Procreative rights denied? Access to assisted reproduction technologies by single women in China

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ABSTRACT

The Chinese regulatory framework on access to assisted reproduction technologies (hereafter ART) is relatively restrictive, limiting ART exclusively to heterosexual married couples as a medical treatment for infertility. ART clinics across China are prohibited from providing ART services for single women. This creates significant regulatory barrier for single women to exercise their procreative rights. The restriction finds its root in the population and family planning law under which reproduction is tied to marriage and childbirth outside marriage are deemed as illegitimate with punishing consequences. It essentially denies the procreative rights of single women which are recognized by Chinese law. A welcoming development is that in seven out of 10 cases the court is willing to grant exceptions by allowing posthumous implantation procedure for widowed women after the sudden and unexpected death of the husband.

KEYWORDS: procreative rights, assisted reproduction technologies, single women, posthumous implantation, best interest of the child, egg cryopreservation

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I. INTRODUCTION

On April 15, 2019, the first Chinese test-tube baby gave birth to a boy in the same hospital in Beijing where she was born 31 years ago.1 In the past three decades, the use of assisted reproduction technology (hereafter ART) has changed from a headline news novelty to a routine procedure and common place. By the end of 2018, there are 497 authorized ART medical clinics and 26 sperm banks across China.2 Every year, over a million IVF cycles are performed in China, resulting in over 300,000 babies born,3 which accounts for about 2 per cent of total population of the new born.4

It has transformed the traditional image of human reproduction beyond imagination. Medical intervention into the natural process of conception separates human reproduction from sexual intercourse and moves it under microscope in a controlled laboratory environment. It divides the process of human reproduction and enables the roles to be allocated and shared among genetic material provider, gestational carrier and care giver, which were traditionally all undertaken by married couples. Although offering a reliable treatment for the disease of infertility that troubled many married couples, it expands the range of reproduction choices and opens up a whole new world of possibilities for other group of individuals with parenting intentions, including single parent and LGBTs.

Facing this new reality, law makers are caught in a rock and a hard place and have a delicate balance to strike. Access to ART is closely linked with personal procreative freedom and choice, which is often regarded as a fundamental human right:5 Meanwhile, it has significant ramifications for our society as a whole and could potentially undermine the values that we cherish. Throughout history, parenting and family has not been an issue of purely personal choice, but rather a social institution shaped and framed by the social context where it is positioned. It is also a collective choice regarding the core values we believe in and how our society looks like.

The first and foremost question every society has to address is how access to ART shall be regulated, on which consensus has been difficult to reach. There is a wide range of diversity in the regulatory frameworks that have been put in place across nations.6 It is a matter of spectrum ranging from a restrictive end toward a more liberal tendency. The Chinese regime is relatively restrictive, limiting access to ART exclusively to heterosexual married couples and denying access for other groups with parenting intention. The restriction is put in place to enforce population and family planning law, it nevertheless creates regulatory barriers for single women to exercise their procreative rights which

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1 Dai Xiaopei, Chinese First Test-tube Baby Becomes a Mum (中国大陆首例试管婴儿喜当妈妈), SCIENCE AND TECHNOLOGY DAILY (科技日报), Apr. 16, 2019, at page A3.
2 Department for the Health of Women and Children of National Health Commission of China, Report on the Development of the Health of Women and Children in China (2019) (中国妇幼健康事业发展报告 (2019)), May 27, 2019, http://www.nhc.gov.cn/fys/s7901/201905/bbd8e2134a7e47958c5c9e032e1da2.shtml (accessed Nov. 9, 2020).
3 Francesco Paolo Busardo et al., The Evolution of Legislation in the Field of Medically Assisted Reproduction and Embryo Stem Cell Research in European Union Members, (1) BIOMED. RES. INT. 1 (2014).
4 Dai, Supra note 1.
5 JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES, Princeton University Press, Reprint edition, 1996.
6 Laurence Brunet et al., A Comparative Study on the Regime of Surrogacy in EU Member States, PE 474.403, May 2013, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, European Parliament, Brussels.
are recognized by Chinese law. One of the most contentious and hotly debated issues in China has been on whether single women with parenting intention should be granted access to ART.

This article contributes to this debate by examining the interplay between regulations on access to ART and procreative rights of single women in China. The article first looks at the regulatory framework on access to ART by single women in China and reviews the broader legal context. In recent years various attempts have been made to lift the restrictions on access to ART by single women. There have been some significant developments in three areas of ART, including artificial insemination (hereafter AI), posthumous implantation and social egg freezing, which will be covered by the following three sections. It critically examines the court judgments relating to these three areas and evaluates the implications they have upon the procreative rights of single women. The article ends with some concluding remarks on the future evolution of Chinese law in this important area of law.

II. THE REGULATORY FRAMEWORK ON ACCESS TO ART BY SINGLE WOMEN

II.A. The NHC Regulations Applicable to ART Clinics

The Chinese top legislature, the National People’s Congress, has not adopted a comprehensive statute dealing with various issues arising from ART. Instead, what is in place is a set of three ministerial regulations issued by the National Health Commission (hereafter the NHC). The Measures on the Administration of ART adopted in 2001 establishes a prior authorization regime and requires ART clinics to meet certain standards to ensure the safety and quality of their service. Carrying out assisted reproduction procedures without prior authorization is in breach of the 2001 Measure and subject to administrative sanctions. Weng Liguo v Bureau of Public Health of Ma’anshan City, (2019) Wan 05 Xing Zhong No. 38; Zhang Mingde v Bureau of Public Health & Family Planning of Tianqiao District of Ji’nan City, (2017) Lu 01 Xing Zhong No. 359.

As one of the 26 ministries of the State Council, the NHC has the competence to adopt regulations that are applicable to the health sector and monitor its compliance. Article 3(1), Provisions on the Functions, Structure and Staffing of the National Health Commission (国家卫生健康委员会职能配置、内设机构和人员编制规定), adopted by General Office of the CPC Central Committee and the General Office of the State Council, Ting Zi [2018] No. 59, Jul. 30, 2018, available at the official website of the NHC http://www.nhc.gov.cn/wjw/jgzn/201809/3f4e1cf5cd104ca8a8275730ab072be5.shtml (accessed Nov. 9, 2020).

Article 44, Regulations for Administration of Medical Institutions (医疗机构管理条例), adopted by the State Council in 1994 amended in 2016; Article 336, Criminal Law of the People’s Republic of China (中华人民共和国刑法).
Meanwhile, the Technical Specifications\(^\text{11}\) and Ethical Principles,\(^\text{12}\) adopted by the NHC in 2001 and revised in 2003, contains detailed and specific rules that ART clinics must comply with in their everyday medical practice. The availability of ART is limited based on marital status. They are reserved exclusively for married couples as a medical treatment for the disease of infertility.\(^\text{13}\) Both regulations contain a general and blanket ban which prohibits ART clinics from performing ART procedures for single women.\(^\text{14}\) The consequence for breaching the rules includes warning, confiscation, fines, and revocation of license. The compliance is monitored and enforced by health authorities across China.

In the regulations, ARTs include two main types, ie AI, and IVF-ET and its derivative technologies such as GIFT or ZIFT, ICSI, FET, and PGD. It remains contestable as to what ART procedures exactly are subject to this ban and if exceptions can be granted under certain conditions. In recent years, this issue has been the focus of debate and legal proceedings in three specific areas of ART, ie AI, posthumous implantation and social egg freezing. These areas will be chosen as case studies in this research.\(^\text{15}\)

The restriction is based on three ethical and legal principles that are applicable to all areas of ART. First is the principle of mutual consent. The 2003 Ethical Principle prescribes that voluntary and informed consent must be obtained from both the husband and wife before any ART procedure can commence.\(^\text{16}\) At practical level, ART clinics are required to check if the patients have proper documentation, including their original ID cards, valid marriage certificates, and pregnancy permission certificate.\(^\text{17}\) A series of consent form must be signed by both the husband and the wife at different stages of the ART treatment. ART clinics would not provide ART services for single women because they are unable to fulfill these formalities requirements. This is often the practical hurdle that single women could not overcome when they attempt to seek access to ART services.

The second principle is the protection of the interests of children. ART procedure is not permitted if evidence suggests that the ART procedure will cause severe physiological, psychological, and social harm to the offspring.\(^\text{18}\) This also creates barrier for single woman to have access to ART. The concern is that it would result in single

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\(^{11}\) Technical Specifications for Assisted Human Reproduction Technology (人类辅助生殖技术规范), Wei Ke Jiao Fa [2003] No. 176 (hereafter the 2003 Technical Specifications).

\(^{12}\) Ethical Principles of Assisted Human Reproduction Technology and Human Sperm Banks (人类辅助生殖技术和人类精子库伦理原则), Wei Ke Jiao Fa [2003] No. 176 (hereafter the 2003 Ethical Principles).

\(^{13}\) The 2003 Ethical Principles, Chapter 1, Recital.

\(^{14}\) The 2003 Ethical Principles, Chapter 1, Section (4), Article (1); The 2003 Technical Specifications, Chapter 3, Article (13).

\(^{15}\) Surrogacy is also a type of ART that single women may resort to in procreation. Chinese approach toward surrogacy is clear. ART clinics are prohibited from carrying out surrogacy by the NHC regulations and surrogacy agreements are held illegal, void, and unenforceable by Chinese courts. Surrogacy is not included in this research and the complexity of this issue may well justify a separate research. For a detailed discussion on surrogacy in China, see Chunyan Ding, Surrogacy Litigation in China and Beyond, 2 J. L. BIOSCI. 33 (2015); Yongping Xiao, Jue Li & Lei Zhu, Surrogacy in China: A Dilemma between Public Policy and the Best Interests of Children, 34 INT. J. LAW POLICY FAM 1 (2020).

\(^{16}\) The 2003 Ethical Principles, Chapter 1, Section (2), Article (1).

\(^{17}\) The 2003 Technical Specifications, Chapter 1, Section (2), Article (2).

\(^{18}\) The 2003 Ethical Principles, Chapter 1, Section (3), Article (3).
parenting family structure which is often assumed to be detrimental to the development of children. The third principle is public interest. Under national population and family planning law, childbirth outside marriage is regarded as illegitimate. It is to enforce this law in the area of ART that single women are denied access to ART services. The interpretation and application of these principles are the key issues in the legal proceedings on this issue. The essence of this task is to strike a balance these legitimate concerns against the procreative rights of single women.

The NHC regulations create the single biggest regulatory barrier for single women to exercise their procreative rights. Such restrictive regime has generated serious tensions and conflicts with the procreative rights of single women because ART offers a safe and reliable option for single women to exercise such rights. Potentially it may even be in breach of the procreative rights of single women without justification and shall be amended or abolished. The first and foremost question that has to be addressed is whether procreative rights of single women are recognized and protected in Chinese legal system in the first place. This will be dealt with in the next section.

