

Human Rights and China's Family Planning Policy:
Direct and Indirect Effects on Women



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MA Thesis in The Theory and Practice of Human Rights

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Deadline for submission: 18 May 2010

Number of words: 19,962 (max. 20,000)

Acknowledgements

First and foremost, I would like to take this opportunity to thank the China Program at the Norwegian Centre for Human Rights, for their financial assistance during my time of study, feedback and advice, and for their help locating sources that would otherwise have proven challenging. My thanks also go out to my primary supervisor Susanne Brandstädter, for offering me new perspectives, informative conversations and assistance, and to my co-supervisor Ingunn Ikdahl, for her clarity and valuable advice.

I would also like to thank Maria Lundberg and Tore Lindholm for their early advice and assistance in putting together a proposal for the China Program.

Thanks always to my mother Delphine, for her ceaseless support and assistance, and unfailing faith in my abilities.

My love and thanks to Skjalg, for all of his support and belief in me.

And finally, thanks to all of my new friends here in Norway who have made this time so memorable and fun.

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List of Abbreviations

CAT	The International Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment
CCP	The Chinese Communist Party
CECC	Congressional-Executive Commission on China
CRC	The International Convention on the Rights of the Child
CEDAW	The International Convention on the Elimination of all Forms of Discrimination Against Women
HRIC	Human Rights In China
LMIHC	The Law of the People's Republic of China on Maternity and Infant Health Care
LPWRI	The Law of the People's Republic of China on the Protection of Rights and Interests of Women
NGO	Non-Government Organisation
PRC	The People's Republic of China
USDS	The United States of America Department of States

1 1: Introduction

1.1 Research Objective

Reproductive health was an emerging area of debate within human rights during the 1990s, and this period saw significant advances in the establishment of greater legal protections. The Cairo International Conference on Population and Development's Program of Action of 1994 established that:

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people [...] have the capability to reproduce and the freedom to decide if, when and how often to do so.¹

The following year, China was host to the next phase of development regarding reproductive rights, when the Beijing Declaration and Platform for Action proclaimed that: "The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their fertility, is basic to their empowerment."²

Yet in spite of such declarations coming out of the heart of the People's Republic of China (PRC) itself, the family planning policy that has been maintained by China for more than 30 years exists in stark opposition to such ideals. Under this policy, women in the PRC are not granted the empowerment described above, but are rather subject to strictly enforced reproductive controls. Furthermore, as a result of the tragic convergence of birthing

¹ Programme of Action of the United Nations International Conference on Population and Development (1994)

² Beijing Declaration and Platform for Women (1995) Article 17

limitations and a traditional discrimination against daughters,³ the policy has indirectly brought about the denial and disregard of female life on a massive scale. Under the population policy of the State Government, Chinese females at varying stages of their life cycle have been subjected to discriminatory treatment, from the denial of life for the millions of female fetuses aborted, the neglect, abandonment and infanticide of newborn girls, to the systematic physical controls placed on women of reproductive age, including forced sterilisation, abortion, and insertion of intrauterine contraceptive devices.

China's most recent reporting session with the Committee monitoring compliance with the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) took place in 2006, at the Committee's 36th session. In its Concluding Comments on the fulfilment of state obligations, the Committee made the following recommendation to the PRC:

The Committee urges the State Party to strengthen its monitoring of the implementation of existing laws against selective abortion and female infanticide [...] to enforce them [and] sanction officials acting in excess of their authority [...] It further recommends that the State Party vigorously address the causes of son-preference, and [...] the negative consequences of the one-child policy as regards the adverse sex ratio.⁴

It is my intention to conduct an investigation concerning the status and treatment of women under the PRCs Family Planning Policy. In order to address this topic, I shall adopt a two-fold approach, as a means of encompassing both the policy itself in a social context, and secondly by investigating the status of the policy under international human rights law, in particular by reviewing modifications to domestic Chinese laws and scrutinising the CEDAW reporting process. I shall consider the following objectives as a means of directing my research.

³ In using the phrase 'daughter discrimination' I mean to refer to social and cultural norms that devalue daughters while expressing a preference for sons. This does not necessarily stipulate 'discrimination' in the legal sense of the word.

