Revisiting Sex Selection in Jewish Law

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Introduction

The serious and very practical question of permitting fertility treatments in general and pre-implantation genetic diagnosis (PGD) in particular has been widely debated among Jewish circles in recent years.[i] Naturally, several opinions that surfaced were subsequently presented in a recent issue of a well-reputed halakhic journal.[ii] We feel, however, that there are a number of points pertaining to the discussion of sex selection within Jewish law that require further clarification. In this piece, we intend to facilitate, or at least initiate, the process of better understanding the moral minefield introduced by the advent of reproductive technologies.

Alleviating Initial Suspicions and Doubts

The arguments hitherto suggested were reminiscent of the debate of several decades ago when, in the summer of 1978, Louise Brown became the first child to be born via in vitro fertilization (IVF) technology. The onset and widespread use of IVF that soon ensued called into question a myriad of ethical, moral, and religious concerns. Some religiously affiliated individuals were quick to voice their opposition to IVF, calling attention to the possibility for mistakes to occur behind the closed doors of fertility clinics and laboratories. Those who managed to document high-profile errors only exacerbated the uncertainty involved and contributed to the general unease of rabbinic decisors who were then beginning to grapple with the new and potentially problematic procedures.

As a result of the increasing ambiguity over the permissibility of assisted reproductive technology (ART), the Puah Institute—a leading Jewish fertility organization in Israel—instituted supervision services at fertility clinics and laboratories in Israel and across the globe. Puah arranged for a trained network of *mashgihim* (professional supervisors) to oversee the entire fertility process and workup.

From initial treatments to eventual birth, the *mashgihim* ensured that all fertility-related procedures were conducted in strict accordance with Jewish law. As expected, rabbinic decisors followed by developing more lenient attitudes and adopting more permissive approaches in tackling the medical, ethical, and religious concerns incurred by ART.

This implementation of halakhic supervision, endorsed by rabbinic authorities and lauded by the Jewish community, is nothing less than a small revolution within medical-religious arena. A rather simple halakhic solution effectively changed both the perceptions and the nature of rabbinic rulings, thus blazing the path for future progress in similar areas involving an interface between technology and halakha. Rabbinic supervision proved reliable and consistent. Most significantly, it demonstrated that previous suspicions can be allayed with prudent precautions and thorough measures. This sort of pragmatic approach could also be part of a resolution in the case at hand.

Fear of the Slippery Slope

Some of the other opponents to ART were not so much concerned with the potential chaos of mistakes committed in the lab; their worry, instead, was of a more general nature—that is, the fear of the slippery slope. While virtually every innovative technology brings with it the potential for a slippery slope, it is unclear exactly what these critics feared. It could be sensed, however, that there was general unease in the air. Instead of laying claim to specific arguments and coherent propositions, this cohort of critics seemed merely troubled by the permissive atmosphere in and of itself. They obsessed over the lenient positions being formulated in response to ART and worried that the momentum was heading in a ruinous and disastrous direction.

In one particular conversation with such a rabbinic decisor, he related that although he had attempted to hold back the "tide," the people had turned the tide and voted with their feet. In today's society, he continued, there is very little one can do to change the scenario of infertile couples undergoing IVF and ART despite the initial opposition of certain rabbinic authorities. The "tide" referenced here—and why its resistance to change was problematic—is ambiguous at best. Again, there appears to be general discomfort emanating from some authorities without any real, transparent arguments or rational explanations for dissent.

It is interesting to note that in a personal conversation with Bob Edwards (the British physiologist and pioneer of reproductive medicine who was instrumental in the first successful human IVF birth) I asked whether in the early days of IVF anyone had accurately conceived of the enormity and impact that ART would have in terms of reshaping our future conceptions of reproduction, procreation, and lineage. He replied in the affirmative, recalling that deep philosophical questions regarding fertility procedures were immediately raised, challenged, and analyzed from the very first drafted paper on the subject. We concurred in our approach to facing problems head-on, opening intellectual forums for reasoned and well-seasoned debate, and seeking necessary precuations to prevent sliding down the slippery slope. Preempting problems, experience continuously confirms, is always preferable to damage control.

