

# Zaozao Xu's case: Chinese women's appeal for the right to freeze their eggs

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## Abstract

China's regulatory framework on assisted reproductive technologies (henceforth ARTs) has remained unchanged and unchallenged for over two decades, prohibiting unmarried women from accessing any form of ARTs. Section 1 Article 4(1) of the Ethical Principles for Human Reproductive Technologies and Human Sperm Banks explicitly stipulates that 'couples who do not comply with national population and family planning laws and regulations and single women' are prohibited from accessing ARTs. However, unmarried men are allowed to freeze sperm regardless of their marital status, constituting direct discrimination against women. Furthermore, significant legislative conflicts exist between local regulations and departmental rules in this area, hindering the consistent application of ART norms in China and substantially limiting the reproductive rights of Chinese women. *Zaozao Xu's case* is the first case in China directly challenging the current prohibitive regulations on egg freezing and may signify a crucial turning point in China's reform of ARTs legislation. This commentary provides an overview of the case and examines various issues associated with the existing regulatory framework, including the vagueness of the legislation and regulation, legislative conflicts in the current framework, deeply rooted discrimination against women, and the regulator's problematic conception of ARTs. This commentary emphasises the urgent need for China to re-evaluate and reform its ARTs regulatory framework to allow unmarried women to access ARTs, or at least egg-freezing services as the first step.

## Keywords

Assisted reproductive technologies, egg freezing, unmarried women's reproductive rights, legislative conflicts, discrimination against women

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## Introduction

Although practised with increasing success since the birth of the first Chinese IVF baby Mengzhu Zheng in 1988,<sup>1</sup> assisted reproductive technologies (henceforth ARTs) were not regulated in Mainland China<sup>2</sup> until 2001.<sup>3</sup> Due to potential ethical, cultural, and public health concerns, China has historically maintained strict regulations regarding the application of ARTs.<sup>4</sup> Notably, unmarried women<sup>5</sup> have always been and are still prohibited from accessing any ARTs, including egg freezing in China. It has been claimed that the legislation was drafted on the basis of principles and reasoning relating to safeguarding public interests and maintaining ethical standards.<sup>6</sup> However, recently, this prohibition has been challenged in court.

In 2019, Zaozao Xu, an unmarried Chinese woman, brought a case to the Chaoyang District People's Court in Beijing (henceforth the District Court) after being refused access to egg freezing at the Beijing Obstetrics and Gynaecology Hospital Affiliated with Capital Medical University (henceforth 'the Hospital'). Xu maintained that the Hospital's refusal to provide egg-freezing services for her constituted violations of her general personality rights. The District Court ruled that the Hospital's refusal did not violate Xu's rights.<sup>7</sup> Xu appealed. Appeal officially began in Beijing No. 3 Intermediate Court in May 2023, and the appellate court has not yet reached a

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1. 'The First Test Tube Baby Was Born in Mainland China on 10 March 1988', *China Gate Online* (中国门户网站), 9 June 2009, available at [http://cn.chinagate.cn/indepths/jianguo60/2009-06/09/content\\_17917231.htm](http://cn.chinagate.cn/indepths/jianguo60/2009-06/09/content_17917231.htm) (accessed 2 November 2023).
  2. Hence excluding Hong Kong Special Administrative Region, Macau Special Administrative Region and Taiwan Province. Mainland China will be referred to as China throughout this commentary.
  3. L. Jiang, 'IVF the Chinese Way: Zhang Lizhu and Post-Mao Human in Vitro Fertilization Research', *East Asian Science, Technology and Society: An International Journal* 23 (2013), available at <https://www.tandfonline.com/doi/full/10.1215/18752160-2855449> (accessed 1 November 2023). ARTs were not regulated prior to 2001, but they were not illegal as demonstrated by the case of Mainland China's first test tube baby in 1988. The birth of the girl Mengzhu did not lead to any legal consequences.
  4. J. Qiao and H. Feng, 'Assisted Reproductive Technology in China: Compliance and Non-Compliance', *Translational Pediatrics* 3 (2014), p. 91.
  5. The wording 'unmarried women' in this commentary does not distinguish the sexual orientation, sexual identity and relationship status (other than marital status) of women. The term 'unmarried women' refers to the women who are legally recognised as female and are not legally married in China; thus, this category may contain single women, transgender men, and women who have partners but are legally unmarried.
  6. The regulatory governance of egg freezing in China will be explored in detail later on.
  7. The text of the judgment is unavailable yet, but it has been made clear in the newspaper article(s) that the District Court did not find any violations of Xu's general personality rights. J. Wang, 'Xu Zaozao, the Claimant in the First 'Egg Freezing Case': I Am Not Confident' (首例“冻卵案”原告徐枣枣：我并不自信), *Xinhua Press Network* (新华报业网), 7 January 2020, available at [https://www.xhby.net/index/202001/t20200107\\_6467634.shtml](https://www.xhby.net/index/202001/t20200107_6467634.shtml) (accessed 9 September 2023).

decision.<sup>8</sup> Given the current regulations on ARTs, the final outcome of Xu's appeal is likely to be the same as the decision reached in the District Court. Nevertheless, this case is important as it is the first in which an unmarried woman has challenged the current regulatory framework of ARTs, especially the Rules governing egg freezing in China.

