

# Single women's access to egg freezing in mainland China: an ethicolegal analysis

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## ABSTRACT

In the name of safeguarding public interests and ethical principles, China's National Health Commission bans unmarried women from using assisted reproductive technology (ART), including egg freezing. Supported by local governments, the ban has restricted single women's reproductive rights nationwide. Although some courts bypassed the ban to allow widowed single women to use ART, they have not adopted a position in favour of single women's reproductive autonomy, but quite the contrary. Faced with calls to relax the ban and allow single women to freeze eggs electively, the National Health Commission refused to amend their policy, partly to protect women's well-being paternalistically and partly to implement the central government's policies to boost the birthrate and maintain traditional family structures. While the government's concerns about elective egg freezing are not entirely unfounded, they have failed to demonstrate that banning single women's egg freezing is a suitable, necessary and proportionate means to safeguard societal interests and ethical principles. The authority's assumptions that women cannot make rational decisions for their health even with adequate informed consent procedures, that banning egg freezing by single women promotes a culture of having children 'at a proper age', and that egg freezing by single women offends China's public moralities have not been substantiated.

I was seeking medical consultation, but what I got was life advice: "Get married soon." —Theresa Xu, the "first Chinese single woman to sue for her right to freeze eggs."

## INTRODUCTION

On 22 July 2022, Theresa Xu received the court judgement of her landmark case. Two years ago, Xu, then 30, sought to freeze oocytes in a hospital in Beijing, but was rejected for being unmarried.<sup>1</sup> Xu recalled that the doctor, while patient and gentle, 'looked at me as if I were joking... and tried to persuade me to marry soon and have children earlier.'<sup>2</sup> Xu sued the hospital for discrimination against unwed women. The case underwent several trials before the court finally judged in the hospital's favour.

The hospital's winning was mainly due to a series of two-decade-old regulations issued by China's former Ministry of Health (the predecessor of today's National Health Commission), which limits the provision of assisted reproductive technology (ART) to legally married couples.

With the advance of technology, the use of ART has increased in China. As of June 2021, the total number of ART cycles implemented per year had exceeded one million in mainland China, with a

clinical pregnancy rate of approximately 40%.<sup>3</sup> At the same time, the government is reforming public medical insurance schemes to make ART more affordable.<sup>4</sup> However, unmarried women are prevented from taking advantage of technological advances and policy reforms regarding ART. Promoting single women's reproductive rights, including access to ART, has become one of the goals of Chinese feminists over the last few years.

Like Xu, many Chinese single women seek not to give birth through ART but to circumvent reproductive ageing through oocyte cryopreservation—also known as 'elective', 'social' or 'non-medical' egg freezing.<sup>5,6</sup> Considering the delay in the average age of marriage and childbearing for Chinese women,<sup>7</sup> the increase in demand for elective egg freezing is not surprising. A recent study shows that, among 750 female college students in East China, 36.9% responded 'yes' when asked whether they would consider freezing eggs, although 40% had a low level of knowledge about the procedure.<sup>8</sup> Compared with the respondents of similar studies in other nations,<sup>9–12</sup> Chinese young women have relatively lower awareness of egg freezing, but their acceptance of the technology is not low.

Given China's new policy to promote population growth, one might expect the government to expand single women's reproductive rights. However, while loosening restrictions on non-marital motherhood through natural conception, the government has not changed attitudes about barring unmarried women from ART. Legislative proposals to relax the ban were repeatedly rejected.<sup>13,14</sup> To sidestep the ban, many had to freeze eggs abroad.<sup>5</sup>

Internationally, an increasing number of women, mostly single, choose to freeze eggs.<sup>15–17</sup> Although the safety and efficacy of egg freezing are generally reassuring for a healthy woman who freezes eggs at a younger age,<sup>18–22</sup> the popularity of egg freezing still raises controversy. Frequently cited concerns include the medical risks involved,<sup>23</sup> the exploitation issue,<sup>24</sup> the medicalisation of social phenomena,<sup>25</sup> and the issue that women may overestimate the success rates of egg freezing and even become pressured to freeze eggs.<sup>26,27</sup> Nevertheless, while cautioning against the downside of the technology, few scholars advocate a blanket ban.

