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The Evolution of China's Legislation on Reproduction

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The Evolution of China's Legislation on Reproduction

DU YIFANG*

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | POPULATION POLICY DURING THE INITIAL STAGE OF THE NEW CHINA: 1949-LATER 1970s..... | 3 |
| | A. <i>Encouraging Reproduction: 1949</i> | 3 |
| | B. <i>The Embryo of Population Control: The 1950s</i> | 4 |
| | C. <i>Reversal of Policy: The 1950s-1970s</i> | 6 |
| | D. <i>The Results of the Policies from 1949 to the 1970s</i> | 6 |
| II. | THE PROMULGATION OF CHINA'S FAMILY PLANNING SYSTEM IN LAW: LATER 1970s-2001..... | 8 |
| | A. <i>Policy Level: From Encouraging Reproduction to Promoting Birth Control</i> | 8 |
| | B. <i>Constitutional Level: Programmatic Regulations on Family Planning</i> | 10 |
| | C. <i>Legislation Level: The One Child System</i> | 11 |
| III. | THE PRACTICE OF THE FAMILY PLANNING SYSTEMS IN CHINA: 2001-2015..... | 13 |
| | A. <i>What Does One Child Mean?</i> | 13 |
| | B. <i>When Can a Couple Have a Second Child?</i> | 17 |
| | C. <i>Management</i> | 19 |
| | D. <i>Sanctions for Violation of the Policy</i> | 22 |
| IV. | THE EFFECTS OF IMPLEMENTATION OF THE FAMILY PLANNING SYSTEM: 2001-2015..... | 24 |
| | A. <i>The Effect of the Family Planning System on Population Size</i> | 24 |
| | B. <i>Reform by Local Governments</i> | 27 |

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| | | |
|-----|---|----|
| C. | <i>Changing Attitudes to the Population Policy and Pressures to Amend the Law</i> | 28 |
| V. | THE POPULATION AND FAMILY PLANNING LAW AMENDMENT (2016)..... | 30 |
| VI. | CONCLUSION | 32 |

The right to control their own reproductive capacity is an important aspect of women’s ability to participate as equals in the workplace, society in general, and the political sphere. As such, women’s reproductive rights have been a part of the international struggle for the equality of women. As a result of social movements, political reform, and legal development, the right of reproductive autonomy has gradually been interpreted as a basic right of the citizens in modern Western society. As stated in the 1995 Platform developed by the Beijing conference on women’s rights:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children. . . . It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.¹

However, in modern China, there has been resistance to the idea that reproductive decisions belong to individual women, separate from the needs of the society in which they live.

In China, reproduction is a serious and sensitive topic. China is one of a few countries that regulate family planning in its constitution and through legislation. While some countries’ family planning regulations aim to encourage reproduction,² China’s family planning regulations limit reproduction. Article 25 of the Constitution of the People’s Republic of China declares that “the state promotes family planning so that population growth may fit the plans for economic and social development,” and Article

1. Fourth Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 95, U.N. Doc. A/CONF.177/20/Rev.1, annex II (Sept. 15, 1995). See also *id.* ¶ 23.

2. See e.g. Tang Mengjun (汤梦君), *Zhongguo Shengyu Zhengce De Xuanze: Jiyu Dongya, Dongnanya Diqu De Jingyan* (中国生育政策的选择: 基于东亚, 东南亚地区的经验) [*Choice for China’s Population Policy: Lessons from East Asian Region*], 37 RENKOU YANJIU (人口研究) [POPULATION RESEARCH] 77, 77–90 (2013) (discussing the family planning systems and related policy encouraging child birth in Japan and Singapore). See also Liu Haiyan (刘海燕) & Liu Jingyuan (刘敬远), *Yindu Yu Zhongguo De Jihua Shengyu Zhengce Bijiao* (印度与中国的计划生育政策比较) [*A Comparative Study of Family Planning Policy in China and India*], 4 NANYA YANJIU JIKAN (南亚研究季刊) [S. ASIAN STUDIES Q.] 86, 86–89 (2010) (stating family planning is voluntary in India).

49 stipulates that “both husband and wife have the duty to practice family planning.”³

This article discusses how China's policy on reproduction developed from one that encouraged population growth to the very restrictive one-child policy. Part I discusses the factors underlying the establishment of the reproduction system after 1949. Part II analyzes the transition of national policy and legislation over the period from 1980 to 2001 from encouraging to controlling childbirth. Part III discusses, in detail, the development and implementation of the one-child policy, and Part IV discusses the effects of this development. Finally, Part V explains the 2016 amendment to the Population and Family Planning Law in China, which abandoned the one-child policy.

I. POPULATION POLICY DURING THE INITIAL STAGE OF THE NEW CHINA: 1949–LATER 1970S

After years of war, China had a small population at the initial stages of the People's Republic. Considering the requirements of military and economic development, the government regarded encouraging reproduction as necessary. In this period, the population policy went through three stages: (1) one in which reproduction was encouraged; (2) one in which the embryo of population control can be seen; and (3) one in which population control policy was reversed, as described in Parts A, B and C below. Part D discusses the background of encouraging reproduction, the effects of a rejuvenated economy and a traditional culture, and the impact of a rapidly increasing population in those decades.

A. *Encouraging Reproduction: 1949*

In the initial stages of the People's Republic of China, as the economy and infrastructure gradually recovered from the destruction of constant wars in previous decades, China entered a stable phase.⁴ The population was low due to decades of warfare and destruction.⁵ Considering the small size of China's population and its need to develop, China's government

3. XIANFA, art. 25 (1982) (China); *id.* art. 49.

4. Nancy E. Riley, *China's Population: New Trends and Challenges*, 59 POPULATION BULL. 3, 5–6 (2004).

5. *See id.*

encouraged couples to have more children.⁶ During that time, Chairman Mao Tse-tung regarded a fast-growing population as a positive force for economic development in China, stating, “China’s large population is a great thing. No matter how many times it would increase, we can solve it by production.”⁷ The slogan “Many hands make light work,” popularized during those decades, declared a fundamental policy that China needed and encouraged: population growth for both economic and military reasons.⁸ In addition to encouraging birth, government policy strictly limited contraception and abortion. For example, in 1950, the National Health Commission and the Military Health Commission jointly released a regulation restricting abortion for women cadres in the army and government agencies.⁹ In sum, the government forcefully encouraged reproduction.

B. The Embryo of Population Control: The 1950s

In 1953, the first census showed the Chinese population was 600 million.¹⁰ This result was far beyond the previous state estimate. At that point, the government began to recognize the problems that might be caused by rapid population growth, and a series of discussions followed.

In 1954, at the first birth control forum of the State Council, Liu Shaoqi, the Chairman of the National People’s Congress Standing Committee from 1954 to 1959, stated, “The Communist Party of China agrees with birth control. It would not cause panic in China.”¹¹ After this forum, the Central Government considered putting the birth control policy into a formal document. In 1955, it did so, explaining that:

Reproduction control is a major administrative issue related to people’s life. In the current historical conditions, we are in favor of the proper reproduction control for the interests of the state, family and the new generation. Local party committees should appropriately explain this policy to cadres and people (except in the

6. See Laura Fitzpatrick, *A Brief History of China’s One-Child Policy*, TIME (July 28, 2009), <http://content.time.com/time/world/article/0,8599,1912861,00.html>.

7. Mao Tse-Tung, BANKRUPTCY OF IDEALIST CONCEPTION OF HISTORY (1949), reprinted in 4 SELECTED WORKS OF MAO TSE-TUNG 451, 453 (Foreign Language Press, Peking ed., 1969).

8. See Victor C. X. Wang & Judith Parker, *Lifelong Learning in China*, 12 REVISTA INT’L DE ORG. 71, 72 (2014).

9. Yang Kuifu (杨魁孚) et al., ZHONGGUO RENKOU YU JIHUA SHENGYU DASHI YAO LAN (中国人口与计划生育大事要览) [CHINA’S POPULATION AND FAMILY PLANNING AFFAIRS HANDBOOK] 1–2 (Zhongguo Renkou Chuban She (中国人口出版社) [China Population Press] (2001).

10. Zhonghua Renmin Gongheguo Guojia Tongjiju (中华人民共和国国家统计局) [National Bureau of Peoples’s Republic of China], DIYICI QUANGUO RENKOU PUCHA GONGBAO (第一次全国人口普查公报) [FIRST NATIONAL CENSUS BULLETIN] (Nov. 2, 2001), http://www.stats.gov.cn/tjsj/tjgb/rkpcgb/qgrkpcgb/200204/t20020404_30316.html.

11. LIU SHAOQI, COLLECTED WORKS OF LIU SHAOQI 275–316 (1969).

minority areas) in order to let them have correct understanding on the birth control problem.¹²

Finally, in 1957, at the 11th enlarged meeting of the State Council Conference, Mao Tse-tung seemed to change his previous position and indicated that:

It is necessary to promote birth control. . . . Peasants are required to control their birth rate. Citizen families with too many children are also required to execute birth control. On this issue, both urban and rural areas have same requirement. It is inappropriate to understand that we have no requirement. I propose to set up a birth control committee as one of the government organs. Nongovernmental organizations can establish a group as well. Our country's population is increasing rapidly, and it is reasonable and possible to study methods of family planning.¹³

This was the first time that Chairman Mao Tse-tung referred to family planning.¹⁴ Due to his prominence, the change in Mao's concept was influential to the development of China's population policy. Accordingly, newspapers and other publications published many articles related to birth control and contraception. Hospitals and clinics provided the direction of contraception practice.¹⁵ In July 1957, Ma Yinchu, a famous demographer in China, published a book titled *New Population Theory*, in which he argued that rapid population growth interfered with industrialization development.¹⁶

In short, the idea of birth control in China originated in the latter part of the 1950s.¹⁷ This meant that the central government's attitude towards reproduction changed dramatically in less than ten years. As the population began growing, the concept of encouraging reproduction that had prevailed in the early stage of the People's Republic of China was erased, and birth control was proclaimed by the national leaders and official documents to be the new goal.¹⁸

12. Peng Peiyun (彭佩云), ZHONGGUO JIHUA SHENGYU QUANSHU (中国计划生育全书) [CHINESE FAMILY PLANNING BOOK] 1 (1997).

13. Kuifu et al., *supra* note 9, at 14–15.

14. *Id.* at 15. 第一次提出计划生育这一新用语。 [This was the first time Mao raised the term of "Family Planning."] *Id.*

15. *Id.* at 16–18.

16. Ma Yinchu (马寅初), XIN RENKOU LUN (新人口论) [NEW POPULATION THEORY], (Guangdong Jingji Chubanshe [广东经济出版社] (Guangdong Economy Press), 1998), at 11. 然而, 我们过多的人口, 就挡住了我们高速度工业化的后腿 [However, the large population will block the high speed of industrialization]. *Id.*

17. Kuifu et al., *supra* note 9, at 13, 15.

18. *Id.* at 15–16.