In this commentary, we reflect on the implications of this case for egg-freezing services and other forms of ARTs. First, we set out the relevant facts of *Xu's case* and the key points raised by the trial court. Second, we reflect on the intersection between the regulatory governance of ARTs and other areas of law pertaining to the protection of procreative rights of women, in particular those of unmarried women. Finally, we argue that *Xu's case* exemplifies the urgency of reforming the current legislation and regulation in China to allow unmarried women to access ARTs, at least egg-freezing services and to equally exercise their reproductive rights in due course.

## Facts and legal process

In 2018, a 30-year-old unmarried woman (Xu) sought egg-freezing services at the Hospital. After undergoing various health checks, the results showed that her physical condition was suitable for undergoing egg-freezing treatment. However, the Hospital refused her request due to her marital status as unmarried. Xu was not happy with the rejection. After consulting with legal experts, Xu brought a case against the Hospital arguing that her general personality rights<sup>9</sup> have been unduly infringed by such refusal.<sup>10</sup> On 23 December 2019, the District Court heard this case.<sup>11</sup> During the trial, both parties presented their cases, and the court conducted a session of evidence presentation and cross-examination. After the first hearing, the court held that the case involved so many issues such as medical law and ethics, public policy, and egg-freezing technology that it could not reach a decision on the day and decided to adjourn the case.

8. X. Wu (武晓慧), 'China's First 'Single Woman's Egg Freezing Case' in the Second Instance, No Verdict was Reached in Court (Yet) (国内首例“单身女性冻卵案”二审未当庭宣判)', *China Daily* (中国日报), 10 May 2023, available at <https://cn.chinadaily.com.cn/a/202305/10/WS645b55aca3105379893738fc.html> (accessed 20 September 2023).
9. Personality rights were adopted in a separate part in China's new Civil Code, which was adopted by the National People's Congress on 28th May 2020. See the 'English Translation of the Civil Code', available at [https://www.pkulaw.com/en\\_law/aa00daaeb5a4fe4ebdfb.html?keyword=civil%20code](https://www.pkulaw.com/en_law/aa00daaeb5a4fe4ebdfb.html?keyword=civil%20code). It is out of this article's scope to explore the unprecedented enactment of the Law of Personality Rights. See generally L. Wang and J. Shi, eds., *Chinese Law of Personality Rights*, 1st ed. (London: Routledge, 2022); L. Wang and B. Xiong, 'Personality Rights in China's New Civil Code: A Response to Increasing Awareness of Rights in an Era of Evolving Technology', in J. Hao and P. Sirena, eds., *The Making of the Chinese Civil Code: Promises and Persistent Problems* (Cambridge: Cambridge University Press, 2023), pp. 41–76.
10. J. Wang, 'Xu Zaozao, the Claimant in the First 'Egg Freezing Case': I Am Not Confident' (首例“冻卵案”原告徐枣枣：我并不自信), *Xinhua Press Network* (新华报业网), 7 January 2020, available at [https://www.xhby.net/index/202001/t20200107\\_6467634.shtml](https://www.xhby.net/index/202001/t20200107_6467634.shtml) (accessed 9 September 2023) (n. 7).
11. Note that there is no official judgment available yet. However, since the case has received widespread attention from a range of Chinese medias across the country, including the state-owned ones, it can be said that media reports have provided extensive facts and details from the hearing in the District Court.

On 17 September 2021, the District Court conducted another hearing and announced that a judgement would be issued later. On 22 July 2022, the court dismissed Xu's entire claim and held that the Administrative Measures for Human Assisted Reproductive Technologies (《人类辅助生殖技术管理办法》) (henceforth the Administrative Measures for ARTs)<sup>12</sup> clearly stipulates that the application of ARTs must be for 'medical purposes' and comply with the state's birth planning policies.<sup>13</sup> The Hospital must have reached its decision while taking into account factors such as her diagnosis, and treatment in question, and the relevant laws, regulations, and rules.<sup>14</sup> Moreover, Section 1 Article 4(1) of the Ethical Principles for Human Reproductive Technologies and Human Sperm Banks (《人类辅助生殖技术和人类精子库伦理原则》)<sup>15</sup> (henceforth the Ethical Principles) explicitly stipulates that 'couples who do not comply with national population and family planning laws and regulations and single women' are prohibited from accessing ARTs. It follows that Xu, as an unmarried woman, was seen as a single woman in law and that she failed to satisfy the requirements set out in the Ethical Principles to receive egg-freezing services. Therefore, the District Court found that the hospital's refusal in providing egg-freezing services for Xu did not constitute a violation of law and an infringement on her general personality rights.<sup>16</sup>