There is a vital lesson not to be missed here. The fear of the slippery slope is a valid one. Leon Kass, an American bioethicist, once remarked: "Once you put human life in human hands, you have started on a slippery slope that knows no boundaries." Indeed, unchecked and unpaved territory is frightening, but only at first. With boundaries intact and cautious measures in effect, the fear and mystery that surround the slope begin to fall away. Human beings advance only through experimentation and trial and error. Humanity reaches great heights only by climbing the stairs, forging ahead, and taking the initial plunge. Had the slippery slope deterred scientists in the past century, many more once-infertile couples would still be yearning for children. If anything, the slippery slope helps to remind us of the important role that boundaries and borders play in our lives, but it ought not to limit and restrict the possibilities for great technological innovations. Our ability and success to create and innovate is far too strong to be curtailed by paying much attention to the argument of the slippery slope.

Obligation vs. Permission

In debating the merits of sex selection—that is, the in vitro selection of either a genetically male or female embryo for subsequent implantation into the gestating womb—there seems to be an unfortunate mix-up of two disparate issues, which are neither synonymous ideologically nor halakhically. On one hand, there exists the question as to whether a man who has children of only one sex is *obliged* to undergo some form of sex selection to ensure the birth of a child of the opposite sex. In other words, is the man who is commanded to "be fruitful and multiply" *obligated* to employ sex selection technology to guarantee that his offspring consist of, at minimum, one boy and one girl? On the other hand, there is a distinct question as to whether one is *allowed* to enlist for sex selection as a valid method of family balancing or for any other desired reason. That is to say, barring any sense of obligation, is one halakhically *permitted* to make use of sex-selection technology? These are two distinct questions that ought not to be intertwined; obligation connotes something entirely different from permissibility.

The *Shulhan Arukh*, the primary centerpiece of authoritative Jewish law, as well as other codes of normative halakhic behavior, do not sanction the notion of sex selection—but they do not expressly condemn it either. The absence of any imperative mandating the necessity to take any and every possible step to ensure both male and female sexes among one's children strongly suggests that there is at least no obligation to undergo a process of sex selection. Therefore, a man with children of only one sex type (only males or only females) dutifully fulfils the mitzvah of *peru u'revu*.[1] While there were certainly no advanced technologies of sex selection during the lifetime of the author of the *Shulhan Arukh*, failure to make mention of any such obligation, even if only imaginably conceivable, is quite telling. Obligation may not be the case, but the option of permissibility cannot and should not be ruled out. Previous published matter on the subject, we note, demonstrated a weakness in investing far too much time and effort in the obligation aspect while neglecting to report on the equally, if not more significant, aspect of permissibility[iii].

In fact, in our clinical experience with dozens of couples seeking PGD for sex selection, couples rarely cite the biblical injunction of *peru u'revu* as an impetus to pursue sex selection. More often than not, couples generally elect PGD for sex selection for reasons entirely unrelated to halakha—be it of social, cultural, or personal preference. Some individuals, for example, express the existential need to have a boy or a girl as their sole motivation. Quite interestingly, and not surprisingly, some religious couples who desire a child of a specific sex have the faulty assumption that it is their absolute biblical duty to produce one boy and one girl through whatever means technologically feasible. Ultimately, they tend to forgo treatment upon hearing an enlightened version of the halakha and are pleased to learn that the halakha speaks in no place of a *requirement* to defer to sex selection as a means of securing both male and female children.

Thus, the question of obligation is a moot point. It is essential that these two aspects—obligation and permission—be separated and filtered out before the application of appropriate halakhic principles. The focus of discussion must shift from obligation to permission in analyzing the use of PGD for sex selection. Of course, when extricating this or any other halakhic inquiry, the approach should be one that assumes permissibility unless demonstrated otherwise. The burden of proof then lies on the shoulders of those who utterly dismiss and disallow the procedure of sex selection. So, what are the halakhic prohibitions, if any, against sex selection?

