Century' (2009) 24(3) *Hypatia* 93, 112 <<http://www.jstor.org/stable/20618166>> accessed 31 March 2024

<sup>60</sup> Davis G, Dewey JM and Murphy EL, 'Giving Sex: Deconstructing Intersex and Trans Medicalization Practices' (2016) 30(3) *Gender and Society* 490, 514 <<http://www.jstor.org/stable/24756183>> accessed 31 March 2024; Marcus R, *Gender, Social Norms, and Women's Economic Empowerment* (1st edn, Routledge 2021)

individuals should have sovereignty over their own bodies and reproductive decisions<sup>61</sup>. This principle is grounded in a constellation of interrelated rights under international human rights law<sup>62</sup>, including the autonomy to determine the number and spacing of one's children, the right to private and family life, the right to marry and found a family, and rights related to maternity protection, to name a few.<sup>63</sup> The Cairo and Beijing Declarations, among other provisions, support the notion of reproductive choice, advocating for the right of individuals to make informed decisions about the number and timing of their children, to access the highest standard of sexual and reproductive health, and to make these decisions free from discrimination, coercion, and violence.<sup>64</sup>

The principle of equal rights in reproductive decision-making, as articulated in Article 16(1) of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), mandates that men and women have the equal right to decide freely and responsibly on the number and spacing of their children.<sup>65</sup> This provision resonates with the ethos of the Cairo and Beijing Declarations but does not explicitly address the issue of

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<sup>61</sup> Julian Savulescu, 'Sex selection: the case for' (1999) 171(7) *The Medical Journal of Australia* 373 <<https://doi.org/10.5694/j.1326-5377.1999.tb123697.x>> accessed 20 October 2022; Rosamond Rhodes, 'Acceptable sex selection' (2001) 1(1) *American Journal of Bioethics* 31 <<https://doi.org/10.1162/152651601750078998>> accessed 20 October 2022; B M Dickens, 'Can sex selection be ethically tolerated?' (2002) 28 *Journal of Medical Ethics* 335 <<http://dx.doi.org/10.1136/jme.28.6.335>> accessed 20 October 2022; John Robertson, 'Sex selection: final word from the ASRM Ethics Committee on the use of PGD' (2002) 32(2) *The Hasting Center Report* <<https://go.gale.com/ps/i.do?id=GALE%7CA85459477&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=00930334&p=AONE&sw=w&userGroupName=anon%7Eae06eae5>> accessed 20 October 2022; Edgar Dahl, 'Preconception Sex Selection: A Survey of Visitors to an Internet-Based Health Forum' (2008) 16(1) *Reproductive Biomedicine Online* <<https://philpapers.org/archive/DAHPSS.pdf>> accessed 20 October 2022; Ruth Macklin, 'The Ethics of Sex Selection and Family Balancing' (2010) 28(4) *Seminars in Reproductive Medicine* 315, 321 <<http://dx.doi.org/10.1055/s-0030-1255179>> accessed 20 October 2022; Edgar Dahl, 'Preconception Sex Selection: A Survey of Visitors to an Internet-Based Health Forum' (2008) 16(1) *Reproductive Biomedicine Online* <<https://philpapers.org/archive/DAHPSS.pdf>> accessed 20 October 2022

<sup>62</sup> Rebecca J Cook, Bernard M Dickens, and Mahmoud F Fathalla, *Reproductive health and human rights* (Clarendon Press 2003)

<sup>63</sup> Rebecca J Cook, Bernard M Dickens, and Mahmoud F Fathalla, *Reproductive health and human rights* (Clarendon Press 2003)

<sup>64</sup> Cairo Programme of Action, para 7.2; Beijing Platform for Action para 95

<sup>65</sup> Programme of Action of the United Nations International Conference on Population and Development, held at Cairo from 5-13 September 1994 (Cairo Declaration); Beijing Platform for Action, The United Nations Fourth Conference of Women, Beijing, September 1995 (Beijing Declaration); Rebecca J Cook and Mahmoud F Fathalla, 'Advancing Reproductive Rights Beyond Cairo and Beijing' (1996) 22(3) *International Family Planning Perspectives* 115, 121 <<https://doi.org/10.2307/2950752>> accessed 18 October 2022

preimplantation sex selection<sup>66</sup>, thereby raising pivotal questions about the extent to which reproductive autonomy encompasses non-medical sex selection.

The focus on autonomy, particularly within this thesis, stems from its central role in arguments supporting sex selection—the belief that individuals should have the ultimate say over their bodies. However, while autonomy is a key concept used to argue for the permissibility of sex selection, it is crucial to acknowledge that autonomy has its limits. This part of this chapter explores the concept of reproductive autonomy as championed by libertarian perspectives, which emphasise personal choice in the domain of reproduction and argue against regulatory interference unless substantial evidence of potential harm exists.<sup>67</sup>

Libertarian perspectives, articulated by scholars such as John Robertson, Harris, Savulescu, and Wilkinson, place a strong emphasis on liberty and autonomy as central to reproductive decision-making.<sup>68</sup> They argue for a minimal regulatory approach, advocating that reproductive choices should be free from state interference, aligning with the belief that mentally competent adults have the right to make informed decisions about their reproduction.<sup>69</sup>

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<sup>66</sup> Note that sex selective abortion was subjected under criticism in the Concluding Comments on Country Reports by the Committee for Elimination of Discrimination against Women. Re. China, 20<sup>th</sup> session (1999) 299 (noting the discriminatory tradition of son preference, especially regarding family planning, and illegal practices of sex selective abortions, female infanticide, and the non-registration and abandonment of female children. CEDAW <<https://www.un.org/womenwatch/daw/cedaw/>> accessed 20 February 2024

<sup>67</sup> Savulescu J and Dahl E, 'Sex Selection and Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine' (2000) 15(9) *Human Reproduction* 1879 <<https://doi.org/10.1093/humrep/15.9.1879>> accessed 31 March 2024; Harris J, 'Sex Selection and Regulated Hatred' (2005) 31(5) *Journal of Medical Ethics* 291 <<http://www.jstor.org/stable/27719400>> accessed 31 March 2024; Wilkinson S, 'Why I Wrote...Choosing Tomorrow's Children: The Ethics of Selective Reproduction' (2010) 5(1) *Clinical Ethics* 46, 50 <<https://doi.org/10.1258/ce.2010.010001>> accessed 31 March 2024

<sup>68</sup> Savulescu J and Dahl E, 'Sex Selection and Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine' (2000) 15(9) *Human Reproduction* 1879 <<https://doi.org/10.1093/humrep/15.9.1879>> accessed 31 March 2024; Harris J, 'Sex Selection and Regulated Hatred' (2005) 31(5) *Journal of Medical Ethics* 291 <<http://www.jstor.org/stable/27719400>> accessed 31 March 2024; Wilkinson S, 'Why I Wrote...Choosing Tomorrow's Children: The Ethics of Selective Reproduction' (2010) 5(1) *Clinical Ethics* 46, 50 <<https://doi.org/10.1258/ce.2010.010001>> accessed 31 March 2024

<sup>69</sup> Savulescu J and Dahl E, 'Sex Selection and Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine' (2000) 15(9) *Human Reproduction* 1879 <<https://doi.org/10.1093/humrep/15.9.1879>> accessed 31 March 2024; Harris J, 'Sex Selection and Regulated Hatred' (2005) 31(5) *Journal of Medical Ethics* 291 <<http://www.jstor.org/stable/27719400>> accessed 31 March 2024; Wilkinson S, 'Why I Wrote...Choosing Tomorrow's Children: The Ethics of Selective Reproduction' (2010) 5(1) *Clinical Ethics* 46, 50 <<https://doi.org/10.1258/ce.2010.010001>> accessed 31 March 2024

However, the discourse on non-medical sex selection introduces complex ethical considerations that might demand limits on the liberation model of reproductive autonomy, particularly in relation to child well-being and the best interests of the child.<sup>70</sup> It is within this context that the limitations of autonomy become apparent. The choices enacted by parents bear significant implications for the child's existence, encompassing potential stigmatisation, adherence to gender stereotypes, and psychological repercussions, thereby constricting the child's own future autonomy and capacity to make uninhibited choices.<sup>71</sup> Moreover, considering potential social impact aspect, the aggregate effect of individual choices on the fabric of society elucidates the limitations of unfettered autonomy. Although arguments in favour of family balancing refute this, there remains a risk that a pronounced predilection for one sex over the other can culminate in demographic disequilibria, eliciting broader societal repercussions, including skewed sex ratios and, in some instances, contributing to social instability.<sup>72</sup> These societal impacts highlight the necessity to weigh the collective implications of reproductive choices, potentially necessitating the curtailment of individual autonomy to safeguard societal welfare. Acknowledging these limitations does not entail a wholesale repudiation of reproductive autonomy but rather signals the necessity for nuance.

Thus, while reproductive autonomy serves as a foundational argument in favour of sex selection, acknowledging its inherent limitations is essential. This thesis will further delve into these limits, exploring how a nuanced understanding of autonomy, coupled with ethical considerations and societal impacts, informs the debate on non-medical sex selection and shapes the direction of legal and ethical frameworks.

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<sup>70</sup> Savulescu J and Dahl E, 'Sex Selection and Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine' (2000) 15(9) *Human Reproduction* 1879 <<https://doi.org/10.1093/humrep/15.9.1879>> accessed 31 March 2024; Harris J, 'Sex Selection and Regulated Hatred' (2005) 31(5) *Journal of Medical Ethics* 291 <<http://www.jstor.org/stable/27719400>> accessed 31 March 2024; Wilkinson S, 'Why I Wrote...Choosing Tomorrow's Children: The Ethics of Selective Reproduction' (2010) 5(1) *Clinical Ethics* 46, 50 <<https://doi.org/10.1258/ce.2010.010001>> accessed 31 March 2024

<sup>71</sup> Browne TK, 'How Sex Selection Undermines Reproductive Autonomy' (2017) 14(2) *Journal of Bioethical Inquiry* 195–204 <<https://doi.org/10.1007/s11673-017-9783-z>> accessed 31 March 2024

<sup>72</sup> Teri Slade, Douglas Gross, Laura Niwa, Ashley McKillop, and Christine Guptill, 'Sex and Gender Demographic Questions: Improving Methodological Quality, Inclusivity, and Ethical Administration' (2020) 24 *International Journal of Social Research Methodology* 1–12 <<https://doi.org/10.1080/13645579.2020.1819518>> accessed 31 March 2024

Additionally, in this context, it is also instructive to examine how international human rights law, particularly through the lens of the European Court of Human Rights (ECtHR), has grappled with similar issues surrounding reproductive autonomy and medically assisted reproduction. The decisions of the ECtHR provide critical insights into balancing individual rights with societal interests, making their inclusion in this thesis relevant. These cases address complex ethical and legal dilemmas, further supporting their importance in the context of reproductive rights<sup>73</sup> and strengthening the analytical framework of this thesis. This analysis is particularly pertinent when considering the ethical and legal dimensions of non-medical preimplantation sex selection. By exploring key ECHR cases, such as *S.H. and Others v. Austria* and *Costa and Pavan v. Italy*<sup>74</sup>, this thesis will demonstrate how these decisions have shaped the discourse on reproductive rights and set important precedents for evaluating similar practices under international law.

The ECtHR rulings on medically assisted reproduction, particularly under Article 8 of the European Convention on Human Rights, provide a valuable perspective on the interplay between reproductive technologies and human rights. By interpreting the right to respect for private life to encompass aspects of personal autonomy and reproductive choice, the Court has established a nuanced framework for balancing individual freedoms with societal interests.<sup>75</sup> These principles enrich the human rights framework employed in this thesis and offer guidance on addressing the complex ethical and legal considerations surrounding non-medical preimplantation sex selection.

Article 8 of the European Convention on Human Rights affirms that '*Everyone has the right to respect for his private and family life, his home and his correspondence,*' and limits interference by public authorities to cases that are '*in accordance with the law and... necessary in a democratic society*' to protect specific interests such as public safety, health,

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<sup>73</sup> Harris DJ and others, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009)

<sup>74</sup> *S.H. and Others v Austria* (2011) 52 EHRR 6; *Costa and Pavan v Italy* App no 54270/10 (ECtHR, 28 August 2012)

<sup>75</sup> Christoffersen J and Madsen MR (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011); Harris DJ and others, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009)

morals, or the rights of others.<sup>76</sup> The ECtHR has extended the interpretation of this article to include various aspects of personal autonomy, such as decisions related to medically assisted reproduction. The following discussion highlights key rulings that illustrate how the Court balances these rights against societal and ethical concerns, with a particular focus on their relevance to non-medical preimplantation sex selection.

In the case of *S.H. and Others v. Austria*, the ECtHR addressed the issue of access to assisted reproduction treatment under Austrian law, which prohibited the use of donor gametes for in vitro fertilization (IVF). The applicants argued that this prohibition violated their rights under Article 8 of the European Convention on Human Rights, which protects the right to respect for private and family life.<sup>77</sup>

The Court ultimately ruled that the Austrian law did not violate Article 8, emphasising the wide margin of appreciation given to states in regulating sensitive moral and ethical issues, such as assisted reproduction. This ruling highlighted the complex balance between individual rights and the state's role in regulating reproductive technologies. It underscored the notion that while individuals have a right to make reproductive choices, states have a legitimate interest in regulating these practices to address ethical and moral concerns.<sup>78</sup>

A similar balancing act was evident in the case of *Costa and Pavan v. Italy*, which dealt with an Italian law prohibiting fertile couples, who are carriers of genetic diseases, from accessing medically assisted reproduction (MAR) and preimplantation genetic diagnosis (PGD). The applicants, a married couple who were carriers of cystic fibrosis, challenged this prohibition, arguing that it violated their rights under Article 8.<sup>79</sup> On August 28, 2012, the ECtHR ruled that the prohibition indeed violated Article 8, emphasising the right to respect for private and family life. The Court found that the Italian law disproportionately restricted the applicants' ability to access MAR and PGD to prevent the transmission of genetic diseases to their offspring. This decision not only led to changes in Italian law, allowing such couples to access

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<sup>76</sup> Harris DJ and others, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009)

<sup>77</sup> *S.H. and Others v Austria* (2011) 52 EHRR 6

<sup>78</sup> *S.H. and Others v. Austria* (2011) 52 EHRR 6, [94]

<sup>79</sup> *Costa and Pavan v Italy* App no 54270/10 (ECtHR, 28 August 2012)

these treatments, but also highlighted a critical moral and ethical consideration: the extent to which the state should interfere in individuals' reproductive choices. It reflects a tension between protecting the rights of individuals to make autonomous decisions about their private and family life and the state's role in regulating reproductive technologies to address broader societal, ethical, or moral concerns.<sup>80</sup> In this case, the Court's decision suggests that the right to prevent the transmission of genetic diseases should outweigh the state's interest in prohibiting access to certain reproductive technologies, aligning national policies with human rights standards while respecting individual autonomy in deeply personal and morally complex matters.

The rulings in *S.H. and Others v. Austria* and *Costa and Pavan v. Italy* illustrate the delicate balance the European Court of Human Rights strives to maintain between individual rights and state interests in regulating sensitive reproductive technologies. While these decisions affirm the Court's recognition of the state's role in safeguarding public health and moral values, they also highlight the importance of protecting individual autonomy within the context of medically assisted reproduction. However, it is noteworthy that the Court tends to weigh individual autonomy more heavily in cases involving medical necessity, such as the prevention of genetic diseases, compared to non-medical contexts, where the Court appears more inclined to defer to the state's discretion in regulating reproductive choices based on broader ethical, moral, or social considerations.

Building on these principles, it becomes evident that similar considerations must be applied to the issue of non-medical preimplantation sex selection. The ECtHR decisions underscore the importance of balancing individual reproductive autonomy with the state's interest in protecting public health, morals, and the rights of others.<sup>81</sup> In the context of non-medical preimplantation sex selection, these decisions provide a framework for understanding how such practices might be evaluated under international human rights law. They suggest that while individuals have a right to make reproductive choices, this right is not absolute and must be balanced against potential societal harms and ethical considerations. This conclusion

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<sup>80</sup> *Costa and Pavan v. Italy* App no 54270/10 (ECtHR, 28 August 2012), [66]

<sup>81</sup> *S.H. and Others v. Austria* (2011) 52 EHRR 6; *Costa and Pavan v. Italy* App no 54270/10 (ECtHR, 28 August 2012)

directly supports the central argument of this thesis, which advocates for the continuation of the ban on non-medical preimplantation sex selection in Thailand. The thesis argues that such a ban is necessary to protect against the reinforcement of harmful gender stereotypes, the commodification of human life, and the broader societal imbalances that could arise from allowing this practice.

By incorporating the insights from the European Court of Human Rights, the thesis reinforces its position that non-medical preimplantation sex selection poses significant ethical and societal risks that justify the ongoing prohibition in Thailand. The inclusion of these legal precedents not only strengthens the thesis's argument but also underscores the importance of maintaining a regulatory framework that prioritises societal well-being over unrestricted reproductive autonomy.

### 3.3 Eugenics

A good way to understand the potential limits reproductive autonomy in the context of pre-implantation sex selection is to consider its relationship with eugenics. By situating non-medical sex selection within the broader historical context of eugenics, this section seeks to critically evaluate how contemporary genetic interventions might inadvertently echo or diverge from eugenic practices, thereby guiding a nuanced legal response that balances individual reproductive autonomy with larger communitarian and societal interests.

#### *3.3.1 Historical Evolution and Ethical Implications of Eugenics*

The term 'eugenics' was coined to describe a scientific field focused on unravelling the principles and mechanisms governing hereditary traits, particularly those considered advantageous, such as robust health and intelligence.<sup>82</sup> Beyond a quest for knowledge, eugenics carried practical and political implications, aiming to not only deepen our understanding of heredity but also enhance the overall human species based on this knowledge. The objective of eugenics was to address perceived societal decline by inhibiting the reproduction of individuals deemed 'inferior' while promoting the reproduction of those

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<sup>82</sup> Galton F, *Inquiries into Human Faculty and Its Development* (2nd edn, Dent & Dutton (Everyman) 1907) [first electronic edition, 2001]; Thomas GR and Katz Rothman B, 'Keeping the Backdoor to Eugenics Ajar? Disability and the Future of Prenatal Screening' (2016) 18 *American Medical Association Journal of Ethics* 406, 415

regarded as 'superior'. The desire to control reproduction thus echoes with some of the objectives of pre-implementation non-medical sex selection.

Preventing a certain group from reproduction is known as negative eugenics, whereas empowering and encouraging the reproduction of a certain group is called positive eugenics. The perspective advocating for the prevention of individuals with mental illness or disabilities from coming to life implies that these groups are seen as a burden to society, categorised as 'inferior' individuals whose existence, if allowed, would be considered cost-ineffective to society.<sup>83</sup> Later, more extreme ideologies emerged, explicitly dividing individuals into those deemed deserving and those considered unworthy of life. In the late 1900s, medical professionals actively promoted eugenic measures in the political sphere. By the 1920s and 1930s, public awareness of eugenics grew, influencing policy decisions in various countries, including Nazi Germany and the United States. Despite different political systems, these nations implemented eugenic policies such as mandatory sterilisation and marriage restrictions. The Nazi regime's widespread sterilisation campaigns and mass killings during World War II stand as the most infamous example. After the war, both the scientific and political aspects of eugenics largely lost credibility, although some countries, like the United States, continued to enforce compulsory sterilisation practices.<sup>84</sup> In the early 1960s, prenatal testing, specifically genetic diagnosis, became a standard in healthcare, sparking debates on abortion rights tied to identified genetic abnormalities. The growing use of genetic diagnosis and legal changes, including abortion legalisation, led to discussions characterising genetic screening as a form of 'new eugenics'.<sup>85</sup> This ongoing debate continues, with sceptics asserting that despite its ostensibly non-political nature, genetic testing's selective nature still carries eugenic undertones. Concepts like neo-eugenics or liberal eugenics highlight this, emphasising the differentiation between lives considered valuable/worthy and those seen as less desirable/less worthy—an association with the core concept of eugenics.<sup>86</sup>

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<sup>83</sup> Galton F, 'The Possible Improvement of the Human Breed Under the Existing Conditions of Law and Sentiment' (1901) 64 *Nature* 659, 665

<sup>84</sup> Reilly PR, 'Eugenics and Involuntary Sterilization: 1907–2015' (2015) 16 *Annual Review of Genomics and Human Genetics* 351, 368

<sup>85</sup> Suter SM, 'A Brave New World of Designer Babies?' (2007) 22 *Berkeley Technology Law Journal* S897, 969; Habermas J, *The Future of Human Nature* (Wiley & Sons Publishing, Hoboken, NJ 2014)

<sup>86</sup> Suter SM, 'A Brave New World of Designer Babies?' (2007) 22 *Berkeley Technology Law Journal* S897, 969; Habermas J, *The Future of Human Nature* (Wiley & Sons Publishing, Hoboken, NJ 2014)

Transitioning from the historical narrative of eugenics, the following section explores the connection between eugenics and the issue of non-medical sex selection, underscoring how advancements in technologies such as preimplantation genetic diagnosis (PGD) reflect a nuanced continuation of eugenic principles and as the thesis will explore in the remaining chapters provides compelling reasons for Thailand to continue to prohibit non-medical pre-implantation sex selection.

### *3.3.2 Liberal Eugenics and Non-Medical Sex Selection*

Many argue that PGD treatments, including preimplantation sex selection, fall under the category of liberal eugenics.<sup>87</sup> Liberal eugenics, in contrast to historical eugenic practices, empowers individual parents to make genetic decisions for their offspring without state interference.<sup>88</sup> It emphasises voluntary, individual-driven choices free from state intervention, aiming to enhance reproductive options for individuals rather than limiting them based on perceived fitness or inferiority.<sup>89</sup>

Supporters of liberal eugenics present two key perspectives. Firstly, they argue that medical applications of PGD, such as sex selection or genome editing, extend individual reproductive autonomy, considering these decisions as personal matters rather than subjects for state involvement. They assert that parents, capable of affording such choices independently, should be granted the autonomy to make genetic decisions.<sup>90</sup> Secondly, proponents invoke the principle of parental autonomy in child rearing, contending that if parents have the right

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<sup>87</sup> Raposo VL, 'From Public Eugenics to Private Eugenics: What Does the Future Hold?' (2022) 26(4) *JBRA Assist Reprod* 666, 674 <<https://doi.org/10.5935/1518-0557.20220032>> accessed 31 March 2024

<sup>88</sup> Ejiófor PF, 'The Future of Humanity' (2021) 31 *Human Affairs* 6, 20 (Institute for Research in Social Communication, Slovak Academy of Sciences)

<sup>89</sup> Anomaly Jonny, 'Defending Eugenics: From Cryptic Choice to Conscious Selection' (2018) 35 *Monash Bioethics Review* 24, 35; Morris ED, 'An Appreciation of The Gene: An Intimate History by Siddhartha Mukherjee and a Call for Expanded Training in the Responsible Conduct of Research' (2017) 90(4) *The Yale Journal of Biology and Medicine* 661, 665

<sup>90</sup> Mehta P, 'Human Eugenics: Whose Perception of Perfection?' (2000) 33(2) *The History Teacher* 222–240 <<https://doi.org/10.2307/494971>> accessed 31 March 2024; Fox D, 'The Illiberality of 'Liberal Eugenics'' (2007) 20 *Ratio* 1–25 <<https://doi.org/10.1111/j.1467-9329.2007.00343.x>> accessed 31 March 2024; Agar N, *Liberal Eugenics: In Defence of Human Enhancement* (2008) <<https://doi.org/10.1002/9780470775004>> accessed 31 March 2024

to care for their children without state intervention in areas like education and healthcare, they should similarly be authorised to make determinations about their child's genetics.<sup>91</sup>

This justification for liberal eugenics relies on cantilever arguments<sup>92</sup>, assuming certain propositions and demonstrating their implications for other related issues. Advocates argue that acknowledging parental reproductive autonomy and child-rearing practices logically extends to the ability to modify the genetic makeup of potential children, including sex selection. However, this line of reasoning could give rise to an issue of whether there are inherent limits to liberalism, particularly when individual autonomy potentially encroaches upon ethical boundaries and societal well-being in the realm of genetic modification. In this regard, the justification of the liberal eugenics argument in non-medical preimplantation sex selection hinges on the balance between individual autonomy and larger communitarian and morality considerations. While recognising the value of reproductive autonomy, the potential dangers of a new form of eugenics<sup>93</sup> underpinned by non-medical sex selection points towards nuanced legal responses.

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<sup>91</sup> Mehta P, 'Human Eugenics: Whose Perception of Perfection?' (2000) 33(2) *The History Teacher* 222–240 <<https://doi.org/10.2307/494971>> accessed 31 March 2024; Fox D, 'The Illiberality of 'Liberal Eugenics'' (2007) 20 *Ratio* 1–25 <<https://doi.org/10.1111/j.1467-9329.2007.00343.x>> accessed 31 March 2024; Agar N, *Liberal Eugenics: In Defence of Human Enhancement* (2008) <<https://doi.org/10.1002/9780470775004>> accessed 31 March 2024

<sup>92</sup> Ejiófor PF, 'The Future of Humanity' (2021) 31 *Human Affairs* 6, 20 (Institute for Research in Social Communication, Slovak Academy of Sciences)

<sup>93</sup> Note that in this thesis, I view that the concepts of liberal eugenics and consumer eugenics, although arising from different historical and ethical contexts, exhibit significant similarities. Liberal eugenics emerged in a context where advancements in genetics and a growing emphasis on individual rights led to a reimagining of eugenic practices as voluntary and choice-driven, rather than coercive and state-imposed. This contrasts with the traditional eugenics of the early 20th century, which was marked by compulsory sterilisation and racial hygiene laws. Consumer eugenics, on the other hand, has developed in the modern consumer culture, where genetic technologies are marketed and utilised as enhancements to meet personal desires, reflecting a commercialisation of genetic choices. Despite these differing backdrops, both paradigms advocate for the use of genetic technologies to enhance human traits based on individual choice, reflecting a shift from state-controlled to privately driven genetic selection. Michael J. Sandel's analysis in 'The Case Against Perfection' provides a critical perspective on this trend. He explores the ethical implications of using genetic engineering to perfect human traits, a practice that embodies the essence of consumer eugenics. This form of eugenics closely mirrors liberal eugenics in that both prioritise personal freedom in genetic decision-making, posing profound ethical questions about equality, fairness, and the essence of human nature. See Michael J Sandel, *The Case Against Perfection: Ethics in the Age of Genetic Engineering* (Belknap Press of Harvard University Press 2007)

### 3.3.3 *The Frameworks of Public Health and Reproductive Autonomy*

#### 3.3.3.1 Diverging Perspectives: Pure Choice vs. Public Health Pluralism

The debate over PGD treatments, including non-medical preimplantation sex selection, revolves around two primary frameworks—public health considerations and reproductive autonomy. Public health perspectives argue for reducing birth defects to enhance population health, while reproductive autonomy emphasises providing parents, especially women with vital information and empowering them to make informed reproductive choices<sup>94</sup>, echoing negative conceptions of eugenics outlined above. Although the reproductive autonomy model is generally deemed more acceptable, critics argue that it may mask the eugenic nature of PGD by presenting it as a choice while essentially cherry-picking genetic traits.<sup>95</sup> The discussion delves into two perspectives: the 'pure choice' model, focusing on enhancing reproductive choice, and 'public health pluralism,' which extends beyond health considerations, potentially exposing PGD to eugenic concerns.<sup>96</sup> The latter perspective notably assumes that possessing traits deviant from what is considered 'normal' is undesirable, implicitly suggesting that erasing or ending the existence of people with disabilities could be advocated. This assumption raises ethical questions about the value placed on diversity and the implications of such a stance for individuals with disabilities, underlining the complex moral terrain navigated by PGD practices.

The vulnerability of the pure choice model lies in its susceptibility to eugenic objections, questioning the scope of choices it should permit.<sup>97</sup> On the other hand, public health pluralism, with its goal of reducing disease prevalence, offers a theoretically more robust rationale for distinctions in PGD choices.

To further elaborate, the 'pure choice' model and 'public health pluralism' further dissect these frameworks, revealing their inherent tensions. The pure choice model, by advocating

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<sup>94</sup> Begovic D, 'Prenatal Testing: Does Reproductive Autonomy Succeed in Dispelling Eugenic Concerns?' (2019) *Bioethics* 958, 964

<sup>95</sup> Paul D, 'Genetic Services, Economics, and Eugenics' (1998) 11(3–4) *Science in Context* 488

<sup>96</sup> Wilkinson S, 'Prenatal Screening, Reproductive Choice, and Public Health' (2015) 29(1) *Bioethics* 26, 35; Ravitsky V, 'The Shifting Landscape of Prenatal Testing: Between Reproductive Autonomy and Public Health' in LP King, RL Zacharias, and J Johnston (eds), *Just Reproduction: Reimagining Autonomy in Reproductive Medicine*, Special Report (Hastings Center Report 47(6) 2017) S34–S40

<sup>97</sup> Morris JK and Springett A, *The National Down Syndrome Cytogenetic Register for England and Wales: 2013 Annual Report (2014)* <[http://www.binocar.org/content/annrep2013\\_FINAL.pdf](http://www.binocar.org/content/annrep2013_FINAL.pdf)> accessed 31 March 2024

for unrestricted reproductive choice, may inadvertently support a form of eugenics, where choices about non-medical traits, including sex, are made in a vacuum without considering the broader societal implications. This model's vulnerability to eugenic objections becomes particularly pronounced in the context of non-medical sex selection, where the decision could be influenced by societal biases rather than medical necessity.<sup>98</sup>

Conversely, public health pluralism, which aims to reduce disease prevalence, introduces a theoretically sounder basis for making distinctions in PGD choices. Yet, when this rationale extends to non-medical sex selection, it encounters ethical dilemmas. The assumption that traits deviating from the 'normal'—in this case, the desired sex—are undesirable, risks perpetuating discrimination against individuals based on gender, echoing eugenic concerns about valuing certain lives over others.<sup>99</sup>

In linking these discussions to non-medical sex selection, it becomes evident that both the pure choice model and public health pluralism grapple with modern incarnations of eugenic thought. Whether through the lens of enhancing reproductive autonomy or addressing public health goals, the selection of specific genetic traits, including sex, navigates a complex moral terrain. This terrain is fraught with ethical considerations about diversity, the value of individual lives, and the societal implications of embracing technologies that allow for such selection. As such, the discourse on PGD, specifically regarding non-medical sex selection, not only reflects the ongoing evolution of reproductive technologies but also underscores the need for a nuanced ethical framework that reconciles individual autonomy with the collective good.<sup>100</sup>

Navigating the complex moral landscape outlined by the diverging perspectives of the 'pure choice' model and 'public health pluralism' leads to a pivotal juncture in the discourse on PGD

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<sup>98</sup> Dive L and Newson AJ, 'Reproductive Carrier Screening: Responding to the Eugenics Critique' (2022) 48(12) J Med Ethics 1060, 1067 <<https://doi.org/10.1136/medethics-2021-107343>> accessed 31 March 2024

<sup>99</sup> W Dondorp and G de Wert, 'Preconception Sex Selection for Non-medical and Intermediate Reasons: Ethical Reflections' (2010) 2(4) Facts Views Vis Obgyn 267, 277 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4086011/>> accessed 24 September 2024; Wilkinson S, 'Prenatal Screening, Reproductive Choice, and Public Health' (2015) 29(1) Bioethics 26, 35

<sup>100</sup> W Dondorp and G de Wert, 'Preconception Sex Selection for Non-medical and Intermediate Reasons: Ethical Reflections' (2010) 2(4) Facts Views Vis Obgyn 267; Whittaker A, 'Reproductive Opportunists in the New Global Sex Trade: PGD and Non-Medical Sex Selection' (2011) 23 Reproductive Biomedicine Online 609

treatments, including non-medical preimplantation sex selection. As the discussion delves deeper into the ethical considerations and societal implications of these frameworks, it becomes imperative to explore a concept that transcends traditional boundaries: 'reproductive autonomy worth having'<sup>101</sup>. This exploration becomes pivotal within the context of non-medical sex selection, challenging a redefinition and critical assessment of reproductive autonomy boundaries. Through this analysis, the implications of such choices on both the individual and society at large can be better understood, ensuring that reproductive autonomy is exercised in a manner that is ethically responsible and reflective of broader societal well-being.

### 3.3.3.2 Reproductive Autonomy Worth Having

Exploring the concept of 'reproductive autonomy worth having' reveals the need to critically assess the limitations inherent in both the pure choice model and public health pluralism. Achieving genuine reproductive autonomy necessitates acknowledging and addressing societal constraints that prevent individuals from acting in accordance with their values and priorities.

Accordingly, 'Reproductive Autonomy Worth Having' recognises the influence of social environments on personal decisions, emphasising the need for autonomy across all aspects of life.<sup>102</sup> The focus extends beyond mere reproductive choices to include societal trends and potential discrimination, allowing for the identification of subtle pressures and the formulation of appropriate policies, such as ensuring access to support and counselling.<sup>103</sup> This contrasts with a public health approach that may inadvertently encourage reducing the number of individuals born with disabilities.<sup>104</sup>

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<sup>101</sup> Johnston J and Zacharias R, 'The Future of Reproductive Autonomy' in LP King, RL Zacharias, and J Johnston (eds), *Just Reproduction: Reimagining Autonomy in Reproductive Medicine*, Special Report (Hastings Center Report 47(6), 2017) S6–S11

<sup>102</sup> Ravitsky V, 'The Shifting Landscape of Prenatal Testing: Between Reproductive Autonomy and Public Health' in LP King, RL Zacharias, and J Johnston (eds), *Just Reproduction: Reimagining Autonomy in Reproductive Medicine*, Special Report (Hastings Center Report 47(6) 2017) S34–S40

<sup>103</sup> Upadhyay UD, Dworkin SL, Weitz TA and Foster DG, 'Development and Validation of a Reproductive Autonomy Scale' (2014) 45(1) *Studies in Family Planning* 19, 41

<sup>104</sup> Begovic D, 'Prenatal Testing: Does Reproductive Autonomy Succeed in Dispelling Eugenic Concerns?' (2019) *Bioethics* 958, 964

In addressing the core thesis that non-medical preimplantation sex selection should be prohibited, it is acknowledged that while there exist significant tensions within the concept of sex selection, the limitation of reproductive autonomy in this context is deemed permissible. The rationale for this stance is grounded in the compelling arguments that highlight the ethical dilemmas and societal implications inherent in allowing unrestricted access to PGD for sex selection. These concerns include the potential for reinforcing gender biases, contributing to demographic imbalance (e.g. skewed sex ratio at birth), and the ethical considerations surrounding the commodification of human life and potential risks of new forms of eugenics.<sup>105</sup> The slippery slope argument suggests that accepting such interventions for non-medical reasons could inadvertently lead to more extreme modifications, potentially fostering harmful stereotypes or exacerbating gender imbalances.<sup>106</sup> Therefore, while the principle of reproductive rights is fundamentally linked to individual autonomy and freedom, it is essential to acknowledge that an unqualified approach to these rights is neither feasible nor judicious. These arguments are explored throughout the thesis.

Furthermore, the debate over non-medical sex selection is emblematic of larger ethical quandaries regarding reproductive technologies. It exemplifies how reproductive choices, initially limited to non-medical preferences such as sex selection, might expand to include other traits, edging society closer to the concept of designer babies.<sup>107</sup> This progression invokes ethical dilemmas about the commodification of human reproduction, the reinforcement of societal biases, and the unforeseeable impacts of influencing future generations' genetic makeup. Hence, the conversation surrounding non-medical sex selection is not merely about individual choice but also about the broader ethical and societal

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<sup>105</sup> Eftekhaari TE and others, 'Ethical Considerations in Sex Selection' (2015) 4 J Educ Health Promot 32 <<https://doi.org/10.4103/2277-9531.157184>> accessed 31 March 2024

<sup>106</sup> Stewart R and others, 'Gendered Stereotypes and Norms: A Systematic Review of Interventions Designed to Shift Attitudes and Behaviour' (2021) 7(4) Heliyon e06660 <<https://doi.org/10.1016/j.heliyon.2021.e06660>> accessed 31 March 2024; Weindling P, 'The History and Historiography of Eugenics' in Dietrich MR, Borrello ME, and Harman O (eds), Handbook of the Historiography of Biology (Historiographies of Science, Springer, Cham 2021) <[https://doi.org/10.1007/978-3-319-90119-0\\_9](https://doi.org/10.1007/978-3-319-90119-0_9)> accessed 31 March 2024

<sup>107</sup> Ethics Committee of the American Society for Reproductive Medicine, 'Use of Reproductive Technology for Sex Selection for Nonmedical Reasons' (2015) 103(6) Fertil Steril 1418, 22 <<https://doi.org/10.1016/j.fertnstert.2015.03.035>> accessed 31 March 2024

boundaries of genetic interventions in reproduction, highlighting the critical importance of cautious deliberation in navigating these complex moral landscapes.<sup>108</sup>

Building upon the intricate discussion of non-medical sex selection and its implications within the realms of eugenics, designer babies, and the ethical considerations of the slippery slope argument, the discussion now transitions to a closely related and critically important issue: gender inequality. This issue underpins the argument for maintaining the ban on non-medical sex selection. The next section emphasises the necessity of embedding gender equality within the framework of reproductive technology discussions, especially concerning non-medical preimplantation sex selection.

### 3.4 Gender Inequality

Regarding the argument concerning gender inequality in non-medical sex selection, particularly the aspect of discrimination on the ground of sex, which is one of the most highly debated ethical case against the practice<sup>109</sup>, this argument concerns the practice's perceived interrelationship with sexism and discrimination against women. Within this argument, sex selection is deemed to be an expression of sexism.<sup>110</sup> Sex selection is perceived and believed to be inherently sexist due to its involvement upon making value judgement about a person based solely on sex.<sup>111</sup> It is argued that choosing the sex of the baby is possibly one of the greatest displays of sexism as it places the worth of a human being entirely on the sex.<sup>112</sup>

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<sup>108</sup> Green R, *Babies by Design: The Ethics of Genetic Choice* (2008)

<sup>109</sup> Agomoni Ganguli-Mitra, 'Sex selection and global gender justice' (2021) *Journal of Social Philosophy* 52 217, 233 <<https://doi.org/10.1111/josp.12405>> accessed 18 October 2022

<sup>110</sup> Jonathan M Berkowitz and Jack W Snyder, 'Racism and Sexism in Medically Assisted Conception' (1998) 12(1) *Bioethics* 25, 44 <<https://doi.org/10.1111/1467-8519.00090>> accessed 20 October 2022; Agomoni Ganguli-Mitra, 'Sex selection and global gender justice' (2021) *Journal of Social Philosophy* 52 217, 233 <<https://doi.org/10.1111/josp.12405>> accessed 18 October 2022

<sup>111</sup> 'Beyond Therapy: Biotechnology and the Pursuit of Happiness' (*President's Council on Bioethics*, October 2003) <<https://bioethicsarchive.georgetown.edu/pcbe/reports/beyondtherapy/fulldoc.html>> accessed 20 October 2022; Neil Levy, 'Against Sex Selection' (2007) 100(1) *Southern Medical Journal* 107 <<http://dx.doi.org/10.1097/SMJ.0b013e31802e6138>> accessed 20 October 2022; Heather Strange and Ruth Chadwick, 'The ethics of nonmedical sex selection' (2009) 18(3) *Health Care Analysis* 252, 266 <<http://dx.doi.org/10.1007/s10728-009-0135-y>> accessed 17 October 2022

<sup>112</sup> Tabitha M Powledge, 'Unnatural Selection on Choosing Children's Sex' in Helen B Holmes, Betty B Hoskins, and Michael Gross (eds), *The Custom-Made Child?* (Springer 1981) <[https://link.springer.com/chapter/10.1007/978-1-4612-6007-3\\_27](https://link.springer.com/chapter/10.1007/978-1-4612-6007-3_27)> accessed 20 October 2022; J B Ullman and L S Fidell, 'Gender Selection and Society' in Offerman and J Zuckerberg (eds), *Gender in Transition* (Springer 1989) <[https://doi.org/10.1007/978-1-4684-5631-8\\_15](https://doi.org/10.1007/978-1-4684-5631-8_15)> accessed 20 October 2022

Some scholars state that sex selection is a form of violation against human dignity. This is because they believed that children, whatever their sex may be, have the right to be loved, respected, and valued for their inherent worth, which cannot and must not be treated like a commodity.<sup>113</sup> Consequently, opponents of non-medical sex selection rely on this claim to demonstrate that gender inequality is a potential harm that can happen. To this end, it is often asserted that the prohibition on non-medical preimplantation sex selection is justified considering the harm of gender inequality that might give way should the law allow such practice.

Turning to International Human Rights Law, particularly principles of equality and non-discrimination, the issue of sex selection invites scrutiny into the potential discriminatory practices underlying such reproductive choices. IHRL, including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), affirms the principle of equality before the law and prohibits discrimination on any ground, including sex (Article 26 of the ICCPR). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) further elaborates on the definition of discrimination against women (Article 1) and mandates states to eliminate discrimination (Article 2), directly addressing the concerns raised by sex selection practices.

The CEDAW Committee has explicitly expressed concerns over son preference and the gender stereotypes perpetuating this practice, particularly noting the impact of policies such as China's former one-child policy on the skewed sex ratio.<sup>114</sup> Furthermore, the topic on sex selection has been brought up within the Commission on the Status of Women (CSW) during its 52nd session where the US and the Republic of Korea had submitted a draft resolution on the elimination

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<sup>113</sup> Andrew Crane and Bahar Ali Kazmi, 'Business and Children: Mapping Impacts, Managing Responsibilities' (2010) 91(4) *Journal of Business Ethics* 567, 586 <<https://www.jstor.org/stable/27749821>> accessed 20 October 2022; Andrea L Kalfoglou, M Kammersell, S Philpott and Edgar Dahl, 'Ethical arguments for and against sperm sorting for non-medical sex selection: A review' (2013) 26(3) *Reproductive Biomedicine Online* 231, 239 <<https://doi.org/10.1016/j.rbmo.2012.11.007>> accessed 20 October 2022; Rachael Wong and Grant Gillet, 'Think of the Children: Sex Selection and Child Welfare' (2015) 22(4) *Journal of Law and Medicine* 751, 762 <[https://www.researchgate.net/publication/281637066\\_Think\\_of\\_the\\_Children\\_Sex\\_Selection\\_and\\_Child\\_Welfare](https://www.researchgate.net/publication/281637066_Think_of_the_Children_Sex_Selection_and_Child_Welfare)> accessed 20 October 2022

<sup>114</sup> Concluding Comments on China's Fifth and Sixth periodic reports, Thirty Sixth Session, 7–25 August 2006, UN Doc CEDAW/C/CHN/CO/6, 25 August 2006, paragraphs 17 and 32; See also Brigit Toebes, 'Sex Selection under International Human Rights Law' (2008) 9(3) *Medical Law International* 197, 225 <<http://dx.doi.org/10.1177/096853320800900301>> accessed 20 October 2022

of harmful practices of prenatal sex selection and female infanticide.<sup>115</sup> During such occasion, however, several state's delegates including the EU delegation and the Chinese opposed the proposed resolution. For the German delegate, it was reported that such opposition against the resolution was steered by a view that it might be a hidden attack on a right to abortion.<sup>116</sup>

In addition, reference to sex selection practice is made by the Human Rights Committee (HRC), a treaty monitoring body of the International Covenant on Civil and Political Rights (ICCPR), when the HRC refers to such practice in its General Comment on equality of rights between men and women. It is expressed that 'the subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses'.<sup>117</sup> However, it can be said that such notion expressed in this document possibly mainly targets an event of sex selection in which the sex-selective process is carried out after the implantation *i.e.* sex-selective abortion, including female infanticide. Notably, there is a noticeable gap in IHRL discourse regarding pre-implantation sex selection, suggesting a need for the legal framework to evolve in response to advances in reproductive technologies. This analysis underscores the complex interplay between reproductive rights, technological advances, and gender discrimination within the IHRL framework. It reveals an oversight in addressing pre-implantation sex selection, calling for a nuanced understanding and adaptation of IHRL principles to contemporary bioethical challenges. Upon analysing the discourse of International Human Rights Law on gender discrimination and equality, it becomes apparent that while significant attention has been directed towards combating prenatal sex selection and abortion practices, as evidenced by HRC's General Comment on the equality of rights between men and women under the ICCPR, a discernible gap emerges in the context of pre-implantation sex selection practices.

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<sup>115</sup> Elimination of harmful practices of prenatal sex selection and female infanticide : draft resolution / Republic of Korea and the United States of America <[https://digitallibrary.un.org/record/593970/files/E\\_CN.6\\_2007\\_L.5-EN.pdf?ln=fr](https://digitallibrary.un.org/record/593970/files/E_CN.6_2007_L.5-EN.pdf?ln=fr)> accessed 20 October 2022

<sup>116</sup> Brigit Toebes, 'Sex Selection under International Human Rights Law' (2008) 9(3) *Medical Law International* 197, 225 <<http://dx.doi.org/10.1177/096853320800900301>> accessed 20 October 2022

<sup>117</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women) 29 March 2000, CCPR/C/21/Rev.1/Add.10 <<https://www.refworld.org/docid/45139c9b4.html>> accessed 20 October 2022

### 3.5 Harm from Skewed Sex Ratio at Birth (SRB)

Another highly prominent argument against non-medical sex selection is the skewed sex ratio at birth (SRB), which is deemed as another notable harm to society. For countries such as India and China, this SRB argument is considerably persuasive given that the evidence of such event can be found in the population statistics reports<sup>118</sup>.

In India, it is believed that women are still generally deemed as economic as well as social burden to their families. Indian women are expected to give birth to a son(s) in order to secure their economic and social status; hence, sons are heavily preferred over daughters. With the prevalent dowry system, this means that families with daughters will have to pay considerable sum of money to the groom's family upon their daughter's marriage<sup>119</sup>. And vice versa, with the dowry systems in place, sons are thought to bring wealth into their families through the dowry payment.<sup>120</sup> Seemingly, the dowry system with sometimes exceedingly high payment can carry detrimental effects onto the brides as they are considered costly to the families. Since 1990, it is reported that more than 20,000 brides have been killed usually by immolation because their husbands (or the husbands' families) were not satisfied with the amount and/or

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<sup>118</sup> 'Towards a normal sex ratio at birth in China' (UNFPA China Policy Brief Series) <[https://china.unfpa.org/sites/default/files/pub-pdf/English-](https://china.unfpa.org/sites/default/files/pub-pdf/English-UNFPA%20China%20policy%20brief%20on%20GBSS%20推动中国出生性别比正常化英文.pdf)

UNFPA%20China%20policy%20brief%20on%20GBSS%20推动中国出生性别比正常化英文.pdf> accessed 20 October 2022; Shuzhuo Li, 'Imbalanced Sex Ratio at Birth and Comprehensive Intervention in China' (4<sup>th</sup> Asia Pacific Conference on Reproductive and Sexual Health and Rights, Hyderabad, October 2007) <<https://www.unfpa.org/sites/default/files/event-pdf/china.pdf>> accessed 20 October 2022; UNFPA, 'How many girls are missing at birth in India? Trends in sex ration at birth (2001-12)' (2015) <<https://india.unfpa.org/sites/default/files/pub-pdf/TrendsInSRB.pdf>> accessed 18 October 2022; 'Sex ratio at birth (male births per female births) – India ,China' (*The World Bank Data*, 2019) <<https://data.worldbank.org/indicator/SP.POP.BRTH.MF?end=2020&locations=IN-CN&start=1992>> accessed 20 October 2022

<sup>119</sup> Stevan Harrell and Sara A Dickey, 'Dowry Systems in Complex Societies' (1985) 24(2) *Ethnology* 105, 120 <<https://doi.org/10.2307/3773553>> accessed 18 October 2022; Mudita Rastogi and Paul Therly, 'Dowry and Its Link to Violence Against Women in India: Feminist Psychological Perspectives' (2006) 7(1) *Trauma, Violence, & Abuse* 66,77 <<https://doi.org/10.1177/1524838005283927>> accessed 18 October 2022

<sup>120</sup> Andrea Krugman, 'Being Female Can be Fatal: An Examination of India's Ban on Pre-Natal Gender Testing' (1998) 6 *Cardozo J Int'l & Comp L* 215 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/cjic6&div=12&id=&page=>> accessed 20 October 2022; 'India's Female Freefall' (*CNN*, 19 June 2001) <<https://edition.cnn.com/2001/WORLD/asiapcf/south/06/19/india.ultrasound/index.html>> accessed 18 October 2022; Kimberly Downing, 'A Feminist is a Person Who Answers 'Yes' to the Question, 'Are Women Human?': An Argument Against the Use of Preimplantation Genetic Diagnosis for Gender Selection' (2005) 8(2) *DePaul Journal of Health Care Law* 431, 433 <[https://www.researchgate.net/publication/7239409\\_A\\_feminist\\_is\\_a\\_person\\_who\\_answers\\_yes\\_to\\_the\\_question\\_are\\_women\\_human\\_an\\_argument\\_against\\_the\\_use\\_of\\_preimplantation\\_genetic\\_diagnosis\\_for\\_gender\\_selection](https://www.researchgate.net/publication/7239409_A_feminist_is_a_person_who_answers_yes_to_the_question_are_women_human_an_argument_against_the_use_of_preimplantation_genetic_diagnosis_for_gender_selection)> accessed 18 October 2022

the promptness of their promised dowry payment<sup>121</sup>. Brides-to-be are also sometimes killed by their male family members simply because they are too costly and perceived as a huge financial burden to the families<sup>122</sup>. From this information, there is a strong or even an extreme form of sexism as well as a great degree of violence against women within the Indian society. Therefore, it is reasonable to derive that there is an actual harm from allowing the sex selection practice to take place. By legally allowing sex selection, it echoes the message that it is acceptable to prefer one sex over the other *i.e.* specifically boys over girls in this scenario. This can potentially strengthen the underlying social value that men are better than women, which further reinforces patriarchy and pseudo emancipation of women in the said society.

Looking at the statistics, it is reported that in 1984 when the ultrasound technology started to become easily accessible, 8,000 Indian women underwent sex selective abortions after finding out the sex of the foetus, all of which were female<sup>123</sup>. During the past three decades since then, with a more accessible and cheaper technology and a push for smaller families due to economic situations, those numbers have grown exponentially.<sup>124</sup>

Consequently, with regards to sex selection law imposed in India particularly in light of the advent of PGD technology, the 1994 Prenatal Diagnostic Techniques Act<sup>125</sup> (Prohibition of sex section) was amended in 2003<sup>126</sup>, of which it also extends its limitation covering the use of

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<sup>121</sup> Mudita Rastogi and Paul Therly, 'Dowry and Its Link to Violence Against Women in India: Feminist Psychological Perspectives (2006) 7(1) Trauma, Violence, & Abuse 66,77 <<https://doi.org/10.1177/1524838005283927>> accessed 18 October 2022

<sup>122</sup> Mudita Rastogi and Paul Therly, 'Dowry and Its Link to Violence Against Women in India: Feminist Psychological Perspectives (2006) 7(1) Trauma, Violence, & Abuse 66,77 <<https://doi.org/10.1177/1524838005283927>> accessed 18 October 2022; Kavya Sukumar, 'Dowries are illegal in India. But families -including mine- still expect them' (*Vox*, 6 February 2017) <<https://www.vox.com/first-person/2017/2/6/14403490/dowry-india-bride-groom-dilemma>> accessed 18 October 2022

<sup>123</sup> Bela Ganatra, Siddhi Hirve, and V N Rao, 'Sex-Selective Abortion: Evidence from a Community-Based Study in Western India' (2001) 16(2) *Asia-Pacific Population Journal* 109, 124 <<https://doi.org/10.18356/555d9cf2-en>> accessed 19 October 2022; Nehaluddin Ahmad, 'Female feticide in India' (2010) 26(1) *Issues Law Med* 13,29 <<https://pubmed.ncbi.nlm.nih.gov/20879612/>> accessed 19 October 2022

<sup>124</sup> Bela Ganatra, Siddhi Hirve, and V N Rao, 'Sex-Selective Abortion: Evidence from a Community-Based Study in Western India' (2001) 16(2) *Asia-Pacific Population Journal* 109, 124 <<https://doi.org/10.18356/555d9cf2-en>> accessed 19 October 2022; Scott Baldauf, 'India's 'Girl Deficit' Deepest Among Educated' (*The Christian Science Monitor*, 13 January 2006) <<http://www.csmonitor.com/2006/0113/p01s04-wosc.html>> accessed 19 October 2022

<sup>125</sup> The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994; India Code (1994) <<http://nrcw.nic.in/shared/sublinkimages/78.htm>> accessed 20 October 2022

<sup>126</sup> The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) (Amendment) Act, 2003, No. 14

PGD for sex selection purposes.<sup>127</sup> As a result, sex selection is illegal across India and considering the fact witnessed in the above paragraphs, such prohibition and limitation of reproductive rights seem to be justifiable because of the existing strong preference of sons, not to mention the extreme form of sexism such as sex selective abortion, female infanticide, and bride killings.

In line with India, China's patriarchal social structure together with the notorious One Child Policy, China's national family planning programme imposed between 1980-2016, ultimately produced similar degree of pressures on Chinese women.<sup>128</sup> The strict birth control policy placed a legal limit on family size, preventing individuals from having multiple children to achieve the birth of the preferred son(s). As a result, son preference manifests itself through sex selection practices, which are believed to be performed either prenatally as well as postnatally.<sup>129</sup> Concurrently with the rapid accessibility of reproductive technology, in particular, the ultrasound and the 1957 law that legalised abortion, to facilitate the early effort of the One Child Policy introduction, the number of abortions soared. Consequently, China has witnessed an unprecedented rise in the skewed sex ratio at birth since the 1980s, when ultrasound technology was easily accessible nationwide with free of charge services provided by the Chinese government.<sup>130</sup> Evidence points that China's sex ratio at birth has been changing as a result of legalised abortion and its popularity. From various studies, the numbers revealed that skewed sex ratio (boys more than girls) increased with the abortion ratio, indicating that there is a positive correlation between sex selective abortion and the sex ratio at birth.<sup>131</sup>

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<sup>127</sup> Ashley Bumgarner, 'A right to choose?: Sex selection in the international context' (2007) 14(1289) *Duke Journal of Gender Law & Policy* 1289 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1139&context=djglp>> accessed 17 October 2022

<sup>128</sup> Alexa Olesen, 'China Sticking to One-Child Policy' (*Washington Post*, 23 January 2007) <<https://www.washingtonpost.com/wp-dyn/content/article/2007/01/23/AR2007012300398.html>> accessed 19 October 2022

<sup>129</sup> Yuyu Chen, Hongbin Li, Lingsheng Meng, 'Prenatal sex selection and missing girls in China: evidence from the diffusion of diagnostic ultrasound' (2013) 48(1) *Journal of Human Resources* 36, 70 <<https://doi.org/10.1353/jhr.2013.0003>> accessed 19 October 2022

<sup>130</sup> Avraham Ebenstein, 'The 'Missing Girls' of China and the Unintended Consequences of the One Child Policy' (2010) 45(1) *Journal of Human Resources* <<http://dx.doi.org/10.1353/jhr.2010.0003>> accessed 19 October 2022

<sup>131</sup> Wanru Xiong, 'Dynamics between Regional Sex Ratios at Birth and Sex Ratios at Prime Marriageable Ages in China' (2022) 48(2) *Population and Development Review* 545, 578 <<https://doi.org/10.1111/padr.12476>> accessed 19 October 2022

The argument against non-medical sex selection, particularly informed by the analysis of skewed sex ratio at birth (SRB) in countries like China and India, underscores the potential harm generated by such practices. This rationale, however, encounters nuanced considerations when applied to a context like Thailand, where there is an absence of skewed SRB and a comparatively milder cultural preference for sons. In this setting, advocates for non-medical sex selection might challenge the prohibition of such practices by arguing that the harm associated with skewed SRBs is less compelling. In Thailand, the lack of evidence for a skewed SRB might suggest that non-medical sex selection has not led to the pronounced demographic and social imbalances observed in other regions.<sup>132</sup> This could be interpreted to mean that within certain regulatory or cultural frameworks, the practice might not inherently result in harmful gender disparities. Hence, the ethical and social arguments underpinning the prohibition of non-medical sex selection might lose some of their urgency in such a context.

However, this perspective necessitates a deeper examination. The absence of skewed SRB could reflect the effectiveness of current social, cultural, or legal norms in preventing these harms, rather than indicating an inherent harmlessness in non-medical sex selection and the eugenics arguments and the slippery slope they present, as discussed above, remain vital. This insight supports the prohibition of the practice as a preventive measure, aimed at safeguarding against potential future imbalances that could emerge if these norms were to shift.

Furthermore, the practice of non-medical sex selection, even in the absence of skewed SRB, may still embody and perpetuate underlying gender biases. It can uphold the notion that the value of children, and by extension individuals, is contingent upon their gender, contravening principles of gender equality and non-discrimination, discussed above in relation to family balancing. This perspective suggests that prohibition could be justified on the grounds of combating subtle forms of gender bias and fostering equality.

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<sup>132</sup> Guilмото C Z, 'The Sex Ratio Transition in Asia' (2009) 35(3) Population and Development Review 519, 549 <<http://www.jstor.org/stable/25593663>> accessed 31 March 2024; 'The Gender Ratio of Thailand' (GlobalData, 2021) <<https://www.globaldata.com/data-insights/macroeconomic/the-gender-ratio-of-thailand-325512/>> accessed 31 March 2024

The consideration of allowing non-medical sex selection in the absence of immediate harm also raises concerns about setting a precedent that could lead to unintended consequences if socio-cultural attitudes were to change. This argument emphasises the potential for the practice to contribute to harmful trends over time, advocating for a cautious regulatory approach. This aligns with the thesis proposal advocating for the continuation of the prohibition on non-medical sex selection in Thailand.

Therefore, while Thailand's lack of a skewed SRB challenges the direct applicability of arguments against non-medical sex selection observed in other contexts, it does not negate the rationale for its prohibition. The debate in Thailand's context highlights the importance of a comprehensive analysis that considers preventive ethics, the reinforcement of gender biases, potential future risks, and adherence to international human rights principles. Such an approach advocates for the cautious regulation of non-medical sex selection to advance broader objectives of gender equality and prevent potential harm, even where immediate evidence of skewed SRB is not apparent. Therefore, the subsequent chapters, particularly Chapter Six, delve into these complexities, examining a broader spectrum of factors beyond skewed SRB to provide a more thorough understanding of the ethical, cultural, and legal dimensions that must be weighed in the evaluation of non-medical preimplantation sex selection in Thailand.

### 3.6 The Children's Wellbeing Consideration

The contentious debate surrounding non-medical sex selection, with its ethical dilemmas and societal implications, intersects with the topic of children's wellbeing consideration. While advocates argue that sex selection contributes to a child's well-being by ensuring they are strongly desired and appreciated by their parents, critics raise significant concerns, arguing that the emphasis on selecting a child based on their sex raises questions about gender equality and implies that a child's worth and love from parents are contingent on their gender. Moreover, the potential commodification of children through selective procreation challenges the notion of unconditional acceptance and may lead to disappointments if the

actual child does not meet parents' expectations.<sup>133</sup> The discussion in this section underscores the need for a careful examination of the impact of non-medical sex selection on a child's overall well-being within the framework of IHRL.

Proponents of non-medical sex selection and critics alike engage in a complex discourse that not only reflects on parental autonomy and preference but also raises fundamental questions about the rights and intrinsic value of children.<sup>134</sup> As this section transitions to examining this issue through the lens of IHRL, it becomes imperative to explore how such practices align or conflict with the principles enshrined in global legal standards, particularly those aimed at protecting children's rights and ensuring their wellbeing.

International treaties, such as the United Nations Convention on the Rights of the Child (CRC), offer a framework for assessing whether the desire for sex selection can be justified in the face of the need to uphold the dignity, equality, and best interests of every child.<sup>135</sup> This discussion aims to bridge the gap between individual preferences and universal rights, casting a critical eye on how sex selection practices may affect the broader objectives of child welfare and gender equality as outlined by IHRL.

Considering the child's best interest, this principle is a core tenet of international human rights law, particularly as outlined in the United Nations Convention on the Rights of the Child (CRC).<sup>136</sup> The CRC asserts that every child has the inherent right to life and insists on ensuring

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<sup>133</sup> Eftekhaari TE and others, 'Ethical Considerations in Sex Selection' (2015) 4 J Educ Health Promot 32 <<https://doi.org/10.4103/2277-9531.157184>> accessed 31 March 2024; Strange H, 'Non-medical Sex Selection: Ethical Issues' (2010) 94(1) British Medical Bulletin 7 <<https://doi.org/10.1093/bmb/ldq002>> accessed 31 March 2024; W Dondorp and G de Wert, 'Preconception Sex Selection for Non-medical and Intermediate Reasons: Ethical Reflections' (2010) 2(4) Facts Views Vis Obgyn 267–277 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4086011/>> accessed 24 September 2024

<sup>134</sup> Simon-Kumar R, Sharma V, and Singh N, 'Between Reproductive Rights and Sex Selection in New Zealand's Abortion Reforms: Practitioner Dilemma in Institutionalising 'Choice' and 'Agency'' (2023) 18(1) Global Public Health 2224420 <<https://doi.org/10.1080/17441692.2023.2224420>> accessed 31 March 2024; Strange H and Chadwick R, 'The Ethics of Nonmedical Sex Selection' (2010) 18(3) Health Care Analysis 252 <<https://doi.org/10.1007/s10728-009-0135-y>> Accessed 4 December 2024

<sup>135</sup> UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013 <<https://www.refworld.org/legal/general/crc/2013/en/95780>> accessed 5 March 2024

<sup>136</sup> UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013 <<https://www.refworld.org/legal/general/crc/2013/en/95780>> Accessed 5 March 2024

the child's survival and development (Article 6). Both the CRC and CEDAW, which examined previously in 3.4 'Gender Equality', provide a strong legal framework advocating for non-discrimination and the promotion of equality. The CRC's emphasis on protecting children from all forms of discrimination (Article 2) and CEDAW's focus on eliminating discrimination against women in all matters relating to marriage and family relations (Article 16) challenge the premises of sex selection practices. By allowing parents to choose the sex of their child, such practices may inadvertently perpetuate gender stereotypes and contribute to a societal devaluation of one sex over the other, thereby undermining efforts to promote gender equality as envisaged by these international treaties.

Moreover, children's rights to develop their identity and autonomy are central to their wellbeing. Non-medical sex selection can be argued to infringe upon these rights by imposing parental desires and societal expectations on children even before they are born, potentially limiting their ability to freely develop their personalities and identities. Prohibiting such practices underscores the importance of recognising children as individuals with their own rights, rather than extensions of their parents' wishes or bearers of societal norms. This perspective is consistent with Article 8 of the CRC, which emphasises the right of the child to preserve their identity without unlawful interference.

Incorporating the prohibition of non-medical sex selection as a measure to protect and promote children's wellbeing reflects a commitment to upholding the principles of equality, non-discrimination, and respect for the autonomy and dignity of every child, as enshrined in IHRL. This approach not only addresses the direct implications of sex selection on children born through such means but also considers the broader societal and ethical implications, advocating for a world where every child is valued and respected, irrespective of their sex. By framing the argument within the context of children's rights and wellbeing consideration, it becomes clear that prohibiting non-medical sex selection is not only about preventing discrimination but also about fostering societies that respect and uphold the rights of all children.

### 3.7 Medical Tourism and Allocation of Medical Resources

Reproductive medical tourism involves individuals traveling across borders to seek assisted reproductive technologies and services, often due to legal or economic constraints in their home countries.<sup>137</sup> While this phenomenon encompasses various forms of ART, it is important to recognise the ethical complexities that arise when these technologies are accessed outside one's country of residence. For some, reproductive tourism can act as a safety net, offering treatments unavailable or inaccessible at home. This includes not only sex selection but also other forms of ART, such as abortion services and donor conception, which may be subject to restrictive regulations in certain jurisdictions.

For many individuals, reproductive tourism offers a means to exercise their reproductive autonomy in the face of domestic legal and ethical constraints. For example, in countries where abortion is heavily restricted or prohibited, crossing borders to access safe abortion services can be a critical option for those in need. Similarly, donor conception services may be sought abroad due to legal prohibitions or limited availability in the home country. In these cases, reproductive tourism ensures access to necessary and desired reproductive healthcare services, which may otherwise be denied, thus preserving reproductive rights and autonomy.