In China's context, since the family planning clause enshrined in the constitution has long created a legal basis for restricting individual reproductive autonomy for societal interests, it is necessary to examine the right to freeze eggs from a legal perspective. While there is a consensus that the Chinese Constitution guarantees reproductive rights, opinions differ sharply where single women's reproductive rights are concerned.<sup>28–32</sup> This article overviews



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the legal framework of single women's reproductive rights in China and analyses the legality and ethics of the National Health Commission's policy to ban single women from freezing eggs. I demonstrate that while courts and local governments have supported the ban, it lacks a constitutional and ethical basis. The policy-makers' arguments for the ban reflect paternalism and the deep-rooted tradition of promoting population policy through heavy-handed intervention. Although their arguments are not entirely unfounded, none justifies an outright egg freezing ban.

### THE CHINESE CONSTITUTION AND THE NATIONAL LAWS HAVE NOT DENIED SINGLE WOMEN'S REPRODUCTIVE RIGHTS

China's national statutory law system consists of the constitution, national laws formulated by the National People's Congress and its Standing Committee, administrative regulations issued by the State Council, and departmental regulations developed by the State Council departments. The National Health Commission's regulations, as departmental regulations, must not contradict the constitution and national laws.

While imposing family planning obligations on citizens, the Chinese Constitution has not explicitly mentioned reproductive rights. Nevertheless, it is widely acknowledged that reproductive rights, as self-evident human rights, are protected by Article 33(3) of the Chinese Constitution, a broad human right clause that guarantees that 'the State respects and protects human rights'.<sup>33,34</sup> Following this common interpretation, single women in China shall enjoy constitutionally protected reproductive rights since Article 33(3) does not exclude unwed people. Therefore, unless single women's egg freezing is deemed to violate Article 51 of the constitution, which stipulates that the exercise of fundamental rights shall not harm the interests of the state or the society, the freedom of unmarried women to prolong fertility through egg freezing technology as part of reproductive freedom should be guaranteed by the constitution.

At the national law level, Article 32 of the Women's Rights and Interests Protection Law stipulates that 'women enjoy the right to have children, and have the freedom not to have children' without excluding single women. The Civil Code, which contains no specific reproductive right provision, can, at best, impact reproductive rights indirectly. If and only if egg freezing by single women is considered unethical, the 'public order and good customs principle' of the Civil Code will nullify the egg freezing agreement.

The Population and Family Planning Law passed in 2001 is often cited as the national law basis for restricting the reproductive rights of unmarried people.<sup>32</sup> In the one-child policy era, Article 18 of the law prescribes that 'a husband and a wife are encouraged to have only one child,' without mentioning whether unmarried people were allowed to have any child. After the end of the one-child policy, Article 18 was amended to read 'the State encourages a husband and a wife to have two children' (2015) and 'a husband and a wife may have three children' (2021). Single people remain unmentioned.

As the Family Planning Law has been silent about single people's reproductive rights, a widely adopted interpretation is that out-of-wedlock childbirth is illegal per se.<sup>32,35</sup> Such an understanding has, however, gone beyond the letter of the law. According to its literal meaning, Article 18 aims to implement the population policy by setting a birth quota instead of denying the reproductive rights of any group of people.

When the policy to curb population growth was strictly enforced, local governments had the incentive to stretch the meaning of Article 18. Women who gave birth outside marriage,

even if they had only one child, were often charged 'social upbringing fees' as violators of the Family Planning Law. Their children were often denied household registration (*hukou*) until the social upbringing fees were paid. In recent years, the family planning policy has become far less coercive with the reversal of China's population policy. Since 2016, compliance with the family planning policy is no longer a prerequisite to registering a child in the *hukou* system. 'Social upbringing fees' were officially repealed in 2021. Against this backdrop, there is more reason to argue that while encouraging people to follow the population policy, the Family Planning Law shall not be interpreted as denying single people's reproductive rights.