Following the widespread media coverage of this case, the topic of unmarried women's reproductive rights in China has sparked widespread debate.<sup>17</sup> After the District Court had found in favour of the Hospital, Xu filed an appeal to Beijing No. 3 Intermediate People's Court (henceforth the Intermediate Court). In the afternoon of 9 May 2023, Xu's appeal was heard by the Intermediate Court. Xu applied for expert witnesses to testify their views on medical ethics and supplemented her case with public opinions, local policies, and her recent physical examination reports. The Hospital maintained that protecting reproductive rights should start from age-appropriate fertility rather than delaying fertility. The Intermediate Court has yet to rule the case.<sup>18</sup> It remains to be seen how it will ultimately decide and reason this case. It should be noted that Xu will have no further right

12. Order No. 14 of the Ministry of Health (卫生部第14号令). See 'Official Document', available at <http://www.nhc.gov.cn/fzs/s3576/201808/99ad3444a14340e79c8361ee23b96251.shtml> (accessed 2 April 2023).

13. Section 1 Article.3.

14. Laws, regulations, and rules are different types of legislation in China. This will be explained in detail in the next section.

15. Wei Ke Jiao Fa [2001] No. 143 (卫科教发【2001】143号).

16. Y. Yu, 'The First 'Single Woman's Egg Freezing Case' Failed in the First Instance, and the Claimant Said She Has Already Filed An Appeal (首例“单身女性冻卵案”一审败诉, 当事人称已邮寄上诉状)', *ThePaper* (澎湃新闻), 5 August 2022, available at [https://www.thepaper.cn/newsDetail\\_forward\\_19329204](https://www.thepaper.cn/newsDetail_forward_19329204) (accessed 20 September 2023).

17. H. Wan, 'The Appeal of China's First Single Women's Egg Freezing Case Began (全国首例单身女性冻卵案二审开庭)', *Yangtze Evening Post* (扬子晚报), 10 May 2023, available at [https://eus.yzwb.net/pc/con/202305/10/content\\_1193456.html](https://eus.yzwb.net/pc/con/202305/10/content_1193456.html) (accessed 20 September 2023).

18. X. Zhang, 'The Appeal of the First 'Single Women's Egg Freezing Case' Was Heard, and the Claimant said: If I Win the Case, I Will Continue to Freeze My Eggs (首例“单身女性冻卵案”二审开庭, 当事人: 若胜诉将继续冻卵)', *Jiemian News* (界面新闻), 9 May 2023, available at <https://www.jiemian.com/article/9370433.html> (accessed 20 September 2023).

to appeal if she loses again.<sup>19</sup> However, under the Civil Procedure Law 2021,<sup>20</sup> she may apply for a retrial under the procedure for trial supervision<sup>21</sup> if she can establish a case satisfying one of the criteria laid down in Article 207 of the Civil Procedure Law 2021.<sup>22</sup>

## The law

### *General background of the Chinese legal system*

In order to understand the legal regime governing ARTs in China, it is necessary to have some background information and knowledge about the Chinese legal system. The Legislation Law of the People's Republic of China, which was promulgated in 2000 and has been recently revised in 2023 clarifies the categories of formal legislation and corresponding authorities in China. Under the Legislation Law framework, the National People's Congress (henceforth NPC) as the national legislator adopts basic laws (基本法律) (laws governing criminal offences, civil affairs, state organs, and other matters) and (other) laws (法律).<sup>23</sup> The Standing Committee of the NPC (henceforth NPCSC) adopts laws (法律) and may supplement or amend laws adopted by the NPC.<sup>24</sup> The State Council (henceforth SC) adopts administrative regulations (行政法规),<sup>25</sup> and the SC ministries and commissions<sup>26</sup> as well as provincial-level people's governments issue rules (规章).<sup>27</sup> The people's congresses of provinces, autonomous regions, and municipalities directly under the Central Government,<sup>28</sup> and the standing committees of these

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19. The judgment of the court of second instance is final, which means a case can only be appealed once. See Article 182, Civil Procedure Law 2021.