However, non-medical sex selection represents a more contentious form of reproductive tourism. Unlike essential healthcare services aimed at addressing genuine medical needs, this practice often involves wealthier individuals traveling to countries like Thailand specifically to select the sex of their child for non-medical reasons. Michele Goodwin's analysis in *'Black Markets: The Supply and Demand of Body Parts'* provides critical insights into how ART services, including sex selection, are often entangled in systems of profit and exploitation. Goodwin argues that the commodification of human life reduces embryos and other reproductive materials to marketable entities, a perspective that is directly relevant to this context.<sup>138</sup> This commodification not only enables individuals to 'purchase' desired traits for future children but also reinforces gender stereotypes and risks devaluing one sex over the

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<sup>137</sup> Salama M and others, 'Cross Border Reproductive Care (CBRC): A Growing Global Phenomenon with Multidimensional Implications (A Systematic and Critical Review)' (2018) 35(7) J Assist Reprod Genet 1277, 1288 <<https://doi.org/10.1007/s10815-018-1181-x>> accessed 31 March 2024

<sup>138</sup> Michele Goodwin, *Black Markets: The Supply and Demand of Body Parts* (Cambridge University Press, 2006) <<https://doi.org/10.1017/9781107051041>> accessed 4 December 2024

other.<sup>139</sup> Such practices raise ethical questions about transforming fundamental biological processes into commercial transactions, which significantly diverges from the principles underpinning equitable healthcare.

Building on this understanding, this thesis posits a steadfast argument for continuing the prohibition of non-medical preimplantation sex selection within Thai law, underpinned by a critical examination of reproductive medical tourism and its ramifications on the equitable allocation of medical resources. Medical tourism specifically for sex selection not only commodifies reproduction but also starkly amplifies existing global healthcare disparities.<sup>140</sup> By prioritising elective procedures, this practice diverts medical resources from essential health needs to personal choices, exacerbating global healthcare inequities as wealthier individuals gain access to advanced technologies unavailable to others. The World Health Organisation's report on assisted reproduction underscores how commercialisation of ART widens these inequities and creates accessibility gaps between socio-economic groups.<sup>141</sup> Furthermore, creating markets for ART services banned or restricted in some countries risks exploiting vulnerable populations, necessitating a more equitable and ethical approach to reproductive healthcare. This aligns with the UNESCO International Bioethics Committee's emphasis on the ethical implications of such markets in exploiting economically disadvantaged groups<sup>142</sup>, underscoring the importance of regulatory frameworks to ensure equality.

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<sup>139</sup> Ethics Committee of the American Society for Reproductive Medicine, 'Use of Reproductive Technology for Sex Selection for Nonmedical Reasons: An Ethics Committee Opinion' (2022) 117(4) *Fertility and Sterility* 720, 726 <<https://doi.org/10.1016/j.fertnstert.2021.12.024>> accessed 4 December 2024; Michele Goodwin, *Black Markets: The Supply and Demand of Body Parts* (Cambridge University Press, 2006) <<https://doi.org/10.1017/9781107051041>> accessed 4 December 2024; W Dondorp and G de Wert, 'Preconception Sex Selection for Non-medical and Intermediate Reasons: Ethical Reflections' (2010) 2(4) *Facts Views Vis Obgyn* 267–277 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4086011/>> accessed 24 September 2024

<sup>140</sup> Michele Goodwin, *Black Markets: The Supply and Demand of Body Parts* (Cambridge University Press, 2006) <<https://doi.org/10.1017/9781107051041>> accessed 4 December 2024

<sup>141</sup> Effy Vayena, Patrick Rowe, and P Griffin, *Current Practices and Controversies in Assisted Reproduction: Report of a Meeting* (World Health Organization 2002) <[https://www.researchgate.net/publication/242470726\\_Current\\_Practices\\_and\\_Controversies\\_in\\_Assisted\\_Reproduction](https://www.researchgate.net/publication/242470726_Current_Practices_and_Controversies_in_Assisted_Reproduction)> accessed 4 December 2024

<sup>142</sup> International Bioethics Committee, *Report of the IBC on Assisted Reproductive Technologies (ART) and Parenthood (SHS/IBC-26/19/2 Rev, 2019)* <<https://unesdoc.unesco.org/ark:/48223/pf0000367957>> accessed 4 December 2024

Moreover, the gravitation towards non-medical sex selection exemplifies a troubling prioritisation of personal desires over medical necessities, effectively skewing the allocation of precious medical resources toward elective procedures.<sup>143</sup> This not only challenges the foundational ethos of healthcare distribution based on clinical urgency and medical need but also risks marginalising those in genuine need of medical interventions for health-related reasons. The phenomenon starkly illustrates a wealth-driven access to reproductive technologies, thereby exacerbating social and economic divides and undermining the principle of fairness in healthcare provision.<sup>144</sup>

Reproductive tourism also raises questions about regulatory harmonisation, particularly concerning contentious practices like non-medical preimplantation sex selection. While a global ban might establish a uniform ethical standard and prevent individuals from circumventing domestic prohibitions, achieving such harmonisation is fraught with challenges.<sup>145</sup> Medical ethics emphasises cultural pluralism and the need to respect diverse moral frameworks, which often conflict with universal regulatory models.<sup>146</sup> Arguably, the principle of moral pluralism suggests that allowing variability in ART regulations can foster inclusivity in reproductive healthcare, acknowledging that societies prioritise different ethical values.

Furthermore, this discussion extends to the realm of International Human Rights Law (IHRL), emphasising the right to health as enshrined in international human rights conventions.<sup>147</sup>

The ethical dilemmas and resource allocation issues raised by reproductive medical tourism

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<sup>143</sup> Ethics Committee of the American Society for Reproductive Medicine, 'Use of Reproductive Technology for Sex Selection for Nonmedical Reasons: An Ethics Committee Opinion' (2022) 117 *Fertility and Sterility* 720 <<https://doi.org/10.1016/j.fertnstert.2021.12.024>> accessed 4 December 2024

<sup>144</sup> Strange H and Chadwick R, 'The Ethics of Nonmedical Sex Selection' (2010) 18(3) *Health Care Analysis* 252 <<https://doi.org/10.1007/s10728-009-0135-y>> accessed 4 December 2024; W Dondorp, G de Wert, G Pennings, F Shenfield, P Devroey, B Tarlatzis, P Barri, and K Diedrich, 'ESHRE Task Force on Ethics and Law 20: Sex Selection for Non-Medical Reasons' (2013) 28(6) *Human Reproduction* 1448 <<https://doi.org/10.1093/humrep/det109>> accessed 4 December 2024

<sup>145</sup> G Pennings, 'Legal Harmonization and Reproductive Tourism in Europe' (2004) 19(12) *Human Reproduction* 2689 <<https://doi.org/10.1093/humrep/deh486>> accessed 4 December 2024

<sup>146</sup> Effy Vayena, Patrick Rowe, and P Griffin, *Current Practices and Controversies in Assisted Reproduction: Report of a Meeting* (World Health Organization 2002) <[https://www.researchgate.net/publication/242470726\\_Current\\_Practices\\_and\\_Controversies\\_in\\_Assisted\\_Reproduction](https://www.researchgate.net/publication/242470726_Current_Practices_and_Controversies_in_Assisted_Reproduction)> accessed 4 December 2024

<sup>147</sup> Leary VA, 'The Right to Health in International Human Rights Law' (1994) 1(1) *Health and Human Rights* 24, 56 <<https://doi.org/10.2307/4065261>> accessed 31 March 2024

and non-medical sex selection underscore a violation of the IHRL principle that mandates equitable access to healthcare.<sup>148</sup> The commodification of reproductive processes through medical tourism not only challenges the ethics of healthcare provision but also raises significant IHRL concerns by creating disparities in access to medical technologies based on economic status, thereby contravening the fundamental human right to health.<sup>149</sup>

The thesis also calls attention to how non-medical sex selection, driven by reproductive medical tourism, necessitates a re-evaluation of ethical frameworks within the context of IHRL. It advocates for reproductive choices to be anchored in the promotion of individual and societal well-being, in alignment with IHRL principles that support equitable and just healthcare practices.<sup>150</sup>

Ultimately, reproductive medical tourism underscores the need for policies that protect individual rights while promoting global health equity and equality. Efforts to harmonise reproductive healthcare regulations must carefully balance ensuring access to essential services with upholding ethical standards. By integrating ethical standards with the principles of IHRL, reproductive healthcare policies can reflect the complexities of medical tourism while promoting equitable access and protecting against exploitation. These considerations strengthen the thesis's argument for maintaining the prohibition on non-medical preimplantation sex selection within Thai law. Upholding this prohibition is essential not only to prevent the commodification of human life and the reinforcement of gender stereotypes but also to ensure that reproductive technologies are employed in a manner that prioritises equitable healthcare and aligns with both ethical and human rights standards.

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<sup>148</sup> Lunt N, Smith RD, Exworthy M, Green ST, Horsfall DG, and Mannion R, Medical Tourism: Treatments, Markets and Health System Implications: A Scoping Review (Social Policy and Social Work, 2011) <<https://www.birmingham.ac.uk/documents/college-social-sciences/social-policy/hsmc/publications/2011/medical-tourism-scoping-review.pdf>> accessed 31 March 2024

<sup>149</sup> Cesario SK, 'Implications of Medical Tourism' (2018) 22(3) Nurs Womens Health 269, 273 <<https://doi.org/10.1016/j.nwh.2018.03.008>> accessed 31 March 2024

<sup>150</sup> Blyth E, Frith L, Crawshaw M, 'Ethical Objections to Sex Selection for Non-medical Reasons' (2008) 16 Suppl 1 Reprod Biomed Online 41, 45 <[https://doi.org/10.1016/s1472-6483\(10\)60398-7](https://doi.org/10.1016/s1472-6483(10)60398-7)> accessed 31 March 2024; W Dondorp and G de Wert, 'Preconception Sex Selection for Non-medical and Intermediate Reasons: Ethical Reflections' (2010) 2(4) Facts Views Vis Obgyn 267–277 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4086011/>> accessed 24 September 2024

#### 4. Harmonising Rights and Responsibilities: A Human Rights-Based Framework for Navigating the Complexities of Non-Medical Sex Selection

This thesis embarks on an in-depth exploration of the complex tensions surrounding non-medical sex selection, with a specific aim to reconcile the diverse principles and values implicated. By adopting a human rights-based analytical framework, this study seeks to navigate the intricate landscape of conflicting rights and to establish a coherent pathway that aligns these rights with the advancements in reproductive technologies and evolving societal norms.

Central to this debate is the tension between the principle of reproductive autonomy and the ethical and societal implications of non-medical sex selection practices. While reproductive autonomy is cherished for empowering individuals in their reproductive decisions, it often clashes with the imperative of gender equality and the risk of entrenching societal biases, including eugenics concerns.

The thesis delves into how non-medical sex selection could inadvertently fuel gender discrimination, with individuals choosing the sex of their child based on personal or societal preferences, thereby potentially reinforcing harmful stereotypes and aggravating gender imbalances. These outcomes pose significant challenges to gender equality efforts and underscore the collective responsibility to combat discrimination and safeguard future generations' welfare.

Moreover, the discussion extends to the impact of non-medical sex selection on societal norms and values, especially how such practices shape perceptions of gender and family dynamics. The concept of 'family balancing' highlights a societal tension between valuing individual choice and considering the collective consequences of these choices on social structures and gender relations. Additionally, ethical concerns arise from the commodification of reproductive technologies, the potential for exploitation through reproductive tourism, and the broader ethical debate on regulating reproductive choices to prevent harm.

In light of these considerations, this thesis supports upholding the ban on non-medical preimplantation sex selection in Thailand. This stance is advocated not only to prevent the perpetuation of gender biases but also as a necessary measure to protect societal welfare and promote ethical standards in reproductive technologies.

The thesis proposes a nuanced resolution that integrates the principles of reproductive autonomy, non-discrimination, and respect for individual choices within the broader context of societal welfare and ethical considerations. This balanced perspective recognises the legitimacy of personal reproductive choices while advocating for a responsible and ethically informed approach to non-medical sex selection.

Through a critical evaluation of the arguments from both sides of the debate, this study contributes to a more nuanced understanding of the interplay between human rights, reproductive technologies, and societal norms. It aims to propose a framework that respects individual rights, promotes gender equality, and upholds ethical responsibility, guiding policymakers, practitioners, and individuals toward practices that align with IHRL principles.

The human rights-based analysis and balancing exercise emerge as central to this discourse, highlighting competing human rights claims in the context of non-medical preimplantation sex selection. Arguments in favour, such as family balancing and reproductive autonomy, and against, primarily concerns over gender equality and harms, are all framed within a human rights perspective. This approach underpins the thesis's aim to discern which competing rights should be prioritised, using the developed analytical framework to navigate these complex issues thoughtfully and systematically.

Accordingly, the subsequent section delves into the human rights-based approach and the balancing exercise, synergistically integrating these concepts to forge a pivotal analytical tool. This tool is essential for addressing the central thesis question outlined previously.

#### 4.1 Human Rights-Based Approach

In essence, the human rights-based approach is a conceptual framework directed towards promoting and protecting human rights, based on domestic and international human rights

standards.<sup>151</sup> Its key objectives are to empower rights-holders to recognise and exercise their rights and to reinforce capacity of duty-bearers who have the obligation to respect, protect, and promote human rights.<sup>152</sup> The right-holders in this case are individuals whose human rights are protected under their respective jurisdictional legal framework. The duty-bearers are states or non-state actors who have the duty to respect, enhance, and protect human rights of the rights-holders.<sup>153</sup>

The human rights approach sets out a vision of what ought to be, and hence, it brings an ethical and moral dimension to the discussed issue. By stipulating internationally agreed set of norms, supported by international laws, the human rights approach provides a stronger basis for individuals to make claims on their rights, holding their states to be accountable for their duties to recognise, protect, and promote the access of the individual's awareness and recognition of such rights.<sup>154</sup>

Upon applying the human rights-based approach to the current thesis question, several competing human rights (*i.e.* reproductive autonomy, a right to privacy and a right to respect for private and family life, and gender equality) are at play. Accordingly, it is the aim of this thesis to determine which of these competing human rights should be prioritised and favoured, under the justification using the below proposed combined analytical framework.

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<sup>151</sup> 'Applying a Human Rights-Based Approach to Poverty Reduction and Measurement- A Guide for National Human Rights Institutions' (European Network of National Human Rights Institutions) <<https://ennhri.org/about-nhris/human-rights-based-approach/>> accessed 19 October 2022

<sup>152</sup> 'Applying a Human Rights-Based Approach to Poverty Reduction and Measurement- A Guide for National Human Rights Institutions' (European Network of National Human Rights Institutions) <<https://ennhri.org/about-nhris/human-rights-based-approach/>> accessed 19 October 2022

<sup>153</sup> 'Applying a Human Rights-Based Approach to Poverty Reduction and Measurement- A Guide for National Human Rights Institutions' (European Network of National Human Rights Institutions) <<https://ennhri.org/about-nhris/human-rights-based-approach/>> accessed 19 October 2022

<sup>154</sup> Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the 'rights-based approach' to development into perspective' (2004) 25(8) Third World Quarterly 1415, 1437 <<https://www.jstor.org/stable/3993794>> accessed 19 October 2022; Celestine Nyamu-Musembi and Andrea Cornwall, 'What is the "rights-based approach" all about? Perspective from international development agencies' (2004) Institute of Development Studies publication IDS Working paper no.234 <<https://www.participatorymethods.org/resource/what-rights-based-approach-all-about-perspectives-international-development-agencies>> accessed 19 October 2022

## 4.2 Balancing Exercise

Balancing encompasses the process of pinpointing an equilibrated solution between two sides of a set of scales, recognising as well as protecting both rights, refraining to overlook and diminishing one right in favour of the other. It is often used as the last step in the proportionality framework and is a vital tool for reconciling competing human rights claims. Essentially, the desirable solution should be the one that allows one of the rights to be applied with the least sacrifice of the other<sup>155</sup>. Unlike other scenarios of balancing, in this case rights are at stake in each side of the balancing equation.

The balancing exercise firstly asks an evaluator to establish the level of non-satisfaction or detriment to the other competing rights (*i.e.* danger or harm), followed by establishing the importance of satisfying the chosen competing right. Finally, the law of balancing asks an evaluator to consider whether or not the importance of satisfying such chosen right justifies the non-satisfaction or detriment of the other competing rights.<sup>156</sup>

In evaluating how Thai law should approach the regulation of non-medical preimplantation sex selection, this thesis adopts a balanced analysis to critically assess the existing ban under Section 18 of the 2015 ART Act, against the backdrop of international human rights norms and standards. This approach, which focuses on the language of rights, suggests that considering the complex array of competing interests within our analytical framework, maintaining the prohibition on non-medical preimplantation sex selection, as specified in Section 18 of the 2015 ART Act, is justified. This conclusion is reached through a method that combines human rights-based analysis with a balancing exercise, providing a well-rounded and defensible framework for addressing the main question of the thesis.

## 5. Research Methodology

According to the arguments and discussions laid down in the preceding parts, the main research objectives covered within this study are, namely:

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<sup>155</sup> Federica Giovanella, 'Chapter 1: The thorny issue of balancing rights' In *Copyright and Information Privacy* (Edward Elgar Publishing 2017) <[https://www.elgaronline.com/view/9781785369353/08\\_chapter1.xhtml](https://www.elgaronline.com/view/9781785369353/08_chapter1.xhtml)> accessed 19 October 2022

<sup>156</sup> Robert Alexy 'Constitutional Rights, Balancing, and Rationality' (2003) 16(2) *Ratio Juris* 131, 140 <<https://www.corteidh.or.cr/tablas/a63.pdf>> accessed 19 October 2022

- (i) to investigate from a human rights perspective whether non-medical preimplantation sex selection should be prohibited or allowed in Thailand. The investigation will draw on legal doctrine and comparative legal material (case study), experience, arguments, empirical knowledge from relevant stakeholders.
- (ii) to investigate limitations and challenges faced by the implementation and enforcement of Thailand's sex selection laws as experienced by the regulators, doctors, and parents.

Upon the investigations set forth above, the thesis concludes that the current prohibition on non-medical preimplantation sex selection should be upheld.

In order to answer the research question of how Thailand law should respond to sex selection practice, it is imperative that the methods and methodology employed are rigorous. The scope of this thesis encompasses a combination of doctrinal research together with qualitative empirical research, which was carried out by gathering primary data in Thailand. The legal methodology for Chapter Two and Chapter Three are explained below; whereas the methodology for the thesis empirical study (data collection through in-depth interviews) is extensively dealt with in Chapter Four.

## 5.1 Methodology for Chapter Two – Doctrinal Research

Doctrinal research has been identified and described as 'a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine'.<sup>157</sup> It comprises in-depth analysis of the legal doctrine with its development process and legal reasoning.<sup>158</sup> Thus, seemingly, doctrinal legal research involves a thorough examination in legal doctrines, values, principles and existing legal texts such as legislations, statutes, regulations, and case laws.<sup>159</sup> There are two main types of methods exhibited within the doctrinal legal research;

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<sup>157</sup> Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (2<sup>nd</sup> edn, Trans-Atlantic Publications 2007)

<sup>158</sup> Amrit Kharel, 'Doctrinal Legal Research' (2018) SSRN Electronic Journal <<http://dx.doi.org/10.2139/ssrn.3130525>> accessed 8 December 2022

<sup>159</sup> Amrit Kharel, 'Doctrinal Legal Research' (2018) SSRN Electronic Journal <<http://dx.doi.org/10.2139/ssrn.3130525>> accessed 8 December 2022

these are black letter method and socio-legal method. The two methods will be discussed below.

### *5.1.1 Black Letter Research Method*

This legal research method concerns the study of law in a substantive manner. It is a method in which the researchers commonly carry out vast literature reviews of both primary and secondary sources. The term 'black letter' reflects the strict manners and characteristics of this type of legal research method upon reviewing, processing, interpreting, and applying the examined legal topics during the course of the research process. Black letter research method utilises scholarly tools towards analysing the law in question, which is dependent on fact. In essence, the process seeks to distinguish between standards and rules, whose utilisation is determined by a balance of various factors.<sup>160</sup>

In sum, black letter research method encompasses the reading and inquiry into the existing legislation, regulations and case laws in a given topic. Such approach can be identified as a classical doctrinal analysis of law and it is considered a useful method for independent legal research.<sup>161</sup> Researchers who opt for black letter method generally investigate existing legal documents in order to understand and identify the rationale behind the concerned legal issues. Commentary notes and observations associated with the examined legal documents, which can often be found in secondary sources such as legal journals, are also employed to help researchers understand the reasoning and justifications pertaining to the researched legal issues, allowing them to gain insights into the current and emerging issues in specific legal area.<sup>162</sup>

### *5.1.2 Socio-Legal Research Method*

Contrary to the method of black letter research, it can be said that socio-legal research method is a departing branch from the traditional doctrinal research tools. In other words, it

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<sup>160</sup> Emerson Tiller and Frank B Cross, 'What is Legal Doctrine' (2005) Northwestern University School of Law Public Law and Legal Theory Papers <<http://law.bepress.com/nwwps-plltp/art41>> accessed 20 October 2022

<sup>161</sup> Amrit Kharel, 'Doctrinal Legal Research' (2018) SSRN Electronic Journal <<http://dx.doi.org/10.2139/ssrn.3130525>> accessed 8 December 2022

<sup>162</sup> Hanoch Dagan, Roy Kreitner, and Tamar Kricheli-Katz, 'Legal Theory for Legal Empiricists' (2018) 43(2) Law & Social Inquiry 292, 318 <<https://doi.org/10.1111/lisi.12357>> accessed 20 October 2022

places its primary focus on theoretical concepts of law, which considerably alters the manner in which legal research is generated and presented<sup>163</sup>. As a divergence from the field of black letter research method, socio-legal research is deemed to be subjected under the broader umbrella of an interdisciplinary approach that incorporates other social science disciplines such as anthropology, sociology, and psychology.<sup>164</sup>

Under the regime of socio-legal research, it studies all forms of law and institutions of law and tries to understand how they are organised, constructed, as well as looking into the operations in a political, economic, social and environmental context. This interdisciplinary approach enables more diverse methodologies of conducting independent legal research.<sup>165</sup> Within this socio-legal approach, researchers are able to carry out the research in more flexible ways such as conducting interviews, design questionnaires, and other quantitative and qualitative methods in order to collect data so as to answer their specific research thesis.<sup>166</sup>

Whilst the black letter relies heavily on primary sources such as existing legislations, precedents and case studies, socio-legal research leans towards a more flexible tool of using primary sources such as data collected from the designed studies.<sup>167</sup> It should be pointed out that socio-legal approach is a suitable choice for research tool when dealing with new legal knowledge, particularly the emerging issues that may not be extensively captured or covered in black letter research.<sup>168</sup>

In this regard, upon determining the doctrinal methods employed for this thesis, this thesis utilised both black letter approach as well as socio-legal research method. To be more specific, in order to assess, compare, and evaluate the effectiveness of sex selection law

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<sup>163</sup> Douglas W Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) *Journal of Law and Society* 163, 193 <<https://doi.org/10.1111/j.1467-6478.2004.00286.x>> accessed 20 October 2022

<sup>164</sup> David Feldman, 'The Nature of Legal Scholarship' (1989) 52(4) *The Modern Law Review* 498, 517 <<https://www.jstor.org/stable/1096178>> accessed 20 October 2022

<sup>165</sup> D R Harris, 'The development of socio-legal studies in the United Kingdom' (1983) 3(3) *Legal Studies* 315, 333 <<https://doi.org/10.1111/j.1748-121X.1983.tb00427.x>> accessed 20 October 2022

<sup>166</sup> S Blandy, 'Socio-legal approaches to property law research' (2014) 3(3) *Property Law Review* 166, 175 <<http://eprints.whiterose.ac.uk/100288/>> accessed 20 October 2022

<sup>167</sup> S Blandy, 'Socio-legal approaches to property law research' (2014) 3(3) *Property Law Review* 166, 175 <<http://eprints.whiterose.ac.uk/100288/>> accessed 20 October 2022

<sup>168</sup> S Blandy, 'Socio-legal approaches to property law research' (2014) 3(3) *Property Law Review* 166, 175 <<http://eprints.whiterose.ac.uk/100288/>> accessed 20 October 2022

imposed in Thailand, a thorough doctrinal legal research was carried out. This thesis started out by analysing the Thai law vis-à-vis sex selection law and other close proximity laws such as personal autonomy, reproductive rights, and gender equality laws. The thesis also employed socio-legal research method by looking at socio-legal aspects including ethical and social arguments concerning the practice of sex selection, specifically non-medical preimplantation sex selection, and carrying out in-depth interviews with key relevant stakeholders and analysing the collected data to establish this thesis's final argument, which is the proposed legal response to Thai sex selection law.

## 5.2 Methodology for Chapter Three – Case Study Approach (Qualitative)

This thesis employs the case study approach as a qualitative research method to systematically gather pertinent information from diverse jurisdictions, each with distinct approaches to the issue of non-medical preimplantation sex selection. The utilisation of the case study method is integral to acquiring specific details pertaining to non-medical sex selection laws practiced outside Thailand. This case study analysis is essential for evaluating the current prohibition within Thai sex selection law.

The case study method entails comprehensive discussions, including critiques, aiming to furnish insights into the examined issue. Its primary objective is to cultivate a profound understanding of a complex matter within its natural context. Widely adopted across various disciplines, particularly in the social sciences.<sup>169</sup>, the case study method manifests in three main types: intrinsic, instrumental, and collective<sup>170</sup>. Intrinsic case studies investigate unique phenomena, distinguishing them from others. Instrumental case studies leverage a specific case to glean a broader appreciation of an issue or phenomenon. Collective case studies involve the simultaneous or sequential examination of multiple cases to yield a more comprehensive understanding of a particular issue.<sup>171</sup>

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<sup>169</sup> Sarah Crowe, Kathrin Cresswell, Ann Robertson Guro Huby, Anthony Avery, and Aziz Sheikh, 'The case study approach' (2011) *BioMed Central Medical Research Methodology* 11 < <https://doi.org/10.1186/1471-2288-11-100>> accessed 28 July 2023

<sup>170</sup> Stake RE, *The Art of Case Study Research* (SAGE Publications 1995)

<sup>171</sup> Sarah Crowe, Kathrin Cresswell, Ann Robertson Guro Huby, Anthony Avery, and Aziz Sheikh, 'The case study approach' (2011) *BioMed Central Medical Research Methodology* 11 < <https://doi.org/10.1186/1471-2288-11-100>> accessed 28 July 2023

Case studies elucidate, describe, or explore events or phenomena in their everyday contexts, facilitating researchers in comprehending and explaining causal links and pathways, such as those resulting from new policy initiatives.<sup>172</sup> Described by scholars as an empirical inquiry examining a specific phenomenon in its real-life context.<sup>173</sup>, case studies represent a qualitative design wherein researchers meticulously investigate events, programs, activities, processes, individuals.<sup>174</sup>

Key attributes of the case study approach encompass its status as a research strategy involving an in-depth examination of the selected unit of analysis, which could be an individual, household, community, program, system, organisation, event, decision, and policy.<sup>175</sup> Within this thesis, as expounded in Chapter Three, the case study approach is harnessed to scrutinise laws and regulations on sex selection, along with relevant provisions concerning reproductive rights. This investigation extends to government working papers and public opinions across four jurisdictions: the US, the UK, Australia, and Israel.

To discern the most efficacious legal response within the unique context of Thailand concerning non-medical preimplantation sex selection, Chapter Three delves into an exploration and analysis of diverse laws from selected jurisdictions. The case study approach is employed to investigate and compare these distinctive legal landscapes, offering valuable insights and enabling comprehensive discussions regarding the efficacy of sex selection laws and the human rights arguments underpinning legal positions on this issue.

This investigation aims to address the central thesis question: ‘How should Thailand respond to non-medical preimplantation sex selection laws?’. This question becomes the focal point of the case study investigation, allowing for robust conclusions and recommendations to be drawn. The thesis examines various case studies and analyses sex selection laws in a comparative framework between Thailand and four jurisdictions: the US, UK, Australia, and

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<sup>172</sup> Sarah Crowe, Kathrin Cresswell, Ann Robertson Guro Huby, Anthony Avery, and Aziz Sheikh, ‘The case study approach’ (2011) *BioMed Central Medical Research Methodology* 11 < <https://doi.org/10.1186/1471-2288-11-100>> accessed 28 July 2023

<sup>173</sup> Yin, R (2009) *The case study anthology*. SAGE Publications

<sup>174</sup> Creswell, J W (2014) *Research design: Qualitative, quantitative, and mixed method approaches* (4<sup>th</sup> edn) SAGE Publications

<sup>175</sup> De Vaus, D (2001) *Research design in social research*. SAGE Publications

Israel. The extensive coverage and systematic analysis of the sex selection laws of the four jurisdictions in Chapter Three facilitate the application of the case study approach.

In the context of this thesis, qualitative (empirical) methods are thoroughly explored in Chapter Four, providing a comprehensive foundation for the subsequent analytical discussions.

Chapter Five, titled 'Research Findings' is dedicated to presenting and analysing the qualitative data collected from interviews with a diverse group of 28 stakeholders, including academics and legal practitioners, healthcare professionals, and parents who have engaged with non-medical preimplantation sex selection in Thailand. This chapter systematically explores their varied perspectives on the practice, focusing on its legislative frameworks and the implications for human rights within the Thai context. Through thematic analysis, it highlights key themes that emerged from the interviews, offering a deep dive into the collective viewpoints on non-medical preimplantation sex selection and its regulation.

Chapter Six aims to synthesise all accumulated knowledge and insights from the first four chapters along with the empirical findings from Chapter Five. This chapter addresses the core thesis question regarding the appropriateness of Thailand's current prohibition on non-medical preimplantation sex selection. It considers the legal, ethical, and human rights dimensions explored throughout the thesis, including case study analyses and the perspectives gathered from interviews. Chapter Six seeks to integrate these diverse inputs to provide a well-rounded discussion on the issue, without predetermining the conclusion of the analysis.

Lastly, following the detailed analysis and discussions in the preceding chapters, Chapter Seven serves as the culmination of the thesis, offering the comprehensive conclusion along with recommendations and suggested ways forward concerning the topic of non-medical preimplantation sex selection in Thailand.

## 6. Chapter summary

Sex selection for non-medical reasons raises complex legal and ethical issues, increasingly discussed across jurisdictions. Thanks to rapid advancements in medical technology, particularly in assisted reproductive technologies that enable parents to determine the sex of their baby prior to implantation—or even conception—through sperm sorting and pre-genetic screening methods, the practice of sex selection has emerged as an available reproductive option for those who can afford it. Given the accessibility of such technologies, several pertinent questions arise, including whether access to these technologies should be restricted or regulated by states, and whether the response to this question depends on how and to what extent the technology is utilised. Essentially, this thesis aims to explore how Thailand should respond to non-medical preimplantation sex selection.

The arguments and discussions in the subsequent chapters will assist in assessing and determining the appropriate response to non-medical preconception and preimplantation sex selection within Thai law.

# CHAPTER TWO: THAILAND'S RELEVANT LEGAL FRAMEWORK VIS-À-VIS NON-MEDICAL PREIMPLANTATION SEX SELECTION

## 1. Introduction

This chapter initiates an exhaustive exploration of Thai legislation concerning preimplantation sex selection, underscoring the pressing need for legal reform in response to identified challenges and inconsistencies within the existing framework. It embarks on a detailed review of the current statutes, highlighting the difficulties arising from the legislation, especially regarding non-medical sex selection.

The narrative progresses by examining three crucial human rights aspects deeply intertwined with non-medical preimplantation sex selection: autonomy and reproductive rights; privacy and the respect for private and family life; and the issues of sexism and gender equality. Within the Thai legal landscape, each of these areas is dissected to reveal the nation's approach to acknowledging and implementing these critical human rights, providing a rich context for the argument favouring the continued prohibition of non-medical preimplantation sex selection. This examination not only addresses existing gaps but also prepares the ground for a comparative legal analysis in later chapters, aiming to broaden the thesis with diverse legal perspectives.

Structured to reflect these aims, the chapter starts with an introduction to Thai laws on sex selection, elaborating on the practice's background and the legal mechanisms overseeing it. It further incorporates a discussion on the implications of the Thai Constitution for sex selection practices, setting a constitutional context for the ensuing debate on autonomy, privacy, and gender equality.

The discourse then moves to dissect autonomy and reproductive rights within Thai legal narratives, detailing their recognition and limitations in the context of sex selection. This section is pivotal for understanding the legal and ethical frameworks that shape these rights in Thailand.

Attention is then shifted to privacy rights, examining their relevance to non-medical preimplantation sex selection. This exploration highlights the intricate legal challenges and implications stemming from the intersection of privacy rights and sex selection regulation, illustrating the complex legal landscape that Thailand navigates.

The final part delves into sexism and gender equality, evaluating their integration within the Thai legal statutes related to sex selection. This scrutiny reveals how such laws might either exacerbate gender biases or foster a more equitable society, pondering the necessary legal and societal transformations for achieving gender equality objectives.

Overall, this chapter is designed to offer a comprehensive analysis of the intricate relationship between Thai sex selection laws, constitutional principles, and fundamental human rights concerns. It lays a critical foundation for subsequent discussions which help pave the way for the main thesis proposal to uphold the current ban on non-medical preimplantation sex selection.

## 2. Sex Selection Background and Sex Selection Law in Thailand

### 2.1 Background of the 2015 ART Act

The need for ART regulations in Thailand arose from series of infamous incidents relating to fertility treatments performed in Thailand. As a response to a series of high-profile cases on surrogacy, which will be discussed in the following section, the Thai government passed the Children Born out of Assisted Reproductive Technology Protection Act B.E.2558 (2015) (hereinafter the 2015 ART Act). As the Act's primary purposes aim at eliminating commercial surrogacy, this Act only briefly deals with the topic of sex selection. The following analysis provides an outline of some of these cases, which offers helpful context for the current question as it enables us to gain an understanding of why Thai assisted reproductive law, which contains provision of sex selection, was passed and put into effect.

A series of controversial cases concerning surrogacy broke out in 2011 when the Taiwanese company named 'Baby101' based in Bangkok was raided by the Thai police. The event revealed that there were 13 trafficked Vietnamese women used for surrogacy to produce

babies for Taiwanese couples, nine of the rescued women were pregnant, and a further 2 women identified at nearby hospital after just have given birth.<sup>176</sup> Later in 2014, another major story was brought to the public attention. This case involved a Japanese man who was discovered to have fathered 15 children to multiple surrogate mothers in Thailand, and later he fled the country with at least 3 of the babies. The doctor involved with this case is the subject on-going legal proceedings which have not yet been made public. This case ultimately gave rise to the description of Thailand as a 'baby factory' in the Thai media.<sup>177</sup> The most recent internationally high-profile case called 'Baby Gammy' emerged in 2016.<sup>178</sup> This case concerns a baby boy with Down syndrome who had been abandoned in Thailand by his Australian intended parents (and biological father) to be cared for by the hired surrogate mother. His twin sister who was born in good health without Down syndrome, on the other hand, had been taken back to Australia.<sup>179</sup> With the introduction of the ART Act in 2015, it is aimed that problems with respect to surrogacy will be better resolved and regulated through provisions that make commercial surrogacy illegal, carrying both fine and criminal penalties such as imprisonment. It should also be noted that the three cases mentioned earlier are all cases concerning surrogacy, a topic which is now being dealt with by the 2015 ART Act. However, cases on preconception and preimplantation treatment, let alone the specific topic of sex selection, have never been the subject of media headlines in the same manner.

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<sup>176</sup> Alessandro Stasi, 'Protection for Children Born Through Assisted Reproductive Technologies Act, B.E. 2558: The Changing Profile of Surrogacy in Thailand' (2017) 11 *Clinical Medicine Insights Reprod Health* 1,7 <<https://doi.org/10.1177%2F1179558117749603>> accessed 18 October 2022

<sup>177</sup> Whittaker A, 'From 'Mung Ming' to 'Baby Gammy': a Local History of Assisted Reproduction in Thailand' (2016) 2 *Reprod Biomed Soc Online* 71,78 <<https://doi.org/10.1016%2Fj.rbms.2016.05.005>> accessed 18 October 2022

<sup>178</sup> To clarify the timing related to the Baby Gammy case and the 2015 ART Act in Thailand, it's important to note that the events leading to the case occurred before the legislation was enacted. Baby Gammy was born in 2013, and the case came to media attention in 2014. The ART Act, which made commercial surrogacy illegal in Thailand, was enacted in 2015 as a response to this and similar controversies. Therefore, the surrogacy arrangement that involved Baby Gammy took place before the new legal restrictions were implemented. This sequence of events highlights the reactive nature of the legislation, which aimed to address the ethical and legal issues highlighted by the international attention the Baby Gammy case attracted. The case itself was a significant factor influencing the Thai government's decision to regulate surrogacy practices more strictly to prevent similar future incidents. See Whittaker A, 'From 'Mung Ming' to 'Baby Gammy': a local history of assisted reproduction in Thailand' (2016) 2 *Reproductive Biomedicine & Society Online* 71, 78 <<https://doi.org/10.1016/j.rbms.2016.05.005>> accessed 8 April 2024

<sup>179</sup> Whittaker A, 'From 'Mung Ming' to 'Baby Gammy': a Local History of Assisted Reproduction in Thailand' (2016) 2 *Reprod Biomed Soc Online* 71,78 <<https://doi.org/10.1016%2Fj.rbms.2016.05.005>> accessed 18 October 2022

## 2.2 Thailand Sex Selection Laws

### *2.2.1 The Children Born out of Assisted Reproductive Technology Protection Act B.E.2558 (2015)*

The ART Act comprises of 6 chapters, accounting to the total of 56 sections, which stipulate the required qualifications of medical practitioners, the standard of treatment, as well as the mentioning of medical ethics in relation to fertility treatments as prescribed by the Medical Council of Thailand (Chapter 2, section 15). Details and provisions with respect to surrogacy law are laid down in Chapter 3, in which the provisions dictate that surrogacy services carried out in Thailand must conform to the required conditions (Chapter 3, section 21). Other provisions stated within this legislation also include the definitions for relevant terms in association with the procedures of assisted reproductive services, the authority, roles, and the composition of the committee for the protection of children born from assisted reproductive technology. The committee's roles and authority comprise of setting out recommended policies relating to assisted reproductive treatments, resolving problems should one arises, issuing Notifications for the execution of this Act, granting permissions relating to ART practices, and overseeing the ART services across Thailand.<sup>180</sup> The Act also prescribes penalties as well as regulations governing the utilisation of assisted reproductive technologies.

The following sections are the only two provisions in the 2015 Act that concern the topic of sex selection. Section 18 sets out the rules allowing PGD to be carried out. With respect to sex selection, the provision merely mentions that such practice of PGD is permissible if it is not performed in a way so as to select the sex of the baby. Section 45 also considers sex selection, where it prescribes that any medical staff who violate the specified sections, including section 18, will be deemed as violating the ethics of medical profession and may be subject to certain penalties.

#### Section 18

In providing the service relating to the medically assisted reproductive technology, the service provider relating to the medically assisted reproductive technology may necessarily and appropriately examine and diagnose a genetic

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<sup>180</sup> Medical Profession Act BE 2525 (1982), s 7

disease in an embryo which may occur; provided that there shall not be an act understanding as sex selection.

The examination and the diagnosis under paragraph one shall comply with the rules, procedures, and conditions prescribed by the Medical Council of Thailand with the approval of the committee.

It should be pointed out that even though the language of Section 18 might seem to indicate that the law forbids all acts that could be regarded as sex selection, not all preimplantation sex selection is prohibited. In the supplementary law issued by the medical council of Thailand, which is discussed shortly in 3.2.2, sex-selection for medical purposes is permissible.

#### Section 45

Any medical practitioner who fails to comply with section 16, section 17, section 18, section 19, section 20, section 21 section 22, section 26, section 37, or section 42 shall be deemed a violation of ethics of medical profession under the law of medical profession.

According to Section 45, the law of medical profession is stipulated in the Medical Profession Act B.E.2525 (1982). Per Section 45 of the 2015 ART Act, any person who fails to comply with the specified sections shall be deemed in breach of ethics of medical profession. As a result, replying on the terms laid down in the 1982 Medical Profession Act, Section 39 dictates that the penalties for those who are found to be in violation of the ethics of medical profession are to be given notice,<sup>181</sup> this is where an official letter will be issued as a warning and should the practice continue, a more severe measure will be taken including probation<sup>182</sup>, suspension of medical license of up to 2 years<sup>183</sup>, or have their medical license revoked<sup>184</sup>.

It should be noted that considering the scope of the above discussed provisions, sex selection is only referred to the sex selection being carried out using PGD. Hence, this law leaves out another popular method of preimplantation ART *i.e.* sperm sorting, which is mentioned earlier, from its scope of regulation.

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<sup>181</sup> Medical Profession Act BE 2525 (1982), s 39(2)

<sup>182</sup> Medical Profession Act BE 2525 (1982), s 39(3)

<sup>183</sup> Medical Profession Act BE 2525 (1982), s 39(4)

<sup>184</sup> Medical Profession Act BE 2525 (1982), s 39(5)

### *2.2.2 Supplementary law issued by the Medical Council of Thailand*

In addition, following the enactment of the 2015 ART Act, 15 Notifications issued by the Medical Council of Thailand have been introduced. These documents are supplementary regulations that purport to provide further details and guidelines for several assisted reproductive issues that have been addressed in the 2015 Act. While the documents marked as Notifications are considered as subordinate legislation, they are perceived and treated as enforceable law nonetheless (provided that their provisions do not conflict with the Constitution or other laws that are ranked above them).<sup>185</sup> Of all 15 Notifications, there is only one document that mentions sex selection. The Notification on rules and conditions concerning preimplantation genetic diagnosis service No. 95 (5)/B.E.2558<sup>186</sup> states that the purposes of PGD are to test for any abnormality presented in the embryo, which must not be carried out in ways that could be deemed as sex selection.

Rule No. 2<sup>187</sup> The purposes of Preimplantation Genetic Diagnosis are:

2.1 To test for the embryo's genetic abnormalities; and

2.2 To check for possible abnormalities of the embryo in the case where the husband and/or wife has been identified to be carrying genetic disorder.

Provided that there shall not be an act understanding as sex selection.

Again, note that this is the exact wording that is also stated in section 18 of the 2015 ART Act. There is no further clarification or reference given out to the term 'sex selection' as well. In the following Rule No. 3, it establishes several conditions in which PGD can be undertaken. These circumstances include, for example, in the case where the husband and/or wife holds genetic disorder and such disorder can be transferred to the embryo, PGD is permissible<sup>188</sup>. In the event where the husband and/or wife do not contain genetic disorder, PGD is allowed subject to various conditions which include, for instance, there is an evidence of abnormalities in previous pregnancy that could have been avoided through PGD<sup>189</sup>, there is a need to create

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<sup>185</sup> In Thailand, the hierarchy of law is respectively the Constitution, Royal Proclamations, Ministerial Regulations, Orders, Notifications, Royal Decrees, and Rules

<sup>186</sup> The Notification on rules and conditions concerning preimplantation genetic diagnosis service No. 95 (5)/BE 2558, The Medical Council of Thailand

<sup>187</sup> Rule No. 2, The Notification on rules and conditions concerning preimplantation genetic diagnosis service No. 95 (5)/BE 2558, The Medical Council of Thailand

<sup>188</sup> Rule No. 3.1, The Notification on rules and conditions concerning preimplantation genetic diagnosis service No. 95 (5)/BE 2558, The Medical Council of Thailand

<sup>189</sup> Rule No. 3.2.1, The Notification on rules and conditions concerning preimplantation genetic diagnosis service No. 95 (5)/BE 2558, The Medical Council of Thailand

a 'saviour sibling' in order to save the existing child from serious illness,<sup>190</sup> or there is a record of 2 consecutive miscarriages that happened before the 12th week of pregnancy<sup>191</sup>. With respect to sex selection for the purpose of creating a saviour sibling, according to provisions prescribed under Notification No. 95 (5)/B.E.2558, Rule No.3.2.2 expressly and clearly spells out saviour sibling to be one the exceptions of sex selective PGD.<sup>192</sup>

On another important note, notice that the language used in most Thai legal documents, evidently in the sex selection related provisions stipulated in all previous discussed documents, is very heteronormative *i.e* the use of the term 'husband' and 'wife'. The excerpt seen in the above discussion is taken from the official translation from Thai to English language. Seemingly, it can be observed that the Thai legal documents adopt this heteronormative language, which pre-supposes a certain type of family relationship.

In sum, with respect to the 2015 ART Act, the mention of sex selection is only present in one section, which is Section 18, with another related provision, which is Section 45, that mentions Section 18. This is similar to the reference of sex selection that is pointed out in the Notification No. 95 issued by the Medical Council of Thailand *i.e.* there is also just one sentence that contains the term 'sex selection'.

To reiterate, vis-a-vis the 2015 ART Act, whilst its impact on commercial surrogacy is straightforward, after the Act's implementation in 2015, stricter rules have been applied to

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<sup>190</sup> Rule No. 3.2.2, The Notification on rules and conditions concerning preimplantation genetic diagnosis service No. 95 (5)/BE 2558, The Medical Council of Thailand

<sup>191</sup> Rule No. 3.2.3, The Notification on rules and conditions concerning preimplantation genetic diagnosis service No. 95 (5)/BE 2558, The Medical Council of Thailand

<sup>192</sup> There are specific scenarios where selecting the sex of a saviour sibling via Preimplantation Genetic Diagnosis (PGD) is medically justified, particularly in the context of sex-linked genetic disorders. Diseases such as Haemophilia A and Duchenne Muscular Dystrophy are linked to the X chromosome and predominantly affect males who inherit a defective X chromosome without a compensatory normal X. Selecting a female saviour sibling in these cases can reduce the risk of these disorders manifesting. Additionally, sex selection may be used to enhance immunological compatibility for organ donations, such as bone marrow transplants, although this is less common. This approach can also prevent the transmission of the disorder to future generations, aligning with strategies to manage hereditary conditions within families. Such uses of PGD require ethical scrutiny and are regulated to ensure responsible use, focusing on severe medical needs rather than gender preference. See S Franklin and C Roberts, *Born and Made: An Ethnography of Preimplantation Genetic Diagnosis* (Princeton University Press 2006); J C Harper and others, 'Preimplantation genetic diagnosis: state of the art 2011' (2012) 131(2) *Hum Genet* 175 <DOI:10.1007/s00439-011-1097-8> accessed 14 April 2024

surrogacy, including a ban on foreigners seeking surrogacy services in Thailand, with respect to sex selection, the Act still falls short of dealing with the issue. In other words, whilst the Act does deal with sex selection, it only does so in perfunctory way. It allows limited PGD for medical reasons but not for non-medical PGD with limited remedial enforcement. This indicates that certain types of sex selective ART procedures such as sperm sorting, or any new treatment which could be introduced in the future might not be captured by Section 18 of the current ART Act.

The limited attention to sex selection in the ART implies that the prohibition of non-medical sex selection was an afterthought. This inference is supported by the interviews this thesis conducted, the findings of which are presented and explored in more depth in Chapters Five and Six. Moreover, even though the Medical Council of Thailand has issued its Notification on the rules and conditions concerning PGD treatment, the provision that mentions sex selection merely exists in one sentence as witnessed earlier. These laws, arguably, have not stopped the practice of sex selection to persist and thrive in Thailand, as expressed by various interview participants of this study – presented and discussed in Chapter Five.

### 3. Thailand Constitution and Its Implications to Sex Selection

Upon considering how and what direction Thailand should go forward with respect to the issue of regulating non-medical preimplantation sex selection, it is necessary to look at how the current Constitution, as well as other preceding versions of the constitutions, protect relevant rights.

#### 3.1 Rights Relating to Reproductive Autonomy under the Constitution(S)

Before examining the rights related to reproductive aspects prescribed under the Thai Constitution(s), it is important to point out that because of the political disruptions since Thailand had its first Constitution in 1932, as of 2022, Thailand has had 21 constitutions, an average of one roughly every four years.<sup>193</sup> The constitutions that this thesis look into are the

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<sup>193</sup> Suwanttana Kahintapongs 'Thailand's Constitution Development' (2022) 14(1) Research and Development Journal Suan Sunandha Rajabhat University <<https://so05.tci-thaijo.org/index.php/irdssru/article/view/254108>> accessed 19 October 2022

1997, 2007, and the 2017 constitutions. The 2017 Constitution is the most recent Constitution which went into effect on April 6, 2017. The Articles and contents within this in-effect 2017 Constitution supersede and prevail over its precedents.<sup>194</sup>

Vis-à-vis reproductive rights, these are discussed across several legal documents, but none specifically focus on sex selection. The Constitution of Thailand<sup>195</sup> outlines basic rights that shall be upheld. In Section 4<sup>196</sup> of the 1997 Constitution, it states that human dignity, human rights and freedom shall be protected. There is no further clarification following the term 'human dignity, human rights, and freedom' used in this section. However, in Section 28<sup>197</sup> of the 1997 document, human integrity is once again brought up, yet, it only states that an individual can exercise one's rights and freedom as long as it does not violate the rights of others and does not contradict public policy and good moral. The provision of section 28 (1997 Constitution) is similar to Section 28 of the 2007 document as well as Section 25<sup>198</sup>, listed under Part 3 titled 'the rights and freedom of Thai citizen' of the 2017 Constitution, which prescribes that unless otherwise stated within the constitution, provided that it is not prohibited by the constitution or other stipulated laws elsewhere, an individual shall have the right and freedom to do as they wish provided that such act will not violate the rights of others. Notably, considering the wording referring to the rights and freedom of Thai citizen under the Constitution, this portrays a strong negative concept of liberty in Thai Constitution. Negative liberty is the absence of obstacles, restrictions, and limitation. Hence, under the concept of negative liberty, one has the negative liberty/ freedom from interference by other people.<sup>199</sup>

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<sup>194</sup> Suwanttana Kahintapongs 'Thailand's Constitution Development' (2022) 14(1) Research and Development Journal Suan Sunandha Rajabhat University <<https://so05.tci-thaijo.org/index.php/irdssru/article/view/254108>> accessed 19 October 2022

<sup>195</sup> The Constitution of Thailand is a one single document containing sections that prescribe the basis for the rule of law in Thailand. The current Constitution (2017) is a 105-page long document, containing 279 Articles <<http://www.ratchakitcha.soc.go.th/DATA/PDF/2560/A/040/1.PDF>> accessed 20 October 2022

<sup>196</sup> Thailand Constitution (1997), s 4

<sup>197</sup> Thailand Constitution (1997), s 28

<sup>198</sup> Thailand Constitution (2017), s 25

<sup>199</sup> Isaiah Berlin, *Four Essays on Liberty* (OUP 1969); Steven J Heyman, 'Positive and Negative Liberty' (1992) 68 Chi-Kent L Rev 81 <<https://scholarship.kentlaw.iit.edu/cklawreview/vol68/iss1/10>> accessed 8 March 2024

With respect to the recognition of ‘bodily integrity’, Section 31<sup>200</sup> of the 1997 Constitution, despite its title being the right to life and bodily integrity, the provision only mentions issues regarding arrest, incarceration, search, and torture. This is similar to Section 32<sup>201</sup> of the 2007 Constitution and Section 28<sup>202</sup> of the 2017 Constitution, which also mentions issues of arrest, incarceration, search and torture.

A right to private life and family life is stipulated in Section 34 of the 1997 Constitution. Nonetheless, it only explicitly addresses a concept regarding right to privacy and a right for one’s name and reputation to be protected. Similarly, Section 35<sup>203</sup> of the 2007 Constitution and Section 32<sup>204</sup> of the 2017 Constitution also set out a right to private life, however, such concept is only pointed to a right to privacy that prohibits state or other individuals to access or distribute private, false, or defamation information of the concerned individual.

From the above paragraphs vis-a-vis provisions within Thailand’s Constitutions, it can be concluded that the law does not explicitly discuss the concept of reproductive autonomy, nor does it give special reference specifically with regards to the concept of reproductive choice.

Considering access to healthcare and reproductive rights, the Constitution of Thailand upholds equal right of all persons to basic healthcare services. Section 52<sup>205</sup> of the 1997 Constitution establishes a right to access basic healthcare services and in particular for low-income individuals, this right extends to receive free medical services as stipulated in relevant laws. The right to access basic healthcare is also mentioned in Section 51<sup>206</sup> of the 2007 document and Section 47<sup>207</sup> of the 2017 Constitution, which also contain similar provisions as stipulated in Section 52 of the 1997 Constitution. Nevertheless, across all provisions laid down in the Constitution, there is no further clarification with respect to the range of ‘basic healthcare services’ that has been brought up by the Constitution. In this regard, upon looking

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<sup>200</sup> Thailand Constitution (1997), s 31

<sup>201</sup> Thailand Constitution (2007), s 32

<sup>202</sup> Thailand Constitution (2017), s 28

<sup>203</sup> Thailand Constitution (2007), s 35

<sup>204</sup> Thailand Constitution (2017), s 32

<sup>205</sup> Thailand Constitution (1997), s 52

<sup>206</sup> Thailand Constitution (2007), s 51

<sup>207</sup> Thailand Constitution (2017), s 47

into the role played by the courts in implementing or developing ‘basic healthcare services’, it seems that the courts do not play a part in such respect. The arriving of this assumption comes from the fact that after conducting a review on publicly accessible court cases, which are all Supreme Court rulings<sup>208</sup>, there is no case law pertaining to this specific matter.

### 3.2 Reproductive Rights Under Other Thai Legal Documents

Nevertheless, despite the absence of explicit mention of reproductive rights (with the exception of abortion) within the Thai legal framework, including the Constitution(s), issues concerning reproductive health are set out in state policies. In 1997, the Ministry of Public Health (MOPH) issued the National Reproductive Health Policy (NRHP), in which it states that ‘all Thai citizens, at all ages, must have good reproductive life’.<sup>209</sup> The provisions of the NRHP includes a number of objectives, which also include the promotion of appropriate family size for the capacity of each family, proper pre and post-natal care, counselling on reproductive health issues, the improvement of reproductive healthcare services and their availability among youth and adolescents, for example.<sup>210</sup> Here, it should be noted that, once again, the law remains silent pertaining to the issue of sex selection.

In 1998, the Ministry of Public Health released the National Family Planning Programme 19. This document concerns areas of reproductive healthcare provided through the government health delivery system. These areas include, for instance, family planning, maternal and child health, HIV/AIDS prevention, abortion, and sex education.<sup>211</sup> Again, there is neither further explanation nor definition following the introduction of the listed areas.

Also, even though there are laws and regulations on abortion, these legal documents do not contain clear provisions or explicit terms that recognise or specifically address the concept of reproductive autonomy. The recent legal reforms in Thailand's abortion laws, enacted following a Constitutional Court decision in February 2021 and taking effect from January

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<sup>208</sup> In Thailand, only the rulings given in Supreme court cases are publicly accessible.

<sup>209</sup> Family Planning and Population Division, Ministry of Public Health, Thailand National Family Planning Programme 19 (1998)

<sup>210</sup> Reproductive Health Division, Ministry of Public Health, Thailand Reproductive Health Profile 6 (2003)

<sup>211</sup> Family Planning and Population Division, Ministry of Public Health, Thailand National Family Planning Programme 19 (1998)

2022, have significantly liberalised access to abortion. These updates permit abortion within the first trimester (up to 12 weeks) without the need for justification, shifting away from the prior restrictive framework that allowed abortions only under specific circumstances like rape, incest, or threats to the mother's health. Furthermore, the law now allows for abortions up to the 20th week under certain conditions, including health risks to the mother or foetal impairment. It's important to note that these changes aim to broaden the scope for legally permissible abortions to encompass wider health and social reasons.<sup>212</sup> However, these reforms do not address the issue of sex selection, focusing instead on enhancing women's access to safe abortion services and expanding reproductive rights within the context of broader health and social circumstances.

Accordingly, it could be derived that with respect to the issue of reproductive autonomy or reproductive health, rights in relation to such topic are not explicitly constitutionally or legally recognised. Upon looking into some policies issued by government officials, a few references can still be relied upon when discussing issues concerning reproductive health. However, considering the discussion that this thesis focuses, which is reproductive autonomy, these policies still do not provide adequate insight into how human rights intersect with the prohibition in Article 18 of the ART.

### 3.3 Gender Equality Under Thai Laws

With respect to the issue of gender equality, the Thai Constitution sets out to uphold equal rights of all persons to basic public health services. These include the right of low-income individuals to access free medical care from participating medical facilities as stipulated by laws<sup>213</sup>, as mentioned earlier. Additionally, the constitution also prohibits unjust discrimination, particularly with respect to the grounds concerning physical or health

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<sup>212</sup> Umeda S, 'Thailand: Abortion in First Trimester Legalized' (2021) <[www.loc.gov/item/global-legal-monitor/2021-03-01/thailand-abortion-in-first-trimester-legalized/](http://www.loc.gov/item/global-legal-monitor/2021-03-01/thailand-abortion-in-first-trimester-legalized/)> accessed 31 March 2024; บัวทอง ชันยพร, 'ทำแท้ง: เปิดกฎหมายยุติตั้งครรภ์หญิงอายุครรภ์ 12-20 สัปดาห์ และทำไมการทำแท้งปลอดภัยยังเข้าถึงยาก' (BBC Thai, 27 กันยายน 2022) <<https://www.bbc.com/thai/articles/cv2ej8yl7yjo>> accessed 8 Mar 2024; ศิษฐ์ศักดิ์ อนุชา, 'พระราชบัญญัติแก้ไขเพิ่มเติมประมวลกฎหมายอาญา (ฉบับที่ 28) พ.ศ. 2564 (ความผิดฐานทำแท้ง) ' (2564) <[https://www.parliament.go.th/ewtadmin/ewt/parliament\\_parcy/ewt\\_dl\\_link.php?nid=80660&filename=house2558](https://www.parliament.go.th/ewtadmin/ewt/parliament_parcy/ewt_dl_link.php?nid=80660&filename=house2558)> accessed 8 Mar 2024

<sup>213</sup> Thailand Constitution (2017), s 52

conditions.<sup>214</sup> Furthermore, rights regarding healthcare of Thai citizen are laid down in the constitution's Directive Principles of Fundamental right, which dictate that state shall provide and promote primary and efficient public health services to all.<sup>215</sup>

Section 30, of both 1997 and 2007 Constitution, addresses gender equality. It is expressed that all men and women are equal. Discrimination on grounds of sex, age, gender, disability, health, economic status, religion, or politics, for example, shall not be tolerated and is prohibited under the Constitution. This is in line with Section 27 of the 2017 Constitution which also sets out the same provisions.

More importantly, in 2015, the parliament passed the Gender Equality Act<sup>216</sup>, which sets out legal measures upon ensuring and safeguarding equal treatment for all. This anti-discrimination law purports to protect individuals from discrimination and compensating those who have been discriminated against. The Act also addresses equal treatment and rights of LGBTQ persons. However, in relation to the discussion of sex selection, the Act does not mention aspects of sex preference of the foetus. Detailed discussion with respect to the meanings and provisions of the Gender Equality Act, which might give rise to legal implications toward the practice of sex selection, will be discussed in following chapters of this thesis.

Ultimately, upon outlining and examining competing rights associating with the topic of non-medical preimplantation sex selection in Thailand and the legal rights that exist within Thai laws, this part of this chapter presents the rights that both opponents and proponents of non-medical preimplantation sex selection draw on. By laying out the tensions in the Thai legal framework, this facilitates the thesis on evaluating and determining whether the current prohibition stipulated under Section 18 of the 2015 ART Act should be maintained or removed, of which the findings bid for the upholding of such prohibition.

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<sup>214</sup> Thailand Constitution (2017), s 30

<sup>215</sup> Thailand Constitution (2017), s 82

<sup>216</sup> Gender Equality Act (2015)

The forthcoming section outlines the research methodology employed in this thesis, which encompasses a combined methodology of several research methods. It should be noted early on that the methodology described below are a partial introduction of the entire methods used throughout the thesis. The other key research methods particularly utilised to collect the empirical qualitative data are examined later in Chapter Four.

#### 4. Autonomy and Reproductive Rights in Thai Legal Framework: An Overview

The preceding chapter featured a discussion on the concept of autonomy and how it applies to the issue of non-medical sex selection. This section, however, turns to explore the three primary types of autonomy prevalent in Thailand: political autonomy, personal autonomy, and medical autonomy. It aims to provide a background understanding of Thai settings in relation to how Thai law recognises and understands autonomy, which can help shed some light on how reproductive rights are developed and shaped in Thai legal settings.

Upon examining the key concepts of autonomy as recognised and manifested in Thailand in the ensuing analysis, it will become apparent that reproductive autonomy is given less importance compared to other forms of autonomy. This observation suggests that the issue of non-medical sex selection, which is intrinsically connected with reproductive autonomy, may not be adequately addressed in Thailand.

Notably, this thesis advocates for maintaining the current ban on non-medical preimplantation sex selection while also recognising the potential for refining the existing legislation on sex selection to address its shortcomings to bolster the law's effectiveness and its standing. Such improvements can be achieved by a thorough examination of how autonomy has evolved in Thailand, which is the focus of the subsequent section. This analysis will explore the development of autonomy, providing insights into how legal reforms could better align the regulation of sex selection with contemporary ethical standards and respect for reproductive rights in Thai settings.

## 4.1 Autonomy in Thailand: Perspectives, Recognition, and Legal Parameters

At first glance, incorporating discussions of political and personal autonomy into a thesis primarily concerned with reproductive autonomy may seem tangential. However, this section is intentionally designed to provide a comprehensive backdrop of autonomy as recognised in Thailand, enabling readers to understand the broader context of the nation's engagement with autonomy. This exploration is crucial for setting the stage and elucidating why reproductive autonomy, in contrast to the more emphasised domains of political and personal autonomy, remains underdeveloped within the Thai legal framework. Political and personal autonomies in Thailand are predominantly associated with freedom of expression and the liberty to make lifestyle choices. This focus has inadvertently led to the neglect of healthcare and, specifically, reproductive autonomy, which has not received comparable recognition or development. This section aims to highlight this disparity, underscoring the need for a more balanced approach to autonomy that includes a stronger emphasis on reproductive rights.

Before moving on to the rest of the chapter, it is of utmost important to draw the reader's attention to the following information with respect to how Thai legal system develop, interpret, and understand rights. Noted that because Thailand uses a statutory law system (also commonly referred to as a civil law system), which means that it is mostly based on written law passed by legislatures. Primary sources of law include the Constitution, legislations, and other supplementary laws passed by competent state authority.<sup>217</sup> Whilst in the common law system, a development of rights such as a right to privacy and reproductive rights often comes from case law<sup>218</sup>, this chapter, with its particular focus on Thai legal framework, can only investigate the development of such relevant rights through what has been reflected and expressed in the Thai Constitution and other existing laws in relation to the topic of non-medical preimplantation sex selection. In this regard, the constitutional

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<sup>217</sup> Bowornsak Uwanno, *Public Law II: The Separation Between Public and Private Law and the Development of Thai Public Law* (5<sup>th</sup> edn, Chulalongkorn University Press 2007); Rawin Leelapana, Andrew Harding, and Eugenie Merieau, 'Thai Legal History: A Brief Literature Review' (2021) <<http://dx.doi.org/10.1017/9781108914369.003>> accessed 21 October 2022

<sup>218</sup> Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) *Oxford Journal of Legal Studies* 499, 532 <<http://www.jstor.org/stable/20468339>> accessed 21 October 2022

analysis in relation to autonomy is presented below to provide an outline of how the Thai Constitution expresses and recognises autonomy.

Under the current 2017 Constitution of Thailand, the first Part concerns general provisions of the Constitution setting out that Thailand is a kingdom that adopts a democratic regime of the government with the King as the head of state.<sup>219</sup> It sets forth at the outset of the Constitution that human dignity, rights, liberties and equality of the people shall be equally protected under this Constitution.<sup>220</sup> The rights and liberties of the Thai people are dealt with under Part 3, from Section 25 to 49.

With respect to autonomy, Section 25 establishes that a person shall enjoy the rights and liberties to perform any act as long as it is not prohibited by the laws, on the condition that such exercise of rights and liberties does not violate the rights of others. The stipulation outlined under Section 25 can be understood to fall within the realm of autonomy. The stipulation that exercises of rights and liberties must not violate the rights of others implies that considerations like eugenics, public health, and gender equality can serve as legitimate bases for restricting non-medical sex selection. This provision acknowledges that individual autonomy may be subject to limitations when it has the potential to affect wider societal concerns. It suggests a regulatory approach that seeks to balance personal freedoms with ethical, public health, and equality considerations, highlighting the need for thoughtful regulation of non-medical sex selection practices to protect collective interests and promote societal well-being.

Section 32 entitles individual to enjoy the rights or privacy, dignity, reputation and family. While this section, *prima facie* considering the wording contained within the Section, can be assumed to include a right to private family life and hence could be possibly linked to reproductive rights, this seems not to be so accurate. The discussion on this particular issue

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<sup>219</sup> Constitution of Thailand (2017), s 2

<sup>220</sup> Constitution of Thailand (2017), s 4

is later dealt with under the section titled 'the right to privacy and a right to respect for private and family life', listed under heading 3.