What must be pointed out in the first place is that NHC does not have the competence to create or deprive the procreative rights of single women. As a ministerial level executive department of the state council responsible for the health sector of China, the NHC has the competence to adopt and enforce regulations for the sector. These three regulations are administrative in nature, which are sectoral regulatory rules applicable only to ART clinics and medical personnel providing ART services. These rules are not applicable to single women seeking ART services, nor do they impose any sanction upon them. In fact, NHC is positioned at the lower end of the hierarchy of rule-making authorities in China and it does not have the competence to adopt regulations that create or deprive the rights of citizens.

II.B. Procreative Rights of Single Women in China

Human reproduction has been subject to strict state regulation and control in China since 1979. Family planning and birth control have been enshrined as a fundamental national policy by the Constitution since 1982. Article 49 of the Constitution also prescribes that every married couple has the obligation to implement the policy. This policy is implemented through the Population and Family Planning Law. Various restrictions are imposed on human reproduction activities. First, procreation is tied to marriage. Procreation is reserved for legally married heterosexual couples. People who are not legally married, including single men and women and LGBTs, are not allowed

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19 Article 3(1), Provisions on the Functions, Structure and Staffing of the National Health Commission (国家卫生健康委员会职能配置、内设机构和人员编制规定), adopted by General Office of the CPC Central Committee and the General Office of the State Council, Ting Zi [2018] No. 59, Jul. 30, 2018, available at the official website of the NHC http://www.nhc.gov.cn/wjw/jgzn/201809/3f4e1cf5cd104ca8a8275730ab072be5.shtml (accessed Nov. 9, 2020).
20 Article 80, Legislation Law of the People’s Republic of China (中华人民共和国立法法), promulgated on Mar. 15, 2000, amended on Mar. 15, 2015.
21 Article 25 provides that the State promotes family planning to ensure population growth fits the plans for economic and social development. Constitution of the People’s Republic of China (中华人民共和国宪法).
22 Yi Fuxian, Change to the Family Planning Policy? National Population Planning Policy from an International Perspective (计划生育谋变?国际视野下的中国人口政策;国际背景下的政策调整), 7 Financial Digest (财经文摘) 30 (2009).
to have children. Second, the number of children allowed is subject to state control and regulation. Since 1980 till 2015 the policy priority was to control the ever-growing Chinese population and a nation-wide one-child policy was imposed and enforced, under which each couple was allowed to have one-child only. It was estimated that the policy reduced the number of childbirths by 400 million.23

The one-child policy was implemented through a prior authorization regime under which every couple must apply to the local health authority for a birth permit before the child was conceived. It operated on a quota system with the main purpose to control the growth of the population. Each year a target for the number of childbirths allowed was set by the central government, which would then be assigned downwards within the administration hierarchy to the community. Local officials were entrusted with the task to decide how this childbirth quota would be allocated among the suitable married couples in their community.24 Without a marriage certificates single women would not be able to obtain such permit.

Childbirth outside marriage context, without prior permission or exceeding the number allowed by the state was deemed as illegitimate with punishing consequences, including fines, forced abortion, and even arrest.25 Another significant obstacle was the household registration which was often preconditioned on the legitimacy of childbirth. This resulted in a situation that millions of children were not legally registered.26 Consequently, they were denied public services, such as education, health care, and employment, and subject to social stigma, discrimination, and even abuse, essentially living as second-class citizens.27

There has been a fundamental shift in Chinese national population policy. The one-child policy was replaced by a universal two-child policy under which married couples are allowed to have two children. This policy was written into law via the amendments to the Population and Family Planning Law in 2015.28 The policy priority has become to encourage, even to urge, couples to have a second child.29 It is largely driven by the demographic shift that China’s aging population problem has reached a crisis point potentially threatening national security.30

23 —, 400 Million Births Prevented by One-Child Policy, PEOPLE’S DAILY, Oct. 28, 2011, http://en.people.cn/90882/7629166.html (accessed Nov. 9, 2020).
24 Jiali Li, China’s One-Child Policy: How and How Well Has it Worked? A Case Study of Hebei Province, 1979–88, 21 POPUL. DEV. REV. 563 (1995).
25 Yi Zeng & Therese Hesketh, The Effects of China’s Universal Two-child Policy, 388 Lancet 1930 (2016).
26 Sun Tingling, Ministry of Public Security Conveys Top Level Meeting to Tackle the Problem of Unregistered Population which Reaches 13 Million (公安部高层开会讨论“黑户”问题，中国超1300万人没户口), Nov. 24, 2015, https://china.huanqiu.com/article/9CaKrnJRHJV (accessed Nov. 9, 2020).
27 Canada: Immigration and Refugee Board of Canada, China: Treatment of ‘Illegal’, or ‘Black’ Children Born Outside the One-Child Family Planning Policy; Whether Unregistered Children Are Denied Access To Education, Health Care And Other Social Services (2003–2007), 26 June 2007, CHN102496.E, https://www.refworld.org/docid/46c403821f.html (accessed Nov. 9, 2020).
28 Article 18, the Population and Family Planning Law of China 2015 (中华人民共和国人口与计划生育法).
29 Zhang Yiqi, Having Children is not Only a Family Business but also a State Affair (生娃是家事也是国事), PEOPLE’S DAILY OVERSEAS EDITION (人民日报海外版), Aug. 6, 2016, at page 6; Central Committee of the Communist Party of China & State Council, Decision on Implementing Full-scale Two-Child Policy and Reforming and Improving the Management of Family Planning Services (关于实施全面两孩政策改革完善计划生育服务管理的决定), Zhong Fa [2015] No. 40.
30 State Council, National Plan for National Population Development (2016–2030) (国家人口发展规划(2016-2030年)), Guo Fa [2016] No. 87.
In line with this policy shift, there has been some relaxation of the policy in recent years toward a more permissive regime on reproduction. Prior authorization was replaced by a registration procedure after 2016. Under this new regime, reproduction now is not subject to authorization by public authorities. Instead, within the limits of two children, it is up to the married couples to decide the timing and the number of children they intend to have. They only need to register the pregnancy before the child is born or even afterwards. The registration certificate can be used for access to a range of public health and welfare services, which are often free of charge.\(^{31}\) Another practical policy change is that since 2016 children born in breach of the Population and Family Planning Law can be registered under the household of either parent. Thus, the child can acquire full legal status and will be treated no different from children born legally. However, childbirth outside marriage by single women is still deemed contrary to the Population and Family Planning Law, rendering the medical bills incurred during the childbirth not being covered by social insurance and extra social maintenance fees being levied which is essentially a punitive fine.\(^{32}\)

Thus, the national Population and Family Planning Law, which governs reproduction activities in China, makes a crucial distinction between the married and unmarried. Procreative right is preconditioned on the marital status of the individual. Reproduction has become a privilege of the married couples. The procreative rights of other groups of people outside marriage is not recognized or protected. Single women having a child are deemed in breach of the Population and Family Planning Law with punishing consequences. Thus, the procreative right of single women is not recognized or protected by the prevailing law.

The NHC regulations on ART follow this distinction. ART is largely seen as a means for married couples to exercise their procreative rights.\(^{33}\) By contrast, single women who are not entitled to this right are denied access to ART. Couples suffering from infertility will have the option to choose to utilize ART technologies. The law recognizes and validates their choice by recognizing the resulting child as their martial child who will be treated in the same way as children born naturally.\(^{34}\)

Such restrictive regime contradicts the principle that the procreative right is a natural and fundamental right. In fact in various places of Chinese law, the procreation right is legally recognized to be extended to everyone regardless of their marital status. Article 17 of the Population and Family Planning Law prescribes that citizens have the right to procreate. The wording of this article is a result of careful deliberation, indicating the intention of the legislature. During the legislative process of the law, the proposition that procreative right is only confined to married couple was discussed but rejected as ‘inappropriate.’ This position is confirmed by the official commentary of the

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31 General Office of the National Health and Family Planning Commission of China, Guidelines on the Provision of Reproduction Registration Service  (关于做好生育登记服务的指导意见) Guo Wei Ban Zhidao Fa [2016] No. 20.

32 Article 41, Population and Family Planning Law of China 2015 (中华人民共和国人口与计划生育法).

33 Jiang Huilian v Luo Dingcai (离婚后未生育子女的抚养权纠纷案), (2002) Jinjiang Min Chu Zi No. 462.

34 Letter of Reply from the Supreme People’s Court concerning the Legal Status of Children Born through AI After Divorce (关于夫妻离婚后人工受精所生子女的法律地位如何确定的意见), [91] Min Ta Zi No. 12, Jul. 08, 1991.
Population and Family Planning Law published by the Legal Committee of the NPC, which contains the following statement regarding the nature of procreative right,

Procreative right of every citizen is a fundamental human right . . . . It is a natural right and it has been in existence prior to the coming into being of the state and the law. No one shall be deprived of their right to procreate at any time; this is different from political rights granted by the Constitution such as the right to vote and the right of association.35

Similarly, Article 51 of Protection of Women’s Rights Act rules that women have the right to procreate in accordance with the law and the freedom not to reproduce. A plain literal reading of the text suggests that this right extends to all women irrespective of their marital status. If the legislature intends otherwise, the wording would have been changed to ‘married women’ instead.

At the constitutional level, the text of the Chinese Constitution does not contain explicit provision on the procreative rights. Nevertheless, Article 33 of the Chinese Constitution stipulates that the state recognizes and protects human rights which as a very broad concept also include procreative rights.36 Meanwhile, the same article also contains an equal protection clause. Reading together, this article renders strong support to the argument that protective rights extend to everyone regardless of their marital status. However, the constitutional dimension of procreative rights has not been contested before the court in China.37 Therefore, it remains unclear whether procreative rights are recognized and protected by the Constitution, and where the boundary lies when public powers interfere with personal procreative rights.38