20. The Civil Procedure Law 2021 has been amended by the NPCSC on 1 September 2023, which will take effect on 1 January 2024. See NPC, 'The NPCSC's Decision to Amend The Civil Procedure Law of the People's Republic of China (全国人民代表大会常务委员会关于修改《中华人民共和国民事诉讼法》的决定)', 1 September 2023, available at [https://www.gov.cn/yaowen/liebiao/202309/content\\_6901570.htm](https://www.gov.cn/yaowen/liebiao/202309/content_6901570.htm) (accessed 4 December 2023). However, the 2023 amendments are mainly about expanding people's courts' authority over cases involving foreign parties and have not changed the part relating to the procedures for trial supervision. See Latham & Watkins, 'China Amends Foreign-Related Civil Procedure Rules', 24 October 2023, Number 3177, available at <https://www.lw.com/en/people/admin/upload/SiteAttachments/China-Amends-Foreign-Related-Civil-Procedure-Rules.pdf> (accessed 4 December 2023).

21. Articles 205–220 of the Civil Procedure Law 2021.

22. See further R. Peerenboom, 'Judicial Independence and Judicial Accountability: An Empirical Study of Individual Case Supervision', *The China Journal* 55 (2008), p. 67.

23. Article 10 of the Legislation Law 2023.

24. Articles 10–12.

25. Articles 72–79.

26. Such as the former Ministry of Health and the National Health Commission now.

27. Articles 91–97.

28. Provincial-level governments and people's congresses refer to the governments and people's congresses of 22 provinces, 5 autonomous regions, and 4 municipalities directly under the Central Government (Beijing, Shanghai, Chongqing, and Tianjin).

people's congresses adopt local regulations (地方性法规);<sup>29</sup> autonomous regions adopt autonomous regulations (自治条例) or separate regulations (单行条例);<sup>30</sup> special economic zones adopt regulations (法规).<sup>31</sup>

Chapter V of the Legislation Law clarifies China's legislative hierarchy. Article 98 declares that the Constitution possesses the highest legal effect. The legal effect of laws is higher than that of administrative regulations, local regulations, and rules, and the legal force of administrative regulations is higher than that of local regulations and rules.<sup>32</sup> The legal effect of local regulations is higher than that of the local government rules at or below the same level,<sup>33</sup> and the legal effect of the rules issued by provincial-level governments is higher than that of the rules issued by districted cities or autonomous prefectures within their administrative region.<sup>34</sup> Finally, departmental rules and local governmental rules have the same legal status.<sup>35</sup>

The types of legislation that are concerned in the area of ARTs include departmental rules issued by the former Ministry of Health (now the National Health Commission, henceforth NHC), the local regulations issued by the people's congresses, especially the People's Congress of Jilin Province, and a number of laws in relevant areas, which will be explored and examined in detail below.

### *The rules governing ARTs in China*

In February 2001, the former Ministry of Health issued two departmental rules:<sup>36</sup> the Administrative Measures for Human Assisted Reproductive Technologies (《人类辅助生殖技术管理办法》) and the Administrative Measures for Human Sperm Banks (《人类精子库管理办法》).<sup>37</sup> In the same year, the former Ministry of Health, issued another four departmental rules in May, including the Technical Specifications for Human Reproductive Technologies (《人类辅助生殖技术规范》), the Basic Standards for Human Sperm Banks (《人类精子库基本标准》), the Technical Specifications for Human Sperm Banks (《人类精子库技术规范》), and the Ethical Principles for Performing Human Reproductive Technologies (《实施人类辅助生殖技术的伦理原则》) in May 2001.

29. Articles 80–83.

30. Article 85.

31. Article 84. See a brief overview of China's legislative system S Xue, 'China's Legislative System and Information: An Overview' (2005) 22 *Government Information Quarterly* 322.

32. Article 99.

33. Article 100.

34. Article 100.

35. Article 102. See a brief analysis on the Chinese legislative system L. Paler, 'China's Legislation Law and the Making of a More Orderly and Representative Legislative System', *The China Quarterly* 182 (2005), p. 301.

36. Departmental rules are a type of legislation. Different types of legislation in China will be outlined and explained below.

37. Order No. 15 of the Ministry of Health (卫生部第15号令). See 'Official Document', available at [http://www.gov.cn/gongbao/content/2002/content\\_61907.htm](http://www.gov.cn/gongbao/content/2002/content_61907.htm) (accessed 2 April 2023).

However, the four Rules published in May 2001 were all abolished in 2003. Instead, the former Ministry of Health codified those old departmental rules into three new departmental rules, namely, the Technical Specifications for Human Reproductive Technologies (《人类辅助生殖技术规范》), the Basic Standards and the Technical Specifications for Human Sperm Banks (《人类精子库基本标准和技术规范》), and the Ethical Principles for Human Reproductive Technologies and Human Sperm Banks (《人类辅助生殖技术和人类精子库伦理原则》)(henceforth the Ethical Principles).<sup>38</sup>

These five departmental rules, including the two published in February 2001 and three published in 2003, are the only national legal norms governing ARTs in China. It should be noted that it has been more than 20 years since those Departmental Rules were drafted and reviewed. Technologies have advanced, and success rates have also soared in that time.<sup>39</sup> However, so far, there still has been no national law passed to regulate ARTs. Most importantly, women, particularly unmarried women, have always experienced great obstacles to access ARTs in China, leading to the main argument that the current regulatory framework on ARTs urgently needs to be reformed.