C. *Reversal of Policy: The 1950s-1970s*

However, the concept of birth control was not implemented because a new situation emerged in China. From 1958 to 1961, China's population decreased sharply due to a three-year, nationwide famine.¹⁹ The government began to worry about the population decreasing, and most projects related to family planning were stopped.²⁰

After 1962, with the end of the famine, the population rapidly increased again.²¹ The government re-proposed the necessity of birth control, but stopped again in 1966 when the Cultural Revolution broke out.²² That revolution plunged China into chaos, and by November 1968, the Family Planning Committee was disbanded.²³ Therefore, the family planning ideas from the 1950s were not executed in practice.

D. *The Results of the Policies from 1949 to the 1970s*

Over the period from 1949 to the later 1970s, the concept of family planning was not really implemented in China, though the idea had appeared. Encouraging reproduction was still the basic attitude of the government. However, the rate of reproduction was not only related to governmental policies, but also to economic, cultural and other social factors which affected people's decisions about how many children to have.²⁴

The first factor affecting population during that period was the economy. In 1949, more than 80 percent of the Chinese people still lived in rural

19. See *Total Population 1959-1961*, NAT'L BUREAU OF STAT. OF CHINA, <http://data.stats.gov.cn/english/easyquery.htm?cn=C01> (last visited Nov. 20, 2016). China's population decreased 134.8 million from 1959 to 1961. *Id.*

20. Zhai Zhengwu (翟振武), *20 Shiji 50 Niandai Zhongguo Renkou Zhengce De Huigu Yu Zai Pingjia* (20世纪50年代中国人口政策的回顾与再评价) [*Retrospect and Re-evaluation of Chinese Population Policy in 1950s*], 1 ZHONGGUO RENKOU KEXUE (中国人口科学) [CHINESE J. POPULATION SCI.] 17, 22-23 (2000).

21. *Id.*

22. *Id.* at 22.

23. Chen Wenlian (陈文莲) & Jiang Taikui (蒋太奎), "*Wenhua Dageming*" *Qijian Zhongguo Renkou Zhengce Yanbian Tanta* ("文化大革命"期间中国人口政策演变探讨) [*On the Evolution of China's Population Policy During the "Great Cultural Revolution"*], 1 ZHONGNAN DAXUE XUEBAO SHEHUI KEXUE BAN (中南大学学报 社会科学版) [J. CENT. SOUTH U. (SOC. SCI.)] 99, 100 (2011).

24. Li Hua (栗华), *Lvetan Yingxiang Renkou Shengyuly De Jige Shehui Yinsu* (略谈影响人口生育率的几个社会因素) [*Introduction About Social Factors Affecting the Population Birth Rate*] 4 RENKOU XUEKAN (人口学刊) [POPULATION JOURNAL], 19, 19-21 (1982) (社会经济发展状况是影响生育的重要因素... 文教卫生状况也影响着生育率的高低... 婚姻 家庭也是影响生育率的一个社会因素... 风俗习惯、伦理道德宗教对生育率也很有影响). ["Social and economic development is an important factor affecting fertility... The status of culture and education and health also affects the fertility level... Marriage and family status is also a social factor affecting fertility rate... Customs, ethics, and religion also have a great influence on fertility."].

areas²⁵ and engaged in self-sufficient agricultural production. This underdeveloped and inefficient productive mode demanded a massive labor force for economic development. The planned economy system instituted after 1949 restricted peasants in rural area and agriculture was the only income for their living, which meant that the economic situation of a family depended on the family's size and labor force participation.²⁶

The second factor was cultural. In traditional Chinese culture, people believed that "the more children, the more blessing."²⁷ Another tradition in rural areas was that only boys could be their family's heirs. As a result, the desire to have a boy to carry on the family name lead those families with daughters to bear more children. Meanwhile, due to an undeveloped social security system, concerns about care for parents in their old age also required a high birth rate in order to care for them in future.²⁸

Finally, the third factor showed that with the progress of health services and medical technology, infant survival rate and life expectancy in China greatly improved. The National Bureau of Statistics of China indicated that neonatal mortality declined from 92.55 per thousand in the period of 1944 to 1949 to 22.90 per thousand in the period of 1980 to 1984.²⁹ Meanwhile, life expectancy was dramatically extended during this period; increasing from around 35 years in 1949 to 68 years in 1980.³⁰

25. See Zhai Zhengwu (翟振武), *Zhongguo Nongcun Renkou Zengzhang De Jingji Jizhi* (中国农村人口增长的经济机制) [*The Economic Mechanism of the Growth of Rural Population in China*], 4 RENKOU YANJIU (人口研究) [POPULATION RESEARCH] 2, 2 (1991).

26. Ping Zhou, *China's Hukou System*. <http://geography.about.com/od/chinamaps/fl/Chinas-Hukou-System.htm> (last visited Nov. 22, 2016). China's Hukou system is a family registration program that serves as a domestic passport, regulating population distribution and rural-to-urban migration. *Id.*

27. Feng Jie (冯杰), Ren Zhiying (任智英), *Duoziduofu Guannian Yingxiang Xia De Zhongguo Jindai Nongye* (多子多福观念影响下的中国近代农业) [*The Contradiction Between Multi-Son Wealth and Modern Farm Development*], 1 HEBEI XUEKAN (河北学刊) [HEBEI ACADEMIC JOURNAL] 246, 247-48 (2008). Confucianism ruled China for more than 2000 years and the multi-son wealth concept has become a Chinese societal concept for long time. *Id.*

28. *Id.*

29. Zhonghua Renmin Gongheguo Guojia Tongjiju (中华人民共和国国家统计局) [National Bureau of Peoples's Republic of China], *ZHONGGUO RENKOU TONGJI NIANJIAN 1989* (中国人口统计年鉴1989) [CHINA POPULATION STATISTICS YEAR BOOK 1989] 141 (1989).

30. *Id.* at 563.

As a result, the population increased quickly compared to the turbulent period before 1949, from 541 million in 1949 to 987 million in 1980.³¹

Population growth was inevitable under the effect of the government's encouragement, economic, cultural and other social factors.

II. THE PROMULGATION OF CHINA'S FAMILY PLANNING SYSTEMS IN LAW: LATER 1970S-2001

The Chinese population doubled in three decades, and the constantly increasing rate made the government realize the necessity of controlling population growth.³² As a result, over the period from the 1980s to 2001, China's family planning system was transformed from one encouraging birth to one controlling birth. I describe this transition below on three levels: those of policy, the Constitution, and legislation.

A. Policy Level: From Encouraging Reproduction to Promoting Birth Control

In the late 1970s, when the Cultural Revolution ended, Chinese society became more stable.³³ At the time, the large number of people born in the 1950s married and had children.³⁴ This huge population would become a

31. Zhonghua Renmin Gongheguo Guojia Tongjiju (中华人民共和国国家统计局) [National Bureau of People's Republic of China], *ZHONGGUO TONGJI NIANJIAN 1983* (中国统计年鉴1983) [CHINA STATISTICAL YEARBOOK 1983] 103 (1983).

32. See *Zhonggongzhongyang Guanyu Kongzhi Woguo Renkou Zengzhang Wenti Zhi Quanti Gongchandangyuan Gongqingtuanyuan De Gongkai Xin* (中共中央关于控制我国人口增长问题致全体共产党员共青团员的公开信) [Open Letter from the Central Committee of the Communist Party to all the members of the Communist Party and Youth League on the control of the population growth of China] (1980), http://blog.sina.com.cn/s/blog_5036bc980102dwwk.html.

33. *Zhongguo Gongchandang Di Shiyi Jie Zhongyang Weiyuanhui Di San Ci Quanti Huiyi Gongbao* (中国共产党十一届中央委员会第三次全体会议公报) [Bulletin of the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China] (1978), <http://cpc.people.com.cn/GB/64162/64168/64563/65371/4441902.html>. 国民经济得到了进一步的恢复和发展; 全国出现了安定团结的政治局面; 我国外交政策得到了重大进展。所有这一切, 都为全党把工作着重点转移到社会主义现代化建设上来准备了良好条件。 [The national economy has been further restored and developed; the political situation of stability and unity has appeared in the whole country; the foreign policy of our country has been greatly developed. All this, for the whole party to focus on the work of the construction of socialist modernization to prepare a good condition.] *Id.*

34. See Nat'l Bureau of People's Republic of China, *supra* note 29, at 563. 尤其严重的是, 我国人口在一九六三年到一九七〇年这一段时间增加得最快, 现在三十岁以下的人, 约占全国人口总数百分之六十五, 今后每年平均将有二千多万人进入结婚生育期。 [Particularly, China's population had increased rapidly from 1963 to 1970. Currently, people under the age of thirty, account for about 65% of total population. Moving forward, there will be about twenty million people entering into the marriage period in the future.] *Id.*

serious social problem for the country with respect to food supply, the environment, housing, social security, and other aspects of social development.³⁵ Thus, birth control again became a priority for the Central Government.

In December 1973, the family planning office of the state council introduced the national family planning policy known as “Late, Rare, Few.” This policy indicated that people should not marry until they are over 25 years of age, restrain for three years following the birth of their first child to have a second child, and limit the amount of children a couple may have to two.³⁶ Local hospitals and birth control agencies were strengthened to provide the necessary birth control services, including contraceptive drugs and other implements for free.³⁷

In September 1982, the twelfth National Congress of the Communist Party of China proposed more specific goals for population control.³⁸ It

35. Chen Baiming (陈百明), “Zhongguo Tudi Ziyuan Shengchan Nengli Ji Renkou Chengzai Liang” *Xiangmu Yanjiu Fangfa Gailun* (“中国土地资源生产能力及人口承载量”项目研究方法概论) [*An Outline of The Research Method of the Project “the Productivity and Population Carrying Capacity of the Land Resource in China”*], 3 ZIRAN ZIYUAN XUEBAO (自然资源学报) [JOURNAL OF NATURAL RESOURCES] 198, 197–205 (1991). 中国正以历史上最严峻的资源状况承载着历史上最大数量的人口。以耕地为例, 1985年至1987年全国累计净减少耕地3160万亩, 平均每年约1050万亩, 1988年起即使按700万亩计, 至2000年还将减少9100万亩。耕地与人口的反向发展使人均占有量多年呈下降趋势, 今后将更为匮乏。[China is bearing the greatest number of people in the history with the most serious resources in history. In arable land, for example, from 1985 to 1987 the cumulative net reduction of 31 million–600 thousand acres of arable land, an average of about 10 million–500 thousand acres per year, and from 1988 onwards to 2000, even by 7 million acres, the arable land will be reduced by 91 million acres. Reverse development of cultivated land and population in the years per capita consumption decreased. It would be much shorter in future.] *Id.*

36. Tang Zhaoyun (汤兆云), *20 Shiji 70 Niandai Zhongguo Renkou Zhengce Yanjiu* (20世纪70年代中国人口政策研究) [*Study on Population Policy of China in 1970s*], 3 JIANGXI SHEHUI KEXUE [江西社会科学] (JIANGXI SOCIAL SCIENCES) 141, 141–43 (2003), http://www.nssd.org/articles/Article_Read.aspx?id=7578283.