Jewish Medical Ethics vs. Medical Ethics

It is worth mentioning the following brief points of comment. In the series of articles that appeared in the journal *Tradition*, one of the articles made reference to widely accepted Western ethical considerations and principles. Although Judaism as a whole accepts, welcomes, and identifies with the major ethical principles (autonomy, beneficence, non-maleficence, and justice) that govern medicine in the West, there certainly come times when normative Jewish thought and law diverge with classical secular ethics. Such dilemmas, for example, arise particularly in the form of life-and-death decisions that conflict with a patient's autonomy. Jewish medical ethics most drastically differs from secular medical ethics in its source of validity and working methodology. Jewish ethics, along with its other commandments, laws, and statutes have their source and validity deeply rooted in the divine, as

expressed in the biblical and oral law. In addition, Jewish law strongly adheres to precedent as a basis for formulating a stance in each situation. Whereas secular ethics searches primarily to apply the same major recurring ethical principles to any given scenario, Jewish medical ethics places a large emphasis on evaluating each situation independently, and only then applying the most applicable and appropriate principles, as grounded in Jewish literature.

Is IVF Dangerous?

Some opponents of PGD for sex selection opine that this procedure is dangerous and therefore unquestionably forbidden according to Jewish law. Indeed, the Torah is very concerned that one must distance oneself from harm and even potential danger. Yet, it has been clearly demonstrated that there is almost negligible danger involved with PGD. The small magnitude of risk associated with PGD is most similar to the risks of IVF (and studies actually show that IVF risks are more commonly linked with the underlying causes of infertility rather than with the procedure itself). Dr. Abraham Steinberg, pediatric neurologist and author of *Encyclopedia of Jewish Medical Ethics*, suggests that crossing a street is statistically more dangerous than any ART procedure and, not shockingly, street crossing has yet to be outlawed.

It should be noted that Rabbi Abraham Isaac Kook originally sought to forbid traveling in cars for purely recreational purposes. He considered "joy rides" to be dangerous and buttressed this claim by pointing to the staggering rates of injuries and fatalities caused by automobile accidents. Rabbi Kook only ruled that driving was problematic, however, if it served no teleological reason. His ruling did not extend to instances beyond recreational driving; he outright permitted purposeful driving, even if unintended for fulfillment of a Torah obligation, so long as it was within the framework of normative human behavior.

If the risks of IVF and PGD are indeed comparable to those of pedestrian street crossings, as initially proposed by Steinberg, then we could reasonably assume that ART poses too minimal a danger to ban its meaningful efficacy and success rate. Some may be quick to retort that IVF is unique since it is performed with the intention to fulfill the biblical duty of procreation and, as such, any potential danger may be more immune to warrant prohibition.[2] But it is unclear if one may technically fulfill the commandment of procreation via ART. If IVF is not an acceptable form of carrying out the commandment of procreation, the argument goes, then we might be left with the inclination to forbid both IVF and PGD procedures.

It is widely accepted, however, to permit the use of IVF despite possibility of associated risks. The underlying reason for this allowance brings us to our next point concerning sex selection.

The Definition of Illness

It is fair to say that ART is an elective process. Halakhic technicalities may prevent us from characterizing the outcome as a fulfillment of procreation, and thus the element of risk enters into the equation more potently. There is still ample reason, however, to permit ART despite its elective nature. The majority of contemporary rabbinic decisors do allow IVF and other methods of reproductive medicine. This touches upon the very notion of how we define illness in the first place. The World Health Organization (WHO) defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[iv] This definition has not been altered since 1948 and has survived accusations that "the perfect definition of health espoused by the WHO is Utopian and removed from reality."[v] Some posit that the WHO's version of health is more a definition of happiness than of health.[vi] Understanding the implications of "health" is essential since the manner in which we choose to visit health directly affects our perception of illness.