## The need for a reform

### *The vagueness of the regulations*

When we have a closer look at the regulations surrounding *Xu's case*, the first point that deserves attention is Section 1 Article 3 of the Administrative Measures for ARTs, which clearly states that the application of ARTs should only be 'carried out in medical institutions' and 'for medical purposes'. However, what amounts to 'medical purposes' is not defined or explained in the legislation, allowing latitude to restrict access to ARTs. The interpretation of 'medical purposes' directly bears on whether aims such as the preservation of fertility and promotion of physical and mental well-being fall within the scope of the Administrative Measures. In *Xu's Case*, the District Court used a rather narrow approach, interpreting 'medical purposes' to only include treating diseases such as infertility. The District Court believed that Xu's reason for accessing egg freezing was to preserve her eggs and to allow her to conceive a biologically related child at a later and preferred age. In the eyes of the District Court, this failed to constitute a 'medical purpose', and Xu's decision to access egg freezing was made on a 'social' rather than on a 'medical' basis. Therefore, failure to have a proper 'medical purpose' was used by the District Court as one of the important reasons for denying Xu's claims.

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38. Wei Ke Jiao Fa [2003] No. 176 (卫科教发【2003】176号). See details Ministry of Health, 'Notice about the Ministry of Health Amending Technical Specifications, Basic Standards, and Ethical Principles for Human Reproductive Technologies and Human Sperm Banks' (《卫生部关于修订人类辅助生殖技术和人类精子库相关技术规范、基本标准和伦理原则的通知》), available at [http://ynswsjkw.yn.gov.cn/html/2007/gongshigonggao\\_0911/98.html](http://ynswsjkw.yn.gov.cn/html/2007/gongshigonggao_0911/98.html) (accessed 22 April 2023).

39. See J. Qiao, Y. Wang, X. Li, et al., 'A Lancet Commission on 70 Years of Women's Reproductive, Maternal, Newborn, Child and Adolescent Health in China', *The Lancet* 397 (2021), p. 2497.

### *The current framework constitutes state-authorized discrimination against women*

Section 1 Article 4(1) of the Ethical Principles directly stipulates that couples who do not comply with national population and family planning laws and regulations and unmarried women are prohibited from accessing ARTs, and this also constitutes part of the code of conduct for medical personnel when carrying out any ARTs procedures. By disallowing unmarried women to access any form of ARTs, this constitutes a substantial restriction and obstacle to the rights of women to freely decide whether, when, and with whom to give birth and found a family.

Furthermore, following Section 1 Article 3 of the Administrative Measures for ARTs, sperm freezing should have also been restricted to married men, but Section 2 Article 2(2) of the Basic Standards allows men to freeze their sperm irrespective of their marital status. Such relaxation on sperm freezing has inevitably led to questions of sexism and discrimination. Why can unmarried men freeze their sperm whenever they feel like doing so, whereas unmarried women can only do so after getting married? Do such provisions constitute direct state-authorized discrimination against women, especially the unmarried ones? Looking at the language and the effects of the current regulatory framework, the answer is, certainly, yes. Within the group of unmarried persons, only men are allowed to freely choose when to exercise their procreative rights and delay reproduction by freezing their sperm. In the eyes of the regulator, unmarried women should not and cannot freeze their eggs to delay parenthood like unmarried men. Such Rules, undoubtedly and bluntly, have infringed the principle of equality as well as one of the most basic fundamental rights of women—the right to found a family. Such discriminatory regulations not only fail to protect and facilitate the reproductive rights of women but also create several legislative conflicts, which will now be explored.

### *The legislative conflicts*

First, there is a clear conflict between those departmental rules and their superior laws.<sup>40</sup> The Constitution 2018, the Civil Code 2020, the Law on the Protection of the Right and Interests of Women 2022, and the Population and Family Planning Law 2021 do not distinguish between the protection afforded to married women and unmarried women, and at least in those laws, unmarried women do not receive a weaker level of protection of their rights just because of their marital status.

Since egg freezing naturally belongs to the content of the reproductive rights of women<sup>41</sup> and those rights are guaranteed by those laws to all women, it should be said that women, regardless of their marital status, should be able to access egg freezing and other forms of ARTs legally because their reproductive rights under those laws encompass such access. Clearly, those Departmental Rules directly contravene the protection

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40. Note that the legal effect of laws is higher than that of administrative regulations, local regulations, and rules.