37. DANG HE GUOJIA LINGDAOREN GUANYU RENKOU YU JIHUA SHENGYU DE LUNSHU (党和国家领导人关于人口与计划生育的论述) (Speech of Party and State Leaders on Population and Family Planning), *Zhongguo Renkou Chubanshe* (中国人口出版社) [China Population Press] 10 (1997). 毛泽东主席提出关于避孕工作, 要送上门去, 避孕药物、器械这些东西, 免费提供, 挨家送, 因为人家不好意思来领。[Mao Tseung emphasized the work of contraception. He said contraceptive drugs and instruments should be provided for free and sent to people's homes because people feel too shy to get it.] *Id.*

38. Hu Yaobang (胡耀邦), *Hu Yaobang Zai Zhongguo Gongchandang Di Shier Ci Quanguo Daibiao Dahui Shang De Baogao* (胡耀邦在中国共产党第十二次全国代表大会上的报告) [*Hu Yaobang's report on the Twelfth National Congress of the Communist Party*

aimed to control China's population so that it would be less than 1.2 billion by the end of the 20th century.³⁹ This meant that the target population would be 0.4 billion less than the expected population growth following the then-current trend. The Twelfth National Congress determined "to implement family planning as one of basic national principle."⁴⁰

Although the government at that time regarded birth control as a national policy, it was unstable and non-mandatory. Birth control policies were implemented by education, persuasion, and propaganda, which had caused the birth control system to be inconsistent before 1980.⁴¹ Because there was no regulation at the legislative level, some regions did not execute birth control proposals or policies, while other regions appeared to force tubal ligation, abortion, and even infanticide.⁴² Under these circumstances, normative laws and regulations were urgently needed.

B. Constitutional Level: Programmatic Regulations on Family Planning

The year 1982 was an important milestone for the construction of the Chinese legal system. After the termination of the Cultural Revolution, the government gradually recognized the importance of the legal system and many laws were enacted, such as the Organization Law of the People's Republic of China concerning the National People's Congress, the Organization Law of the State Council of the People's Republic of China, and, most importantly, the Constitution of the People's Republic of China.⁴³

Against this legal and social background, birth control was written into the Constitution as one of the constitutional obligations.⁴⁴ Article 25 of the Constitution (1982) provides, "The state promotes family planning so that population growth may fit the plans for economic and social development."⁴⁵ Also, Article 49 states, "Both husband and wife have the obligation to practice family planning."⁴⁶ Although there was no specific

of China], CPC.PEOPLE.COM.CN (Sept. 8, 1982), <http://cpc.people.com.cn/GB/64162/64168/64565/65448/4526430.html>.

39. *Id.*

40. *Id.*

41. Martin King Whyte et al., *Challenging China's One-Child Policy*, 74 CHINA J. 144, 145–50 (2015).

42. *Id.* at 150.

43. See, e.g., Zhonghua Renmin Gongheguo Guowuyuan Zuzhi Fa (中华人民共和国国务院组织法) [Organization Law of the State Council of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 10, 1982, effective Dec. 10, 1982), <https://www.cecc.gov/resources/legal-provisions/organiclaw-of-the-state-council-of-the-peoples-republic-of-china-1982>.

44. XIANFA art. 25 (1982) (China).

45. *Id.*

46. *Id.* art. 49.

legislation issued for family planning, it was included in the Constitution for the first time. Thus, family planning was regarded as a basic national policy by the Constitution, but, unfortunately, reproduction was defined as an obligation at the constitutional level.

C. Legislation Level: The One Child System

Although the Constitution defined the principle of family planning, there was no family planning regulation on the legislative level.⁴⁷ By the 1990s, China began to open up and play an international role.⁴⁸ With the reforms and opening-up policy of Deng Xiaoping, China's economy started to develop rapidly.⁴⁹ China increased efforts to attract international investment, on the one hand, and to encourage the development of domestic enterprises on the other hand.⁵⁰ All this development demanded a more rational legal system and more elaborate legislation, which required the

47. The earliest legislation about family planning was the Protection of Rights and Interests of Women Law established in 1992. See *Zhonghua Renmin Gongheguo Funv Quanyi Baozhang Fa* (中华人民共和国妇女权益保障法) [Law of the People's Republic of China on the Protection of the Rights and Interests of Women] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 3, 1992, effective Oct. 1, 1992), arts. 43-51.

48. DENG XIAOPING TONGZHI ZHONGYAO TANHUA (1987 NIAN 2 YUE - 7 YUE) (邓小平同志重要谈话(一九八七年二月-七月)) [The Important Reports from Deng Xiaoping (February to July 1987)], *Renmin Chubanshe* (人民出版社) [People's Publishing House] 1987, at 21-22. 鉴于过去的教训,我们必须改变闭关自守的状态,必须调动人民的积极性,这样才制定了开放和改革的政策。开放是两个内容,一个对内开放,一个对外开放。[In view of past lessons, we must change the status from closing a country to a country that is open, mobilizing the enthusiasm of people, then establishing the opening and reforming policy. There are two contents in openness: one is opening inside, the other one is opening outside.] *Id.*

49. See *Zhonggongzhongyang Guanyu Jianli Shehui Zhuyi Shichang Jingji Tizhi Ruogan Wenti De Jueding* (中共中央关于建立社会主义市场经济体制若干问题的决定) [The Decision of the Central Committee of the Communist Party of China on Several Issues Concerning the Establishment of a Socialist Market Economy], <http://www.people.com.cn/GB/shizheng/252/5089/5106/20010430/456592.html>. 邓小平同志1992年年初重要谈话和党的十四大为标志,我国改革开放和现代建设事业进入了一个新的发展阶段。[In the beginning of 1992, the important talks from Comrade Deng Xiaoping and the 14th Party Congress, as the symbol of China's reform and opening up and modernization drive, has entered a new stage of development.] *Id.*

50. See Sang Baichuan (桑百川), *30 Nian Waishang Touzi De Gongxian, Jingyan Yu Qianjing* (30年外商投资的贡献、经验与前景) [Contribution, Experience and Prospect of Foreign Investment in Recent 30 Years], 1 *GUOJI MAOYI* (国际贸易) [INTERNATIONAL TRADE] 58, 58-66 (2009). 对外开放30年来,我国吸收外商直接投资规模持续扩大,尤其近5年来一直高速增长,国家前列。[In the past 30 years, China's foreign direct investment has continued to expand, especially in the past 15 years. It has been the highest in the forefront of developing countries.] *Id.*

Chinese government to pay more attention to constructing its legal system.⁵¹ China entered into an active legislation stage.

In this period, two laws were promulgated relating to family planning. In 1992, the Protection of Rights and Interests of Women Law was enacted, which stated that women have the right to have children as well as the freedom not to have any children.⁵² This was a great improvement because it was the first time in China that reproduction was defined as a right instead of as an obligation. Although this right has many limitations, because the article referred to provided that the right should be exercised in accordance with relevant regulations, in fact no other regulations defined family planning on the national level at that time.⁵³

In 2001, the Population and Family Planning Law, meant to be the new basic law in reproduction, was enacted.⁵⁴ Article 18 of this law provides: “The State maintains its current policy for reproduction, encouraging late marriage and childbearing and advocating one child for one couple.⁵⁵ Where the requirements specified by laws and regulations are met, plans for a second child, if requested, may be made.”⁵⁶

These two paragraphs provide a summary of Chinese family planning legislation on the national level up until 2015.⁵⁷ China had established a clear constitutional foundation and legislation for family planning in this period. However, because of the complexity of population issues, the practice of the family planning system was left to the different provinces, and areas of China proceeded according to similar but different measures and regulations, as described in the next section.

51. *Yifa Zhiguo Jiben Fanglve De Tichu He Fazhan* (依法治国基本方略的提出和发展) [The Basic Strategy of Rule of Law Propose and Develop] ZHONGGUO RENDA WANG (中国人大网) [CHINA NATIONAL PEOPLE’S CONGRESS] (Nov. 18, 2014, 10:46 AM) <http://npc.people.com.cn/n/2014/1118/c14576-26046559-4.html>. In 1997, the 15th meeting of National Congress of the Communist Party set the “rule of law” as the basic strategy of governing the country. It further established “a socialist country ruled by law” as the major task of socialist modernization and put forward the construction of China socialist legal system as an important goal. In 1999, “rule of law” was written in the Constitution of China. *Id.*

52. *Zhonghua Renmin Gongheguo Funv Ouanvi Baozhang Fa* (中华人民共和国妇女权益保障法) [Law of the People’s Republic of China on the Protection of the Rights and Interests of Women] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 3, 1992, effective Oct. 1, 1992), art 47.

53. *See id.*

54. *Zhonghua Renmin Gongheguo Renkou Yu Jihua Shengyu Fa* (中华人民共和国人口与计划生育法) Population and Family Planning Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2001, effective Sept. 1, 2002), art. 18, <http://www.gov.cn/english/laws/2005-10/11/content75954.thm> [hereinafter *Population and Family Planning Law of the People’s Republic of China*].

55. *Id.*

56. *Id.*

57. *Id.*

III. THE PRACTICE OF THE FAMILY PLANNING SYSTEM IN CHINA: 2001-2015

The Chinese Constitution does not explain the content of family planning. According to Article 18 of the Population and Family Planning Law (2001), described above, family planning policy was generally recognized as being that one couple can have only one child.⁵⁸ However, in practice, because of China's vast territory and ethnic diversity, the implementation of birth control policy was located on the provincial level to accommodate different conditions. Consequently, each provincial government had its own family planning regulations, which vary widely among each province. Accordingly, the one-child policy was accomplished by different regulations in different areas.

With respect to practice under Article 18 of the Population and Family Planning Law, it could be clarified from following aspects: What did one child mean? Who could have a second child? How was the policy implemented, and what happens if a couple violates the policies? Each of these questions is discussed in subparts A through D below.

A. What Does One Child Mean?

According to Article 18 of the Population and Family Planning Law (2001), it was generally recognized that one couple could only have one child.⁵⁹ How was this policy implemented in the different provinces?

China has 33 provincial level administrative regions, including four municipalities, 22 provinces, five ethnic minority autonomous regions, and two special administrative regions.⁶⁰ As shown in Table 2, twenty-eight provinces adopted the one-child policy as the basic family planning system; two provinces regarded two children as the basic family planning system; and three provinces set no limitation on family size.

58. *Id.*

59. *Id.* arts. 18, 25.

60. *Provinces of China*, WIKIPEDIA, https://en.wikipedia.org/wiki/Provinces_of_China (last visited Nov. 25, 2008).