### CHINA'S TOP HEALTH AUTHORITY BANS SINGLE WOMEN FROM FREEZING EGGS WITHOUT DIRECT CONSTITUTIONAL AND LEGAL BASIS

In 2001, the former Ministry of Health issued the Administrative Measures for Human-ART (hereinafter, Administrative Measures), which are still in effect today.<sup>36</sup> A series of ethical principles and codes of practice were also published, which were amended in 2003.<sup>37</sup>

Article 3 of the Administrative Measures stipulates that ART must be performed for 'medical purposes' and 'adhere to the national family planning policy, ethical principles and relevant regulations'.<sup>36</sup> As elective egg freezing is usually considered non-medical, the usual interpretation is that it is entirely banned in China. Still, the ban impacts single women more, given that they usually have a greater demand for fertility preservation.<sup>15-17</sup>

Even if avoiding age-related infertility is recognised as a medical purpose, ethical principles issued by the authority will still prevent single women from freezing eggs. In Ethical Principles for Human-ART and Human Sperm Banks (2003) the former Ministry of Health established seven principles,<sup>1</sup> among which the principle of promoting public interests prohibits applying ART to unmarried women—together with the prohibition of the violation of the family planning policy, gender selection and abuse of cloning technology.<sup>38</sup> Accordingly, the Code of Practice for Human-ART explicitly bans performing ART on single women, while the Basic Standards and Technical Code of Practice for Human Sperm Banks allow men to freeze sperm for 'reproductive insurance' regardless of their marital status.<sup>37</sup> When explaining its decision, the National Health Commission emphasised the concern that non-marital childbearing through ART would challenge China's traditional values.<sup>13</sup>

Since the ethical principles published by the former Ministry of Health do not explicitly mention egg freezing, whether they prohibit single women from freezing eggs depends on whether oocyte cryopreservation is categorised as ART. As the National Health Commission defines, 'ART refers to in vitro fertilisation-embryo transfer (IVF) and its derivative technologies, as well as artificial insemination'.<sup>37</sup> From a technical perspective, egg freezing can be categorised as ART as a modification of IVF. However, given that the immediate purpose of egg freezing is to preserve fertility instead of reproduction, another possible interpretation is that the ethical principles do not prohibit single women from merely freezing eggs. But so far, the National Health Commission has not endorsed this interpretation<sup>14</sup> and

<sup>1</sup>They are principles of benefiting the patient; obtaining informed consent; protecting future generations; promoting public interests; ensuring anonymity; preventing commercial exploitation strictly and conducting ethical supervision.

**Table 1** The National Health Commission's policy about freezing eggs for single women

Reasons for egg freezing by single women	The current policy
To avoid age-related infertility	Banned for being unethical
For donation	Banned. Only women undergoing ART treatment themselves (who must be married and infertile according to the current policy) can legally donate eggs <sup>38</sup>
For medical reasons	Not explicitly stipulated

ART, assisted reproductive technology.

has not explicitly allowed single women to freeze eggs for any purpose, even medical ones (table 1).

The legal framework of single women's right to ART is summarised in figure 1. The egg freezing ban restricts single women's reproductive autonomy without a direct constitutional or national law basis—as explained earlier, neither the constitution nor national laws have expressly denied the reproductive rights of unmarried women.