41. See further J. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1996).



of women's reproductive rights as laid down in the laws.<sup>42</sup> In principle, such conflict between the laws and departmental rules would have naturally invalidated the departmental rules as an inferior type of legislation to the laws. However, in practice, the departmental rules may still be in force and can be enforced regardless of the legislative conflict between the laws and them. As all the aforementioned laws and the Constitution have only been revised very recently, the NPC and NPCSC chose to ignore or failed to recognise and acknowledge the existence of such legislative conflict.<sup>43</sup> Also, courts in China cannot invalidate departmental rules due to a conflict with their superior laws. Nor can the people's courts declare a piece of legislation to be unconstitutional and invalidate it due to the limited power and jurisdiction<sup>44</sup> that they enjoy in theory and in practice and the non-justiciable nature of the Constitution.<sup>45</sup> As a result, these legislative conflicts remain unrecognised and unresolved, leading to an awkward fact that those Departmental Rules are legally enforceable, so are the laws.

Second, there is a clear legislative conflict between a local regulation and those Departmental Rules. Apart from the department rules, local regulations in different provinces also play a vital role in regulating ARTs in their respective jurisdictions. Interestingly, under Article 30 of the Regulation of Jilin Province on Population and Family Planning 2002 (henceforth the Jilin Regulation), unmarried women could access ARTs. Article 30 was the first and the only attempt, so far, in China, to grant unmarried women the right

42. See also L. Zhu, 'Procreative Rights Denied? Access to Assisted Reproduction Technologies by Single Women in China', *Journal of Law and the Biosciences* 8 (2021), p. 84.

43. Note that there are a large number of legislative conflicts at all levels across the country. See D. Cai, 'Legislative Conflicts and Channels for Resolving them (法律冲突及其解决途径)', *Chinese Legal Science* (中国法学) 3 (1999), p. 53; J. Chen, 'Unanswered Questions and Unresolved Issues: Comments on the Law on Law-making', in J. Chen, Y. Li, J. Otto, and M. Polak, eds., *Law Making in the People's Republic of China* (Leiden: Brill, 2000), pp. 246–247.

44. In both theory, law, and practice, people's courts cannot declare legislation invalid. Local people's courts have tested the boundaries in the past, and the judges often faced significant legislative backlash. In response, the SPC prohibited people's courts from making explicit determinations on the validity of legislation in judicial judgments. See, for example, D. Cai (蔡定剑), 'Legal Conflicts and Channels for Their Resolution (法律冲突及其解决途径)', *Chinese Legal Science* (中国法学) 3 (1999), pp. 49–59; G. Wang (王贵松), 'Court Responses to the Problem of Legislative Conflicts: The Present Situation and a Look Forward' (法院对法律冲突问题的应对: 现状与前瞻), *Law & Business Study* 2 (2010), p. 66.

45. On the point of non-justiciability of the Chinese Constitution, see, for example S. Jiang (强世功), 'Written and Unwritten Chinese Constitutions: A New Approach to the Study of Constitutional Government in China (中国宪法中的不成文法—理解中国宪法的新视角)', *Open Eras* (开放时代) 36 (2009), pp. 21–46; D. Cai (蔡定剑), 'Exploring the Judicialisation Path of China's Constitution (中国宪法司法化路径探索)', *Legal Studies* (法学研究) 5 (2005), pp. 110, 122–124. See also *Qi Yuling's case*; Z. Tong, 'A Comment on the Rise and Fall of The Supreme People's Court's Reply to *Qi Yuling's Case*', *Suffolk University Law Review* 43 (2010), pp. 669, 677–679; K. Hand, 'Resolving Constitutional Disputes in Contemporary China', *University of Pennsylvania East Asia Law Review* 7 (2011), p. 51.

to access ARTs. When the Jilin Regulation was sent to the former National Family Planning Commission (was then a department of the SC but now part of the NHC) for filing,<sup>46</sup> the National Family Planning Committee explicitly expressed their strong willingness to delete Article 30.<sup>47</sup> Nevertheless, the Jilin People's Congress decided to keep Article 30, notwithstanding that Article 30 directly and vividly contradicted the basic state policy of 'one child policy'<sup>48</sup> and the Departmental Rules issued by the former Ministry of Health.