TABLE 1

AN OVERVIEW OF ONE-CHILD AND TWO-CHILD STATUS IN CHINA
TO THE END OF 2015

| Number of Children | Provinces | No. |
|----------------------|---|-----------------|
| One child allowed | Anhui, Beijing, Chongqing, Fujian, Gansu, Guangdong, Guangxi, Guizhou, Hainan, Hebei, Henan, Heilongjiang, Hubei, Hunan, Jilin, Jiangsu, Jiangxi, Liaoning, Ningxia, Qinghai, Shandong, Shanxi, Shaanxi, Shanghai, Sichuan, Tianjin, Yunnan, Zhejiang | 28 |
| Two children allowed | Inner Mongolia, Sinkiang | 2 |
| No limit | Tibet, Hong Kong, Macao | 3 ⁶¹ |

61. Hunan Sheng Renkou He Jihua Shengyu Tiaoli (湖南省人口和计划生育条例) [Hunan Province Population and Family Planning Regulations] (promulgated by Standing Comm. of the Ninth Nat'l People's Cong., effective Nov. 29, 2009) 122 HUNAN PROVINCIAL PEOPLE'S CONG.. <http://www.dincai.com/group/609480.htm> (China); Jiangsu Sheng Renkou He Jihua Shengyu Tiaoli (江苏省人口和计划生育条例) [Jiangsu Province Population and Family Planning Regulations] (promulgated by the Standing Comm. of the Jiangsu Provincial People's Cong., Mar. 28, 2014, effective Mar. 28, 2014) STANDING COMM. OF JIANGSU PROVINCIAL PEOPLE'S CONG., (China), http://www.jsrd.gov.cn/sy/xw_syxw/201403/t20140331_83638.shtml; Jilin Sheng Renkou Yu Jihua Shengyu Tiaoli (吉林省人口与计划生育条例) [Jilin Province Population and Family Planning Regulations] (promulgated by the Standing Comm. People's Cong. of Jilin Province General Assembly, effective Apr. 1, 2014) STANDING COMM. NINTH PEOPLE'S CONG. OF JILIN PROVINCE ASSEMBLY (China), http://wsjsw.jl.gov.cn/ywpx/zhgl_45575/201407/t20140728_1706848.html; Jiangxi Sheng Renkou Yu Jihua Shengyu Tiaoli (江西省人口与计划生育条例) [Jiangxi Province Population and Family Planning Regulations] (promulgated by Jiangxi Province People's Cong. Standing Comm., Jan. 16, 2014) STANDING COMM. OF JIANGXI PROVINCIAL PEOPLE'S CONG. (China), http://china.findlaw.cn/fagui/p_1/376890.html; Liaoning Sheng Renkou He Jihua Shengyu Tiaoli (辽宁省人口和计划生育条例) [Liaoning Province Population and Family Planning Regulations] (promulgated by Liaoning Province People's Cong. Standing Comm., Sept. 26, 2014) LIAONING PROVINCE PEOPLE'S CONG. STANDING COMM., (China) <http://law.51labour.com/lawshow-96047.html>; Ningxia Hui Zuzhi Renkou Yu Jihua Shengyu Tiaoli (宁夏回族自治区人口与计划生育条例) [Ningxia Hui Autonomous Region Population and Family Planning Regulations] (promulgated by the Ningxia Hui Autonomous Region People's Cong. Standing Comm., Dec. 28, 1990, effective December 28, 1990; amended, Nov. 19, 2009) NINGXIA HUI AUTONOMOUS REGION PEOPLE'S CONG. STANDING COMM. (China), <http://www.nhfpc.gov.cn/zhuzhan/dfil/201304/08c4a176494c4d1aa8060e8c070152e7.shtml>; Qinghai Sheng Renkou Yu Jihua Shengyu Tiaoli (青海省人口与计划生育条例) [Qinghai Province Population and Family Planning] (promulgated by the Standing Comm. People's Cong. of Qinghai Province, Sept. 20, 2002, effective Sept. 20, 2002) NATIONAL FAM. PLAN. COMM. OF PEOPLE'S REPUBLIC OF CHINA, (<http://www.nhfpc.gov.cn/zhuzhan/dfil/201304/173cafa2f5ce4ef095f392b5201b03d6.shtml>); Shandong Sheng Renkou Yu Jihua Shengyu Tiaoli (山东省人口与计划生育条例) [Shandong

Province Population and Family Planning Regulations] (promulgated by the Shandong Province People's Cong. Standing Comm., May 30, 2014, effective May 30, 2014) TWELFTH STANDING COMM. OF SHANDONG PROVINCE (China), http://www.sdwsjs.gov.cn/zlzx_766/yjswzl/gzdt/sjyw/201409/t20140925_51048.html; Shanxi Sheng Renkou Yu Jihua Shengyu Tiaoli (山西省人口与计划生育条例) [Shanxi Province Population and Family Planning Regulations] (promulgated by Shanxi Province People's Cong. Standing Comm., May 29, 2014) SHANXI PROVINCE PEOPLE'S CONG. STANDING COMM. (China), http://www.ycsnlw.com/nczy/html/96/96-hjjs_2014611101132.html; Shanxi Sheng Renkou Yu Jihua Shengyu Tiaoli (陕西省人口与计划生育条例) [Shaanxi Province Population and Family Planning Regulation] (promulgated by Shaanxi Provincial People's Cong. Standing Comm., May 27, 2009) NAT'L FAM. PLAN. COMM. OF PEOPLE'S REPUBLIC OF CHINA, <http://www.nhfpc.gov.cn/zhuzhan/dftl/201304/15632600c8024160bc9ad88ad06e86aa.shtml>; Shanghai Shi Renkou Yu Jihua Shengyu Tiaoli (上海市人口与计划生育条例) [Shanghai Population and Family Planning Regulation] (promulgated by the Shanghai Mun. People's Cong. Standing Comm., Feb. 25, 2014, effective Mar. 1, 2014) STANDING COMM. OF THE SHANGHAI PEOPLE'S CONG. (China), <http://www.spesc.sh.cn/shrdgzw/node5/node47/u1ai56050.html>; Sichuan Sheng Renkou Yu Jihua Shengyu Tiaoli (四川省人口与计划生育条例) [Sichuan Province Population and Family Planning Regulations] (promulgated by the Standing Comm. of the Sichuan Provincial People's Cong., Mar. 20, 2014, effective Mar. 20, 2014) STANDING COMM. OF THE SICHUAN PROVINCIAL PEOPLE'S CONG. (China), http://www.scwst.gov.cn/wj/flfgwj/jjd/fgwj/201501/t20150129_8611.html; Tianjin Shi Renkou Yu Jihua Shengyu Tiaoli (天津市人口与计划生育条例) [Tianjin Population and Family Planning Regulations] (promulgated by the Standing Comm. of the Tianjin People's Cong., February 14, 2014, effective Feb. 14, 2014) STANDING COMM. OF THE TIANJIN PEOPLE'S CONG. (China), http://www.tjwsj.gov.cn/html/WSJn/ZCFG22939/2015-03-06/Detail_636894.htm; Anhui Sheng Renkou Yu Jihua Shengyu Tiaoli (安徽省人口与计划生育条例) [Anhui Province Population and Family Planning Regulations] (promulgated by Anhui Provincial People's Cong. Standing Comm., Jan. 15, 2016) TWELFTH PEOPLE'S CONG. OF ANHUI PROVINCE (China) <http://www.ahwjw.gov.cn/jcjs/ywwj/201601/1af4766ad8714d34954ded6d52f6ad1f.html>; Beijing Shi Renkou Yu Jihua Shengyu Tiaoli 2014 Nian Xiuzheng (北京市人口与计划生育条例(2014年修正)) [Beijing City Population and Family Planning Regulations] (promulgated by Beijing People's Congress Standing Committee, July 18, 2003, effective Feb., 21, 2014) BEIJIN PEOPLE'S CONG. STANDING COMM. (China), <http://www.cdpsn.org.cn/policy/dt105139639.htm>; Chongqing Shi Renkou Yu Jihua Shengyu Tiaoli 2014 Nian Xiuzheng Ban (重庆市人口与计划生育条例(2014年修正版)) [Chongqing Municipal Population and Family Planning Regulations] (promulgated by Standing Comm. of Chongqing Municipal People's Cong., Mar., 26, 2014) STANDING COMM. OF CHONGQING MUNICIPAL PEOPLE'S CONG. (China), <http://www.ddk.gov.cn/html/fwzn/zjbl/jhsy/14/05/49290.html>; Fujian Sheng Renkou Yu Jihua Shengyu Tiaoli 2014 Nian Xiuding Ban (福建省人口与计划生育条例(2014年修订版)) [Fujian Province Population and Family Planning Regulations] (promulgated by Fujian Province People's Cong. Standing Comm., Mar., 29, 2014) FUJIAN PROVINCE PEOPLE'S CONG. STANDING COMM. (China), <http://www.gl.gov.cn/News/ArticleDetail.aspx?articleid=642178>; Gansu Sheng Renkou Yu Jihua Shengyu Tiaoli (甘肃省人口与计划生育条例) [Gansu Province Population and Family Planning Regulations] (promulgated by Gansu Provincial People's Cong. Standing Comm., Mar. 26, 2014, effective Mar. 26, 2014) GANSU PROVINCIAL PEOPLE'S CONG. STANDING COMM. (China) http://www.gansu.gov.cn/art/2014/4/30/art_81_175793.html; Guangdong Sheng Renkou Yu Jihua Shengyu Tiaoli (广东省人口与计划生育条例2014) [Guangdong Province Population and Family Planning