### THE BAN HAS RECEIVED SUPPORT FROM COURTS AND LOCAL POLICY-MAKERS

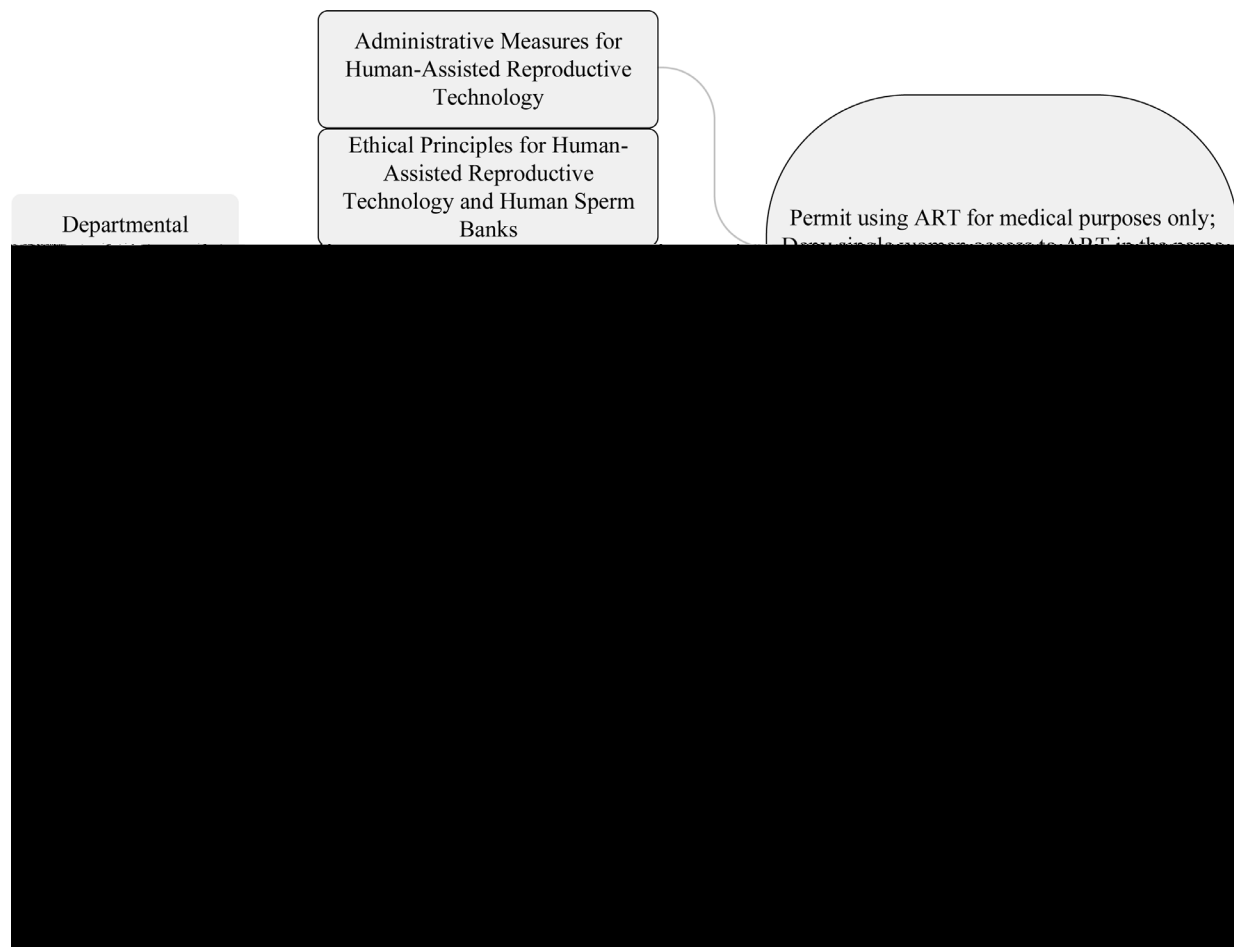
According to the Chinese Legislation Law, provinces, autonomous regions and the 'direct-administered municipalities' have the power to enact local regulations (Article 72 (1)). Local legislation must not contravene the constitution, national laws or

administrative regulations but does not have to follow departmental regulations such as those issued by the National Health Committee (Article 95(2)).

Despite China's centralised political system, it is not uncommon for local governments to go against central policies.<sup>39</sup> Some local health authorities did express doubts about the egg freezing ban. For example, the Hunan Provincial Health Commission stated that to reduce involuntary childlessness of unmarried women, 'it may be a workable compromise to allow single women to freeze eggs while keeping the marriage certificate a prerequisite document for thawing and fertilising eggs'.<sup>40</sup>

However, so far, most provinces, including Hunan, have strictly followed the regulations of the National Health Commission regarding ART in local law-making and enforcement. The only exception is Jilin Province, whose local regulations prescribe that 'women who have reached the legal age of marriage, have no children and decide to marry no longer, can use ART to give birth to one child.' However, this provision has never been put into practice. According to a local physician, as the local government failed to take measures to strongly support the use of ART by single women, local hospitals dare not challenge the national health authority.<sup>41</sup>