⁴ CEDAW/C/CHN/CO/6 (2006) p.7-8 (Emphasis added)

My first objective in this study is to consider both the occurrence and impact of son preference in China. While a preference for sons is evident in many societies, particularly in Asia, its occurrence in the PRC, with its strictly monitored limitations of the number, timing and spacing of births, has resulted in a unique scenario. It is my intention therefore, to conduct an investigation into the reasons for son preference in China, the contribution of socio-economic factors in the maintenance of such strategies, and the human rights issues which have consequently arisen.

My second objective is to consider the laws regulating the PRC's family planning policy, firstly by reviewing the manner in which the human rights obligations of the PRC are being upheld by domestic Chinese law, in addition to exploring possible reasons for their failure to prevent ongoing occurrences of sex-determinative ultrasounds, selective abortions, and female infanticide. In doing so, I will examine the challenges that are inhibiting the full implementation and enforcement of relevant human rights norms within the domestic legal system of the PRC.

My final objective in this thesis is to consider the specific human rights implications of China's population policy regarding its effects on women. By examining the reporting process between China and the CEDAW Committee, I intend to ascertain whether the existence of the policy is in conformity with the human rights obligations undertaken by China as a state party to that treaty in particular, with its specific focus on the situation of women. One of the challenges that is frequently referred to as a hindrance to the success of legal reforms is that of traditional beliefs and culture, and as such I shall also investigate the manner in which these concepts are used in the context of the human rights reporting process.

It is necessary for me to clarify at this point, that my intention in this paper is not to argue directly against the policy itself. What I propose to argue then, is not for the abolition of the policy, but rather against the manner by which it is executed and enforced. As I will discuss in the final section of Chapter 3, positive reforms in the manner in which the policy is enforced have taken place, and such moves are highly laudable. The fact remains that serious matters of concern continue to surface, despite these improvements. It is,

therefore, clear that further reforms must be introduced in order to facilitate the realisation of human rights in relation to the enforcement of the population policy.

1.2 Context and Scope of Study

The human rights issues which have emerged as a result of China's birth control policy are abundant, and consequently it has proven impossible to discuss them all in this paper. Thus, I propose to consider those which fall within the scope of my research objectives, which shall include both direct and indirect effects of the policy. I have deliberately chosen the terms 'direct' and 'indirect' consequences, in order to call upon and reflect the concepts of direct and indirect discrimination. The concept of indirect discrimination refers to facially neutral laws, policies and programmes that inadvertently have a disproportionate effect on a particular group, and I propose that the population policy of China has had such an effect on in-utero, newborn and young girls in China. Therefore, in discussion referring to the indirect consequences of the policy, I shall refer to the female infants, children, and the unborn, who have disproportionately been affected by the enforcement of the family planning policy. In the case of the policy's direct effects, I shall refer to adult women of reproductive age, and the manner in which they have been affected.

1.2.1 Human Rights and Policy in the Social Context: The Indirect Consequences of China's Birth Policy

The relationship between traditional customs and women's rights has long been a contentious one. As such, the CEDAW Convention contains several articles that explicitly aim to encompass harmful social and cultural patterns within the sphere of state responsibility, and in doing so reflect the significance of the broad and complex causes of discrimination against women. Article 2⁵ of the Convention requires that states take appropriate measures to 'modify or abolish' any discriminatory customs or practices with the goal of eradicating discriminatory practices against women. Article 5(a) further states that such measures must address prejudices and customs based on the superiority or

⁵ For the full text of CEDAW Articles used herein see: Appendix 1

inferiority of either sex. These articles are of great importance to what I have described as the indirect consequences of China's population policy. I therefore intend to refer to the effects of the population policy that were not specifically stipulated, but instead were the unintended outcomes of strict birth limits in combination with the social context of a preference for sons. In the first half of this thesis, I intend to introduce the 'One-Child'⁶ Policy and investigate the causes and effects that daughter discrimination has had in such a context. I shall therefore discuss the human rights issues that have subsequently arisen, including the following phenomena: sex selective abortion, female infanticide and the resultant adverse sex ratio.

Chapter 2 consists of an examination of the policy itself, changes within the policy over time, and the reasons for which it has proven controversial. The birth planning policy of the PRC failed to estimate the strength of desire in Chinese families for sons, and in doing so has resulted in the widespread loss and devaluing of female life. Yet the policy has been subject to reforms, and I shall introduce some of the methods hoped to improve both popular perception and the negative impacts of the policy.