Regulations] (promulgated by Standing Comm. of Guangdong Provincial People's Cong., Mar., 27, 2014) STANDING COMM. OF GUANGDONG PROVINCIAL PEOPLE'S CONG. (China), <http://www.chinalawedu.com/falvfagui/22598/wa2014040109044475195674.shtml>; Guangxi Zhuangzu Zizhiq Renkou He Jihua Shengyu Guanli Banfa (广西壮族自治区人口和计划生育管理办法) [Population and Family Planning Administration of Guangxi Zhuang Autonomous Region Population and Family Planning Management Measures] (promulgated by the Twelfth Autonomous Region People's Gov. of the 26th Executive Meeting, Feb. 24, 2014, effective Mar. 1, 2014) TWELFTH AUTONOMOUS REGION PEOPLE'S GOV. (China), http://www.gxzf.gov.cn/zwgk/zfwj/zzqrmzfl/201403/t20140303_429244.htm; Guizhou Sheng Renkou Yu Jihua Shengyu Tiaoli Xiuzhengan Caoan (贵州省人口与计划生育条例修正案(草案)) [Guizhou Province Population and Family Planning Regulations Amendments (Draft)] (promulgated by the Guizhou Provincial People's Cong. Education Science Culture and Health Committee, May 17, 2014) GUIZHOU PROVINCIAL PEOPLE'S CONGRESS (China), <http://www.gzrd.gov.cn/cwhhy/gzsdsegrdcwhdchyzt/hywg/7974.shtml>; Hai Nan Sheng Renkou Yu Jihua Shengyu Tiaoli (海南省人口与计划生育条例) [Hainan Province Population and Family Planning Regulations] (promulgated by the Standing Comm. of the Eighth Meeting of the Fifth Conf. of Hainan People's Cong., May 30, 2014, effective May 30, 2014) HAINAN PROVINCIAL PEOPLE'S CONG. (China) <http://www.chinalawedu.com/falvfagui/22598/wa2014061214242225806630.shtml>; Hebei Sheng Renkou Yu Jihua Shengyu Tiaoli 2014 (河北省人口与计划生育条例2014) [Hebei Province Population and Family Planning Regulations] (2014) (China), <http://yjbys.com/2015/ertaizhengce/766301.html>; Hubei Sheng Renkou Yu Jihua Shengyu Tiaoli (湖北省人口与计划生育条例) [Hubei Province Population and Family Planning Regulation] (promulgated by the Hubei Provincial People's Cong. Standing Comm. on the General Assembly, Mar. 27, 2014, effective Mar. 27, 2014) HUBEI PROVINCIAL PEOPLE'S CONG. STANDING COMM. (China) <http://hbwsjs.gov.cn/detail/20140331104359102001.html>; Henan Sheng Renkou Yu Jihua Shengyu Tiaoli (河南省人口与计划生育条例) [Regulations of Henan Province on Population and Family Planning] (promulgated by Standing Comm. of the People's Cong. of Henan Province, Nov. 30, 2002, effective Nov. 30, 2002; amended Nov. 25, 2011) NAT'L FAM. PLAN. COMM. OF PEOPLE'S REPUBLIC OF CHINA, <http://www.nhfp.gov.cn/zhuzhan/dftl/201304/12710390cb2640f09a22c4198374086a.shtml>; Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli (黑龙江省人口与计划生育条例) [Heilongjiang Province Population and Family Planning Regulations] (promulgated by Heilongjiang Provincial People's Cong. Standing Comm., Apr., 22, 2014) HEILONGJIANG PROVINCIAL PEOPLE'S CONG. (China), http://www.law-lib.com/law/law_view.asp?id=451974; Yunnan Sheng Renkou Yu Jihua Shengyu Tiaoli (云南省人口与计划生育条例) [Yunnan Population and Family Planning Regulations] (promulgated by the Standing Comm. of the Ninth People's Cong. of Yunnan Province, July 25, 2002, effective July 25, 2002) NATIONAL FAM. PLAN. COMM. OF PEOPLE'S REPUBLIC OF CHINA (China), <http://www.nhfp.gov.cn/zhuzhan/dftl/201304/3b6262d3df66480f9ddecbeb09ee8e1c.shtml>; Zhejiang Sheng Renkou Yu Jihua Shengyu Tiaoli (浙江省人口与计划生育条例) [Zhejiang Province Population and Family Planning Regulations] (promulgated by Zhejiang Province People's Congress Standing Committee, Jan. 17, 2014) ZHEJIANG PROVINCE PEOPLE'S CONG. STANDING COMM. (China), <http://www.cnrencai.com/zengche/52250.html>; Neimenggu Renkou Yu Jihua Shengyu Tiaoli (内蒙古自治区人口与计划生育条例) [Inner Mongolia Autonomous Region Population and Family Planning Regulations] (promulgated by Inner Mongolia Autonomous Region People's Congress Standing Committee, Jan. 31, 2014) INNER MONGOLIA AUTONOMOUS REGION PEOPLE'S CONG. STANDING COMM. <http://www.hhnm.gov.cn/hlebsc/zcfg/webinfo/2015/08/1438089169087386.htm>; Xinjiang Weiwuer Zizhiq Renkou Yu Jihua Shengyu Tiaoli (新疆维吾尔自治区人口与计划生育条例) [Xinjiang Uygur Autonomous Region Population and Family Planning Regulations] (promulgated by Xinjiang Uygur Autonomous Region People's Cong. Standing Comm.) XINJIANG UYGUR AUTONOMOUS REGION PEOPLE'S

Thus, most of the provinces implemented the strict one-child policy, and only a few provinces implemented a two-child policy or no limitation. Nevertheless, those provinces that regarded the one-child policy as the principal family planning regulation considered a variety of factors in implementing the system, such that, when couples satisfied certain conditions, they could apply to have a second or even more children.⁶²

B. When Can a Couple Have a Second Child?

Although a second child is an exception under the one-child policy, every province established various detailed regulations to qualify to have a second child.⁶³ If couples were qualified according to the relevant regulations, they might have the right to have a second child. The qualifications to have more than one child varied, but can be subdivided into three types. The first was based on the couple's situation, the second was based on the family's situation, and the third was based on the children's situation.

TABLE 2
 FACTORS FOR SECOND CHILD PERMISSION IN DIFFERENT PROVINCES⁶⁴

| Family Classification | | Regulation Detail |
|--|-----------------------|--|
| Couple's situation | One Child | Both are only children. |
| | | One parent is the only child in rural area. |
| | | One parent is the only child of a martyr. |
| | Ethnic minority | Both are ethnic minorities. |
| | | Both or one is an ethnic minority in rural area. |
| | Handicapped or martyr | Both or one side is martyr. |
| Both or one is handicapped because of industrial injury. | | |

CONG. STANDING COMM. (China), <http://www.mlx.gov.cn/mlxzf/xxgk/zcfg/2015/90222.htm>; Xizang Zizhiqu Renkou yu Jihua Shengyu Tiaoli (西藏自治区人口与计划生育条例) [Tibet's Population and Family Planning Regulations] (promulgated by TAR Fam. Plan. Interim Mgmt., 2015) TAR FAM. PLAN. INTERIM MGMT., <http://news.asean168.com/a/20150206/2803.html>.

62. See *supra* note 61 and accompanying text.

63. *Id.*

64. *Id.*

| | |
|-----------------------|---|
| | Both or one is handicapped in rural area. |
| Overseas relationship | Overseas Chinese. |
| | Returned overseas Chinese. |
| | Hong Kong, Macao or Taiwan citizens but living in mainland provinces. |
| Type of work | Underground mineworker. |
| | Ocean deep water operations |
| | Ocean fishing and only child is a girl. |
| | Coastal fishermen engaged in maritime operations. |
| Residential zone | Live in mountain areas, and only child is a girl. |
| | Settle in village allocated on the border of the country. |
| | Settle in the reclamation area along the coast. |
| | Island residents. |
| Family's situation | In rural area and more than two generations had only one child. |
| | In rural area and wife is the only child in family and husband settled in her family. |
| | In rural area; husband's brothers have no child and are infertile. |
| Child's situation | The first child is handicapped and cannot participate in normal labor force. |
| | In rural area and first child is a girl. |

These complicated second child regulations meant that China's family planning system varied in practice, due to complicated political, cultural, and economic factors, as well as urban-rural policy, ethnic policy, social security policy, or even foreign policy. For example, the difference between application of the policy in urban and rural areas was because the social security system in China did not adequately cover rural areas.⁶⁵ Thus,

65. See Zhongguo Shehui Baoxian Fazhan Niandu Baogao 2014 (中国社会保险发展年度报告2014) [Annual report on the development of social insurance in China], <http://www.mohrss.gov.cn/gkml/xxgk/201507/t20150702213521.html>. 在中国的基本养老保险制度中, 职工与农村人口适用不同的体系 参见《中华人民共和国社会保险法》第十条“职工应当参加基本养老保险, 由用人单位和职工共同缴纳基本养老保险费。” 第二十条“国家建立和完善新型农村社会养老保险制度 新型农村社会养老保险实行个人缴费, 集体补助和政府补贴相结合。” 在此背景下, 农村人口能获得的保障远低于职工。以2014年为例 企业离退休人员每月人均养老金2061元/月, 而城乡居民基本养老保险人均养老金为90元/月。 [In China's basic endowment insurance, people in

policies that allowed couples to have a second child if the first child was a girl or the husband settled in with the wife's family in a rural area, took into account both the absence of social security in rural areas and deeply ingrained traditional concepts. For another example, policies concerning martyrs, underground miners, and workers involved in deep-water ocean operations involved compensation for difficult work and also encouraged people to work in these areas in order to avoid decline of the industries. In addition, the family planning policy concerning ethnic minorities took their population status and their traditional customs into account.⁶⁶ Finally, policies such as giving permission to have a second child in families with only one child living in mountainous areas were intended to maintain basic population living in these areas, and those allowing the birth of a second child in areas along the borders were based on military security.⁶⁷

Because so many factors were considered, the family planning system became quite diversified. In other words, although the one-child policy was the basic principle of China's reproduction system, it did not mean that all Chinese couples could only have one child.

C. Management

Different local governments adopted various administrative regulations to manage reproduction.⁶⁸ There were three administrative management modes used by different local governments: a license system, a registration

urban and rural areas apply according to different systems. As article 10 in China Social Insurance Law "Workers shall participate in basic pension insurance and the basic pension insurance premiums shall be paid jointly by the employing entities and the workers". In article 20, the State establishes and improves the new rural social pension insurance system. The new rural social pension insurance involves a combination of personal payment, collective subsidy and government subsidy.] *Id.*

66. Luo Chun (罗淳), *Lun Shaoshu Minzu De Shengyu Zhengce* (论少数民族的生育政策) [Discussion on the Fertility Policy of Ethnic Minorities], 2 MINZU YANJIU (民族研究) [ETHNO-NATIONAL STUDIES] 49, 50–58 (1997).

67. See Jia Yumei (贾玉梅), *Bianjing Diqu Renkou Anquan Yu Jingji Shehui Fazhan Yanjiu* (边境地区人口安全与经济社会发展研究) [A Study of Population Security and Economical Social Development in Border Areas], 5 RENKOU XUEKAN (人口学刊) [POPULATION JOURNAL] 22, 22–29 (2012). 人口安全是国家安全的基础和重要保障 国家应加大对边境地区的扶持政策力度 完善人口政策 维护边境地区人口安全. [Population security is the foundation and important guarantee of national security. Countries should increase efforts to support the border areas, improve population policy, maintaining the security of the population in the border areas.] *Id.*

68. *Population and Family Planning Law of the People's Republic of China*, *supra* note 54.

system, and a postpartum certification system.⁶⁹ The number of provinces employing each one is shown in Table 4.