35 The editor of the book is Dr Zhang Chunsheng, who acted as the vice chairman of the Legal Committee of the NPC. It was written by legal experts who took part in the legislative process. It was aimed to provide an authoritative and accurate commentary of the law. It was published in print as a brochure and also online at the official website of the NPC. http://www.npc.gov.cn/npc/c2223/flsyywd_list.shtml (accessed Nov. 9, 2020).
36 Article 33 of the Chinese Constitution provides that all citizens are equal before the law. The State respects and protects human rights.
37 Provisions contained in the Chinese Constitution themselves do not serve as the legal basis for enforceable rights before the court. Fei Shancheng, The Enforceability of Chinese Constitution (论宪法的通用地), (3) JURIST REVIEW (法学家) 19 (1996).
38 Local enforcement of the Population and Family Planning Law may violate personal procreative rights, which have been heavily criticized. Such events are not uncommon. For example, in 1995 Ms Dong Ruijuan had to terminate her pregnancy because she was not legally married. While performing the abortion procedure, the doctor employed by the local authority fit an Intrauterine device (IUD) in her uterus without her knowledge, which prevented her from getting pregnant later even though she became qualified for having a child. The case was adjudicated by the local trial court without addressing the issue of procreative rights at constitutional level. Qi Rusxin, A Women had an IUD Fit in her Uterus without her Knowledge During Abortion, Causing Huge Suffering (做人流被上节育环和不怀孕给农妇带来巨大伤害), Nov. 7, 2001, http://news.southcn.com/community/jrgz/200111070909.htm (accessed Nov. 9, 2020).
In 2012, Mrs Feng Jianmei was subject to forced abortion when she was in the seventh month pregnancy because she has not obtained a birth permit and could not pay a fine of 40,000RMB. She did not file a lawsuit against local authority. The event triggered public outcry. —, Forced Abortion of Feng Jianmei in Ankang (安康孕妇强制引产事件) http://special.caixin.com/event_0614/#bcbf (accessed Nov. 9, 2020). The latest example is that a man in Yunnan province was subject to sterilization operation in 2017 because he had four children in two marriages which exceeded the number of children permitted by the law. Zhang Xiangmei & Liu Sijia, A Man is Subject to Forced Sterilization in Yun’nan and Local Officials Claim it’s Legal (男子在云南镇雄遭计生干部强行做结扎手术,当地政府称合规), Feb. 14, 2017, https://www.thepaper.cn/newsDetail_forward_1618056 (accessed Nov. 9, 2020).
There are various legal grounds that single women can seek redress. First, she may file complaint to the regulatory authority regarding the discriminatory practice of ART clinics. The procedure is administrative in nature. After receiving such complaint, the health bureau may conduct investigation and impose sanctions if the clinic is found in breach of the NHC regulations. Until now, this channel has only been utilized once in the Wang Xia case concerning posthumous implantation, which will be covered in section IV of this article. In addition, lawsuits may be brought before the court on the ground that the procreative right has been infringed, which will call for judicial review of the legitimacy of the NHC regulations. This is well reflected in the Xu vs Beijing Obstetrics and Gynecology Hospital (BOGH) case which is still pending before the court concerning access to egg freezing. It will be dealt with in section IV of this article. Furthermore, contract law which seems irrelevant to the issue has also been invoked as a legal ground to seek exception. This option arose in 10 cases concerning posthumous frozen-thawed embryo transfer (hereafter FET) in which the widowed women seek specific performance of the contract which had been concluded before the death of her husband. This will be examined in section IV of this article.

In recent years, repeated efforts have been made by activists to convince the legislature to amend the law. In 2017 several members of the National People's Congress submitted an advisory opinion to lift the restrictions on the exercise of procreative rights by single women. The issue was later forwarded to and addressed by the NHC. In the official response, the NHC recognizes that single women are entitled to compenstation for compensation are rare to find. In the Liu Wangxian vs Family Planning Commission of the Yima County, the plaintiff claimed civil compensation for injuries caused by complications from the sterilization operation carried out by doctors employed by local authority. The court rejected his claim on the ground the alleged wrongful actions involves the exercise of public powers. Liu Wangxian vs Family Planning Commission of the Yima County (刘望现与伊马县计划生育委员会等计划生育技术服务并发症赔偿责任纠纷上诉案), (2010) San Min Zhong Zi No.379.

Litigations for compensation are rare to find. In the Liu Wangxian vs Family Planning Commission of the Yima County, the plaintiff claimed civil compensation for injuries caused by complications from the sterilization operation carried out by doctors employed by local authority. The court rejected his claim on the ground the alleged wrongful actions involves the exercise of public powers. Liu Wangxian vs Family Planning Commission of the Yima County (刘望现与伊马县计划生育委员会等计划生育技术服务并发症赔偿责任纠纷上诉案), (2010) San Min Zhong Zi No.379. 39 Qiu Ruixian & Tu Duanyu, 《A Female Migrate Worker Becomes the First to Obtain Permission for Test-tube Baby after the Sudden Death of Her Husband》 (打工妹成全国首位得偿所愿者), GUANGZHOU DAILY (广州日报), Oct. 29, 2004.

40 —, Controversy Arising from Single Woman Seeking Egg Freezing: An Area of Legal Lacuna? (单身女性冻卵与现行法规相悖?), CHINA NEWS SERVICE, Dec. 26, 2019, http://www.chinanews.com/gn/2019/12-26/9043521.shtml (accessed Nov. 9, 2020).

41 Wu Ye & Wang Kaining, Is Egg Freezing by Single Women Incompatible with Current Regulation? (未婚女性冻卵与现行法规相悖?), Wuhan Evening Post (武汉晚报), Oct. 31, 2019; Xiang Qingping, Single Women in Jilin may Freeze their Eggs? Hurdles to Overcome for Single Women to Exercise their Procreative Rights (吉林未婚女“冻卵”？单身女性实现生育权须跨过多道坎), CAIXIN ONLINE, Feb. 11, 2018, http://china.caixin.com/2018-02-11/101210292.html (accessed Nov. 9, 2020).

42 —, National Health and Family Planning Commission Commenting on Egg Freezing by Single Women: to Investigate its Feasibility and to Promote Clinical Application Cautiously (卫计委回应单身女性冻卵 积极做好可行性研究 审慎推进临床应用), CAIXIN ONLINE, Feb. 25, 2018, http://china.caixin.com/2018-02-25/101215739.html (accessed Nov. 9, 2020).

43 Member of National People's Congress may submit legislative proposals or advisory opinions. Although the former covers issues within the jurisdiction of the NPC, by contrast the latter is less formal and relates to a wide range of issues falls within the jurisdiction of the administrative organ. Advisory opinions will be collected by the secretariat of the NPC and then transmitted to the public authority responsible for the matter in question. In 2014, the State Council adopted a decision requiring public authorities to publish reports on how issues raised in the advisory opinions are addressed. In this case, what the NPC member submitted was not a legislative proposal, but merely an advisory opinion. It was later transmitted to the NHC.
to procreative rights. Meanwhile, it suggests that the exercise of such rights requires further examination and deliberation. The NHC is in the process of revising the regulations.\textsuperscript{44} How the law in this area will develop and evolve in the future should be monitored closely.

II.C. The Jilin Ordinance Allowing Single Women Access to ART

A significant legislative breakthrough occurred in 2002 in Jilin Province. Article 30 of the local population and family planning ordinance allows single women access to ART for the first time in China.\textsuperscript{45} It was incorporated into the legislation to meet the demand by some single women to have access to ART, which was raised to the officials of local health bureau as early as 1994.\textsuperscript{46} It provides that,

\begin{quote}
If a woman, having reached legal marriage age, does not have a child and decides to remain unmarried, she may resort to legitimate medical ART to have a child.
\end{quote}

It generated a lot of controversy from the very beginning. Before the ordinance was adopted, NHC even suggested to the local health bureau that this provision should be deleted.\textsuperscript{47} After it was adopted, it attracted intense attention and discussions from the media and academics, which was not anticipated by the local health bureau. Opinions were divided into two camps. For the supporting side, the ordinance was endorsed as a pioneering progress and breakthrough in recognizing and protecting procreative rights.\textsuperscript{48} On the other side, serious concerns and doubts were raised by commentators.

\begin{quote}
\textsuperscript{44} It was reported that the NHC regulations was in the process of revision since 2013. But it remains unclear when the amended version will be adopted. Ma Suping, \textit{The ART Dilemma over Left-over Frozen Embryos (“移植”人工辅助生殖的中国困境”), SOUTHERN WEEKLY (南方周末), Oct. 15, 2015 http://www.infzm.com/content/112254 (accessed Nov. 9, 2020).

\textsuperscript{45} Article 30, Ordinance on Population and Family Planning of Jilin Province (吉林省人口与计划生育条例), adopted in 2002, amended in 2004, 2011, 2014, and 2016 (hereafter the Jilin Ordinance).

\textsuperscript{46} Duan Yuhong & He Tao, \textit{How the Jilin Policy 'Single Women May have Children' was Formulated: The Right to Procreate (吉林单独女性可生育“政策出台调堑:生育的权利), 21ST CENTURY WORLD HERALD (21世纪环球报'}, Nov. 19, 2002.

\textsuperscript{47} Chen Jieren, \textit{National Health and Family Planning Commission: Inappropriate to Grant Single Women Procreative Right through Legislation (国家计生委:不宜以法律形式规定单独女子生育权), CHINA YOUTH DAILY (中国青年报), Nov. 13, 2002.

\textsuperscript{48} Cui Hongwei, \textit{Risk is Inevitable for Any Innovation— How the Policy 'Single Women May have Children' was Formulated (创新就要承担风险— 独身女性可生育政策出台前后), LIAONING & SHENYANG EVENING POST (辽沈晚报), Nov. 13, 2002.}
They argued the law would result in single parent families, which were assumed to be detrimental to the interests of the child. Some went even further and contended that the legislation was unconstitutional because it challenged the traditional parenting structure and even threatened the status of family as a fundamental institution. Despite of these controversies, the text of this provision remains unchanged until now, although the ordinance itself has been amended four times after its adoption.

The inconsistence is caused by the overlapping jurisdiction between the NHC and provincial people's congress. Law-making power is shared at national and local levels in China. NHC as the ministry responsible for the health sector has the competence to adopt sector regulatory rules applicable to the whole ART sector across China (sector specific rule-making competence; vertical). Its rules are administrative in nature and are directed at ART clinics, prohibiting them from providing the service to single women. On the other hand, the local people's congress as the local legislative body have the competence to adopt rules to implement national legislation to suit local circumstances which are applicable within its jurisdiction only (local rule-making competence; horizontal). It is in the exercise of this authority that the People's Congress of Jilin passed ordinance to implement national population and family planning law and allowed single women access to ART as a means for procreation.

Both administrative regulation and local ordinance must be consistent with the legal rules that are superior in the sources of law hierarchy. When the rules are in conflict with each other, it is up to the State Council and ultimately the Standing Committee of the People's Congress to decide which one prevails. The court also has the power to declare those ministerial regulations and local ordinances in breach of the superior law and thus invalid and inapplicable. However, the review procedures have not been triggered and the legality of the Jilin Ordinance has not been contested.