As to the judicial branch, as of August 2022, 83 published judgements that cited Administrative Measures can be retrieved from the Wolters Kluwer Law database. Most of these cases involve disputes about surrogacy or gamete sales (31.3%), ownership of frozen embryos or eggs (28.9%), contracts between unqualified ART centres and patients (18.0%), and single women's right to use ART (12.0%). Before Xu's lawsuit,



**Figure 1** The legal framework of single women's right to use ART in China

Chinese courts had no opportunity to specifically discuss single women's access to egg freezing. Still, if we look at the court's opinions in ART-related cases, we will find that the result of Xu's case was not unexpected.

There were 10 lawsuits concerning single women's access to ART, or more precisely, widowed single women's right to use ART. In these cases, a wife was undergoing ART treatment with her husband, who died before pregnancy was achieved; the widowed wife hoped to continue the process but was rejected for being legally unmarried. In seven cases, the courts bypassed the National Health Commission's regulations and ruled in favour of the widowed single women. In *Gao v. Shandong University Affiliated Hospital* and four other cases, the court held that widowed single women were 'different from single women in the usual sense'.<sup>42–46</sup> In *Hu v. Yunnan Jiuzhou Hospital* and two other cases, the court held that the Administrative Measures regulated the management of medical institutions and had no effect of denying a citizen's reproductive rights.<sup>43 44 46</sup>

Some suggest that, by allowing widowed single women to use ART, the courts have released a welcoming signal of enhancing single women's reproductive rights.<sup>32</sup> Such interpretations are overly optimistic. When a widowed woman uses ART to have a child related to her deceased husband, it is essentially the same as a heterosexual married couple having a child through ART. If a widowed woman wants to use donated sperm to bear a child not genetically related to her deceased husband, will today's Chinese courts allow it? The answer is likely to be no. In the newly reported *Zou v. Hunan Maternal and Child Health Hospital*, the court stated that denying single women access to ART is to 'prevent single women from evading their marital and family responsibilities through ART'.<sup>47</sup> It was held that by 'continuing the blood of the deceased husband,' the plaintiff would not only 'fulfil the responsibility of a mother, but also embody traditional Chinese virtues'.<sup>47</sup> The notion of 'continuing the blood of her husband' originates from the Chinese patriarchal clan concepts and has nothing to do with women's reproductive autonomy. In short, although some courts have circumvented the ban in some cases, their purpose is not to expand single women's reproductive rights.

### THE AUTHORITY'S REASONS FOR THE BAN AND THEIR INSUFFICIENCY

As analysed earlier, China's Constitution and national laws have not denied single women's reproductive rights. Only if single women's egg freezing is proven to be contrary to ethics or public interests, the 'public order and good customs' principle of the Civil Code or the fundamental right restriction clause of the constitution may provide the legal basis to bar unmarried women from egg freezing service. In a formal response to the legislative proposal to allow single women to freeze eggs (hereafter the Response), the National Health Commission mentioned the public interest and ethical considerations behind its current policy.<sup>14</sup>

The Response suggests that the ban has the following public policy purposes. First, to protect women's well-being. The Response emphasises that egg freezing involves medical risks and its long-term safety requires follow-up.<sup>14</sup> It is also mentioned that legalising egg freezing by single women may encourage delayed motherhood, which could negatively affect the health of mothers and children.<sup>14</sup> Moreover, the Response worries that women may have false hope about the success rate of egg freezing, considering the fertility clinics will 'inevitably abuse the

technology' for profit, and that the media may embellish the benefits of egg freezing and hype it as a 'medicine for regret'.<sup>14</sup>

Second, to encourage a culture of 'proper-age marriage and childbearing'. During the one-child policy era, 'getting married late and having children late' was vigorously promoted and even written into law. After the reversal of the population policy, the low-fertility culture remains. Since 2013, the number of marriage registrations has declined year after year in China.<sup>48</sup> The total number of marriage registrations was 8.1433 million in 2020, a decrease of 39.5% compared with 2013.<sup>48</sup> The average age of first marriage for women has been delayed by 3.95 years in the past decade, from 24 to 27.95.<sup>7</sup> Under such background, the National Health Commission states in the Response that its next work plan includes 'encouraging people to have children at a proper age'.<sup>14</sup> It seems that, in the government's view, a technology that gives women greater freedom in when to have children may just hinder its goal of encouraging a baby boom.