TABLE 3
MANAGEMENT SYSTEMS FOR THE FAMILY PLANNING SYSTEM TO
THE END OF 2015⁷⁰

| Implementation | Provinces | No. |
|-------------------------------|--|-----|
| License system | Jiangxi | 1 |
| Registration system | Anhui, Fujian, Gansu, Guangxi, Guizhou, Hainan, Hebei, Henan, Shanxi, Hubei, Hunan, Jilin, Liaoning, Ningxia, Shandong, Shaanxi, Sichuan, Tianjin, Tibet, Yunnan, Inner Mongolia | 21 |
| Postpartum certificate system | Zhejiang | 1 |
| Not specified | Beijing, Chongqing, Guangdong, Heilongjiang, Jiangsu, Qinghai, Shanghai, Sinkiang | 8 |

Initially, most provinces adopted the license system to manage the one-child policy but it was gradually abolished by most provinces at the end of 2015, leaving only Jiangxi province.⁷¹ Under this system, couples could have a child only after strict review and no reproduction was allowed without approval.⁷² In accordance with Article 8 of the Jiangxi Family

69. *Id.*

70. *Id.*

71. See Jiangxi Sheng Renkou Yu Jihua Shengyu Tiaoli 2002 (江西省人口与计划生育条例2002) [Jiangxi Province Population and Family Planning Regulations] (promulgated by the Jiangxi Province People's Congress Standing Committee of the Seventh General Assembly at the fifteenth meeting, June 16, 1990; third revision by the Jiangxi Province People's Cong. Standing Comm., Oct. 23, 2002), 第八条规定“生育第一胎的在分娩前,凭结婚证、户口簿,以及夫妻双方单位或者所在村(居)民委员会的证明,经一方户籍所在地的乡(镇)人民政府或者街道办事处审核,发给《一胎生育证》” [Article 8 defines the first fertility before child birth. The definition is based on the marriage certificate, residence booklet, and couples' employer or suburb (urban) committee's certificate. Upon review, the local government would issue “first birth certificate” after approval]. *Id.* In 2009, this article was amended to “implement first child birth license system and second child birth license system.” In 2016, it was modified to “implement birth registration system and second child birth approval system.”

72. See Jiangxi Sheng Renkou Yu Jihua Shengyu Tiaoli 2009 (江西省人口与计划生育条例2009) [Jiangxi Province Population and Family Planning Regulations] (promulgated by the Jiangxi Province People's Cong. Standing Comm., June 16, 1990;

Planning Regulation, for example, couples needed to provide a marriage certificate, household register, and proof from their employer or village (residential) committee to the government agency where the husband's or wife's household was located for inspection in order to get a reproduction license to have a child.⁷³ All these proofs from their employer or village committee were used to prove they had never given birth before.⁷⁴

The registration system, by contrast, required couples to register at their local governmental agency after pregnancy, but before childbirth.⁷⁵ The registration involved submitting information such as their marriage situation, first childbirth situation, household registration, and other family information.⁷⁶

rev'd by the Jiangxi Province People's Cong. Standing Comm., Mar. 27, 2009), (第五十七条违反本条例规定,有下列情形之一的,为计划外生育:(二)符合本条例第九条第一款规定的条件,但未申请领取《再生一胎生育证》生育的 [Article 57 defines the following situation as listed in unplanned birth . . . (2) Fulfill the condition defined in the article 9 clause, but have not applied Second Birth License.] *Id.*

73. See Jiangxi Sheng Renkou Yu Jihua Shengyu Tiaoli 2002 (江西省人口与计划生育条例2002) [Jiangxi Province Population and Family Planning Regulations] (promulgated by the Jiangxi Province People's Cong. Standing Comm., June 16, 1990; third revision by the Jiangxi Province People's Cong. Standing Comm., Oct. 23, 2002) (第八条规定“生育第一胎的,在分娩前,凭结婚证,户口簿,以及夫妻双方单位或者所泊村(居)民委员会的证明,经一方户籍所在地的乡(镇)人民政府或者街道办事处审核,发给《一胎生育证》。 [Article 8 defines the first fertility, before child birth. The definition is based on the marriage certificate, residence booklet, and couples' employer or suburb (urban) committee's certificate, local government would issue “first birth certificate” after approval]. *Id.* See Jiangxi Sheng Renkou Yu Jihua Shengyu Tiaoli 2009 (江西省人口与计划生育条例2009) [Jiangxi Province Population and Family Planning Regulations], (第八条 生育第一胎的夫妻,分娩前凭结婚证,身份证,以及夫妻双方单位或村(居)民委员会的证明,到一方户口所在地的乡(镇)人民政府或街道办事处领取《生育服务证》。 [Article 8 defines the first fertility before child birth. The definition is based on the marriage certificate, identification card, and couples' employer or suburb (urban) committee's certificate, those couples needing to obtain birth certificate at local government or subdistrict office.] *Id.*

74. See Jiangxi Sheng Renkou Yu Jihua Shengyu Tiaoli (江西省人口与计划生育条例) [Population and Family Planning Regulations of Jiangxi Province] (promulgated by the Jiangxi Province People's Cong. Standing Comm., June 16, 1990; third revision by the Jiangxi Province People's Cong. Standing Comm., Oct. 23, 2002), CHINA INTERNET INFORMATION CENTER, <http://www.china.com.cn/chinese/renkou/221346.htm>.

75. See Anhui Sheng Renkou Yu Jihua Shengyu Tiaoli 2014 (安徽省人口与计划生育条例2014) [Anhui Province Population and Family Planning Regulations 2014] (promulgated by Anhui Province People's Cong. Standing Comm. Decision Amending Anhui Province Reg., Jan. 22, 2014), ANHUI NATIONAL PEOPLE'S CONGRESS NETWORK, Jan. 23, 2014, art. 22, http://www.ahrd.gov.cn/npcweb/web/info_view.jsp?strId=1390465305308423 (China).

76. See (安徽省规定办证应当提供的材料: (1) 填写完整的《生殖保健服务证登记表》; (2) 夫妻双方户口簿, 居民身份证明, 结婚证; (3) 夫妻近期脱冠2寸合影照片2张; (4) 乡级以上计划生育技术服务部门或卫生部门出具的女方孕育前检查证明 [Take Anhui province as an example.

The registration system enabled the government to provide childbirth services and to manage the couple's reproduction status. The registration system was both more reasonable and more efficient than the license system.

In the postpartum certificate system, local governments would issue a first child birth certificate to women after they gave birth.⁷⁷ This system allowed automatic registration through hospitals and clinics after childbirth instead of requiring couples to register at the government agency by themselves. Compared to the other two systems, the postpartum birth certificate system was better at respecting personal privacy rights and reproductive rights. Unfortunately, this postpartum birth certificate system was not common in China—only Zhejiang province adopted this mode.⁷⁸

D. Sanctions for Violation of the Policy

Since the one-child policy was stipulated in law as the basic principle, when couples violated the policies implemented by the systems described above, what sanctions would be imposed on them? Article 19 of the Population and Family Planning Law provided that family planning implementation should mainly rely on contraception.⁷⁹ Article 41 indicated that couples should pay social maintenance fees for any violation to compensate the state for the costs of an additional child.⁸⁰ This method restricts the behavior of multi-fertility, and makes those couples compensate for society.⁸¹ These regulations indicated that the execution of the family planning system

Here, the material list to apply for registration is: (1) Fulfill “Reproductive health service card registration form”; (2) Provide husband and wife residence booklet, identity cards, marriage certificate; (3) Provide two copies of husband and wife's recent 2-inch photos; and (4) Provide woman pregnant check information certificate issued by family planning technical service or health department]. [Http://zjbl.ahpfpc.gov.cn/bzlc.html](http://zjbl.ahpfpc.gov.cn/bzlc.html) (China).

77. See Zhejiang Sheng Renkou Yu Jihua Shengyu Tiaoli 2014 (浙江省人口与计划生育条例2014) [Zhejiang Province Population and Family Planning Regulations 2014], art. 21. 男女双方均未生育, 经依法登记结婚后, 可以自愿安排生育第一个子女的时间; 县级计划生育行政部门或其委托的乡(镇)人民政府、街道办事处应当及时为其发放一孩生育证明 [If couples are not fertile, they could arrange for pregnancy of a first child-birth by themselves after marriage. Family planning administrative departments at the country level, village (town), local government, sub-district office shall issue first child-birth certificate to them in time.] *Id.*

78. *Population and Family Planning Law of the People's Republic of China*, *supra* note 54.

79. *Id.* art. 19.

80. *Id.* art. 41.

81. See Caizheng Bu, Guojia Fazhan Jihua Weiyuan Hui, Guojia Jishengwei Lianhe Fachu Guanyu Jihuawai Shengyu Fei Gai Shehui Fuyang Fei De Tongzhi (财政部 国家发展和改革委员会, 国家计生委联合发出关于计划外生育费改社会抚养费的通知) [The Ministry of Finance, the State Development Planning Commission, and the National Family Planning Commission, Jointly Issued Notice to Change Unplanned Birth Fee to Social Maintenance Fee], <http://www.nhfp.gov.cn/fzs/s3577/201502/8f718435b7f946b18b3605afc6f347c3.shtml>.

mainly depended on prevention before childbirth and payment of a social maintenance fee after childbirth.⁸² However, there was no description in the law about how to make prevention effective or how to select the method.⁸³ In practice, as shown in Table 4, different provincial governments followed several different methods: pregnancy termination, taking remedial measures, and charging the social maintenance fee.

TABLE 4
 ENFORCEMENT MEASURES FOR COUPLES WHO VIOLATE FAMILY
 PLANNING REGULATION IN DIFFERENT PROVINCES⁸⁴

| Enforcement Measure | Provinces | No. |
|--------------------------------------|---|------------|
| Termination of pregnancy | Anhui, Fujian, Guizhou, Hainan, Hebei, Henan, Shanxi, Heilongjiang, Hubei, Hunan, Jilin, Jiangsu, Jiangxi, Liaoning, Ningxia, Shaanxi, Zhejiang | 17 |
| Remedial measures | Fujian, Gansu, Guangdong, Guizhong, Henan, Jiangxi, Qinghai, Shanxi, Shaanxi, Sichuan, Tianjing, Tibet, Sinkiang, Chongqing | 14 |
| Collection of social maintenance fee | Guizhou, Zhejiang | 2 |
| Not specified | Beijing, Guangxi, Inner Mongol, Shandong, Shanghai | 5 |

As Table 4 shows, 17 provinces, or more than half of all the provinces, adopted pregnancy termination to address violations of family planning regulations. Some provinces, such as Fujian, Henan and Shanxi, adopted multiple methods, which adopted both pregnancy termination and remedial measures. Guizhou adopted all three enforcement measures to impose sanctions for violation of the birth control regulations.

82. *See id.*

83. *See Population and Family Planning Law of the People's Republic of China, supra note 54.*

84. *Id.*

In sum, during this period, legislation defined reproduction as a right, but with many limitations. Meanwhile, although China implemented a very strict family planning system that set the one-child policy as the principle, it also had many exceptions to the policy that allowed a couple to have more children. Based on different provinces' regulations, the one-child policy varied in its definition and implementation, and provinces also had different regulations on sanctions as well.