The practical effect of Article 30 of the Jilin Ordinance is limited as the ordinance only has local effect that is being applicable in Jilin province. Other provinces are more cautious and have not followed suite to adopt similar rules. Even in Jilin Province, it seems Article 30 on access to ART by single women has not been brought into effect. Although there has been no detailed and comprehensive study into how the Jilin ordinance has been implemented in practice, it transpires that single women in Jilin province still face practical barriers to access ART. First, under the Population and Family Planning Law, child birth was subject to a prior approval regime which was replaced by a registration procedure after 2016. It applies equally to single women

49 Chen Xiangjian, “Procreative Right of Single Women” is Questionable ( 所谓“单身女性生育权”), 24 (5) LAW SCIENCE MAGAZINE (法学杂志) 70 (2003).
50 Tang Qing, Procreative Right and Generational Equality: Questioning the Reasonableness of Article 30(2) of Jilin Population and Birth Planning Ordinance（ 单身女人生育权与代际平等——评《吉林省人口与计划生育条例》第30条第2款的非合理性）, (12) LAW SCIENCE （法学） 28 (2002).
51 The local ordinance was enacted to implement the national population and family planning law. It is administrative in nature and its main content is not on ART. It stipulates how public administration of family planning is organized and how reproduction activities are regulated. Article 30 is the only provision that mentions ART. As the local legislature, the local people's congress has the power and authority to revise the law to suit social changes. All subsequent amendments do not deal with access to ART by single women. Article 30 remains unchanged.
52 Article 86, Legislation Law of the People’s Republic of China ( 中华人民共和国立法法), promulgated on Mar. 15, 2000, amended on Mar. 15, 2015.
if they decide to have a child through ART. However, the procedures and detailed requirements to implement the local ordinance have not been adopted by local health authority to process such application. There is a lack of practical guidance on how single women could obtain such documentation. No application to request ART services has been filed to the local health authority until 2018.53

Secondly, the inconsistency between the Jilin Ordinance and the NHC regulations has not been resolved. ART clinics in Jilin Province are still subject to NHC regulations which prohibit them from carrying out ART procedures for single women. Without clear guidance from the national or local health bureaus, ART clinics across Jilin Province would still refuse to perform ART procedures for single women.54 Therefore, the law largely remains dormant with little practical effect.55

III. SOCIETAL DEMANDS FOR ACCESS TO ARTIFICIAL INSEMINATION

The growing significance of extending procreative rights to single women becomes apparent when taking into account the fundamental changes that have taken place in China in terms of marriage patterns and family structures. Being single and unmarried has been on the rise and has become commonplace in China. Official statistics shows that, among people aged 20–59, 170 millions of them remained single in 2013,56 and has increased steadily to 200 millions in 2015,57 and 220 millions in 2017 accounting for 15 per cent of the total population.58 This trend is also observable in the proportion of women remaining unmarried at the reproduction age between 25 and 34, from

53 National Health and Family Planning Commission of China, Reply to the 3395th Proposal of the Fifth Session of the 12th National People’s Congress (对十二届全国人大五次会议第3395号建议的答复), Jul. 27, 2017, http://www.nhc.gov.cn/zwgk/jianyi/201712/8a24174d2522466997c6942c65052ce5.shtml (accessed Nov. 9, 2020).

54 Telephone interviews with all six authorized ART clinics in Jilin province confirmed that they would refuse to perform ART procedures for single women. Xiang, supra note 41; This is also the view shared by other ART clinics across China when they face requests for ART from single women. This has been confirmed in provinces such as Henan, Guizhou, Sichuan, and Jiangsu by news reporters.

(1) Zong Lei & Zheng Xiaoqian, A Leftover Woman Aged 33 in Nanjing Becomes a Mum through AI; This is Strictly Prohibited in Henan (剩33岁剩女人工授精当妈,河南严禁剩女女性实施), HENAN BUSINESS DAILY (河南商报), Mar. 29, 2014;

(2) Cai Xue & Han Lixin, Leftover Women Resort to AI to Have Children? Strictly Prohibited (“剩女”借精生子?剩女女性严禁“人工授精”), GUIZHOU METROPOLIS DAILY (贵州都市报), Apr. 2, 2014;

(3) Zhang Rui, A Single Woman in Chengdu Requests for AI but Denied by the Hospital (单身女求“借精”医院拒绝“不行”), TIANFU MORNING POST (天府早报), Mar. 27, 2014;

(4) Wang Chunxia, Is it Feasible for Single Women to Have Children through AI? (单身女性想要“借精生子”,可行吗?), JINLING EVENING POST (金陵晚报), Dec. 9, 2019.

55 There has been only one reported news story that a single woman in Nanjing aged at 33 became pregnant through AI after two failed relationships. She admitted that it was not done through normal legitimate channel, but through connection and bribery. Zong & Zheng, supra note 54.

56 Yan Xi, China is Witnessing the 4th Wave of Singledom—Women in Shenzhen Seeking a Male Partner with a Monthly Income of 16 k (中国面临第4次单身潮,深圳女性要求男方月薪1.6万), CHINA FUND NEWSPAPER (中国基金报), Mar. 30, 2017.

57 Jing Yishan, China’s Single Population Reaches 200 Million (单身男女两亿了! ), HEALTHY TIMES (健康时报), Nov. 18, 2016, at page 1.

58 —, China’s "Single Economy" Stimulates New Consumption Trend, PEOPLE'S DAILY ONLINE, Mar. 14, 2019, http://en.people.cn/n3/2019/0314/c90000-9556084.html (accessed Nov. 9, 2020).
10.02% in 2000 to 26.97% in 2010, a 2.6 times increase in 10 years. This corresponds to change in marriage patterns: marriage rate has been in steady decline from 9.9% in 2013 to 7.2% in 2018, and by contrast, divorce rate on the rise from 2.6% in 2013 to 3% in 2016.

It is against this background that demanding access to ART by single women began to come into the spotlight since around 2000. There is no complete and comprehensive empirical research on the practice of access to ART by single women in China. The data of this research derive from news reports and court judgments that are publicly available in which various types of ART services are involved.

The most common area of ART service for single women to exercise their procreative rights is to have access to AI using sperms from sperm banks. In authorized ART clinics, strict quality control and regulations ensures AI is a safe and reliable option. However, AI falls within the scope of prohibition lay down by the NHC regulations. The ART clinics across China would not provide AI service for single women, otherwise they would be in violation of the NHC regulations and subject to sanctions.

Although the NHC regulations prohibit ART clinics from providing the service for single women, it does not eliminate the demand for AI service by single women. As early as in 2000, it was reported in the news that a 28-year-old Miss Ye Fan in Chengdu city intended to conceive a baby through AI. She had a successful career in an IT company after receiving her master degree in mathematics from one of the top universities in China. After six relationships ended up in failure, she lost interest in marriage and decided to remain single. Her request for AI service with sperm from sperm bank was denied by ART clinics. Her story is not alone; three other similar stories have been reported in the news in recent years. It was estimated that 2 per cent of single women would attempt AI. ART clinics in China often receive a number of requests for such procedure every year. These women, at their 30s, are usually financially independent with a successful career, but unable to find a suitable partner to marry.

There has been only one reported case in China where a single women named Miss Chen Yafang from Nanjing city managed to conceive a child through AI in 2014. Her story is much similar to Miss Ye Fan. Miss Chen was well educated with a college education, having a successful career, but unable to find a partner to marry.

59 Wang, supra note 54.
60 News Commentator, Marriage Rate in Steady Decline and Divorce on the Rise—a Worrisome Trend? (结婚率连降 结婚率攀升可堪忧虑), GUANGMING ONLINE, Apr. 2, 2019 https://guancha.gmw.cn/2019-04/02/content_32708800.htm (accessed Nov. 9, 2020).
61 Dai Wanying, A Single Woman with Master Degree Intends to Undergo AI and Who Can Help Her Become a Unmarried Mum? (未嫁女硕士想要“人工授精”谁能谁能帮她做未婚妈妈?), TIANFU MORNING POST (天府早报), Oct. 8, 2000.
62 (1) —, A Leftover Woman’s Request to Have a Child through AI is Refused— Controversy over Banning Single Women Access to ART (剩女欲借助代孕生子遭拒, 常州单亲女性人工授精惹争议), Nov. 5, 2019, http://eladies.sina.com.cn/gq/2009/1105/1607931095.shtml (accessed Nov. 9, 2020).
   (2) Gao Hui, Single Woman Claims Procreative Right: Shall White-collar Leftover Women be Allowed Access to AI (单身女性要求生育权,白领剩女能否人工授精), SANJIN METROPOLIS DAILY (三晋都市报), Nov.4, 2010;
   (3) Wang, supra note 54.
63 Liu Zhan, Challenging Marriage: Single Women Demand Access to AI (挑战婚姻:独身女性呼唤“人工授精”), (12) HEALTHY WORLD (健康天地) 18 (2002).
64 Wang Hui, Unmarried but Intends to be a Mum—Problematic (不想结婚却想当妈妈 “非妈妈”问题多多), BEIJING MORNING POST (北京晨报), Nov. 10, 2002.
degree and had a stable and secure job with decent salary. She had two unsuccessful relationships and could not find a suitable partner to marry. Aged 33, she was worried about the possibility of not being able to bear a child and decided to have a child through AI. The procedures she had were carried out not via normal channels but through connections and even bribery.65 The ART clinic in question was in clear violation of the NHC regulations and may be sanctioned by the local health authority.

With their requests for AI denied by authorized ART clinics, some single women would turn to underground market or travel abroad to seek the service. It has been reported that underground sperm donation have been in operation for many years across China, although the exact scale is difficult to estimate. It was largely enabled and facilitated by online platforms and communications.66 One of these platforms, juanjing.net, claimed to be the first and biggest sperm donation website and began to operate since 2012 and had 15,000 registered users.67 The process was undertaken in a DIY manner outside medical facilities, often in hotels. Conception was achieved through vagina injection immediately after fresh sperm was extracted through masturbation or even unprotected sexual intercourse,68 with a price tag ranging from free to 8000RMB. This practice carries great health and ethical risks and was prohibited by Chinese law.

Some rich and well-off women would travel abroad to seek AI treatments. Six single women successfully gave birth to a child after undergoing AI overseas, including one in Thailand,69 one in Australia,70 and four in the USA71. The figure seems to be on the rise. An Australia ART clinic has reported a significant increase of on-site visit by interested Chinese patients from two patients a year to two every month.72 This trend would intensify inequality in access to ART as overseas IVF treatment may cost half a million RMB, far beyond the financial reach of many ordinary single women.73