Vis-à-vis the right to freedom of expression, this is outlined under Section 34, which stipulates that a person shall enjoy the liberty to express opinions. Yet, it also prescribes exceptions to such right provided that there are legal provisions specifically enacted for the purpose of maintaining the security of the State, securing public order and good morals, and protecting the rights of others. Noted that the exceptions provided here can be broadly interpreted depending on the state's discretion. Hence, in the following section, it is not surprising to find out that various expressions of opinions are strictly limited and sometimes subjected under severe criminal punishment.

Most of the Sections between Section 35-49 deal with political related rights such as the right to enjoy the liberty of communication by any means (Section 36), a right to be informed and access public data in possession of the relevant state agencies (Section 41), a right to form an association, union, organisation or any other group (Section 42), and a right to assemble peacefully and without arms (Section 44), and the right to form a political party (Section 45). Notably, whilst most of the Sections prescribing rights and liberties of Thai people under the Constitution, Section 49 expressly and clearly stipulates that all right and liberties established under Part 3 cannot be exercised to overthrow the democratic regime of government with the King as the head of state. Any exercises of such rights and liberties in this particular regard will be severely subjected to criminal prosecution. Nevertheless, this stipulation is rather disturbing especially when Thailand is currently under the military-led government, backed by the military proposed and passed Constitution of 2017.

After a comprehensive review and examination of constitutional rights in relation to the concept of autonomy, the evidence points to a significant limitation in the recognition, protection, and development of autonomy within the Thai constitutional legal framework. This conclusion is drawn from analysing various sections discussed in the preceding parts,

which collectively provide insights into how autonomy, and particularly reproductive autonomy, is conceptualised and regulated in Thailand. In short, the investigation of autonomy in the Thai constitutional framework as witnessed above, especially in relation to reproductive rights, points to the underdevelopment of reproductive autonomy. Upon contrasting with political and personal autonomy, this signifies a critical area for advancement to ensure comprehensive protection and recognition of individual freedoms and rights. Accordingly, whilst the thesis advocates for maintaining the current ban on sex selection, yet it also points out that Thai law's approach to autonomy, particularly in terms of reproductive rights and non-medical sex selection, demands a critical re-evaluation and development to address the observed gaps.

The following section explores the development of political and personal autonomy in Thailand, extending beyond constitutional analysis to offer a more nuanced understanding of how autonomy is interpreted and implemented in practice. This examination is crucial for the thesis due to the previously discussed reasons, providing necessary context for comprehending the broader implications of autonomy within Thai society. This analysis directly informs the discussion on sex selection, highlighting how the prevailing interpretations of autonomy impact the legal and societal attitudes towards non-medical sex selection practices. By understanding these dimensions of autonomy, the thesis is able to shed light on the complex interplay between individual rights and regulatory frameworks governing sex selection and proposes to uphold the current ban on non-medical preimplantation sex selection in Thailand.

#### *4.1.1 Political Autonomy*

Thailand has been struggling with achieving greater democratic rule for over 90 years since the end of the absolute monarchy in 1932, of which since then, Thailand has had over 20 constitutions and charters, with a series of intervening military coups.<sup>221</sup> For the purpose of this section's discussion, political autonomy refers to a right to self-govern, and rights

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<sup>221</sup> Hitoshi Kotani and Yukaka Ono, 'Thailand's new constitution favours the monarchy and military' (*Nikkei Asia*, 13 April 2017) <<https://asia.nikkei.com/Politics/Thailand-s-new-constitution-favors-the-monarchy-and-military>> accessed 21 October 2022

associated with political aspects under a democratic society<sup>222</sup>, which are different from personal autonomy that is later examined in 2.2.2.

Arguably, one of the early and greatest impacts on how Thailand perceived autonomy to be politically related is the introduction of decentralisation of power, which allows the people to embrace a sense of self-governed. With respect to such decentralisation policy, this was first introduced in Thailand in 1997 following the promulgation of the 1997 Thailand Constitution (B.E.2540) and later came into effect after the passing of the 1999 Determining Plans and Process of Decentralisation Act (B.E.2542), of which it presented as a strong impetus for nationwide decentralisation. This momentum has been fostered and upheld over the past two decades, resulting in increasing autonomy and democracy at the local government level. It is pointed out that there have been significant changes and greater opportunities for local participation in managing local governance and monitoring local administration as a result of the decentralisation policy,<sup>223</sup> which brings forth a greater sense of understanding and recognition of political autonomy for the general public.

Since then, there had been several key events that prompted the public to be engaged in the discussion and development of political autonomy. For example, the 'deep south' insurgency between 1990s and 2004, in which the protestors demanded the four highly Muslim populated provinces in the southern part of Thailand to be declared as independent from the Thai government.<sup>224</sup> Whilst the insurgency momentum peaked in 2004-2005, the situation still has not been successfully resolved, with some minor disruptions such as riots and small

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<sup>222</sup> Jakob Elster, 'Autonomy in Political Philosophy' (*Oxford Research Encyclopedia of Politics*, 30 July 2020) <<https://doi.org/10.1093/acrefore/9780190228637.013.1385>> accessed 8 November 2022

<sup>223</sup> 'Capacity building and civil education on support of decentralisation and local governance in Thailand' (*UNDP* 2009) <<https://www.undp.org/content/dam/thailand/docs/ExecutiveSummaryImprovingLocalAdmStructure.pdf>> accessed 21 October 2022

<sup>224</sup> Duncan McCargo, 'Autonomy for Southern Thailand: Thinking the unthinkable' (2010) 83(2) *Pacific Affairs* 261, 281 <<https://www.jstor.org/stable/25698454>> accessed 21 October 2022; Roger Suso, 'Territorial autonomy and self-determination conflicts: opportunity and willingness cases from Bolivia, Niger, and Thailand' (2011) International Catalan Institute for Peace Working paper no. 2010/1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1884156](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884156)> accessed 21 October 2022; Romadon Panjor, 'Patani Autonomy?: When the minority (people) was surrounded by nation-state (in Thai)' (2015) 19(1) *Songklanakarin Journal of Social Sciences and Humanities* 37, 72 <<http://dx.doi.org/10.13140/RG.2.1.2665.9360>> accessed 21 October 2022

bombings still happening occasionally.<sup>225</sup> As a result of greater awareness concerning the southern provinces crisis, which brings about a large number of debates and discussions that appeared in the media, the public, and within the government focused concerns, the term autonomy has consequently been equated with the idea of self-governing and heavily linked with political ideology.

Additionally, the most recent development of greater display of awareness and recognition concerning political autonomy in Thailand can be witnessed in the 2020-2021 protests led by students and the younger class generation who joined together upon demanding the military government, *i.e.* a group of soldiers led by the commander of the Royal Thai Army who launched a coup d'état back in 2014, to step aside and allow general election to take place. Due to almost a decade long suppression of the military Government (since the mentioned military coup in 2014<sup>226</sup>), the cry-out for greater political autonomy has reached its peak, triggering several protests being organised on a weekly basis.

It must be noted that the protests carried out by these youth activists will also be discussed in the part of personal autonomy below. It will be demonstrated that as important as demanding democracy and more political autonomy from the Government, key message from the people is to extend their personal autonomy, to remove strict limitations on their personal autonomy especially with respect to freedom of expression.

In summary, as of 2024, Thailand has transitioned from a military government to an elected democratic government. This change has influenced public perceptions and discussions around political autonomy, a concept increasingly associated with self-governance. Although historical events such as military coups and regional crises previously allowed the central

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<sup>225</sup> Simon Montlake, 'Thai leaders spar over autonomy for south' (*The Christian Science Monitor*, 19 February 2008) <<https://www.csmonitor.com/World/Asia-South-Central/2008/0219/p04s06-wosc.html>> accessed 21 October 2022; 'Southern Thailand's peace dialogue: No traction' (*International Crisis Group*, 21 September 2016) <<https://www.crisisgroup.org/asia/south-east-asia/thailand/southern-thailand-s-peace-dialogue-no-traction>> accessed 21 October 2022; Austin Bodetti, 'Thailand's quest crisis: 'The southern problem'' (*The Diplomat*, 12 July 2019) <<https://thediplomat.com/2019/07/thailands-quiet-crisis-the-southern-problem/>> accessed 21 October 2022

<sup>226</sup> Utthapol Muangming 'Government in Thailand and Decentralisation: the 2014 Military Coup (1)' (*Khamnadee*, 6 November 2018) <<https://www.khamnadee.go.th/blog/aebngpankhwaamruu/local-government-in-thailand-and-decentralization-after-the-2014-military-coup-1>> accessed 21 October 2022

government to consolidate control, the democratic shift has led to a reinvigorated interest and demand for greater political autonomy among the Thai populace. Despite these positive developments, the path to enhanced political autonomy remains complex and contingent on the evolving political landscape under the new democratic governance.

#### 4.1.2 Personal Autonomy

This part deals with what is meant by personal autonomy as discussed under the purpose and scope of this thesis and how it is translated into the concept that sits within Thailand legal framework. Accordingly, when it comes to personal autonomy, many scholars have provided definitions for the term, of which essentially the general and common concept regarding personal autonomy is in a sense that describes personal autonomy as the capacity to decide for oneself and being able to pursue a course of action as one deems fit.<sup>227</sup> Personal autonomy is occasionally referred to as individual autonomy and this notion encompasses a psychological property, the possession of which enables oneself to reflect critically on their natures, preferences and ends, to locate their most authentic commitments, and to live consistently in accordance with these in the face of various forms of internal and external interference.<sup>228</sup> Additionally, personal autonomy also refers to a person's sense of self-determination, of being able to make choices regarding the direction of her or his own actions, including the freedom to pursue those choices.<sup>229</sup> Therefore, a person who owns and exercises his/her personal autonomy is someone who is capable of engaging in effective self-regulation, successfully monitoring his/her needs and values, and being able to respond adaptively in order to achieve such needs.

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<sup>227</sup> Robert S Taylor, 'Kantian Personal Autonomy' (2005) 33(5) *Political Theory* 602, 628 <<http://www.jstor.org/stable/30038446>> accessed 21 October 2022

<sup>228</sup> G Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, New York 1988); K Möller, 'The Right to Autonomy' in *The Global Model of Constitutional Rights* (Oxford Constitutional Theory, Oxford, 2012; online edn, Oxford Academic 24 January 2013) <<https://doi.org/10.1093/acprof:oso/9780199664603.003.0004>> accessed 14 April 2024; L Swaine, 'Critique of Personal Autonomy' in *Ethical Autonomy: The Rise of Self-Rule* (New York, 2020; online edn, Oxford Academic 19 March 2020) <<https://doi.org/10.1093/oso/9780190087647.003.0003>> accessed 14 April 2024

<sup>229</sup> G Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, New York 1988); K Möller, 'The Right to Autonomy' in *The Global Model of Constitutional Rights* (Oxford Constitutional Theory, Oxford, 2012; online edn, Oxford Academic 24 January 2013) <<https://doi.org/10.1093/acprof:oso/9780199664603.003.0004>> accessed 14 April 2024; L Swaine, 'Critique of Personal Autonomy' in *Ethical Autonomy: The Rise of Self-Rule* (New York, 2020; online edn, Oxford Academic 19 March 2020) <<https://doi.org/10.1093/oso/9780190087647.003.0003>> accessed 14 April 2024

Vis-à-vis the concept of personal autonomy as perceived in Thailand, while political autonomy is often referred to and understood as a right to self-govern, personal autonomy can be described as an ability for an individual to do as he/she wishes and needs within the sphere of his/her own life, denying anyone else to have to authority to control over his/her activity.<sup>230</sup> It must be pointed out that as the concept of personal autonomy is largely overlapped with notions of freedom and rights,<sup>231</sup> consequently, there are a number of issues that recently trigger heated debates among the public regarding violations of such personal autonomy.

It might be useful to establish that appeals to autonomy can be employed to justify free speech claims where the right and freedom of expression are raised against the state.<sup>232</sup> Hence, it can be observed here that there is an overlap between political autonomy and personal autonomy under the Thai framework. Freedom of expression is a prerequisite for the people to be able to influence decision-making as well as a means for each individual to develop a sense and recognition of autonomy that lies in reflectively forming the political opinions, of which one expresses in the democratic process.<sup>233</sup> In other words, it can be said that freedom of expression is considered as a part of personal autonomy. In this regard, one of the most recent attentions with respect to the violation of personal autonomy in Thailand concerns the issue of freedom of expression, especially politically related. Many student activists are charged with criminal offences against their social medial posts and their participation in anti-government demonstrations. In this regard, it should also be acknowledged here that there are overlaps between the concepts of political and personal autonomy.

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<sup>230</sup> J Varelius, 'The Value of Autonomy in Medical Ethics' (2006) 9 *Med Health Care Philos* 377 <<https://doi.org/10.1007%2Fs11019-006-9000-z>> accessed 8 March 2024

<sup>231</sup> Sharon S Brehm and Jack W Brehm, *Psychological Reactance: A Theory of Freedom and Control* (Academic Press, 1981); Edward L Deci and Richard M Ryan, *Intrinsic Motivation and Self-Determination in Human Behavior* (Springer New York 1985); Edward L Deci and Richard M Ryan, 'The Support of Autonomy and the Control of Behavior' (1988) 53(6) *Journal of Personality and Social Psychology* 1024, 1037 <<http://dx.doi.org/10.1037/0022-3514.53.6.1024>> accessed 21 October 2022; Richard M Ryan, 'The Nature of the Self in Autonomy and Relatedness' in J Strauss and G R Goethals (eds) *The Self: Interdisciplinary Approaches* (Springer New York 19991) <[https://link.springer.com/chapter/10.1007/978-1-4684-8264-5\\_11](https://link.springer.com/chapter/10.1007/978-1-4684-8264-5_11)> accessed 21 October 2022; Richard M Ryan, Julius Kuhl, and Edward L Deci, 'Nature and Autonomy: An Organizational View of Social and Neurobiological Aspects of Self-Regulation in Behavior and Development' (1997) 9(4) *Development and Psychopathology* 701, 728 <<http://dx.doi.org/10.1017/S0954579497001405>> accessed 21 October 2022

<sup>232</sup> Susan Easton, 'Autonomy and the Free Speech Principle' (1995) 12(1) *Journal of Applied Philosophy* 27, 39 <[www.jstor.org/stable/24354036](http://www.jstor.org/stable/24354036)> accessed 21 October 2022

<sup>233</sup> Christian F Rostbøll, 'Freedom of Expression, Deliberation, Autonomy and Respect' (2011) 10(1) *European Journal of Political Theory* 5, 21 <<https://doi.org/10.1177/1474885110394644>> accessed 21 October 2022

One of the most noteworthy examples of limitations on personal autonomy in Thailand can be witnessed in the case of the protest on the lese-majeste law. In 2020, several of the young leaders of Thailand's ongoing movement for democracy and monarchy reform were faced with royal defamation charges in criminal court for allegedly insulting the monarchy during the 2020 protests.<sup>234</sup> Under Section 112 of Thailand's Criminal Code, otherwise known as the lese-majeste law, defaming, insulting or threatening the Thai royal family is punishable by up to 15 years in prison. It was reported that more than 90 Thais have been, without due process, charged with lese-majeste law since the 2014 coup, the event of which the military government has come into power.<sup>235</sup> The military government relied on the catch-all phrase 'peace and order' to pursue and further its suppression, prosecution and detention of critics and other activists, including through the Computer Crimes Act, which essentially made online dissent, especially on social media platforms, potentially dangerous and easily fell under the scope of criminal prosecution.<sup>236</sup>

In summary, the foregoing discussions highlight that, within the context of Thailand and its legal framework, emphasis, and comprehension regarding the concept of autonomy predominantly revolve around political and personal autonomy. However, the subsequent section shifts focus to address a recently emerging and expanding notion of healthcare-related autonomy. The ensuing discussion underscores that, despite the acknowledgment of healthcare-related autonomy within Thai legal settings, this specific form of autonomy is notably constrained and offers opportunities for further development.

## 4.2 Reproductive Autonomy in Thailand and Relevant Reproductive Rights

Reproductive health often refers to the condition of male and female reproduction systems during all stages of life. To be more specific, it is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, in all matters relating to

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<sup>234</sup> Doug Snow, 'Freedom of speech elusive in Thailand as activists face royal defamation charges' (*ASEAN Today*, 14 December 2020) <<https://www.aseantoday.com/2020/12/freedom-of-speech-elusive-in-thailand-as-activists-face-royal-defamation-charges/>> accessed 21 October 2022

<sup>235</sup> Doug Snow, 'Freedom of speech elusive in Thailand as activists face royal defamation charges' (*ASEAN Today*, 14 December 2020) <<https://www.aseantoday.com/2020/12/freedom-of-speech-elusive-in-thailand-as-activists-face-royal-defamation-charges/>> accessed 21 October 2022

<sup>236</sup> 'The Student's Declaration against the Government demands 5 resolutions for true democracy' (in Thai) (*Thai Post*, 25 July 2020) <<https://www.thaipost.net/main/detail/72442>> accessed 21 October 2022

the reproductive system and to its functions and processes. Reproductive health implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.<sup>237</sup> In Thailand, there are various aspects of healthcare related legal and policy issues that are associated with the concept of reproductive rights and reproductive autonomy. From the outset of the constitutional rights in relation to reproductive rights, under the current 2017 Constitution, the Constitution, particularly Section 27, 47, 48, 55 and 71, guarantees the equal rights of all persons to basic public health services, and the right of low-income individuals to free medical treatment from public health facilities, as provided by laws.

In the following section, the chapter now turns to examine some of the key topics that the thesis deems relevant to its analysis and assessment towards reforming the current sex selection laws.

#### *4.2.1 Maternal Healthcare*

As witnessed in Chapter One regarding several basic healthcare schemes provided by the state, it must be pointed out again that since the enforcement of Universal Health Coverage (UHC) in 2002, which was launched to cover all remaining populations who are not insured by the two existing schemes, which are the Civil Servant Medical Benefit Scheme (CSMBS) and the Social Health Insurance (SHI), medical care given through these schemes have been extended to vast population and improved continuously. Particularly with respect to maternal healthcare, the mortality rate has decreased significantly.<sup>238</sup>

Considering that most people are provided with healthcare through two main schemes, which are UHC and SHI, and the fact that the benefits provided by the CSMBS are relatively similar to the UHC scheme, the following part discusses the benefits and rights prescribed under the UHC and SHI plans.

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<sup>237</sup> 'Reproductive health in the Western Pacific' (*World Health Organization*) <<https://www.who.int/westernpacific/health-topics/reproductive-health>> accessed 21 October 2022

<sup>238</sup> Warisa Panichkriangkrai, Chompoonut Topothai, Nithiwat Saengruang, Jadej Thammatach-aree, and Viroj Tancharoensathien, 'Universal access to sexual and reproductive health services in Thailand: achievements and challenges' (2020) 28(2) *Sexual and Reproductive Health Matters* <<https://doi.org/10.1080/26410397.2020.1805842>> accessed 21 October 2022

The SHI Act Section 33/39 offers a fixed amount of 15,000 THB (approximately GBP350) for each pregnancy to the mother, but this is only valid for two pregnancies. Hence, if the mother is pregnant more than twice, the following pregnancies will not be entitled to the fixed sum prescribed under Section 33/39 of the SHI Act. Such policy practice is consistent with the policy regarding compensation and paid leave recognised and upheld by law *i.e.* paid maternity leave is guaranteed and given twice only. In a sense, such limitations apparently generate certain hindrance upon making reproductive choices. For those who may be extremely financially dependent on the maternity benefits provided by state welfare, the said limitation could potentially curb and restrict reproductive autonomy.

In contrast, under the UHC, there is no money given out to the mother, however, the care is given in the form of an actual medical treatment and services instead. Hence, under the UHC, woman can give birth free of charge at the medical facilities she is registered with. Nonetheless, UHC only covers the cost of regular childbirth delivery operation. In the event where the woman wishes to give birth using caesarean operation, she will have to pay for the operation herself, without any compensation or financial support from the UHC. Exemption is made provided that the doctor views that regular birth would be harmful and possibly detrimental to the health of the mother or the child, or both. In this event, caesarean birth delivery will be covered by the UHC. There is no limitation imposed with respect to the number of pregnancy or childbirth per one person, which is different from the rules set out in the SHI scheme.

With the UHC health plan vis-à-vis maternal care and pregnancy, it facilitates a woman to have as many pregnancies as she wishes, without a subjection to the number limit imposed under the SHI scheme. In this regard, for those who are covered under SHI, arguably, a certain level of reproductive autonomy is limited because beyond the second pregnancy, they will no longer be financially covered by their healthcare plan. To those with SHI coverage who cannot financially afford the cost associated with pregnancy care, the decision to have a third child would be substantially restricted, potentially deterring them from exercising their reproductive choices.

Vis-à-vis the matter of maternity leave under Thai labour law, pursuant to the regulations stipulated in the Labour Protection Act<sup>239</sup>, the law only prescribes a duration of 14 weeks (a total of 98 days including prenatal visits to the doctor) for maternity leave, where only the first half of the leave (45 days) is required by law to be fully paid by the employer. The second half of the leave is then paid by social security under the SHI scheme (at 50%, and subject to a monthly cap of THB 15,000)<sup>240</sup>. As mentioned earlier, for the mothers who are under the SHI coverage, the maternity leave can only be taken for two childbirths. In this regard, despite the law warranting the mother's right to take maternity leave, the seemingly short period of paid leave (45 days) by the employer can act as a hindrance upon a women's reproductive decision to get pregnant.

#### *4.2.2 Contraception and Sterilisation*

The current law does not prohibit the use of contraception, except for methods with possible harmful effects such as pills containing more than 50 micrograms of estrogen, which are known to raise the risk of haemorrhage.<sup>241</sup> With respect to the use of emergency contraception, there is considerably easy access to the product, which is normally available in any drugstore nationwide.

As for sterilisation, this is legal in Thailand. There is no specific law vis-à-vis the procedure or its eligibility requirements. However, there is one requirement concerning the service provider, of which the process must be carried out by a trained medical professional in sterilisation in accordance with the ministry of public health regulations.<sup>242</sup> Furthermore, it is given that a person who seeks sterilisation treatment is required to give written informed consent prior to the procedure.<sup>243</sup> Access to contraception as well as sterilisation, for both

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<sup>239</sup> Labour Protection Act (Thailand) 2019

<sup>240</sup> Social Security Act (No.4), s 65

<sup>241</sup> Ministry of Public Health, Ministerial Order No.349/2543 on Abolishing Registered Drugs (May 27, 1991)

<sup>242</sup> The Ministry of Public Health's Regulation on Persons whom the Ministry, Departments Concerned, Bangkok Metropolitan Administration, Pattaya District, Provincial Administrative Organizations, Municipalities, Sanitary (Sukhaphibal) Units, Other Local Administrative Organizations, or the Thai Red Cross, assign to work under the control of officers who work as medical practitioners BE 2539 (1996), Article 11; 'Women of the World: Laws and Policies Affecting their Reproductive Lives East and Southeast Asia' (2011) Center for Reproductive Rights <<https://reproductiverights.org/wp-content/uploads/2020/12/Thailand.pdf>> accessed 21 October 2022

<sup>243</sup> 'Women of the World: Laws and Policies Affecting their Reproductive Lives East and Southeast Asia' (2011) Center for Reproductive Rights <<https://reproductiverights.org/wp-content/uploads/2020/12/Thailand.pdf>> accessed 21 October 2022

men and women, is largely covered under all public healthcare schemes. Also, paid leave is upheld by law through the labour protection Act 1998 which specifies that an employee is entitled to a paid leave for sterilisation for such time as prescribed by an authorised medical practitioner.<sup>244</sup>

Considering that contraception and sterilisation are deemed to fall under the scope of reproductive autonomy, the regulations and public healthcare in place seemingly safeguard and uphold such reproductive rights in this specific regards.

#### *4.2.3 Abortion*

In Thailand, with the latest development of abortion law which has been passed in February 2021, abortion is currently legal on several conditions. To elaborate, all pregnancy that does not exceed 12-week gestation period is now allowed by law to be terminated.<sup>245</sup> This can be considered as a drastic change in the previous law that prohibited all abortion which does not comply with list of criteria laid down in section 305 of the previous Thai Criminal Code. Under the previous abortion law, it was stipulated that abortion can only be carried out specifically in the cases where the pregnancy threatens the woman's life or health, resulted from rape or incest, or occurred when the girl was under the age of 15 and therefore unable to consent to sex.

However, there are still limitations under the new abortion law. In other words, for the pregnancy which exceeds 12 weeks but does not exceed 20-week gestation period, a termination of such pregnancy is subjected to a sentence of maximum 6-month imprisonment, a fine with the maximum of 10,000 Baht, or both.<sup>246</sup> Nonetheless, a provision under Section 305 stipulates that for the pregnancy which exceeds 12 weeks but does not exceed 20 weeks, if it can be justified that the woman in question has consulted with relevant experts (social workers and healthcare professionals) regarding the unwanted pregnancy, the termination of such pregnancy is lawful.<sup>247</sup>

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<sup>244</sup> Labour Protection Act BE 2541 (1998), s 33

<sup>245</sup> The Criminal Code (Thailand) BE 2564 (2021), s 301

<sup>246</sup> Note that penalties for illegal abortions apply to both the women undergoing the procedure and the providers performing it if the abortion is conducted under conditions not permitted by the law.

<sup>247</sup> The Criminal Code (Thailand) BE 2564 (2021), s 305

It should be pointed out that similar exceptions still exist in the new abortion law. Section 305 of the new Criminal Code maintains that a woman can seek to terminate her pregnancy if it can be justified that the continuing of such pregnancy may result adversely in either mental or physical health of the mother, or there is a reason to believe that the child will be born with severe physical disorders, or it can be established that the pregnancy is a result of rape. These conditions are almost identical to the previous law. The only difference in the new law with respect to these conditions is that the law now takes into account the physical state of the unborn child, which it now permits abortion in the case where the foetus exhibits signs of severe physical disabilities.

Whilst the new abortion law can be considered as a big step towards granting women with greater reproductive rights, some activists continue to argue that the new law is still a disappointment as it does not eliminate criminal punishment, which is the imprisonment sentencing all together<sup>248</sup>. For women who fail to satisfy the conditions laid down by the new abortion law, an imprisonment up to six months can be imposed.

Notably, the latest abortion law is deemed to be a much better improvement from the old one, of which women's reproductive rights were significantly diminished and restricted. Considering abortion law before this 2021 latest amendment, almost all abortion had been declared as illegal and those who violated such law were subjected to a maximum sentence of ten years in jail. Several attempts and pro-choice movements were emerged from time to time over the last 60 years, but no significant changes had been brought about until now. In other words, the abortion law of the 1956 Criminal code (Section 301) dictated that a maximum of ten years imprisonment can be imposed on those who violated the law. Later in the 2019 amendment of the Criminal Code Section 301, the imprisonment sentence was then reduced to a maximum of three years, with a fine of up to 60,000 Baht (approximately GBP 1,5000), or both. Despite of the reduction in imprisonment period, the seriousness of such offence can still be deemed rather severe as it continues to carry criminal punishment of

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<sup>248</sup> 'RIP to the new abortion law that disrespects women's rights, turning women into criminals' (in Thai) (*Matichon Online*, 28 January 2021) <[https://www.matichon.co.th/lifestyle/social-women/news\\_2550749](https://www.matichon.co.th/lifestyle/social-women/news_2550749)> accessed 21 October 2022

imprisonment, of which many activists move for the imprisonment sentence to be completely removed from abortion offence under Section 301 of the Criminal Code.<sup>249</sup>

Seemingly, despite some changes in the level of fine and penalty comparing between the 2019 abortion law and the 1956 abortion law (from THB20,000 fine to THB60,000 and a reduced sentence from ten years to three years imprisonment), the 2019 law remained firm to criminalise and penalise women who seek to undergo abortion. In this regard, we can see that up until 2019/2020, women's autonomy in Thailand was largely undermined by the law. In other words, with the provision and enforcement of section 301 (and other related provisions on banning abortion which are Section 302, 303 and 305)<sup>250</sup>, women were prohibited to exercise their rights over their own bodies and cannot legally resort to end the pregnancy even if they are not ready to undergo and experience the process of pregnancy, childbirth and parenting, unless they can fulfil the extremely limited exemptions prescribed by law as stipulated in Section 305 of the Thai Criminal Code.

With respect to abortion and the available public healthcare, access to abortion is free under the universal coverage scheme, social security scheme, and healthcare for civil servant scheme. Women age under 15 years old will need to require consent from parents/ legal guardian to obtain the treatment. This is consistent with several laws (civil and commercial code on 'capacity', for example) and guidelines on patient's right. Nevertheless, there are discussions which argue that parental involvement and requirement of parental consent regarding abortions in minors may hinder and limit the minor's reproductive autonomy.<sup>251</sup>

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<sup>249</sup> Heather Barr, 'Thailand Should Fully Decriminalize All Abortion' (*Human Rights Watch*, 25 January 2021) <<https://www.hrw.org/news/2021/01/25/thailand-should-fully-decriminalize-all-abortion>> accessed 21 October 2022; 'RIP to the new abortion law that disrespects women's rights, turning women into criminals' (in Thai) (*Matichon Online*, 28 January 2021) <[https://www.matichon.co.th/lifestyle/social-women/news\\_2550749](https://www.matichon.co.th/lifestyle/social-women/news_2550749)> accessed 21 October 2022; Muktita Suhartono and Mike Ives, 'Thailand Legalizes Abortion in 1<sup>st</sup> Trimester but Keeps Other Restrictions' (*New York Times*, 28 January 2021) <<https://www.nytimes.com/2021/01/28/world/asia/thailand-abortion-rights.html>> accessed 21 October 2022; Chaiyot Yongcharoen, 'Abortion law amendment - a great change in 60 years, leaves outstanding concerns' (in Thai) (*BBC Thai*, 5 February 2021) <<https://www.bbc.com/thai/thailand-55940721>> accessed 21 October 2022

<sup>250</sup> The Criminal Code (Thailand) BE 2564 (2021), s 302 Procuring an abortion with consent

The Criminal Code (Thailand) BE 2564 (2021), s 303 Procuring an abortion without consent

The Criminal Code (Thailand) BE 2564 (2021), s 305 Exemptions that exclude liability

<sup>251</sup> Heather Boonstra and Elizabeth Nash, 'Minors and the Right to Consent to Health Care' (2002) The Guttmacher Report on Public Policy <<https://www.guttmacher.org/sites/default/files/pdfs/pubs/tgr/03/4/gr030404.pdf>> accessed 21 October

Moreover, it is argued that the harm arising from delayed and denied abortion substantially outweighs the costs of permitting minors to consent on their own to abortion services.<sup>252</sup>

After the new abortion law is passed and come into effect in February 2021, relevant government bodies have issued new policies which aim to facilitate and provide greater assistance to women seeking legal abortion. Social Health Insurance Commission has issued guideline on referrals, allowing woman who seeks an abortion to be able to receive the treatment at other hospitals or state clinics, without having to wait for referral letter issued by the hospital that the patient is registered to under the SHI or UHC plan, in the event that the patient's registered hospital refuses or unable to provide abortion service.<sup>253</sup>

This is a big improvement from previous policy. Prior to the new abortion law 2021, women who seek abortion could only access free abortion at the registered facility listed by the healthcare scheme they are entitled to. Doctors can refuse to perform abortion claiming medical ethics and personal believes. When this happens, a referral is needed in order for the women to go and seek free services at other listed hospitals. This is usually difficult and carry stigma to the women.<sup>254</sup>

Evidently, specifically with references to the change in the new Thai abortion law, which many view as a big improvement to the old version, this could support a tendency for greater and increasing protection of reproductive rights within the Thai legal settings. To this end, whilst proponents of non-medical sex selection might attempt to leverage this progress to advance their cause, it is crucial to note, though, that such an argument is fundamentally flawed. Reproductive rights, while expanding, should not encompass the right to select the sex of a

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2022; 'Laws restricting teenagers' access to abortion' (ACLU) <<https://www.aclu.org/other/laws-restricting-teenagers-access-abortion>> accessed 21 October 2022

<sup>252</sup> 'Laws restricting teenagers' access to abortion' (ACLU) <<https://www.aclu.org/other/laws-restricting-teenagers-access-abortion>> accessed 21 October 2022

<sup>253</sup> 'NHSO receives open letter from unready pregnancy network and moves for safe abortion services' (in Thai) (National Health Security Office, 30 July 2022) <<https://www.hfocus.org/content/2022/07/25657>> accessed 21 October 2022; 'Urgent demand for NHSO to regulate its hospital network to perform safe abortion and referral' (in Thai) (The Coverage, 29 July 2022) <<https://www.thecoverage.info/news/content/3816>> accessed 21 October 2022

<sup>254</sup> Nuttynui, 'Q&A on rights to abortion with doctor Krit Lithong-in at NHSO' (in Thai) (AIDS Access Foundation, 20 October 2020) <<https://www.aidsaccess.com/detail.php?id=241>> accessed 21 October 2022

child for non-medical purposes. Non-medical sex selection introduces ethical and societal concerns, including the potential for gender imbalances and the reinforcement of stereotypes, as discussed in the previous chapter.

#### *4.2.4 ART Care*

As briefly mentioned in Chapter One regarding legal aspects of the Protection for Children Born Through Assisted Reproductive Technologies Act, B.E.2558 (the 2015 ART Act), with respect to its relevance to the discussion on autonomy, several restrictions on autonomy are brought about as a result of the provisions laid down within this particular Act. These limitations imposed on autonomy are discussed below.

To reiterate, from a legal standpoint, assisted reproductive technologies was highly unregulated and hardly ever mentioned prior to the enactment of the 2015 Act. There were only 2 Medical Council Regulations introduced in 1997 and 2001 addressing the use of ARTs.<sup>255</sup> The purpose behind these Announcements was to assure that the reproductive procedures met the medical standards and principles of care. However, one Announcement particularly circumscribed patient's reproductive autonomy. This was Section 4/2 of the 21/2545 Announcement which stated that in the event where a couple wishes to have a child through surrogacy, the medical practitioner may provide the service only in the case where the embryo is conceived from the said couple's gametes. In other words, for couples who would be able to undergo surrogacy, both would have to be able to produce viable gametes. Such provision essentially deters couples who are either or both infertile *e.g.* men with weak or low sperm counts, or women with degenerated eggs condition. Nevertheless, it should be pointed out that these announcements were not legally binding. Yet, looking at the guidelines (announcements) issued by the Medical Council, this echoed and reinforced the concept as well as the acknowledgement of limitations on patient's reproductive autonomy.

Several sections under the 2015 ART Act can be viewed as an imposition of strict limitations on individual's reproductive autonomy. These limitations, mostly identified within the requirements concerning use of gametes and marital status condition, are examined below.

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<sup>255</sup> Announcements 1/2540 and 21/2545, Medical Council Regulations, Medical Council of Thailand

### ***Use of Gametes and The Relatedness Requirement***

Whereas the guideline imposed in the announcements of the Medical Council of Thailand expressed that both gametes must come from the legally married couple receiving the treatment, in the 2015 provision, the law now allows surrogacy to take place where at least one party is the owner of the gametes. To elaborate, the new Act dictates that an embryo, which will be used for surrogacy, must only be created by the eggs and sperms of the intended parents (who must be legally married), a donated egg fertilised with sperm from the intended father, or a donated sperm fertilised with an egg of the intended mother. This particular provision sets out a legal requirement for genetic relatedness. In other words, at least one of the intended parents must be biologically related to the child born through surrogacy. Whilst this can be observed as an improvement from the previous Medical Council 's announcement, limitations on reproductive autonomy are still present. Such relatedness requirement for fertilisation process shows that the current ART law only recognises the rights and autonomy of married couples who, one of them, must at least be able to produce viable gametes. To further the emphasis on such limitation imposed using the requirement of relatedness, this particular provision clearly restricts the rights of those patients who wish to undergo ART and surrogacy treatments but are incapable of physically and genetically contribute to the procedure as dictates by law. Under this regulation, couples who are both reproductively challenged are banned by law to access such assisted reproductive treatments. This provides serious limitations to those infertile who wish to undergo the treatment; therefore, it can be conceded that ultimately the current reproductive law still evidently undermines the patient's autonomy.

With respect to the rules regarding who can become a surrogate mother, Section 21(4) prescribes that a surrogate mother must be a blood relative to either the intended mother or father. In the event where the commissioning couple does not have any relatives to become the surrogate mother, permission to undergo the process with a non-blood relative surrogate must be obtained from the ministry of public health special committee. It can be observed that while the law mentions that in case where there are no relatives of the intended couples, the couple may still be able to undergo the surrogacy treatment given specified rules, procedures and conditions of the ministry of public health, which must be reviewed by the special

committee, such exception given by law still shows a certain degree of unjustifiable restriction on the intended couple's autonomy and their right to create family.

***Marital Status Check List and The Requirement on Woman's Experience of Conceiving and Giving Birth to A Child***

Section 19 specifies that only a woman having lawful husband can undergo assisted reproductive treatment. In addition, Section 21 and 36 of the 2015 ART Act state that the couples receiving any type of ART treatment which involves the creating of embryo must have been legally married. For surrogacy, the requirement extends further to a proof of minimum 3 years of marriage. This ultimately restrict single people who want children but are not married as well as couples who are not legally wedded but wishes to receive assisted reproductive services.

Also, under Section 21 of the ART Act, the law provides that a surrogate mother must have given birth to a child. This particular provision not only limits access to surrogacy for the intended parents, it also restricts personal autonomy of the women who wish to act as surrogate, who are mentally and physically fit to act as a surrogate mother, but never conceived and given birth to a child. In other jurisdictions such as the UK, nowhere in the law on surrogacy state that a surrogate mother must conceived a child prior to the surrogacy arrangement.<sup>256</sup> Considering this specific condition regarding to have been previously conceived and given birth, this significantly curtails and undermines intending surrogate women's reproductive autonomy.

More importantly, if the surrogate mother has a lawful husband or cohabits with a man as husband and wife, a consent must be obtained from such lawful husband or such man.<sup>257</sup> Such prerequisite for intending surrogate mother to obtain a consent from her husband or boyfriend strikingly imparts a strong notion of patriarchy and gender inequality. In other words, the provision means that in case a consent is not given, a woman who wants to act as surrogate mother cannot do so as she wishes. This particular stipulation not only restricts personal autonomy of the intended surrogate mother, it also treats women unequally to their

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<sup>256</sup> Surrogacy Arrangements Act 1985 (UK)

<sup>257</sup> The Protection for Children Born through Assisted Reproductive Technologies Act BE 2558 (2015), s 21(4)

male counterparts. Moreover Section 22(2) states that in any given circumstances can a surrogate mother's egg shall be used *i.e.* a surrogate mother cannot donate her eggs to the intended couples. This also provide limitation on the surrogate mother's right over her own body and her personal autonomy.

While it can be seen here that the law expressly demands a woman to obtain a consent from her husband or boyfriend prior to become a surrogate mother, there is no provision that requires similar condition from the sperm donor. In other words, a man's choice to give away his sperm is entirely autonomous; and therefore, in this respect the choice to exercise his reproductive right is recognised and upheld by law. As a result, such element that involves the required consent from the woman's husband or boyfriend is flagged as gender and sex discrimination issue, of which will be dealt with later on in the final part of this chapter.

In essence, considering how Thailand recognises autonomy, both politically and individually, and how the concept of autonomy has developed overtimes across several legal documents, it may be stated that, with references to the evidence presented in the arguments earlier, the concept of autonomy in Thailand is still relatively limited and underdeveloped. Moreover, when it comes to the position of the government and Thai officials towards upholding and respecting such concepts of autonomy, this is also similar to how autonomy is developed in Thailand, which is considerably limited with little progress. Specifically, *vis-à-vis* reproductive autonomy, individuals especially women are denied personal autonomy over their reproductive health, which is evident in the case of abortion that still bans pregnancy termination after 12 weeks and surrogacy regulations that prohibit unmarried individuals to access surrogacy services or act as a surrogate.

In light of the preceding discussions on autonomy and sexual and reproductive rights, a critical observation emerges: certain provisions in Thailand's laws significantly constrain reproductive autonomy, particularly for women, and perpetuate gender inequality, notably impacting women's reproductive rights. The inherent gender disparities embedded in these legal provisions underscore the need for careful consideration and strategic policymaking. Consequently, it becomes evident that in order to address and rectify the existing gender inequalities, Thailand should persist in its ban on non-medical sex selection. By continuing this

prohibition, Thailand can assert its commitment to promoting gender equality and safeguarding women's reproductive rights, counteracting the prevailing legal constraints and fostering a more equitable and rights-respecting socio-legal landscape.

The subsequent section undertakes an examination of the issue of privacy and the right to respect for private and family life, with a particular focus on the concepts embedded in the Thai socio-legal framework. The exploration of these rights within the Thai context holds paramount importance, as it enables the thesis to scrutinise and assess the justifications for maintaining the ban on non-medical sex selection. Therefore, the ensuing discussion unfolds as follows.

## 5. Privacy and A Right to Respect for Private and Family Life

Before exploring the concept of privacy and a right to respect for private and family life within the context of Thailand, it must be flagged here that in the following chapter, privacy and a right to respect for private and family life is extensively discussed throughout all selected case-study jurisdictions because it is one of the main justifications mostly employed in the arguments concerning non-medical preimplantation sex selection. Consequently, under this section, the primary focus would be on how and to what extent privacy and a right to respect for private and family life are recognised, interpreted, and applied under the settings of Thai socio-legal framework.

Accordingly, a quick recap on privacy and a right to respect for private and family life, as briefly discussed in Chapter One, whilst the Constitution recognises and addresses to uphold such rights, seemingly, the scope of such stipulation only encompasses a right for one's name and reputation to be protected. Considering the provisions concerning privacy and what seems to come close to the resemblance of a right to respect for private and family life contained within the Thailand's Constitutions, it is evident that the law does not discuss the concept of reproductive autonomy, nor does it give special reference specifically with regards to the concept of reproductive choices. To elaborate, the exact wording of Section 32 of the 2017 Constitution spells out that 'A person shall enjoy the rights of privacy, dignity, reputation and

family.’ In this regard, after combing through the entire document<sup>258</sup>, the mention of a right to ‘family’ under Section 32 can hardly be interpreted to include reproductive rights. In other words, the mention of ‘family’ under this specific section is used narrowly and seems to only associate itself with the area of the protection of private information and reputation. This is the same with other legal documents and legislations imposed in Thailand *i.e.* there is no legal provision that extends the scope of privacy and a right to respect for private and family life into an area of reproductive autonomy.

To validate the above claim, this thesis sets out to examine relevant legal documents and literatures that concern the topic of privacy and a right to respect for private and family life in Thailand. Upon doing so, the findings confirm the assumption that in so far as the development of Thai privacy law goes, the scope of privacy and a right to respect for private and family life does not encompass a right to make reproductive choices. The ensuing section provides a concise summary *vis-à-vis* the development of Thailand privacy law.

## 5.1 Development of Privacy and A Right to Respect for Private and Family Life in Thai Legal Framework

Privacy and a right to respect for private and family life, as recognised and interpreted in Thailand, involves a notion that recognises privacy as a fundamental human right that is central to the protection of human dignity which forms the basis of a democratic society.

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<sup>258</sup> There are three sections of the Constitution that mention ‘family’ or ‘family life’. Section 32 ‘A person shall enjoy the rights of privacy, dignity, reputation and family’.

Section 48 ‘The rights of a mother during the period prior to and after giving birth shall be protected and assisted as provided by law. A person who is over sixty years of age and has insufficient income for subsistence and an indigent person shall have the right to receive appropriate aids from the State as provided by law’

Section 71 ‘The State should strengthen the family unit which is an important basic element of society, provide an appropriate accommodation, promotion and develop the enhancement of health in order to enable people to have good health and strong mind, as well as promote and develop excellence in sports and to maximise the benefit for the people.’

Section 32 and 48 are listed under Part 3 which outlines the rights and liberties of an individual. From looking at the entirety of Section 48, it can be observed that this section talks about state welfare that shall be entitled to the specified groups of people, which is not about giving the people’s right to reproductive choices.

Section 71 is listed under Part 4 which outlines the directive principles of state policies.

Amongst various literature, privacy is deemed to support and reinforce other rights e.g. freedom of expression, information and association.<sup>259</sup> Also, privacy is viewed to embody the presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere' free from arbitrary state intervention as well as excessive unsolicited intervention by other uninvited individuals.<sup>260</sup> Notably, it seems that the application of privacy and a right to respect for private and family life under Thai laws has yet to be extended to areas concerning reproductive autonomy. Nevertheless, to investigate further into this observation, the following section canvasses Thai domestic laws related to the protection of privacy and a right to respect for private and family life. Setting aside the already discussed constitutional protection of privacy and what seems to be a right to private and family life as stipulated under Article 35 of the 1997 and 2004 Constitution (see Chapter One), there are several domestic legal documents that concern the issue of privacy, as outlined below.

### *5.1.1 Key Legislations Concerning the Protection of Privacy*

**The Official Information Act (1997):** This Act protects personal information by providing exceptions to the principle of transparency upon the disclosure of official documents. Despite being arguably the first privacy relating law in Thailand, its principle is largely based on the concept of a right to know and an access to information. In short, the Act maintains the privacy of individuals and requires public sector to protect the data systems and allows individuals to correct personal data maintained by the state.<sup>261</sup> However, this Act contains a drawback because it only applies to public entities. Hence, the following legal provision was put in place to bridge the gap and extends its authority over private organisations as well as

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<sup>259</sup> Krisana Kitiyadisai, 'Privacy Rights and Protection: Foreign Values in Modern Thai Context' (2005) 7(1) Ethics and Information Technology 17, 26 <<http://dx.doi.org/10.1007/s10676-005-0455-z>> accessed 21 October 2022; Nakorn Serirak, 'Towards Personal Data Protection: A Proposed Model for the Development of 'Right to Know' in Thailand' (2006) 11(1) Thammasat Review 115 <<https://sc01.tci-thaijo.org/index.php/tureview/article/view/40859>> accessed 21 October 2022; 'Submission on the right to privacy in Thailand, Human Rights Committee, 119<sup>th</sup> Session' (*Privacy International*, February 2017) <[http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT\\_CCPR\\_ICO\\_THA\\_23](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_ICO_THA_23)> accessed 21 October 2022; Soraj Hongladarom, 'Privacy, Contingency and Personal Identity' (2022) <[https://www.researchgate.net/publication/265990324\\_Privacy\\_Contingency\\_and\\_Personal\\_Identity](https://www.researchgate.net/publication/265990324_Privacy_Contingency_and_Personal_Identity)> accessed 21 October 2022

<sup>260</sup> Martin Scheinin, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (2009) A/HRC/17/34 <<https://digitallibrary.un.org/record/648291?ln=en>> accessed 21 October 2022

<sup>261</sup> Official Information Act BE 2540 (1997) (Thailand)

individuals.<sup>262</sup> Consequently, in 2010, the Policy and Guidelines for Protection of Personal Information in Public Sectors (2010) was issued. This legal document regulates the management of personal information used or stored by either public or private sector in electronic form, which has not been explicitly covered under the 1997 Official Information Act.<sup>263</sup>

***The Personal Data Protection Act 2019 (PDPA):*** This is the most recent law concerning privacy, regulating how businesses in Thailand must handle personal data related to Thai citizens. The law provided a one-year grace period for businesses to prepare for compliance. However, it was postponed twice due to the COVID pandemic and to allow more time for businesses to prepare for the law's implementation. Consequently, the PDPA has recently come into full effect on 1<sup>st</sup> June 2022.<sup>264</sup>

In essence, the PDPA regulates the collection, use, disclosure, and/or transfer of personal data by businesses (data controller or data processor) for commercial purposes. The Act sets up a Personal Data Protection Committee (PDPC) whose role is to enforce the law and ensure compliance of the new PDPA. The Office of the Committee is also responsible for publishing guidelines, standards, and exceptions for data controllers and processors to handle the personal data.<sup>265</sup>

Noted that while the PDPA represents a significant development in data privacy within the commercial sector, it underscores the limited scope of privacy rights recognition in Thailand, which predominantly views privacy through the lens of data protection. This focus on data privacy without a broader acknowledgment of privacy rights in contexts such as reproductive

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<sup>262</sup> Sneha Chawla, 'The concept of privacy in Thailand and the European union: a comparative study of religious-cultural origins and legal developments' (Master of Laws thesis, Thammasat University 2019)

<sup>263</sup> Policy and Guidelines for Protection of Personal Information in Public Sectors BE 2553 (2010) (available in Thai) <<https://www.etda.or.th/files/1/files/12.pdf>> accessed 21 October 2022

<sup>264</sup> Personal Data Protection Act BE 2562 (2019) (Thailand); Janine Phakdeetham, 'Explainer: What is PDPA, Thailand's new data law?' (*Bangkok Post*, 1 June 2022) <<https://www.bangkokpost.com/business/2319054/explainer-what-is-pdpa-thailands-new-data-law->>> accessed 21 October 2022

<sup>265</sup> Janine Phakdeetham, 'Explainer: What is PDPA, Thailand's new data law?' (*Bangkok Post*, 1 June 2022) <<https://www.bangkokpost.com/business/2319054/explainer-what-is-pdpa-thailands-new-data-law->>> accessed 21 October 2022

health reflects a narrow development of the privacy concept in Thailand. As such, discussions on the PDPA may seem peripheral but are essential to understanding the overall landscape of privacy rights, including those related to reproductive autonomy.

### *5.1.2 Other Supplementary Laws Regulating Personal Data*

Apart from previously mentioned key legislations, there are other legal provisions under different legislations that deal with personal data held by private sector, such as the Credit Information Business Act (2002), the Electronic Transaction Act (2011), the Royal Decree Prescribing the Security Procedure Presumed as a Reliable Method of Electronic Transaction (2010) enacting the provisions of Electronic Transaction Acts, Section 7 of the National Health Act protects personal health information, some other sets of standards has been announced by ETDA and National Broadcasting and Telecommunication Commission (NBTC).

The mentioned laws and legal frameworks in Thailand are primarily concerned with the management, storage, distribution, and protection of personal information. This focus demonstrates the prevalent interpretation of 'privacy' within the country, which is largely limited to data privacy. As such, it appears that Thai privacy legislation does not extend its scope to include reproductive autonomy, highlighting a significant gap in the protection of broader privacy rights.

## **5.2 Recent Concerns Regarding Privacy Protection After The 2014 Coup**

As a result of the military coup in 2014, there has been growing concerns for individual privacy. Under the martial law, it stipulates that the military authority shall have superior power over the civil authority for the purpose of keeping public order. This enables the military government to extensively exercise its power, including conducting civilian surveillance. The martial law was then replaced by Article 44 of the interim Constitution, which provides the government with unregulated and unchecked powers to exercise executive rights in all areas, quoting the sake of keeping public order. In this regard, between 2014 and 2015, there were several legislations passed by the military government that were

criticised for falling short to protect fundamental rights, particularly in relation to the right to privacy and freedom of expression.<sup>266</sup>

Particularly, amongst many proposed legislations by the military government is the Cyber Security Act (2019), which entitles the government to conduct communication surveillance without adequate safeguards and limits in accordance with the principles of legality, necessity, and proportionality.<sup>267</sup> With growing protests against the military ruling, as discussed in autonomy section earlier, there have been many violations of individual privacy through government surveillance. Due to its popularity, social media and internet-based communications such as Facebook, Twitter, Instagram, WhatsApp, and Line (a mobile application used for communications which is vastly popular in Thailand) are the main target for government surveillance. In December 2014, ICT minister claimed that they can ‘monitor all nearly 40 million Line messages sent by people in Thailand each day’.<sup>268</sup> Also, user contents posted on social media platforms that are deemed relating to the discussion of the Thai monarchy were taken down, as ordered by the military government.<sup>269</sup>

Clearly from the preceding discussion is the absence of the notion of a right to respect for private and family life alongside the topic of privacy. This resonates with the observation that Thailand predominantly centres its attention on the concept of privacy, primarily concerning

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<sup>266</sup> ‘The Right to Privacy’ Stakeholder Report Universal Periodic 25<sup>th</sup> Session – Kingdom of Thailand (*Thai Netizen Network and Privacy International*, September 2015) <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiKqqvJnPH6AhW\\_xTgGHWcmD0oQFnoECAYQAQ&url=https%3A%2F%2Fprivacyinternational.org%2Fsites%2Fdefault%2Ffiles%2F2017-12%2Fprivacy\\_thailand.pdf&usg=AOvVaw2r5pJOdsTVXoobSfr7V5WJ](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiKqqvJnPH6AhW_xTgGHWcmD0oQFnoECAYQAQ&url=https%3A%2F%2Fprivacyinternational.org%2Fsites%2Fdefault%2Ffiles%2F2017-12%2Fprivacy_thailand.pdf&usg=AOvVaw2r5pJOdsTVXoobSfr7V5WJ)> accessed 21 October 2022

<sup>267</sup> National Cybersecurity Bill (the draft approved by the Cabinet on 6 January 2015) <<https://thainetizen.org/wp-content/uploads/2015/03/cybersecurity-bill-20150106-en.pdf>> accessed 21 October 2022; Pavinee Bunyamissara, ‘Thailand’s Cyber Security Act Finally Comes into Force’ (2019) Nishimura & Asahi <<https://www.nishimura.com/en/articles/thailands-cyber-security-act-finally-comes-into-force.html>> accessed 21 October 2022

<sup>268</sup> Lorenzo Franceschi-Bicchierai, ‘Thai Police Want to Mine Popular Japanese App for Chat Records’ (*Mashable*, 13 August 2014) <<http://mashable.com/2013/08/13/thai-police-line-app/>> accessed 21 October 2022; John Russel, ‘Thailand’s Government Claims It Can Monitor The Country’s 30M Line Users’ (*Tech Crunch*, 23 December 2014) <<http://techcrunch.com/2014/12/23/thailand-line-monitoring-claim/>> accessed 21 October 2022

<sup>269</sup> ‘The Right to Privacy’ Stakeholder Report Universal Periodic 25<sup>th</sup> Session – Kingdom of Thailand (*Thai Netizen Network and Privacy International*, September 2015) <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiKqqvJnPH6AhW\\_xTgGHWcmD0oQFnoECAYQAQ&url=https%3A%2F%2Fprivacyinternational.org%2Fsites%2Fdefault%2Ffiles%2F2017-12%2Fprivacy\\_thailand.pdf&usg=AOvVaw2r5pJOdsTVXoobSfr7V5WJ](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiKqqvJnPH6AhW_xTgGHWcmD0oQFnoECAYQAQ&url=https%3A%2F%2Fprivacyinternational.org%2Fsites%2Fdefault%2Ffiles%2F2017-12%2Fprivacy_thailand.pdf&usg=AOvVaw2r5pJOdsTVXoobSfr7V5WJ)> accessed 21 October 2022

the parameters of data protection. This leaves little room for the development and extension of the concept of a right to respect for private and family life into the realm of reproductive autonomy.

## 6. Gender Equality

This part examines the topic of gender equality to see how the concept is understood, practiced, and developed under the Thai legal framework. More importantly, it sets out to see what and how the implication of gender equality affects the issue of non-medical preimplantation sex selection.

In this regard, this part begins with the examination of how the concept of gender equality sits within Thai legal settings by looking at several laws that contain elements of gender equality. Upon doing so, the findings reveal that despite the newly implemented Gender Equality Act (discussed below), there are several areas of laws and legal provisions that need to be developed to uphold the principle of gender equality.

### 6.1 Thai Legal Provisions in Relation to Gender Equality

Under the current Constitution of Thailand (2017), Section 4 states that human dignity, rights, liberties and equality of the people shall be protected. Specifically with reference to the principle of gender equality, Section 27 provides that all persons are equal before the law, and shall have rights and liberties and be protected equally under the law. Whilst the language of this document did use the wording 'men and women shall enjoy equal rights', which seems to be too binary; nevertheless, in the following part of Section 27, it further stipulates that unjust discrimination against a person on the grounds of differences in origin, race, language, gender, age, disability, physical or health condition, personal status, economic and social standing, religious belief, education, or political view shall not be permitted. Evidently, the principle of gender equality is recognised, upheld, and protected under the Thai Constitution.

Apart from the constitutional protection of gender equality enshrined in the Constitution, the most recent and prominent legal document in relation to the principle of gender equality is

the 2015 Gender Equality Act. This Act contains a definition of discrimination<sup>270</sup> which mentions (but does not provide definitions to) both direct and indirect discrimination by government agencies, the private sector or individuals, whether it be from policies, rules, regulations, announcements, measures, projects or any practices. This law includes and focuses on protecting all persons of all sexes, women, men and those who manifest different gender other than his/her gender of origin, instead of focusing on protecting women and persons with sexual orientation and gender identity, which are vulnerable groups who are usually affected from acts of gender discrimination.<sup>271</sup> This Act, which came into force in September 2016, equally prohibits government and other non-government sectors to announce or conduct gender based discriminatory practices. The Act, verbatim, protects 'men, women and people who express themselves differently from their biological sex'. The enactment of this law is regarded to be a significant progress for the promotion of gender equality and particularly the protection of LGBTQ+ rights in Thailand.

Nevertheless, it is of major concern that this law gives room for discrimination, by allowing exemptions for possible gender discriminatory practices for reasons of religious principles or national security, or to protect the people's welfare and safety.<sup>272</sup> In other words, the actions of these reserved limitations will not be considered as discrimination cases. In this regard, apart from the national security and religious claims, the phrase 'with an objective to overcome obstacles or encourage all persons to exercise their rights and liberties equally, or

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<sup>270</sup> The 2015 Gender Equality Act of Thailand defines 'discrimination' as any distinction, exclusion, restriction, or preference, whether direct or indirect, based on gender that results in the impairment or nullification of the recognition, enjoyment, or exercise by women, men, or those who express a gender identity different from their sex at birth, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field. The 2015 Gender Equality Act specifically aims to protect all individuals regardless of their gender identity or expression, emphasizing the inclusion of not just women and men, but also those who identify differently from their gender assigned at birth. It encompasses a broad perspective on discrimination, covering policies, rules, regulations, practices, and actions by both government agencies and the private sector. See 'Assessment Report: Implementation of the Gender Equality Act BE 2558 (2015)' (UNDP, 3 May 2020) <<https://www.undp.org/thailand/publications/assessment-report-implementation-gender-equality-act-be-2558-2015>> accessed 21 October 2022

<sup>271</sup> 'Assessment Report: Implementation of the Gender Equality Act BE 2558 (2015)' (UNDP, 3 May 2020) <<https://www.undp.org/thailand/publications/assessment-report-implementation-gender-equality-act-be-2558-2015>> accessed 21 October 2022

<sup>272</sup> Gender Equality Act BE 2558 (2015), s 17 stipulates that execution of policies, rules, regulations, announcements, measures, projects or practices by any government agencies, non-governmental organisations or persons, which are considered as unjust gender discrimination shall not be allowed. The implementation of such actions to protect the people's welfare and safety, to uphold religious principles and practices, or to ensure national security shall not be regarded by any means as unjust gender discrimination.

to protect their welfare and safety' is rather vague and unclear, and since the enactment and implementation of this Act, no further clarification has been given to elucidate this wording.<sup>273</sup> Moreover, there are also serious limitations to the realisation of the gender equality Act i.e. gender discrimination cases are designated to be processed through state-appointed committee, most of whom are not trained on gender nor human rights issues. Hence, various concerns are generated with respect to the shortfall and enforceability of the 2015 Gender Equality Act<sup>274</sup>, suggesting that Thailand may not be adequately prepared for its robust implementation at present.

## 6.2 Gender (In)Equality and Reproductive Rights Under Thai Laws

The legal regulations which encompass both concepts of reproductive rights and gender equality in Thailand is evidently the law on assisted reproduction which is established in the 2015 ART Act. To reiterate certain provisions laid down in the 2015 Act, which concern the issue of gender equality, that have already been mentioned and explored earlier, it is useful to go over the said provisions once again here in order that emphasis can be placed upon the shortfall regarding gender equality of the assisted reproduction laws.

As previously stated, Section 21 of the 2015 ART Act stipulates that the intended parents must be a legally married couple whose wife is unable to conceive. The emphasis of 'legally married couple' means that the law effectively discriminates the rights to seek surrogacy service of non-heterosexual couple. It must be pointed out that currently Thailand law does not allow or recognise same sex marriage, hence, by prescribing that only the legally married couple can undergo assisted reproductive treatment, of which in this case of Section 21 of the 2015 ART Act is surrogacy, the law carries a great degree of gender inequality within its provisions.

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<sup>273</sup> Sawatree Suksri, 'The Gender Equality Act BE 2558 (2015): Problems on Provisions and Law Enforcement' (2021) 4 Thammasat Law Journal 532 <<https://so05.tci-thaijo.org/index.php/tulawjournal/article/view/253711/173007>> accessed 21 October 2022

<sup>274</sup> Thai Lawyers for Human Rights Center, 'Unequal Gender Equality Act' (in Thai) (*iLaw*, 16 September 2015) <<https://ilaw.or.th/node/3848>> accessed 21 October 2022; Sawatree Suksri, 'The Gender Equality Act BE 2558 (2015): Problems on Provisions and Law Enforcement' (2021) 4 Thammasat Law Journal 532 <<https://so05.tci-thaijo.org/index.php/tulawjournal/article/view/253711/173007>> accessed 21 October 2022; 'Gender Equality Act: a gateway to success or failure?' (in Thai) (*Mathichon*, 26 August 2020) <[https://www.matichon.co.th/lifestyle/social-women/news\\_2322738](https://www.matichon.co.th/lifestyle/social-women/news_2322738)> accessed 21 October 2022

Similarly, Section 36 of the 2015 ART Act further adds that ‘no one shall create an embryo other than for the purpose of infertility treatment for a legally married couple’. Once again, such provision highlights strong legal focus that discriminates LGBTQ+ couple who cannot be legally married under Thai law and others who are not married but still desire to have a child.

Furthermore, consent must be obtained if a woman wishes to act as surrogate mother but is in a cohabitate relationship with a man as husband and wife or has a lawful husband.<sup>275</sup> This particular point has already been flagged in the earlier section and it is important to attend to such consent requirement again here so as to point out the gender inequality that resides with this regulation. The need for a woman to seek out a man’s consent before she can take part in surrogacy and become a surrogate mother clearly undermines the underlying principle of gender equality. Evidently, there is no reason or explanatory note given out by the legislature to justify such legal prerequisite. Such establishment of legal requirements set out across various provisions of the ART Act can lead to the observation that Thai law on reproductive health, specifically with respect to an area of assisted reproductive healthcare, still allows and is open to the concept and practice of gender discrimination and inequality.

Vis-à-vis the Thai abortion law, upon taking into account the link between abortion and gender equality, it can be argued that as long as there is still a criminal punishment attached to abortion, the law continues to carry its recognition and its position towards gender inequality. This is because only women can get pregnant and undergo abortion, men, on the other hand, are not subjected under any legal punishment even though they are also a key participant who takes part in the unwanted conception/ pregnancy. As discussed earlier during the autonomy section, whilst the new abortion law now sets out new conditions such as the period of which women can legally carry out abortion (12 weeks and 20 weeks with justified and authorised medical reasons from the physicians), other abortions which fall outside the scope of stipulations allowed by law still face with criminal charges, which contain considerably severe punishments, including imprisonment. As a result, with the existing law that still partly criminalises abortion, it can be said that the presence of gender inequality persists under the abortion law of Thailand.

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<sup>275</sup> The Protection for Children Born through Assisted Reproductive Technologies Act BE 2558 (2015), s 21(4)

### 6.3 The Implication of Gender Equality on Non-Medical Preimplantation Sex Selection

The examination of gender equality within Thai legal provisions, especially under the Gender Equality Act of 2015 and laws pertaining to reproductive rights such as the ART Act, unveils significant implications for the issue of sex selection in Thailand. The legal framework, while aiming to promote gender equality, inadvertently highlights areas of gender discrimination, particularly in relation to reproductive technologies and rights. For instance, the emphasis on legally married heterosexual couples for access to assisted reproductive technologies (ART) underscores a form of indirect discrimination, excluding LGBTQ+ couples and thereby perpetuating a heteronormative bias. This bias could potentially influence sex selection practices, as the legal framework implicitly upholds traditional gender roles and family structures, which might prioritise one gender over another.

Furthermore, the constraints placed on reproductive rights, such as the stringent conditions under which abortion is permitted and the requirement for women in certain relationships to seek consent for surrogacy, reflect an underlying gender inequality that could exacerbate the preference for male offspring, especially in a society where familial and economic pressures might favour sons. This legal environment, by limiting women's autonomy over their reproductive choices and subtly endorsing gendered expectations, might inadvertently encourage sex selection practices, despite the overarching intent to promote gender equality. Therefore, while Thailand's legal efforts towards gender equality are commendable, the nuances within these laws reveal complex implications for sex selection. These legal provisions, by enforcing restrictive views on family and reproductive rights, could perpetuate gender biases, ultimately affecting sex selection preferences in a manner that contradicts the principles of gender equality. To fully address the issue of sex selection within the context of gender equality, Thai legal provisions need to be critically evaluated and potentially reformed to ensure they truly uphold and promote equality across all genders, without indirectly supporting practices that favour one gender over another.