IV. THE EFFECTS OF IMPLEMENTATION OF THE FAMILY PLANNING SYSTEM: 2001-2015

The basic legislation of China's reproduction policy, the Population and Family Planning Law, evoked controversy after it was implemented in 2001. Opponents criticized the strict reproductive regulations as conflicting with the right of reproduction contained in the Constitution.⁸⁵ This article does not judge the propriety of the Population and Family Planning Law, but seeks simply to analyze its implementation and prospects. Section A below assesses the effects of the family planning system on China's population. Section B describes local regulatory reforms that took place in the absence of reform legislation. Section C discusses the different attitudes to the population policy and law that developed in the academy, government, and Communist Party of China and led to its amendment.

A. The Effect of the Family Planning System on Population Size

The rate of growth of China's population has decreased since family planning regulation was implemented in recent decades.⁸⁶ The policy of encouraging reproduction had led to a high fertility rate in 1960s in China.⁸⁷

85. Li Tiezhu (李铁柱), *15 Xuezheshangshu Quanguo Renda Jianyi Xiugai Renkou Yu Jihua Shengyu Fa* (15学者上书全国人大建议修改人口与计划生育法) [15 Scholars' Proposal to National People Congress to Amend Population and Family Planning Law], http://news.jrb.com/jxsw/201207/t20120706_898548.html (explains how the Current Population and Family Planning Law places emphasis on controlling the population and establishing a fertility approval system. It also forces over-birth families to pay social compensation fees and sanctions economic or duty punishment upon those parents. This is viewed as improper restrictions on the reproductive rights of citizens, but also does not conform to the provisions on the protection of human rights in China's Constitution).

86. In 1982, the birth rate was 2.22%. In 1990, the rate was 2.11%. In 2000, the rate was 1.4%. In 2014, the rate was 1.24%. See NAT'L BUREAU OF STATS. OF CHINA [NBS], *Basic Statistics on Population*, <http://data.stats.gov.cn/tablequery.htm?code=AD03> (showing birth rates in China).

87. In the 1960s, the fertility rate was around 3.5%. In 1963, it reached the highest rate of 4.36% during that period. See NAT'L BUREAU OF STATS. OF CHINA [NBS], *Basic Statistics on Population*, <http://data.stats.gov.cn/search.htm?s=1963%E4%BA%BA%E5>

Statistics showed that the fertility rate of Chinese women in 1969 was 3.4%.⁸⁸ However, from the 1970s to 1990s, as the family planning policy was implemented, the fertility rate slumped to lower than 1.5% in 2000.⁸⁹ With the promulgation of the Population and Family Planning Law in 2001 and other local regulations, the fertility rate entered a relatively stable phase and slightly decreased from 1.4% to 1.2% after 2000.⁹⁰

On the other hand, drawbacks of the system of birth limitation regulations gradually began appearing in the 1990s. The first problem is an aging population. As shown in Table 5, the elderly population in China had been increasing rapidly. Following this trend, China's aging population would rise from 5.5% of the total population in 1990 to 11.5% in 2020, and the number of elderly people would exceed 240 million at that time.⁹¹ Because of the lack of a young population to provide resources to care for the elderly population, China has been required to increase pension expenses borne by the state, thus increasing the burden to the whole society.

%8F%A3%E5%87%BA%E7%94%9F%E7%8E%87 (showing the fertility rate and changes in population for 1963).

88. See NAT'L BUREAU OF STATS. OF CHINA [NBS], *Basic Statistics on Population*, <http://data.stats.gov.cn/search.htm?s=1969%20%E4%BA%BA%E5%8F%A3%E5%87%BA%E7%94%9F%E7%8E%87>.<http://data.stats.gov.cn/search.htm?s=1969%20%E4%BA%BA%E5%8F%A3%E5%87%BA%E7%94%9F%E7%8E%87> (showing the fertility rate for 1969).

89. NAT'L BUREAU OF STATS. OF CHINA [NBS], *The Basic Situation of The Population*, <http://data.stats.gov.cn/tablequery.htm?code=AD03> (last visited July 27, 2016).

90. *Xilie Baogao Zhi Wu: Renkou Zongliang Shidu Zengzhang Jiegou Mingxian Gaishan* (系列报告之五: 人口总量适度增长结构明显改善) [*Report Five of Series: The Moderate Growth in Total Population Structure Has Improved Significantly*], GUOJIA TONGJI JU (国家统计局) [National Bureau of Statistics of China] (Sept. 11, 2009), http://www.stats.gov.cn/ztjc/ztfx/qzxyzgcl60zn/200909/t20090911_68637.html.

91. Tan Lin (谭琳), *Zhongguo Renkou Laolinghua Fazhan Qushi Yuce Yanjiu Baogao* (中国人口老龄化发展趋势预测研究报告) [*A Forecast of the Development Trend of China's Aging Population*], 2 *ZHONGGUO FU YUN* (中国妇运) [CHINESE WOMEN'S MOVEMENT] 15, 15-18 (2007).

TABLE 5

PROPORTION OF POPULATION 65 OR OVER FROM
1982 TO 2015⁹²

| Age 65+ | 1982 | 1990 | 2000 | 2014 | 2015 |
|--------------------------------|-------|-------|-------|--------|--------|
| Population (millions) | 49.91 | 63.68 | 88.21 | 137.55 | 144.34 |
| Total percentage of population | 4.9 | 5.5 | 7.0 | 10.1 | 10.5 |

Another problem related to population size was the threat of a labor force shortage. The population in the labor force had been continually declining. The National Bureau of Statistics declared in 2014 that the labor force population was nearly 1 billion, reduced by 3.7 million from the end of 2013.⁹³ This decline would affect China's developing economy. A labor force shortage would raise the cost of enterprises and lead to a further decline in investment. After 2012, the labor force in China appeared to reach the Lewis turning point, that is, there was no more surplus rural labor.⁹⁴ Thus, the labor transfer from agriculture to non-agricultural industries had slowed down and has reduced the efficiency of resource allocation.⁹⁵ All these changes indicated that the traditional components that supported the rapid increase in the Chinese economy had disappeared or declined.

There is no doubt, therefore, that one cause for these problems occurring was due to the family planning system being first introduced in the 1980s by the Chinese government.⁹⁶ However, the process of urbanization was

92. Zhonghua Renmin Gongheguo Guojia Tongjiju (中华人民共和国国家统计局) [Nat'l Bureau of Statistics of China], Renkou Jiben Qingkuang (人口基本情况) [The Basic Information of Population], <http://data.stats.gov.cn/english/tablequery.htm?code=AD03> (last visited July 27, 2016).

93. See NAT'L BUREAU OF STATISTICS OF CHINA, STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2014 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT (Feb. 26, 2015), http://www.stats.gov.cn/english/PressRelease/201502/t20150228_687439.html [hereinafter Statistical Communiqué 2014]; NAT'L BUREAU OF STATISTICS OF CHINA, STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2013 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT (Feb. 24, 2014), http://www.stats.gov.cn/english/PressRelease/201402/t20140224_515103.html [hereinafter Statistical Communiqué 2013].

94. Guo Han & Ren Baoping, *Demographic Divided Changes and Economic Development in China*, 3 CONTEMPORARY FIN. & ECON. 5-13 (2014).

95. Li Hongmei (李红梅) & Yang Jie (杨洁), Laodongli Renkou Lianxu San Nian Xiajiang Laodongli Duanque Xianxiang Riyi Jiaju [劳动力人口连续三年下降 劳动力短缺现象日益加剧] (Labor forces continued to decline for three years. The situation of labor force shortage proved aggravating.), RENMIN RIBAO (人民日报) [PEOPLE'S DAILY] (July 3, 2015, 8:15 AM), <http://politics.people.com.cn/n/2015/0703/c1001-27247829.html>.

96. Liping Bu & Elizabeth Fee, *Family Planning and Economic Development in China*, 102 AM. J. PUB. HEALTH 1858, 1859 (2012).

an independent cause of the decline.⁹⁷ More and more people were seeking to stay in cities rather than in the countryside because cities could provide better living conditions and more job opportunities.⁹⁸ Nevertheless, this internal migration flow had increased the burden on citizens, such as the cost of children's education, the price of apartments, and a strain on medical resources.⁹⁹ Under these circumstances, many couples made the decision to either have only one child or no children for personal reasons unrelated to the one-child policy.¹⁰⁰

B. Reform by Local Governments

These new population problems became an important focus again, especially for local governments who had the power to alter the implementation of the policy. Although the Central Government had no adjustment mechanism for family planning, on the local government level many provincial governments began to adjust the local regulation of family planning policy.¹⁰¹ For example, in 2014, Zhejiang province amended the population and family planning regulations of Zhejiang province, changing Article 19.1 as follows: "for those couples which have already had a child, if both of them or one of them is an only child, they are qualified to have a second child."¹⁰² This was the first province on the mainland not an ethnic minority area to relax the one-child limitation.¹⁰³ By the end of 2014, more than 50% of the provinces had also done so.¹⁰⁴ Revision of these articles indicated

97. *See id.*

98. *Id.*

99. *See The Great Sprawl of China; How to Fix Chinese Cities*, THE ECONOMIST (Jan. 24, 2015), <http://www.economist.com/news/china/21640396-how-fix-chinese-cities-great-sprawl-china>.

100. *Chinese Families Can Now Have Two Children, But Can They Afford Them?*, BLOOMBERG (Oct. 29, 2015, 4:29 PM), <http://www.bloomberg.com/news/articles/2015-10-29/china-scrapping-one-child-rule-too-little-too-late-for-growth>.

101. Laney Zhang, *Where to Find China's Provincial Family Planning Regulations*, Library of Congress (Oct. 29, 2015), <https://blogs.loc.gov/law/2015/10/where-to-find-chinas-provincial-family-planning-regulations/>.

102. Zhejiang Sheng Renkou Yu Jihua Shengyu Tiaoli (浙江省人口与计划生育条例) [Population and Family Planning Regulations of Zhejiang Province] (promulgated by the Zhejiang Province People's Cong. Standing Comm., Jan. 13, 2014, effective Jan. 17, 2014), art. 19(1), http://www.zj.gov.cn/art/2014/1/17/art_32594_1080715.html (China).

103. Ben Blanchard & Michael Martina, *Eastern Chinese province first to ease one-child policy*, REUTERS (Jan. 17, 2014, 5:55am EST) <http://www.reuters.com/article/us-china-onechild-idUSBREA0G0J220140117> (last accessed Nov. 22, 2016).

104. *Id.*

a new policy that couples qualified to have a second child not only if both of them were the only child in their family but also if only one of them was an only child.¹⁰⁵ Thus, the local governments adopted looser regulations than the Central Government.