The above reasons reflect coercive paternalism and a habit of heavy-handedly intervening in fertility behaviours to achieve public policy goals. When legal paternalism is justified is a matter of controversy,<sup>49</sup> but in any case, the National Health Commission failed to provide sound reasons why barring single women from freezing eggs is necessary to protect women's well-being. Given the advancement of ART in China and the central government's policy reforms to expand the accessibility of ART for the married population, the medical risk is no longer a compelling reason to ban elective egg freezing. Since Chinese women have insufficient knowledge about egg freezing,<sup>8</sup> it is indeed necessary to take measures to protect women from irrational decision-making. But instead of a ban, the authorities could consider softer measures, such as regulating medical advertisements and setting an informed consent standard for egg freezing. Moreover, regarding women's welfare, the potential benefits of lifting the ban should not be ignored. In addition to the most frequently mentioned benefits, such as promoting reproductive autonomy and gender equality,<sup>50</sup> in China, the authorities should consider whether allowing healthy single women to freeze and donate eggs legally might ease the egg trading problem. As only married infertile women undergoing ART treatment can legally donate eggs according to current policy,<sup>38</sup> the waiting time for an egg donor now is 5–8 years.<sup>40</sup> Patients may, therefore, resort to the black market. It is worth noting that although surrogacy and sales of eggs are outlawed in China, among the 83 ART-related judicial cases published, as many as 26 arose from surrogacy agreements or sales of eggs.

As to the public good, admittedly, restricting individual rights for countervailing public interests is not only permitted by China's Constitution but also well-accepted in public health ethics.<sup>51</sup> However, the consensus in human rights law is that any restriction of fundamental rights must pass the proportionality test,<sup>52</sup> which consists of several subprinciples:

- ▶ The legitimacy principle requires assessing the legitimacy of a policy objective.
- ▶ The suitability principle requires the means to be suitable to achieve the legitimate end.
- ▶ The necessity principle requires choosing a means that causes the least harm to fundamental rights.
- ▶ The proportionality (in the narrow sense) principle requires balancing the benefits of achieving the end and the harm caused to fundamental rights.

So far, the authorities have failed to demonstrate that the egg freezing ban promotes public welfare, let alone its proportionality. First, even if we leave aside the issue of whether it is legitimate to implement the population policy by restricting

fundamental rights, the policy-makers still need to show why the egg freezing ban is a suitable measure to achieve its policy goals. Without empirical data, the National Health Commission's assumption that women will deliberately delay marriage and childbearing through elective egg freezing is arbitrary. In international academic literature, studies found that the difficulty in finding the right partner, instead of lifestyle choices, is the main reason why women freeze eggs.<sup>16 17 53–55</sup> Moreover, the causes for the decline in marriage and fertility intentions are complex. In addition to common causes across countries, in China, the low fertility culture formed after the long-term implementation of the one-child policy and the skewed sex ratio at birth are all possible reasons.<sup>56 57</sup> The authorities should not arbitrarily assume that the egg freezing ban will help boost the birthrate, especially when other softer measures may promote fertility.

As to ethical aspects, the National Health Commission's arguments made in the Response overlap with its public policy considerations. By emphasising the concerns that egg freezing may cause physical risks, encourage women to postpone motherhood irrationally, and invite risks of commercialisation of women's bodies, the National Health Commission aims to justify its policy through the ethical principles of non-maleficence, preventing exploitation and promoting

of carrying on the family line (Confucianism).

of Confucianism, attached to

the concept of filial piety (孝道), which is a core value in Chinese culture. The ban on egg freezing is seen as a way to protect the family line and ensure the continuation of the family name. This is particularly important in a society where the family is highly valued and where the elderly are often dependent on their children for support.

**Data availability statement** All data relevant to the study are included in the article or uploaded as online supplemental information.

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