Building on the understanding of the complex interplay between gender equality laws and the practice of sex selection in Thailand, this thesis will delve deeper into advocating for the prohibition on non-medical preimplantation sex selection. Acknowledging the critical need to

address and mitigate gender biases and discriminatory practices, a detailed analysis and discussion will be presented later in this thesis, particularly in Chapter Six.

In conclusion, from the above discussion reading the issue of gender equality, it can be observed that Thailand has developed a gender equality framework (as witnessed in the various versions of the Constitutions and particularly the recent Gender Equality Act). Such framework, on one hand, could be utilised to support the argument for non-medical preimplantation sex selection, asserting that a woman should be able to choose the desired sex of her baby. On the other hand, the gender equality framework could also be used by opponents of sex selection to prohibit non-medical preimplantation sex selection by arguing that society needs to ensure that baby girls are also born through such assisted reproductive technology treatment. To this end, upon examining other case-study jurisdictions (Chapter Three) together with the qualitative data collected from the interview study (presentation of the findings and the discussion of the findings are presented in Chapter Five and Chapter Six respectively), the knowledge accumulated throughout these chapters will help guide the way forward on how gender equality should be understood in the context of non-medical preimplantation sex selection. Hence, such analysis is later presented in the discussion chapter of this thesis (Chapter Six).

## 7. Chapter Summary

This chapter elucidates and sets out Thai legal framework relevant to the practice of non-medical preimplantation sex selection. In particular, the chapter addresses three primary principles that form the basis for non-medical sex selection arguments. In the first part concerning autonomy, the discussion canvasses existing concepts of autonomy in Thailand and concludes that despite some senses of recognition vis-à-vis reproductive autonomy, Thailand remains its primary focus on autonomy towards political and personal autonomy. In the second part which involves the discussion with respect to privacy and a right to respect for private and family life, it is evident that the scope of privacy, recognised and applied in Thai settings, does not extend to encompass an aspect of reproductive rights. In the final part where it examines gender equality under the Thai legal framework, it reveals that Thai gender equality laws, including the constitution and the 2015 Gender Equality Act, show progress for

LGBTQ+ rights but face concerns over exemptions allowing discrimination. The 2015 Assisted Reproductive Technology (ART) Act introduces gender disparities, limiting surrogacy to legally married heterosexual couples. Consent requirements for surrogate mothers highlight gender inequality. The Thai abortion law, partially criminalising abortion, reflects gender bias with only women facing legal consequences. This dual framework, encompassing constitutional principles and the 2015 Gender Equality Act, presents a complex landscape regarding non-medical preimplantation sex selection. On one hand, it provides support for arguments advocating reproductive autonomy, particularly for women, by emphasising equality and individual rights. On the other hand, the framework also offers grounds for opposition, citing concerns related to potential discrimination, ethical considerations, and societal implications. The analysis of other case-study jurisdictions and qualitative data in Chapter Six is crucial for navigating and understanding the nuanced perspectives, helping to inform and guide the ongoing discourse on the legal and ethical dimensions of non-medical preimplantation sex selection in Thailand.

Building on the foundation laid in the discussion of Thailand's legal framework regarding non-medical preimplantation sex selection, the next chapter transitions to a comparative analysis through case studies of selected jurisdictions. This exploration aims to illuminate how different legal and ethical landscapes address and regulate non-medical preimplantation sex selection, suggesting a suitable regulatory model for Thailand. The chapter will examine the legislative approaches, societal impacts, and ethical considerations in these jurisdictions to provide a broader perspective on managing reproductive technologies and gender equality. This comparative lens helps navigate the complex interplay of autonomy, privacy, and gender equality, enriching our understanding of global discourse on the topic. The findings from these case studies are instrumental in advocating for the continuation of the ban on non-medical preimplantation sex selection in Thailand, offering a balanced approach that upholds gender equality and ethical integrity in reproductive technologies.

# CHAPTER THREE: A Case Study Analysis of Non-Medical Preimplantation Sex Selection Laws: United States, the United Kingdom, Australia, and Israel

## 1. Introduction

This thesis aims to assess legal responses to preimplantation sex selection in Thailand, utilising case studies four jurisdictions: the US, UK, Australia, and Israel. The US represents one end of the regulatory spectrum with no specific laws governing sex selection, while the UK, at the other end, prohibits non-medical preimplantation sex selection but allows it for medical reasons. Australia's stance is similar to the UK's, in that the current laws prohibit non-medical preimplantation sex selection. However, given the current legal framework, there have been oscillations between proposals to abolish and to strengthen the sex selection ban. Israel, uniquely, explicitly permits non-medical preimplantation sex selection under certain conditions, making its legal framework particularly noteworthy.

The chapter progresses by examining the legal landscape of each jurisdiction, starting with the US's lack of regulation and moving through the UK's structured prohibitions, Australia's oscillating legal stance, and finally, Israel's conditional allowance of the practice. This case study method reveals diverse approaches and justifications for regulating preimplantation sex selection, influenced by each jurisdiction's unique context and concerns. By focusing on these four jurisdictions, the chapter seeks to provide insights and guidance for the development of Thailand's legal framework regarding non-medical sex selection. The ultimate goal is to answer the central research question of how Thai law should address non-medical preimplantation sex selection, culminating in a recommendation to retain the current prohibition in Thailand. This comprehensive examination highlights the complexity of legal responses to sex selection and the importance of considering various international practices and human rights rationales in shaping effective legislation.

Nevertheless, before proceeding with the detailed case studies of the United States, the United Kingdom, Australia, and Israel, it is crucial to address the notable omission of other significant jurisdictions, specifically China and India, and to clarify the reasons for their exclusion from this regulatory analysis.

The exclusion of China and India from this thesis's regulatory analysis is primarily due to the practical challenges of accessing comprehensive legal sources and detailed regulatory information from these jurisdictions. Language barriers and limited availability of legal documents further complicate efforts to conduct thorough analyses of their regulatory frameworks. Consequently, this study focuses on the United States, the United Kingdom, Australia, and Israel, where legal materials are more accessible, ensuring the depth and integrity of the analysis.

This limitation does not detract from the overall analysis. The selected case studies offer a diverse spectrum of regulatory approaches to non-medical preimplantation sex selection. For instance, the United Kingdom's Human Fertilisation and Embryology Authority (HFEA) prohibits sex selection for non-medical reasons, reflecting public opinion that opposes such practices. In contrast, the United States lacks federal regulation on this matter, resulting in varied practices across different states. Australia and Israel present their own unique regulatory landscapes, further enriching the comparative analysis. These regulatory frameworks are examined in greater detail later in this chapter, highlighting their significance in shaping the thesis's discussions on non-medical preimplantation sex selection.

Furthermore, the ethical, cultural, and legal considerations discussed in relation to China and India are still addressed through the literature reviews (as witnessed in Chapter One) and empirical data from interview accounts (Chapter Five). These discussions highlight the significant issues of skewed sex ratios and the societal implications of sex-selective practices in these countries, providing a contextual understanding of the global landscape of sex selection.

By focusing on jurisdictions with accessible regulatory frameworks, the thesis aims to provide a detailed and coherent analysis of non-medical preimplantation sex selection, contributing to the broader discourse on reproductive ethics and law. Future research could benefit from overcoming the practical challenges identified and incorporating a more detailed analysis of China and India's regulatory responses to sex selection, further enriching the comparative study of global practices.

In conclusion, while the exclusion of China and India from the regulatory analysis is a noted limitation, it does not undermine the integrity or comprehensiveness of the thesis. The selected case studies, coupled with the contextual discussions of China and India, offer a robust foundation for examining the ethical and legal dimensions of non-medical preimplantation sex selection.

## 2. The United States

### 2.1 Introduction

In the US, none of the law at state's level stipulates that preimplantation sex selection is prohibited. Vice versa, no laws of any state express that such practice is allowed. This is a matter of non-binding guidelines and practices. The closest to laws relevant to preimplantation sex selection is the regulation of Pre-Genetic Diagnosis (PGD). In some states, especially amongst fertility's online social discussion platforms, sex selective PGD is even publicly encouraged.<sup>276</sup> Consequently, within the US, people who access treatment of assisted reproductive technologies have the option to choose the sex of their babies notwithstanding whether it is for a medical or non-medical purpose or not. The legality of the use of assisted reproductive technology for non-medial sex selection is currently a matter of state law, nonetheless, as pointed out above, at present no states contain the law that prohibits the practice.<sup>277</sup> This is a strong contrast to many jurisdictions across the world where non-medical preimplantation sex selection is prohibited.

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<sup>276</sup> Jaime S King, 'American's role in sex selection' (*SLS Center for Law and the Biosciences*, 9 October 2011) <<https://law.stanford.edu/2011/10/09/americas-role-in-sex-selection/>> accessed 21 October 2022

A survey published in March 2018 in the *Journal of Assisted Reproduction and Genetics* found that nearly 73 percent of U.S. fertility clinics offer gender selection. Of those, nearly 84 percent offer it to couples who do not have fertility problems but are considering IVF solely to control the pregnancy's outcome. See Sarah M Capelouto, Sydney R Archer, Jerrine R Morris, Jennifer F Kawwass, and Heather S Hipp, 'Sex selection for non-medical indications: a survey of current pre-implantation genetic screening practices among U.S. ART clinics' (2018)35(3) *J Assist Reprod Genet* 409, 416 <<https://doi.org/10.1007/s10815-017-1076-2>> accessed 23 October 2022

<sup>277</sup> S Soini, 'Preimplantation genetic diagnosis (PGD) in Europe: diversity of legislation a challenge to the community and its citizens' (2007) 26(2) *Med Law* 309, 323 <<https://pubmed.ncbi.nlm.nih.gov/17639853/>> accessed 23 October 2022; Lusine Aghajanova and Cecilia T Valdes, 'Sex selection for nonhealth-related reasons' (2012) 14(2) *Virtual Mentor* 105, 111 <<https://doi.org/10.1001/virtualmentor.2012.14.2.ccas3-1202>> accessed 23 October 2022

In this part concerning sex selection and relevant laws and policies that are present in the US, key human rights at stake that must be considered upon assessing the issue are identified below. These factors or so-called competing rights are autonomy, right to privacy, sexism, and the harm principle<sup>278</sup>. These group of rights and principles essentially form the basis and the framework of the law pertaining to sex selection in the US. The practice of preimplantation sex selection involves many elements. For the decision to participate or undergo with such practice, the concept of autonomy and right to privacy come together to form a strong supporting argument for those who wish to have the treatment. Opponents of sex selection put forward justifications drawn from the concept of sexism. Both advocates and opponents of non-medical preimplantation sex selection also use the harm argument to justify their own claims.

In order to explore these competing interests, the following part begins by looking at legal precedents with respect to reproductive autonomy and privacy (as autonomy and privacy closely entwined in US jurisprudence) as upheld by the US Supreme Court.

## 2.2 Reproductive Autonomy and Right to Privacy Within the US Legal Framework

There is a prevailing view that individual decisions in the area of reproductive and fertility related matters merit the protection of the right to privacy – a concept which is protected and upheld within the US.<sup>279</sup> As the Supreme Court has stipulated, ‘if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child’<sup>280</sup>. In other words, an individual’s decision to procreate falls

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<sup>278</sup> The ‘harm principle’ is a concept often invoked in discussions of legal and ethical issues, particularly in the context of balancing individual freedoms against the potential for actions to cause harm to others. Originally articulated by the philosopher John Stuart Mill, the principle suggests that the actions of individuals should only be limited to prevent harm to other people. See Epstein RA, ‘The Harm Principle - And How It Grew’ (1995) 45(4) *The University of Toronto Law Journal* 369, 417 <<https://doi.org/10.2307/825731>> accessed 31 March 2024

<sup>279</sup> *Roe v Wade* 410 US 113, 153 (1973)

*Eisenstadt v Baird* 405 US 438, 453-55 (1972)

*Griswold v Connecticut* 381 US 479, 485-86 (1965)

<sup>280</sup> *Eisenstadt v Baird* 405 US 453 (1972)

within the scope of the right to privacy, state intervention into such matter is unjustified and should be deterred.

Similarly, a women's right to control her body has been conceptualised as stemming from the right to be left alone.<sup>281</sup> Accordingly, some parents who argue that they should be allowed to plan their family free from state intervention are in favour of sex selection and base their claim upon the postulated right to privacy or the right to be left alone. With respect to the woman's right to privacy, the claim is further strengthened as the embryo's sex may have a direct relevance on the number of pregnancies and births that a women may have to undergo provided that the mother desire for a child of a particular sex. In other words, to the extent that privacy creates a sphere in which intimate decisions can be made without interference from the government, this could suggest that the decision whether to have a boy or a girl ultimately belongs within such sphere<sup>282</sup>.

Arguably, there seems to be certain echoes of the US Supreme Court's approaches to reproductive rights which find their ways into/ influence the position of US preimplantation sex selection law as the US system does not heavily regulate this area of reproduction. This section examines the autonomy-privacy rationale in the context of reproduction in the US Supreme Court case law, including the complications and challenges from the latest decision, *Dobbs*, reversing abortion rights.

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<sup>281</sup> *L v Matheson* 450 US 398, 434-35 n 18 (1981)

<sup>282</sup> On the constitutional aspect of whether the desire to choose an embryo's sex should be seen as invoking substantive due process protection associated with fundamental reproductive rights, see Owen D Jones, 'Sex Selection: Regulating Technology Enabling the Predetermination of a Child's Gender' (1992) 6 *Harvard Journal of Law & Technology* <<https://scholarship.law.vanderbilt.edu/faculty-publications/1069>> accessed 23 October 2022; Rachel E Remaley, 'The Original Sexist Sin': Regulating Preconception Sex Selection Technology' (2000) 10 *Health Matrix* 249 <<https://scholarlycommons.law.case.edu/healthmatrix/vol10/iss2/7>> accessed 23 October 2022; F Shenfield, G Pennings, P Deveroey, C Sureau, B Tarlatzis, J Cohen, and ESHRE Ethics Task Force, 'Taskforce 5: Preimplantation Genetic Diagnosis' (2003) 18(3) *Hum Reprod* 649, 651 <accessed 23 October 2022; Rebecca Knox, 'Preimplantation Genetic Diagnosis: Disease Control or Child Objectification?' (2003) 22(2) *Saint Louis University Public Law Review* <<https://scholarship.law.slu.edu/plr/vol22/iss2/14>> accessed 23 October 2022

The development of reproductive rights in US Supreme Court jurisprudence was rooted in the 14<sup>th</sup> Amendment and the due process clause.<sup>283</sup> As an example, is *Buck v. Bell* in 1927<sup>284</sup>. The Court upheld a Virginia statute that allowed the State to sterilise a woman who was judged as 'feeble minded'.<sup>285</sup> Notably, this landmark decision is often cited as a pivotal moment in the history of negative eugenics<sup>286</sup> in the United States.<sup>287</sup> It marks a significant instance where reproductive rights intersected with the concept of eugenics, indicating a time when judicial decisions supported eugenic measures in the name of public welfare. This decision reflects the complex and sometimes troubling ways in which legal systems have navigated issues of reproduction and genetic selection.<sup>288</sup> In this 1927 case, the law in question allowed the superintendent of state mental institutions to sterilise individuals provided that it was in the best interests of the patient and society. Justice Holmes, presiding the case, delivered the now infamous phrase, 'three generations of imbeciles are enough'<sup>289</sup>. However, an abrupt change later in the case of *Skinner v. State of Oklahoma*, the Court's attitude towards government mandated sterilisation made a swift turn against its precedent when the Court

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<sup>283</sup> Beginning in 1942, the Supreme Court has recognised, through a series of cases, that the right to procreate is a fundamental right protected by the Fourteenth Amendment. See Meryl B Rosenberg, 'The individual Right to Procreate and Gestational Surrogacy' ABC Paper 2016 <<https://www.lcc.mn.gov/lcs/meetings/10112016/ABA%20Paper%20The%20Individual%20Right%20to%20Procreate%20Final%202016.pdf>> accessed 23 October 2022

The Fourteenth Amendment contains a number of important concepts, mostly state action, privileges and immunities, citizenship, due process, and equal protection. All of which are contained in Section One. Vis-à-vis Due Process, this concept is linked to reproductive rights under the argument that all individuals must be treated equally and fairly. With reference to particularly substantive due process, this concept is often used to endorse other rights such as a right to privacy (as we can see in *Griswold v. Connecticut* 1965). The Court also relied on right to privacy in several other cases involving liberties, such as allowing abortions in *Roe v Wade* 1973, permitting private homosexual acts in *Lawrence v Texas* 2003. See 'Fourteenth Amendment' (*Cornell Law School Legal Information Institute*) <[https://www.law.cornell.edu/wex/fourteenth\\_amendment\\_0](https://www.law.cornell.edu/wex/fourteenth_amendment_0)> accessed 23 October 2022

<sup>284</sup> *Buck v Bell* 274 US 200 (1927)

<sup>285</sup> *Buck v Bell* 274 US 200 (1927)

<sup>286</sup> Negative eugenics, aimed at preventing certain individuals or groups deemed undesirable from reproducing, found legal endorsement through this case. See Romeo-Casabona CM, 'Health and Eugenics Practices: Looking towards the Future' (1998) 5(3) *European Journal of Health Law* 241, 260 <<http://www.jstor.org/stable/45437815>> accessed 31 March 2024

<sup>287</sup> Cynkar RJ, 'Buck v. Bell: 'Felt Necessities' v. Fundamental Values?' (1981) 81(7) *Columbia Law Review* 1418, 1461 <<https://doi.org/10.2307/1122204>> accessed 31 March 2024; Suuberg A, 'Buck v. Bell, American Eugenics, and the Bad Man Test: Putting Limits on Newgenics in the 21st Century' (2020) 38(1) *Law & Inequality* <<https://scholarship.law.umn.edu/lawineq/vol38/iss1/5>> accessed 31 March 2024

<sup>288</sup> Suuberg A, 'Buck v. Bell, American Eugenics, and the Bad Man Test: Putting Limits on Newgenics in the 21st Century' (2020) 38(1) *Law & Inequality* <<https://scholarship.law.umn.edu/lawineq/vol38/iss1/5>> accessed 31 March 2024

<sup>289</sup> *Buck v Bell* 274 US 200 (1927). See also Paul A Lombardo, *Three generations, no imbeciles: Eugenics, the Supreme Court, and Buck v Bell* (Johns Hopkins University Press 2010)

struck down Oklahoma's Habitual Criminal Sterilisation act which allowed Oklahoma to sterilise convicted individuals. The Supreme Court expressed that the concerned statute involved 'the basic civil rights' and fundamental to existence. The statute was struck down in recognition that governmental power to draw lines regarding who could reproduce and who could not pose the threat of 'invidious discriminations ... against groups or types of individuals' in violation of the constitutional guarantee of equality.<sup>290</sup>

*Griswold v. Connecticut*<sup>291</sup> shifted the analysis on reproduction and the law from equality rights to privacy rights. The Court in this case recognised a constitutionally protected right to privacy in the marital home, striking down the Connecticut law that restricted the use of contraceptives for married people.<sup>292</sup> The Court in *Griswold* expressed that whilst it was not their place to judge the wisdom of laws relating to economics or social conditions, 'this law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.'<sup>293</sup> The Court found that the decisions concerning contraception in a marital relationship rested within the 'zones of privacy created by several fundamental constitutional guarantees'<sup>294</sup>. The Court later concluded that 'would we allow the police to search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship'.<sup>295</sup> Notably, the rationale and ruling in this case arguably make *Griswold* one of the key cases in sexual reproductive rights in the US.

Reproductive rights including a right to privacy in relations to such rights were also expanded from the marital context in *Eisenstadt*<sup>296</sup>, a case in which a lecturer was convicted for handing out a condom and contraceptive foam to an unmarried student who attended his lecture on birth control methods.<sup>297</sup> The Court overruled the state law of Boston, which prohibited

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<sup>290</sup> *Skinner v Oklahoma* 316 US 535 (1942)

Kimberly M Mutcherson (ed), *Feminist Judgments: Reproductive Justice Rewritten* (Cambridge University Press 2020)

<sup>291</sup> *Griswold v Connecticut* 381 US 479 (1965)

<sup>292</sup> *Griswold v Connecticut* 381 US 479 (1965) 485, 486

<sup>293</sup> *Griswold v Connecticut* 381 US 479 (1965) 482

<sup>294</sup> *Griswold v Connecticut* 381 US 479 (1965) 482

<sup>295</sup> *Griswold v Connecticut* 381 US 479 (1965) 485, 486

<sup>296</sup> *Eisenstadt v Baird* 405 US 438 (1972)

<sup>297</sup> *Eisenstadt v Baird* 405 US 438 (1972)

unmarried person from receiving contraception, and stipulated that ‘if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’<sup>298</sup> Therefore, deriving from the ruling in *Eisenstadt*, being married or not, everyone is entitled to the protection of such rights. This is an important take especially on the consideration of equality *i.e.* regardless of the marital status, everyone should be able to make decisions about their reproductive aspects, based on the principles of equality. This is inconsistent with the current Thai sex selection law, as discussed in previous chapters. Ultimately, *Eisenstadt* challenged the distinctions in reproductive rights between married and non-married individuals. In contrast, in the context of sex selection law, Thailand still restricts to only married couples who can undergo ART treatments – treatments which also include PGD.

Following *Eisenstadt*, the Supreme Court extended the right of privacy and personal liberty to abortion rights in *Roe v. Wade*<sup>299</sup>, in which the Court was asked to assess the constitutionality of Texas statutes that criminalised abortion for reasons other than the medical purpose of saving the mother’s life.<sup>300</sup> In *Roe*, the plaintiff was a single pregnant woman who wished to have an abortion ‘performed by a competent, licensed physician, under safe, clinical conditions’ but was unable to legally do so due to the fact that the plaintiff did not qualify for the medical exception prescribed within the Texas statute.<sup>301</sup> Accordingly, the plaintiff sought to have the relevant Texas statutes ruled as unconstitutional on the ground that these laws violated a women’s constitutionally protected right to personal privacy.<sup>302</sup> Such right claimed by the plaintiff also included the right to ‘choose to terminate her pregnancy’.<sup>303</sup> The Supreme Court ruled that the implied constitutional right of privacy ‘is broad enough to include a women’s decision’ to terminate or not to terminate her pregnancy, provided that the pregnancy is qualified under the stipulated trimester framework, and the termination is carried out by a licensed doctor at safe and clinically suitable facility.<sup>304</sup> With respect to the

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<sup>298</sup> *Eisenstadt v Baird* 405 US 438 (1972) 453

<sup>299</sup> *Roe v Wade* 410 US 113 (1973)

<sup>300</sup> *Roe v Wade* 410 US 113 (1973) 118

<sup>301</sup> *Roe v Wade* 410 US 113 (1973) 120

<sup>302</sup> *Roe v Wade* 410 US 113 (1973) 120

<sup>303</sup> *Roe v Wade* 410 US 113 (1973) 129

<sup>304</sup> *Roe v Wade* 410 US 113 (1973) 153

trimester framework established in *Roe*, the Court stated that during the first trimester of the pregnancy, the decision to undergo an abortion was solely up to the woman's choice. After the first trimester, the state could regulate procedure. During the second trimester, the state could regulate, but not outlaw, abortions in the interests of the mother's health. After the second trimester, when it was deemed that the foetus became viable, the state could either regulate or outlaw abortions in the interest of the potential life, except when it was necessary to preserve the life or health of the mother.<sup>305</sup>

Accordingly, it is evident that the decision in *Roe* echoes the US constitutional position that abortion right is an embedded fundamental right upon individual autonomy, of which a right over one's own body is recognised and constitutionally upheld.

Nevertheless, the rights upheld in *Roe* was then modified in *Planned Parenthood v. Casey*<sup>306</sup>, in which the Court removed the trimester framework set up in *Roe*, holding that, prior to viability of the foetus, the State may express a preference for childbirth, so long as state regulation does not impose an 'undue burden on a woman's ability to make this decision'. Notably, whilst the case of *Casey* did reaffirm the existence of a constitutional right to abortion as upheld in *Roe*, the ruling in this case can be seen as a step backward for specifically abortion rights from the decision made in *Roe*. This is because the ruling in *Casey* allows burdens, to the point of undue-ness, to be placed on women's right to privacy. In other words, while the Supreme Court upheld the fundamental holding of *Roe*, it gave states more leeway to regulate abortion through the requirements of informed consent, waiting periods, and other barriers.<sup>307</sup>

In essence, the examination of relevant Supreme Court cases reveals a foundation of reproductive rights in the concept of liberty, a stance that has been curtailed by the *Dobbs*

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<sup>305</sup> Randy Beck, 'Self-Conscious Dicta: The Origins of *Roe v Wade's* Trimester Framework' (2011) 51(3) *The American Journal of Legal History* 505, 529 <<http://www.jstor.org/stable/41345374>> accessed 23 October 2022

<sup>306</sup> *Planned Parenthood of Se Pennsylvania v Casey* 505 US 833, 874 (1992)

<sup>307</sup> Michael F Moses, 'Casey and Its Impact on Abortion Regulation' (2004) 31(3) *Fordham Urban Law Journal* 805 <<https://ir.lawnet.fordham.edu/ulj/vol31/iss3/7/>> accessed 23 October 2022; Neal Devins, 'How 'Planned Parenthood v. Casey' (Pretty Much) Settled the Abortion Wars' (2009) 118(7) *The Yale Law Journal* 1318, 1354 <<https://www.jstor.org/stable/40389508>> accessed 23 October 2022; Lackland H Bloom, 'Chapter 18 *Roe and Casey*' in *Do Great Cases Make Bad Law?* (Oxford Academic 2014) <<https://doi.org/10.1093/acprof:oso/9780199765881.003.0018>> accessed 23 October 2022

decision. However, this principle of liberty echoes absence of regulation concerning sex selection.

Based on the precedents prior to *Dobbs*, deciding to have a child is considered a choice central to personal dignity and autonomy. When it comes to preimplantation sex selection, arguments for such practices are grounded in autonomy and privacy, aligning with the principles of the US Constitution. Predicting how the Court would address these arguments is challenging, but importantly, preimplantation sex selection does not directly raise the abortion issue. This distinction is notable, especially as laws against sex-selective abortion grow in the US, with eight states having banned the practice.<sup>308</sup> Despite the similarities between sex-selective abortion and preimplantation sex selection in their reliance on autonomy and privacy, the latter avoids the contentious debates surrounding abortion.

The discussed precedents show the Supreme Court historically ruling that states should not place undue burdens on individuals' reproductive choices, including contraception, sterilisation, and abortion rights, although the undue burden standard was repealed by the *Dobbs*<sup>309</sup> ruling and it is still unclear what it might mean for the legal regulation of pre-implantation sex selection. *Dobbs* centred on Mississippi's Gestation Age Act, which restricts abortions past 15 weeks, barring medical emergencies or severe foetal anomalies, and imposes penalties on abortion providers. Challenged by Jackson Women's Health Organization, Mississippi contended that the Constitution does not recognise abortion as a right, arguing against its classification as a fundamental right protected by the Due Process Clause of the 14th Amendment.<sup>310</sup>

Upon its ruling, the Court first stated that the Constitution makes no express references to abortion. Further, it holds that a state regulation of abortion does not fall within the scope of

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<sup>308</sup> University of Chicago Law School - Global Human Rights Clinic, National Asian Pacific American Women's Forum, and Advancing New Standards in Reproductive Health, 'Replacing Myths with Facts: Sex-Selective Abortion Laws In The United States' (2014) Global Human Rights Clinic 7 <<https://chicagounbound.uchicago.edu/ihrcl/7>> accessed 23 October 2022

<sup>309</sup> *Dobbs v Jackson Women's Health Organization* 597 US \_\_\_ (2022) <<https://supreme.justia.com/cases/federal/us/597/19-1392/>> accessed 15 October 2022

<sup>310</sup> *Dobbs v Jackson Women's Health Organization* 597 US \_\_\_ (2022) <<https://supreme.justia.com/cases/federal/us/597/19-1392/>> accessed 15 October 2022

a sex-based classification. Later, the Court then set out that abortion is not deeply rooted in the US history and traditions. From there, the Court elucidated that the Due Process Clause only protects substantive rights that are guaranteed under the 8<sup>th</sup> Amendments, and rights that are deemed fundamental.<sup>311</sup> In essence, the underlying message the Court established is that abortion is not a right constitutionally recognised under the Due Process Clause and that it cannot be considered as a fundamental right rooted in the history or traditions of the nation. Furthermore, the Court pointed out that the issue of abortion should be rested in the hands of the people and its elected state representatives. More importantly, the Court said that linking abortion to a right to autonomy would also license fundamental rights to ‘illicit drug use, [or] prostitution’.<sup>312</sup> With respect to the implications of privacy in the reproductive context, the ruling in *Dobbs* makes it difficult to predict the outer boundaries of privacy and reproductive rights, as evidenced by the confusion around IVF treatment in Alabama<sup>313</sup>. The removal of abortion right in *Dobbs* could imply that with respect to non-medical preimplantation sex selection, the autonomy given to this practice could be further diminished. Also, since *Dobbs* ruling points out that abortion regulation should fall back to the hands of each state’s representatives, it can be expected that sex selection, which is an issue that closely skirt around abortion, could see similar fate *i.e.* the views of the public and local lawmakers may guide the decision-making process made by its elected representatives.

In the ultimate analysis of the case study conducted for the purposes of this thesis, it is crucial to underscore that the thesis does not exclusively hinge on the US model. The examination of the US scenario highlights the adaptability of law, even when seemingly entrenched in constitutional principles, to evolve in response to the changing needs or political climate of a specific jurisdiction.<sup>314</sup>

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<sup>311</sup> *Dobbs v Jackson Women’s Health Organization* 597 US \_\_\_ (2022) <<https://supreme.justia.com/cases/federal/us/597/19-1392/>> accessed 15 October 2022

<sup>312</sup> *Dobbs v Jackson Women’s Health Organization* 597 US \_\_\_ (2022) <<https://supreme.justia.com/cases/federal/us/597/19-1392/>> accessed 15 October 2022

<sup>313</sup> Craig T, Malhi S, 'Shock, anger, confusion grip Alabama after court ruling on embryos' (20 February 2024) The Washington Post <<https://www.washingtonpost.com/nation/2024/02/20/alabama-supreme-court-ivf-embryos/>> accessed 31 March 2024

<sup>314</sup> Matthew Lippman, *Law and Society* (2<sup>nd</sup> edn, Sage 2017) ; Tanu Kapoor, ‘Law and Society’ (2019) 8(10) International Journal of Science and Research 804 <<https://www.ijsr.net/archive/v8i10/ART20201785.pdf>> accessed 8 November 2022; Rosidi Roslan, I Gusti Ayu Ketut Rachmi Handayani, and Lego Karjoko, ‘Legal Relationship and Social Changes and Their Impact on Legal Development’ (International Conference on

## 3. United Kingdom

### 3.1 Introduction

In the 1980s, the UK distinguished between medical and non-medical sex selection. Medical sex selection was defined as being used for the purpose of avoiding sex linked diseases whereas non-medical sex selection was defined as being based on preference or any other non-medical motivation.<sup>315</sup> The UK has banned non-medical sex selection, as did a number of countries worldwide including China, India, the EU, Australia, and Canada.<sup>316</sup> For the purpose of this thesis, particularly for this chapter, the UK sex selection law is chosen for the comparative study because it offers a different approach towards regulating such practice comparing to the US. It has legislation that specifically tailored to govern issues surrounding medically assisted reproduction, which is the Human Fertilisation and Embryology Act 2008. Moreover, there are various documentations issued by the government that provide rationale behind the issuing and the implementation of the 2008 HFE Act, which can help shed greater lights into key decision-making factors, including human rights, concerning the position of UK sex selection law.

With respect to the law governing sex selection, there is sex selection law regulating aspects of such practice with a clear restriction on sex selection for non-medical reasons. The Human Fertilisation and Embryology Act<sup>317</sup> (hereinafter HFE Act) of 1990 requires anyone creating, keeping, or using an embryo to hold a medical license.<sup>318</sup> The Act also establishes the Human Fertilisation and Embryology Authority<sup>319</sup> (hereinafter HFEA) for the purpose of reviewing information regarding embryos and treatments covered by the HFE Act as well as providing advisory services to the Secretary of State on relevant matters.<sup>320</sup> Moreover, the HFE Act

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Environment and Energy Policy, Indonesia, October 2021) <<http://dx.doi.org/10.2991/assehr.k.211014.060>> accessed 8 November 2022

<sup>315</sup> Falcia Elenberg and Edmund G Howe III, 'The Possible Dangers of Prenatal Nonmedical Sex Selection in regard to *in vitro* Fertilization' (2019) 3(1) *Madridge J Womens Health Emancipation* 56, 59 <<https://doi.org/10.18689/mjwh-1000112>> accessed 23 October 2022

<sup>316</sup> Falcia Elenberg and Edmund G Howe III, 'The Possible Dangers of Prenatal Nonmedical Sex Selection in regard to *in vitro* Fertilization' (2019) 3(1) *Madridge J Womens Health Emancipation* 56, 59 <<https://doi.org/10.18689/mjwh-1000112>> accessed 23 October 2022

<sup>317</sup> Human Fertilisation and Embryology Act 1990 (as amended by the Human Fertilisation and Embryology Act 2008)

<sup>318</sup> Human Fertilisation and Embryology Act 1990, s 3(1)(a)-(b)

<sup>319</sup> Human Fertilisation and Embryology Act 1990, s 5(1)

<sup>320</sup> Human Fertilisation and Embryology Act 1990, s 8(a)

prescribes the HFEA to be responsible for issuing the HFEA Code of Practice so as to 'secure the safety or efficacy of particular clinical or scientific practice raising fundamental ethical and social questions', such as sex selection<sup>321</sup>.

Between 1991, when the original 1990 Act came into effect, and 2009 when the amendments introduced to the 2008 HFE Act came into force, guidance on Preimplantation Genetic Diagnosis (PGD) practice was only provided by the HFEA in its non-legally binding form known as the Code of Practice. However, this has now changed and, under the amended 1990 HFE Act, it has been stipulated that PGD can only be practiced in specified circumstances, including to identify the sex of an embryo, provided that the HFEA has granted a licence to the medical facility for such specified practice and strictly only for medical purposes.<sup>322</sup>

Notably, it is now a criminal offence to perform PGD without a licence, outside the terms of a licence, or use it to select specific sex of an embryo for non-medical reasons.<sup>323</sup> A violation of such provision is now punishable by up to two year imprisonment, a fine, or both.<sup>324</sup> In essence, the recommendations put forth in the HFEA's report were adapted and codified as an amendment to the HFE Act in 2008.<sup>325</sup> Consequently, as stated earlier, under the existing law, sex selection for non-medical reasons are illegal and the sex selection procedure itself, either for medical or non-medical reasons, are heavily regulated through the licensing requirements issued by the HFEA and the HFE Act.

### 3.2 Regulating Non-Medical Preimplantation Sex Selection

When preimplantation reproductive technology, specifically PGD, was first successfully practiced in the UK, this was not regulated by any laws despite the fact that the possibility of sex selection and testing an embryo (in order to identify the sex of the embryo) had been

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<sup>321</sup> Human Fertilisation and Embryology Authority, *Code of practice* (8<sup>th</sup> edn, HFEA 2009) <<https://www.hfea.gov.uk/media/2062/2017-10-02-code-of-practice-8th-edition-full-version-11th-revision-final-clean.pdf>> accessed 24 October 2022

<sup>322</sup> Human Fertilisation and Embryology Act 1990, s 33(1)-(1A), 11, and schedule 2, paras 1ZA-B

<sup>323</sup> Human Fertilisation and Embryology Act 1990, s 41(2)

<sup>324</sup> Human Fertilisation and Embryology Act 1990, ss 3(1)-(1A), 11, 41(2), and sched 2, paras 1ZA-B

<sup>325</sup> Rina Agrawal Elizabeth Burt, and Roy Homburg, 'Time-Line in HFEA Developments and Regulatory Challenges: 20 Years of Overseeing Fertility Practices and Research in the UK' (2013) 63(6) *J Obstet Gynaecol India* 363, 369 <<https://doi.org/10.1007%2Fs13224-013-0494-z>> accessed 24 October 2022

addressed in the Warnock Committee Report back in 1984.<sup>326</sup> In the 1984 Report, it was expressed that there is no reason why, provided that a method of sex selection before fertilisation is developed, it should not be offered to couples who have good medical grounds for choosing the sex of their children.<sup>327</sup> Noted that for non-medical sex selection *i.e.* cases where there is no 'good medical grounds' as recognised by the Warnock Committee, the Committee reported that they could not make a positive recommendations for non-medical sex selection, pointing out that non-medical sex selection could give rise to possible negative social effects such as the effect on ratio of males to females<sup>328</sup>, and possible danger to human rights issue such as violence against women, sexism, and gender inequality. This stance inherently underscores the committee's concerns over human rights, emphasising that the ethical dilemmas and potential social ramifications of non-medical sex selection are fundamentally intertwined with issues of gender equality, human dignity, and the protection of individual rights.

Upon looking at the 1990 HFE Act, PGD was addressed in a research context, of which it was stipulated that a research licence could be issued in order to develop methods for detecting the presence of gene or chromosome abnormalities in embryos/ foetus before the implantation.<sup>329</sup> From here, it can be seen that the 1990 law did not provide a specific provision that expressly says that a 'treatment licence' could be granted for clinical use of PGD. In 1993, the HFEA stated that PGD could be used to identify the sex of the embryo under the condition that it was done for medical reasons.<sup>330</sup> Later in 1995, under the third edition of the HFEA Code of Practice, selecting an embryo on the basis of its sex was mentioned, in which it set out that clinics should not select the sex of the embryo for social reasons<sup>331</sup>, and

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<sup>326</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cm 9314, 1984) (Warnock Report)

<sup>327</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cm 9314, 1984) (Warnock Report)4

<sup>328</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cm 9314, 1984) (Warnock Report)

<sup>329</sup> Human Fertilisation and Embryology Act 1990, schedule 2, para 3(2)(e)

<sup>330</sup> Human Fertilisation and Embryology Authority (HFEA), *Sex Selection Public Consultation Document* (HFEA: London, 1993) paras 17, and para 42

<sup>331</sup> Human Fertilisation and Embryology Authority, *Code of practice* (3<sup>rd</sup> edn, 1995), para 7.20

this provision has stayed on in all other subsequent Code.<sup>332</sup> Furthermore, in 2003, a guidance on the use of PGD was published in the sixth edition of the Code which covered issues such as licensing, genetic counselling, patient information, including the s13(5) that prescribes an obligation to consider the welfare of the child.<sup>333</sup>

Despite the existence of the guidance provided in several editions of the Code of Practice on sex selection, such provisions were not legally binding, and it was not a criminal offence to violate it. Nevertheless, even though the Code was a mere practice guideline, a licence committee can take any breaches of it into account when deciding whether to vary or revoke a clinic's practice licence.<sup>334</sup> Therefore, in a way, regulation on non-medical sex selection was carried out indirectly through licensing.

With respect to the formal regulation, in 2005, the House of Lords asserted that PGD fell under the jurisdiction of the HFEA licencing authority<sup>335</sup> and regulations on non-medical PGD sex selection were established in 2007 to reaffirm the 1990 HFE Act on the provision that a licence from the HFEA could authorise procuring, keeping, testing, processing, or distributing embryos.<sup>336</sup> Accordingly, as set out earlier, from 1991 until 2007, neither PGD nor the practice of sex selection were legislatively prohibited, but it should be noted that the HFE policy guidance did discourage such practice.

When the 2008 Human Fertilisation and Embryology Act came into force in 2009, PGD in both research and clinical treatment contexts are now only be allowed to carry out under a licence issued from the HFEA. To be more specific, a license can only authorise embryo testing for certain purposes and PGD can only be licensed to identify the sex of the embryo strictly for

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<sup>332</sup> Sara Fovargue and Rebecca Bennett, 'What role should public opinion play in ethico-legal decision making? The example of selecting sex for non-medical reasons using preimplantation genetic diagnosis' (2016) 24(1) Medical Law Review <<http://dx.doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

<sup>333</sup> Sara Fovargue and Rebecca Bennett, 'What role should public opinion play in ethico-legal decision making? The example of selecting sex for non-medical reasons using preimplantation genetic diagnosis' (2016) 24(1) Medical Law Review <<http://dx.doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

<sup>334</sup> Human Fertilisation and Embryology Act 1990, s 25

<sup>335</sup> *R (Josephine Quintavalle) v HFEA* [2005] UKHL 28

A Alghrani, 'Regulation of Assisted Reproduction: Past, Present and Future' in *Regulating Assisted Reproductive Technology: New Horizons* (Cambridge Univeresity Press 2018)

<sup>336</sup> Human Fertilisation and Embryology (Quality and Safety Regulations) 2007/1522, para 29 <<https://www.legislation.gov.uk/uksi/2007/1522/contents/made>> accessed 24 October 2022

medical purposes only. For the HFEA to grant a treatment license that allows testing an embryo, this can only be done under the following conditions: (1) to establish whether an embryo has an abnormality which might affect its ability to result in a live birth, (2) where there is a particular risk that an embryo might have an abnormality to establish whether it has it, or (3) where there is a particular risk that any resulting child will have or develop a gender related serious physical or mental disability, serious medical illness, or serious medical condition.<sup>337</sup> In this regard specifically to the condition that involves possible gender related serious diseases or illness, the HFEA will only issue the licence provided that such serious diseases or illness only affect one particular sex or affect one sex significantly more than the other.<sup>338</sup> Whilst the HFEA does not provide a concrete definition of ‘serious’ with regards to such diseases or illness, it does provide a list of conditions (over 500 conditions<sup>339</sup>), which are approved to undergo PGD testing.<sup>340</sup>

In 2002, when there was evidence that British couples were resorting to advanced reproductive technologies to select the sex of their babies for non-medical reasons, the HFEA was tasked by the government to conduct a ‘review of sex selection’ techniques, including their safety and reliability, and was requested to submit its opinion and recommendations with respect to the arrangements for sex-selection regulation.<sup>341</sup> In the final report issued by the HFEA, a recommendation concerning sex selection was made, of which it set out that Preimplantation Genetic Diagnosis (PGD) shall be permitted only for medical reasons by a clinic and physician that meets the licensing requirements<sup>342</sup> under the HFE Act.<sup>343</sup>

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<sup>337</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1, paras 131-142

<sup>338</sup> Human Fertilisation and Embryology Act 1990, schedule 2, para 1ZA (3)

<sup>339</sup> Evan, ‘Preimplantation Genetic Diagnosis and the HFEA’s Role’ (*Genetic Alliance*, 11 April 2019) <<https://geneticalliance.org.uk/gauk-news/news/preimplantation-genetic-diagnosis-and-the-hfeas-role/>> accessed 23 October 2022

<sup>340</sup> ‘PGT-M Conditions’ (*Human Fertilisation & Embryology Authority*, 25 May 2022) <<https://www.hfea.gov.uk/media/twpcgiwd/2022-05-25-pgt-m-full-approved-condition-list.xlsx>> accessed 23 October 2022

Note that PGT-M is previously known as PGD.

<sup>341</sup> ‘Sex Selection: Options for Regulation: A Report on the HFEA’s 2002-03 Review of Sex Selection Including a Discussion of Legislative and Regulatory Options’ (2003) Human Fertilisation & Embryology Authority <[http://www.hfea.gov.uk/docs/Final\\_sex\\_selection\\_main\\_report.pdf](http://www.hfea.gov.uk/docs/Final_sex_selection_main_report.pdf)> accessed 23 October 2022

<sup>342</sup> Human Fertilisation and Embryology Act 1990, schedule 2

<sup>343</sup> Human Fertilisation and Embryology Act 1990

In addition, the HFEA gives reasons justifying its recommendation by asserting that IVF and PGD are extremely technical and can be considered as risky procedures that should only be employed 'where there is a genuine health benefit to balance these risks'.<sup>344</sup> With the risk-to-health notion in mind, it should be noted that while the practice of PGD is not believed to pose any serious health risks<sup>345</sup> (which is contradictory to the claim given by the HFEA as witnessed previously), PGD does involve manipulating the developing embryo and until now, no rigorous long-term studies have been carried out to confirm or identify such risks.<sup>346</sup> As a result, it might be sufficed to state that currently there seems to be no concerning health risks associated with PGD procedure- including sex selective PGD; however, future studies into this particular issue might reveal otherwise and this might affect how HFEA and the UK laws and laws in other jurisdictions, respond to sex selective PGD.

Nevertheless, considering the HFEA claim and justification with respect to the use of PGD, it can be derived that upon issuing the sex selection law, the UK government relies primarily on human rights-based framework as its justification for placing and implementing sex selection restrictions. In other words, the restrictions are drawn from the concern of harm of inequality. Accordingly, throughout the following section, rationale employed by the UK towards issuing the prohibition on non-medical sex selection will be investigated. Consistent with the analysis of the US, arguments regarding reproductive autonomy, right to privacy (right to private life), the harm principle, and issues concerning sexism and gender inequality will also be addressed.

Examining how the ban on non-medical sex selection was implemented in the UK is crucial. Analysing the arguments and justifications put forth by the UK government, particularly the HFEA, will reveal the underlying reasons driving the ban in UK legislation. Identifying these rationales is essential for assessing their persuasiveness, especially in the context of the UK.

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<sup>344</sup> Department of Health, *Review of the Human Fertilisation and Embryology Act Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)* (Cm 6989, 2006)

<sup>345</sup> American Society for Biochemistry and Molecular Biology, 'Preimplantation Genetic Diagnosis May Pose Neurological Risks' (*Science Daily*, 22 July 2009) <<https://www.sciencedaily.com/releases/2009/07/090721122857.htm>> accessed 23 October 2022

<sup>346</sup> American Society for Biochemistry and Molecular Biology, 'Preimplantation Genetic Diagnosis May Pose Neurological Risks' (*Science Daily*, 22 July 2009) <<https://www.sciencedaily.com/releases/2009/07/090721122857.htm>> accessed 23 October 2022

This analysis will contribute to a deeper understanding of the legal regulations in Thailand, guiding the evaluation of whether similar principles should be applied in the Thai scenario.

The thesis endorses the UK's ban on non-medical sex selection, finding its rationale compelling for the Thai context as well. It underscores a rights-based approach that seamlessly integrates scientific progress with ethical and societal considerations. The ban serves as a crucial safeguard against gender discrimination, ensuring that technological advancements in reproduction adhere to principles of equality and non-discrimination. By prioritising collective welfare and the rights of children to an unbiased start in life, as well as the responsible use of medical resources, the legislation presents a well-rounded perspective. This approach not only opens avenues for individuals to explore new possibilities in reproductive rights but also ensures that such advancements are in harmony with broader international human rights standards, and ethical and social considerations.

### 3.3 UK Rationale for Sex Selection Prohibition

In contrast to the United States, where the arguments of reproductive autonomy and a right to privacy are highly emphasised, the UK's rationale for imposing a ban on non-medical sex selection does not appear to accord the same level of significance to autonomy and privacy as its US counterpart. The UK's justification for implementing the ban is outlined below.

#### *3.3.1 Autonomy and Right to Privacy*

In the UK, the topic of reproductive autonomy is mostly associated with family balancing argument. Proponents of non-medical sex selection often rely on the family balancing argument to support that preimplantation sex selection should be allowed. To reiterate, family balancing, which has been briefly mentioned in Chapter One, is when parents have children predominantly of one sex and would like to have a child of the opposite sex to complement their family.

One prominent case involving the family balancing claim is the case of the Masterton family.<sup>347</sup> The Masterton filed an application seeking to employ sex selection technology to have a daughter but were rejected by the HFEA. The decision by the HFEA raises a number of arguments regarding reproductive autonomy and the issue of non-medical sex selection.<sup>348</sup> It should be pointed out that with this particular case of the Masterton family, the HFEA was not asked to look into the Masterton's appeal directly because any appeal made to the HFEA must be done by the fertility clinics and not the perspective patients themselves. As a result, because the fertility clinics refused to appeal on behalf of the family, the Masterton resorted to make a direct appeal to the HFEA by asking the HFEA to review and reassess the existing policy on sex selection, and not the specific case of the Masterton family. Nonetheless, despite the result which maintained that the ban shall not be lifted, the case of Masterton did help put the topic of non-medical preimplantation sex selection into the interest of the public and further along the claim that support family balancing sex selection.<sup>349</sup>

Within the HFEA reasons for banning non-medical sex selection, the issue of family balancing was brought up, as evident in the 2002 consultation document. This concept of family balancing was addressed in a sense of the HFEA giving definition for the term, of which it states that family balancing refers to a situation when parents already have children predominantly of one sex and would like a child of the opposite sex to complement their existing family.<sup>350</sup> Furthermore, within the 2002 consultation document, the HFEA seems to imply that there are two possible ways of narrowing the definition of family balancing. One

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<sup>347</sup> Kirsty Scott, 'Bereaved couple demand right to baby girl' *The Guardian* (London, 5 October 2000) <<https://www.theguardian.com/uk/2000/oct/05/humanrights.world1>> accessed 23 October 2022; Sex Selection' (2003) Parliamentary Office of Science and Technology postnote Number 198 <<https://www.parliament.uk/globalassets/documents/post/pn198.pdf>> accessed 23 October 2022; Stephen Wilkinson, 'Sexism, sex selection and 'family balancing'' (2008) 16(3) *Medical Law Review* 369, 389 <<http://dx.doi.org/10.1093/medlaw/fwn013>> accessed 23 October 2022

<sup>348</sup> Stephen Wilkinson, 'Sexism, sex selection and 'family balancing'' (2008) 16(3) *Medical Law Review* 369, 389 <<http://dx.doi.org/10.1093/medlaw/fwn013>> accessed 23 October 2022

<sup>349</sup> DB Paul, 'Is Human Genetics Disguised Eugenics?' in David L Hull and Michael Ruse (eds), *The Philosophy of Biology* (OUP 1998); Kirsty Scott, 'IVF selection still off limits' *The Guardian* (London, 19 October 2000) <<https://www.theguardian.com/science/2000/oct/19/genetics.uknews>> accessed 23 October 2022; Anne Kerr and Tom Shakespeare, *Genetic Politics: From Eugenics to Genome (Issues in Social Policy)* (New Clarion Press 2002); Stephen Wilkinson, 'Sexism, sex selection and 'family balancing'' (2008) 16(3) *Medical Law Review* 369, 389 <<http://dx.doi.org/10.1093/medlaw/fwn013>> accessed 23 October 2022; Stephen Wilkinson, 'Eugenics, embryo selection, and the Equal Value Principle' (2006) 1(1) *Clinical Ethics* 46, 51 <<http://dx.doi.org/10.1258/147775006776173408>> accessed 23 October 2022

<sup>350</sup> Stephen Wilkinson, 'Sexism, sex selection and 'family balancing'' (2008) 16(3) *Medical Law Review* 369, 389 <<http://dx.doi.org/10.1093/medlaw/fwn013>> accessed 23 October 2022

being to make having no existing children of the desired sex a necessary prerequisite; hence, for example, this would mean that selecting a girl would be considered as family balancing provided that the family started off with no girls and three boys, but not if it started off with one girl and three boys. The other possible narrowing is the requirement of a sex differential of two or more in the existing family. Therefore, in this scenario, selecting a girl where boys outnumber girls by four-to-two would be considered 'family balancing'. However, it would not be 'family balancing' if boys outnumbered girls by only four-to-three.<sup>351</sup> Noted that these additional possible scenarios were combined for the 2002 questionnaire<sup>352</sup>, which asked whether sex selection should be allowed for non-medical purposes provided that a family has at least two children of one sex and none of the other sex.<sup>353</sup>

Vis-à-vis the outcome of the report on the HFEA 2002-2003 consultation which ultimately prohibits non-medical preimplantation sex selection, yet touches upon the concept of family balancing, it could be observed that evidently, upon employing family balancing to support non-medical preimplantation sex selection, while on one hand it does seem to embrace the notion of reproductive freedom; on the other hand, limiting reproductive autonomy to the scope of this prescribed 'family balancing' still inevitably restricts individual's right to procreate. In other words, although it may appear that the HFEA was signalling the possibility of accepting family balancing sex selection, which in a way implying that the HFEA recognises and values individual's reproductive autonomy, in fact, the HFEA simply upholds such autonomy of those families who are fit with the prescribed conditions. Consequently,

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<sup>351</sup> Stephen Wilkinson, 'Sexism, sex selection and "family balancing"' (2008) 16(3) *Medical Law Review* 369, 389 <<http://dx.doi.org/10.1093/medlaw/fwn013>> accessed 23 October 2022

<sup>352</sup> This is a 3-page questionnaire, attached in Part 7 of the 2002 HFEA consultation document, which says that the period of the said consultation would run from October 2002 to January 2003. See Human Fertilisation and Embryology Authority, 'Sex Selection: choice and responsibility in human reproduction' (London, 2002) <<https://www.bioeticaweb.com/wp-content/uploads/2014/07/hfeasexselection.pdf>> accessed 23 October 2022

The consultation document was sent to 248 organisations for comment. Members of the public were able to write in for copies for the document and also able to access and download it from the HFEA website and respond to the questions online. There were 66 organisations responded to the HFEA consultation, the lists of respondents can be found in Appendix A of the report on the HFEA 2002-2003 reviewing of sex selection including a discussion of legislative and regulatory options. See 'Sex Selection: Options for Regulation: A Report on the HFEA's 2002-03 Review of Sex Selection Including a Discussion of Legislative and Regulatory Options' (2003) Human Fertilisation & Embryology Authority <[http://www.hfea.gov.uk/docs/Final\\_sex\\_selection\\_main\\_report.pdf](http://www.hfea.gov.uk/docs/Final_sex_selection_main_report.pdf)> accessed 23 October 2022

<sup>353</sup> 'Sex Selection: Options for Regulation: A Report on the HFEA's 2002-03 Review of Sex Selection Including a Discussion of Legislative and Regulatory Options' (2003) Human Fertilisation & Embryology Authority <[http://www.hfea.gov.uk/docs/Final\\_sex\\_selection\\_main\\_report.pdf](http://www.hfea.gov.uk/docs/Final_sex_selection_main_report.pdf)> accessed 23 October 2022

comparing the scope of reproductive autonomy that is given or allowed by the UK legislations to its US counterpart, the degree of such given reproductive autonomy is much greater in the US than in the UK.

### *3.3.2 Harm and Sexism*

Opponents of non-medical sex selection assert that allowing unlimited access to sex selection technology, allowing non-medical sex selection to be more precise, could generate a profound effect on the sex ratio of the UK population and reinforce sex discriminatory attitudes. This assertion shows that the argument expressed by those who oppose of non-medical sex selection focus their claim around the topic of harm that can happen to women's equality rights, of which non-medical sex selection could bring to UK society. The harm in question can be said to largely involve an aspect of skewed sex ration and the concern of sexism.

Upon looking at the harm arguments employed by the HFEA, which is discussed below, it shows that the aspects of harm that the UK primarily focus on are the harm to children and the harm to society (specifically sexism and skewed sex ration). Reflecting on the HFEA's concerns about potential harm to children and societal impacts like sexism and skewed sex ratios, it is vital for Thai law to consider how the UK addresses these concerns in the law. The UK's more balanced approach respects individual rights while addressing the broader ethical and societal implications, guiding responsible advancement in assisted reproductive technologies.

### *3.3.3 The Harm Principle with Respect to The Welfare of the Child*

Upon drafting the HFEA Code of Practice, concerns for welfare of the child-to-be-born were brought up. The HFEA asserted that it had robustly considered the likely scenario of a child born as a result of sex selection. Their main concerns were expressed to be related to the potential psychological harm if a child found out that he or she had been sex-selected, the tendency of possible preferential or prejudicial treatment to fit the parent's expectations, as well as the possibility of favouritism and neglect of existing children.<sup>354</sup>

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<sup>354</sup> Nadja Kanellopoulou, 'Sex Selection: Options for Regulation' (2004) 1(1) SCRIPT-ed 217 <<http://dx.doi.org/10.2966/scrip.010104.217>> accessed 23 October 2022

In fact, with regards to the issue of harm to child-to-be-born in the HFEA report on sex selection, the HFEA offered no evidence to support its conclusion that non-medical sex selection should be banned due to hypothetical risks to the welfare of a hypothetical resultant child. Upon responding to the HFEA banning non-medical sex selection recommendation, the House of Commons Science and Technology Committee (STC) asserted that whilst the HFEA contended that most persuasive argument was not that there was actual evidence of harm but the 'evidence' of 'concern' of such harm, the STC pointed out that such argument proposed by the HFEA was not a satisfactory use of evidence to support policy advice.<sup>355</sup>

Also, the STC concluded that the burden should be on those who oppose non-medical sex selection to demonstrate harm from its use<sup>356</sup> and pointed out that the UK should carefully consider the current evidence there is available now about harms before allowing blanket changes to the UK sex selection regulations.<sup>357</sup> Furthermore, the STC noted that the fact that the HFEA has drawn on theoretical harms in formulating policy on sex selection gave rise to its concern that potential for harm is often quoted without recourse to a growing body of evidence of its absence.<sup>358</sup>

In essence, the STC's remarks on the HFEA argument vis-à-vis harm principle is consistent with previously stated argument of proximity and probability. In other words, as pointed out earlier, to rely on the harm argument so as to suggest that the harm caused by non-medical sex selection may outweigh other competing interests such as reproductive autonomy and right to private life, such harm would have to be relatively imminent and likely to occur. Therefore, without convincing aspects of the proximity and probability of the concerned harm, giving much weight to such claim that ultimately supports non-medical sex selection ban would be unreasonable as well as ill founded. Again, it should be reiterated that the harm

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<sup>355</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1, para 272

<sup>356</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1, para 142

<sup>357</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1, para 140

<sup>358</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1, para 139

observed within this context given by the STC refers to the harm that could occur to the individual child and not the harm to women as a group.

The HFEA highlighted that their recommendations were greatly influenced by one particular study, with findings that revealed the general public was substantially uncomfortable with the notion of parents being able to choose the child's sex for non-medical reasons.<sup>359</sup> It should be pointed here that employing public opinion to guide legislative decisions is rather difficult and it is quite complicated to form questions that do not lead opinion in one direction or another.<sup>360</sup> Upon using public opinion as the basis for making legislative decisions, this could give rise to regulations which are inconsistent and unstable and such legislations may need frequent revisions in order to keep up with the views of the public. This is because public opinion can change over time as social norms evolve and as the public becomes more familiar with, and possibly more accepting for certain practice.<sup>361</sup> Moreover, the impact of public opinion on law-making raises a crucial question about its reliability as a foundation, considering its potential to be emotive or reactionary. This aspect of public opinion is examined later in this section, in which it proposes that Thailand should consider the UK's approach to non-medical sex selection, advocating for a balanced regulatory strategy that integrates public opinion along with ethical, social, and child welfare considerations and human rights.

#### *3.3.4 The Harm Principle on Serious Harm to Society*

Whilst the above section talks about the harm that might occur to the child born out of sex selection, this section examines another type of harm that is argued to happen to society from allowing such practice. It must be pointed out early on that the harm to society in this scenario

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<sup>359</sup> Nadja Kanellopoulou, 'Sex Selection: Options for Regulation' (2004) 1(1) SCRIPT-ed 217 <<http://dx.doi.org/10.2966/scrip.010104.217>> accessed 23 October 2022

<sup>360</sup> Paul Burstein, 'The Impact of Public Opinion on Public Policy: A Review and an Agenda' (2003) 56(1) Political Research Quarterly 29, 40 <<https://doi.org/10.2307/3219881>> accessed 23 October 2022; Paul Burstein, 'The Influence of Public Opinion and Advocacy on Public Policy: Controversies and Conclusions from IV -Civil Society: The Roots and Processes of Political Action' in Thomas Janoski, Cedric de Leon, Joya Misra, and Issac William Martin (eds), *The New Handbook of Political Sociology* (Cambridge University Press 2020) <<https://doi.org/10.1017/9781108147828.029>> accessed 23 October 2022

<sup>361</sup> Sarah Jane Fovargue and Rebecca Bennett, 'What Role Should Public Opinion Play in Ethic-Legal Decision Making?: The Example of Selecting Sex for Non-medical Reasons Using Preimplantation Genetic Diagnosis' (2016) 24(1) Medical Law Review 34, 58 <<https://doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

is based on human rights argument concerning gender equality as the key concern seems to revolve around the imbalance of sex ratio and sexism.

In one of the debates during the discussion on passing the HFE Act amongst the House of Lords, the issue concerning skewed sex ratio at birth was brought up to address and support the opposition against allowing non-medical sex selection.<sup>362</sup>

*‘There is so much at stake – so much money – in people, for example, being able to determine such things as the sex of their own child. Many noble Lords will know that the built-in hereditary preference for boys over girls has produced a surplus of what is estimated to be over 30 million young males in China, as against the women that they might one day marry. The social consequences of that are absolutely terrifying. They are the consequences of producing a warrior people – a warrior race if you like. We have to think about the social consequences.’<sup>363</sup>*

Similar remarks were expressed in the 1984 Warnock Report where it was noted that sex selection for non-medical purposes ‘would obviously affect the individual family and the children involved, and would also have implications for society as a whole’.<sup>364</sup> While it was impossible to predict the effect on the male to female ratio in society, important social implications could follow if males were chosen to be the first born and there is considerable evidence that the firstborn sibling may enjoy certain advantages over younger siblings.<sup>365</sup> Sex selection might have particular implications for the role of women in society.<sup>366</sup> Thus, it was asserted that:

*‘These important considerations make the Inquiry dubious about the use of sex selection techniques on a wide scale, but because of the difficulty of predicting the outcome of any such trend we have not found it possible to make any positive recommendations on this issue. Nevertheless, we consider that the*

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<sup>362</sup> Sarah Jane Fovargue and Rebecca Bennett, ‘What Role Should Public Opinion Play in Ethic-Legal Decision Making?: The Example of Selecting Sex for Non-medical Reasons Using Preimplantation Genetic Diagnosis’ (2016) 24(1) Medical Law Review 34, 58 <<https://doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

<sup>363</sup> Sarah Jane Fovargue and Rebecca Bennett, ‘What Role Should Public Opinion Play in Ethic-Legal Decision Making?: The Example of Selecting Sex for Non-medical Reasons Using Preimplantation Genetic Diagnosis’ (2016) 24(1) Medical Law Review 34, 58 <<https://doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

<sup>364</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cm 9314, 1984) (Warnock Report), para 9.11

<sup>365</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cm 9314, 1984) (Warnock Report), para 9.11

<sup>366</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cm 9314, 1984) (Warnock Report), para 9.11

*whole question of the acceptability of sex selection should be kept under review.*<sup>367</sup>

With respect to other harms to society that have been widely discussed, it has been suggested that these might include the start of a slippery slope if non-medical sex selection was allowed by law<sup>368</sup>, possibility that expectations based on gender role will be reinforced<sup>369</sup>, or a skewed sex ratio within certain societies<sup>370</sup>, to name a few.

It is important to note that for these concerns to be relied upon and justified as a well-grounded basis for prohibiting non-medical sex selection, hypothetical speaking, reasonable and adequate supporting evidence should be present. In fact, in this regard, the Science and Technology Committee declare that ‘reproductive and research freedoms must be balanced against the interests of society but alleged harms to society, too, should be based on evidence’.<sup>371</sup> Accordingly, as it has been pointed out earlier and will be discussed further in the following section, the HFEA offered limited evidence for its position against non-medical sex selection in its 2003 report.<sup>372</sup> In fact, evidence from the HFEA’s recommendations suggested that they were worried about the potential risk of harm that could happen if non-medical sex selection were to be allowed.

Considering the potential risk of harm, proponents of non-medical sex selection may argue that the degree and immediacy of the concerned harm are diminished and unjustified. However, even if it is perceived as a fear or concern rather than evidence of harm, the lack of conclusive proof does not warrant complete dismissal. Given the complexity of non-medical

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<sup>367</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cm 9314, 1984) (Warnock Report), para 9.11

<sup>368</sup> Shaun D Pattinson, *Influencing Traits Before Birth* (Routledge 2002); Jennifer Hunt and Masoud Afnan, ‘Sex selection: Choice and responsibility in human reproduction. Response of the British Fertility Society to the public consultation document’ (2009) 6(1) *Human Fertility* 6 <<https://doi.org/10.1080/1464770312331368903>> accessed 23 October 2022

<sup>369</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1, paras 131-136

<sup>370</sup> Emily Jackson, *Medical Law: Text, Cases and Materials* (3<sup>rd</sup> edn, OUP 2013); Jonathan Herring, *Medical Law and Ethics* (9<sup>th</sup> edn, OUP 2022)

<sup>371</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1 para 46

<sup>372</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1 para 272

sex selection, other crucial elements must be considered in order to construct a comprehensive argument for or against its support.

Seemingly, the rationale behind banning non-medical sex selection in the UK lacks substantial evidence demonstrating that it is likely to cause serious harm to individual children or wider societal damage. Consequently, another argument, which has been emphasised in the amendment and enforcement of the current sex selection law in the UK, centres on public opinion. Examining the subsequent section reveals that the fear of a risk of serious harm, both to the child and society, appears to be reflected in public opinion, playing a significant role in shaping the existing sex selection law for non-medical purposes.