After this change, in 2014, more than one million couples in China applied for permission to have a second child.¹⁰⁶ The birth rate increased to 12.37 per thousand; 0.29 per thousand higher than the birth rate of 2013.¹⁰⁷ The National Bureau of Statistics reported that there were 16.87 million infants born in 2014, and 9.77 million individuals died.¹⁰⁸ This ratio of births to deaths was close to the data from 2013. In short, thanks to relaxation of the one-child policy, the declining trend in the birth rate of previous years was reversed.¹⁰⁹

Although local governments had been trying to modify the local policy or regulations to relieve the population problem, there was still no change in legislation at the national level at that time. More discussion was needed to review the relevant family planning policy regulations in order to solve these problems.

C. Changing Attitudes to the Population Policy and Pressures to Amend the Law

As time went on, a number of influential people began to challenge the validity of the one-child policy. In 2014, six deputies of the National People's Congress signed a joint proposal to cancel the social maintenance fee.¹¹⁰ They believed that reproduction was one of the basic rights recognized by the Constitution, and that charging a social maintenance fee violated this right.¹¹¹ In 2015, fifty famous law professors and scholars in China strongly proposed modification of the current Population and Family Planning Law.¹¹² They suggested abandoning the existing reproduction registration

105. Zhang, *supra* note 101.

106. *1 mln Chinese Couples Apply to have Second Child*, CHINA DAILY (Jan. 12, 2015, 3:14 PM), http://africa.chinadaily.com.cn/china/2015-01/12/content_19297390.htm.

107. Statistical Communiqué 2014, *supra* note 93.

108. *Id.*

109. NAT'L BUREAU OF STATS. OF CHINA [NBS], *Basic Statistics on Population*, July, 22, 2016, <http://data.stats.gov.cn/english/tablequery.htm?code=AC03>.

110. Zhang Ting (张婷), 6 Renda Daibiao Jianyi Quxiao Shehui Fuyang Fei (6 人大代表建议取消社会抚养费) [Six Deputies of National People's Congress Suggesting Canceling Social Maintenance Fee] *Xin Jing Bao* (新京报) [The Beijing News] (Nov. 29, 2014), http://epaper.bjnews.com.cn/html/2014-11/29/content_549633.htm?div=-1.

111. *Id.*

112. Some 50 legal scholars jointly recommended the abolition of reproduction approval. *Li Buyun Deng 50 Ge Falv Xuezheng Gongtong Jianyi Pizhun Zixing Quxiao Shehui Fuyangfu Zhidu* (李步云等50个法律学者共同建议批准自行取消生育取消社会抚养费制度) FAXUE

system and the social maintenance fee system.¹¹³ They emphasized, as the Constitution, Population and Family Planning Law, and Law on the Protection of Rights and Interests of Women also acknowledge, that reproduction is one of the basic rights of citizens.¹¹⁴ Thus, these proposals demanded the protection of a basic civil right.

Meanwhile, the attitude of national party leaders also changed. Li Keqiang, the Premier of the State Council, referred to the reform of family planning services and their management in the 2015 Report on the Work of the Government, indicating that the function of the government in relation to reproduction would be changed from constraining the size of the population to providing reproductive services.¹¹⁵ The report did not add the phrase “to adhere to the basic state policy of family planning.”¹¹⁶ As a signpost of national and government work, the modification of these terms in the government work report indicated the possibility of amendment in the family planning system by the government.

Finally, on October 29, 2015, the 18th Communist Party of China's 5th Plenary Session of the Central Committee decided “to adhere to the basic state policy of family planning; to improve the population development strategy; to fully implement the policy that a couple can have two children; and actively carry out policies to deal with aging population.”¹¹⁷ The promulgation of this decision demonstrated the attitude of the Communist Party of China, one in favor of change to a two-child policy. The declaration

YANJIU SUO (法学研究所) [INSTITUTE OF LAW] (Mar. 23, 2015), <http://www.iolaw.org.cn/showNews.aspx?id=44480>.

113. *Id.*

114. *Id.*

115. *Id.*

116. See Li Keqiang (李克强), *Zhengfu Gongzuo Baogao 5 — 2015 Nian 3 Yue 5 Ri Zai Di Shier Jie Quanguo Renmin Daibiao Dahui Disan Ci Huiyi* (政府工作报告—2015年3月5日在第十二届全国人民代表大会第三次会议上) 5 [Government Work Report 5], RENMIN WANG (人民网) -[PEOPLE.CN] (Mar. 17, 2015), http://paper.people.com.cn/rmrb/html/2015-03/17/nw.D110000renmrb_20150317_2-01.htm. See also *2015 Zhengfu Gongzuo Baogao Wei Ti Jianchi Jihua Shengyu Guoce Bu Dongyao* (2015政府工作报告未提坚持计划生育国策不动摇) [2015 government work report did not mention that it would budge on the family planning policy], http://www.guancha.cn/politics/2015_03_05_311170.shtml.

117. Wu Zhong Quanhui: *Quanmian Shishi Yidui Fufu Ke Shengyu Liangge Haizi Zhengce* (五中全会:全面实施一对夫妇可生育两个孩子政策) [Fifth Plenary Session: Full Implementation of a Couple Can Have Two Children Policy], RENMIN WANG (人民网) [PEOPLE.CN] (Oct. 29, 2015, 6:55 PM), <http://politics.people.com.cn/n/2015/1029/c1001-27755508.html>.

of policy conformed to the trend of development, but was contrary to the existing legal system, requiring legislative amendment.

V. THE POPULATION AND FAMILY PLANNING LAW AMENDMENT (2016)

On December 27, 2015, the 18th meeting of the 12th session of the Standing Committee of the China National People's Congress finally passed a revision of the Population and Family Planning Law, to be implemented January 1, 2016.¹¹⁸ The amendment focused on Article 18 of the Population and Family Planning Law (2001).¹¹⁹ It clearly prescribed nationwide implementation of a two-child policy, advocating that each couple have two children.¹²⁰ Thus, the one-child policy that lasted more than 30 years in China became history, and China officially entered the stage of two children.

In addition, clauses 2, 3, and 4 of Article 18 of the new population and family planning law also provide that, in line with conditions defined in law and regulation, a family could arrange to have even more than two children.¹²¹ The specific measures would be prescribed by provinces, ethnic minority autonomous regions, and municipalities. If a couple came from and were registered in different provinces, ethnic minority autonomous regions, or municipalities, and those provinces, autonomous regions, or municipalities had differing regulations about reproduction, those couples may select the policy which is most beneficial to them.¹²² This means that, within a basic two-child policy, local governments have the right to prescribe when couples can have even more children.

In Shanghai, for example, on February 23, 2016, the Shanghai People's Congress revised Article 23 of the Shanghai Population and Family Planning Regulation. The amendment states that each couple may have more than two children if they meet one of the following conditions:

- A. One party of the couple had no child before marriage; the other had one child before marriage; and they had another child together after their marriage.
- B. Both parties had two or more children before marriage, but had not given birth to another child after marriage.

118. *Zhonghua Renmin Gongheguo Renkou Yu Jihua Shengyu Fa* (中华人民共和国人口与计划生育法) [Amendment to the Population and Family Planning Law of the People's Republic of China] (promulgated by the Standing Comm'n of the Nat'l People's Cong., Dec. 25, 2015, effective Jan. 1, 2016), art. 18, China Law LEXIS 1247.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

- C. Neither party of the couple have had a child before their marriage, and they bore two children after marriage, but the first child is identified as disabled due to non-hereditary reasons by medical identification agencies at the municipal, district, or county level, and there is little possibility that the child will grow up into an individual with normal working ability.¹²³

Around this time, Guangdong, Zhejiang, Beijing, and most other provinces revised their local population and family planning regulations based on the amendment of the Population Family Planning Law.¹²⁴ Under the new policies, each couple could have two children, and there were procedures to qualify for more than two children; the legal sanctions for violation of the new policy would be defined in provincial regulation. Thus, the family planning system still can only be understood in light of different provinces' policies.

China's population planning system still has a series of legal implementation problems that need to be resolved, however. These include adjusting family planning policies not only to conform to the Population and Family Planning Law, but also to address related problems, such as social maintenance charge collection, floating population¹²⁵ management, family planning incentives, social security of families who have lost their only child, and family planning service improvement. Only by improving the administrative regulations and local laws and regulations can the new amendments of the Population and Family Planning Law be properly and fully implemented.

Although the amendment of the Population and Family Planning Law has loosened the family planning system, this amendment has not changed its obligatory nature. The current legislation sets lower limitations on the number of children, compared to the legislation in 2001, but it still does

123. Shanghai Shi Renkou Yu Jihua Shengyu Tiaoli (上海市人口与计划生育条例) (Regulation of Shanghai Municipality on Population and Family Planning) (promulgated by the Standing Comm. of Shanghai Municipal People's Cong., Feb. 23, 2016, effective Mar. 1, 2016) LV SHANG WANG (律商网) [LEXIS CHINA ONLINE], Mar. 28, 2016, at 44, 10.

124. *Quanguo Ge Sheng Qu Shi Xiangji Kaishi Xiuding Difang Ban Jisheng Tiaoli* (全国各省市相继开始修订地方计划生育条例) [The Provinces and Municipalities Have Begun to Amend the Health Ordinance], ZHONGGUO XINWEN WANG (中国新闻网) [CHINA NEWS NETWORK] (July 14, 2016, 8:36 AM), <http://www.toutiao.com/i6306974969691636225/>.

125. Floating population refers to the population who live in places other than where they are officially registered, excluding those in the same city. See Thomas D. Armstrong, *China's "Floating Population,"* S. CAL. INT'L REV. (Oct. 12, 2013), <http://scir.org/2013/10/chinas-floating-population/>.

not give women full freedom of reproductive choice. More important, family planning is still officially regarded as a constitutional obligation for Chinese citizens, not a basic human right.

VI. CONCLUSION

In sum, Chinese policy on reproduction has evolved since 1949 from encouraging reproduction to limiting reproduction, and ultimately to a strict limitation, which has only recently been relaxed. The different implementation of the one-child system in the provinces was important to understanding the reality of the national one-child policy. After amendment of Article 18 of the Population and Family Planning Law in 2016, China has entered a stage that allows two children for all couples. The implementation of this system will also depend on specific regulation and execution in the provinces.

As a basic system regulated in the Chinese Constitution, the family planning system has now been implemented for more than three decades. Since 2016, the Chinese government has liberalized its former policy at the legislative level, but reproduction in China still has many restrictions. Chinese law is far from guaranteeing a right of reproduction as a basic human right of all Chinese citizens under the Constitution.

Chinese population and reproduction policies undertake to address many considerations about the national economy, society, culture, and politics. Any reform of the current system needs not only to be suitable for social development at the time, but also to address these other concerns as well. Nonetheless, compared with the strict reproductive system of the 1980s, recent changes have made the system looser and freer. There is reason to believe that the transition from an obligation to a right for reproduction may be a long, but expectable, process in China.