Is there a unique Jewish or a halakhic vision of illness? Various talmudic sources point to illnesses that come with different degrees of severity and with distinct definitions. The sick person is generally obliged to study the Torah and obey the vast majority of commandments. There are some examples, however, when the ill individual is exempt from religious duties. The sick are exempt from sitting in the sukkah on the holiday of Sukkoth and from the requirement of appearing at the Temple before God

on the festivals. Additionally, an ill person is exempt from standing in the presence of a Torah scholar and from donning the ritual tefillin.

Interestingly, the halakha actually differs in its depiction of the ill person from one source to another. The ill person exempted from the sukkah need not be dangerously ill and extends to one "who is in no danger, even if he has a pain in his eye and a headache." This exemption is derived from the nature of the condition to "dwell in the sukkah as one would dwell in his own house" ("*Teshvu k'en taduru*"). The ill person who is exempt from trekking out to Jerusalem for the festivals is one who cannot walk. The ill person who is permitted to remain sitting before a learned scholar is either one who is entrenched in his own pain and unhappiness or one who is lying on his or her deathbed. The ill person who is exempt from tefillin refers to an individual with digestive difficulties (there are other opinions that suggest that general suffering due to any illness exempts one from tefillin due to the impossibility of proper attention and mindset).

Clearly, considerations for defining illness are specifically dependent on the sort of obligation in question. It is also evident that a life-threatening disease or debilitating medical condition is not a necessary condition to exempt an ill person from the abovementioned commandments.

Elsewhere, in a discussion regarding someone who is terminally ill, Maimonides relates: "One who has a headache or a pain in his eyes, leg, or hand is considered to be well for all matters connected to his business dealings. But, the ill person whose entire body is weakened due to his illness or someone who cannot walk outside and is confined to the bed is called a *shekhiv me'ra*." Here, Maimonides presents a scenario of an individual who experiences discomfort and mild pain, but whose condition is not sufficiently severe to classify as an illness.

The WHO's somewhat deficient definition and the above cited halakhic sources indicate that even something as seemingly simple and basic a task as defining illness is more complex than first meets the eye.

In a past article, we explored the opinions of several rabbinic decisors that perceive infertility as an illness. Beyond the physiological incapability of naturally conceiving a child, infertility is often accompanied by serious psychological distress and insecurities. Thus, illness is not merely defined in physiological terms. The halakha sympathizes, empathizes, and acknowledges the internal frustration of the infertile individual and/or couple. Accordingly, psychological distress and discomfort account for a condition to be regarded as an illness within Jewish law.

This mental and emotional pain—indeed, a natural component of coping with the reality of not being capable to conceive naturally—serves as the primary basis to permit this elective surgery and others like it. Though there is no medical *necessity*, elective surgery in halakha is often grounded in justifications that highlight the relevant psychological factors. Despite lack of medical necessity, there is room to permit virtually any surgery that would alleviate serious psychological suffering (assuming there are no external contraindicating reasons and/or significant possibility of harm in electing the surgery).

Is Sex Selection Permitted in Cases of Psychological Pain?

Sex selection via PGD could likewise be rendered permissible. Most couples that opt to undergo the sex selection process do so because of psychological reasons. Before outright sanction of sex selection, it might be worthwhile to establish guidelines to determine when and to what degree psychological distress or desire warrants its use. But, then the tricky question obviously becomes: who and how can one adequately determine what amounts to sufficient psychological pain to permit an elective treatment? May parents experiencing an extended period of secondary infertility undergo ART ?