65 Xiao Yu, Leftover May Become Crazy; A Single White-collar Woman Parent a Child through AI (剩女也疯狂：单身女白领人工授精当妈记), (12) Life and Partner (人生与伴侣) 6 (2014).
66 —, Infertile Couples Turn to Sperm Black Market, SHANGHAI DAILY, Sept. 18, 2012, http://www.china.org.cn/china/2012-09/18/content_26553863.htm (accessed Nov. 9, 2020).
67 Shi Zheng, Watch Out! Undercurrent of the Underground Market for Sperm Donation (当心！地下“助孕”暗流涌动), CHANGJIANG TIMES (长江商报), Apr. 19, 2015, http://www.changjiangtimes.com/2015/04/500749.html (accessed Nov. 9, 2020).
68 —, Undercover Report: Sperm Donor Propose Direct Sexual Intercourse for Conception (女记者卧底捐精，捐精人称可直接发生性关系)，May 29 2015, http://xj.people.com.cn/n/2015/0529/c188521-25057196-2.html (accessed Nov. 9, 2020).
69 Yang Shengquan, Frustrated by Unsuccessful Relationships, a Female Doctor Travelled to Thailand for AI and Suffers Psychiatric Disorders after Becoming Pregnant (女博士感情受挫赴泰国人工授精 怀孕后精神失常), CHONGQING ECONOMIC TIMES (重庆商报), Aug. 13, 2013.
70 Rosemary Bolger, IVF Tourism: The Chinese Women Travelling to Australia for a Baby, SBS NEWS, Jan. 29, 2018, https://www.sbs.com.au/news/ivf-tourism-the-chinese-women-travelling-to-australia-for-a-baby (accessed Nov. 9, 2020).
71 Fu Ziyang, The Single Women that Travelled Abroad for AI (到海外授精子的单身女人), THE BEIJING NEWS (新京报), Feb. 25, 2019, at pages A14–15.
72 Bolger, supra note 70.
73 It was reported in the news that the AI treatment in Thailand and subsequent child care cost even bankrupted a middle-class university lecturer in 2013 in the Nanchang city of Jiangxi province. Though having a successful career, Ms Yang had difficulties in socializing and lost confidence in marriage and remained single at the age of 30 after unsuccessful relationship. She quit her job and sold her apartment to pay for the cost. In fear of objection from her family, she cut off contact with them and disappeared. Later she was found homeless and pregnant and suffering from psychiatric disorders. Yang, supra note 69.
Another related area is extraction of sperm from the deceased after his sudden and unexpected death. Usually the procedure must be performed within 48 hours of his death when sperms remain alive, which could then be frozen to preserve its reproductive capabilities and used later to conceive a child. It remains unclear if the procedure is prohibited by the NHC regulations and ART clinics are uncertain as to whether they should proceed with the procedure. The first reported case of this procedure in China happened in 2006 in Sichuan Province. In this case, the husband Mr Liu Qiang died from traffic accident aged at 23. His widowed wife aged 26 intended to have a child of their own and had his sperm successfully extracted and preserved by doctors. By contrast, in 2011 local ART clinics in the Changsha city of Hunan Province refused to carry out the procedure after a man died from falling off from the 25th story of a building where he was working. Even though the clinic agreed to extract the sperm, its later use for AI by the widowed wife still faces regulatory barriers. The reasons lies in that after the death of the husband, the widowed wife becomes legally unmarried and ART clinics are prohibited from carrying out AI for single women. This issue will be dealt with in the next section of this article.

In the abovementioned cases, no legal proceeding was initiated by the parties to challenge the decision in court or before administrative authorities. On the other hand, there have been 12 legal cases on posthumous implantation of frozen embryo by widowed women and one pending court case on social egg freezing. These cases offer rare examples on how the court would address the controversial issue involved. This will be the focus of the following two sections.

IV. POSTHUMOUS IMPLANTATION BY WIDOWED WOMEN

ART technology enables control and maneuver over the process of human reproduction. Genetic gametes are extracted from human body, which could be kept alive through cryopreservation for a significant long period of time for later use. Conception occurs in a test tube under a controlled environment in a lab without sexual intercourse. Due to these technological capabilities and advances, ‘birth after death’ is not mere science fiction but technologically feasible, which has raised challenging moral and ethical issues.

This issue was first raised in Mrs Wang Xia’s case in 2004, which has caused a lot of media attention and coverage. Her case offers a representative example. Five years
into marriage, Mrs Wang was diagnosed with oviduct blockage and could not conceive naturally and required IVF procedure. She and her husband had 15 embryos frozen at an ART clinic in Guangzhou. The first implantation failed on February 28, 2004. Unfortunately, her husband died in a traffic accident on May 12, 2004. In June 2004, she requested the clinic to perform the implantation procedure using their frozen embryos as they had planned, thus initiating a new cycle of treatment. The ART clinic was of the opinion that the procedure shall not proceed on the ground that Mrs Wang had become legally unmarried after the death of her husband and ART for single women is prohibited by the NOH regulations. Mrs Wang filed an administrative complaint to the local health bureau in Guangdong Province, which was uncertain how the regulations shall be interpreted and applied and referred the issue to the NHC. In an official written reply in October 2004, the NHC granted permission to the clinic to carry out the procedure for Ms Wang.

Since then there have been 12 cases concerning posthumous FET, all arising from very similar circumstances—widowed women seeking to conceive a child using their frozen embryo after the sudden and unexpected death of the husband. The full texts of eight court judgments are published and two with a summary reported in the news. The focus of these legal proceedings is whether the NHC ban on access to ART by single women covers widowed women having frozen-thawed embryo implantation procedure. This section will look at how the court approaches the issue and examine what implications these cases have upon access to ART by single women in general.

It is a welcoming development that in the majority of the cases (7 out of 10) the court allowed the procedure to proceed, which essentially granted an exception from the ban on access to ART by single women. The results are welcoming. However, the legal ground is not based on the recognition of the procreative rights of the widowed as single women, but rather on the procreative rights of a married couple. What the court has ordered is specific performance of a prior existing contract that had been signed and concluded between the married couple jointly as one party and the ART clinic when the husband was still alive. Mutual consent from both the husband and wife had to be established, although consent of the deceased husband was implied from his behavior when he was still alive and recognized by the court.

IV.A. Specific Performance of a Prior Existing Contract

In all 10 cases, before the death of the husband, the married couple had already commenced the IVF treatment procedure in the ART clinics and had their embryo frozen. Thus, the courts all agreed that a contract had been signed and concluded between the married couple jointly as one party and the ART clinics as the other. This contract is legal, binding, and valid. In seven cases, the court ruled that the clinic should continue to perform this contract after the death of the husband.

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77 The practical barrier is that the husband cannot sign the consent form, without which the procedure cannot proceed as each IVF cycle requires renewed mutual consent from both the husband and wife.

78 Its decision is brief and reads as follows:

After discussion by experts, it is decided the frozen-thawed embryo transfer procedure requested by the applicant constitutes a part of the ART process. Approval is granted to the ART clinic to carry out such procedure for the applicant.

Qiu & Tu, supra note 76.
The crucial questions remain as to what ART procedures exactly are covered by this contract. The IVF procedure is often time consuming and will go through different stages and steps. Several embryo implantation procedures may be attempted before successful pregnancy and each has the potential and possibility to result in the creation of new life. Extra leftover embryos may be frozen and persevered for many years, which could then be thawed and implanted to conceive a child. In medical practice, consent does not operate on a ‘once for all’ basis, instead it is an ongoing process and a renewed consent needs be obtained before each stage. The question remains as to what was agreed by both the wife and the husband when he was alive. In other words, whether each IVF stage constitutes an independent and separate contract or the whole process as a package is one contract. How the court approaches this issue would in turn determine the scope of ART services that the widowed women are allowed to have access to.

The significance of this issue is well illustrated by a comparison of two cases arising from similar circumstances. In the Ya Chunli case, the court adopted a narrow approach by holding each step of the IVF treatment as constituting an independent and separate contract. 79 In this case, Mrs Ya Chunli and her husband Mr Bo Lianzhou had harvested five embryos on January 5, 2017. Three days later fresh embryos were implanted but did not lead to pregnancy. The extra three embryo were frozen and preserved. Unfortunately, the husband died on the February 15, 2017 and Mrs Ya’s request for implantation using frozen embryo was refused by the clinic.

In the judgment, the court paid much attention to the consent form signed by the married couple when the husband was still alive. The form was only signed for a particular stage of the treatment, ie implantation of fresh embryo, which was deemed by the court as constituting the content of the contract concluded between the married couple and the clinic. Thus, the court stated that the contract had been discharged and came to an end when first implantation procedure was carried out despite the fact that it did not result in pregnancy. It held that the essence of Mrs Ya’s request for FET is to establish a new contractual relationship with the clinic. Such a new contract requires consent from both the husband and the wife, which could not be fulfilled after the death of the husband. 80 Therefore, the court rejected her claim.

This is in stark contrast with the Zhang Qin case, in which the court did not confine itself to the formalities of the consent form, instead adopted a teleological approach by looking at the purpose of the contract which was to conceive a child. 81 In this case Mrs Zhang Qin and her husband Mr Li Lin successfully harvested eight suitable embryos and had them frozen and stored on August 26, 2017. A consent form for the storage phrase was signed by both of them. Unfortunately, Mr Li died the next day from traffic accident. The ART clinic refused to carry out the embryo implantation procedure requested by Mrs Zhang. It argued that such procedure was not included in

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79 Ya Chunli v The First People’s Hospital of Yunnan Province (庞某与云南省第一人民医院医疗服务合同纠纷一案民事判决书), (2019) Yun 0112 Min Chu No. 9370.
80 This distinction between the prior existing contract and a new contract has been made clear by the court in the Yang Yonghui judgment. If it is a new contract, mutual consent must be obtained from both the husband and wife, which would be practically impossible after the death of the husband.
81 Zhang Qin v Sichuan Academy of Medical Sciences/Sichuan Provincial People’s Hospital (张琴与四川省医学科学院/四川省人民医院医疗美容合同纠纷一案民事判决书), (2018) Chuan 0105 Min Chu No. 12958.
the contract signed by the married couple, which was merely a medical storage contract. The court rejected its argument and made the following statement:

When Mrs Li Qin and Zhang Lin signed the contract, their ultimate purpose was to conceive a child, not merely to store their frozen embryos. Although ART often consists of several steps and stages due to its technical characteristics, this does not affect the integrity of the contract as a whole.

This approach is also adopted in four other cases, in which the court would treat the whole process of treatment as one complete contract consisting of different stages. Accordingly, the wife and the husband had jointly signed the contract for the whole package when he was alive. Several implantations may be attempted until conception is successful. The death of the husband does not affect the continued performance of this contract. Posthumous FET procedure requested by the widowed wife is an integral part of the ART treatment process. It is based on this understanding that the clinics are obliged under the contract to perform such procedure; it is to discharge its obligations under a prior existing contract. In other words, the ART clinic shall continue the ART treatment process even after the death of the husband.

Another related issue is the question of when does this contract terminate. The significance of this issue lies in that it is not uncommon that embryos may be stored for a while even for years due to various reasons. Frozen embryos still have the capability to develop into fetus after up to 15 years in storage. It seems the court is willing to take a pro-right approach by extending the lifespan of this contract to include the storage period. This is well illustrated in the Xiao Qin case. Xiao Qin and her husband had four embryos frozen at the clinic in May 2017. Implantation of the embryos was postponed because Xiao Qin suffered from OHSS caused by the extraction of her eggs. In July 2019, the husband died from an accident. Her request for implantation procedure was refused by the clinic. One reason relied on by the clinic was the fact that the storage fee had not been paid for up to two years, which was deemed as abandoning the embryos based on the consent form they had signed.