### *3.3.5 Public Opinion*

Arguably, the prohibition of non-medical preimplantation sex selection in the UK is significantly influenced by public opinion. This is evident in the UK and Australia, where public sentiment plays a crucial role in the legislative process and ultimately results in the ban on such practices. The significance of public opinion in shaping these laws warrants further exploration.

For the UK, the perceived risk of harm (*e.g.* harm to society as perceived by the public) can be said to have been assessed from public opinion, gathered and presented in the 2002-2003 consultation document. The Government undertook a public consultation on the 1990 Act and a summary of that consultation was published in March 2006.<sup>373</sup> The consultation document noted that according to a survey conducted in during 2002, it found ‘strong public opposition’ to non-medical sex selection and that the Science and Technology Committee had been unable to justify prohibiting sex selection for family balancing reasons.<sup>374</sup> The Government, thereby, sought views on non-medical sex selection and whilst there were 535 respondents to the consultation in total, no figures have been presented or relied upon

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<sup>373</sup> People Science and Policy Ltd, *Report on the Consultation on the Review of the Human Fertilisation and Embryology Act 1990*, prepared for the DH (DH: London, 2006)

<sup>374</sup> People Science and Policy Ltd, *Report on the Consultation on the Review of the Human Fertilisation and Embryology Act 1990*, prepared for the DH (DH: London, 2006)

regarding responses to each question.<sup>375</sup> Moreover, the ‘strong public opposition’ against non-medical sex selection seems to come from various reasons. Many respondents expressed a range of moral arguments to back up their opinions, and there were many disapproval responses against non-medical sex selection that were said to have come from intuitive moral objection.<sup>376</sup>

In the 2007 drafted HFE Bill, statutory prohibitions on non-medical sex selection were introduced. The joint committee on the 2007 drafted bill expressed that attempts have been made to weigh in the public opinion on non-medical sex selection and that the Chief Executive of the HFEA had told the committee that the HFEA had found that ‘largely very overwhelmingly’ in this country were opposed to the matter in question. Noted that, particularly based on this thesis interview study, it is observed that the public opposition against non-medical sex selection does not always rely on right-based arguments because the respondents were asked with questions about their attitudes *i.e.* what they think about the matters, which were not necessarily based and formed their point of views from the right-based arguments.

Nevertheless, it was pointed out that the policy direction in which the law will be passed to prohibit non-medical sex selection has gained public support, thus, the Committee had taken in such public support as the basis of its public consultation.<sup>377</sup> Moreover, the idea that ‘public opinion’ supported a prohibition on non-medical sex selection was explicitly reiterated in the House of Lords debates on the HFE bill, in which it was stated that the public came out very clearly against sex selection for non-medical reasons and that has remained the principle and the way forward of the HFEA and this particular bill.<sup>378</sup> Additionally, to emphasise the

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<sup>375</sup> People Science and Policy Ltd, *Report on the Consultation on the Review of the Human Fertilisation and Embryology Act 1990*, prepared for the DH (DH: London, 2006)

<sup>376</sup> ‘Sex Selection: Options for Regulation: A Report on the HFEA’s 2002-03 Review of Sex Selection Including a Discussion of Legislative and Regulatory Options’ (2003) Human Fertilisation & Embryology Authority <[http://www.hfea.gov.uk/docs/Final\\_sex\\_selection\\_main\\_report.pdf](http://www.hfea.gov.uk/docs/Final_sex_selection_main_report.pdf)> accessed 23 October 2022

<sup>377</sup> Joint Committee on the Human Tissue and Embryos (Draft) Bill, First Report (2007), para 17 <<https://publications.parliament.uk/pa/jt200607/jtselect/jtembryos/169/16902.htm>> accessed 24 October 2022

<sup>378</sup> Sarah Jane Fovargue and Rebecca Bennett, ‘What Role Should Public Opinion Play in Ethic-Legal Decision Making?: The Example of Selecting Sex for Non-medical Reasons Using Preimplantation Genetic Diagnosis’ (2016) 24(1) *Medical Law Review* 34, 58 <<https://doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

importance of public opinion basis, it was mentioned in the House of Lords that following the results of the public consultation on the matter at hand, the HFE bill shall also outlaw non-medical sex selection practices.<sup>379</sup>

As a result of series of consultations on the issue of non-medical sex selection, this rendered the HFEA's Code of Practice to be amended, in which it had been consistently stated that embryos should not be selected on the ground of sex for 'social reasons'.<sup>380</sup> Accordingly, the current legal position with respect to the prohibition of non-medical PGD sex selection, as prescribed in the HFE Act, seemingly, has been largely based and justified on the ground of public opinion.

### 3.4 Criticism of the HFEA Consultation Document and Its Reliance on Public Opinion

In 2005, the Science and Technology Committee highlighted some of the concerns regarding how public opinions were employed as a justification and the basis for banning non-medical preimplantation sex selection in the UK.<sup>381</sup>

In the Science and Technology Committee's report, it was expressed that:

*'... even if the HFEA exaggerates the public's hostility to sex selection for social reasons, we have little reason to doubt that a majority of the British public oppose it. ... Nevertheless, we do not see this as adequate grounds for prohibition'.<sup>382</sup>*

The above notion suggests an argument that public opinion alone is not adequate to be used as a justifiable reason for prohibiting non-medical preimplantation sex selection. Nevertheless, it should be noted that the argument against relying solely on public opinion

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<sup>379</sup> Sarah Jane Fovargue and Rebecca Bennett, 'What Role Should Public Opinion Play in Ethic-Legal Decision Making?: The Example of Selecting Sex for Non-medical Reasons Using Preimplantation Genetic Diagnosis' (2016) 24(1) Medical Law Review 34, 58 <<https://doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

<sup>380</sup> Sarah Jane Fovargue and Rebecca Bennett, 'What Role Should Public Opinion Play in Ethic-Legal Decision Making?: The Example of Selecting Sex for Non-medical Reasons Using Preimplantation Genetic Diagnosis' (2016) 24(1) Medical Law Review 34, 58 <<https://doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

<sup>381</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1 paras 360-361

<sup>382</sup> House of Commons Science and Technology Committee, *Human Reproductive Technology and the Law*, Fifth Report of Session 2004-05 (2005), Volume I, HC 7-1, para 142

for prohibiting non-medical preimplantation sex selection emphasises the potential drawbacks of emotive and reactionary sentiment.

However, criticism has been made against the use of public opinion to support the ban on non-medical sex selection, it is argued that responses from these public consultations were 'likely to be a result of an intuitive 'gut' reaction to the issue, which may be based on false or ill-informed information, prejudice and fear'.<sup>383</sup> This suggests that the reasoning based on gut reaction, as quoted earlier, should not be used exclusively to justify the ban on non-medical sex selection. To back up such observation, the Joint Committee on the draft Bill of May 2007 admitted some of the problems of relying on public consultations and public opinions and stated that 'responses to public consultations often come from those with strong views which may not be representative of those held by the general public. Those who reply to public consultations are by their nature self-selecting'.<sup>384</sup> In other words, there are limits to what public consultations and public opinions can do. Ultimately with the case of non-medical sex selection, whilst public opinion may enable us to find out what 'some' people's gut reaction to this ethical issue are, it is important to note that public opinion should not be treated as conclusive and sole evidence for determining the moral acceptability of a practice nor how we should regulate non-medical preimplantation sex selection.

Nevertheless, drawing from the UK's experience with non-medical sex selection, this thesis views that Thailand should engage in public consultation to align its regulations with societal values while considering ethical, social, and child welfare concerns. A balanced approach, respecting reproductive autonomy yet mindful of potential societal impacts like sexism and skewed sex ratios, is essential. Thailand could benefit from adopting a human rights-based framework, as outlined and discussed in previous chapters, to navigate these complexities, ensuring legislation is both democratically informed and ethically sound. This nuanced strategy would respect individual freedoms while safeguarding societal well-being, reflecting a careful consideration of the lessons learned from the UK's regulatory journey.

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<sup>383</sup> John Harris (ed), *Bioethics* (OUP 2001)

<sup>384</sup> Joint Committee on the Human Tissue and Embryos (Draft) Bill, First Report (2007), para 21 <<https://publications.parliament.uk/pa/jt200607/jtselect/jtembryos/169/16902.htm>> accessed 24 October 2022

The following section transitions to a case study of Australia, where, like the UK, non-medical preimplantation sex selection is banned. Both countries share similarities in their restrictive approaches and reliance on public opinion to justify these bans. A detailed comparison of the sex selection laws in the UK and Australia follows.

## 4. Australia

Australia has issued a ban on non-medical sex selection since 2004. However, since then, there has also been a continuing growth of the public support for the law to allow such practice. In 2018, with the release of a new study that reports on national surveys and consultations conducted between 2015 and 2016 by the Australian National Health and Medical Research Council (NHMRC), it now points out that the position of the public views in Australia has been shifted towards higher support for non-medical sex selection.

Non-medical sex selection regulations in Australia are examined in this section because they share similar background and justification as the sex selection law in the UK. Both UK and Australia contain a law that specifically prohibits non-medical sex selection. More importantly, these laws and regulations can be said to be heavily based and formed themselves around public opinions. Accordingly, the focus of this section is on Australia legal framework concerning non-medical sex selection practices and particularly how such rules and regulations have been influenced, generated, and enforced.

### 4.1 Introduction

The use of assisted reproductive technology for the purpose of selecting a particular sex of the intended baby for non-medical reasons has been prohibited in Australia since 2004. The Australian National Health and Medical Research Council (NHMRC) also issued guidelines in that same year on the use of assisted reproductive technology in clinical practice and research.<sup>385</sup> The guidelines state that sex selection is an ethically controversial issue and it is

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<sup>385</sup> 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research', National Health and Medical Research Council 2004 (revised in 2007 and 2017) <[http://www.nhmrc.gov.au/publications/synopses/\\_files/e78.pdf](http://www.nhmrc.gov.au/publications/synopses/_files/e78.pdf)> and <<https://www.nhmrc.gov.au/about-us/publications/art>> accessed 23 October 2022

believed that admission to life should not be conditional upon a child being a specific sex. It can be observed that the guidelines implicitly pointed out that there are competing/conflicting rights involved with non-medical sex selection upon identify the issue as ethically controversial. It also implied a notion that encompasses a fundamental human rights argument on gender equality when it expressed that there should not be a condition to life based on the sex of the baby. Hence, pending further public discussion, sex selection must not be carried out unless it is to be undertaken for the purposes of medical related reasons such as to reduce the risk of a serious genetic condition. This principle is evidently in line with many jurisdictions, and consistent with the UK guidelines issued by the HEFA, as witnessed earlier.

Moreover, within the 2004 guidelines, under the Appendix section, it listed reasons for and against non-medical preimplantation sex selection. The reasons for were family balancing, fulfilment of religious obligations or cultural expectations that require children of a certain sex, and the right to reproductive autonomy. The reasons against non-medical sex selection were incompatibility with unconditional acceptance by parents, possible expression of gender bias and gender equality especially against girls, and possible skewed sex ratio at birth.<sup>386</sup> At the time of the sex selection ban, which was introduced in Australia in 2004, the practice of sex selection using ART, particularly through IVF, was minimal.<sup>387</sup> It is reported that in 2003, a year before the NHMRC guidelines were released, only 90 babies across Australia and New Zealand were born out of ART involving PGD (in the context of more than 300,000 total births), with PGD mostly employed to screen for genetic disorders rather than for social sex selection.<sup>388</sup>

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<sup>386</sup> 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research', National Health and Medical Research Council 2004 (revised in 2007 and 2017) <[http://www.nhmrc.gov.au/publications/synopses/\\_files/e78.pdf](http://www.nhmrc.gov.au/publications/synopses/_files/e78.pdf)> accessed 23 October 2022

<sup>387</sup> Kerry Petersen, H W G Baker, Marian Pitts, and Rachel Thorpe, 'Assisted reproductive technologies: professional and legal restrictions in Australian clinics' (2005) 12(3) 373, 385 <<https://pubmed.ncbi.nlm.nih.gov/15754559/>> accessed 23 October 2022

<sup>388</sup> Anne-Marie Water, Jishan H Dean, and Elizabeth A Sullivan, 'Assisted reproduction technology in Australia and New Zealand 2003' Australian Institute of Health and Welfare National Perinatal Statistics Unit and The Fertility Society of Australia Assisted Reproduction Technology Series Number 9 (February 2006) <[https://npsu.unsw.edu.au/sites/default/files/npsu/data\\_collection/Assisted%20reproductive%20technolog%20in%20Australia%20and%20New%20Zealand%202003.pdf](https://npsu.unsw.edu.au/sites/default/files/npsu/data_collection/Assisted%20reproductive%20technolog%20in%20Australia%20and%20New%20Zealand%202003.pdf)> accessed 24 October 2022

In 2007, the NHMRC guidelines were revised, and again in 2017.<sup>389</sup> Both revisions continuously maintain the ban on non-medical sex selection. In the 2017 version, the NHMRC noted that:

*'Many of the issues surrounding ART are as much social and political as they are ethical. With any controversial practice, society's readiness to accept a practice is a relevant and important consideration. At the time of the publication, there is limited research into the question of whether Australians support the use of sex selection for non-medical purposes.'*

Seemingly, the expression that the NHMRC made suggests that Australia considerably relies its sex selection law and policy on public opinion. This is similarly consistent with the UK case, of which the use of public opinion has been extremely emphasised and relied upon by the HFEA and the UK government.

Notably, the status of these guidelines is not in themselves legally binding, however, reproductive facilities offering these types of services must be accredited by an accreditation body such as the Fertility Society of Australia, which requires compliance with the NHMRC ART guidelines as part of its accreditation and licensing process.<sup>390</sup>

As witnessed from the above section, since 2004, there has been several restrictions against the use of sex selection ART and guidelines have been issued and constantly revisited. In the following part, the chapter examines the regulations and legal framework with respect to non-medical preimplantation sex selection in Australia.

## 4.2 Regulations and Legal Framework

Regulations vis-à-vis assisted reproductive technology in Australia are comprised of state legislations, national professional standards, and ethical guidelines. At the time of this writing, there are four states which have passed specific ART legislation, namely, New South Wales,

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<sup>389</sup> 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research', National Health and Medical Research Council 2004 (revised in 2007 and 2017) <[http://www.nhmrc.gov.au/publications/synopses/\\_files/e78.pdf](http://www.nhmrc.gov.au/publications/synopses/_files/e78.pdf)> and <<https://www.nhmrc.gov.au/about-us/publications/art>> accessed 23 October 2022

<sup>390</sup> 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research', National Health and Medical Research Council 2004 (revised in 2007 and 2017) <[http://www.nhmrc.gov.au/publications/synopses/\\_files/e78.pdf](http://www.nhmrc.gov.au/publications/synopses/_files/e78.pdf)>

Victoria, South Australia, and Western Australia.<sup>391</sup> With an exception of New South Wales, all of these legislative frameworks impose eligibility criteria under statutes, limiting services to those who have seek to undergo preimplantation sex selection due to medical related reasons.<sup>392</sup> Parents who wish to receive ART services for the sole purpose of non-medical sex selection are unlikely to meet these eligibility requirements as the desire to use IVF and PGD is not backed by a medical justification. Upon certain issues where legislations do not address specific aspects of ART, the ART guidelines issued by the NHMRC will apply.<sup>393</sup>

Aside from eligibility requirements, several legislative frameworks are in place to prohibit the practice of non-medical preimplantation sex selection.<sup>394</sup> Nonetheless, with respect to the state of Victoria, its legislative framework concerning sex selection is unique in that it provides an option for intended parents to apply to the Patient Review Panel to circumvent either the legislative prohibition on non-medical sex selection, or to overcome the restriction based on the statutory eligibility criteria.<sup>395</sup> The role of the Patient Review Panel in Victoria is demonstrated by the case *JS and LS v Patient Review Panel*<sup>396</sup>, which concerned a couple who wished to employ IVF and PGD technology to determine the sex of the baby, following the death of their child. It was ruled that the parents were not permitted to receive non-medical IVF/PGD treatment because their case did not primarily concern the welfare and interests of the child-to-be-born.<sup>397</sup> Notably, the provision concerning the state's Patient Review Panel is

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<sup>391</sup> Assisted Reproductive Technology Act 2007 (New South Wales)  
Assisted Reproductive Treatment Act 1988 (South Australia)  
Assisted Reproductive Treatment Act 2008 (Victoria, Australia)  
Human Reproductive Technology Act 1991 (Western Australia)

<sup>392</sup> Assisted Reproductive Treatment Act 1988 (South Australia), s 9  
Assisted Reproductive Treatment Act 2008 (Victoria, Australia), s 10  
Human Reproductive Technology Act 1991 (Western Australia), s 23

<sup>393</sup> Louise Johnson, 'Regulation of assisted reproductive treatment (ART) in Australia & current ethical issues (2014) 140(Suppl 1) Indian J Med Res s9, s12 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345760/>> accessed 23 October 2022

<sup>394</sup> Assisted Reproductive Treatment Act 2008 (Victoria, Australia), s 28

<sup>395</sup> Assisted Reproductive Treatment Act 2008 (Victoria, Australia), s 15(1), 85(b)(e)

For a discussion of the regulatory position in Victoria and how the statutory framework applies to non-medical sex selection, see Malcolm K Smith and Michelle Taylor- Sands, 'Comparing Non-medical Sex Selection and Saviour Sibling Selection in the Case of *JS and LS v Patient Review Panel*: Beyond the Welfare of the Child?' (2018) 15(1) Journal of Bioethical Inquiry 139, 153 <<https://doi.org/10.1007/s11673-018-9838-9>> accessed 24 October 2022

<sup>396</sup> *JS and LS v Patient Review Panel* (Health and Privacy) [2011] VACT 856

<sup>397</sup> Malcolm K Smith and Michelle Taylor- Sands, 'Comparing Non-medical Sex Selection and Saviour Sibling Selection in the Case of *JS and LS v Patient Review Panel*: Beyond the Welfare of the Child?' (2018) 15(1) Journal of Bioethical Inquiry 139, 153 <<https://doi.org/10.1007/s11673-018-9838-9>> accessed 24 October 2022

a distinctive feature which is not implemented in any other Australian jurisdiction as it provides a chance for potential applicants to try have their cases heard and possibly a legal permission to carry out the desired procedure.<sup>398</sup>

Access to PGD for non-medical sex selection is similarly restricted in Western Australia and South Australia thanks to the general statutory eligibility criteria. Apart from the sex selection legislations in place, the NHMRC ART guidelines also prohibit the use of non-medical preimplantation sex selection.<sup>399</sup> It is expressed in the ART guidelines that sex selection is an ethically contentious topic, adding on that ‘attitudes towards some of the more controversial practices and aspects of ART differ considerably, and are shaped by an individual’s own particular set of values, preferences, and beliefs, or those of their family and community’.<sup>400</sup> With the notion in mind that the NHMRC guidelines are not technically legally binding, yet, as it requires compliance from fertility clinics across Australia to adhere by the guidelines in order to pass the national accreditation system as well as to receive national funding<sup>401</sup>; in this regards, consequently, the practice of non-medical preimplantation sex selection is not currently permitted in Australia.

In particular, with respect to specifically preimplantation sex selection utilising the use of ART, legal provisions are varied in different states; however, the underlying tone is very similar to one another, which is the prohibition on non-medical sex selection. The state of Victoria prohibits sex selection during assisted reproduction, unless it is necessary to prevent a genetic abnormality or disease, or a Patient Review Panel has otherwise approved the use of sex

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<sup>398</sup> Assisted Reproductive Treatment Act 2008 (Victoria, Australia), s 15(1), 85(b)(e)  
Malcolm K Smith and Michelle Taylor- Sands, ‘Comparing Non-medical Sex Selection and Saviour Sibling Selection in the Case of *JS and LS v Patient Review Panel: Beyond the Welfare of the Child?*’ (2018) 15(1) *Journal of Bioethical Inquiry* 139, 153 <<https://doi.org/10.1007/s11673-018-9838-9>> accessed 24 October 2022

<sup>399</sup> National Health and Medical Research Council (NHMRC), *Draft Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research: Public Consultation – 2015* (2015) <[https://consultations.nhmrc.gov.au/public\\_consultations/assisted-reproductive-tech](https://consultations.nhmrc.gov.au/public_consultations/assisted-reproductive-tech)> accessed 24 October 2022

<sup>400</sup> National Health and Medical Research Council (NHMRC), *Draft Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research: Public Consultation – 2015* (2015) <[https://consultations.nhmrc.gov.au/public\\_consultations/assisted-reproductive-tech](https://consultations.nhmrc.gov.au/public_consultations/assisted-reproductive-tech)> accessed 24 October 2022

<sup>401</sup> ‘Reproductive Technology Accreditation Committee Certification Scheme (RTAC Scheme)’ (2010) Fertility Society of Australia <<https://www.fertileysociety.com.au/wp-content/uploads/201011201-final-rtac-scheme.pdf>> accessed 24 October 2022; Michelle Taylor-Sands, *Saviour Siblings: A Relationship Approach to the Welfare of the Child in Selective Reproduction* (Routledge 2013)

selection.<sup>402</sup> For Western Australia, the Reproductive Technology Council prohibits the use of technology to select the sex of the embryo unless it is to prevent a gender-based disorder.<sup>403</sup> Vis-à-vis South Australia, the state prohibits the use of sex selection using reproductive technology unless it is to prevent the transmission of a genetic defect.<sup>404</sup>

In addition, the state of Victoria, South Australia, and Western Australia have passed specific legislations prohibiting the practice of sex selection with an exception in the cases where it is necessary to prevent ‘a genetic abnormality or disease’<sup>405</sup>, ‘a gender-based disorder’<sup>406</sup>, or ‘the transmission of genetic defect’<sup>407</sup>. More specifically, the regulatory framework in Victoria is unique in terms of the Australian regulatory landscape relevant to sex selection for non-medical reasons. To elaborate, as it is stipulated in section 28 of the Assisted Reproductive treatment Act 2008 (Vic) (also known as the ART Act), the Act prohibits all sex selection treatments unless there is either a medical need or the permission given by the state’s Patient Review Panel.

Regarding criminal charges against the practice of sex selection, penalties are imposed on those who are found to be in violation of sex selection laws. For instance, according to the 2008 Assisted Reproductive Treatment Act, which was passed and enacted by the state of Victoria, an individual may face up to two years imprisonment for carrying out sex selection treatment procedure:<sup>408</sup>

Accordingly, with strict regulations and threats of facing criminal punishment, many Australian couples are travelling to Thailand, spending more than \$10,000 in order to select the sex of their IVF babies.<sup>409</sup> In one reported fertility clinic, Sydney IVF, the medical director

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<sup>402</sup> Assisted Reproductive Treatment Act 2008 (Victoria, Australia)

<sup>403</sup> Reproductive Technology Council, *Approval for Diagnostic Testing of Embryos* (2004) (WA); ‘Sex Selection & Abortion’ (2009) The Law Library of Congress LL File No.2009-002876 <<https://tile.loc.gov/storage-services/service/ll/llgird/2018298975/2018298975.pdf>> accessed 24 October 2022

<sup>404</sup> Reproductive Technology (Clinical Practices) Act 1988 (South Australia), s 13

<sup>405</sup> Assisted Reproductive Treatment Act 2008 (Victoria, Australia), s 28

<sup>406</sup> Reproductive Technology Council, *Approval for Diagnostic Testing of Embryos* (2004) (WA)

<sup>407</sup> Reproductive Technology (Clinical Practices) Act 1988 (South Australia), s 13

<sup>408</sup> Assisted Reproductive Treatment Act 2008 (Victoria, Australia)

<sup>409</sup> ‘Couples head to Thailand to choose gender’ *Daily Telegraph* (Sydney, 6 December 2008) <<https://www.dailytelegraph.com.au/couples-heading-to-thailand/news->

revealed that the clinic received roughly 10 inquiries per month with regards to sex selection services. He further stated that the clinic has set up a joint venture with fertility clinics in Bangkok and claimed that his clinic had treated 10 Australian couples with sex selection request for purely non-medical reasons and admitted that many more were planning on such sex selection trip to Thailand.<sup>410</sup>

Moreover, the third largest IVF company in Australia, Genea Ltd., routinely recommends that couples wishing to predetermine the sex of their babies to visit its affiliated clinics in Bangkok. The director of Genea Ltd admitted that, overall, Australian's numbering 'in the hundreds per year' travel to Thailand for receiving sex selection treatment.<sup>411</sup> In 2013, it was reported that around 120 couples attended IVF facilities in Thailand in order to avoid the Australian government's ban on non-medical sex selection.<sup>412</sup>

The trend of Australian couples traveling to Thailand for sex selection treatments highlights differences in the regulatory landscapes of the two countries. Australia's stringent laws on non-medical preimplantation sex selection might drive couples to seek non-medical sex selective IVF/PGD treatments in Thailand, where regulations are more lenient.<sup>413</sup> This highlights the significance of analysing the legal and regulatory contexts in both Australia and Thailand to comprehend the motivations behind cross-border reproductive choices. The discussion on medical tourism in Thailand, particularly in the context of non-medical preimplantation sex selection (addressed in Chapter One and further explored in Chapter Six),

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story/98b6ba853e3293d0947764b23f467f1e?sv=74dbb0d76c74c071948755daaae5815e> accessed 24 October 2022

<sup>410</sup> 'Couples head to Thailand to choose gender' *Daily Telegraph* (Sydney, 6 December 2008) <<https://www.dailytelegraph.com.au/couples-heading-to-thailand/news-story/98b6ba853e3293d0947764b23f467f1e?sv=74dbb0d76c74c071948755daaae5815e>> accessed 24 October 2022

<sup>411</sup> 'Women from Hong Kong, China and Australia Flocks to Bangkok for Child Gender Selection' *Samui Times* (Samui, 17 July 2014) <<http://www.samuitimes.com/women-hong-kong-china-australia-flock-bangkok-child-gender-selection/>> accessed 24 October 2022

<sup>412</sup> 'Australian Couples Travel Overseas to Avoid Ban in Choosing Their Baby's Sex' *ABC News* (Sydney, 1 September 2013) <<http://www.abc.net.au/news/2013-09-01/ivf-gender-sex-selection-thailand-clinic-baby-foetus/4927340>> accessed 24 October 2022

<sup>413</sup> It is important to note that despite the implementation of the 2015 ART Act, many fertility clinics and websites—both Thai and international—continue to promote Thailand as a destination for sex selection services. This ongoing advertising highlights the complex issues surrounding medical tourism and reproductive ethics, suggesting that current regulatory measures may not fully address the underlying factors driving this trend.

serves as one of the pivotal factors which supports the thesis's stance on maintaining the existing ban on non-medical preimplantation sex selection.

### 4.3 Rationale for Banning Non-Medical Preimplantation Sex Selection

In 2015, the Australian National Health and Medical Research Council (NHMRC) reviewed the moratorium on non-medical sex selection as part of its review of the national ethical guidelines concerning assisted reproductive technology.<sup>414</sup> The review resulted in the publication of the revised ethical guidelines on the use of assisted reproductive technology in clinical practice and research.<sup>415</sup> Under the section heading 'Do not select sex for non-medical purposes' of the guideline, it stated that 'Sex selection is an ethically controversial issue. The Australian Health Ethics Committee believes that admission to life should not be conditional upon a child being a particular sex. Therefore, pending further community discussion, sex selection (by whatever means) must not be undertaken except to reduce the risk of transmission of a serious genetic condition.' Notably, this is the same guidelines issued in 2004 with an additional notion that pointed out and acknowledged the importance of public opinion. Whilst the guidelines remain the same *i.e.* maintaining the ban on non-medical sex selection, this 2015 version did address the topic of public opinion, which suggested that depending on future public consultation, the direction with respect to regulations on non-medical preimplantation sex selection could be changed.

Additionally, as being claimed to assist with the community debate concerning the issue, three arguments for and three arguments against non-medical sex selection were listed in an Appendix to the 2004 and 2015 guidelines. The arguments supporting non-medical sex selection were namely, family balancing, fulfilment of religious obligations or cultural expectations, and an individual's reproductive autonomy. It can be observed that the supporting arguments for non-medical sex selection encompass several implicit rights at

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<sup>414</sup> National Health and Medical Research Council (NHMRC), Draft Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research: Public Consultation – 2015 (2015) <[https://consultations.nhmrc.gov.au/public\\_consultations/assisted-reproductive-tech](https://consultations.nhmrc.gov.au/public_consultations/assisted-reproductive-tech)> accessed 24 October 2022

<sup>415</sup> 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research', National Health and Medical Research Council 2017 <<https://www.nhmrc.gov.au/about-us/publications/art>> accessed 23 October 2022

stake, which are a right to private and family life, a right to religious practice, and a right to reproductive autonomy.

The arguments against non-medical sex selection were, namely, incompatibility with unconditional acceptance by parents of their children, possible expression of gender bias against women, and potential skewed sex ratio which could lead to ‘a shortage of women for men to marry’.<sup>416</sup> It should also be noted here that the opposing arguments involve an implied rights-based arguments on best interest of the child and a right to gender equality. Effectively, upon concluding evaluation of the AHEC, these guidelines prohibit the practice of sex selection for non-medical purposes in Australia.<sup>417</sup>

#### 4.4 The Importance of Public Opinion

In 2017, following an extensive review of the NHMRC ethical guidelines on assisted reproductive technology, it was upheld that the moratorium on non-medical sex selection was to still remain in place pending further public debate.<sup>418</sup> As part of its review, in 2015 the NHMRC carried out a public survey and a range of respondents were made on the issue of non-medical sex selection. Notably, a majority of the respondents to the NHMRC in 2015 reflect a permissive attitude toward the use of non-medical sex selection technology. Although the public survey carried out by the NHMRC in 2015 might not represent a permissive attitude towards non-medical sex selection, it is the first time in Australia that a consulted/surveyed majority has expressed support for non-medical sex selection. It should be noted that the public opinion consulted and presented by the NHMRC highlights a potential disconnect between the concerns raised about non-medical sex selection in academic literature (which support a prohibitive approach against non-medical sex selection) and more liberal public/ community views.

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<sup>416</sup> ‘Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research’, National Health and Medical Research Council 2004 (revised in 2007 and 2017) <[http://www.nhmrc.gov.au/publications/synopses/\\_files/e78.pdf](http://www.nhmrc.gov.au/publications/synopses/_files/e78.pdf)> accessed 23 October 2022

<sup>417</sup> ‘Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research’, National Health and Medical Research Council 2017, para 8.14.1 <<https://www.nhmrc.gov.au/about-us/publications/art>> accessed 23 October 2022

<sup>418</sup> National Health and Medical Research Council (NHMRC), *Draft Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research: Public Consultation – 2015* (2015) <[https://consultations.nhmrc.gov.au/public\\_consultations/assisted-reproductive-tech](https://consultations.nhmrc.gov.au/public_consultations/assisted-reproductive-tech)> accessed 24 October 2022

For Australia, as well as the UK, public opinion towards the issue of sex selection for non-medical reasons has a significant influence on the legal regulation.<sup>419</sup> With respect to Australia, the potential shift in public views toward allowing non-medical sex selection suggests that it might be time to take a less restrictive approach to regulating non-medical preimplantation sex selection.

The following section sheds light on the substantial reliance on public opinion regarding non-medical preimplantation sex selection in Australia, elucidating the extent to which public sentiment shapes the laws and regulations governing non-medical sex selection practices.

#### 4.5 A Change in Public Attitudes on Non-Medical Sex Selection

Vis-à-vis Australia, upon redrafting the ART guidelines, the Australian Health Ethics Committee (AHEC) noted that ‘with any controversial practice, society’s readiness to accept a practice is a relevant and important consideration’. Nevertheless, when looking into the submissions in response to the NHMRC’s 2015 public consultation, it turns out that the majority of the submissions were in support of the non-medical sex selection. This apparent change in support of non-medical sex selection marks a change in opinion since the last public survey conducted in 2013. Also, this is the first time that the Australian public has responded with a majority in favour of non-medical sex selection.<sup>420</sup>

Concerning the use and the importance of public opinion, although checking how the public would respond to certain issues is an important element in the reform process in a democratic society, it is pointed out that the use of public opinion especially when state is seeking to regulate ethically controversial issues could be problematic.<sup>421</sup> It is notable to flag down some

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<sup>419</sup> Heather Strange, ‘Non-medical sex selection: ethical issues’ (2010) 94(1) *British Medical Bulletin* 7, 20 <<https://doi.org/10.1093/bmb/ldq002>> accessed 24 October 2022; Rebecca Kippen, Edith Gray, and Ann Evans, ‘High and growing disapproval of sex-selection technology in Australia’ (2018) 15(134) *Reproductive Health* <<https://doi.org/10.1186/s12978-018-0577-5>> accessed 24 October 2022; Michelle Taylor-Sands, Malcolm Smith, and Harriet Fraser, ‘Non-Medical Sex Selection in Australia: Public Views and Bioethical Concerns’ (2019) 18(2) *QUT Law Review* 44 <<http://dx.doi.org/10.5204/qutlr.v18i2.759>> accessed 24 October 2022

<sup>420</sup> Michelle Taylor-Sands, Malcolm Smith, and Harriet Fraser, ‘Non-Medical Sex Selection in Australia: Public Views and Bioethical Concerns’ (2019) 18(2) *QUT Law Review* 44 <<http://dx.doi.org/10.5204/qutlr.v18i2.759>> accessed 24 October 2022

<sup>421</sup> Sarah Jane Fovargue and Rebecca Bennett, ‘What Role Should Public Opinion Play in Ethic-Legal Decision Making?: The Example of Selecting Sex for Non-medical Reasons Using Preimplantation Genetic Diagnosis’ (2016) 24(1) *Medical Law Review* 34, 58 <<https://doi.org/10.1093/medlaw/fww046>> accessed 24 October 2022

problems concerning the undertaking of public consultations, which encompass issues such as the ability to engage a sufficient number of participants, ensuring participants are well informed with sufficient knowledge of the concerned issues and the complexity of such issues.<sup>422</sup>

Proponents of non-medical sex selection postulate that reproductive choices should not simply be dismissed ‘wherever and whenever a voting majority can be assembled against them’.<sup>423</sup> Thus, it is proposed that with respect to regulating controversial issue such as non-medical preimplantation sex selection, especially when individual autonomy (reproductive autonomy) is involved, the harm principle is essential in guiding the making of law.<sup>424</sup>

However, the findings from the 2015 public consultation carried out in Australia revealed a different direction of public opinion towards non-medical sex selection than it was before between 2004 to 2013. Nonetheless, it must be pointed out that there were 217 responses made as part of the consultation process, of which only 117 submissions were accessible to the public. Hence, the data that is used to base the analysis in this chapter was drawn from just under 54 per cent of the total submissions received by the NHMRC.<sup>425</sup>

From the 117 available submissions, it was revealed that 59 per cent of the publicly available submissions were positive attitudes towards non-medical sex selection and such responses were found to be in support of regulatory changes concerning non-medical sex selection in Australia.<sup>426</sup>

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<sup>422</sup> Sarah Jane Fovargue and Rebecca Bennett, ‘What Role Should Public Opinion Play in Ethic-Legal Decision Making?: The Example of Selecting Sex for Non-medical Reasons Using Preimplantation Genetic Diagnosis’ (2016) 24(1) *Medical Law Review* 34, 58 <<https://doi.org/10.1093/medlaw/fwv046>> accessed 24 October 2022

<sup>423</sup> John Harris, ‘Sex Selection and Regulated Hatred’ (2005) 31 *Journal of Medical Ethics* 291, 293 <<http://dx.doi.org/10.1136/jme.2003.007526>> accessed 24 October 2022

<sup>424</sup> John Harris, ‘Sex Selection and Regulated Hatred’ (2005) 31 *Journal of Medical Ethics* 291, 293 <<http://dx.doi.org/10.1136/jme.2003.007526>> accessed 24 October 2022; Kathryn Boyd, ‘Reproductive Autonomy and Social Sex Selection: A Chance of Choice?’ (2018) 25(4) *Journal of Law and Medicine* 1106, 1118 <<https://pubmed.ncbi.nlm.nih.gov/29978688/>> accessed 24 October 2022

<sup>425</sup> Michelle Taylor-Sands, Malcolm Smith, and Harriet Fraser, ‘Non-Medical Sex Selection in Australia: Public Views and Bioethical Concerns’ (2019) 18(2) *QUT Law Review* 44 <<http://dx.doi.org/10.5204/qutlr.v18i2.759>> accessed 24 October 2022

<sup>426</sup> Michelle Taylor-Sands, Malcolm Smith, and Harriet Fraser, ‘Non-Medical Sex Selection in Australia: Public Views and Bioethical Concerns’ (2019) 18(2) *QUT Law Review* 44 <<http://dx.doi.org/10.5204/qutlr.v18i2.759>> accessed 24 October 2022

On the contrary to the findings from the 2016 public consultation carried out by the NHMRC, another public survey was conducted by the Australian Survey of Social Attitudes (AuSSA) in 2016<sup>427</sup>, in which the findings of this study revealed contradictory results from the NHMRC 2015 findings. Noted that the AuSSA is an annual national postal survey of adult Australians chosen at random from the Australian Electoral Roll (enrolment on the Roll is compulsory for all Australian citizens aged 18 years and over). The Survey was sent out to 5000 people and 25 per cent responses were reported back.<sup>428</sup> In this 2016 AuSSA's study, it showed that around three-quarters of the respondents were opposed to legalising non-medical sex selection, including family balancing purposes. In fact, the data from this particular study suggested that there was a strong disapproval of non-medical sex selection for both sex selective abortion as well as sex selective preimplantation through ART treatments.<sup>429</sup>

The Australian experience, marked by shifting public opinions on non-medical sex selection and the challenges associated with using public sentiment to regulate ethically controversial issues, provides a pertinent example for Thailand. It underscores the necessity of balancing competing rights, a principle echoed in this thesis's advocacy for a human rights-based approach to reproductive autonomy, gender equality and ethical regulation. As demonstrated in the Australian context, where the majority recently supported non-medical sex selection, the reliance on public opinion highlights the complexity of regulating such issues democratically. This scenario illustrates the importance, as proposed in the first chapter of this thesis, of maximising individual rights while minimising potential harm. For Thailand, reflecting on Australia's approach means carefully navigating the interplay between public opinion, reproductive choices, and ethical considerations.

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<sup>427</sup> Rebecca Kippen, Edith Gray, and Ann Evans, 'High and growing disapproval of sex-selection technology in Australia' (2018) 15(134) *Reproductive Health* <<https://doi.org/10.1186/s12978-018-0577-5>> accessed 24 October 2022

<sup>428</sup> Rebecca Kippen, Edith Gray, and Ann Evans, 'High and growing disapproval of sex-selection technology in Australia' (2018) 15(134) *Reproductive Health* <<https://doi.org/10.1186/s12978-018-0577-5>> accessed 24 October 2022

<sup>429</sup> Rebecca Kippen, Edith Gray, and Ann Evans, 'High and growing disapproval of sex-selection technology in Australia' (2018) 15(134) *Reproductive Health* <<https://doi.org/10.1186/s12978-018-0577-5>> accessed 24 October 2022

Notably, it is crucial to acknowledge the potential pitfalls of relying on public opinion as the basis for regulation. The contradictory findings from the studies discussed earlier underscore the concerns expressed by many observers regarding the fluctuating nature of public sentiment. Public opinion is subject to change and evolution over time, making it impractical for laws to consistently align with these varying viewpoints. Additionally, public opinion might not always give sufficient weight to human rights concerns or fully comprehend the rights issues at stake. This oversight can lead to regulations that overlook essential human rights principles, underscoring the importance of a more nuanced approach that balances public sentiment with a deep understanding of the human rights implicated by these complex ethical issues.

The subsequent section explores Israel's unique stance on allowing non-medical preimplantation sex selection, ostensibly for family balancing. Despite its permissive legal framework, the section highlights the stringent criteria required for approval, illustrating the complexities and criticisms associated with Israel's approach to non-medical sex selection.

## 5. Israel and Its Sex Selection Law Model

Together with previous discussions, it can be witnessed that many countries prohibit the use of PGD for sex selection under all circumstances (for example, Germany, Austria, and Switzerland), or restrict its use to medical reasons only (*e.g.* UK, France, Norway, Spain, Australia, India)<sup>430</sup>. In the US, as witnessed earlier, there is no law that prohibits the practice of either medical or non-medical preimplantation sex selection. For the UK and Australia, there are laws and regulations in place which prohibits non-medical preimplantation sex selection, as discussed previously.

Whilst other countries regulate the use of PGD through their legislations, this is not the case with Israel. In other words, regulations of PGD in Israel is not based on legislation; instead,

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<sup>430</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) Cambridge Quarterly of Healthcare Ethics 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

PGD is mandated by a directive of the Ministry of Health, also known as the Circular.<sup>431</sup> Noted that although the Circular does not carry the force of law<sup>432</sup>, the policy guidelines stated in the Circular are important especially with the issue of non-medical preimplantation sex selection, which is relatively new and still developing.

Under the 2003 Circular, which is no longer in effect, this 2003 version prohibited all cases of non-medical sex selection using PGD or IVF.<sup>433</sup> However, vis-à-vis the current in-effect 2005 Circular<sup>434</sup>, while most provisions regarding regulating sex selective PGD are still in place, it states that sex selection for non-medical purposes is generally prohibited, but that exceptions can be made in 'highly unusual, irregular and rare cases', which must be accompanied by the written permission granted by the National Committee for Sex Selection by PGD for Non-Medical Reasons<sup>435</sup> (henceforth shall be referred to as the 'Committee'). Applicants who meet the prescribed requirements can apply to the Committee, which can approve the procedure only if all of the following requirements are met:

- (i) There is real and imminent risk of significant damage to the mental health of one or both parents, or to the expected child, if the procedure is not conducted;
- (ii) The applicants are married and have four joint children of the same sex and none of the other, except in extremely rare and idiosyncratic cases;
- (iii) The applicants have received genetic counselling and information regarding all details of the PGD process, including chances of success, ethical considerations, with particular attention to the status and fate of the embryos of the non-selected sex;

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<sup>431</sup> Nirit Pessach, Saralee Glasser, Varda Soskolne, Amihai Barash, and Liat Lerner-Geva, 'The Israeli National Committee for sex selection by pre-implantation genetic diagnosis: a novel approach (2005-2011)' (2014) 3 *Isr J Health Policy Res* 33 <<https://doi.org/10.1186%2F2045-4015-3-33>> accessed 24 October 2022

<sup>432</sup> Meitar Liguornik Geva Leshem Tal 'Israel: Israeli Tax Authority Issues Circular on Taxation of Trusts, including New Rules and Clarifications, but Many Questions Remain' (*Mondaq*, 2 May 2017) <<https://www.mondaq.com/tax-authorities/590600/israeli-tax-authority-issues-circular-on-taxation-of-trusts-including-new-rules-and-clarifications-but-many-questions-remain>> accessed 24 October 2022

<sup>433</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) *Cambridge Quarterly of Healthcare Ethics* 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

<sup>434</sup> Ministry of Health, Director General Circular: Nohal Lebreirat Min Hayilod Be-ivhun Geneti Trom Hashrashati, Hozer Mankal Misrad Habriut Mispar 21/05 [The Procedure for Selecting the Embryo's Sex Through Preimplantation Genetic Diagnosis], 5 September 2005 (hereinafter the 2005 Circular)

<sup>435</sup> Nirit Pessach, Saralee Glasser, Varda Soskolne, Amihai Barash, and Liat Lerner-Geva, 'The Israeli National Committee for sex selection by pre-implantation genetic diagnosis: a novel approach (2005-2011)' (2014) 3 *Isr J Health Policy Res* 33 <<https://doi.org/10.1186%2F2045-4015-3-33>> accessed 24 October 2022

(iv) Applicants clearly understand that if healthy embryos of the non-selected sex remain, permission will not be granted for additional in-vitro fertilisation (IVF) cycles for sex selection until the remaining healthy embryos have all been used by the couple for reproductive purposes; and

(v) Both parents have given informed written consent.

The 2005 Circular essentially sets out a path which allows non-medical sex selection, yet the underlying policy we have witnessed in the earlier discussion is rather contradictory. This is because whilst the Circular revokes the outright ban on sex selection, its extremely cautious guidelines ensure that non-medical sex selection shall be allowed only in exceptional case, limited to situations of extreme sex imbalance within a family, and other unique cases.<sup>436</sup>

These requirements set forth in the 2005 Health Ministry Directive clearly demonstrate that the Israeli government has adopted the family balancing approach towards preimplantation sex selection. By stating within the requirements that only married couples with at least four children of the same sex can be qualified for non-medical sex selection, this points to the direction that family balancing is considered as a ground for allowing non-medical sex selection. It can be observed that the argument for family balancing in Israel is grounded in the underlying rights of reproductive autonomy and the right to respect for private and family life. These rights are one of the key factors that the thesis has considered when assessing and balancing competing rights and interests related to the topic of non-medical sex selection.

The third criteria is good medical practice and the fourth reflects the desire to prevent the creation of embryos as a trivial matter. The second criteria is set to limit the impact of 'family balancing' in driving sex selection and the first reflects the importance of taking into consideration the mental distress upon evaluating the ethical nature of preimplantation sex selection for non-medical reasons.

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<sup>436</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) Cambridge Quarterly of Healthcare Ethics 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

Nonetheless, considering these outlined requirements which the applicants must fulfil in order to be granted a permission to undergo non-medical sex selective PGD/IVF, it is undeniable that such criteria significantly keep out those who do not fall under the scope of the prescribed requirements. Evidently, unmarried couples are excluded from these rules. This can be seen as another major discrimination issue against those who are unmarried. Moreover, the requirement in Israel for having existing four children of the same sex raises concerns about its impact on women's health, as it may potentially subject them to too many pregnancies, which could be detrimental to their physical and, in some cases, mental health. This raises questions about whether such a requirement genuinely considers the wellbeing of women.

A closer look at the 2005 Circular, the Israeli Ministry of Health created a legal mechanism for allowing non-medical sex selective PGD. Following recommendation given by the Ministry's Helsinki committee on genetic experimentation in human and the bioethics committee of the Israeli National Academy of Sciences, it set up a seven-person Committee, authorised to approve non-medical sex selection. This Committee consisted of a clinical psychologist, an expert in the field of medical and bioethics a social worker, a legal expert, a doctor with expertise in genetics, a doctor with expertise in obstetrics and a gynaecology who is working in the field of fertility, and a clergyman of the faith of the couple applying for the approval. The criteria, outlined above, have to be fully met in order for the applicant to receive an approval for undertaking such requested treatment.

It is observed that a large degree of the recommendations seemingly reflects the position of Halakha (Jewish Law). It is pointed out that Halakhic Judaism welcomes with enthusiasm the new opportunities to help couples overcome the pain of infertility. Particularly with the issue of getting pregnant through reproductive assisted technologies, it is suggested that, whilst the position is not universally endorsed, if the gametes of the married couples are used to create the embryo *e.g.* the eggs and the sperms belong to the married couple and not from donors, ART treatment to help with overcoming the infertility problem is welcome.<sup>437</sup>

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<sup>437</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) Cambridge Quarterly of Healthcare Ethics 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

With respect to the topic of sex selection, Halakha sees no intrinsic moral difficulty in wanting a child of a particular sex. However, specifically when it comes to sex selection using ART treatments, this prompts up significant concerns which lead to strong aversion to such practices. This general aversion to ART sex selection was confirmed when the Israeli Ministry of Health issued its guidelines. Rabbinic authorities were quoted as condemning sex selection for non-compelling personal parental satisfaction as antithetical to traditional Jewish values.<sup>438</sup>

It can be useful to consider ethical considerations given by the Halakha authority which support medical sex selection. 'One cannot close the door in the face of despondent who suffer mental anguish in fear of giving birth go sick children, pressure which can drive the mother mad. Therefore, in the case of a serious genetic disease which affects the couple, it is difficult to forbid genetic screening through PGD.' From this quoted information, it is pointed out that it is the mental anguish of the parents that creates a compelling situation that allows for the genetic screening such as sex selection for medical purposes. Notably, this could be linked to a rights-based argument on reproductive autonomy and a right to respect for private and family life, including the best interests of both the parents and the child who could have been born with severe genetic deformity. Noted that such claim might be disregarded and opposed by the disability community. However, it is with this type of rationale, as presented in the quoted text, that allows many halakhists to permit abortion of the foetus identified to carry Tay Sachs disease.<sup>439</sup> Evidently, it seems to be the parents' distress rather than the child's medical condition that create the compelling justification that supports abortion.

Former Chief Rabbi of Israel ruled that PGD for sex selection could be carried out provided that a couple must have six children of the same sex and who would not have any more children unless they were sure that the seventh child would be of the opposite sex.<sup>440</sup>

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<sup>438</sup> Nirit Pessach, Saralee Glasser, Varda Soskolne, Amihai Barash, and Liat Lerner-Geva, 'The Israeli National Committee for sex selection by pre-implantation genetic diagnosis: a novel approach (2005-2011)' (2014) 3 *Isr J Health Policy Res* 33 <<https://doi.org/10.1186%2F2045-4015-3-33>> accessed 24 October 2022

<sup>439</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) *Cambridge Quarterly of Healthcare Ethics* 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

<sup>440</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) *Cambridge Quarterly of Healthcare Ethics* 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

Consistently, another former Chief Rabbi of Israel also provided similar view that non-medical sex selection could be permitted for a married couple who had five children of the same sex.<sup>441</sup>

Prior to the enforcement of the current regulations, a case involving non-medical sex selection with an emphasis of parental distress was brought into spotlight. In this case, a 'kohen' is a descendant of the biblical High Priest Aaron and has special public duties and rights in the synagogue. Within a religious community, it is obvious who is a kohen and who is not. Only a male child can inherit this status hereditarily from his father. In this case, it involves an infertile (sterile) kohen whose wife was undergoing donor insemination. The wife was worried that members of the community would know that the child was not her husband's genetic son, destroying his privacy in the matter. Therefore, the couple requested sex selective PGD to guarantee a daughter.<sup>442</sup> The requested procedure was approved by the Israeli Health Ministry's legal adviser at the time on an ad hoc basis as the current regulations having not yet been issued at the time of the request.

Another case that concerns a couple seeking a permission to undergo non-medical sex selective PGD in order to attain a son also shares similar justification to the kohen case. In this case, the distress that formed the basis for such sex selective treatment did not come from preferential desire for male over female baby. In fact, it was claimed to be based on an idiosyncratic situation in Jewish law, known as 'yichud' which prohibits unrelated men and women from being alone together in a closed room unobserved by a third party.<sup>443</sup> As this case involved the use of donor sperms, according to the Jewish law, the child born from a donor sperm is halakhically related to the mother but not the father. Hence, it was

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<sup>441</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) Cambridge Quarterly of Healthcare Ethics 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022; Nirit Pessach, Saralee Glasser, Varda Soskolne, Amihai Barash, and Liat Lerner-Geva, 'The Israeli National Committee for sex selection by pre-implantation genetic diagnosis: a novel approach (2005-2011)' (2014) 3 Isr J Health Policy Res 33 <<https://doi.org/10.1186%2F2045-4015-3-33>> accessed 24 October 2022

<sup>442</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) Cambridge Quarterly of Healthcare Ethics 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

<sup>443</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) Cambridge Quarterly of Healthcare Ethics 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

presumably lead to a yichud prohibition between the female child and the 'social father' (a social father is referred to a father who has no genetic connection to the child). Notably the halakhic authority who approved the donor sperm insemination also insisted on sex selection for a male child to avoid such yichud problems.<sup>444</sup>

Both cases discussed above presented a halakhic views and attitudes towards non-medical sex selection. Arguably, it seems that they suggested that on the basis of mental distress, intense embarrassment, and invasion of one's privacy can constitute a compelling justification for allowing non-medical sex selection.

The permissive stance on non-medical sex selection in Israel, particularly evident before the enactment of the 2005 regulations, is significantly influenced by parental interests aligned with Jewish religious law and traditions. This reliance on religious authority underscores a cultural dimension that is intrinsic to Israel's regulatory approach. In contrast, Thailand does not share this religious tradition, making the direct transplantation of Israel's approach to non-medical sex selection impractical for the Thai context.

At present, the Israeli sex selection regulations established in the 2005 Circular remain in effect. Evidently, the rationale for such guidelines contains an assumption that not every request for non-medical sex selection using PGD is inherently unethical, particularly when it is not driven by gender bias but by major religious and ethical traditions. It is argued in this respect that for the ethical and religious universe of one's patients should be a natural component of any therapeutic protocol, especially in those cases where its concerns reflect the overall attitude of the general medical community.<sup>445</sup> From this assertion, it seems to suggest that public attitudes play a certain role in the legal framework of Israel's sex selection law. As seen from the two cases outlined earlier, religious traditions, which can also be viewed as an element constituting public opinion, were taken into consideration when drafting the

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<sup>444</sup> Daniel Pollack, Moshe Bleich, Charles J Reid Jr, and Mohammad Fadel, 'Classical Religious Perspectives of Adoption Law' 79(2) The Notre Dame law review 693, 753 <<https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1428&context=ndlr>> accessed 24 October 2022

<sup>445</sup> Richard V Grazi, Joel B Wolowelsky, and David J Krieger, 'Sex selection by preimplantation genetic diagnosis (PGD) for nonmedical reasons in contemporary Israeli regulations' (2008) 17(3) Cambridge Quarterly of Healthcare Ethics 293, 299 <<https://doi.org/10.1017/S0963180108080353>> accessed 24 October 2022

current regulations. Its permissive approach towards non-medical sex selection practices, despite the onerous criteria, suggests that non-medical sex selection can be permitted in Israel.

Reflecting on the critiques of family balancing as examined in Chapter One, the concept's underlying assumptions and potential implications highlight the need for careful consideration in policy formulation. The discussion around the Israeli model, which adopts a permissive stance largely influenced by family balancing, parental interests, and religious considerations, underscores the complexity and ethical ambiguity of non-medical sex selection. This thesis argues that while family balancing serves as a significant rationale for permitting sex selection, such reasoning alone may not suffice to justify a permissive approach towards non-medical sex selection. Given the multifaceted concerns raised, including sexism, gender stereotyping, and the reinforcement of binary gender norms, policies must evolve to critically address these issues, ensuring that regulation is both ethically sound and socially responsible.

## 6. Chapter Summary

This chapter compares the legal stance on non-medical preimplantation sex selection across four case study jurisdictions, highlighting the US's permissive approach and contrasting it with the explicit prohibitions found in the UK and Australia, where considerations of harm, such as skewed sex ratios and gender inequality, outweigh individual rights like autonomy and privacy. It also notes the potential instability of basing laws on public opinion, as seen in shifts towards accepting family balancing in the UK and Australia, cautioning against overlooking human rights in legislative processes. Israel's conditional allowance of sex selection underlines the tension between reproductive rights and regulatory restrictions. Through these case studies, the chapter underscores the importance of tailoring legal frameworks to each country's context and prioritising human rights to balance individual freedoms with societal risks.

In the upcoming chapter, the research methodology for the participant interviews is outlined. These interviews are of utmost significance as they generate original data on a topic that has

not been previously explored. The methodology is carefully designed and presented to demonstrate its appropriateness and thoroughness in collecting data crucial to this thesis.

# CHAPTER FOUR: RESEARCH METHODOLOGY

## 1. Introduction

As witnessed from the secondary literatures examined in Chapter One, Chapter Two, and Chapter Three, the existing knowledge alone is not sufficient to answer the main thesis question of how Thailand should respond to non-medical preimplantation sex selection. Moreover, considering the paucity (almost close to non-existent) of information regarding the practice of non-medical preimplantation sex selection in Thailand, it is imperative that this thesis conducts an empirical study to collect the necessary and relevant data that can be of use to address and answer the main thesis question.

Consequently, to address the gap in the existing knowledge towards how Thailand should respond to non-medical preimplantation sex selection, this chapter purports to provide a detailed overview of the methodology adopted to examine and evaluate legal responses through semi-structured interviews with key stakeholders towards the practice of non-medical preimplantation sex selection in Thailand. By combining doctrinal legal analysis with forms of empirical study, collecting primary data from in-depth interviews, and comparative legal analysis of selected jurisdictions through a case study approach, the chapter justifies the choice of empirical research and develops the method for interviewing in hopes of developing an innovative approach to investigate the model legal framework about the practice of non-medical preimplantation sex selection in Thailand.

Legal research can generally be categorised in three major types, all with their own body of methods: doctrinal research, empirical legal scholarship, and international and comparative legal research.<sup>446</sup> This chapter explains how the thesis uses elements of all three types and how the selected different methods are applied to various data to answer the research question posed in Chapter One. Noted that an examination regarding doctrinal and comparative legal research has already been discussed earlier in Chapter One.

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<sup>446</sup> McConville and Hong Chui, *Research Methods for Law* (Universal Law Publishing 2007)

Accordingly, in order to answer the thesis question set out in Chapter One to support a suitably robust analysis, the methods and methodology employed in this thesis are drawn from rigorous methodological knowledge. It is often difficult to categorise a thesis, particularly one on the subject of law under any specific headings, as many works of this type involve a hybrid of methods.<sup>447</sup> The important distinction between ‘method’ and ‘methodology’ should be identified here. There is an argument that ‘method refers to the range of techniques that are available to us to collect evidence about the social world.’ Methodology, however, concerns the research strategy as a whole.<sup>448</sup> This is a crucial point for this chapter as the research strategy of this thesis is a mixture of doctrinal (it examines the concept and laws concerning preimplantation sex selection), empirical (it studies and analyses the data gathered from interviewing key informants within the preimplantation sex selection field in Thailand, and comparative legal study (it utilises a comparative approach to look at three main different jurisdictions and their legal framework in connection with sex selection practice).

## 2. Introducing Research Questions

Previous chapters examined issues and arguments surrounding the practice of sex selection, particularly non-medical preimplantation sex selection. From these arguments, this primary research question appeared to be unresolved by existing literatures:

*How should Thailand respond to non-medical preimplantation sex selection?*

Seemingly, after conducting a thorough literature review on available information particularly in Thailand with respect to non-medical preimplantation sex selection law, the main research question presented above has not been fully addressed. Consequently, additional research questions were developed to produce better insights and more well-rounded findings for the present study.

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<sup>447</sup> Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (2<sup>nd</sup> edn, Trans-Atlantic 2007)

<sup>448</sup> Matt Henn, Mark Weinstein and Nick Foard, *A Critical Introduction to Social Research* (2<sup>nd</sup> edn, Sage 2006)

Further questions or subtheme questions of this study were specifically tailored for the doctrinal study, comparative study, and qualitative empirical data collection. These sub-questions were drawn from several relevant issues concerning the practice of non-medical sex selection that were discussed in previous chapters.

*What is the current legal position regarding sex selection law in Thailand?* (Doctrinal study)

*What are the potential legal responses to non-medical preimplantation sex selection in other jurisdictions? And how human rights issues are engaged with preimplantation sex selection?* (Combined methodology: doctrinal study, case study)

*What are the general attitudes of relevant parties with respect to the issue of non-medical preimplantation sex selection?* (Combined methodology: empirical data and a desk-based review and analysis of secondary data regarding public attitudes from other jurisdictions)

*What are the responses of relevant interest parties in Thailand on the sex selection prohibition?* (Empirical data)

*How should Thailand sex selection law be particularly concerning non-medical preimplantation sex selection?* (Combined methodology: doctrinal study, case study, empirical data)

Accordingly, in order to answer these questions, research design which includes the chosen research methods were employed. These methods are addressed and elaborated in the latter section below.

### 3. Research Paradigm

The research process has three major dimensions: ontology, epistemology, and methodology.<sup>449</sup> Ontology asks ‘what is reality’, epistemology asks ‘how do you know something’, and the methodology asks ‘how do you go about finding it out’. A research paradigm is described as an all-encompassing system of interrelated practice and thinking that define the nature of enquiry along these three dimensions.<sup>450</sup> The term ‘paradigm’

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<sup>449</sup> Martin Terre Blanche and Kevin Durrheim, *Research in Practice: Applied Methods for the Social Sciences* (University of Cape Town Press 1999)

<sup>450</sup> Krishana Khatri, ‘Research Paradigm: A Philosophy of Educational Research’ (2020) 5 *International Journal of English Literature and Social Sciences* 1435,1440 < [https://ijels.com/upload\\_document/issue\\_files/15IJELS-109202027-Research.pdf](https://ijels.com/upload_document/issue_files/15IJELS-109202027-Research.pdf)> accessed 12 October 2022

originated from the Greek word 'paradeigma' which means pattern. 'Paradigm' is used to denote a conceptual framework shared amongst scholars and academics which provide them with a convenient model for examining problems and finding solutions. Moreover, a paradigm is described as an integrated cluster of substantive concepts, variables and problems attached with corresponding methodological approaches and tools.<sup>451</sup> Accordingly, it can be said that a paradigm implies a pattern, structure and framework of academic ideas, values and assumptions.<sup>452</sup> This section sets out the research paradigm so that a clear framework is present upon addressing what is the thesis question, how to answer such question, and what approaches or methods will be used to generate the answers to such thesis question can be established. The following part provides detailed knowledge outlining the ontology and epistemology of this research.

### 3.1 Ontology and Epistemology

Ontology and epistemology can be combined to be described as a person's worldview; this worldview plays significant role on the perceived relative importance of the aspects of reality. Whilst ontology concerns the question of what is reality, and the epistemology deals with how such knowledge of reality is obtained, under the ontological and epistemological framework, three types of philosophical categories pertaining to the research paradigm can be distinguished. These categories are positivism, interpretivism, and critical postmodernism.<sup>453</sup> Nevertheless, this chapter addresses positivism and interpretivism as they are significantly referenced to and employed for the presentation of research findings in Chapter Five.

The positivist paradigm of exploring social reality is based on the philosophical ideas of the French philosopher August Comte. According to Comte, observation and reason are the best means of understanding human behaviour. It is posited that true knowledge is based on

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<sup>451</sup> Thomas Kuhn, *The Structure of Scientific Revolutions* (4<sup>th</sup> edn, University of Chicago Press 2012)

<sup>452</sup> Stephen Kwadwo Antwi and Kasim Hamza, 'Qualitative and Quantitative Research Paradigms in Business Research: A Philosophical Reflection' (2015) 7(3) *European Journal of Business and Management* 217 <<https://core.ac.uk/download/pdf/234626233.pdf>> accessed 13 October 2022

<sup>453</sup> J M Watkins, 'A postmodern critical theory of research use' (1994) 7 *Knowledge and Policy* 55, 77 <<https://doi.org/10.1007/BF0269629>> accessed 12 October 2022; Jerry W Willis, *Foundations of Qualitative Research: Interpretive and Critical Approaches* (Sage 2007)

experience of senses and can be obtained by observation and experiment.<sup>454</sup> On the ontological level, positivists assume that reality is objectively understood and is measurable using properties which are independent of the researcher and his or her instruments. In other words, knowledge can be objective and quantifiable.<sup>455</sup> Therefore, positivism takes on scientific methods and systematises the knowledge generation process, bringing in quantification to help improving as well as ensuring precision of the data. Additionally, positivism is concerned with uncovering truth and presenting it by empirical means<sup>456</sup>, particularly with the use of quantitative method, of which is addressed in the methodology part set out later in this chapter.

In essence, the positivist position maintains that scientific knowledge consists of facts where its ontology considers the reality as independent of social construction.<sup>457</sup> Provided that the research study comprises of a stable and unchanging reality, in this case, the researcher can opt for an objectivist approach *i.e.* a realist ontology, which is a belief in an objective real world, and detaches epistemological point of view based on a notion that people's perceptions and statements are either true or false, right or wrong. With this approach, researchers tend to employ methods that rely on control and manipulation of reality. Positivism and its dominance were challenged by academics from two alternative approaches: interpretive constructionism and critical postmodernism<sup>458</sup>, which is now explored in the next section.