It should be noted that Article 30 did not allow all unmarried women across China to access ARTs in Jilin, but only the ones who have *hukou* in Jilin to legally access ARTs in Jilin fertility clinics. *Hukou* is a system of household registration in China,<sup>49</sup> and it is an essential document for Chinese citizens to establish identity.<sup>50</sup> People without *hukou* would find it extremely hard to establish eligibility for going to school, getting a job, and applying a passport.<sup>51</sup> *Hukou* in China is very much like the immigration system in many other countries through which you can acquire rights such as the right to reside and the right to work through investing in a local business, buying a property, having a degree, holding a qualified job,<sup>52</sup> or having been born in a family in which the mother and/or the father has the local *hukou*. And in this case, only the unmarried women with their *hukou* being registered in Jilin Province could, in theory, access ARTs. However, due to the inconsistency between the Departmental Rules and the Jilin Regulation (which have the same level of legal force) as well as the lack of clear guidance from national and local health bureaus, fertility clinics in Jilin would still refuse unmarried women to access ARTs in practice.<sup>53</sup>

Notably, the People's Congress of Jilin Province amended the 2002 Jilin Regulation in 2004, 2011, 2014, 2016, and 2021. Yet today, notwithstanding the conflict between the Jilin Regulation and the Rules issued by the former Ministry of Health, the Jilin

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46. According to the Legislation Law, the SC does not exercise the authority to amend or annul those local regulations while reviewing them. Only the NPCSC has the power to do so. See further on filing and reviewing K. Hand, 'Understanding China's System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony', *Columbian Journal of Asian Law* 26 (2013), p. 139.

47. Note that even the National Family Planning Committee was part of the State Council, it did not have the power to annul or amend or change a local regulation passed by a local people's congress. Only the NPCSC and the NPC have the power to do so.

48. Articles 2 and 18 of the Population and Family Planning Law of the PRC 2002. During the one-child policy era, any births given by unmarried women would have been categorised as 'unplanned birth', resulting in fines. Therefore, the Jilin Regulation contravened the one child policy. Note that one child policy was abolished in 2016 and is no longer in force.

49. See T. Cheng and M. Selden, 'The Origins and Social Consequences of China's *Hukou* System', *The China Quarterly* 139 (1994), p. 644.

50. Op. cit.

51. Op. cit.

52. See The Economist, 'Changes to China's Hukou System Are Creating New Divides', 19 August 2020, [www.economist.com](http://www.economist.com) (accessed 10 November 2023).

53. Zhu, 'Procreative Rights Denied'.

Regulation has not been amended or annulled by the NPCSC, and it is still in force, so is Article 29 of the 2021 Jilin Regulation, which allows unmarried women in Jilin to access ARTs.<sup>54</sup> Many scholars have argued that the Jilin Regulation has gone too far and is not compatible with China's family planning policies.<sup>55</sup> However, it should be pointed out that the Jilin Regulation constitutes a major step forward in the protection of reproductive rights, albeit one that has been the subject of great controversy.

The important question to be asked here is how to resolve those legislative conflicts and provide clear guidance for fertility clinics in Jilin. Where two effective legislative provisions conflict, Chapter V of the Legislation Law 2023 provides a clear hierarchy of legislation and rules for applying legislation. However, it is not sufficiently clear as to the legal effectiveness of the legislative provisions in the event of conflict or inconsistency between local regulations and the rules of SC ministries. Under such circumstances, the SC makes a recommendation.<sup>56</sup> If the SC finds the local rule should be applied, then the local rule shall be applied in its local jurisdiction (*i.e.* Jilin Province); if the SC recommends prioritising the Departmental Rule, it will be up to the NPCSC to decide which legislation should be applied.<sup>57</sup> Unfortunately, the legislative conflict between the Jilin Regulation and the Departmental Rules has yet to attract the attention of the SC and the NPCSC, and therefore, the inconsistency remains. Since the internal incoherence of legislation is so apparent, the national legislature – NPC or its Standing Committee – should find a way to resolve those conflicts and evaluate the possibility of potential reform of the current framework on ARTs.

## The regulator's problematic conception of arts

Access to ARTs raises not only legal but moral, ethical, and societal questions. Unlike many other countries, religious reasons are not one of the main concerns for regulating fertility, including ARTs in China.<sup>58</sup> Instead, social, cultural, and legal reasons are the primary reasons why there is still a national blanket ban on allowing unmarried women to access ARTs.

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54. Health Commission of Jilin Province, 'The Jilin Regulation on Population and Family Planning' (in Chinese), available at [http://wsjkw.jl.gov.cn/zfxgk/fdzdgknr/qttx/zcfg/202111/t20211129\\_8302919.html](http://wsjkw.jl.gov.cn/zfxgk/fdzdgknr/qttx/zcfg/202111/t20211129_8302919.html) (accessed 18 October 2022).

55. See, for example, Q. Tang (汤擎), 'Single Women's Reproductive Rights and Intergenerational Equality – Comments on the Irrationality of Article 30, Paragraph 2 of the Regulation of Jilin Province on Population and Family Planning (单身女性生育权与代际平等 – 评《吉林省人口与计划生育条例》第20条第2款的非合理性)', *Legal Science (法学)* 12 (2002), p. 28; W. Rui (芮卫东), 'Legal Analysis of Birth Control – Also on the Reproductive Rights of Single Women (生育控制的法律分析 – 兼论单身女性的生育权)', *Population and Health (人口与健康)* 8 (2003), p. 23.