Searching for a similar precedent, the Talmud (*Shabbat* 50b) discusses a man's removal of a bodily scab. The rabbis debate if this practice is a strictly female activity that would be forbidden for males as a corollary to the general prohibition of men wearing women's clothing. The Talmud concludes that it is forbidden to remove a scab as a method of beautification (an activity associated with females), but it is within the confines of halakha to remove the scab in order alleviate suffering or pain. The *Tosafot*

commentators question what sort of pain is necessary in order to allow the removal of the scab; does embarrassment of presenting oneself with a scab on the face qualify as “pain”? Tosafot emphatically answer in the affirmative, even going so far as to insist, “there is no greater pain than this” in reference to psychological pain. Emotional pain and psychological stress cannot go unnoticed and unacknowledged. What one experiences as shameful and embarrassing might not register as such with another individual. This fact only tells us that emotions and psychology could be subjective and personal. Indeed, psychological pain may be highly subjective, but is real and valid nonetheless.

This subjective aspect becomes apparent from some clinical cases that Puah has helped mediate. Among the scenarios were the following cases: a *kohen* who needed a sperm donor and was absolutely unwilling to undergo the procedure unless guaranteed future anonymity (i.e. by selecting for a girl), a woman suffering from depression after having three children of the “wrong” gender, and a couple who had six children of the same gender and were desperate to conceive a child of opposite sex. Invariably, upon presenting these cases, there is always at least one person in the audience who will argue that it is our duty to convince such parties that it is not so terrible not to have a child of the other sex. Skeptics suggest that the *kohen* must come to terms with revealing the truth of a sperm donation in the case of a male child, the woman must seek psychological help to convince her that having another child of the same gender is not the end of the world, and the couple must accept the reality and plausibility of conceiving a seventh child of the same sex. In a word, critics claim, such individuals must suppress their inner worries, tensions, anxieties, and pressures. Life is fine and elective PGD for sex selection is uncalled for. Seek therapy, work it out, and get over it.

What these critics and naysayers fail to grasp, however, is that our own personal intuitions, or anyone’s individual feelings, are totally irrelevant here. In light of the Talmud’s depiction of shame and embarrassment as a legitimate form of pain, we must recognize that anguish and distress come in all different sizes, shapes, and colors. Where pain—any form of pain, be it physiological or psychological—could be lessened, we must strive to do so through rational and scientifically available means. It is far too easy to quickly dismiss someone’s situation as trivial or petty. It requires a certain degree of fortitude and integrity to see one’s pain for what it is and to acknowledge one’s distress as duly legitimate. Humans do not experience pain equally. Some hurt a little more, others a little less. What makes humanity great, however, is its ability to breed two drastically disparate individuals who nevertheless understand and acknowledge each other’s personal, yet equally genuine, concerns and emotions.

Conclusion

Artificial reproductive technologies, and PGD in particular, call into question numerous moral and halakhic issues. As science continues to innovate and discover, it is vital that the Jewish community not veer away from grappling with the challenges, if any, posed by new reproductive techniques. Instead, we ought to embrace the challenges and engage in meaningful dialogue. For some, it is tempting to brush aside modern technology and cast it as antithetical to the letter and spirit of Jewish law. Through serious research and scholarship, however, more often than not it becomes clear that Judaism invites and welcomes technological and scientific advancement. As we have hopefully demonstrated, there is ample room within Jewish law for permitting the practice of sex selection through PGD.

[i] A. Steinberg, "Sex Selection," *Assia*, January 2006 in Hebrew, Finkelstein B. "In Vitro Fertilization in Order To Choose Gender," *Techumin* Vol. XXVII, 576.

___ See for example, Flug, "A Boy or a Girl? The Ethics of Preconception Gender Selection," *Journal of Halakha and Contemporary Society*, 48 (2004) 5-27.

[iv] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, June 19-22, 1946; signed on July 26, 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and authorized on April 7, 1948.

[v] Van Der Weyden MB, "In reply: Boundaries of Medicine," *Medical Journal of Australia* 2003; 178 (10): 527.

[vi] Saracci R. "The World Health Organization Needs to Reconsider its Definition of Health," *BMJ* 1997; 314: 1409.