Interpretivism purports that reality consists of people's subjective experiences of the external world, hence, they may adopt an inter-subjective epistemology and the ontological approach

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<sup>454</sup> E Henning, W van Rensburg, and B Smit, *Finding your way in qualitative research* (Van Schaik 2004)

<sup>455</sup> Martyn Hammersley, 'The Paradigm Wars: reports from the front' (1992) 13(1) *British Journal of Sociology of Education* 131, 143 <<https://doi.org/10.1080/0142569920130110>> accessed 13 October 2022

<sup>456</sup> E Henning, W van Rensburg, and B Smit, *Finding your way in qualitative research* (Van Schaik 2004)

<sup>457</sup> G Walsham, 'Interpretive case studies in IS research: nature and method' (1995) 4(2) *European Journal of Information Systems* 74, 81 <<https://doi.org/10.1057/ejis.1995.9>> accessed 13 October 2022

<sup>458</sup> Filipe J Sousa, 'Chapter 9 Metatheories in research: positivism, postmodernism, and critical realism' (2010) 16 *Organizational Culture, Business-to-Business Relationships, and Interfirm Networks Advances in Business Marketing and Purchasing* 455, 503 <<https://documents.pub/document/metatheories-in-research-positivism-postmodernism-and-2010bpdf2012-03-02metatheory.html?page=1>> accessed 13 October 2022

that reality is socially constructed.<sup>459</sup> The interpretative paradigm is supported and constructed upon observation and interpretation, hence, to observe is to collect information whilst to interpret is to make meaning of that information by drawing conclusions which are reached on the basis of such information, evidence, and reasoning, or by identifying and assessing the similarity or equivalency between such information and certain abstract patterns.<sup>460</sup>

The interpretivist paradigm emphasises the need to put analysis, which involves comprehending and making sense of the world as it is from individual's subjective point of view, in context. Hence, the methods used involve meaning oriented methodologies, such as conducting interviews or collecting participant observations, which rely on a subjective relationship between the researcher and research subjects. Interpretive research 'does not predefine dependent and independent variables but focuses on the full complexity of human sense-making as the situation emerges'.<sup>461</sup> This is the interpretive approach, which purports to understand and be able to justify subjective reasons and meanings hidden behind the investigated social actions.

Interpretivists often assert that only through the subjective 'interpretation of and intervention in reality' can that reality be fully grasped. The study of certain actions or events in their natural settings is vital to the interpretivist philosophy, together with the recognition that researchers cannot avoid affecting those events or actions they examine. They also acknowledge that there may be many interpretations of reality but that these interpretations are in themselves a part of the scientific knowledge they are pursuing.<sup>462</sup> In short, constructivists or interpretivists believe that there is no single reality or truth, and hence it is

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<sup>459</sup> Stephen Kwadwo Antwi and Kasim Hamza, 'Qualitative and Quantitative Research Paradigms in Business Research: A Philosophical Reflection' (2015) 7(3) *European Journal of Business and Management* 217 <<https://core.ac.uk/download/pdf/234626233.pdf>> accessed 13 October 2022

<sup>460</sup> Stephen Kwadwo Antwi and Kasim Hamza, 'Qualitative and Quantitative Research Paradigms in Business Research: A Philosophical Reflection' (2015) 7(3) *European Journal of Business and Management* 217 <<https://core.ac.uk/download/pdf/234626233.pdf>> accessed 13 October 2022

<sup>461</sup> Muhammad Faisal Chowdhury, 'Interpretivism in Aiding Our Understanding of the Contemporary Social World' (2014) 4(3) *Open Journal of Philosophy* 432, 438 <<http://dx.doi.org/10.4236/ojpp.2014.43047>> accessed 13 October 2022

<sup>462</sup> Muhammad Faisal Chowdhury, 'Interpretivism in Aiding Our Understanding of the Contemporary Social World' (2014) 4(3) *Open Journal of Philosophy* 432, 438 <<http://dx.doi.org/10.4236/ojpp.2014.43047>> accessed 13 October 2022

of the opinion that reality needs to be interpreted. Therefore, constructivists or interpretivists tend to opt for qualitative methods to achieve those various possible realities.

This study is situated in the interpretivist paradigm. The study employed a top-down approach upon determining the research paradigm this thesis sits. The study started out by discerning that there can be several ways, including legal approaches, upon responding to as well as dealing with non-medical sex selection. In other words, with respect to the question of how the law should respond to preimplantation sex selection for non-medical reasons, there is no one single answer or approach. As witnessed in Chapter One, Two, and Three, sex selection encompasses a wide range of ethical and socio-legal aspects, which cannot be fitted into a one-size-fit-all legal model. Notably, reality pertaining to sex selection in this case is created by individuals in groups and societies. Therefore, the ontology and epistemology of this thesis situates well with the constructivist/ interpretive approach.

### 3.2 Research Methodology

The increasing growth of sex selection industry and the limited legal regulation point towards a careful consideration and potential need for legal reform. Given the paucity of relevant legal scholarship existed in Thailand, and the complexity of reproductive legislation, this study uses a combined multiple methods of empirical, doctrinal, as well as comparative methods and seeks to understand the legal context as well as the experience of those affected by the laws in order to provide suggestions for improving the current system for both legislative and practice purposes. The following part examines the empirical method which is employed for the qualitative empirical study which its findings are presented in the next chapter (Chapter Five). Noted that the thesis uses of doctrinal and comparative method have been previously justified and dealt with at the outset in Chapter One.

#### ***Empirical***

Empirical study is often viewed as a rather new interdisciplinary version of legal research, in which methods usually taken from social sciences are applied to the study.<sup>463</sup> The term

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<sup>463</sup> Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 (1) The University of Chicago Law Review <<https://chicagounbound.uchicago.edu/uclrev/vol69/iss1/1>> accessed 13 October 2022

'empirical' indicates the utilisation of evidence which are based on observations or experiences. Such empirical evidence can be either quantitative or qualitative. It should be noted that quantitative and qualitative methods provide different types of data and knowledge, and from this have sprung a range of disciplines and orthodoxies.<sup>464</sup> In essence, empirical research purportedly encompasses studies that are based on observations from the real world, in other words, the data – which can either be qualitative and/or quantitative.

This thesis empirical study deals with the matter of qualitative data. In this regard, in a nutshell, qualitative research is a systematic inquiry into the nature or qualities of complex social behaviours by using interpretive approach in order for the researcher to gain greater understanding of how the participants think about the concerned research topic, as well as being able to produce detailed descriptions of the participants' views and opinions.

Accordingly, this thesis empirical study through qualitative methods to uncover views and opinions given by key informants regarding the issue of preimplantation sex selection for non-medical reasons. The knowledge and data acquired from the qualitative data collection process were of great use for this particular study on preimplantation sex selection due to the fact that there has been no previous studies about the impact and experience of conducting non-medical preimplantation sex selection in Thailand. Hence, it was important to gather first-hand accounts of how the legislation is enacted and undertaken by both clinicians and the couples who previously experienced non-medical preimplantation sex selection treatment. Notably, qualitative research is suitable and applicable for thick narrative description of the social behaviours in the observed settings. This thick description technique was utilised to achieve trustworthiness and strengthen validity of research findings, of which this technique is further discussed later in Part 4.4 marked 'Trustworthiness and Validity' as seen below.

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<sup>464</sup> Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 (1) *The University of Chicago Law Review* <<https://chicagounbound.uchicago.edu/uclrev/vol69/iss1/1>> accessed 13 October 2022

## 4. Research Design

The purpose of a research design is to show how all of the major parts of the research study *e.g.* sampling groups and measures are used in an attempt to address the research questions. In other words, research design can be viewed as an architectural outline which serves to plan, structure, and execute the study to maximise the validity of the findings.<sup>465</sup>

This study had two phases, phase one used legal doctrinal and comparative methods to thoroughly examine existing between Thai laws and the laws of specific jurisdictions, which are relevant to the issue of sex selection, to identify any gaps or discrepancies relating to the international human rights framework. Phase two of the study gathered empirical qualitative data from a range of participants to improve understanding of the impact and experience of the ART legislation and policies in Thailand. This phase employed qualitative methods, using interviews to gather data, which were combined with the other methods to answer the main thesis question. Participants were selected for their knowledge about non-medical preimplantation sex selection, including professionals (regulators, assistive reproductive technology (ART) physicians, government officials, judges and public prosecutors) and parents with experiences of undergoing sex selective ART treatments.

### 4.1 Interview Development

The most common qualitative data collection method is said to be the interview.<sup>466</sup> Interviews are identified into three main types; in-depth or intensive, semi-structured, and loosely structured or unstructured. Each type generally involves an 'interactional exchange of dialogue'.<sup>467</sup> Interviews can be very productive due to the fact that the interviewer can pursue specific issues of concern that may lead to focussed and constructive suggestions.<sup>468</sup>

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<sup>465</sup> Johann Mouton, *Understanding Social Research* (Van Schaik 1996)

<sup>466</sup> Jennifer Mason, *Qualitative Researching* (2<sup>nd</sup> edn, Sage 2002)

<sup>467</sup> Sandy Q Qu and John Dumay, 'The qualitative research interview' (2011) 8(3) *Qualitative Research in Accounting and Management* 238, 264 < <https://doi.org/10.1108/11766091111162070> > accessed 13 October 2022

<sup>468</sup> Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (2<sup>nd</sup> edn, Sage 2005)

The main advantages of interview as a data collection method are that interview allows direct contact with participants which often leads to specific and constructive suggestions.<sup>469</sup> Also, interviews are a good channel to obtain detailed information whilst few participants (comparing to quantitative methods such as surveys and questionnaires) are needed to gather rich and detailed data.<sup>470</sup> In essence, there are several types of interviews, often differentiated by their level of structure.<sup>471</sup> Structured interviews have predetermined questions which are asked in a predetermined order to collect the intended data. The interview questions in this type of interview structure are often closed-ended, asking for a yes or no answer or giving interview participants multiple-choice answers to choose from.<sup>472</sup> Vis-à-vis unstructured interviews, this type of interviews are more free-flowing, allowing the interviewer to pose open-ended questions which allows the interview participants to express his or her own opinion freely.<sup>473</sup>

Another interview type that is also commonly used is the semi-structured interviews. This type of interview has features of both the structured and unstructured interviews *i.e.* it employs both closed and open-end questions. Consequently, semi-structured interviews contain the advantages of both structured and unstructured methods.<sup>474</sup> Semi-structured interviews use a set of pre-planned key questions for guidance such that the same areas are covered with each interviewee. As the interview session progresses, the interviewee is given the opportunity to elaborate or provide more insightful and relevant information should he or she chooses to do so.<sup>475</sup> Accordingly, this thesis utilised semi-structured interviews for all participants taking part in the research as the research questions are exploratory in nature.

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<sup>469</sup> Adhabi Essa Ali and Christina B Iash Anozie, 'Literature Review for the Type of Interview in Qualitative Research' (2017) 9 International Journal of Education 86, 97 <<https://doi.org/10.5296/IJE.V9I3.11483>> accessed 13 October 2022

<sup>470</sup> Einat Lavee and Guy Itzhakov, 'Good listening: A key element in establishing quality in qualitative research' (2021) Qualitative Research <<https://doi.org/10.1177/14687941211039402>> accessed 13 October 2022

<sup>471</sup> Jane Ritchie, Jane Lewis Carol McNaughton Nicholls, and Rachel Ormston, *Qualitative Research Practice—A Guide for Social Science Students and Researchers* (2<sup>nd</sup> edn, Sage 2013)

<sup>472</sup> Greg Guest, Emily E Namey, and Marilyn L Mitchell, *Collective Qualitative Data: A Field Manual for Applied Research* (Sage 2013); Jennifer Preece, Helen Sharp, and Yvonne Rogers, *Interaction Design: Beyond Human-Computer Interaction* (4<sup>th</sup> edn, Wiley 2015)

<sup>473</sup> Reimann, Mathias, and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> edn, OUP 2019) <<https://doi.org/10.1093/oxfordhb/9780198810230.001.0001>> accessed 13 October 2022

<sup>474</sup> Sandy Q Qu and John Dumay, 'The qualitative research interview' (2011) 8(3) Qualitative Research in Accounting and Management 238, 264 < <https://doi.org/10.1108/11766091111162070>> accessed 13 October 2022

<sup>475</sup> Chauncey Wilson, *Interview Techniques for UX Practitioners* (Morgan Kaufmann 2013)

The answers from open-ended questions were deemed to be able to guide and provide the insights into the practice of non-medical preimplantation sex selection.

With respect to this thesis study, because participants were divided into five main categories, there were five sets of guideline questions.

Due to COVID-19 restrictions, all interviews were conducted through online platforms using Skype and Zoom. All interviews lasted between 45 to 60 minutes each, and were audio recorded with prior informed consents given by the interviewed participants. It is viewed that such length of time, between 45 to 60 minutes, is appropriate for an in-depth semi-structure individual interviews where the participants are asked to answer pre-set open-ended questions and engage with discussions that may arise from the given answers.<sup>476</sup>

### ***Interview Question Development***

The different groups of interview participants required different interview schedules in order to effectively gather data from each group. The next section explores the various interview schedules and the types of questions developed, and the purpose for this differentiation.

The interview questions for parent couples were designed to examine how much background knowledge the parents contained (prior or current knowledge) with respect to the ban on non-medical preimplantation sex selection, stipulated in the 2015 ART Act. The interview schedule also included questions asking the parent's opinion regarding sex selection and if they had specific favour for one sex over the other, and if so, why.

Questions for assisted reproductive technology (ART) physicians were generated to assess the level of acknowledgement they contained regarding the law governing preimplantation sex selection, to share their experiences in this particular area of reproductive care, to see how they perceive non-medical sex selection and what they think the law should be in this regard.

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<sup>476</sup> Barbara Diccio-Bloom and Benjamin F Crabtree, 'The qualitative research interview' (2006) 40(4) *Med Educ* 314 <<https://doi.org/10.1111/j.1365-2929.2006.02418.x>> accessed 13 October 2022; Herbert J Rubin and Irene S Rubin, *Qualitative interviewing: The art of hearing data* (3<sup>rd</sup> edn, Sage 2022)

Questions for government officials were specifically targeted to ask about their views and experiences concerning cases involving non-medical preimplantation sex selection, what they think about the current law, and their thoughts regarding the practice.

Ultimately, the interview questions used in this study are a useful way to explore what Thailand should be doing with respect to the issue of non-medical preimplantation sex selection. By gaining insights from key relevant parties, many of whom were directly involved with the issue, this allows the thesis to generate useful data, which is employed together with the extant knowledge and the comparative studies upon assessing and coming up with recommendations and proposal to the current sex selection law in Thailand.

## 4.2 Sampling Strategy and Participants Recruitment

Qualitative research is an organised method of describing the views and opinions perceived by research participants, which often involves people's internal feelings.<sup>477</sup> This approach provides a thorough and deep overview of a phenomenon through data collection and presents rich description using flexible methods of research.

Snowball sampling was employed to recruit the interview participants; this is useful and effective when it is difficult to access participants with the set characteristics and criteria. In this study, the existing participants recommended other target participants through their connections, and the sampling continued until data saturation.<sup>478</sup> Snowball sampling is also referred to as the 'chain method', which it is also efficient and cost-effective to access participants who would otherwise be very difficult to find and recruit.<sup>479</sup> Moreover, this type of sampling strategy is particularly fruitful for finding participants who careful about revealing their identities<sup>480</sup> due to the sensitive and private nature of the questions that will be asked

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<sup>477</sup> Zubin Austin and Jane Sutton, 'Qualitative research: getting started' (2014) 67(6) *Can J Hosp Pharm* 436, 440 <<https://doi.org/10.4212%2Fcjhp.v67i6.1406>> accessed 13 October 2022

<sup>478</sup> Nancy Burns and Susan Grove, *The Practice of Nursing Research: Conduct, Critique, & Utilization* (5<sup>th</sup> edn, Saunders 2004)

<sup>479</sup> Mahin Naderifar, Hamideh Goli, and Fereshteh Ghaljaei, 'Snowball sampling: A purposeful Method of Sampling in Qualitative Research' (2017) 14(3) *Strides in Development of Medical Education* <<http://dx.doi.org/10.5812/sdme.67670>> accessed 13 October 2022

<sup>480</sup> Mahin Naderifar, Hamideh Goli, and Fereshteh Ghaljaei, 'Snowball sampling: A purposeful Method of Sampling in Qualitative Research' (2017) 14(3) *Strides in Development of Medical Education* <<http://dx.doi.org/10.5812/sdme.67670>> accessed 13 October 2022

during the interviews. As a result of the sensitivity of the topic, this meant that some participants were careful about their involvement, and snowballing was a good way to connect with a wider pool of participants.

Recruitment of participants for this study was strategically designed to capture a variety of views on the legislation concerning Assisted Reproductive Technologies (ART) and its effects on those under its jurisdiction in Thailand. The study gathered insights from a diverse group of participants, including professionals from the legal and medical sectors, as well as parents who have undergone Assisted Reproductive Technology (ART) treatments. The rationale behind selecting a varied participant base was to ensure a broad range of experiences and viewpoints regarding the implementation and impact of the 2015 ART law. This approach aimed to provide a comprehensive understanding of the subject matter by reflecting the different experiences and perspectives related to the ART process and its legal framework.

The inclusion of participants from different backgrounds and sectors offers a broader exploration of the 2015 ART law's effects. While the study does not claim to provide an exhaustive account, it seeks to enhance the credibility of the findings by incorporating a wide array of experiences and insights. This approach helps address potential biases and limitations associated with focusing on a single type of participant, contributing to a more thorough understanding of the law's implications.

Professional participants were initially identified through the researcher's personal contacts and networks. The process began with outreach to known associates within the Medical Council of Thailand, leading to the recruitment of two officials who then facilitated the identification of two fertility doctors and an official from the Ministry of Public Health (MOPH). Similarly, personal contacts enabled the recruitment of a prosecutor, a judge, and subsequently, their colleagues. An official from the Office of the Attorney General (AOG) extended the recruitment reach to the Thailand Human Rights Commission, from which one official and two human rights lawyers were recruited. Additionally, university networks proved fruitful for recruiting two human rights academics, enhancing the legal perspective of the study. Participants from the Council of State (OCS) were also recruited through personal contacts, adding valuable insights into the legislative process behind the ART law. Although a

focus group was initially planned for these participants, the COVID-19 pandemic necessitated a pivot to individual interviews, demonstrating adaptability in research methodology.

Parent participants were integral to understanding the personal impact of the ART legislation. One parent couple was recruited through an existing personal relationship with the researcher, while others were identified through referrals from interviewed ART doctors and the initial parent couple participant. These parents, who underwent non-medical sex selective ART treatments, offered crucial perspectives on the experiential aspects of the ART law and its effects on individuals seeking reproductive assistance.

By employing a recruitment strategy that leverages both snowball sampling and personal networks, the study aimed to gather in-depth insights into the multifaceted implications of the ART legislation in Thailand. This approach not only facilitated the acquisition of diverse and comprehensive viewpoints but also ensured the research's adaptability to external challenges, thereby strengthening the overall validity of the findings.

#### 4.3 Participant Information

This study consists of 28 participants in total, from several different backgrounds. Key information of each participant is outlined below so that readers can understand the context of the interviewed participants, as well as the suitability for this study.

Group	Specific group	Gender	Age(range)	Number
1.Academics and legal practitioners	Human Rights Commission	1 male	45-55 55+	N = 1
	Office of Attorney General	2 female 1 male	45-55 - 1 55+ - 1	N = 3
	Judges	2 female 1 male	45-55 55+	N = 3
	Human rights lawyers	2 male	45-55 - 1 55+ -1	N = 2

	Human rights academics	2 female	45-55 55+	N = 2
	OCS officials involved in developing 2015 ART bill	2 male 1 female	35-45 – 3 45-55 55+	N = 3
2. Healthcare professionals	ART physicians	1 female 1 male	45-55 55+	N = 2
	Ministry of Public Health (MOPH) - Public health official, physician Government official	2 female	35-45 - 1 45-55 55+	N = 2
	Thailand Medical Council	2 male	45-55 55+	N = 2
3. Parents	Parents with experiences of sex selection treatment (4 couples)	4 female 4 male	35-45 – 45-55 55+	N = 8
Participants in Total				N = 28

#### 4.4 Ethical Considerations

Any research endeavour that involves human subjects needs to take into account ethical issues that might potentially impact the individuals participate in the study. Participants in this study are individuals who can provide expert opinions about non-medical preimplantation sex selection in Thailand, from a variety of viewpoints. All participants were given a participant information sheet as well as a consent form outlining all research procedures and guideline topics that would be asked and discussed over the interview sessions. Such procedure is needed to ensure that participants are able to have informed consent about participating in this interview. Details concerning the procedures ensuring that ethical considerations are adequately and suitably addressed are presented below.

With respect to the issue of consent, participant's written consent was acquired using a process of *negotiated consent*<sup>481</sup> involving several stages:

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<sup>481</sup> Sara Manti and Amelia Licari, 'How to obtain informed consent for research' (2018) 14(2) *Breathe* (Sheff) 145, 152 <<https://doi.org/10.1183%2F20734735.001918>> accessed 13 October 2022

- Prior to starting the study, all participants were provided with an information sheet and consent form. These documents stress the importance of confidentiality and explain to them that all information will be protected. The participant information sheet describes the objectives of the research project, the thesis questions of this project, the importance of gaining informed consent, guarantees of confidentiality of the data and how the information will be used. Participants were given with the opportunity to ask any questions before a data gathering event to ensure that they are fully aware of what is involved and how this will affect them prior to their participations into this project. Participants were encouraged to ask any questions regarding their participation.
- During the interview, participants were informed that if they feel uncomfortable with continuing, it would be at their disposal should they wish to carry on or end the interview session.
- After each interview, participants were asked if they are happy to be included in the study and were offered an opportunity to retract their data, as well as the further opportunities for withdrawing their participation. Lastly, there was a final explanation of the mechanisms by which their identities would be protected by anonymising their identifying characteristics in all publications, using pseudonyms in particular.

This study follows the principles of conducting research laid down in the Declaration of Helsinki<sup>482</sup>, which although intended for medical research, contains useful guidelines that are valid as ethic principles for all research involving human subjects. As a result, participants were made aware before their participation that all personal information would be treated in the strictest confidence and would remain confidential throughout. With respect to participant's wish to withdraw from the project, they were given a chance to do so during all stages of the study *i.e.* before, during, and after the interview. Also, it was emphasised and reassured to the participants that should they feel uncomfortable with any part of the research process, for any reason whatsoever, that they would be free to withdraw at any time

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<sup>482</sup> The World Medical Association Ethics Unit, 'Declaration of Helsinki' (2000) <<https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/>> accessed 8 December 2022

without providing explanation, until the data analysis process started. Subsequently, all participants were contacted before the writing of this study's data analysis, all had expressed their consents for the researcher to carry on with the data analysis process.

It is essential to note that, given the sensitivity of the data gathered, confidentiality is an important consideration for this study. In line with University of Birmingham ethics processes, a full Data Protection Impact Assessments (DPIA) has been completed to consider the implications and rationale of collecting this data from these participants.

Participant data confidentiality is protected at all times. All participants are identified using a unique code, kept in a separate location from the data to separate the identity of the participants from their statements. Any identifying information that may reveal the position, class rank, or specific names of their organisation unit/ departments are not revealed in any publication and strictly concealed. All data pertaining to this qualitative study are stored on encrypted files and placed on Bear Research Data Store (RDS). These files are accessed only by the researcher and are not shared under no circumstances.

In the event of participants describing illegal activities *i.e.* that they are/were involved in sex-selection, the study maintains their confidentiality because there is no requirement to report PGD (Preimplantation Genetic Diagnosis) sex selection prescribed under the 2015 ART Act. Also, there are no penalties issued for any breaches of this relevant provision concerning non-medical sex selective PGD *i.e.* the current law does not dictate that sex selection is illegal *per se*. Hence, despite some of the participants describing activities relating to non-medical preimplantation sex selection, the thesis insists upon maintain the participants' identity and confidentiality. Nevertheless, *vis-à-vis* other illegal activities that should be deemed serious and must report to the authority, during the entire interview study with all 28 participants, there was no description of such illegal activities being committed, hence, throughout the entirety of this thesis, the identity and confidentiality of the interview participants remain protected.

Regarding Data protection, with the signed consent form of the participants, all interviews were audio recorded and then transcribed to produce verbatim transcripts suitable for data

analysis. All data collected during this project were subject to the provisions of the Data Protection Act 2018, the EU General Data Protection Regulation (GDPR), and Thailand Personal Data Protection Act 2019.

#### 4.5 Trustworthiness and Validity

In conducting empirical studies, it is crucial to distinguish between trustworthiness and validity, which serve different roles in assessing research quality from distinct paradigms. Validity, often associated with quantitative research, concerns the accuracy of the findings and whether the study truly measures what it intends to. Trustworthiness, a term more common in qualitative research, evaluates the research's credibility, detailing the study's purpose, methodology, data collection, and analysis to ensure transparency and reliability.<sup>483</sup>

Understanding these concepts helps clarify the research process: trustworthiness emphasises the study's methodological integrity and transparency, while validity focuses on the precision of the research outcomes. This distinction is vital for accurately communicating the research's strengths and ensuring its findings are robust and applicable to the intended context.<sup>484</sup>

Trustworthy research should allow readers to be able to follow the progression of events and understand the logic behind the data presentation, which should contain adequate description, explanation, and justification of the methodology and methods employed within the study.<sup>485</sup>

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<sup>483</sup> Elo S, Kääriäinen M, Kanste O, Pölkki T, Utriainen K, Kyngäs H, 'Qualitative Content Analysis: A Focus on Trustworthiness' (2014) 4(1) Sage Open <<https://doi.org/10.1177/2158244014522633>> accessed 31 March 2024; Sürücü L, Maslakci A, 'Validity and Reliability in Quantitative Research' (2020) 8, 2694, 2726 <<https://doi.org/10.15295/bmij.v8i3.1540>> accessed 31 March 2024

<sup>484</sup> Morse JM, Barrett M, Mayan M, Olson K, Spiers J, 'Verification Strategies for Establishing Reliability and Validity in Qualitative Research' (2002) 1(2) International Journal of Qualitative Methods 13, 22 <<https://doi.org/10.1177/160940690200100202>> accessed 31 March 2024; Shenton A, 'Strategies for Ensuring Trustworthiness in Qualitative Research Projects' (2004) 22 Education for Information 63, 75 <<https://doi.org/10.3233/EFI-2004-22201>> accessed 31 March 2024

<sup>485</sup> Simon C Kitto, Janice Chesters, and Carol Grbich, 'Quality in qualitative research' (2008) 188(4) Med J Aust 243, 246 <<https://doi.org/10.5694/j.1326-5377.2008.tb01595.x>> accessed 13 October 2022; K Hammarberg, M Kirkman, and S de Lacey, 'Qualitative research methods: when to use them and how to judge them' (2016) 31(3) Human Reproduction 498, 501 <<https://doi.org/10.1093/humrep/dev334>> accessed 13 October 2022

Lincoln and Guba's enhanced concept of trustworthiness for qualitative research introduces four key criteria: credibility, transferability, dependability, and confirmability. These criteria serve to parallel traditional quantitative assessments of validity and reliability, yet are specifically tailored to address the unique needs of qualitative studies. Credibility refers to the believability of the findings, transferability to the applicability of these findings across different contexts, dependability to the consistency and repeatability of the results, and confirmability to the neutrality of the findings, ensuring they are shaped by the study's participants rather than by researcher bias or interest.<sup>486</sup> Lincoln and Guba argue that these criteria offer a more appropriate framework for evaluating qualitative research than the traditionally positivist criteria of validity, highlighting the nuanced and context-dependent nature of qualitative inquiry. This perspective positions trustworthiness as a cornerstone for assessing the integrity and applicability of qualitative research findings.<sup>487</sup>

A further evaluation criterion for research is validity, which is often used interchangeably with terms such as authenticity, adequacy, plausibility, and neutrality.<sup>488</sup> It is important that qualitative research demonstrate that the presented results are valid. Arguably, the most influential concept of validity is the work introduced by Guba and Lincoln.<sup>489</sup> They proposed that although research must contain high truth value, the properties of knowledge within the 'rational' (or quantitative) paradigm is different from the properties of knowledge within the 'naturalistic' (or qualitative) paradigm.<sup>490</sup> According to Guba and Lincoln, each paradigm requires specific criteria to determine the veracity of the research. Within the quantitative paradigm, criteria can be formulated in terms of internal validity, external validity, reliability, and objectivity. Within the qualitative paradigm, one is better to speak of criteria such as

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<sup>486</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985); Lorelli S Nowell, Jill M Norris, Deborah E White, and Nancy J Moules, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16(1) *International Journal of Qualitative Method* 13 <<https://doi.org/10.1177/1609406917733847>> accessed 13 October 2022

<sup>487</sup> <sup>487</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985)

<sup>488</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985); Sharan B Merriam, *Qualitative research and case study applications in education* (2<sup>nd</sup> edn, Jossey-Bass 1998)

<sup>489</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985); Vasco Lub, 'Validity in Qualitative Evaluation: Linking Purposes, Paradigms, and Perspectives' (2015) 14(5) *International Journal of Qualitative Methods* <<https://doi.org/10.1177/1609406915621406>> accessed 13 October 2022

<sup>490</sup> Vasco Lub, 'Validity in Qualitative Evaluation: Linking Purposes, Paradigms, and Perspectives' (2015) 14(5) *International Journal of Qualitative Methods* <<https://doi.org/10.1177/1609406915621406>> accessed 13 October 2022

‘credibility’, ‘fittingness’, and ‘confirmability’. These concepts were later redefined to ‘credibility’, ‘transferability’, and ‘dependability’.<sup>491</sup>

Subsequently, this study used several procedures to increase the trustworthiness and validity of this qualitative research, which include: thick description, member checking, and audit trail.<sup>492</sup> The following subsections explore these in turn.

### ***Thick description***

Thick description is referred to as a way of obtaining a type of external validity. By providing a description of certain phenomenon in rich detail, this allows one to evaluate the extent to which the conclusions drawn are transferable to other times, settings, situations, and people<sup>493</sup>. In other words, thick description can be described as the detailed account of field experiences in which the researcher makes explicit the patterns of cultural and social relationships and puts them in context.<sup>494</sup> In this research, thick description was repeatedly utilised during the presentation of research findings, as seen in Chapter Five. The thesis presents thick description in the presentation of data by providing detail, context, and emotion recorded and observed from the interview participants. Upon using thick description, this allows the thesis to present the collected data with details concerning facts, perspectives, and sometimes emotions expressed and shared by interview participants, which were later analysed, interpreted, and formed into the thesis analysis, along with presentation of quotes and snippets to support the researcher’s analysis claims and arguments.

### ***Member checking***

A further method of improving the trustworthiness and validity of qualitative data is member checking. This is when the data are tested with members of the groups from whom the data were originally collected, in this case – interview participants. Member checking can be carried out either formally or informally and the opportunities to perform such checking could

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<sup>491</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985)

<sup>492</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985)

<sup>493</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985); Immy Holloway, *Basic Concepts for Qualitative Research* (Wiley-Blackwell 1997)

<sup>494</sup> Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973); T M Luhmann, ‘Thick Description: Methodology’ in N J Smelser and P B Baltes (eds), *International Encyclopaedia of the Social & Behavioral Sciences* (Pergamon 2001)

arise during the normal course of observation and conversation *i.e.* during the interviews. This study conducted member checking by paraphrasing the narratives/ descriptions given by the participants back to them during the interviews to check that the understanding of such narratives/ descriptions carries the same understanding as the participants had produced.

In essence, member checking allows a researcher to understand and assess what the participants intended, provides participants a chance to correct errors and challenge what are viewed as wrong interpretations, as well as giving a researcher an opportunity to summarise preliminary findings.<sup>495</sup> Ultimately, the process of member checking encompasses systematic feedback obtained from informants or participants on the collected data, set categories, interpretations, and conclusions of the study. In conformity with the approved research's AER application<sup>496</sup>, participants were given the opportunity to assess the credibility of the authors' account<sup>497</sup>, which aims to minimise the risk of misinterpretations by the researcher. In this study, transcripts and research findings were sent to interview participants to allow them a chance to go over the documents and reject any data they deemed incorrect or had been wrongly interpreted by the researcher. These documents were sent to interview participants in the form of nascent themes following initial data analysis. In this regard, all interview participants described significant agreement with the data and findings, and did not suggest any alterations.

### **Audit trails**

This refers to a transparent description of the research steps taken from the start of a research project towards the development and reporting of research findings. These include the records and data that are kept to keep track of what was done during the research project. This was achieved through logs and memos, kept by the researcher over the course of the writing of this thesis. Materials used for literature reviews, instrument development

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<sup>495</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* (Sage 1985); John W Creswell, *Qualitative inquiry and research design: Choosing among five traditions* (Sage 1998); M J Angen, 'Evaluating interpretive inquiry: Reviewing the validity debate and opening the dialogue' (2000) 19(3) *Qual Health Res* 378, 395 <<https://doi.org/10.1177/104973230001000308>> accessed 13 October 2022

<sup>496</sup> The AER approval for this thesis was obtained in April 2021.

<sup>497</sup> Vasco Lub, 'Validity in Qualitative Evaluation: Linking Purposes, Paradigms, and Perspectives' (2015) 14(5) *International Journal of Qualitative Methods* <<https://doi.org/10.1177/1609406915621406>> accessed 13 October 2022

information *e.g.* interview questions, consent forms, and participant information sheets, raw data such as audio files and written notes, and data analysis products such as interview notes, and summaries were all systematically and chronologically stored on the researcher's personal computer and encoded external hard drive.

Considering that the issue of trustworthiness is also a significant consideration in the next phase of an empirical study, which is the data analysis; accordingly, in the following section concerning data analysis, the content shows how collected data was processed and analysed, in conformity with the concept of trustworthiness and validity, to form the research findings, which are presented in Chapter Five.

#### 4.6 Data Analysis

This study analyses the collected data using thematic analysis. Thematic analysis is deemed as a method for identifying, analysing, and reporting the recurrent themes which run across the collected data. Some researchers expressed that thematic analysis is one of the most straightforward methods of deducing themes from qualitative data.<sup>498</sup> Essentially, thematic analysis encompasses analytical construction of codes, themes, and the identification and assessment of the linkage or associations between these themes.<sup>499</sup> Furthermore, it has been established that thematic analysis is specifically suitable for analysing experiences, understandings, as well as perceptions. In addition, thematic analysis is considered to be suitable for the analysis of small, medium-sized, and even large data sets. In fact, thematic analysis has been referred to as 'possibly the most widely used qualitative method of data analysis'.<sup>500</sup>

Thematic analysis can assist researchers upon establishing what the participants consider important, how they categorise experiences and perceptions, what related attitudes they

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<sup>498</sup> Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (Sage 2013)

<sup>499</sup> Chirstain Herzog, Christian Handke, and Erik Hitters, 'Analysing Talk and Text II: Thematic Analysis' in Hilde Van den Bulck, Manuel Puppis, Karen Donders, and Leo Van Audenhove (eds) *The Palgrave Handbook of Methods for Media Policy Research* (Springer 2019)

<sup>500</sup> Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (Sage 2013)

hold and how various categories are associated with one another.<sup>501</sup> In this regard, in order to answer the research question, it was essential to gather and understand the perceptions and attitudes of the various participants and consider how they inter-related, for which thematic analysis was eminently suitable.<sup>502</sup>

### ***Constructing thematic analysis***

The Thematic analysis employed within this study involved the following six steps<sup>503</sup>:

#### *Familiarising the collected data*

- In this research, this first step was achieved through repeated reviewing of the interview transcripts, during which ideas and potential codes were noted.

#### *Generating initial codes*

- Generation of initial codes, using open coding of data to produce a preliminary coding frame based on the thematic categories embedded in the data.

#### *Searching for themes*

- Identification of themes, through a detailed revision of the coding frame to categorise codes into potential themes.

#### *Reviewing themes*

- Review the potential themes, refine, and develop key themes.
- Read the data associated with each theme and consider whether the data really support it. Then, consider whether the themes work in the context of the entire data set. The aim of this process is to make sure that the themes should be coherent and distinct from each other.

#### *Defining and naming themes*

- Defining and refining themes, through detailed examination of the correlations and associations between codes, merging and pruning of codes, and revising thematic

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<sup>501</sup> Steinar Kvale, *Doing Interviews* (Sage 2007); Oliver T Massey, 'A proposed model for the analysis and interpretation of focus groups in evaluation research' (2011) 34(1) *Eval Program Plann* 21, 28 <<https://doi.org/10.1016/j.evalprogplan.2010.06.003>> accessed 13 October 2022; Uwe Flick (ed) *The SAGE Handbook of Qualitative Data Collection* (Sage 2018)

<sup>502</sup> Moira Maguire and Brid Delahunt, 'Doing a Thematic Analysis: A Practical, Step-by-Step Guide for Learning and Teaching Scholars' (2017) 9(3) *AKSHE-J* 3351 <<https://ojs.aishe.org/index.php/aishe-j/article/view/335/553>> accessed 13 October 2022

<sup>503</sup> Moira Maguire and Brid Delahunt, 'Doing a Thematic Analysis: A Practical, Step-by-Step Guide for Learning and Teaching Scholars' (2017) 9(3) *AKSHE-J* 3351 <<https://ojs.aishe.org/index.php/aishe-j/article/view/335/553>> accessed 13 October 2022

definitions. The findings and the developed themes were then rechecked for validity using peer reviews. Two colleagues who have backgrounds in data sciences were contacted by the researcher to help with validation of the produced codes and themes.

#### *Producing the report: the writing up process*

- In fact, writing starts during the first step and continues through the final step of presenting the data. Throughout the entire process of constructing a thematic analysis, the researcher repeatedly went over back and forth across the entire data set to ensure accuracy. The final report of the data findings, which is presented in Chapter Five of this thesis, contains data extracts as interview quotes, which is deemed to best represent a particular theme that emerged from the analysis.<sup>504</sup>

## 5. Limitations

All research studies include limitations. There are several criticisms which claim that qualitative research is purely descriptive and therefore not rigorous, and that it is too subjective and impressionistic have been addressed.<sup>505</sup> Another major criticism vis-à-vis the use of qualitative method is that it arguably lacks transparency *i.e.* it is difficult to see why and how a researcher might reach their conclusions.<sup>506</sup> To this end, previous sections on trustworthiness and validity have already addressed and discussed such concerned issues of transparency in great length; hence, the transparency concern is adequately handled in this regard.

Another limitation, more of method than approach, involves the interviews with participants. It is considered a limitation of the study that the researcher could not control the selection of candidates for interview participation. Because, as mentioned previously, the method of sampling employed in this study was snowball sampling, the researcher could only send out

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<sup>504</sup> Chirstain Herzog, Christian Handke, and Erik Hitters, 'Analysing Talk and Text II: Thematic Analysis' in Hilde Van den Bulck, Manuel Puppis, Karen Donders, and Leo Van Audenhove (eds) *The Palgrave Handbook of Methods for Media Policy Research* (Springer 2019)

<sup>505</sup> Christina Goulding, *Grounded Theory: A Practical Guide for Management, Business and Market Researchers* (Sage 2002)

<sup>506</sup> Emma Bell and Alan Bryman, 'The Ethics of Management Research: An Exploratory Content Analysis' (2007) 18(1) *British Journal of Management* 63, 77 <<http://dx.doi.org/10.1111/j.1467-8551.2006.00487.x>> accessed 13 October 2022

requests to selected organisations or key individuals with some prescribed criteria and rely on these organisations or individuals to provide names and contacts of potential candidates, which were relatively limited. Moreover, some participants were initially reluctant to take part in the study due to the stigma associated with the interview topic; however, being referred by a known person helped encourage them to eventually agree to participate.

Despite the small sample sizes in some participant groups, the study aimed to enhance the trustworthiness and validity of its findings by ensuring a diverse range of experiences and perspectives were included. Although the sample size was limited, the study remained committed to capturing depth and detail in the data collected. This approach provided a nuanced understanding of the participants' experiences, which contributes to the study's overall credibility.

Furthermore, during the interviews, some participants initially hesitated to discuss criticisms of their organisations, particularly regarding the issue of inaccessible public records. These records, theoretically public, were difficult to access due to the disorganised systems within the Ministry of Public Health and the Medical Council. When first questioned about this accessibility issue, participants were initially silent. However, the dialogue began to change when the researcher mentioned that limited access to data is a common problem for researchers in Thailand. This acknowledgment helped ease the tension, making it easier for participants to engage in the conversation. Following this approach, participants gradually began to discuss the topic more openly and eventually acknowledged the restrictions on data access. This strategy of sharing common challenges in research facilitated a more candid discussion, contributing valuable insights to the study without claiming a complete resolution of all initial reluctances. Noted that upon addressing potential implications for data accuracy, strategies such as ensuring confidentiality and building rapport were employed, encouraging more open communication. These measures aimed to collect honest responses, contributing to the study's analysis without claiming to have completely eliminated all initial reluctance.

Concerning the researching of case law, it was extremely difficult to locate relevant case law that might be useful for the topic of sex selection law because of the current Thai judicial system, in which all court rulings that did not reach the supreme courts are concealed from

public access. The difficulties of locating and accessing relevant statistics and court cases remained persistent; yet, considering the available resources and time constraint of this study, all possible and available steps to attain the data were explored and taken to secure due diligence.

Moreover, because of the situations surrounding the COVID-19 pandemic, interviews were carried out through online platforms only. The research design originally included focus group interview, scheduled before the COVID lockdown. The focus groups were cancelled and despite an attempt to run an online focus group, it did not happen because participants did not have same available dates and time for the proposed focus group session.

Also, due to the nature of the interviews which contained sensitive information that requires the identity of the interview participants to be strictly safeguarded, the researcher was left to do all the transcript and translation without any assistant.

## 6. Chapter Summary

This chapter outlines the methodological approach used to explore non-medical preimplantation sex selection in Thailand, combining qualitative analysis of attitudes, experiences, and professional insights with secondary data for context. A comparative case study across multiple jurisdictions provides diverse perspectives on legal approaches to sex selection. This interdisciplinary methodology offers a holistic view of the complex issue, drawing on first-hand accounts and legal frameworks to inform the analysis. The findings, detailed in Chapters Five and Six, lead to the conclusion that Thailand should maintain its ban on non-medical sex selection. This stance is supported by the research, highlighting the need to balance individual autonomy, societal welfare, and ethical considerations.

# CHAPTER FIVE: RESEARCH FINDINGS

## 1. Introduction

Previous chapters set out the central research question. Should Thailand reform its prohibition on non-medical preimplantation sex selection? It asks this question from a human rights perspective. Chapter Two examined the human rights framework in Thailand to pull together tools to consider how human rights as protected and understood in Thailand could be used by opponents and proponents of reform. Chapter Three explored the human rights underpinnings or rationales for the legal approaches to non-medical preimplantation sex selection in a range of case-study jurisdictions. Chapter Four outlines the research methods employed in collecting empirical qualitative data. The thesis now shifts to examine the perspective of relevant stakeholders in Thailand. In this chapter, the research findings from 28 interview participants are presented, together with the analysis of such data.

As described earlier in Chapter Four, the interview element of this study used sets of questions asking participants about their knowledge, expertise, and opinions about non-medical preimplantation sex selection practices in Thailand, with a particular focus on legislative frameworks and how they are working.

Thus, for the purpose of this thesis, interview participants are categorised into three main groups based on their backgrounds and differing contributions to the study: (i) academics and legal practitioner, (ii) healthcare professionals, and (iii) parents who previously involved with non-medical preimplantation sex selection. This chapter presents the data collected from the interview study through five main themes which have been identified within the participants' narratives. Upon going through each theme, the shape of data generated from the participants' submissions are introduced, followed by direct excerpts from the interviews to support the presentation of findings. Observations from the data along with the analysis of the presented findings are laid out accordingly so that any proposed argument arising from the findings is substantiated and adequately validated.

Accordingly, the analysis generated five themes, which repeatedly occurred across the collected interview data, namely:

- (i) General attitudes towards sex selection law in Thailand
- (ii) Reasons supporting sex selection in Thailand
- (iii) Participants' arguments against non-medical sex selection
- (iv) Legal transplants and legislative borrowing
- (v) Participants' concerns with the current Thai sex selection law

The chapter starts by exploring the views of interviewees regarding the current law, which bans non-medical sex-selective ART. It details the perspectives of 25 out of 28 participants on both the pros and cons of non-medical preimplantation sex selection. In contrast, three officials from the Office of the Council of State (OCS) were asked a different set of questions, focused specifically on the drafting process of the 2015 ART bill rather than the advantages and disadvantages of the practice.

Thematic analysis found participants presented mixed attitudes towards allowing non-medical preimplantation sex selection. Some participants, especially academics and legal practitioners, strongly expressed that the law should continue to ban such practice due to the underlying human rights regarding gender equality and sex discrimination, and the concern towards certain consideration of harms such as skewed sex ratio and a child's future and welfare. Nevertheless, healthcare professionals, parents, and few academics and legal practitioners supported the practice by giving several arguments to justify non-medical preimplantation sex selection (autonomy, right to privacy and private life, and arguments based on consideration of harms). In addition, the findings from the interview studies specifically with officials from the Office of the Council of State (OCS) reveals patterns of legal transplants and legislative borrowing with respect to their views about the current sex selection prohibition stipulated under section 18 of the 2015 ART Act. Finally, most participants from all three categories mentioned their concerns towards the current sex selection law, prescribed in the 2015 ART Act, of which most submissions indicated that there are relatively serious problems with the prohibition in place. In this regard, a predominant consensus among participants indicates support for the continuation of the ban on non-

medical sex selection in Thailand. However, there is a prevailing sentiment across all participant groups that revisions are necessary to address the existing gaps in the legislation.

Throughout this thesis, all participant names are pseudonyms. When participants are quoted for the first time, relevant information is given to help contextualise the data. This is particularly important when considering differences of attitudes between the different participant groups.

The following section presents the general attitudes expressed by interview participants concerning the current sex selection law in Thailand.

## 2. General Attitudes Towards Sex Selection Law in Thailand

Considering the nuanced landscape surrounding the knowledge of the 2015 ART Act—originally widely recognised as the surrogacy act, as detailed in the first two chapters of this thesis—it is essential to delineate the varying levels of awareness among different groups.

Vis-à-vis healthcare professionals, both ART physicians, as frontline practitioners of assisted reproductive technologies (ART), generally possess a foundational understanding of the laws governing ART, including the critical provisions against preimplantation sex selection outlined in Section 18. In contrast, parent couples, largely distanced from the legal intricacies of ART, exhibit a notable lack of awareness regarding specific legal provisions, including those concerning sex selection.

Within the Ministry of Public Health (MOPH), a body expected to have comprehensive knowledge of such regulations, there exists a dichotomy. One member demonstrates a robust understanding of the law, indicative of the level of awareness that should be universally expected within the MOPH. However, another member within the same body exhibits a more basic familiarity with Section 18, which does not fully encompass the depth of understanding necessary for the effective enforcement and regulation of ART practices.

This observation reveals a notable division in knowledge about the non-medical sex selection prohibition outlined in Section 18, particularly between healthcare professionals and Council of State participants compared to other participant groups. Such division is understandable, given that healthcare professionals, by virtue of their roles, often have direct experiences with non-medical preimplantation sex selection and are bound by the terms of the sex selection ban.

However, the data also indicates that awareness of the sex selection law does not consistently correlate with professional status or personal experiences, particularly for non-medical participants. For instance, two parent couples who successfully completed non-medical sex selective PGD treatments were not aware of the corresponding prohibition. Furthermore, a disconcerting observation arises from the fact that many legal practitioner participants (prosecutors, judges, and lawyers) whose professional expertise revolves around human rights, laws, and legal enforcement, demonstrated limited knowledge, and in some cases, no knowledge at all, regarding the sex selection law. This discrepancy underscores the need for enhanced awareness and education across various professional sectors involved in or impacted by assisted reproductive technologies and their legal frameworks.

In this regard, as presented earlier, two out of four parent couples who were interviewed admitted that they were not at all made aware of this law and were very surprised to learn that the law prohibits choosing the sex of the foetus through ART technologies. Suvimol, a mother of one son conceived through ICSI (Intracytoplasmic Sperm Injection) and soon be undergoing another round of IVF/PGD treatment for a baby girl, said:

‘I’m really surprised and somehow shocked to know that choosing the sex of my baby is considered illegal. At the very start of the treatment process, my doctor was telling me all about the process, the pros and cons... Not once that he mentioned about the law.’ (Suvimol, parent participant - mother)

Another parent also shared similar experience as described by Suvimol, with both the father and the mother stated that they were not informed about the law at the time of their consultation with their physician. Yod, a father of one baby girl conceived using IVF, said:

‘I have no idea that sex selection is prohibited. Before we started the IVF treatment, we have met with many medical personnel who explained us about the process. The nurses and doctor at the clinic did not mention anything about any law. To be honest,

I did not expect myself to be concerned with legal stuffs ... What does law has anything to do with this?' (Yod, parent participant – father)

Yod's wife, Nuttha added:

'We were aware of the surrogacy Act and the infamous controversy case of baby Carmen<sup>507</sup> before we even go to the fertility clinic but I didn't think this Act has anything to do with IVF/PGD treatment. Our doctor even asked us whether we prefer a boy or a girl, so we didn't think at all that sex selection is prohibited.' (Nuttha, parent participant – mother)

However, the analysis of the narratives from these two parent couples contrasts with the experiences recounted by the ART physicians who took part in this research. Doctor Bella, a female ART physician with over 5 years of experience at a reputable hospital in Bangkok, provided a different perspective, stating:

'We (the ART doctors at her hospital) were all informed about the law and once in a while we were required to sit in a seminar on legal updates... I was instructed to inform my patients about such laws and I always tell my patients that I cannot select the embryo based on the sex. The most viable ones are chosen and that is it.' (Doctor Bella, ART physician participant)

Doctor Bella's claim is consistent with the interview given by Doctor Ken, a male ART physician who has been working in a respectable fertility clinic in Bangkok for almost 10 years. Doctor Ken stated:

'Of course, I am aware of the ban on preimplantation sex selection. As a common procedure, during the consultation period, I tell the patients about details of the methods used, ... and also informing them that sex selection is not allowed by law'. (Doctor Ken, ART physician participant)

When he was asked whether there are any patients who specifically request to select the sex of the baby, Doctor Ken said:

'This is common for parents who walk in here, I understand them that they pay a lot of money to have this baby and they are entitled to think they should get the chance to select the sex. But I stand firm by my statement and insist that we have to abide by the law and therefore any act that can be interpreted as choosing the sex of the baby cannot be performed here at this clinic'. (Doctor Ken, ART physician participant)

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<sup>507</sup> Baby Carmen case (2015) concerns a homosexual American-Spanish couple who came to Thailand to commission a surrogacy. Complications ensued after the surrogate mother decided to keep the baby after claiming that she did not wish the baby to go to a gay couple and that she did not know earlier that the commissioning couple was gay. The case was led into a 14-month long custody battle, of which at the end the court ruled in favour of the commissioning couple and granted the girl's custody to them. See Associate Press, 'Baby Carmen surrogacy custody trial opens' (Bangkok, 23 March 2016) <<https://www.bangkokpost.com/thailand/general/908068/baby-carmen-surrogacy-custody-trial-opens>> accessed 13 October 2022; Oliver Holmes, 'Gay couple win custody battle against Thai surrogate mother' (Bangkok, 26 April 2016) <<https://www.theguardian.com/world/2016/apr/26/gay-couple-win-custody-battle-against-thai-surrogate-mother>> accessed 13 October 2022

Nevertheless, he went on to state that:

‘I know many doctors, even those who also work in this clinic, who are willing and offer patients to choose the sex... Those who are willing to perform the (sex selection) treatment can go around the law by stating that they select this embryo because it is the strongest and most likely to be successfully implanted.’ (Doctor Ken, ART physician participant)

The analysis of interviews with both ART physicians and parents reveals a consensus: non-medical preimplantation sex selection is occurring in Thailand despite the ban, with some doctors prepared to circumvent legal restrictions to offer these treatments.

Apparently, it seems that doctors who offer non-medical preimplantation sex selection treatments to their patients can easily circumvent Section 18 prohibition by claiming medical justification of a healthy and viable embryo. Hence, it can be seen that not only the current sex selection law lacks recognition and awareness, but it can also be relatively easy to be sidestepped.

This analysis raises the observation that the current structure of the sex selection ban, characterised by its apparent ease of circumvention, renders its existence seemingly inconsequential to the actual practice of sex selection.

An analysis of the narratives given by participants from the academics and legal practitioners group reveals a limited understanding of arguments related to preimplantation sex selection, although some degree of familiarity with the relevant law is evident. In relation to the broader topic of sex selection, many participants conveyed that their initial thoughts about the term ‘sex selection’ were primarily associated with sex-selective abortion and female infanticide.

In an interview with Prosecutor Beth, a public prosecutor with 15 years of experience, including handling numerous women’s rights cases, she explained that:

‘I think I can speak for all of my known colleagues that we all link the notion of sex selection to abortion. However, under the abortion law listed under Section 305-307 of Thailand’s Criminal Code, there is no mention of the term sex selection.’ (Prosecutor Beth, legal practitioner)

When asked why she associates sex selection with abortion, Prosecutor Beth replied:

‘Well, to me, selecting sex of the baby promptly leads to aborting unwanted babies based on sex, and such action falls under Section 305, which is a law on abortion.’ (Prosecutor Beth, legal practitioner)

Similar to Prosecutor Beth’s narrative, in which the topic of sex selection promptly led to the thought of sex selection abortion, Prosecutor Peter also expressed that:

‘Sex selection for me, especially considering from the scope of my work, it only involves abortion... and frankly, we actually never heard of or ask them whether the reasons for their abortions come from unwanted baby’s sex. Unwanted pregnancy leads to illegal abortion, and that is the only scope we work with.’ (Prosecutor Peter, legal practitioner)

Nevertheless, he further added that the issue of preimplantation sex selection is a very interesting topic and he is excited to see how the law can be enforced on such particular issue.

‘I’m very intrigued to see a sex selection case to reach the court because this will be the first time the court deals with this topic... it would be interesting to see how the court gives rulings.’ (Prosecutor Peter, legal practitioner)

Judge Kant, a judge working at the supreme court for 15 years, said:

‘When I hear sex selection, my mind goes straight to abortion. Most of the cases that reached the courts in Thailand concerning reproduction are about abortion and section 305 of the Thai Criminal Code... I never came across one that deals with sex selection claim.’ (Judge Kant, legal practitioner)

His statement is consistent with Judge Wanda and Judge Prissy, of which during the interviews it was pointed out that they have never heard of a case involving sex selection, especially preimplantation sex selection. Judge Wanda who also works at the Supreme Court for over 5 years and had been sitting as a judge in criminal cases for almost 10 years before transferring to the supreme court, mentioned that:

‘I don’t think there is a case that reaches Thai courts that concern the topic of sex selection. The closest I can think of is about abortion, which there were so many abortion cases that I am aware of... I even presided over at least nine or ten cases over the years working as a criminal court judge in the North.’ (Judge Wanda, legal practitioner)

She further explained that:

‘Abortion cases were almost always about prosecuting illegal clinic owners and illegal doctors who performing abortion or assault charges that resulted in miscarriage of women.’ (Judge Wanda, legal practitioner)

Similarly, an interview with Judge Prissy, a senior Supreme Court judge who has been working in criminal division for almost 40 years, is relatively the same with what Judge Wanda described.

‘Sex selection is a new concept, so it makes sense that there are none that reaches the court... of course there are hundreds and thousands of reproductive related cases but they were almost all about issues of abortion, which has nothing to do with sex selection topic.’ (Judge Prissy, legal practitioner)

Particularly with respect to the awareness and the knowledge of the sex selection law, specifically Section 18 of the 2015 ART Act, participants who are judges and public prosecutors demonstrate very limited ideas towards the matter. Two of the judges admitted that they were not aware of Section 18 of the 2015 ART Act, and they also did not realise that preimplantation sex selection is legally banned.

‘To be honest, I was not aware at all that there is such law banning sex selection. As a matter of fact, the topic of preimplantation sex selection has never crossed my mind. I was only made aware of this law when you contacted me and sent me the participant information sheet.’ (Judge Kant, legal practitioner)

The other judge also pointed out that:

‘I have to admit I did not know about sex selection law prior to this meeting... Although I am not surprised of the content and provisions contained in the ART Act because at some point the law has to catch up with reproductive technology and as far as I am concerned, more and more people are getting pregnant using IVF.’ (Judge Prissy, legal practitioner)

Similarly, two of the interviewed prosecutors admitted that they were not aware of Section 18 of the 2015 ART Act, which prohibits preimplantation sex selection:

‘This is news to me. I was very intrigued when you approached me to ask about sex selection law... I think sex selection is against the value of what I believe in in so many ways. It is sexist and above all it is wrong.’ (Prosecutor Jane, legal practitioner)

‘I am sorry to say that I don’t really know anything about this sex selection discussions. I wasn’t aware of the sex selection ban before our meeting. I did know some contexts about the surrogacy act because that was big in the news for a while.’ (Prosecutor Peter, legal practitioner)

The interviews with legal practitioners, including judges and public prosecutors, reveal a significant gap in awareness regarding Section 18 of the 2015 ART Act, which prohibits preimplantation sex selection. Despite their extensive experience in handling cases related to women’s rights and reproductive issues, most participants initially associate sex selection

exclusively with abortion, underlining a broader unfamiliarity with the specific legal frameworks addressing ART and preimplantation techniques. This lack of awareness is not only surprising given their professional backgrounds but also indicative of a wider gap in the legal community's understanding of contemporary reproductive technologies and their regulation.

The significance of this finding cannot be overstated in the context of this thesis. It underscores a critical challenge in the enforcement and interpretation of laws related to ART, particularly those that address ethical and emerging issues such as sex selection. If those responsible for upholding the law are unaware of its provisions, it seemingly raises questions about the effectiveness of legal frameworks in regulating complex biomedical practices.

Building on the insights gathered from legal practitioners, the analysis now shifts to the perspectives of academics specialising in women's rights and gender equality. The subsequent section aims to reinforce the observed trend of mixed awareness among legal professionals on the comprehension and application of the ART Act, particularly its provision on sex selection.

During the interviews with the two academic participants, it became evident that Professor Judy possessed a more comprehensive understanding of sex selection issues compared to Professor Bow, despite both being listed as professors specialising in women's rights and gender equality at their respective universities.

'I find your thesis question to be very interesting because I don't think there has ever been a study on this issue in Thailand... It is very interesting for me because there seems to be no literature written about sex selection in Thailand.' '... there are so many arguments surrounding non-medical sex selection... there's autonomy, privacy, gender inequality argument, and not to mention arguments of skewed sex ratio like what's happening in China and India. The more I read about sex selection, especially non-medical sex selection, it seems like a big stewing pot of conundrum that is very difficult to pinpoint the correct response.' (Professor Judy, academics participant)

'This is a topic that is very interesting and very new to my knowledge. ... my best response to this topic would be that we have to consider human rights principle and women's rights... ... I am on the fence but leaning to the side of opposing non-medical sex selection as I think it is inherently sexist. Take China and India for example, they

have a problem of highly skewed sex ratio at birth, excess men, and possibly the root cause of this comes from sex selection practices.’ (Professor Bow, academics participant)

The reflections shared by the academics, Professor Judy and Professor Bow, underscore the complexity and multifaceted nature of the sex selection debate, particularly in the context of non-medical reasons. Professor Judy’s deep dive into the subject for this interview highlights the scarcity of research and literature on sex selection in Thailand, pointing to a significant gap in academic discourse. Her acknowledgment of the myriad arguments surrounding the issue—ranging from autonomy and privacy to gender inequality and demographic imbalances—illustrates the intricate challenges in formulating a clear stance on non-medical sex selection. Similarly, Professor Bow’s admission of limited prior knowledge on the topic and his tentative opposition to non-medical sex selection, based on its potential to exacerbate gender disparities and demographic shifts, reflects the ethical dilemmas faced by scholars in this field.

These insights from academics specialising in women’s rights and gender equality provide a crucial backdrop for the thesis, highlighting the novel nature of the study and underscoring the importance of exploring sex selection within the Thai context. Their perspectives reveal not only the lack of local scholarly attention to this issue but also the ethical, legal, and social complexities that make it a ‘stewing pot of conundrum’. This discussion lays the groundwork for introducing further data in the subsequent section, which will be helpful during the analysis phase in the discussion chapter of the thesis.

Concerning the findings from interviews with two human rights lawyers, both participants demonstrated a certain degree of knowledge regarding the prohibition of sex selection and explicitly linked the practice to human rights concerns. However, the discussions were directed towards areas of prenatal sex selection, particularly addressing the problems of abortion and female infanticide in China and India. Ultimately, both participants highlighted what they perceived as shortcomings of the existing sex selection ban and concluded that the current prohibition is ineffective due to its lack of penalties.

‘The ban is pointless. I’m only saying this because section 18 does not prescribe penalties for those who might violate this.’ (Tom, legal practitioner – human rights lawyer participant)

‘This might be overclaiming, but no one is going to respect and follow the law if there’s no penalty attached to it. Even though this non-medical sex selection ban suggests that there is penalty for those who violate section 18, but when you go look for other relevant provisions and try to find what is the penalty prescribed under the ministerial announcements of the ministry of public health, you will hit a wall because as of now there is still no announcement issued to deal with violation of the non-medical sex selection ban.’ (Nate, legal practitioner – human rights lawyer participant)

In essence, regarding awareness of the non-medical sex selection prohibition outlined in Section 18 of the ART Act, healthcare professionals in this study appear to possess a relatively good understanding of the prohibition. However, it is disconcerting to find that individuals directly involved in the practice, such as two parent couple participants, had no awareness of the sex selection law. Furthermore, the unexpected discovery from the findings was that most legal practitioners were not aware of the non-medical sex selection prohibition.

In addition to the issue of awareness, a discussion on public opinion emerged during an interview with an OCS participant. It is worth contemplating the implications of the observed lack of awareness on public opinion and its influence on the legislative process. The interview highlighted that public opinion was not a significant consideration in drafting most laws, including the sex selection law, as the 2015 ART Act was primarily a response to surrogacy scandals rather than public sentiment. This insight raises questions about the role and importance of public opinion in shaping policy and legislation related to reproductive technologies.

When it comes to the perception of public opinion, the data collected from the interviews reveals that the use of public opinion, known as public hearing (Prachabhijan in Thai) can be found across all projects that involve the government or local government. For example, when the government contracting out private party to build a waste power plant, public hearing is one of the requirements that need to be sought before the construction process.<sup>508</sup> In this regard, in theory, approvals from the public are gathered from representatives of local

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<sup>508</sup> Patcharee Siroros and Kenneth J Haller, ‘Thai Public Hearings: Smokescreen or Ceremony?’ (2000) 5(1) *Thammasat Review* 147, 164 < <https://sc01.tci-thaijo.org/index.php/tureview/article/view/40993> > accessed 13 October 2022

citizens who might be affected by the project<sup>509</sup>, however, in practice, such representatives would be local leaders who can often be bought and would vote in favour of the paying party.<sup>510</sup> With respect to policy decision making and law making, the use of public opinion is rare. The only example of public opinion in relation to law making was the national referendum on the proposed amended Constitution in 2016, which was a formal process in which Thai people with voting eligibility were asked to cast their vote on the proposed constitution and the appointment of 250 Senate members<sup>511</sup>. For other laws and regulations, public opinion is not included in the decision-making process.<sup>512</sup>

‘Public opinion in Thailand is unreliable, it is either rigged, badly sampled, or paid to produce whatever the paying party wishes to convey... Upon making this law (the 2015 ART legislation), public opinion did not play any role at all. We were asked to quickly draft the bill and send it back to the Parliament to approve. I don’t think there is any law in Thailand that has been drafted using or factor in the support of the public.’ (Nathan, OCS participant)

Hence, Nathan surmised that with regards to the 2015 ART Act, public opinion was not utilised upon the legislative making process, which is unlike the UK and Australia cases, of which public opinion have played significant role towards the prohibition on the non-medical preimplantation sex selection, as seen with the discussion presented in Chapter Three.

It is unfortunate that the discussion of public opinion was mentioned by only one participant out of the entire study. This limited engagement with public opinion as highlighted by only one participant opens up an opportunity for additional research to explore its influence on legislative processes in Thailand. However, it is important for this chapter to report this finding because in Chapter Three, it discusses the UK and Australia substantial reliance on the use of public opinion upon their sex selection law making process. This particular finding

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<sup>509</sup> Regulation of Ministry of Industry regarding public hearing on the approval of a receipt of notification on factory operation commencement, a factory operation permit, a factory expansion permit in pursuant to the factory law B.E. 2555 (2012) <[https://www.jetro.go.jp/ext\\_images/thailand/pdf/moi\\_reg\\_public\\_hearing.pdf](https://www.jetro.go.jp/ext_images/thailand/pdf/moi_reg_public_hearing.pdf)> accessed 14 October 2022

<sup>510</sup> Aroon Kayanha, ‘Rules and limits on public consultation in Thai society’ (2020) 9(2) Bangkok Thonburi University Journal 164, 176 <<https://so01.tci-thaijo.org/index.php/bkkthon/article/view/244130/166099>> accessed 13 October 2022

<sup>511</sup> Asian Network for Free Elections, ‘Thailand constitutional referendum 2016: A brief assessment report’ (2016) <<https://anfrel.org/wp-content/uploads/2019/05/Thailand-Referendum-2016-Report-FIN-2.pdf>> accessed 13 October 2022

<sup>512</sup> Patcharee Siroros and Kenneth J Haller, ‘Thai Public Hearings: Smokescreen or Ceremony?’ (2000) 5(1) Thammasat Review 147, 164 <<https://sc01.tci-thaijo.org/index.php/tureview/article/view/40993>> accessed 13 October 2022

about the importance and the use of public opinion in Thailand legislative process reveals a sharp contrast to its UK and Australia counterparts as it was stated by the OCS participant that during the ART law making process, public opinion was not taken into account<sup>513</sup>. The discussion and analysis regarding varying use of public opinion with respect to the law-making process is examined in the next chapter (Chapter Six).