82 Li Lianfeng v Yunnan Jiuzhou Hospital Ltd (李连风与云南九洲医院有限公司医疗服务合同纠纷——民事判决书), (2020) Yun Min Chu No. 676; Chen Yan v The 2nd Affiliated Hospital of Wenzhou Medical University, Children’s Hospital Affiliated to Wenzhou Medical University (陈燕与温州医科大学附属第二医院, 温州医科大学附属育婴儿童医院医疗服务合同纠纷——民事判决书), (2019) Zhe 0302 Min Chu No. 4777.
83 Chen Yan v The 2nd Affiliated Hospital of Wenzhou Medical University, Children’s Hospital Affiliated to Wenzhou Medical University (陈燕与温州医科大学附属第二医院, 温州医科大学附属育婴儿童医院医疗服务合同纠纷——民事判决书), (2019) Zhe 0302 Min Chu No. 4777.
84 Qiu & Tu, supra note 76.
85 Sha Sha v Yunnan Jiuzhou Hospital (沙莎与云南九州医院医疗服务合同纠纷——民事判决书), (2019) Yun Min Chu No. 6987.
86 —, Frozen Embryo Baby Born in Shenzhen after 15 Years of Storage (深圳最长冻龄“胚胎宝宝”诞生,——出生就有“15岁”), http://news.youth.cn/jsxw/201705/t20170525_9874502_1.htm (accessed Nov. 9, 2020).
87 Zhang Jianbo, Test-tube Baby after the Death of the Husband? A Lawsuit between the Widowed Wife and the ART Clinic without Real Division in their Opinions (丈夫身亡能否继续试管婴儿手术? 妻子与医院打了——场默默官司), Jun. 24, 2020, https://tech.sina.com.cn/roll/2020-06-24/doc-irircuvk0183729.shtml (accessed Nov. 9, 2020).
The court pointed out that the purpose of the contract signed by Xiao Qin and her husband with the clinic was to conceive a child, which had not been achieved due to Xiao Qin’s health reasons, and thus the contract had not been terminated. Furthermore, though the clinic may unilaterally terminate the contract and destroy the frozen embryos under the contract, it had not done so. Thus, the court supported the claim of Xiao Qin and ordered the performance of the contract. In practice, the ART clinics would usually not destroy forgotten embryos and allow the payment of overdue charges at a later stage. This would allow a prolonged time period for the widowed women to have access to their frozen embryos to conceive a child.

However, one important limitation of this contract-based approach is that it creates legal obstacles preventing the widowed women from using their frozen embryos to conceive a second child after the death of the husband. Even though the lifespan of the contract extends to the storage period, it will come to an end when it is discharged through performance, ie a child has been successfully conceived. If the widowed women intend to use the leftover embryos to conceive another child after the death of her husband, this would constitute a new contract which still requires mutual consent from both the husband and the wife. The death of the husband essentially renders this condition impossible to be fulfilled and her claim will not be supported by the court.

This drawback is well demonstrated in the Qin Huiping case. On October 8, 2014, Mrs Qin Huiping and her husband Mr Ma Xin had eight embryos frozen at the ART clinic. On August 22, 2015, embryo implantation led to successful pregnancy and a baby girl was born on May 5, 2016. Unfortunately, the husband died from traffic accident on August 27, 2015. On February 9, 2018, Mrs Qin requested the clinic to perform another implantation procedure after paying up all the storage fee, which was refused by the clinic. In the judgment, the court pointed out that the clinic had already carried out two FET procedures, resulting in a successful pregnancy and childbirth. Therefore, the court concluded that the contract between the couple and the clinic had been discharged and thus terminated, after which their legal relationship had turned into a storage contract. When she attempted to conceive a second child, this constituted a new contract which would require a fresh consent from both the husband and the wife. It is based on this ground that Mrs Qin’s request for FET procedure to conceive another child was not supported by the court.

A comparison of the Qin Huiping and Xiao Qin cases offers some very important findings. In both cases, the couple began the IVF process when the husband was still alive. They had their embryos frozen for more than two years. The crucial difference between the two cases is that Xiao Qin had not successfully conceived a child through ART whereas Mrs Qin Huiping had done so. Accordingly, the termination of the contract concluded between the married couple and the clinic when the husband was still alive was triggered by a child being successfully conceived through ART.

**IV.B. The Construction and Application of the Ethical Principles**

The second step in the analysis of the court decisions is whether the performance of the contract is barred because of the three moral and ethical principles underlying all ART
operations, ie mutual consent, protection of public interests, and the interests of the child contained in the NHC regulations. It is often based on these three principles that the clinic refused to perform the FET procedure requested by the widowed women. The crucial question is how these principles shall be interpreted and applied. In the majority of the judgments (eight out of nine) the court adopted a pro-right approach and held that the procedure was compatible with these principles. There is only one judgment that ruled otherwise.

First is the principle of mutual consent.\(^{88}\) ART is deemed as a means for the married couple to exercise their procreative rights, and consent from both the husband and the wife must be obtained before the commencement of each cycle of treatment. Though the written form signed by the husband is the best evidence to prove his consent, it is practically impossible to obtain his signature after his death, posing practical barrier for the widowed woman to have access to FET procedure.

In the *Guo Yingjun* case in 2017, the court adopted a stringent and literal approach toward the construction of consent.\(^{89}\) Mrs Guo and her husband had nine embryos frozen and preserved in February 2014. The first baby was born in August 2014. In March 2017, they decided to have a second child using the frozen embryo and the first implantation was not successful. Unfortunately, her husband committed suicide and died in May 2017. The court ruled that mutual consent in writing from both the husband and the wife must be obtained before each implantation, which could not be fulfilled after the death of the husband. Thus, the court rejected her claim for FET procedure.

By contrast, the court in the other eight cases adopted a permissive and facilitative approach by ruling that consent could be implied and allowed the FET procedure to proceed for widowed women. This is well illustrated in the *Yang Yonghui v Zhoushan Women & Children Hospital* judgment in December 2016.\(^{90}\) In this case, after being diagnosed with infertility problem, Mrs Yang aged 32 and her husband decided to undertake IVF treatment and signed the consent forms in March 2016. Five embryos were frozen and preserved for up to one year. Unfortunately, the fish boat where her husband was working went missing in a fishing trip in the ocean and only the wreckage was found later. All 17 crew on board were presumed dead by local fishery authority and their bodies were never recovered.\(^{91}\) In July, her request for embryo implantation was denied by the ART clinic, which led to the lawsuit in October 2016.

The court pointed out that, despite the fact that the husband was not able to sign the consent form for this particular cycle of implantation, he had signed three other consent forms in which he had expressed his consent for the IVF treatment as a package. In other words, the ART process consisting of multiple cycles shall be seen as a whole. The effect of consent to previous IVF cycles extends to cover subsequent ones.

\(^{88}\) Article 2(1) of the 2003 Ethical Principles provides that written mutual consent from the husband and wife must be obtained before any ART can proceed.
\(^{89}\) *Guo Yingjun v Reproductive Hospital Affiliated to Shandong University* (鲁某健与山东山大生殖医院有限公司合同纠纷 一审民事判决书), (2017) Lu 0103 Min Chu No. 7541.
\(^{90}\) *Yang Yonghui v Zhoushan Women & Children Hospital* (杨勇会与舟山市妇幼保健院医疗服务合同纠纷 一审民事判决书), (2016) Zhe 0902 Min Chu No. 3598.
\(^{91}\) Zhang Yan et al., *A Dangerous Ocean Fishing Trip* (危险的出海), (23) *CAIXIN WEEKLY* (财新周刊) 40 (2016).
court also held that, carrying out the implantation would not go against the intention of the deceased husband taking into consideration of four factors: (i) the manifestation of his own intention; (ii) his own conducts; (iii) traditional ideas widely shared by local community; (iv) human nature.

The pro-right philosophy was made unequivocal in two other judgments in which the court held that consent could be established by the mere fact that the husband had taken up the ART treatment when he was alive. Following this approach, the threshold for establishing consent is extremely low. The court is very likely to conclude that consent can be established unless the husband had indicated otherwise before death. This would render support for the widowed women to have access to the FET procedure.

The problem with this approach is that it may go against the intention of the deceased husband and jeopardize his procreative rights. The reason lies in that it may not lead to the discovery of the true intention of the deceased. Intention is not fixed and may change due to significant changes in circumstances. Death certainly amounts to one of such events. If given the chance to decide, they may not agree. There have been cases where some cancer patients with the prospect of certain death did not agree to resort to the ART procedure in the first place or withdrew his consent before a new cycle of implantation took place. Implying the intention of the diseased would stretch the concept of consent to a breaking point.

Serious doubts about the true intention of the deceased husband may also arise if there is significant time gap in the IVF treatment process. For example, in the Xiao Qin case, the embryos had already been stored for more than two years after the first attempt failed. During this prolonged period, procreative intention may change due to various reasons such as financial deterioration, serious illness, and relationship breakdown. In particular, failure to pay storage charges on time may also be construed as lacking procreative intention because such event could lead to the abandoning and destruction of the embryos by the clinic. This may cast doubts over the appropriateness of court implying consent of the deceased.

The principle of mutual consent is also related to the second principle, i.e. protection of the interests of the child. In terms of the legal status of the resulting child, consent serves the very important function as the legal basis of legal fatherhood. If the consent

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92 The husband together with his wife began to undertake the ART treatment when he was still alive. They had attempted embryo transfer procedure but with no success. Based on these facts, it is inferred that it is not against the intention of the deceased husband to perform another FET procedure.

Li Lianfeng v Yunnan Jiuzhou Hospital Ltd, (2020) Yun Min Chu No. 676. Sha Sha v Yunnan Jiuzhou Hospital (沙莎与云南九洲医院医疗服务合同纠纷——— 审民事判决书), (2019) Yun Min Chu No. 6987.

93 Chen Hui & Ge Feng, A Young Wife Intends to Conceive a Child for Her Husband Suffering from Incurable Disease (年轻妻子执意为癌症丈夫生"废腹子"受阻), YANGCHENG EVENING NEWS (羊城晚报), Jan. 25, 2010.

94 Li & Guo v Guo & Tong, Guiding Case No. 50 of the Supreme People's Court of China, 15th April 2015.

95 Zhang, supra note 87.

96 The 2003 Ethical Principles prohibit ART procedures that would be detrimental to the resulting child with physiology, psychology, and social harm. The 2003 Ethical Principles, Chapter 1, Section 3, Article 3.

97 Chinese legislation remains silent on the issue of legal parentage in ART. The only legal authority to fill in this vacuum is a Letter of Reply issued by the Supreme People's Court in 1991, which stipulates the legal
from the deceased husband can be established, even though it is implied, he will be regarded as the legal father of the resulting child. The widowed woman who gave birth to the child will be the legal mother. This will establish certainty in terms of legal parentage.98 The resulting child will be deemed as their marital child and is treated equally as child born naturally in terms of legal rights and obligations.

Though legal parentage could be established, it will not change the fact that the child will be born fatherless in a single parent family, which is often presumed to be detrimental to the development of the child. In the Yang Yonghui case, the court rejected such assumption explicitly, which reads as follows:

It is likely that the child would born into a single parent family, nevertheless, it does not lead to the certain conclusion that the child would suffer physiological, psychological and social harm.

In terms of economic conditions, the concern is that single parent would often receive less income than traditional two-parent family and thus the child would be worse off. In response to such consideration, the court held that ‘material conditions and economic resources shall not be deemed as a factor to limit the exercise of procreative rights’.99 In other words, economic consideration may be a legitimate and justifiable concern, but irrelevant to the exercise of procreative rights. In addition, the mother-to-be does not assume the burden to prove that she has the material and financial resources to raise the child alone. In this respect, acceptance and support from the extended family is also an indication that the well-being of the child will be taken care of. This position has been accepted in three other court judgments.100 This is an applaudable development which may render support for recognizing the procreative rights of single women in general.

doctrine of general application for deciding legal parentage in ART. It rules that:

During the persistence of a marriage between a husband and wife, if both parties agree to have AI, the resulting child is deemed to be their marital child. The rights and obligations between the child and the parents are governed by relevant rules in the Marriage Statute.