56. Article 95 (2), Legislative Law 2023.

57. *Op. cit.*

58. See M. Sleeboom-Faulkner, 'Boundary Making and 'Good' Stem Cell Research (SCR) in Mainland China: Including Bioethics, Excluding Debate', *East Asian Science, Technology and Society* 4 (2010), p. 31.

Some members of the Chinese People's Political Consultative Conference (henceforth CPPCC) have asked the NHC if it is possible to relax the current blanket ban and allow unmarried women to access egg freezing. It is clear from the NHC's official Reply<sup>59</sup> that the true rationale behind the blanket ban is the fear of destruction of traditional family units, the emergence and the rise of complex family law matters after allowing unmarried women to have babies before marriage, and ultimately the damage or destruction of so-called social stability. All of these reasons are hidden under the disguise of preventing bodily harm to unmarried women due to long-term hormonal treatment caused by the egg-freezing procedure.

Indeed, the process of getting any ART treatment is far more burdensome for women than men. Women must bear the discomfort or long-term impact on their bodies and fertility as a result of intensive hormonal treatment, whereas men barely need to go through any discomfort or encounter any long-term impact. However, if what NHC has claimed is really the case that ARTs are harmful for unmarried women's bodies to the extent that they should be banned from accessing such services for the sake of protecting their own health, then ARTs should not be allowed for any women to access, including the married ones. Instead, the current regulatory framework seems to suggest that ARTs only cause harm to unmarried women, not to the married ones or not as significantly as to the married ones, as if marriage could shield married women from being harmed by ARTs.

Clearly, the national and provincial regulators in many cases have behaved as if they were regulating ARTs on the basis of medical science. However, in fact, the regulators only have given the *appearance* of regulating ARTs based on medical science, when they have been regulating on the grounds of political and social reasons. Many of them have ignored everything but the main political agendas, such as social stability and strong emphasis on the traditional form of families. The regulator, over the past decades, has created many obstacles for women to access ARTs, and in doing so, it essentially created risks for pushing women to go to the underground market to pursue such treatment. Moreover, the greater health risks caused by ART procedures should have given women a stronger interest than any other persons in making decisions surrounding ARTs and their fertility. However, the patriarchal values that are deeply rooted in the law-making culture direct the decision-making power to the men, who can freely decide whether and when to access ARTs to preserve their sperms and delay their reproduction to a preferred timing, instead of the women who, in fact, have more interests in claiming such decision-making power to decide what should be done to their bodies.

## Conclusion

*Xu's case* provides a vivid depiction of the problems existing in the current regulatory framework on ARTs and highlights the urgency of amending and potentially reforming

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59. NHC, 'Letter Regarding the Reply to Proposal No. 2049 (Social Management No. 144) of the Third Session of the 13th CPPCC National Committee' (关于政协十三届全国委员会第三次会议第2049号(社会管理类)提案答复的函), 23 July 2020, available at <http://www.nhc.gov.cn/wjw/tia/202101/b77b161058e44bad9f0c79c0541f4370.shtml> (accessed 10 November 2023).

the ARTs framework to allow unmarried women to access ARTs. By denying unmarried women's right to freeze their eggs, this has actively constituted violation and infringement of their reproductive rights, and this should no longer be overlooked by the legislator and the regulator, and it is the time to re-examine the current framework on ARTs and reform it in due course.

Furthermore, procreation is fundamental to the very existence and survival of the human race.<sup>60</sup> The desires and reasons for wishing to have children do not differ according to a person's marital status, sexual orientation, or gender identity. More importantly, there is no sound basis to conclude that marital status, gender identity, or sexual orientation can impact a person's reproductive interests.<sup>61</sup> Unmarried persons or couples may have the same wish to have genetically related children. Therefore, it is important to at least start considering reforming the current discriminatory regulatory regime and stopping denying unmarried women from accessing ARTs. At least, it can be started by allowing unmarried women to legally access egg-freezing services in China.

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60. See I. Cohen, 'The Right(s) to Procreate and Assisted Reproductive Technologies in the United States', in D. Orentlicher and T. Hervey, eds., *The Oxford Handbook of Comparative Health Law* (New York: Oxford University Press, 2020), pp. 1010–1025.

61. G. De Wert, W. Dondorp, F. Shenfield, P. Barri, P. Devroey, K. Diedrich, B. Tarlatzis, V. Provoost, and G. Pennings, 'ESHRE Task Force on Ethics and Law 23: Medically Assisted Reproduction in Singles, Lesbian and Gay Couples, and Transsexual People', *Human Reproduction* 29 (2014), p. 1859.