The next part presents the findings which are grouped under the framework of several rights that support the practice of non-medical preimplantation sex selection. These rights include key issues and participants narratives concerning reproductive autonomy, privacy right, and a right to private and family life.

### 3. Supports for Sex Selection in Thailand

Many participants from all three groups—healthcare professionals, parents, and academics and legal practitioners— express their support for non-medical preimplantation sex selection, drawing on several rights concepts such as reproductive autonomy, the right to privacy, and the right to private and family life. The narrative progresses systematically, starting with the presentation of findings on reproductive autonomy in section 3.1, followed by insights into the right to privacy in section 3.2. Moving to section 3.3, ‘Evaluating Arguments Concerning the Consideration of Harms’, this part aims to present interview data that sheds light on the ethical and societal impacts of non-medical sex selection. It outlines participants' views on how individual decisions around sex selection intertwine with broader issues of gender bias and inequality. This structure ensures a focused presentation of interview findings, setting the stage for an in-depth discussion on the complex dynamics at play.

#### 3.1 Reproductive Autonomy

Most of the participants expressed that upon discussing the topic of preimplantation sex selection and the relevant laws and regulations, they have their most prioritised concern

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<sup>513</sup> See also Rule of the Office of the Prime Minister on Public Consultation B.E.2548 (2005) <[http://web.krisdika.go.th/data/outsitedata/outside21/file/RULE\\_OF\\_THE\\_OFFICE\\_OF\\_THE\\_PRIME\\_MINISTER\\_ON\\_PUBLIC\\_CONSULTATION,\\_B.E.\\_2548\\_\(2005\).pdf](http://web.krisdika.go.th/data/outsitedata/outside21/file/RULE_OF_THE_OFFICE_OF_THE_PRIME_MINISTER_ON_PUBLIC_CONSULTATION,_B.E._2548_(2005).pdf)> accessed 14 October 2022; Aroon Kayanha, ‘Rules and limits on public consultation in Thai society’ (2020) 9(2) Bangkok Thonburi University Journal 164, 176 <<https://so01.tci-thaijo.org/index.php/bkkthon/article/view/244130/166099>> accessed 13 October 2022

towards the issue of reproductive autonomy. Many participants, especially healthcare professionals and parent couple participants, pointed out that the current sex selection law, which prohibits non-medical sex selection, essentially violates individual's reproductive autonomy.

During an interview with Professor Bow and Professor Judy, (they were interviewed together), arguments concerning women's right over her own body were stressed and mentioned throughout the interview. It was pointed out by Professor Judy, who is a dedicated feminist professor of gender studies, that one of the most justifying and convincing argument which support preimplantation sex selection would be an argument concerning reproductive autonomy. Moreover, gendered reproductive autonomy – specifically women's- was also stressed in her narratives.

'By placing a ban on choosing the sex of your baby while using ART technologies such as IVF and PGD, this ultimately restricts the women's right over her own body. If we follow the concept that individual, in this case – a women, is entitled to the rights over her own body, it implies that she should be able to decide what can or will happen to her body. Pregnancy is a long road for women and it's a difficult job, so it might be able to argue that the mother should have an ultimate say over what is happening to her body, especially though the pregnancy, in which she will have to endure difficult and uncomfortable physical conditions.' (Professor Judy, academics participant)

Professor Bow also supported her colleague statement and further added that:

'Certainly being pregnant is hard to most of women as we have to endure several stages of changes of our body, with regards to the process of preimplantation sex selection, it is a scenario where parent decided to get pregnant using...say IVF method, the choice of choosing the sex of the fertilised eggs is already there, and if the parent decided to have a baby of a certain sex, they should be entitled to do so... after all, they did pay a lot of money for the process and it is not like the case of sex selective abortion, where the eggs has already been implanted and the parent decided to abort the pregnancy when they found out that the sex of the foetus is not the sex they desired.' (Professor Bow, academics participant)

The excerpt from Professor Bow's interview implies that she considered reproductive autonomy when assessing the merits and justification of non-medical sex selection. She also discussed the relevance of a certain concept of contractual agreement, suggesting that it aligns with the idea of entering into a service contract between intended parents and ART doctors. Furthermore, Professor Bow indicated that the potential harm resulting from non-

medical preimplantation sex selection was minimal compared to other forms of prenatal sex selection, such as sex-selective abortion, emphasising that non-medical sex-selective IVF/PGD does not involve terminating the pregnancy and aborting the successfully implanted foetus.

While Professor Bow's perspective appears reasonable, it's crucial to note that she did not address potential concerns related to harm arising from eugenics or potential harm to the child born from non-medical sex selection. The omission of these elements in the discussion could contribute to a flawed and incomplete understanding of the broader implications and ethical challenges associated with non-medical sex selection. A comprehensive examination of these factors is essential for a well-informed and balanced discourse on the ethical considerations surrounding reproductive technologies.

Nevertheless, both professors also presented their counter arguments of which they suggested that the scope of reproductive autonomy might not encompass the ability to choose the sex of one's baby, regardless of whether it is a pre or post implantation period.

'Now on the contrary to the argument supporting sex selection claiming reproductive autonomy that I just expressed a moment ago, I feel that I should also point out that reproductive autonomy argument might be stricken out on the basis that it might not be appropriate or adequate to base the supporting claim using such factor.'  
(Professor Judy, academics participant)

When asked to clarify her particular statement, she explained that:

'What I'm trying to say is... while those who support the right to choose the sex of the baby using ART techniques, one can also argue that the concept and the scope of this so-called 'reproductive autonomy' does not include the right to choose the sex of the baby even when it's prior to conception.'  
(Professor Judy, academics participant)

In this regard, Professor Bow also suggested that:

'As far as I am concerned, there is not one single document on human rights..., either Thai or international, that says reproductive autonomy also includes or can be interpreted to include the act of preimplantation sex selection.'  
(Professor Bow – academics participant)

It should be observed that while both participants contended that the ability to choose the sex of one's baby did not fall under the realm of reproductive autonomy, they did not give additional explanation as to the reason for not including sex selection into arrays of reproductive rights. In other words, both participants did not give any reason why they think reproductive autonomy should be conceptualised with these limits. This narrative raises

questions about the justifications that could be invoked to limit reproductive autonomy. Noted that the upcoming chapter will analyse arguments related to the boundaries of reproductive autonomy, demonstrating that reproductive rights are not unlimited. This discussion supports the thesis's stance that reproductive rights should not extend to non-medical sex selection.

ART physicians from healthcare professional group also put forward reproductive autonomy as their main argument for supporting preimplantation sex selection. Both ART physicians that were interviewed expressed repeatedly throughout their interviews that they support the right to choose the sex of the foetus during the preimplantation stage *i.e.* preimplantation sex selection.

'Maybe it's because I am a doctor so what I value most in this situation is the right of the patient to make their own medical decisions... informed decisions. Therefore, if you ask me, I will say that I think patients should be able to choose the sex of their baby. Over the courses of my work as a doctor, many parents came and asked me to give them tips and techniques to achieve the particular desired baby's sex. There are many tricks, not medically or scientifically proven to be successful, anyhow, what I'm trying to say is that even this is an attempt by the parents to get the desired result through these techniques, such as trying to eat a lot of certain food and avoid eating salty... this is an act of trying to choose the sex of the baby and this is fine and acceptable for generations.' (Doctor Ken, ART physician participant)

He went on to state that:

'...now... with today's help of technology, we are now being able to ensure the desired sex, I don't see any difference with the tips and tricks to get pregnant with a boy or a girl... altogether they are all the same thing, which is to want to have a certain baby's sex, and that is completely acceptable to me.' (Doctor Ken, ART physician participant)

Nevertheless, when expressing his thoughts about preimplantation sex selection, Doctor Ken circled back to the current law and restated that despite his personal view towards the matter, he highly respects the law and guidelines and ensured that he strictly abided by the current law. During the interview, the participant was asked about his opinion concerning the prohibition on non-medical preimplantation sex selection, he admitted that whilst he follows the law, he wished that the provision concerning sex selection in Section 18 of the 2015 ART Act to be abolished.

'I follow the law but that doesn't mean I agree with it.' (Doctor Ken, ART physician participant)

Similarly, upon interviewing Doctor Bella, she also expressed that she does not agree with the current legal regulations in place and would like to see a change to such law regarding preimplantation sex selection. Noted that a concept of patient's best interest has come up many times during the discussion with Doctor Bella, such discussion is laid out below in the coming section on the topic of patient's best interest, which deals with patient rights and perhaps a more broadly sense of a right to health rather than reproductive rights.

It was pointed out by MCT (Medical Council of Thailand) participants that preimplantation sex selection is an issue that falls under the scope of reproductive autonomy. MCT participants stated that the Council does not pass the law and its tasks are only to issue accompanying regulations that will be used correspondingly with the 2015 ART Act. It was revealed that whilst the main 2015 Act itself, specifically Section 18 which deals with preimplantation sex selection PGD, does not contain penalties for those violating the law, the provision leaves room for readers to go follow up with other relevant legal documents such as ministerial announcement, or medical council regulations.

'Section 18 only states that sex selection is prohibited, but it doesn't say what happens to those who violate this section... so it's up to you to go find relevant regulations and let me tell you this, there is none. Since the introduction of the 2015 Act, the medical council hasn't issued any follow-up regulations with regards to the topic of sex selection. Look, I have been here for a long time and I can say that there has never been a case or a complaint against preimplantation sex selection.' (Doctor Andrew, MCT participant)

When asked about his opinion with respect to the sex selection ban, Doctor Andrew expressed clearly and loudly that:

'The law is bad, it goes against the rule of autonomy and what is worse is that the law doesn't have any real teeth. It's just a letter written in a pile of papers, although everyone knows about it, no one respect or follow this sex selection prohibition.' (Doctor Andrew, MCT participant)

Doctor Andrew's expression demonstrates and confirms the argument many participants also shared that the current law on preimplantation sex selection (Section 18) is undesirable and lacks teeth, especially those working in healthcare profession.

During a parent interview with Ching and Meaw, a 41-year-old father of two ART conceived daughters, he expressed that reproductive autonomy is the key justification for supporting non-medical sex selection. Ching said:

‘First of all, having a child is a very private matter and we are talking about Thailand not ... China where the communist government bans its people from having more than one child. At least we are in a democratic society, well at least I would like to hope that we are still have democracy... and this should give us fundamental rights that must be protected by law. A matter of wanting a boy or a girl falls under reproductive autonomy and as long as preimplantation sex selection does not hurt others, it should be allowed.’ (Ching, parent participant – father)

When asked about the parent’s experience concerning ART treatments, Meaw, a 39-year-old wife explained that both her husband and herself were informed about all relevant matters concerning the IVF/PGD treatment, including the laws and regulations specifically on non-medical sex selection.

‘The doctor informed us at the time before we decided to purchase the IVF/PGD package that the law stipulates that doctors cannot act in any way that might be interpreted as performing sex selection.’ (Meaw, parent participant – mother)

However, contradictory to Meaw’s latest statement, her husband, Ching, revealed that right after the doctor informed them about relevant information, he (the doctor) asked the parent whether they had a preference and explained further that there are ways to go around the sex selection ban. As a result, Ching and Meaw admitted that at first they did not have a sex preference of their babies, but once asked directly by their doctor, they both agree that they wish to have a baby girl.

‘When we told our doctor that we think we want a girl to be our firstborn, the doctor smiled and said ‘no problem, that can be arranged’.’ (Ching, parent participant – father)

What happened during Ching and Meaw’s experience while undergoing IVF/PGD sex selection treatment seemingly reveals that the practice of preimplantation sex selection still exists in Thailand, despite the medical personnel’s awareness of the ban. The analysis derived from these particular findings indicates that the choice of choosing the sex of one’s children through the use of assisted reproductive technology to enhance reproductive autonomy is highly valued amongst key interest parties especially ART physicians (healthcare professionals) and parents. Moreover, even though non-medical sex selection is legally prohibited, the treatment continues to be requested by parents and performed by fertility doctors because there seems to be no meaningful consequences to such breaches of the law, not to mention the observation made earlier that the ban contains loophole that can be easily sidestepped.

All four parent couples that have been interviewed, all of them admitted that they have undergone preimplantation sex selection treatments. Regardless of being informed that the act violates the law, parents who were informed still being offered with an opportunity to exercise their options anyway. Among the four couples that participated in this study, there is no significant imbalance in the sex of the babies conceived through sex-selective ART treatments. The distribution is relatively even, with three girls and two boys, and one more boy anticipated, as reported during the time of the interview.

The narrative on reproductive autonomy provided by Doctor Bella suggests that, at least for some healthcare professionals (including herself and Doctor Ken), the patient's best interest is perceived as paramount. According to the findings, it appears that, from the perspective of these ART physicians, the patient's right over her own body and the ability to choose the sex of her children outweigh other arguments against non-medical preimplantation sex selection.

However, it is important to note that using the term 'patient's best interest' in this context may not necessarily align with the comprehensive definition of the term, as it could be interpreted more narrowly to encompass the patient's desires or wishes. The assessment of a patient's best interest in the context of non-medical sex selection involves multiple perspectives and considerations, extending beyond the patient's preferences. Various angles can be taken into account to evaluate the patient's best interest in this scenario, and it is evident that it does not solely revolve around the patient's wish, but includes broader ethical, social, and medical considerations.

In reinforcing the finding that underscores the importance of reproductive autonomy and the patient's best interest, both ART physicians emphasised the paramount concern for their patients' well-being. They asserted a steadfast commitment to supporting and upholding their patients' reproductive autonomy based on the belief that it aligns with the best interest of the individuals they serve.

Doctor Bella, for instance, drew from her first-hand experiences, noting instances where women had to undergo multiple pregnancies to achieve the desired sex of the baby. This observation further strengthens the argument in favour of reproductive autonomy,

suggesting that empowering individuals to make decisions aligned with their preferences can contribute to their overall well-being and satisfaction.

‘... as a doctor, my job is to think of the welfare and act in best interest of the patients first... as a result, when coming across so many pregnant women whose body should not and sometimes almost cannot bear so many times of pregnancy... this saddens me. And to think that the law prohibits women to choose the sex of her own babies through medically safe and successfully proven method such as IVF or ICSI, this isn’t right. ... .. I know so many mothers who already underwent three or four pregnancies just to have a boy or a girl. It’s sad to see that they are not allowed to get the baby’s sex they want using ART technology’. (Doctor Bella, ART physician participant)

The discussions and first-hand accounts provided by ART physician participants, notably Doctor Bella, highlight a profound commitment to reproductive autonomy and the well-being of their patients. Their advocacy for the right to non-medical preimplantation sex selection stems from a deep understanding of the physical and emotional toll that repeated pregnancies can have on women striving for a child of a specific sex. This narrative underlines the conflict between current legal restrictions and the practical realities faced by many women. These insights advocate for a re-evaluation of the legal stance on sex selection, emphasising that allowing individuals to make informed choices about the sex of their offspring through ART could enhance their overall well-being and satisfaction, underscoring the paramount importance of aligning healthcare practices with the best interests of patients.

Relatively similar was participants concern for the patient’s best interest, as expressed by both Doctors Ken and Bella. Doctor Ken said that, from his views and his experiences working in this field of medicine, doctors tend to be more concerned about the mental and physical welfare of the patients, *i.e.* the mothers:

‘I care more about the welfare of the mother, not the hypothetical child... .. I don’t buy the argument of how an unborn child should be free from gender expectation, ... .. their time will come when they are born, but not at this very minute when the mother is deciding about what baby sex she wishes to give birth to.’ (Doctor Ken, ART physician participant)

Doctor Ken’s opinion of putting patient’s interest first, was also shared by Doctor Bella, who referenced an event in which her colleagues handing out abortion pills to be an acceptable practice that highlights the patient’s consideration and best interest approach.

'I dare say to go so far as telling you that doctors, at least some female doctors I know, are willing to give out abortion pills so that their patients do not have to undergo unbearable and unwanted pregnancies.' (Doctor Bella, ART physician participant)

When asked whether the prescribing of abortion pills is related to sex selection, Doctor Bella responded that she could not be certain, however, the reason she gave the example was to make a point that if there is a competing interest between the mother vs the unborn child, it is likely that the interests of the mother will triumph those of the unborn child.

The said data given by both ART physician participants is another example of how the law might be ignored by some healthcare professionals despite the abortion law containing a concrete and real threats of criminal penalties, even with the latest reforms in 2022. It is understandable from this information and clearer to see why few doctors abide by the current sex selection prohibition, stipulated in Section 18 of the 2015 ART Act. In other words, insights from interviews with two doctors suggest that they prioritise their patients' interests, including physical and mental well-being. This might be used to support the contention that Section 18 could be largely ignored by healthcare professionals in Thailand, though it is important to note that these views are based on a limited sample and may not represent the broader perspective of all healthcare providers.

All in all, the above findings reveal that a significant number of healthcare professionals and parent couple participants strongly endorse non-medical preimplantation sex selection, primarily driven by their acknowledgment and appreciation of the concept of reproductive autonomy. However, it is noteworthy that their support for non-medical sex selection is notably subjective and lacks consideration of broader ethical concerns, potential sex discrimination, and the implications of eugenics.

Moreover, while acknowledging the significance of reproductive autonomy and the right to health, it is essential to scrutinise the inclusion of choosing the sex of a baby through PGD within the framework of the right to health. Ethical considerations come to the forefront, as this choice may be perceived as a non-essential preference rather than a medical necessity, raising questions about its alignment with the core principles of healthcare. Additionally, one

must weigh the ethical implications of resource allocation within the healthcare system, as previously mentioned in Chapter One, questioning whether limited resources should be directed towards addressing non-medical preferences instead of critical health issues. Expanding on the impact of limited medical resources, it is crucial to highlight that directing these resources toward non-medical sex selection can exacerbate disparities and undermine the fundamental purpose of healthcare. Prioritising non-essential procedures, such as non-medical sex selection, may divert resources away from urgent and essential healthcare needs, potentially compromising overall public health. This allocation dilemma becomes even more pronounced when considering the global context of healthcare inequalities. Advocating against non-medical sex selection on these grounds underscores the need for responsible resource allocation, ensuring that healthcare systems address critical health issues affecting a broader population rather than catering to non-essential and individual preferences. This approach aligns with the ethical duty of healthcare systems to prioritise interventions that maximise overall well-being and address pressing health concerns.<sup>514</sup>

Furthermore, societal implications cannot be overlooked, as allowing sex selection through PGD might inadvertently contribute to reinforcing gender stereotypes or imbalances. This may run counter to the broader goals of promoting health and equality, suggesting that certain choices, while within the realm of reproductive autonomy, may not inherently fall under the purview of the right to health.

Also, whilst understanding their justifications for non-medical sex selection is informative, it is crucial to exercise caution in being swayed by their reasoning. Their perspectives appear to be more individualistic, focused on what is deemed best for them personally rather than taking into account the wider societal implications. Therefore, it is imperative not to readily adopt their rationale without critically examining the broader ethical and societal dimensions surrounding non-medical preimplantation sex selection.

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<sup>514</sup> Buchanan AE, Brock DW (eds), *Deciding for Others: The Ethics of Surrogate Decision Making* (Cambridge University Press, 1989); Buchanan A, Brock DW, Daniels N, Wikler D, *From Chance to Choice: Genetics and Justice* (Cambridge University Press, 2000); Daniels N, *Just Health: Meeting Health Needs Fairly* (Cambridge University Press, 2007)

The ensuing section presents findings that underscore the acknowledgment and recognition of privacy, as well as the right to respect for private and family life. These aspects are put forth as supporting arguments and justifications for advocating the allowance of non-medical preimplantation sex selection in Thailand.

### 3.2 Privacy and The Right to Respect for Private and Family Life

This section examines the debate around non-medical preimplantation sex selection, contrasting views from parents advocating for their privacy rights with those of healthcare professionals and legal practitioners who question the ethical implications of such choices. Through the lens of diverse stakeholders, the discussion navigates the complex terrain of privacy versus societal and ethical considerations, setting the groundwork for a comprehensive exploration of the issue.

Parent participants shared their opinions and asserted that they should have a right to be able to seek out preimplantation sex selection treatment because this is a personal matter, of which the law should not violate and restrict such right. Preaw, a 38-year-old mother whose first-born son was sex selected and conceived using IVF technique expressed that:

‘Having a baby, getting pregnant... this is a very private matter and I don’t see good enough reasons for the law to put a ban on sex selective IVF treatment.’ (Preaw, parent participant – mother)

Preaw’s 38-year-old husband, Tong, also agreed with his wife’s submission and added that:

‘This is bad law, not only it lacks respects from both patients and doctors, but it also greatly violates our privacy. This is what happens to us, to our small private family, who are you to tell that we can’t have a boy... it’s none of the government’s business.’ (Tong, parent participant – father)

In line with the above parent participants’ narrative, healthcare professionals (especially participants from the MCT and ART physicians) seem to share similar opinion. Both MCT participants and the ART physicians described that they perceive non-medical preimplantation sex selection as a matter of private choice that should be free from legal restriction and intervention. It was pointed out by the interviewees that a right to respect for private and family life signifies that individuals are at liberty to exercise their reproductive choices freely.

‘Choosing the sex of your baby especially when it is done through PGD is an extremely private matter in a sense that what is decided and done falls entirely into your choices. So, obviously I don’t agree with the current sex selection ban. It’s outrageous.’ (Doctor Andrew, MCT participant)

‘I respect the law but to gain my respect the law has to be reasonable. What we have been discussing here is totally private. It is about what family discusses privately and I think people with the means to access this kind of treatment should be able to do as they like.’ (Doctor Liam, MCT participant)

Doctor Bella and Doctor Ken (ART physicians) agreed when mentioning the issue of privacy and a right to respect for private and family life. They described that though they abide by the law (Section 18 which bans non-medical preimplantation sex selection), they firmly disagree with what Section 18 dictates and wished this provision was reviewed and amended to allow non-medical preimplantation sex selection.

Nevertheless, opponents of privacy argument, who do not agree that preimplantation sex selection should be allowed considering the concept of right to privacy or right to private and family life, asserted that the scope of privacy or right to private life does not encompass the right to choose the sex of the baby through non-medical preimplantation sex selection technology. Lewis, a Human Right Commission (HRC) official pointed out that whilst he does not familiar with the issue of preimplantation sex selection, he viewed that a right to choose the sex prior to conception still does not fall under the scope of a right to privacy.

‘To wish for a boy or a girl is one thing, but to specifically generate the desired result using almost 100% successful medical technique is completely a different story. When people argue that sex selection is their right to privacy, I utterly disagree. You can go through all legal documents on this earth and I can assure you that not a single document says that a right to choose the sex of one’s baby using assisted reproductive technology is considered as a right to privacy or a right to private and family life’. (Lewis, HRC participant)

He also argued further that:

‘... of course, there is a right to respect for one’s private and family life under Article 8 of the European Convention on Human Rights but this entire article does not go anywhere near the topic of preimplantation sex selection. Therefore, I think it’s unacceptable to claim privacy as an argument supporting the practice of sex selection. It’s just not right’. (Lewis, HRC participant)

Similarly, during an interview with Professor Bow and Professor Judy, it was also brought up that a right to privacy claim is not suitable to be used to support an act of non-medical sex selection. Professor Judy expressed that privacy should not and cannot be interpreted to

encompass all areas of personal life aspects. Upon discussing a right to privacy and reproductive rights, despite the intimate and private nature of the topic, privacy does not extend its scope onto a matter of sex selection.

‘Of course... how many children you want, when you want to have children, the gap of time between your first baby and second, third, or even fourth, fifth children...all depends on you and those are the rights you can exercise, but certainly not the right to determine the sex of your children’. (Professor Judy, academics participant)

From the above narrative, while acknowledging the importance of privacy and the right to respect for private and family life, it is crucial to note that privacy should not be interpreted to encompass all areas of personal life. When considering the right to privacy and reproductive rights, despite the intimate and private nature of the topic, it is argued that privacy does not extend its scope onto the matter of sex selection. In other words, even though privacy rights are traditionally understood to protect personal matters from unwarranted intrusion, however, when it comes to reproductive decisions such as sex selection, the ethical and societal dimensions of these choices extend beyond individual privacy. The potential impacts on gender equality, ethical concerns related to sex discrimination, and broader societal implications necessitate a more nuanced evaluation that goes beyond the traditional boundaries of privacy rights. Therefore, while recognising the importance of privacy, it is essential to carefully delineate the limits of its application in the context of reproductive technologies like non-medical preimplantation sex selection.

In addition to the argument concerning privacy and a right to respect for private and family life, Professor Bow also maintained that exercising the rights to privacy is very important in a democratic society, as long as such exercise of rights does not harm others.

‘... in this sex selection case, although from first glance, no one is harmed, but eventually this can potentially lead to harmful effects on the society.’ (Professor Bow, academics participant)

Professor Bow further expanded her argument by introducing the concerns of skewed sex ratios and violence against women. It is important to note that by raising issues related to skewed sex ratios and violence against women, Professor Bow's narrative implies the incorporation of a women's equality argument when evaluating non-medical sex selection. In essence, Professor Bow utilises the framework of women's equality to bolster her stance in

favour of limitations and restrictions on non-medical sex selection. Subsequent sections will delve into Professor Bow's arguments regarding opposing views on non-medical preimplantation sex selection.

### 3.3 Evaluating Arguments Concerning the Consideration of Harms

When considering sex selection scene in Thailand, the issue of limited access to non-medical preimplantation sex selection procedures was also brought up. Based on the observations of the healthcare professional participants, they posited that non-medical preimplantation sex selection is a luxury right afforded only by the rich, which implies that very exclusive and limited number of people can access such procedure.<sup>515</sup> Doctor Ken and Doctor Bella both expressed that only a small group of people could access such treatments, and even amongst the rich (from the upper-middle income group upwards), having the financial ability to seek out non-medical preimplantation sex selection through assisted reproductive technologies such as ICSI and IVF/PGD does not necessary lead to an event where sex selection is performed. In other words, not all affordable parents would seek out sex selection using ART treatments. Natural conception is largely predominant and preferred, considering that only a handful of couples enter fertility treatments, it is this particular group of people, commonly faced with fertility difficulties, who are offered the choice of preimplantation sex selection. Furthermore, it could be observed from both participants' narratives that preimplantation sex selection is a class privilege intersecting with fertility challenges, which might also intersect with age as well.

'For most couples, if they can get pregnant on their own, it is very unlikely that they would choose to undergo such an invasive and...frankly... unenjoyable treatments. It's not just about the money, it's also about so many steps of IVF. The mother needs to be injected with hormones every morning for a period of two weeks, which is not an enjoyable experience. And also comes the process of extracting the eggs and

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<sup>515</sup> Note that the observation by healthcare professional participants (Doctor Bella and Doctor Ken) that non-medical preimplantation sex selection (PGD) is a 'luxury right' accessible primarily to the wealthy highlights significant concerns about social equality and potential discrimination. Describing this procedure as a luxury underscores its exclusivity and limited availability, suggesting that it reinforces socioeconomic disparities by ensuring that only affluent individuals can afford the choice of selecting the sex of their offspring. This situation opens the practice to criticism from an equality perspective, where fundamental reproductive technologies could be perceived as deepening existing societal inequalities rather than serving the common good. Moreover, such exclusivity could be criticised as a form of discrimination, as it implicitly denies this reproductive option to those of lesser means, potentially reinforcing class divisions and privileging certain rights based on economic status. This critique invites a broader discussion on the ethical implications of medical services that are not equitably accessible to all segments of society.

implanting the fertilised or chosen eggs back into the uterus... so from my experience, only couples with fertility challenges ... or at least fertility concerns are seeking out ART treatments.' (Doctor Bella, ART physician participant)

Similarly, Doctor Ken stated during the interview that he believed only a few couples without fertility problems would wish to undergo ART treatments:

'Couples that came into my care were mostly come to see me because they had certain kind of difficulty to conceive naturally... they tried at least a year to get pregnant but failed so they come for my help. Some came to me because the age of the mothers, and they were concerned that because they are old, if they conceived naturally, the babies might come out with certain kind of disabilities... mostly under these circumstances, they expressed that they were very worried to give birth to children with down syndrome or autism.' (Doctor Ken, ART physician participant)

It should be pointed out that while both doctors acknowledged that non-medical sex selection is a privilege and a luxury right affordable only by the wealthy, the argument that its impact on society is minimal because only a small group of people can access such procedures is flawed. The issue lies in the assertion that the limited number of individuals undergoing non-medical sex selection would not significantly affect society. However, the concern is not just about the numerical impact, but the broader societal implications and ethical considerations associated with offering this service exclusively to the affluent. The argument overlooks the potential ethical concerns, such as reinforcing socio-economic disparities and perpetuating gender-based inequalities. Even if the number of people engaging in non-medical sex selection is small, the practice itself raises questions about fairness, justice, and the societal message it sends about the value placed on certain characteristics, in this case, gender. Additionally, limiting access based on financial means might perpetuate a system where reproductive choices are not equally available to all, irrespective of economic status. Therefore, in this regard, it should be highlighted that the societal impact of non-medical sex selection extends beyond numerical considerations and involves ethical and social dimensions that merit careful examination.

## 4. Participants' Arguments Against Non-Medical Sex Selection

### 4.1 Skewed Sex Ratio at Birth

In the discussion surrounding the drawbacks of sex selection, the concern of skewed sex ratios is frequently raised. Non-medical sex selection is often interconnected with broader issues

such as sexism, violence against women, and gender inequality, all of which will be elaborated upon in the subsequent section.

Upon discussing the practice of non-medical preimplantation sex selection, several participants, especially academics and legal practitioner participants, mentioned that allowing non-medical sex selection might lead to problems concerning skewed sex ratio at birth in the future. Noted that as the topic of skewed sex ratio has been previously examined in Chapter One, Chapter Two, and Chapter Three of this thesis, it can be noticed that this particular topic is commonly associated with the sex selection discussion. Moreover, all of the participants who brought up the argument of skewed sex ratio at birth also mentioned China and India as an example which highlights the infamous case of unnatural imbalance between male and female population, arguably as a result of the practice of sex selection.

However, it should be noted that the skewed sex ratio as witnessed in China and India can be said to stem from mainly prenatal sex selection, specifically sex selective abortion and the result of a myriad of legal, political, economic and cultural factors unique to China and India. Yet, throughout various interviews carried out in this research, seemingly, all participants who mentioned the topic of skewed sex ratio to support their argument against non-medical preimplantation sex selection made several references to the case of China and India, which do not provide an accurate or similar scenario to the case of Thailand where there is no recorded evidence of the problem concerning sex selective abortion, or relevant secondary literatures confirming the identified practice.

Participants from the Ministry of Public Health pointed out that one of the most important reasons for Thailand to strictly regulate and prohibit preimplantation sex selection is because such practice can lead to 'unnatural imbalance ratio between male and female'. A few participants asserted that boys are preferred over girls in Thailand, and allowing preimplantation sex selection would certainly worsen the situation *i.e.* the sex ratio imbalance. Prudence, a senior official from the MOPH, expressed that:

'...let's face it, even there's no empirical data supporting the assertion that boys are preferred over girls in Thailand, people are still expecting their babies to be boys, not girls. As you must know already, most of Thai people have Chinese background, and

deep-down these people hope to get a son, not a girl... so if they can choose, of course they will choose to have a son.' (Prudence, MOPH participant)

Doctor Kate, a doctor working at the MOPH provided a similar view, when she said:

'It's a patriarchy system in Thailand, always have and possibly always will be...; hence, if the law allows people to choose the sex of the baby through IVF/PGD, more boys will be born than girls, which can lead to skewed sex ratio just like what happens in India and China. We don't want that.' (Doctor Kate, MOPH participant)

The argument presented by both MOPH participants assumes a preference for male children in Thailand, based on the assertion that Thai people's alleged Chinese heritage leads to a cultural bias in favour of sons during IVF/PGD treatments. This assertion, however, can be criticised for relying on broad generalisations and can be viewed as fallacious reasoning that could lead to stereotyping. Although there is secondary literature supporting son preference in certain Thai families<sup>516</sup>, using this to suggest a universal preference across Thailand is problematic and unsupported by broader evidence.

Supporters of non-medical sex selection might challenge this view by highlighting flaws in associating broad cultural preferences with individual reproductive choices. They could argue that a preference for sons in some segments of the population does not necessarily reflect a widespread cultural trend across Thailand and should not dictate the ethical framework governing reproductive technologies. Furthermore, the normal SRB<sup>517</sup> reported by the World Bank could be used by proponents to refute the notion of a pervasive son preference, suggesting that existing cultural dynamics do not justify stringent restrictions on non-medical sex selection. Instead, they may advocate for a regulatory approach that respects individual choice while addressing ethical concerns within a broader human rights context.

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<sup>516</sup> John Knodel and Visid Prachuabmoh, 'Preferences for Sex of Children in Thailand: A Comparison of Husbands' and Wives' Attitudes' (1976) 7(5) *Studies in Family Planning* 137, 143 <<https://doi.org/10.2307/1964858>> accessed 14 October 2022; Fred Arnold, 'Gender Preferences for Children' (1997) *Demographic and Health Surveys Comparative Studies No. 23* <<https://dhsprogram.com/pubs/pdf/CS23/CS23.pdf>> accessed 14 October 2022; Valentine Becquet, Nicolas Sacco, and Ignacio Pardo, 'Disparities in Gender Preference and Fertility: Southeast Asia and South America in a comparative perspective' (2022) 41(3) *Population Research and Policy Review* 1295, 1323 <<https://link.springer.com/article/10.1007%2Fs11113-021-09692-1>> accessed 14 October 2022

<sup>517</sup> The World Bank, 'Sex ratio at birth (male births per female births) – Thailand' (*The World Bank Data*, 2019) <<https://data.worldbank.org/indicator/SP.POP.BRTH.MF?locations=TH>> accessed 14 October 2022

Nevertheless, this thesis argues that debates on non-medical sex selection should not be driven solely by cultural factors and claims of sex imbalance. It is crucial to integrate international human rights and ethical considerations, ensuring that laws and policies not only reflect cultural sensitivities but also adhere to broader ethical norms and human rights standards.

Upon discussing the skewed sex ratio argument with Professor Judy, she did admit that China and India might not be a convincing example to oppose preimplantation sex selection.

‘Thailand situation is far from what happens in India and China, ... in China where they have serious issues of ‘bare branches’ (excess of male population) and in India where male population is significantly bigger than female, which arguably lead to serious violence against women... Thailand is not there yet, but it doesn’t mean that we won’t become like those societies. The law is there to act as a precaution and setting the argument of skewed sex ratio aside, sex selection in any form, any stage, is unjustified.’ (Professor Judy, academics participant)

Professor Judy continued to assert that:

‘... with fundamental rights such as human rights and gender equality, these are the rights that must be universally protected and upheld. You can’t just say that sex selection via abortion is wrong, but sex selection using ART is right. When it comes to very important and fundamental principle of equality, particularly gender equality, this rule must apply to all.’ (Professor Judy, academics participant)

To unpack Professor Judy’s narrative, she admitted that the problem regarding skewed sex ratio at birth as occurred in China and India does not accurately reflect the case of Thailand where such skewed sex ratio problem does not exist. However, setting the argument of skewed sex ratio aside, she contended that sex selection is associated with human right issues, *e.g.* gender equality, and such human rights must be protected on all accounts. Essentially, it seems that Professor Judy viewed sex selective abortion as equally unacceptable as sex selective preimplantation treatment. From Professor Judy’s explanation, it can be observed that sex selective abortion was juxtaposed with preimplantation sex selection. This given comparison seems to suggest that while sex selective abortion contains a clear harm to the viable implanted foetus, and despite there is no clear or imminent harm to the unchosen and non-implanted foetus, Professor Judy’s explanation seems to suggest that there might be other forms of harm that may be present as a result of the sex selective implantation practices. Thus, Professor Judy relied on this rationale and maintained her position against non-medical preimplantation sex selection.

Lewis, a participant from the HRC, shared his view on the topic of skewed sex ratio that this is a potential problem that can be a result from allowing sex selection, by making preimplantation sex selection legal, this could signify the public that the practice of sex selection is acceptable, which might encourage those who are able to make such decision to lean towards opting for sex selection treatment.

‘If we allow sex selection, it will send out the message that we are okay with choosing sex of our babies, and we don’t want this’. (Lewis, HRC participant)

Seemingly, most academics and legal practitioner participants referenced the argument of skewed sex ratio to argue against non-medical preimplantation sex selection. However, based on the data presented by the World Bank, it reveals that there is no evidence of skewed SRB in Thailand<sup>518</sup>. Nevertheless, it is crucial to emphasise that the absence of an evident skewed sex ratio in Thailand does not warrant dismissing the concerns associated with skewed sex ratios as irrelevant. Even if the immediate impact is not visible, the potential long-term consequences and the ethical considerations tied to sex selection practices necessitate careful scrutiny. Moreover, it is essential to highlight that skewed sex ratio is not the sole factor used to justify non-medical sex selection. Even in the absence of a skewed sex ratio in Thailand, the argument for legally allowing non-medical sex selection is not automatically validated. Other ethical, societal, and gender equality considerations must be thoroughly evaluated to form a comprehensive perspective on the permissibility of non-medical sex selection. The potential implications on issues such as sexism, violence against women, and gender inequality, as mentioned earlier, contribute to the complexity of the discussion and must be taken into account when assessing the appropriateness of legal allowances for non-medical sex selection.

## 4.2 Sexism, Violence Against Women, and Gender Inequality

One of the academic participants, Professor Judy, suggested that ‘sex selection is an extreme form of sexism’. This was asserted during her interview where she firmly stated her opinion that the practice of sex selection, either pre- or post-natal, constitutes an extreme form of sexism, as can be seen in this quote:

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<sup>518</sup> The World Bank, ‘Sex ratio at birth (male births per female births) – Thailand’ (*The World Bank Data*, 2019) <<https://data.worldbank.org/indicator/SP.POP.BRTH.MF?locations=TH>> accessed 14 October 2022

‘This is not just about how women get paid lower than men in the same job position, this is about choosing which sex gets to live, to be born... so I’m standing by my statement that this is an extreme form of sexism, which the law should not, ...correction.... ‘cannot’ allow to happen.’ (Professor Judy, academics participant)

Another academic participant, Professor Bow, agreed; pointing out that although she did not agree that preimplantation sex selection should be considered as an extreme form of sexism, she did view that it is ‘a form’ of sexism, which should be deterred and guarded against. Professor Bow explained that whilst she might not strongly feel about sex selection as a serious form of sexism, by choosing one sex over the other is still considered as sexism. Such practice needs to be carefully monitored and regulated by laws in order to avoid any unfortunate adverse effects in the future.

‘It’s true that Thailand doesn’t seem to have a problem with preimplantation sex selection at the moment, but this doesn’t guarantee that a problem will not occur in the future. You can say that to play safe, sex selection law is needed to guard against such unfortunate incidents.’ (Professor Bow, academics participant)

Related to the above concerns of sexism, is the issue of violence against women. Sex selection has been identified by some participants of this study that the act itself can be regarded as violence and that sex selection could lead to skewed population (excess of men) which could consequently constitute violence against women. Interviews with legal practitioner participants indicated that sex selection could lead to violence against women and girls. Judge Wanda said:

‘In a society where there are way more men than women, this always leads to greater degree of violence against women and girls. Men harassing women, exerting their powers over women.’ (Judge Wanda, legal practitioner)

Agreeing with Judge Wanda’s opinion is an argument given by Prosecutor Beth, who suggested that sex selection can reinforce the concept of patriarchy where men have power over women:

‘Thailand has been a patriarchy society where men are more powerful than women, louder voice, more recognised, more accepted and respected. Nowadays, I wish to say that we are becoming more and more equal... and if we allow sex selection, even if it’s a preimplantation stage, it’s a step backward for women.’ (Prosecutor Beth, legal practitioner)

Prosecutor Beth goes on to express her opinion concerning the correlation between sex selection and patriarchy, positing that:

‘If the law allows sex selection, it implies that choosing male over female is alright in the eyes of law, and that means something in the public eye. It can potentially reinforce and uphold patriarchal values.’ (Prosecutor Beth, legal practitioner)

From Prosecutor Beth’s narratives, it should be noted that patriarchy is a term that describes the system of male dominance in wide areas of life and the violence against women within such system is one of the manifestations of a patriarchal structure. Seemingly, by positing that Thailand is a patriarchal society, Prosecutor Beth relied on this assumption to further assert her objection against the removal of the sex selection ban.

Vis-à-vis gender inequality argument, in general, participants who mentioned such issue contended that preimplantation sex selection can result in a greater degree of gender inequality. The train of thoughts involving the argument of gender inequality closely resembles those provided during the topic of sexism and violence against women. Many participants pointed out that choosing one sex over the other can be regarded as gender inequality. In other words, it was pointed out that the act of preferring a certain sex might be seen as giving greater value of the chosen/ preferred sex, constituting unequal treatment between different sexes.

‘It doesn’t have to be choosing to have a boy over a girl, any kind of choosing one sex over the other means that you think that one particular sex is better than the other... You think you want to have a son because boy is better than girl, there is some attachment of disapproval thoughts against girls. These thoughts can accumulate, and this can get to the point where in a situation when you are facing with the choice to choose between men or women, you choose men because your mind consistently deem that men are better than women.’ (Lewis, HRC participant)

Lewis’s above statement is consistent with the opinion put forwarded by both MOPH participants, who individually stated that one of the justifications supporting a prohibition on preimplantation sex selection is the concern of gender inequality:

‘Parents who strongly desire, for example, a boy can be said to treat boys better than girls because they value boys more.’ (Prudence, MOPH participant)

‘By allowing parents to choose to have a boy or a girl, in a sense, this is gender inequality. Equality would mean that it’s not important whether your child is a boy or a girl. But once you point your finger and pick a specific sex, that’s when gender inequality manifests itself through your choosing.’ (Doctor Kate, MOPH participant)

In addition, another point made by Professor Judy is that sex selection is directly associated with gender inequality, of which she maintained that:

‘Gender inequality is a discrimination based on sex and gender, which causes one sex or one particular gender to be routinely privileged or prioritised over the other. This is a fundamental human right violation and the right to be treated equally regardless of the sex or gender must be taken as an absolute right which must be upheld and respected.’ (Professor Judy, academics participant)

Her opinion reflects Professor Bow’s view, who also insisted that sex selection is interconnected with gender inequality, hence, the law is justified upon restricting such practice.

Nevertheless, an issue of weighing between degree or possibility of harm and assessing how imminent such harm is was introduced during some of the interviews. When asked whether provided that the value of allowing sex selection outweighs the harm caused by such practice, several participants stated that they might be willing to reconsider and change their attitudes towards preimplantation sex selection. Judge Kant stressed that:

‘... I have to consider both sides of the argument, if it’s become clear that upholding reproductive autonomy is more pressing than some harms that may or may not happen in the future, then it’s possible that I would choose to uphold autonomy and support preimplantation sex selection.’ (Judge Kant, legal practitioner)

Prudence, an MOPH participant also admitted that if the benefits of allowing preimplantation sex selection to outweigh the risks of sexism, gendered-based violence and gender-based equality, she would also be willing to support preimplantation sex selection. Prudence shared her opinion on this matter, positing that:

‘If it comes to the point where, all things being considered, risks associated to sex selection are very remote and unlikely to happen in Thailand, then I think... being a doctor myself... an issue of great importance, which is patient’s autonomy, should be taken into account and that the law should allow such practice.’ (Prudence, MOPH participant)

The findings from the study presents a complex landscape where participants, particularly among academics and legal practitioners, express concerns that non-medical sex selection might perpetuate sexism, potentially leading to increased violence against women and exacerbating gender inequality.

Conversely, certain participants from healthcare professionals' group and legal practitioners' group acknowledge that, despite the potential for such negative outcomes, they could support the practice if it were shown that the benefits of upholding reproductive autonomy outweigh these harms. However, the findings do not clearly define the threshold at which the benefits of non-medical sex selection would surpass its associated risks. The discussion among interviewees primarily touched upon the notion of balancing competing interests related to non-medical preimplantation sex selection, without delving into concrete criteria for determining such a balance. This ambiguity may stem from gaps in data collection and a general lack of detailed knowledge about the implications of this practice.

Notably, the thesis proposal to support the continuation of the ban on non-medical preimplantation sex selection in Thailand emerges from a careful consideration of the diverse viewpoints presented in this study's findings. While recognising the valid arguments for reproductive autonomy, the overarching concerns related to the potential reinforcement of gender biases, increased violence against women, and the exacerbation of gender inequality weigh heavily in this deliberation. Furthermore, the speculative nature of the potential outcomes, coupled with the current insufficiency of comprehensive data on the practice's implications, underscores the need for a more protective stance. By advocating for the maintenance of the ban, the thesis aims to prioritise the mitigation of possible adverse societal impacts, reflecting a commitment to promoting gender equality and protecting women's rights within the complex socio-cultural fabric of Thailand.

### 4.3 Sex Selection Is Morally Wrong and Unethical

Some participants, mostly from legal practitioner participant group, expressed their uneasy feelings towards sex selection. Prosecutor Jane, a 54-year-old female public prosecutor who has many experiences with women's right cases, voiced that the main reason for her to oppose preimplantation sex selection is entirely based on her feelings. During an interview, the term 'moral' was mentioned several times, together with the concept of religious beliefs, particularly Buddhism, which could also be linked to a right to religion – a constitutionally upheld right within the Thai Constitution.

Pimpatsorn (the Thesis' author): 'Why did you say that sex selection is morally wrong?'

Prosecutor Jane: 'I don't know how to explain to you... it's just that, to me, it feels wrong to be able to play god and choose the sex of the baby. And being a firm Buddhist, I believe in karma, what will happen, will happen. You should not interfere with your fate of having a boy or a girl.' (Prosecutor Jane, legal practitioner)

Prosecutor Peter also shared his view, which seems to be in line with his colleague's above narrative, that:

'Being able to point fingers that you want a son over a daughter is morally wrong. Babies, boys or girls, should not have any differences. Both sexes should be loved by their parents and family. Also, sex and gender nowadays is something that's very fluid, one minute you think you have a son, but then one day he might walk up to you and say that he is a girl... and that should be totally fine. There is nothing wrong with being gay, either boys or girls... it is okay.' (Prosecutor Peter, legal practitioner)

Notably, Prosecutor Peter's above argument about sex selection seems to involve two relevant human rights arguments, which is the autonomy of the child born out of sex selection, which should be entitled to a right to full advancement and development, without being subjected under the parent's sex or gender expectations (a concept of gender equality and children's wellbeing consideration). These arguments could suggest that children should be able to freely embrace their gender identities as they grow up, based on their rights to autonomy as well as gender equality. Analysis of Prosecutor Peter's narrative shows a greater concern with the child's right and the weight of gender expectations upon parents selecting a certain sex of their children than the argument of sex selection being morally wrong.

Another relatively similar argument against preimplantation sex selection based on moral and wrong is a claim concerning ethics. Doctor Kate and Judge Prissy used the word 'unethical' to describe the practice of non-medical preimplantation sex selection. Judge Prissy pointed out that 'It's unnatural and unethical to be able to create a specific baby of certain sex'.

Doctor Kate, who seems to oppose such practice, considering the content of her given interview, also expressed that she deemed preimplantation sex selection for non-medical reasons as unethical. This was pointed out during her interview that sex selection for non-medical reasons is unfair and sexist and should not be 'ethically tolerated'. However, when asked to give further clarification on the employed term, she did not give additional elaboration on such issue.

Pimpatsorn (the Thesis' author): 'Can you please explain further on the term 'ethically tolerated' you just mentioned?'

Doctor Kate: 'I think it explains itself quite clear already. It's unethical and, hence, it should not be tolerated and accepted.' (Doctor Kate, MOPH participant)

Looking closely at the responses given above, they show that there is a sense of immoral or unethical feelings that the participants seem to struggle to identify in greater depth. In other words, the analysis of this narrative might suggest that the law should not prohibit certain type of action because the people expressed that they feel that such action is wrong or unethical. However, noted that without clear elaboration to support this sense of immoral or unethical feelings, and whether a select group of individuals ethical stance should govern the entire country, the argument put forth seems to be inadequately supported, which could potentially invite criticism.

However, support for banning non-medical sex selection based on immoral and unethical feelings can be justified by emphasising the alignment of laws with shared social values. If a significant portion of society deems non-medical sex selection morally objectionable, it is reasonable for legal frameworks to reflect these collective ethical sentiments, contributing to social cohesion. Additionally, the argument can be strengthened by highlighting the preventive nature of such laws, aiming to avoid potential harm associated with societal issues and gender imbalances that may arise from unrestricted non-medical sex selection. The protection of vulnerable parties, particularly potential children, can be framed as a key consideration, safeguarding against discrimination and the reinforcement of harmful gender stereotypes.

Finally, the notion of a moral consensus within a society can be invoked, suggesting that laws prohibiting non-medical sex selection reflect an ethical agreement among the populace, even if not universally shared, contributing to the overall well-being of the community.

In the following section, the chapter examines another important theme which has been identified from the interviews with the participants from the Office of the Council of State. The theme is grouped under the heading of legal transplants and legislative borrowing as the findings from this group of participants reveal a pattern of taking (borrowing) sex selection

law from other jurisdiction, specifically the UK, and place it into the Thai sex selection legislation.

## 5. Legal Transplants and Legislative Borrowing

As briefly mentioned previously that interview questions used during the three interviews with participants from the Office of the Council of State (OCS) were different from questions for other participants. When considering the findings from this group of participants, it can be helpful to note that, in the Thai legislative system, the process of issuing legislation begins with policy approval from the government cabinet and Council of Ministers. A drafting committee, comprising government or non-government personnel, is appointed by the relevant ministry to create the draft. The OCS then examines, edits, and ensures legal consistency. The edited bill is presented to the Council of Ministers for approval and subsequently voted on in Parliament.<sup>519</sup>

Accordingly, the findings presented in the following section contain narratives and opinions expressed by those who were closely involved with the drafting process of the 2015 ART legislation. These data essentially generate a pattern of legal transplants and legislative borrowing which were identified across the given narratives of the legislative writing process.

The concept of legal transplants is generally referred to the dissemination of legal models from an exporting jurisdiction to a receiving one. In a broader sense, legal transplants or borrowings encompasses the process of law making or legal reforms which is initiated by a plan of legal change based on an imitation of laws, doctrines and theories, or judicial decisions, which are already in place in different legal jurisdictions (*i.e.* exporting jurisdiction).<sup>520</sup> Legal transplants and legislative borrowing take place as a result of the need of a recipient society to come up with a new law. The process of choosing which law to imitate

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<sup>519</sup> Charae Panpruang, 'The Enactment of the Act under the Constitution of the Kingdom of Thailand' (2022) 17(1) Journal of Rattana Bundit University 1, 13 <<https://so03.tci-thaijo.org/index.php/rbac/article/view/259236/174358>> accessed 14 October 2022; Office of the Council of State, 'Thai Legislative Process' <<https://www.krisdika.go.th/web/office-of-the-council-of-state/thai-legislative-process>> accessed 14 October 2022

<sup>520</sup> Gianmaria Ajani, 'Legal Transplants' in A Marciano and GB Ramello (eds), *Encyclopaedia of Law and Economics* (Springer 2019) <[https://doi.org/10.1007/978-1-4614-7753-2\\_731](https://doi.org/10.1007/978-1-4614-7753-2_731)> accessed 14 October 2022

could base on several factors such as considerations regarding the efficacy of the law, chance and necessity.<sup>521</sup> With legal transplants and legislative borrowing, there are arguably certain advantages of applying these approaches. In the case where the topic that needs regulations is rather new, by looking and learning from other jurisdictions which already have established such relevant laws could be beneficial as such laws have already been implemented and ‘successfully tested’ abroad.<sup>522</sup> However, these approaches of legal transplants and legislative borrowing have also been criticised, specifically with the argument that they often do not fit well in the transplant jurisdiction due to differences in the socio-cultural and economic (as well as political) context.<sup>523</sup>

During the three interviews with officials from the Office of the Council of State (hereinafter referred as OCS participants) whose role are to examine and draft bills and legislation, revising them before submitting them to the government, the provided justifications for prohibiting preimplantation sex selection are revealed to be a result of taking provisions from the UK HFE Act and place relevant provisions into the proposed ART bill (which was later passed by the Parliament and came into effect in 2015). All three OCS participants had played certain roles upon drafting the 2015 ART Act and it is important to note that all of them admitted that during the process of drafting the ART law, UK model was set as the main reference that the drafting commission drew from. Such narratives point to the appropriation of legal transplants and legislative borrowing, in which the imitation was achieved from copying the provisions laid out in the UK HFE Act.

Nathan, a 38-year-old male official who went to UK universities for his undergraduate and post graduate degrees, conceded that while helping the drafting commission coming up with the 2015 ART bill, he himself along with a few of his colleagues looked up the provisions laid down in the UK HFE Act (2008 Human Fertilisation and Embryology Act) and took various ideas from the HFEA’s provisions into the 2015 ART bill.

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<sup>521</sup> Alan Watson, *Legal transplants: An Approach to Comparative Law* (University of Georgia Press 1993)

<sup>522</sup> Mathias Siems, ‘Malicious Legal Transplants’ (2018) 38 *Legal Studies* 103, 119 <<https://ssrn.com/abstract=3162239>> accessed 14 October 2022

<sup>523</sup> John Jupp, ‘Legal transplants as tools for post-conflict criminal law reform: justification and evaluation’ (2014) 3(2) *Cambridge Journal of International and Comparative Law* 381, 407 <<http://sro.sussex.ac.uk/59047/>> accessed 14 October 2022

‘Basically, we received an order from our superior to come up with ART Bill as soon as possible because of the scandalous cases concerning surrogacy at the time... so we all went straight to the HFE Act because my colleagues and I remembered reading about the UK Act when we were at UK universities some years back. I hate to admit this but because of the pressing nature of our assignment at that time, we just took the provisions directly from the UK HFE Act, translated them and put them up for the drafting commission’s considerations.’ (Nathan, OCS participant)

He further added that:

‘If you compare the two documents together, you can almost tell that the Thai law copies the UK law almost word for word.’ (Nathan, OCS participant)

His statement is consistent with another official who also had a certain role upon the drafting of the Thai ART bill, who, for the purpose of keeping his identity anonymous, is referred to in this thesis as Paul. Paul, a 41-year-old male OCS official, admitted that significant parts of the Thai 2015 ART law have been taken out from the UK HFE Act.

‘With laws that are urgent, such as this one (the ART Act), we only had about less than two weeks to come up with a draft before presenting it to the cabinet and the Parliament. If I remembered correctly, the entire process of drafting and passing this law only took a month or two to pass... so yes, it was an extremely urgent matter. Our best option was to pick a law from jurisdiction that we saw fit, normally this would be a law from the UK, US, Japan, Singapore, and EU... and we sort of copied and pasted... well translated it first of course.’ (Paul, OCS participant)

The other OCS participant who was involved during the drafting of the ART bill also concurred with her two colleagues and mentioned that:

‘Please don’t judge us, I am being honest here and this is how we sometimes do things... with the case of ART Act, it basically comes from the UK legislation. Most of the content and provisions are pretty much the same, we just made some alterations, added some twists so that it doesn’t look like we didn’t do anything,’ (Nancy, OCS participant)

Specifically with the narratives given by OCS participants concerning the drafting of the 2015 ART legislation, the given rationale and background of how the law came about can be said to involve the process of legal transplant and legislative borrowing – taking legal provisions from the UK jurisdiction and placing them into the Thai ART legislation.

Additionally, it should be flagged that the issue of legal transplants and legislative borrowing are later discussed in the next chapter (Chapter Six), of which criticisms and advantages from such process are explored further, especially with respect to its application to Thailand context.

All in all, it can be witnessed that upon discussing the topic of non-medical sex selection, especially within the Thai cultural and legal settings, legal transplants and legislative borrowing concept were brought up by participants of this study. For the following heading, the section reports findings that reveal participants' concerns with the current non-medical preimplantation sex selection prohibition in Thailand.

## 6. Participant Concerns with Thailand's Current Sex Selection Laws

Participant's concerns with the current sex selection law in Thailand, specifically Section 18 of the 2015 ART Act, were identified during interviews with participants from legal practitioner and healthcare professional participant groups. Questions regarding possible shortcomings or concerns about the non-medical preimplantation sex selection ban were specifically asked to participants of these two groups because it was speculated that these participants might have come across first-hand experiences or difficulties accompanying the non-medical sex selection ban. Particularly with expressed concerns involving the effectiveness and the enforceability of the specified law, several participants who are front liners such as doctors (ART physician participants), regulators (MOPH and MCT participants), and law enforcement (judge and prosecutor participants) indicated that the current provision contains significant flaws, which render the law ineffective.

Doctor Liam, a retired physician who used to work in senior position at the Medical Council of Thailand as well as the Ministry of Public Health pointed out the legal loopholes existed within the sex selection law of the 2015 ART Act.

'Section 18 of the surrogacy act is flawed. There is a mention of sex selection and how the law prohibits PGD sex selection for non-medical reason. However, there's no penalty, no sanction attached to it. Even if sex selection is reported to the Council, the most drastic response the Council can or will issue is to revoke the license of the physician. However, this is never going to happen because revoking the license is considered to be an extremely severe punishment and only doctors who seriously violate the medical code of ethics will be subject to such punishment. As for sex selection, even the law somehow tells that it should not be done, because there is no clear sanction against the conduct, this leaves a lot of room for the Council to exercise its discretion. So far, there has been no cases concerning sex selection reported to the Council, and I am rather certain that even if there is a case of sex selection to reach the Council, no strong punishment is going to be imposed... and it

is definitely not going to be revoking the license of the doctors.’ (Doctor Liam, MCT participant)

On other similar note regarding the loophole of the current sex selection law given by Doctor Andrew, it was voiced that:

‘There’s no whistle blower in this case of sex selection, doctors are not going to report that their patients request to do sex selection, and vice versa, the patients surely are not going to report that their doctors perform sex selection service. There’s no point in telling because the doctors get their money, clinic gets their money, and parents get the sex of the baby they want.’ (Doctor Andrew, MCT participant)

He also added that because the law, especially Section 18 of the 2015 ART Act lacks enforceability, which includes prescribed penalty, this renders the provision ‘null and void’, in his own word.

‘Because there’s no real penalty, this law is like a ghost, we think it is there but we never see it... I mean the penalty being enforced... so basically it scares no one. Frankly, speaking from my long-working experience, I personally believe that there will be no cases of prosecution coming out of the non-medical preimplantation sex selection ban. The law itself lacks teeth, it is being disregarded, no one cares, and no one is going to tell.’ (Doctor Andrew, MCT participant)

According to the given narratives above, it can be derived that the common feature that was most mentioned when discussing the problems with the current sex selection ban seems to circle around the concept that the ban itself does not carry threats and penalty to scare off possible violators. Moreover, such problem compounded with the submission indicating that the ban also severely lacks recognition and awareness. In this regard, several legal practitioner participants expressed that one of the most major shortcomings of Section 18 ban is possibly the fact that very few people are aware of the existence of this prohibition.

‘The law prohibits sex selection, but the problem is that this law is designed and drafted as a quick getaway to tackle problems of illegal surrogacy, hence its name of so-called surrogacy Act. Therefore, the purpose of this Act mainly deals and targets commercial surrogacy. The provision that says the law bans sex selection only appear in one small sentence and there is no further clarification on the subject.’ (Judge Prissy, legal practitioner)

‘To be honest, I was not aware of sex selection law prior to your contact to interview me. I am aware of the 2015 ART Act and that this Act concerns laws regulating commercial surrogacy. I notice that sex selection is only mentioned once at the final sentence of Section 18. With my experience working with reproductive rights, most of the cases I was involved with mainly concern issues of abortion. However, let’s set abortion aside, with sex selection, I haven’t heard of a case reaching the office of the attorney general that concerns sex selection. ... .. I have to admit that this is an area

where the law is very new and I think enforcement or implement issues will be quite difficult. ... .. One of the reasons that come to mind is the fact that there is no clear penalty for those found in violation of sex selection law. This could be the reason why no cases have been brought to the attorney general's attention, or even in a court case.' (Prosecutor Peter, legal practitioner)

In essence, considering that both above narratives came from participants who work closely with the law *i.e.* they are law enforcers who, although are not legal experts on reproductive health law, but at the very least have experienced with cases concerning reproductive rights and healthcare laws, the findings which reveal that they were not aware of the existence of this sex selection ban shows that this ban is seriously in need of recognition.

Furthermore, not only the ban on non-medical preimplantation sex selection lacks recognition even amongst interest parties such as parents who seek out or had already undergone the treatment, law enforcers such as public prosecutors and judges, the findings reveals that the law also contains loopholes that allow the ban to be easily circumvented. This loophole was pointed out by an ART physician participant, who stated that:

'I am aware that there is a law prohibiting sex selection, however, frankly, with this business, if your patient ask you to do it and you refuse, they will just move on to the next physician, whether it's in the same facility or different one. As a result, this is a win-win situation, where you, as a doctor think that it's nothing wrong with sex selection, and your patient also gets to win because they pay and they receive the baby of certain sex they wish to have.' (Doctor Bella, ART physician participant)

Also, some participants, particularly legal practitioner participants, expressed concerns about the current ban on non-medical sex selection. These concerns are notwithstanding the aforementioned arguments such as reproductive autonomy and right to privacy that have been presented earlier, were brought up by law enforcements officials during the interviews. Prosecutors from the Office of the Attorney general voiced their concerns that the prohibition, if becomes strictly regulated and enforced, might force intended parents who wish to seek the sex selection treatment to go to illegal clinics. Two of the prosecutor participants made the point that their concerns about the ban relate to the negative impact of the abortion ban, where the law banning abortion has consequently driven thousands of women and girls to resort to illegal practice, which were unregulated, unsafe, and mostly life threatening. Prosecutor Beth and Judge Prissy pointed out that they had witnessed many

abortion cases which resulted in severe health injuries where sometimes the mother died or gravely injured from the illegal abortion practices.

‘With non-medical sex selection, I can’t say that the same thing with abortion will happen, but it is a possibility. Even as we speak, I believe people who really wish to receive the treatment will eventually find a way to get what they want. If they are being refused in Thailand, they can fly to other countries where sex selection is allowed.’ (Prosecutor Beth, legal practitioner)

Similarly, Judge Prissy also mentioned that if the sex selection law tightens, and contains strict and serious penalties, this could give rise to more cases of parents who wish to choose the sex of their babies seeking illegal treatments from fertility clinics, which may be dangerous to the mothers undergoing the treatment. Judge Prissy used the term ‘underground clinic’ and pointed out that it could lead to dangerous consequences and can be hazardous for the mothers.

In addition to considering the current ban, participants discussed a hypothetical reversed scenario where the ban on sex selection is lifted. Professor Judy expressed that if Thailand allows non-medical preimplantation sex selection, it could encourage and promote ‘reproductive tourism’, which she strongly opposed. Professor Judy reiterated her views against non-medical sex selection and stressed that by allowing the practice to flourish, it signifies and encourages the public that sex selection is acceptable.

‘We have seen the Thai Government trying to promote medical tourism, and it flourishes because we have great doctors, medical personnel, and medical facilities... and it’s cheaper comparing to medical costs in other countries. If you walk into private hospitals like Bhumrungraj and Smitivej (before Covid) you would see that it’s flooded with patients coming from the middle east, and of course Chinese people. Now... if sex selection is allowed, couples from China will definitely overflow these hospitals. I know that it’s good for the economy, but it sends out the wrong and dangerous message that sex selection is okay. It is not okay. It is a violation of human and women’s rights, and it undermines the universally upheld principle of gender equality.’ (Professor Judy, academics participant)

To unpack Professor Judy’s narratives, not only her argument against non-medical preimplantation sex selection involves the concern for women’s rights and gender (in)equality, it also addresses an emerging concern of medical resource scarcity, which she foresaw to possibly occur should the law permits non-medical sex selection in Thailand. Whilst the idea of Thailand being a medical hub for medical (including reproductive)

treatments could have some potential benefits to the country's economy, Professor Judy pointed out that if the law were to allow non-medical sex selection, this seems to openly declare that non-medical sex selection is welcome and it might invite foreign couples who wish to receive such treatment to come to Thailand (transnational reproductive tourism) and have the procedure done. Notably, Professor Judy's narrative which specifically mentioned Chinese couples seems to reflect her assumption that all Chinese couples seeking non-medical sex selection treatment have a son preference, which seems to be overly stereotyping postulation.