The Supreme People’s Court, Letter of Reply concerning How to Decide the Legal Status Born through AI in the Event of Divorce (关于夫妻离婚后人工授精所生子女的法律地位如何确定的复函), [1991] Min Ta Zi No.12.

98 In the Guo Yingjun case, because the court held that consent from the husband could not be obtained and thus legal parentage of the child could not be established. Therefore, the court held posthumous implantation would lead to uncertainties in the legal status of the child, causing psychological pressure upon the child and thus detrimental to his development. On the contrary, in the Yang Yonghui case, consent from the husband was implied and therefore legal parentage would not be problematic. This led to the court to conclude that, ‘child born through ART are treated equally as child born naturally in terms of legal rights and obligations.’

99 Yang Yonghui v Zhoushan Women & Children Hospital (杨勇辉与舟山妇女儿童医院医疗服务合同纠纷 —— 审民事判决书), (2016) Zhe 0902 Min Chu No. 3598.

100 Li Lianfeng v Yunnan Jiuzhou Hospital Ltd (李连锋与云南九洲医院有限公司医疗服务合同纠纷 —— 审民事判决书), (2020) Yun Min Chu No. 676; Sha Sha v Yunnan Jiuzhou Hospital (沙莎与云南九洲医院医疗服务合同纠纷 —— 审民事判决书), (2019) Yun Min Chu No. 6987; Zhang Lei, She Intended to Have a Baby with Her Deceased Husband but was Refused by the Hospital. The Court Rules Today. (丈夫去世妻子欲移植胚胎生子被医院拒绝, 法院这么判) Beijing Evening Post (北京晚报), May 22, 2019.
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It is based on these considerations that in six cases the court distinguished widowed women from single women. And, an exception is granted to allow a widowed woman to conceive a child through posthumous FET using embryos obtained when her husband was still alive. The wording was carefully formulated by the court to ensure that the derogation is narrowly defined, which is well indicated by the following statement in the Yang Yonghui case:

As a widowed woman, the claimant intended to have a child using frozen embryos obtained by her and her husband through ART. This is different from single women resorting to ART which is prohibited based on the principle of public interest. Therefore, the ART clinic does not violate the abovementioned principle of public interest and is allowed to proceed to perform the ART procedure for the claimant.

In conclusion, it is a welcoming development that the Chinese courts are willing to allow the widowed women to have access to posthumous implantation procedure. However, they should not be read as conferring single women a general right of access to ART. The legal ground is contractual, i.e., specific performance of a prior existing contract jointly signed by the couple when the husband was alive. Mutual consent from both the husband and the wife has been established, though the consent from the deceased husband was implied through expansive interpretation of the concept. Therefore, it does not depart from the current understanding and ideology that access to ART is limited to legally married heterosexual couples.

V. EGG CRYOPRESERVATION FOR SOCIAL PURPOSES

In China, the first baby conceived using frozen eggs was born in 2004 in Beijing. Since then egg cryopreservation technology has been used for medical purposes. Forty-five childbirths using frozen eggs have been reported in the news, although the precise data are not available. A well renowned ART hospital in Shanghai carries out

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101 In the Guo Yingjun case, the court reached the opposite conclusion. It adopted a literal reading of the 2003 Ethical Principles and ruled that carrying out the implantation would be in breach of the provision because she lost her marital status due to the sudden death of her husband. Guo Yingjun v Reproductive Hospital Affiliated to Shandong University (郭英俊与山东大学附属生殖医院有限公司合同纠纷—— 审民事判决书), (2017) Lu 0103 Min Chu No. 7541.

102 —, China’s First Frozen Egg Baby Born, China Daily, May 12, 2004.

103 This has been made clear by an official notice from the health bureau in Shanghai, which prescribes that egg cryopreservation shall be used only in the following two circumstances: (1) During IVF treatment for couples with infertility problem, after eggs are retrieved, husband fails to produce sperm and the couple do not accept sperm donation; (2) for women who are diagnosed with cancer or other serious disease and their reproductive organs may be damaged by the treatment.

Shanghai Municipal Commission of Health and Family Planning, Notice on Quality Management of ART Services in Shanghai (关于做好本市人类辅助生殖术服务项目质量控制的通知), Hu Wei Ji Fu You [2013] No. 4.

There has been one reported case in Zhejiang where two single women aged at 26 and 28 suffered from breast cancer and the ethical committee approved their requests to undertake egg freezing treatment to preserve their fertility from damage of chemotherapy. Xie Jinyi, Can I have my Eggs Frozen? (我可以冷冻保存我的卵子吗?), Metropolis Express (都市快报), June 5, 2017, at page A12.

104 (1) Xie, supra 103;

(2) Guo Xinghua, Waiting for the Newborn (迎接生命的应征), ZHEJIANG DAILY (浙江日报), Mar. 10, 2015, at page A14;

(3) Lv Shuang, Who Should Consider Egg Freezing (谁适用冷冻卵子技术), (29) ORIENTAL OUTLOOK
10–15 egg freezing procedures every year since 2011.\textsuperscript{105} It is reported that the success rate for pregnancy is close to or even the same as that using fresh eggs,\textsuperscript{106} and children born using frozen eggs show no significant differences from children born naturally.\textsuperscript{107}

What has come into spotlight and caused controversy is egg cryopreservation for social purposes. The technology allows healthy eggs to be harvested and preserved which can be used to conceive a child at a later stage of life, thus acting as a ‘back-up plan’ or ‘fertility insurance’. This option was largely brought into public awareness in 2015 by a renowned celebrity actress, Xu Jinglei, who disclosed that she had her eggs frozen in the USA at the age 39 and claimed that this was the only fertility insurance one could buy.\textsuperscript{108} Since then there has been growing interest and demand for egg freezing service by single women in China.\textsuperscript{109} ART clinics have witnessed a significant increase in the number of inquiries about egg freezing services by interested single women.\textsuperscript{110} In an online survey by a well-known newspaper in December 2019, 42.5 per cent of the survey indicates that they or their friends considered egg freezing as an option.\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{105} Ma Xinran, Egg Freezing not an Ideal Option as a ‘Fertility Insurance’ (‘冻卵生子配成“生育保险”’), XINMIN EVENING POST (新民晚报), Oct. 29, 2014, at page 2.
\item \textsuperscript{106} Xie, supra 103.
\item \textsuperscript{107} —, ‘China’s First Frozen Egg Baby Born’, CHINA DAILY, May 12, 2004.
\item \textsuperscript{108} Shenjia Yin & Li Xueqing, I Decide What to Do with My Eggs (我的卵子我做主), (18) VISTA (看天下) 42 (2015).
\item \textsuperscript{109} Du Xiao & Li Hanwen, The Legal and Ethical Dilemmas in Egg Freezing (冻卵面临诸多法律伦理难题), LEGAL DAILY, Jan. 4, 2020, at page 4.
\item \textsuperscript{110} Chen Liya, Chinese Single Women Begin to Demand Access to Egg Freezing. How Much Do We Know and What should We Know about it? (中国单身女性开始要求冻卵权利，我们了解冻卵有多少，以及该了解什么？), Q DAILY, Mar. 13, 2018, https://www.sohu.com/a/225476399_139533 (accessed Nov. 9, 2020).
\item \textsuperscript{111} Wu Bin, Song Chenghan & Ma Yixiao, The 31-year-old Claimant: It Takes Long Time to Fight for Access to Egg Freezing and I Hope My Eggs Can Wait till That Day (31岁原告:争取冻卵权利路很长,希望我的卵子能等到), SOUTHERN METROPOLIS DAILY (南方都市报), Dec. 24, 2019, at page GA12.
\end{itemize}
This is largely due to the fundamental shift in marriage patterns that has taken place in China. The general trend is to postpone both marriage and child birth at a later stage in life. Before 2013 most marriage registrations were made by people aged between 20 and 24, and since 2013, the age range has changed to between 25 and 29. From 1970 to 2017, the average age of first marriage for women has been delayed for four years from 21.4 to 25.7 years old, and the age for having their first child has moved from 23.4 to 26.8. This has become more widespread and common place in first-tier cities such as Beijing, Shanghai, and Guangzhou. As fertility will begin to decline after 32, a pressing issue for many single women is to preserve fertility and egg freezing seems to offer a promising option.

The NHC official position is that egg freezing as a type of ART service falls within the scope the NHC regulations and shall not be provided for single women. This policy has been followed by local health bureaus. In 2019, an ART clinic in Wuhan announced that it obtained the first permit to carry out egg freezing procedure in China and has offered such service to 10 single women. Local health bureau immediately carried out inspection and called off the practice. ART clinics across China could refuse to perform egg freezing procedure for single women in fear of violation of the NHC regulations.

With a prohibitive regulatory framework in place in China, some rich and well-off single women would travel abroad seeking egg freezing service. It is difficult to estimate the exact number. In 2014, 10 Chinese single women (aged between 33 and 44 with an average age 38) had their eggs frozen at the Egg Freezing Center at Santa Monica Fertility in California. In recent years, about 25 Chinese single women had their eggs frozen at the Fertility & Surgical Association of California every year and the

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112 People’s Daily, Data on Chinese Marriage in 31 Years (31年中国人婚姻数据), Aug. 16, 2018, http://www.njdaily.cn/2018/0816/1718618.shtml (accessed Nov. 9, 2020).
113 National Bureau of Statistics, To Coordinate National Population Strategy for a Balanced Development of Population (统筹人口发展战略,实现人口均衡发展), Sept. 18, 2018, http://www.stats.gov.cn/ztjc/ztfx/ggkf40n/201809/t20180918_1623598.html (accessed Nov. 9, 2020).
114 In Shanghai, the average age for first marriage in 2014 was 32 years old. Xiang, supra note 42.
115 —, NHC Says Egg Freezing for Single Women is Illegal, http://news.cnr.cn/native/gd/20150727/t20150727_519328253.shtml (accessed Nov. 9, 2020).
116 —, Access to Egg Freezing not Open to Single Women (未婚女性冻卵未放开), CHANGJIANG DAILY (长江日报), Nov. 1, 2019, at page 11.
117 For example, Hua Ling & Wu Biqi, Egg Freezing Enables Her to Have Her Dream Baby (冻卵子怀上幸运儿), HEFEI EVENING POST (合肥晚报), Apr. 16, 2015, at page A03; Zhang Fang, Egg Freezing Abroad Costing Hundreds of Thousands a Reliable Option? Kunming Residents: Access to Egg Freezing Should be Open to Single Women(赴数10万出国冻卵靠谱吗?昆明市民:单想冻卵要开放), YUN’NAN ONLINE, May 15, 2017, http://news.yntv.cn/content/16/201705/15_16_1498806.shtml (accessed Nov. 9, 2020).
118 Du & Li, supra note 109; An Ziyuan & Tan Liya, American Media Reports: Chinese Single Women Traveling Abroad for Egg Freezing is on the Rise (美媒:中国越来越多单身女性赴海外冻卵子) GLOBAL TIMES ONLINE, Sep. 1, 2016, https://world.huanqiu.com/article/9CaKrnjXol6 (accessed Nov. 9, 2020).
119 —, Egg Freezing & Sperm Donation: The Chinese are More Open towards Reproduction (冻卵、捐精：中国人生育观念要开放了), TODAY MORNING EXPRESS (今日早报), Aug. 5, 2015, at page A10 (accessed Nov. 9, 2020).
number is rising annually.\textsuperscript{120} It was reported that there has been 10–15 per cent surge for social egg freezing services by Chinese single women in the US.\textsuperscript{121}

A significant development in this respect has been the attempt to challenge the law through the judicial process, ie the Xu \textit{vs} Beijing Obstetrics and Gynecology Hospital (BOGH) case.\textsuperscript{122} This is the first court case concerning this issue and may have far-reaching implications. In this case, Ms Xu, at the age of 31, was already in a relationship but did not plan to marry early while she was pursuing a professional career and leading a highly competitive and fast-paced life style in Beijing. The dispute was straightforward. On November 14, 2018, medical examination in BOGH confirmed that Ms Xu was healthy and her eggs were of good quality. However, her request for egg freezing was refused by the hospital because she was unmarried. She filed a lawsuit against the hospital in Chaoyang District Court in Beijing. The first hearing took place on December 22, 2019. The case is still pending and how the court will address this issue should be closely monitored.

Her claim is based on that her procreative right has been violated by the discriminatory practice of the ART hospital. For discrimination claim to have a valid standing, there must be a violation of the legal obligations by the defendant.\textsuperscript{123} If discriminatory access to ART is mandated by the regulations, the hospital would not act in breach of any legal obligations, but on the contrary in accordance with them. Therefore, the critical issue is how the regulatory ban on access to ART by single women is to be construed and whether or not egg freezing falls within its scope.

It would be desirable for the court to take this opportunity to recognize that procreative right as a personal right extends to every citizen including single women. Following this doctrine, single women are entitled to access to full range of ART services to exercise their procreative rights. This essentially means that the NHC regulations are in breach of the procreative rights of single women and thus unconstitutional.\textsuperscript{124} This would entail a fundamental departure from the current understanding that procreative rights are reserved for legally married heterosexual in the judicial practice of Chinese courts. This approach may turn to be too bold and revolutionary for the court to take.

A small step toward the direction of relaxing the restriction on access to ART by single women would be to allow access to egg freezing service by single women as a derogation. The aim of the NHC regulations denying access to ART by single women

\textsuperscript{120} —, \textit{Single Chinese Women Want to Freeze Their Eggs and Enjoy Life}, Aug. 2, 2017, https://www.bbc.com/news/world-asia-china-40183587 (accessed Nov. 9, 2020).

\textsuperscript{121} Song Wei, \textit{More Chinese Women Freeze Their Eggs Overseas: NYT, CHINA DAILY}, Sep. 1, 2016.

\textsuperscript{122} —, \textit{Controversy Arising from Single Woman Seeking Egg Freezing: An Area of Legal Lacuna? (单身女性亦可爭取凍卵保值何成法律空白?)} \textit{CHINA NEWS SERVICE}, Dec. 26, 2019, http://www.chinanews.com/gn/2019/12-26/9043521.shtml (accessed Nov. 9, 2020).

\textsuperscript{123} Jiang Shuming, \textit{A Research on Civil Remedies for Discrimination of Personality (“格離別”的民事法律探析)}, (3) \textit{J. GANSU POL. SCI. LAW INST. (甘肅政法院學報)} 21 (2003).

\textsuperscript{124} It seems this is the genuine purpose of Ms Xu to bring this lawsuit. Before this case, she sent letters to 63 members of National People’s Congress to convince them to change the law to grant access to ART by single women. —, \textit{Controversy Arising from Single Woman Seeking Egg Freezing: An Area of Legal Lacuna? (单身女性亦可爭取凍卵保值何成法律空白?)} \textit{CHINA NEWS SERVICE}, Dec. 26, 2019, http://www.chinanews.com/gn/2019/12-26/9043521.shtml (accessed Nov. 9, 2020).
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is to prevent the separation of procreation from marriage.\(^{125}\) Prohibiting single women access to egg freezing does not serve such purpose. Egg freezing does not constitute a procreative activity. Human reproduction commences at the point of conception when the egg is fertilized by the sperm. Unlike AI technology, egg freezing does not result in the creation of embryo; no sperm is involved at all. Its function is to preserve healthy eggs for pregnancy, thus preparing for procreative activity at a later stage.

Furthermore, egg freezing does not necessarily lead to the separation of procreation from marriage or single parenting structure. The reason for many single women to resort to this technology is not because they choose to remain unmarried, but because their marriages and childbirhgs are postponed. The latest annual survey carried out in 2019 by one of the most popular online dating websites shows that 94 per cent of the single men and women intend to get married.\(^{126}\) And the majority of them prefer to marry late: 48% of them would like to marry at the age of 26–30, 20% at the age of 30–36 and only 6% at 20–25.\(^{127}\) This is also confirmed by official census figures. For example, in 2000 more than half (57.46%) of women aged at 20–24 were single; 10 years later in 2010 when they were at the age of 30–34 only 5.35% of them remained single.\(^{128}\) By the time they decide to have children, they may already have been married. Granting them access to egg freezing technology would increase the chance of pregnancy for many women who choose to give birth later in life.

The court could set a limitation for the use of frozen eggs: it could be thawed for procreative purpose only when the owner is already legally married. Such approach means that procreation is still reserved for married couples, thus still within the current legal framework. Though a narrow derogation, it would greatly increase the freedom and options on how women exercise their procreative rights.

In addition, legislative efforts have been made to lift the restriction on access to egg freezing by single women at local level. In January 2020 in the cities of Shanghai\(^{129}\) and Changsha\(^{130}\) proposals were made to the Political Consultative Conferences which are important platforms to influence public opinion and shape the legislative process. Similar proposals had already been made in Shanghai in 2017 and 2019.\(^{131}\) Such

\(^{125}\) Zhang Qin v Sichuan Academy of Medical Sciences/Sichuan Provincial People’s Hospital (张琴与四川省医学科学院/四川省人民医院医疗服务合同纠纷 一 审民事判决书), (2018) Chuan 0105 Min Chu No. 12958.

\(^{126}\) Zhen’ai Online, Annual Survey of Chinese Singledom: to Delay Marriage and Childbearing is the Trend (中国单身大调查:晚婚晚育是大势所趋), Nov. 26, 2019, https://new.qq.com/omn/20191126/20191126A0PNNS00.html (accessed Nov. 9, 2020).

\(^{127}\) Ibid.

\(^{128}\) Ibid.

\(^{129}\) Wang Yongjun, The Proposal on Allowing Egg Freezing by Single Women is a Pilot Programme Becomes Better than Last Year (单身女性冻卵提案在“悄悄改变”), EASTDAY ONLINE, Jan. 16, 2020, http://n.eastday.com/m/lh2017/u1ai10273608.html (accessed Nov. 9, 2020).

\(^{130}\) Liu Shuang, The Government Should Gradually Legalize Access to Egg Freezing (建议政府逐步开放冻卵合法化), XIAOXIANG MORNING POST (潇湘晨报), Jan. 9, 2020, at page A4.

\(^{131}\) Wang Yongjuan, Wi Japing, Member of the Political Consultative Conference: The Law Should be Amended to Grant Women the Freedom to Choose Egg Freezing(委员提案:修改相关法规让冻卵成为女性自主选择), Eastday Online, Jan. 18, 2017, http://sh.eastday.com/m/lh2017/u1ai10273608.html (accessed Nov. 9, 2020); Wang Ling, A Member of the Political Consultative Conference Proposes to Allow Egg Freez-
repeated efforts may be explained by the fact that the urgency to change the law is most felt in Shanghai where the average age for first marriage has been postponed till 28.4 and age for the first childbirth at 29. The Shanghai proposal is cautious with an important restriction: the frozen eggs could only be used when the owner is legally married. Such approach would be far less controversial and has a greater chance to be adopted by the lawmaker. This initiative may be seen as the first step for broader policy changes at the national level as local legal reforms act as important testing ground and provide much-needed lessons and experiences.

VI. CONCLUDING REMARKS

The NHC regulations prohibiting clinics from providing ART services to single women have been adopted to enforce the national Population and Family Planning Law. Such restriction has created serious tension and conflicts with the principle that procreative rights are natural and fundamental rights entitled by everyone. There has been increasing demand for access to ART from single women due to the fundamental changes in marriage and reproduction patterns. A simple ban will not eliminate such demand and may turn out to be counterproductive. When requests for ART are denied by ART clinics across China, single women in such need would resort to other channels such as underground market or travelling abroad for treatment. This will significantly increase the cost of ART treatment and create unnecessary risks and uncertainties.

Lawsuits challenging the discriminatory law and practice in China are still far and few and the approach of the courts may seem conservative and less promising. In the cases concerning posthumous implantation, the court still sticks to the doctrine that procreative rights are reserved for legally married couple. Nevertheless, these judgments also demonstrate that the court is willing to allow derogations and adopt a pro-right philosophy in its interpretation and application of the law. This is a welcoming development toward the right direction.

Furthermore, the court has already developed doctrines and provided legal framework which may pave the way for further reform. In the Yang Yonghui case, the court held that, procreative rights should be legally recognized and protected to the greatest extent possible and any restriction would be allowed only if it is justified on moral and legal grounds. This balanced approach offers a workable framework within which personal procreative freedom could be weighed against public moral values and collective policy choices. In this case, the court explicitly rejected the assumption that single parenting is detrimental to the development of the child. This renders support in favor of recognizing procreative rights of single women in general.

This issue has triggered broader public debate and various efforts have been made to reform the law to recognize the procreative rights of single women and to lift the

132 Lu Zhe, What Changes Have Happened to Women in Shanghai in the Past 40 Years since the Reform and Opening up Policy? Significant Increase in Ages of First Marriage, First Childbirth and Life Expectancy (改革开放40年来上海女性发生了哪些变化?初婚初育年龄、平均预期寿命大幅提高), XINMIN EVENING POST (新民晚报), Nov. 27, 2018.

133 Wang, supra note 129.
restriction on access to ART. The law shall adjust itself by making necessary reforms to keep pace with the development of the society, not the other way around. Moral values and ethical concerns are justifiable consideration; they shall not be taken for granted without debate and scrutiny. Nor should they highjack the process of decision-making. It may take some time for the law makers to figure out how to best manage access to ART in China. When they do so, it is worth remembering that the procreative rights of our fellow citizens shall be equally appreciated, cherished, respected, recognized, and protected.