Other participants agreed with Professor Judy's concern about reproductive tourism; Prudence and Doctor Kate also mentioned their concerns that loosening the restrictions could lead to problems which reproductive tourism could bring about. They made their point that reproductive tourism especially for non-medical sex selection could potentially give rise to related law enforcement issues in Thailand. Doctor Kate shared her view on the matter that:

'...Before the 2015 Act, surrogacy was not regulated so it became a matter of exploitation of resources in Thailand. Women were brought over (trafficked) from neighbouring countries such as Vietnam and Laos and were heavily exploited. If the law allows sex selection, this might not be the same as the surrogacy incidents, but it does make one stop and think that unexpected unfortunate consequences can also happen with sex selection. From the way I see it, if Thailand is a country where the law is sacred and effectively enforced, this will not be a problem... but we all know that this is Thailand... (laughing) ... so we can't expect much and have to prepare for the worst.' (Doctor Kate, MOPH participant)

Similarly, a discussion with Prudence vis-à-vis the concern arising from sex selection tourism was brought up. It was stated that without proper tools to regulate and enforce preimplantation sex selection, it can lead to unforeseeable risks such as resource scarcity, not up-to-standard medical treatments, and unethical disposals of unwanted fertilised eggs.

'Thailand is already a medical hub in Asia-pacific region, and fertility treatment in our country is world-renowned. Unfortunately, the law (Thai law) does not seem to catch up with the medical advancement we are experiencing, and this leaves out a lot of room for mistakes and errors. To this day, I'm not even sure that there is a proper law in place to deal with all sorts of procedures that involve sex selective PGD. What to do with fertilised eggs that are not chosen? How long should you be able to store them, on what conditions you can still use them if ... say... one of the partners no longer gives their consent to use the frozen fertilised eggs? Above all, who is going to enforce and oversee all this? and so on and so on...' (Prudence, MOPH participant)

Prudence's concerns, as highlighted in the interview, extend beyond addressing arguments against non-medical sex selection to encompass potential legal and enforcement challenges that may arise if non-medical preimplantation sex selection were to be permitted. Recognising the significance of these issues becomes pivotal when contemplating possible amendments to Thailand's existing sex selection laws. Furthermore, incorporating concerns related to medical tourism adds an additional layer of complexity. The potential for individuals seeking non-medical sex selection services from abroad poses unique challenges in terms of enforcement and cross-border legal cooperation. Understanding and addressing the intricate interplay of legal, enforcement, and medical tourism considerations is vital for crafting policy direction that not only have regulatory teeth but also effectively manage the complexities associated with non-medical sex selection, both domestically and in the context of medical tourism. The relevant insights gathered from this interview study could provide valuable guidance in navigating these complex dimensions to ensure a comprehensive and effective legal framework.

## 7. Chapter Summary

This chapter navigates the complex terrain of non-medical preimplantation sex selection, weaving through a myriad of opinions revealed in interviews. It contrasts human rights principles with the risks associated with the practice, reflecting a consensus among participants towards balancing these aspects. While support from parents and some medical professionals emerges, concerns from legal and academic quarters about societal harms—such as gender imbalances and discrimination—underscore the debate. The argument put forth is that non-medical sex selection falls outside the scope of reproductive autonomy, which is centred on health and informed family planning choices, rather than preference-based decisions. Advocating for the continuation of the existing ban as delineated in the 2015 ART Act, the thesis aims to harmonise individual rights with societal and ethical considerations.

In the next chapter (Chapter Six), it examines and discusses the findings presented under this chapter, produces analysis, tackles the original thesis question that has been set out in

Chapter One, and finally arrives at the thesis conclusion vis-à-vis the legal responses regarding the practice of non-medical preimplantation sex selection in Thailand.

## CHAPTER SIX: THESIS DISCUSSION

### 1. Introduction

The purpose of this chapter is to answer the main thesis question of how Thai law should be with respect to the issue of non-medical preimplantation sex selection. At the time of this writing, Section 18 of the 2015 ART Act (the Children Born out of Assisted Reproductive Technology Protection Act B.E.2558) explicitly prohibits the use of assisted reproductive technology (ART) for selecting the foetus's sex for non-medical reasons. Upon taking all relevant factors examined and discussed throughout the entire thesis into consideration, this thesis proposes that the current prohibition on non-medical preimplantation sex selection should remain in place.

In order to answer the outlined thesis question, all accumulative materials and previous knowledge from Chapter One to Chapter Five must be taken into account for accomplishing such task. This knowledge includes relevant literatures concerning non-medical preimplantation sex selection, Thai sex selection law and other relevant laws and legal framework associated with reproductive regulations, international laws and principles in relation to the sex selection topic, case studies of selected legal jurisdictions (US, UK, Australia, and Israel), and the findings from the interview study, as laid out in the previous chapters.

Upon completing all relevant arguments and analysis concerning the topic of non-medical preimplantation sex selection, the chapter proposes that the current prohibition should be maintained. In this part, it provides justifications, rationale and compelling arguments supporting the continuation of this specific ban.

### 2. Situating the Findings within Extant Knowledge

The arguments and data presented in this thesis facilitate an assessment of whether the prohibition on non-medical preimplantation sex selection in Thailand should remain effective or be reformed. Although the thesis advocates for the continuation of the existing ban under Section 18 of the 2015 ART Act, it is critical to acknowledge that the findings evoke two main perspectives: those for and against non-medical preimplantation sex selection. The

proponents of such practices highlight four main areas: reproductive autonomy, family balancing, rights to privacy and respect for private and family life<sup>524</sup>, and the concept of balancing harm with competing rights.

Conversely, the opposition raises six primary concerns: eugenics, gender inequality, skewed sex ratios at birth, considerations for children's well-being, and the allocation of medical tourism resources. Additionally, the impact of public opinion on the decision to maintain or revoke the ban is also discussed. The following section examines the arguments in favour of non-medical sex selection. It is crucial to acknowledge that the notion suggesting opposition to the ban among the Thai public cannot be said to be robustly supported, given the limited scope of the empirical data collected. This limitation stems from small sample size utilised in the study, which has revealed a split in opinions.

## 2.1 Arguments Supporting Non-Medical Sex Selection

This section synthesises and examines the arguments in favour of permitting non-medical preimplantation sex selection, as identified in Chapters One, Two, Three, and Five. Its goal is to offer a comprehensive overview of the rationale behind this practice, with a focus on autonomy, family balancing, the right to privacy and respect for private and family life, and the balancing of competing rights. However, it is essential to note that while this discussion underscores the arguments supporting non-medical sex selection, it simultaneously subjects these arguments to critical evaluation. This dual approach facilitates a balanced assessment

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<sup>524</sup> Note that the concepts of 'rights to privacy' and 'respect for private and family life', though closely related yet distinct, frequently emerge together in this thesis. Privacy rights generally safeguard individuals from unwarranted intrusions into their personal lives, whereas respect for private and family life zeroes in on the integrity and autonomy of family-related decisions. Despite their nuanced differences, both terms are often jointly referenced by advocates of non-medical sex selection to emphasise various facets of personal freedom. In the context of this thesis, the intertwining of these terms showcases the argument that decisions regarding family composition, including the sex of children via technologies such as preimplantation sex selection, should be protected under these rights. This highlights a broader narrative where both individual autonomy in reproductive choices and the sanctity of family life are presented as central to the debate on non-medical sex selection. See Gomez-Arostegui, T., 'Defining Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations' (2005) 35 California Western International Law Journal 2, available at SSRN <<https://ssrn.com/abstract=669401>> accessed 31 March 2024; Council of Europe, Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights, Council of Europe Human Rights Handbooks (Council of Europe, Strasbourg, 2012) <[https://www.echr.coe.int/documents/d/echr/roagna2012\\_en](https://www.echr.coe.int/documents/d/echr/roagna2012_en)> accessed 31 March 2024; Koops, B.J., Newell, B., Timan, T., Skorvanek, I., Chokrevski, T., & Galič, M. (2017) 'A Typology of Privacy', University of Pennsylvania Journal of International Law, 38

of the appropriate legal response to non-medical preimplantation sex selection, particularly in Thailand's context, acknowledging both its justifications and limitations.

### *2.1.1 Autonomy*

The argument of autonomy, reproductive autonomy to be specific, is largely employed amongst proponents of non-medical sex selection. The general justification for allowing non-medical sex selection is said to base on the principle of a right to reproductive choices *i.e.* reproductive autonomy. From such principle, it follows that individual should be able to decide what can or cannot be done over their own bodies, and that supposedly include a right to choose which sex of fertilised foetus is going to be implanted into one's uterus. This particular rationale can be reflected in the US legal framework in relation to the practice of non-medical sex selection. Even though the US does not have a law that expressly permit the act itself, there is also no legal provision that prohibits the use of ART for selecting the sex of the foetus prior to the implantation process. As a result, within the US, sex selective ART treatments through PGD, ICSI, and IVF are currently legal.

The empirical findings of this thesis reveal a predominantly permissive attitude towards non-medical preimplantation sex selection among healthcare professionals involved in the study, particularly among physicians specialising in assisted reproductive technologies (ART). These participants expressed a unanimous desire for the repeal of the current prohibition, aligning with views from two other healthcare professionals from the Medical Council of Thailand (MCT), who advocated for legal amendments to better respect and acknowledge patient reproductive autonomy. Additionally, the unanimous support from all four participating parent couples underscores the sentiment that reproductive decisions, including sex selection through ART before implantation, are seen as a fundamental right that the law should protect.

However, the findings also highlight contrasting views among participants from academics and legal backgrounds. While most healthcare professionals and couple participants advocated for non-medical sex selection, citing reproductive autonomy as their basis, several legal scholars and practitioners disagreed. They argued that reproductive autonomy should not be interpreted to include the right to select the sex of a baby for non-medical reasons. This divergence of opinion prompts a critical examination of the scope of reproductive

autonomy, questioning whether it should extend to the choice of a baby's sex before the implantation stage. Supporting this contention, there may be limits to reproductive autonomy<sup>525</sup> so that non-medical sex selection could be prohibited, a stance further bolstered by interpretations of international human rights laws.

Furthermore, as explored in the first chapter, the debate regarding the principle of reproductive autonomy, frequently cited to justify the acceptability of non-medical sex selection, uncovers notable flaws. In particular, this reproductive autonomy-focused argument overlooks critical concerns, one of which includes how granting such autonomy over sex selection could inadvertently pave the way for eugenic practices. This occurs as individuals might choose offspring traits based on societal preferences rather than medical necessity, leading to ethical and moral dilemmas.<sup>526</sup> Additionally, relying solely on reproductive autonomy for justification fails to address the array of criticisms that emerge from neglecting other ethical considerations.

It is imperative to recognise that the scope of reproductive autonomy, while expansive, is not boundless. Reproductive autonomy must be reconciled with other competing ethical, social, and legal considerations. Therefore, the invocation of reproductive autonomy as an overriding rationale in debates concerning non-medical sex selection is overly reductive and does not sufficiently capture the multifaceted nature of the issue. Non-medical sex selection, as a complex and contentious matter, warrants a more holistic examination that transcends the narrow focus on reproductive autonomy.

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<sup>525</sup> Brigit Toebes, *The right to health as a human right in international law* (Intersentia/HART 1999); Ashley Bumgarner, 'A right to choose?: Sex selection in the international context' (2007) 14 *Duke Journal of Gender Law & Policy* 1289, 1310 <<https://scholarship.law.duke.edu/djglp/vol14/iss2/13>> accessed 15 October 2022; Laura Davis Mattar, 'Legal recognition of sexual rights – a comparative analysis with reproductive rights' (2008) 5(8) *Sur Revista Internacional de Direitos Humanos* <<https://doi.org/10.1590/S1806-64452008000100004>> accessed 15 October 2022; Deidre C Webb, 'The sex selection debate: a comparative study of sex selection laws in the United States and the United Kingdom' (2013) 10(1) *South Carolina Journal of International Law and Business* 163 <<https://scholarcommons.sc.edu/scjilb/vol10/iss1/6>> accessed 15 October 2022; W Dondorp, G De Wert, G Pennings, F Shenfield, P Devroey, B Tarlatzis, P Barri, and K Diedrich, 'ESHRE Task Force on ethics and law 20: sex selection for non-medical reasons' (2013) 28(6) *Human Reproduction* 1448, 1454 <<https://doi.org/10.1093/humrep/det109>> accessed 15 October 2022

<sup>526</sup> Wilkinson S, 'Eugenics Talk' and the Language of Bioethics (2008) 34(6) *J Med Ethics* 467, 71 <<https://doi.org/10.1136/jme.2007.021592>> accessed 31 March 2024; Raposo VL, 'From Public Eugenics to Private Eugenics: What Does the Future Hold?' (2022) 26(4) *JBRA Assist Reprod* 666, 674 <<https://doi.org/10.5935%2F1518-0557.20220032>> accessed 31 March 2024

In the context of Thailand, where the legal and political landscape is distinct, the response to non-medical preimplantation sex selection needs to be carefully considered. Thai law and its specific settings are crucial factors in this assessment. As discussed in Chapter Two, the concept of autonomy in Thailand has predominantly been oriented towards political autonomy. This focus is understandable given Thailand's political history, marked by military coups and struggles between authoritarianism and democratic governance.

Given the intense focus on political autonomy in Thailand, healthcare-related autonomy has not received equivalent attention or development. This is evident in the limited legal framework addressing healthcare autonomy, with only a few laws, such as the 2007 National Health Act and the 2015 Declarations of Patient's Rights and Duty, providing guidance. These documents, as explored in Chapter Two, reveal a lack of robust legally recognised healthcare autonomy in Thailand, indicating that the concept remains underdeveloped.

In light of Thailand's nascent healthcare autonomy and its complex political environment, upholding the ban on non-medical preimplantation sex selection under Section 18 of the 2015 ART Act seems prudent. The enactment of this prohibition, executed under time constraints as discussed in Chapter Five, likely lacked the comprehensive deliberation essential for such innovative medical practices. This cautious stance is vital in a context where ethical, social, and cultural considerations surrounding reproductive technologies are still evolving. It allows for careful observation and adaptation within the medical community and society, avoiding hasty adoption of practices with significant societal and legal implications, like potential gender imbalances, eugenics practices, and reinforcement of stereotypes. Moreover, in Thailand's dynamic political climate, a measured approach ensures healthcare policies remain consistent, avoiding unintended consequences in a rapidly advancing medical landscape. Consequently, the extant prohibition as delineated in the 2015 ART Act epitomises a responsible and judicious approach to the formulation of healthcare policy.

Moreover, while there may have been recent movements towards greater personal autonomy in Thailand, as seen in the changes to abortion laws in 2021, these developments should not precipitate a hasty decision to lift the ban on non-medical preimplantation sex

selection. Instead, these movements should be viewed as part of a gradual process of evolving reproductive rights, which necessitates careful consideration and alignment with Thailand's unique legal and cultural context. The cautious approach to novel medical practices, especially in areas like reproductive technologies, is essential in ensuring that decisions are well-informed and fit into Thai socio-legal landscape.

In summary, the nuanced debate surrounding non-medical preimplantation sex selection reveals a critical tension between individual reproductive autonomy and broader ethical, social, and legal considerations. While the autonomy argument highlights the significance of personal choice in reproductive decisions, it also neglects key issues such as the potential for eugenic practices and the necessity for a balanced ethical framework, topics that will be further explored later in this chapter. Given Thailand's specific legal and political context, along with the nascent state of healthcare-related autonomy, maintaining the current prohibition under the 2015 ART Act is prudent. This approach ensures that any evolution in reproductive rights and technologies proceeds with caution, while avoiding premature adoption of practices with profound societal implications.

### *2.1.2 Family Balancing and the Weight of Public Opinion in Non-Medical Sex Selection Debates*

In the UK, while the reproductive autonomy argument tends to be given little and less weight when comparing to other arguments that oppose non-medical sex selection such as harms to society and gender equality arguments, there is a commonly surfaced argument for family balancing that has been publicly discussed in the UK and Australia, not to mention the family balancing rationale that permits non-medical sex selection in Israel law on that specific ground. With respect to UK and Australia, the family balancing argument has been examined in great length, as witnessed in literature reviews and the discussion in Chapter Three. During national public consultations in both UK and Australia, family balancing was one of the key issues that was placed at the centre of the non-medical sex selection debate.

The significance of the family balancing argument in these debates highlights a shift towards incorporating personal family situations into the ethical considerations of reproductive decisions. However, it is crucial to state that, while family balancing is an important factor, it

alone may not justify the potential harms associated with permitting non-medical sex selection. The future direction of the family balancing argument within the realm of non-medical preimplantation sex selection is still evolving and its adequacy as a sole rationale remains in question. Whether future legislative and ethical frameworks will permit non-medical sex selection for family balancing purposes is a matter of ongoing debate<sup>527</sup>. However, the present state of discourse clearly illustrates an underlying tension in the arguments surrounding non-medical sex selection. This tension is rooted in the dichotomy between individual desires, exemplified by the pursuit of family balancing, and the prevailing societal norms that are often anchored in concerns about gender equality and potential societal harms- a theme that is recurrent in the discourse surrounding reproductive technologies and their regulations. This tension is particularly pronounced in the case of non-medical preimplantation sex selection, where the interplay between personal choice, societal expectations, and legal constraints becomes increasingly complex and contentious.

Within the scope of the family balancing discussion in Chapter Three, it points toward the direction that the UK and Australia's bans on non-medical sex selection reflect public opinion. This insight brings to light the importance of re-evaluating the role of public opinion in such decisions. Despite the growing acceptance of reproductive choices, including family balancing, the idea of revisiting these bans emerges. Yet, this discussion emphasises that solely relying on public opinion to navigate the ethical complexities of sex selection is inadequate. The focus remains on family balancing, critically assessing its influence on legislative frameworks while highlighting the limitations of public opinion as the sole determinant.

This thesis posits that while public opinion is undoubtedly a significant element in the legislative process across various jurisdictions<sup>528</sup>, it should not be the sole determinant upon

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<sup>527</sup> Kudina O, 'Accounting for the Moral Significance of Technology: Revisiting the Case of Non-Medical Sex Selection' (2019) 16(1) *Journal of Bioethical Inquiry* 75, 85 <<https://doi.org/10.1007%2Fs11673-018-9891-4>> accessed 31 March 2024; Ethics Committee of the American Society for Reproductive Medicine, 'Use of Reproductive Technology for Sex Selection for Nonmedical Reasons: An Ethics Committee Opinion' (2022) 117(4) *Fertility and Sterility* 720, 726 <<https://doi.org/10.1016/j.fertnstert.2021.12.024>> accessed 31 March 2024

<sup>528</sup> Nancy L Siemion, 'Judicial Decision Making and Public Opinion in the Warren and Burger Courts' (Master Thesis, Western Michigan University 1993) <[https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1837&context=masters\\_theses](https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1837&context=masters_theses)> accessed 16 October 2022; Karl T Kurtz, 'Legislatures and Citizens: Public Participation and Confidence in the Legislature'

assessing reproductive autonomy in the context of non-medical sex selection. The complexity and sensitivity of this issue demand a more robust and multifaceted approach.

The reliance on public opinion, especially in a matter as contentious and ethically charged as non-medical preimplantation sex selection, risks oversimplifying the underlying ethical dilemmas. It neglects to account for the nuanced balance required between individual autonomy and broader societal and ethical considerations. These considerations include the potential for reinforcing gender stereotypes, perpetuating gender imbalance, and the broader implications for societal values and norms.

Ultimately, this thesis acknowledges the significant role of public opinion in shaping laws and policies but emphasises that it should be just one of several considerations in the legislative process. It argues for maintaining the ban on non-medical sex selection, not simply to align with prevailing public opinion but to address the deeper ethical, social, and legal complexities at play. This nuanced approach allows for a comprehensive and balanced evaluation of the issue, beyond the fluctuating tides of public opinion.

However, it is critical to note that the discussion on the influence of public opinion does not directly apply to Thailand due to the lack of extensive data on Thai public attitudes towards non-medical sex selection. The empirical evidence in this thesis is based on a limited sample size, insufficient to accurately represent the wider Thai public opinion. Consequently, while advocating for considering public opinion as part of a broader array of factors in legislative decision-making, the insights offered here should not be taken as indicative of the overall sentiment of the Thai population.

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(1997) National Conference of State Legislatures <[https://www.ncsl.org/documents/public/trust/LegCitizens\\_PublicParticipation\\_Kurtz2.pdf](https://www.ncsl.org/documents/public/trust/LegCitizens_PublicParticipation_Kurtz2.pdf)> accessed 16 October 2022; Ernesto Calvo, 'The Responsive Legislature: Public Opinion and Law Making in a Highly Disciplined Legislature' (2007) 37(2) *British Journal of Political Science* 263, 280 <<http://dx.doi.org/10.1017/S0007123407000130>> accessed 16 October 2022; Piotr Mikuli and Grzegorz Kuca, 'The Public Hearing and Law-Making Procedures' (2016) 37 *Liverpool Law Review* 1, 17 <<https://doi.org/10.1007/s10991-016-9177-z>> accessed 16 October 2022; Nara Park and Jihyun Ham, 'Does public opinion shape public policy? Effect of citizen dissent on legislative outcomes' (2022) 38(4) *The Information Society* 269, 289 <<https://doi.org/10.1080/01972243.2022.2077493>> accessed 16 October 2022

### *2.1.3 Right to Privacy and Right to Respect for Private and Family Life*

With respect to the issue of privacy and the right to respect for private and family life, this issue largely overlaps with the previous topic of reproductive autonomy. In other words, on several occasions, reproductive autonomy is expressed as the right to marry and found a family, sometimes as the right to privacy and the right to respect for private and family life.<sup>529</sup> Upon contemplating this particular issue, the argument is often employed to justify non-medical sex selection. In line with this argument (that privacy and right to respect for private and family life justify non-medical sex selection), the findings of this study reveal that several participants agreed with this justification.

As presented in Chapter Five, the data portrays that almost all of the healthcare professional participants and all four parent couples deemed that non-medical sex selection should be allowed because it is a matter of privacy and the right to respect for private and family life. Several legal practitioner participants also shared similar view.

It was not surprising to discover strong supports for privacy argument from couples and healthcare professional participants in the data analysis. In other words, as for the couple participants, they were key interest party in the sex selection scenario and by supporting privacy claim, this enables them to gain greater reproductive autonomy and to be able to exercise their reproductive rights. For healthcare professionals, especially ART doctors, arguing for privacy and the right to respect for private and family life not only reflect their belief about best interests for the patients, but also entitles them to be able to perform such treatments, benefiting from their medical services.

Nevertheless, many participants from academics and legal practitioners' group diverged from the above view, arguing that privacy right and the right to respect for private and family life do not encompass the right to non-medical sex selection. In doing so, it was exerted that despite a private nature of the practice, privacy or the right to respect for private and family

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<sup>529</sup> Rebecca J Cook, 'International Human Rights and Women's Reproductive Health' (1993) 24(2) *Studies in Family Planning* 73, 86 <<https://doi.org/10.2307/2939201>> accessed 15 October 2022; Ivana Roagna, 'Protecting the right to respect for private and family life under the European Convention on Human Rights' (2012) *European Commission against Racism and Intolerance* <[https://www.echr.coe.int/LibraryDocs/Roagna2012\\_EN.pdf](https://www.echr.coe.int/LibraryDocs/Roagna2012_EN.pdf)> accessed 15 October 2022

life cannot be used to justify non-medical preimplantation sex selection. Unfortunately, the findings do not provide further clarification as to why they believed non-medical sex selection was not deemed to fall within the protection of privacy rights.

The analysis of the US stance on non-medical preimplantation sex selection reveals a nuanced landscape shaped significantly by the nation's legal valuation of privacy. This perspective, derived from discussions in earlier chapters, highlights that the permissiveness towards non-medical preimplantation sex selection in the US does not stem from explicit legal endorsement but rather from a foundational respect for privacy within reproductive rights jurisprudence. Historically, the US Supreme Court rulings have underscored privacy as a critical component of reproductive rights, thereby indirectly influencing the country's approach to sex selection technologies.

In the context of reproductive rights, privacy has served as a cornerstone for various landmark decisions. These decisions collectively underscored the principle that individuals possess a protected right to make private decisions concerning reproductive matters. However, the recent shift marked by the *Dobbs v. Jackson Women's Health Organization* ruling significantly alters the landscape. By overturning *Roe v. Wade* and removing constitutional protection for abortion rights, *Dobbs* introduces uncertainties regarding the stability of privacy as the underpinning for reproductive rights, including those related to technologies like non-medical preimplantation sex selection.

Despite *Dobbs'* focus on abortion, its implications extend beyond, hinting at a potential re-evaluation of privacy-based reproductive rights. Justice Thomas's concurrence in *Dobbs* specifically invites further scrutiny of precedents grounded in the substantive due process, suggesting that other privacy-related reproductive rights might face challenges.

This backdrop of evolving legal interpretations, particularly in the post-*Dobbs* era, underscores a complex interplay between privacy, reproductive rights, and technological advancements in reproduction. While non-medical preimplantation sex selection remains unregulated in the US, largely due to historical privacy protections, the future of such freedoms, in light of *Dobbs*, appears increasingly uncertain. The US's experience thus offers a

critical lens through which to examine the delicate balance between privacy, reproductive autonomy, and the ethical considerations that emerge with advancements in reproductive technologies. This analysis not only contextualises the US approach within a global dialogue on reproductive rights and technologies but also prompts a re-evaluation of how privacy's role in this domain may evolve moving forward.

In the case of Thailand, there appears to be a limited examination of the intersection between privacy rights and reproductive rights, particularly in the context of sex selection. The insights gleaned from participant narratives and doctrinal research within this thesis suggest that while reproductive rights may be anchored in claims of privacy, their protection should be contingent upon ensuring that these rights do not excessively infringe upon other pertinent rights or lead to harm to individuals or society at large. This careful perspective indicates that the invocation of privacy claims, like reproductive autonomy claims, may not be sufficiently robust to support the right to non-medical sex selection, especially when considering the potential broader implications and conflicts with other rights and societal interests.

In conclusion, the debate over non-medical sex selection intersects with privacy and reproductive autonomy, revealing a division of opinion. While many healthcare professionals and parents advocate for it under privacy rights, legal experts challenge this inclusion. This reflects a broader tension between individual rights and societal concerns, heightened by the US evolving stance on privacy and reproductive rights post-*Dobbs*. Thailand's cautious approach in exploring this intersection further underscores the complexities of balancing privacy with wider ethical and societal implications, suggesting a need for careful consideration in legal and ethical frameworks surrounding reproductive decisions. This complexity and the need for careful balance underscore why this thesis advocates for Thai law to continue banning non-medical preimplantation sex selection.

#### *2.1.4 Balancing Harm and Competing Rights*

One of the most frequently cited rights-based arguments for reproductive choices emphasises that individuals' freedom to procreate should largely be free from state interference, except where it can be demonstrated that the interests and rights associated with of upholding reproductive choices are outweighed by other competing human rights and interests.

Thus, proponents of non-medical sex selection argue that if such practice does not significantly harm other rights, the law should not impose restrictions on non-medical preimplantation sex selection<sup>530</sup>. This section explores the human rights-based framework, which involves balancing competing rights to support non-medical preimplantation sex selection. It incorporates insights from previous chapters (Chapters One, Two, and Three) on this argument, along with findings from Chapter Five, to bolster this rationale. Additionally, this section delves into the human rights-based argument concerning the balance between the rights of the mother (health and wellbeing, reproductive autonomy) and the rights of the hypothetical child born from non-medical sex selection treatments. This perspective, highlighted by healthcare professionals during interviews, offers a novel insight into the debate on non-medical preimplantation sex selection, a topic that has been seldom addressed in existing literature.

Noted that the concept of balancing harms and competing rights was predominantly mentioned by study participants in favour of allowing non-medical preimplantation sex selection. The concern of harm, closely linked with the consideration of competing rights, was evident in discussions and narratives across most participant groups. Some academics and legal practitioners expressed that if non-medical sex selection causes minimal or insignificant harm, or if no evidence of such harm exists, the state should not restrict the right to exercise sex selection.

Healthcare professional participants echoed this sentiment. The personal experiences shared by medical practitioners, such as Doctor Bella, shed light on the intricate balance between the welfare of individual patients and the ethical standards underpinning reproductive medicine. Doctor Bella's concern for the health implications faced by women desiring a child of a specific sex, amidst legal prohibitions against non-medical preimplantation sex selection, encapsulates a profound ethical dilemma. This dilemma oscillates between the need to

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<sup>530</sup> John Harris, 'Sex Selection and Regulated Hatred' (2005) 31(5) *Journal of Medical Ethics* 291, 294 <<https://www.jstor.org/stable/27719400>> accessed 15 October 2022  
John Harris, 'No sex selection please, we're British' (2005) 31 *Journal of Medical Ethics* 286, 288 <<http://dx.doi.org/10.1136/jme.2004.008870>> accessed 15 October 2022

protect women's physical and mental health and the imperative to adhere to regulations designed to prevent societal and ethical misalignments.

Further complicating this discourse is the recognition of an often-overlooked dimension: the physical and mental health risks to mothers undergoing multiple pregnancies in pursuit of a desired sex. This aspect, while critical, has been less emphasised in discussions surrounding the societal consequences of non-medical sex selection, such as gender imbalances, sexism, and gender inequality. The focus on these broader societal impacts, although paramount, inadvertently marginalises the immediate health risks posed to mothers. This oversight not only narrows the scope of debate but also suggests a gap in the comprehensive evaluation of non-medical sex selection's ramifications. The insights from the narratives of two ART doctors interviewed for this study illuminate this gap, albeit these accounts provide but a glimpse into a much broader, complex picture that demands further investigation.

Despite the valuable perspective offered by these healthcare professionals, it is clear that this vantage point alone does not suffice to encapsulate the entirety of the issue. Consequently, although recognising the potential health risks to mothers adds a vital dimension to the discourse on non-medical sex selection, it cannot alone justify the practice. This calls for more rigorous research to fully assess the maternal health implications and ensure a balanced consideration of both societal and individual impacts associated with non-medical sex-selective assisted reproductive technologies (ART).

In contrast, from existing literatures examined throughout this thesis, it seems that the UK and Australia employ the argument of harm to justify their prohibition on non-medical sex selection. With respect to the UK, evidences from various sources such as the report produced by the HFEA on the 2002 consultation and the HFEA recommendations upon drafting the HFEA Code of Practice suggest that the harms that were considered mainly involves the harm to the child-to-be-born<sup>531</sup> (the 'hypothetical child' as quoted by the healthcare professional participants in this study) and the harm to society such as the concerns for skewed sex ratio

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<sup>531</sup> Nadja Kanellopoulou, 'Sex Selection: Options for Regulation' (2004) 1(1) SCRIPT-ED 217, 220 <<https://script-ed.org/wp-content/uploads/2016/07/1-1-Kanellopoulou.pdf>> accessed 15 October 2022

and sexism<sup>532</sup>. In this regard, with the case of the UK HFEA, the main concerns were expressed to be related to the potential psychological harm if a child found out that he or she had been sex-selected, the tendency of possible preferential or prejudicial treatment to fit the parent's expectations, as well as the possibility of favouritism and neglect of existing children.<sup>533</sup> It is important to acknowledge that the harm hypothesised to the 'hypothetical child' remains speculative, with no concrete evidence to substantiate these fears. However, while such concerns are founded on conjecture rather than proven harm, the principle underlying these fears provides some grounding for the claim and should not be entirely dismissed. The apprehension of potential harm, albeit hypothetical, is a valid consideration in the discourse on the ethics of non-medical preimplantation sex selection.<sup>534</sup> This concern reflects a cautious approach, prioritising the welfare of children-to-be-born and societal balance over the allowance of such practices, even in the absence of concrete evidence. Thus, the argument for potential harm to the hypothetical child, while speculative, forms an essential part of the rationale behind the existing prohibitions on non-medical sex selection.

Regarding societal harm, the issue of skewed sex ratio is an undeniable reality. However, the topic of skewed sex ratio often forms a central argument against non-medical sex selection, a discussion that will be delved into in more detail in the following section. For the moment, it is important to note that the concern about skewed sex ratios at birth (SRB) is a significant aspect of this debate and will be comprehensively addressed in the ensuing part of this thesis. This acknowledgment serves as an indicator of the complex and multifaceted nature of the issues surrounding non-medical sex selection, highlighting the necessity for a thorough exploration in the subsequent analysis.

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<sup>532</sup> Science and Technology Committee, *Human Reproductive Technology and the Law* (HC 2004-2005, HC 7-1) paras 1315-136 <<https://publications.parliament.uk/pa/cm200405/cmselect/cmsstech/7/7i.pdf>> accessed 15 October 2022; Emily Jackson, *Medical Law: Text, Cases and Materials* (3<sup>rd</sup> edn, OUP 2013); J Herring, *Medical Law and Ethics* (5<sup>th</sup> edn, OUP 2014);

<sup>533</sup> Nadja Kanellopoulou, 'Sex Selection: Options for Regulation' (2004) 1(1) SCRIPT-ED 217, 220 <<https://script-ed.org/wp-content/uploads/2016/07/1-1-Kanellopoulou.pdf>> accessed 15 October 2022

<sup>534</sup> Shenouda CK and Danovitch JH, 'Effects of Gender Stereotypes and Stereotype Threat on Children's Performance on a Spatial Task' (2014) 27(3-4) *Revue Internationale de Psychologie Sociale* 53, 77 <<https://www.cairn.info/revue--2014-3-page-53.htm>> accessed 31 March 2024; King TL et al, 'Gender Stereotypes and Biases in Early Childhood: A Systematic Review' (2021) 46(2) *Australasian Journal of Early Childhood* 112, 125 <<http://dx.doi.org/10.1177/1836939121999849>> accessed 31 March 2024

Moving forward, the next section conducts a thorough examination and assessment of the key arguments against non-medical preimplantation sex selection, as uncovered through literature reviews and empirical data from this study.

## 2.2 Arguments Against Non-Medical Preimplantation Sex Selection

This section delves into an exploration and assessment of the principal arguments against non-medical preimplantation sex selection, drawing upon extensive literature reviews and empirical data gathered during this study. The discourse is structured around distinct thematic categories, each addressing critical dimensions of the debate.

The first category, Harms Considerations, encompasses concerns such as eugenics, skewed birth sex ratios, and the wellbeing of children. This segment scrutinises the potential negative repercussions these practices may have, both at the societal level and for the individuals involved, highlighting the ethical dilemmas and consequences inherent in such choices.

In the Gender Inequality segment, the focus shifts to the ways in which sex selection may perpetuate sexism and violence against women. This part of the discussion aims to illuminate the complex interplay between reproductive technologies and gender biases, examining the social and cultural underpinnings that facilitate these disparities.

Lastly, the Public Opinion section delves into the role of societal perspectives in forming resistance to non-medical preimplantation sex selection. It reflects upon the broader ethical, moral, and cultural frameworks that shape public sentiment, emphasising the significance of these viewpoints in the ongoing discourse.

The rationale behind delving into the above structured examination serves to investigate the justifications for sustaining the existing prohibitions on non-medical preimplantation sex selection, while simultaneously recognising and scrutinising any shortcomings or fallacies within these arguments. This dual approach aims not only to reaffirm the ethical and social grounds for maintaining these bans but also to foster a balanced and nuanced understanding of the complex ethical, social, and medical dimensions involved. By dissecting the multifaceted arguments against non-medical preimplantation sex selection, this section

strives to offer a well-rounded perspective on the debates surrounding reproductive technologies.

### *2.2.1 Harms Considerations*

The ethical debate over non-medical preimplantation sex selection in Thailand transcends individual autonomy, engaging a broader array of concerns including eugenics, child welfare, equitable resource allocation, and societal impacts of skewed sex ratios at birth (SRB). These issues collectively form a multifaceted argument against the practice.

Eugenics concerns, as explored in Chapter One, arise from historical attempts to improve human populations through controlled breeding, which resonate with the selective nature of sex selection. This parallel raises ethical dilemmas about modern genetic practices potentially slipping into valorising certain traits, such as a child's sex, under the guise of reproductive autonomy.

Child's wellbeing is paramount, with the practice of selecting a child's sex posing risks of commodification and imposing restrictive gender norms. This can potentially impair psychological development and affect self-worth, underscoring the importance of a child's right to be valued beyond gender expectations.

Whilst the findings from the thesis' interview study interestingly highlight concerns primarily centred on the harm to mothers who are refused non-medical sex selection treatments, a perspective seldom addressed in extant literature, despite the fact that such discovery sheds light on a new dimension of the debate, it does not, however, eclipse the myriad ethical considerations against permitting non-medical sex selection. The argument that the refusal of non-medical sex selection treatments inflicts harm upon mothers does not sufficiently counterbalance the broader ethical and societal harms, including the detrimental impact on children's wellbeing, eugenics concern, and the perpetuation of gender biases. Thus, despite the novelty of concerns regarding maternal harm, the overarching ethical imperatives—especially the rights of children to be loved, accepted, and valued beyond gender expectations—remain compelling reasons to uphold the ban on non-medical preimplantation sex selection in Thailand. This stance reinforces the necessity of prioritising the intrinsic worth

and wellbeing of children over fulfilling specific gender desires, ensuring a legal and ethical framework that safeguards the dignity and rights of all individuals involved.

Furthermore, the allocation of medical resources also comes into question, as pursuing non-medical sex selection could divert resources from essential health services. This raises ethical concerns about healthcare equity and the prioritisation of medical needs over personal preferences for a child's sex.

Thailand's emergence as a nexus for medical tourism, particularly in the realm of in vitro fertilisation (IVF) treatments and fertility clinics, presents a multifaceted discussion point within the broader context of global healthcare dynamics. The country's advanced healthcare infrastructure, combined with cost-effective treatment options, has positioned it as an attractive destination for individuals and couples seeking fertility treatments from around the world.<sup>535</sup> This trend, while beneficial for Thailand's healthcare sector and economy, brings with it complex ethical, social, and medical considerations, especially when discussions extend into the realm of non-medical preimplantation sex selection. Consequently, as Thailand positions itself as a potential destination for non-medical preimplantation sex selection, as discussed in the study findings (Chapter Five), it inadvertently risks exacerbating these strains, diverting resources that could otherwise serve essential health services for its population. This juxtaposition underscores the need for legislation that considers the wider ethical and societal impacts, including potential effects on global SRBs, gender equality, eugenics concerns, and societal norms.

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<sup>535</sup> Effy Vayena, Patrick J Rowe, and P David Griffin (eds), *Current Practices and Controversies in Assisted Reproduction: Report of a Meeting on Medical, Ethical and Social Aspects of Assisted Reproduction*, WHO Headquarters, Geneva, Switzerland, 17–21 September 2001 (World Health Organization 2002) <<https://iris.who.int/bitstream/handle/10665/42576/9241590300.pdf>> accessed 4 December 2024; Medical Tourism Magazine, 'Budding Life in the East: Thailand's Foremost IVF Fertility Centers' (Medical Tourism) <<https://www.magazine.medicaltourism.com/article/budding-life-in-the-east-thailands-foremost-ivf-fertility-centers>> accessed 31 March 2024; Whittaker A, 'Global Technologies and Transnational Reproduction in Thailand' (2009) 33 *Asian Studies Review* 319, 332 <<https://doi.org/10.1080/10357820903154101>> accessed 31 March 2024; Noree T, Hanefeld J and Smith R, 'Medical Tourism in Thailand: A Cross-Sectional Study' (2016) 94(1) *Bulletin of the World Health Organization* 30, 36 <<https://doi.org/10.2471%2FBLT.14.152165>> accessed 31 March 2024

The issue of skewed SRB also receives attention, highlighting the societal impact of sex selection practices. As witnessed in Chapter Three, the UK and Australia also seem to rely on the argument that non-medical sex selection should not be permitted because it might lead to skewed SRB. In other words, both jurisdictions justify the sex selection ban with their expressed concerns of irregular sex ratio between male and female. In contrast, skewed sex ratio argument is not referenced in the US context.<sup>536</sup>

With respect to the study findings, the data reveals that only some participants from the academics and legal practitioners group mentioned the skewed SRB argument. Evidently, their narratives regarding skewed SRB were associated with references of China and India, of which such references were made to support the ban on non-medical sex selection in Thailand. The limited discussion among participants about skewed SRBs suggests a broader need for awareness and research on the topic.

Despite Thailand's current maintenance of a normal SRB<sup>537</sup>, the thesis argues this should not serve as a justification for legalising non-medical preimplantation sex selection. The potential for future imbalances and the rapid technological advancements in reproductive technologies necessitate a cautious approach. The thesis underscores the importance of considering the broader societal and ethical implications of such practices, including the reinforcement of gender discrimination and the need to address underlying issues of sexism and gender inequality.

Accordingly, in weaving together these concerns, the opposition to non-medical preimplantation sex selection in Thailand is framed within a comprehensive ethical analysis that highlights the potential harms associated with such practices. The intersection of eugenics, children's wellbeing, the equitable distribution of medical resources, and the

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<sup>536</sup> Deidre C Webb, 'The sex selection debate: a comparative study of sex selection laws in the United States and the United Kingdom' (2013) 10(1) South Carolina Journal of International Law and Business 163 <<http://scholarcommons.sc.edu/scjilb/vol10/iss1/6>> accessed 18 October 2022; Sital Kalantry, 'Sex Selection in the United States and India: A Contextualist Feminist Approach' (2013) 18 UCLA Journal of International Law and Foreign Affairs 61 <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2537&context=facpub>> accessed 8 November 2022

<sup>537</sup> The World Bank, 'Sex ratio at birth (male births per female births) – Thailand' (*The World Bank Data*, 2019) <<https://data.worldbank.org/indicator/SP.POP.BRTH.MF?locations=TH>> accessed 14 October 2022

societal implications of skewed sex ratios encapsulates a multifaceted argument against the legalisation of non-medical sex selection. This collective perspective emphasises the need for a legal and ethical framework that transcends individual autonomy, considering the broader societal, ethical, and moral implications of reproductive technologies. By addressing these interconnected concerns, Thailand can uphold a stance that not only protects individual rights but also safeguards the collective wellbeing and moral integrity of society.

### *2.2.2 Gender Inequality, Sexism, and Violence Against Women*

This section examines the debate surrounding non-medical preimplantation sex selection in Thailand, specifically through the lens of gender inequality, sexism, and violence against women. It synthesises empirical insights from interviews with key stakeholders and theoretical discussions, derived from the thesis' literature revision, to address the multifaceted dimensions of this issue. By highlighting the consensus on the inherent sexism of sex selection practices and their implications for legal and societal norms, this analysis advocates for the continuation of the ban.

In the intricate debate over non-medical preimplantation sex selection within Thailand, a comprehensive analysis that marries empirical findings from stakeholder interviews with theoretical discussions offers a rich perspective on the multifaceted dimensions of gender inequality. The synthesis of these discussions foregrounds the ethical, legal, and societal imperatives necessitating the continuation of the ban on such practices.

Empirical findings derived from interviews with several academics and legal practitioners and healthcare professionals illuminate the deeply entrenched sexism inherent in sex selection practices. These insights reveal a consensus among stakeholders that sex selection not only reinforces but also amplifies societal gender biases, placing a preferential value on one gender over another. This practice, identified as a form of sexism, perpetuates patriarchal structures, thereby exacerbating existing gender disparities.

The discourse extends into the realm of legal and human rights, where participants' reflections highlight the discordance of sex selection practices with the principles of gender equality and non-discrimination championed by International Human Rights Law, including

instruments such as the CEDAW. This legal dissonance underscores the ethical dilemmas posed by non-medical sex selection, reinforcing its incompatibility with both international commitments and the Thai constitution's ethos of equality and non-discrimination.

Revisions on the extant knowledge, particularly examined in Chapter Two, shed light on Thailand's strides towards legal gender equality, particularly through the Gender Equality Act of 2015. However, it also pointed out the inadvertent gender biases embedded within existing laws, especially those regulating assisted reproductive technologies (ART). Such legal provisions, by emphasising heterosexual married couples, not only marginalise LGBTQ+ individuals but also underscore heteronormative biases, reflecting a broader societal inclination towards gender inequality.

The societal repercussions of endorsing non-medical sex selection, underscored by interview findings, span beyond ethical considerations to encompass potential exacerbations of gender inequalities. Risks such as skewed sex ratios (as discussed in the previous section), increased gender-based violence, and the perpetuation of patriarchal norms present significant challenges. While some participants noted the potential for re-evaluation if reproductive autonomy's benefits were to significantly outweigh these concerns, the prevailing sentiment favoured a cautious approach that prioritises the mitigation of societal disparities and upholds gender equality.

Integrating these empirical insights with the broader academic discourse underscores the compelling case for upholding the prohibition of non-medical preimplantation sex selection in Thailand. The analysis, enriched by the diverse perspectives of stakeholders, highlights the necessity of a judicious approach that champions gender equality and safeguards against sexism, discrimination, and gender-based violence. By maintaining the ban, Thailand aligns with its international human rights obligations and internal ethical standards, fostering a societal ethos that values and upholds gender equality. The findings from the empirical study accordingly reinforces the proposal to maintain the prohibition, ensuring that reproductive technology advancements do not detract from efforts to promote a more equitable and just society.

### *2.2.3 Public Opinion that Opposes Non-Medical Sex Selection*

The matter of public opinion was explored previously in Chapter Three where the importance of its usage was highlighted during the UK and Australia comparative discussion. Public opinion evidently plays significant role in relation to the shaping of non-medical sex selection policy and regulations within both case-study jurisdictions. With respect to the influence and significance of public opinion in Thai legal settings, this produces a contrasting scenario against the UK and Australia. In other words, based on the examination of available relevant literatures, it seems that the Thai legislative process does not take matters of public opinion into consideration upon passing its laws and regulations. The following part examines how the argument of public opinion sits within Thai legal settings comparing to the case-study of UK and Australia.

Drawing upon the data and discussions presented in previous chapters, this conclusion seeks to address the role of public opinion in the context of non-medical sex selection, particularly in relation to legislative decision-making. While public opinion evidently plays a significant role in shaping policy and regulations regarding non-medical sex selection in the UK and Australia, the situation in Thailand presents a contrasting scenario. In Thai legislative processes, as revealed through the study's findings and literature reviews, public opinion does not appear to be a major consideration in law-making, including the formulation of the 2015 ART Act.

The data collected during this study's interviews further reinforce this contrast. Public opinion was rarely mentioned by participants, and only one council of state participant alluded to it, noting its exclusion in the decision-making process for Thailand's current ban on non-medical sex selection. This approach diverges markedly from that of the UK, where a 2005 public consultation document led the HFEA to conclude a 'strong public opposition' to non-medical sex selection, influencing their guidelines.<sup>538</sup> Similarly, Australia's reliance on public

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<sup>538</sup> Department of Health, *Review of the Human Fertilisation and Embryology Act Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)* (Cm 6989, 2006)

sentiment is evident in its 2017 NHMRC revised guidelines, which continue to ban non-medical sex selection, citing the need for further public debate.<sup>539</sup>

Despite its prominence in these case-study jurisdictions, the thesis is cautious about employing public opinion as a supporting factor in decisions regarding non-medical sex selection. The criticism of relying on public opinion, particularly in Thailand, is notable. It raises concerns about 'gut reaction' responses that may not accurately reflect the general public's views or adequately justify limitations on autonomy and reproductive rights.<sup>540</sup> The reliance on such opinion in legislative procedures, as critiqued in the UK context, suggests that public views might not always be representative of wider societal perspectives, thereby questioning their efficacy in justifying policy decisions and law-making. Adding to this complexity, the interview study and literature review concerning Thailand revealed a notable absence of literature specifically addressing public opinion on non-medical sex selection. This gap, coupled with the divided perspectives among interview participants, may indicate that Thai public opinion on this issue is not only underexplored but also potentially divided. This division further complicates the reliance on public opinion as a basis for legislative or policy decisions, underscoring the need for a more nuanced approach that considers a broader array of ethical, legal, and societal factors beyond immediate public reactions.

Therefore, while public opinion is a significant factor in some jurisdictions, its application in the context of non-medical sex selection needs careful consideration. The limitations and criticisms of using public opinion, combined with the contrasting approaches of Thailand compared to the UK and Australia, underline the complexity of integrating public opinion into legislative decisions, particularly in areas as ethically and socially charged as non-medical sex selection.

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<sup>539</sup> National Health and Medical Research Council (NHMRC), 'Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research' (2017) <[https://www.nhmrc.gov.au/file/3776/download?token=QsZvWpw\\_](https://www.nhmrc.gov.au/file/3776/download?token=QsZvWpw_)> accessed 16 October 2022

<sup>540</sup> John Harris (ed), *Bioethics* (OUP 2001)

### 3. Final Assessments and Thesis Proposal

The discourse on regulating non-medical preimplantation sex selection in Thailand, scrutinised through insights from Chapters One to Five, leads to a critical evaluation of the existing legal framework. This comprehensive analysis illuminates the multifaceted dimensions of the issue, culminating in a well-founded conclusion that Thailand's current prohibition on non-medical preimplantation sex selection is justified and should be continued. This stance is bolstered by several key considerations, each contributing significantly to the overarching rationale for upholding the ban.

Noted that in reaffirming the thesis' support for the continuation of Thailand's prohibition on non-medical preimplantation sex selection, it is essential to acknowledge the foundational role this ban plays in upholding ethical considerations and fostering gender equality within the realm of reproductive technologies. However, upon an examination of Section 18 of the 2015 ART Act, one cannot overlook its shortcomings, notably its vague reference to sex selection. This provision is characterised by a notable absence of both clear definitions of prohibited practices and penalties for violations. Such deficiencies in specificity and deterrence significantly undermine the law's capacity to effectively prevent non-medical preimplantation sex selection.

This critique posits that the current legal framework's inadequacies necessitate targeted amendments. There is a compelling need to introduce more explicit prohibitions against non-medical preimplantation sex selection and to establish corresponding penalties for non-compliance. Implementing these changes is imperative for enhancing the law's effectiveness and aligning Thailand's regulatory stance with that of other jurisdictions, such as the UK, Australia, and Israel. This comparative analysis, as detailed in Chapter Three through case studies, serves as a crucial benchmark for Thailand, suggesting paths for refining its legal framework to better regulate non-medical sex selection.

In the United Kingdom, the regulation of non-medical preimplantation sex selection is tightly controlled under the Human Fertilisation and Embryology Act (HFE Act). The Act explicitly prohibits sex selection for non-medical reasons, with the Human Fertilisation and Embryology Authority (HFEA) overseeing the licensing and compliance of fertility clinics. Violations of

these regulations are treated with severity, including penalties such as imprisonment, fines, or both, for performing PGD without a license or for non-compliant purposes. This stringent regulatory framework underscores the UK's commitment to ethical reproductive practices and the prevention of gender discrimination, setting a precedent for the incorporation of explicit penalties as a deterrent against misuse.

Australia's approach to regulating non-medical sex selection is similarly restrictive, with guidelines issued by the National Health and Medical Research Council (NHMRC) dictating the conditions under which sex selection may occur. In particular, the state of Victoria's Assisted Reproductive Treatment Act of 2008 exemplifies the country's stance, imposing up to two years of imprisonment for carrying out sex selection procedures in violation of the Act. This legal structure reflects a nuanced balance between respecting reproductive autonomy and safeguarding against potential ethical and social harms associated with sex selection, highlighting the importance of clear guidelines and penalties in enforcing the prohibition.

Israel presents a unique case where non-medical preimplantation sex selection is permitted under strict conditions, as detailed in the 2005 Circular issued by the Israeli Ministry of Health. This policy allows for sex selection in 'rare and exceptional cases', with applicants required to meet comprehensive criteria and obtain written permission from the National Committee for Sex Selection by PGD for Non-Medical Reasons. This regulatory model illustrates a controlled approach to sex selection, emphasising careful scrutiny and oversight to minimise ethical and societal concerns while accommodating individual cases under stringent conditions.

These international perspectives highlight the importance of a well-defined legal framework, including specific regulations, clear guidelines, and enforceable penalties, for regulating non-medical preimplantation sex selection. Thailand's current regulation, as outlined in Section 18 of the 2015 ART Act, lacks the clarity and enforceability seen in the UK, Australia, and Israel. This discrepancy reveals the potential for Thailand to enhance its legal strategy by incorporating explicit definitions, compliance guidelines, and penalties to effectively deter violations.

Additionally, empirical findings, as discussed in Chapter Five, indicate a significant lack of awareness about the prohibition among legal practitioners, certain healthcare professionals, and parent participants. This awareness gap, coupled with the absence of penalties for non-compliance, suggests the inadequacy of the current legal framework in compelling adherence to the ban. The need for improved public education and stricter enforcement mechanisms is evident.

In essence, the rationale for maintaining the ban encompasses human rights considerations together with other relevant concerns such as harms from skewed SRB and medical tourism resources allocation. The perpetuation of discriminatory attitudes through non-medical preimplantation sex selection undermines gender parity efforts and poses ethical and societal risks. Moreover, the practice's alignment with eugenic tendencies raises concerns about the societal impact of genetic selection based on personal preferences. Hence, following a comprehensive evaluation of crucial factors surrounding non-medical preimplantation sex selection in Thailand, this thesis endorses the ongoing ban of non-medical sex selection as prescribed in Section 18 of the 2015 ART Act. This final note, building upon the chapter's discussion, emphasises that while the ban should be upheld, the legislation demands refinement for enhanced clarity and precision to address the intricacies of the practice effectively.

In conclusion, this thesis strongly advocates for the continuation of the prohibition on non-medical preimplantation sex selection in Thailand. Furthermore, by addressing the identified shortcomings in the current legal framework, Thailand can more effectively uphold fundamental human rights, ethical standards, and societal values.

#### 4. Chapter Summary

This chapter synthesises interview findings with the thesis's broader discussions, critically evaluating the debate on non-medical preimplantation sex selection. Given Thailand's socio-legal context and relevant data, it supports maintaining the ban per the 2015 ART Act's Section 18, prioritising human rights and ethical concerns over deregulation arguments. It advocates continuing the prohibition to uphold international human rights and prevent

societal and ethical harms, highlighting the importance of careful legislative action in reproductive technology within Thailand's unique context.

The next chapter is the final part of this doctoral dissertation. It concludes the dissertation, revisiting the research question, its implications, and the arguments leading to the thesis's conclusion. It also suggests future research directions in this field.

# CHAPTER SEVEN: EPILOGUE- THE PATH AHEAD

## 1. Introduction

The thesis sets out to examine the arguments involving the issue of non-medical preimplantation sex selection and its current prohibition in Thailand and to arrive at the conclusion regarding how Thailand sex selection law, should be. After reviewing all relevant secondary literatures, examining and assessing both the argument opposing as well as supporting the practice, and factoring in the data collected from the study interviews of 28 participants, who are considered key interest parties with respect to the issue of non-medical preimplantation sex selection, the thesis comes to a conclusion and proposes that the current sex selection ban should be maintained.

Accordingly, this final chapter revisits all the arguments presented throughout the thesis, culminating in a comprehensive rationale for maintaining the prohibition on non-medical sex selection. The chapter begins by revisiting the original research question, followed by an elucidation of the research's significance. Progressing towards the thesis conclusion, the chapter systematically reviews all the key arguments related to non-medical preimplantation sex selection, incorporating insights from the thesis's interview study findings.

Building on these discussions, the chapter then summarises the thesis's stance in favour of upholding the current ban, outlining the reasoning behind this position and the recommendations for enhancing the effectiveness of Thailand's existing sex selection law. In conclusion, the chapter proposes future research directions and discusses how further studies on the topic of non-medical preimplantation sex selection law could continue to evolve and contribute to this field.

## 2. Reintroducing the Original Research Question

Looking back to the regulations and the implementation concerning non-medical preimplantation sex selection in Thailand, we have learnt that despite having a legal prohibition issued under the 2015 legislation, the data from relevant literature reviews together with the findings collected from key interest parties of the examined topic

essentially suggest that there is an underlying problem with the current legislation on non-medical sex selection. Since its enactment in 2015, there seems to be no available records or data on how the non-medical sex selection ban, stipulated in the Children Born Out of Assisted Reproductive Technology Protection Act B.E. 25558 (the 2015 ART Act), has been exercised or enforced. Accordingly, this doctoral study takes a small piece of the 2015 ART legislation, which is one single phrase from section 18 on non-medical preimplantation sex selection, to study as the subject matter of the analysis. It proposes a re-examination of the expressed prohibition and to explore all relevant arguments pertaining to the topic of the said practices specifically against Thailand's socio-legal framework.

Ultimately, the main original thesis question asks:

*How should Thailand respond to non-medical preimplantation sex selection?*

For the thesis to be able to address and answer the postulated question, and given the complexity of the analysis topic, this thesis employs a mixed research methodology of empirical, doctrinal, as well as case-study method to tackle the original thesis question.

Subsequently, the core argument of this study maintains that although the rationale for permitting non-medical preimplantation sex selection in Thailand, particularly based on reproductive autonomy and privacy arguments, may appear compelling, they are significantly counterbalanced by the potential harms of such practices. This includes not only the direct consequences but also broader human rights considerations and ethical implications. Opponents of non-medical sex selection highlight concerns about skewed sex ratios at birth, eugenics concerns, gender inequality, sexism, and violence against women. This study concludes that these concerns, encompassing potential harms, human rights issues, and ethical implications, are substantial and should be prioritised over arguments advocating for individual reproductive autonomy and the right to respect for private and family life. It is important to note, as discussed in previous chapters, that reproductive autonomy may not inherently encompass the right to sex selection, as there is no established right to select the sex of a child within the scope of reproductive rights, not just within Thailand but especially within international human rights law.

Therefore, considering all related factors, this thesis strongly advocates for maintaining the prohibition on non-medical preimplantation sex selection as stipulated in Section 18 of the 2015 ART Act. This stance is taken in order to safeguard against violations of international human rights and the significant ethical and societal risks associated with non-medical preimplantation sex selection.

### 3. Importance of The Thesis

Due to the paucity of relevant legal scholarship existed in Thailand with respect to the topic of non-medical preimplantation sex selection and the perplexing complications surrounding the topic of reproductive legislations, this thesis offers an original contribution to the accumulated knowledge existed in this field. In other words, not only the scope of this thesis examines the topic that has never been studied in Thailand, as non-medical preimplantation sex selection is a relatively new issue and there is very little literature and few records relating to the topic, but the thesis also includes an original set of data gathered from in-depth interviews which provides significant contribution to the analytical work of the thesis.

More importantly, this thesis encompasses an extraordinary combination of interview participants who were drawn from multidisciplinary fields, including those who were (and still are) directly involved with the non-medical preimplantation sex selection procedures, for example, ART doctors, couples who underwent the concerned treatment, regulators, and state officials who were responsible for the drafting of the 2015 ART legislation. As a result, the findings from the interview study presents to be very important as (at the time of this writing) there are no literatures on the analysis topic that relied on or referred to primary empirical data collected within Thailand.

The interview study within this thesis brings to light a novel aspect of the harm argument in the context of non-medical preimplantation sex selection. Previously, as detailed in Chapters Five and Six, discussions of harm predominantly focused on issues like skewed sex ratio, sexism, gender inequality, and violence against women. However, this study introduces the additional concern for potential harm to mothers who are denied sex-selective treatment. This type of harm, which has not been prominently featured in existing literature arguing for

or against non-medical preimplantation sex selection, pertains to the mother's bodily integrity and autonomy.

While the principal arguments about harm from non-medical preimplantation sex selection have traditionally centred on the child born from the procedure, this new finding adds a dimension to the debate. It highlights the potential physical and mental health consequences for mothers who might be compelled to undergo natural conception repeatedly to achieve a desired baby's sex, either out of personal desire or familial pressure.

Despite these innovative insights, it is crucial to recognise that the data concerning harm to the mother, while intriguing, remains significantly limited. It does not provide a comprehensive basis to support the legalisation of non-medical preimplantation sex selection. This thesis, therefore, while acknowledging this new perspective, maintains that the current prohibition under Section 18 of the 2015 ART Act should not be abolished solely on this basis. The study's findings, while contributing a fresh viewpoint, are insufficient to outweigh the broader ethical, societal, and legal considerations that underpin the existing ban.

#### 4. Assessing the Arguments and Arriving at Conclusion

Throughout this thesis, key issues related to non-medical preimplantation sex selection have been thoroughly examined, with a particular focus on empirical data specific to Thailand as discussed in Chapters Five and Six. The predominant arguments surrounding this topic are centred on issues of reproductive autonomy, privacy, the right to private and family life, the harm principle, concerns about skewed sex ratio, eugenics, sexism, gender inequality, violence against women, and public opinion on non-medical sex selection.

Employing a human rights-based approach and a balancing exercise, the thesis shapes its response to the regulation of non-medical preimplantation sex selection in Thailand. This approach involves weighing competing rights and interests associated with non-medical preimplantation sex selection, aiming to resolve these competing claims.

Upon assessing the argument of autonomy in conjunction with the harm principle, it becomes evident that within the Thai context, potential harms associated with non-medical sex selection, such as skewed sex ratios and violence against women, currently appear minimal and are not substantiated by strong evidence. However, this thesis argues that the absence of clear and present harm does not automatically lead to the conclusion that sex selection should be permitted. The lack of evident harm does not negate the need for a cautious approach, particularly considering the potential long-term societal and ethical implications. Therefore, while the immediate concern for these harms may not seem substantial, it is prudent to maintain a perspective that prioritises the broader societal context and ethical considerations over the aspects of reproductive autonomy, privacy, and the right to respect for private and family life in the decision to allow non-medical sex selection.

Upon addressing the concerns related to skewed sex ratios and sexism, the thesis acknowledges these as significant issues. While the available data indicate that Thailand has consistently maintained a normal sex ratio at birth (SRB) since the 1990s, suggesting the absence of a strong son preference, this data alone cannot be conclusively used to justify the permissibility of non-medical sex selection. It is crucial to consider that the lack of a current skewed SRB does not guarantee the same trend will continue if non-medical sex selection is permitted.

In conclusion, this thesis evaluates the key arguments surrounding non-medical preimplantation sex selection within the Thai context. By employing a human rights-based approach and a balancing of rights, it supports the continuation of the current prohibition on non-medical sex selection as stipulated in Section 18 of the 2015 ART Act. The thesis contends that, even in the absence of robust evidence for the stated harms and considering the importance of upholding rights like reproductive autonomy and privacy, the balance of considerations still tilts towards upholding the existing ban on non-medical sex selection. This stance is primarily driven by the imperative to prioritise human rights considerations, particularly issues related to gender equality and sexism. It is crucial to recognise that reproductive autonomy does not inherently encompass the right to non-medical sex selection. Therefore, based on these deliberations, the thesis supports the continuation of

the prohibition on non-medical sex selection, underscoring the necessity of safeguarding broader ethical and societal values.

## 5. The Way Forward

An important insight of the analysis developed from the empirical data of this study reveals that Thailand contains significantly minimal information and database concerning the practice of non-medical preimplantation sex selection. As witnessed in Chapter Five, despite in-depth interviews with those who were key interest parties of the subject, their knowledge and awareness about the law regulating such practice were alarmingly lacking. Furthermore, information reveals by two Medical Council of Thailand participants as well as two participants from the Ministry of Public Health was rather disconcerting for the fact that there seems to be no available record of sex selective PGD/IVF carried out in medical facilities across the country.

In discussing the potential harms associated with non-medical preimplantation sex selection, this thesis acknowledges the novel nature of this topic and the emerging debates surrounding it. While some arguments, including those based on first-hand accounts from ART physicians, highlight the psychological and physical harms to mothers denied sex selection treatments, it is crucial to weigh these against broader concerns.

The newly identified argument regarding 'harm to the mother' challenges us to re-evaluate the relationship between such harm and the laws prohibiting non-medical sex selection. Specifically, it questions whether the legal restrictions themselves contribute to the mother's distress, suggesting a need for deeper examination of the law's impact on women's physical and mental health.

However, this thesis contends that while the harm to the mother could be a significant factor, it must be balanced against other critical concerns. These include the potential for non-medical sex selection to perpetuate gender biases and its long-term effects on societal gender balance, despite current evidence suggesting that it does not lead to skewed sex ratios immediately. Therefore, while recognising the importance of considering maternal wellbeing

(the mother who is refused non-medical sex selective treatment), the broader ethical, social, and legal implications also demand careful consideration, supporting the continued prohibition of non-medical sex selection under current law.

All in all, the discourse surrounding non-medical preimplantation sex selection through ART is relatively nascent compared to other reproductive practices like abortion, which have been debated for centuries. While the topic has started to gain attention internationally, with varying legal responses evident in jurisdictions such as the UK and Australia, it remains underexplored, especially in Thailand where it was introduced less than a decade ago. Given the lack of empirical data on the implications and impacts of sex-selective ART in Thailand, this thesis would like to emphasise the need for comprehensive research and data accumulation.

As more studies emerge and data becomes available, the debate can evolve with well-supported arguments backed by tangible evidence. Establishing a robust database will be critical for assessing public opinions and behaviours regarding non-medical sex selection, and for refining Thailand's legal approach to these technologies.

However, it is crucial to remember that while data is important, the assessment of non-medical sex selection should not rely solely on empirical evidence. A broader framework that incorporates international human rights standards and considers the social and ethical dimensions of the practice is essential. This comprehensive approach ensures that policy and legislative decisions are not only data-driven but also ethically sound and aligned with global human rights norms, thereby enhancing the integrity and efficacy of legal responses to complex reproductive technologies.

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