Chapter 3 will discuss the existence of daughter discrimination in China, reasons why it continues to exist, and the consequences of its combination with strict limitations on fertility. Chinese society has long shown a preference for sons, which I shall argue is significantly maintained by socio-economic factors. When combined with restrictions on the number of births, this 'preference' becomes a far more serious matter. The population of China today reveals a gross distortion of the natural balance between the sexes, due in part to the availability of ultrasound technology enabling sex determination at a very early stage.

At present, it has been estimated that some regions of China have a sex ratio at birth of 120:100⁷ (wherein the 'sex ratio at birth' is defined as the number of live male births for

⁶ I use this term while acknowledging that in many cases the policy allows for more than one child.

⁷ Zhu (2009) p.2 of 6

every 100 female births),⁸ with the nation itself having an excess male population of more than 32 million. Current research suggests that this equates to approximately 1 million excess male births every year,⁹ a pattern that is expected to continue over the next two decades.¹⁰ While the true extent of consequences, which will most certainly have repercussions for Chinese society, the economy, and the human rights situation, cannot yet be foreseen or understood, it seems unlikely they will be favourable. This dystopian future scenario for China's youth remains speculative, and yet the reality of the situation will most certainly prove to pose a new population challenge for the Government of China to address. In avoiding a crisis of over population, another unforeseen issue has emerged, with discrimination against daughters costing millions of female lives, denied by sex selective abortions, or lost due to infanticide or discriminatory care provision.

1.2.2 Human Rights and the Law: The Direct Consequences of China's Birth Policy

The CEDAW Convention includes several rights which relate to the area of reproduction and family planning.¹¹ Article 12 covers the elimination of discrimination in the field of health care, which includes the equality of men and women in relation to family planning. The specific problems faced by rural women, including discrimination, are covered in Article 14, with provision 2(b) stipulating that they be provided with access to adequate health care and information, counselling and services in the area of family planning. Article 16 requires that states take measures to eliminate discrimination within marriage and the family, with provision (e) ensuring that women have the same rights to choose the number and spacing of their children.

Protections offered by reproductive rights, therefore, encompass many contexts and situations. Yet within the debate surrounding such rights, China and its particular situation

⁸ Hesketh (2006) p.13271

⁹ Ibid p.13273

¹⁰ Zhu (2009) p.1 of 6

¹¹ CEDAW (1979)

proves to be a significantly atypical case. Rather than limiting or forbidding access to contraception, abortions or information regarding family planning methods (as is often the case in Catholic nations), in the PRC the state actively promotes them as national policy. While this situation represents an inversion of the typical discussion at the heart of reproductive rights, the key issues at stake remain limitations of personal choice, physical integrity and the liberty of the individual. Under the strict enforcement of the PRCs population policy, both choice and the sanctity of the person are under threat, and as I will go on to discuss, the ongoing consequences of the population policy are manifested in systematic violations of the physical integrity of women.

In the second half of this paper, I shall begin an investigation of human rights implications of the practices referenced by CEDAWs 2006 Concluding Comments report, which will detail breaches of human rights law including instances of forced abortion and sterilisations, coercive measures undertaken by policy officials, and failures regarding the enforcement of domestic law and the lack of punishment for those responsible. In Chapter 4, I shall consider the domestic legal reforms made prior to the 2006 CEDAW report. Following this, I will consider and discuss the challenges that face the full implementation of both the law and human rights standards in China.

Finally, in Chapter 5, I intend to conduct an investigation utilising the dialogue of reports that took place between the PRC and the CEDAW Committee during its 36th Session, of 2006. This discourse will include relevant analysis of State Reports submitted to the Committee, as the treaty monitoring body, its responding comments, observations and recommendations, as well as the shadow report tabled by non-governmental organisation Human Rights In China. I shall also conduct a discussion concerning references to ‘culture’ in the CEDAW reporting process, and the impact that this may have on the progression toward the full realisation of human rights for women.

1.2.3 Limitations

Examination of these topics has revealed an abundance of issues. The following areas will regrettably fall beyond the scope of my intended investigation:

- Trafficking of women as a possible result of the adverse sex ratio

- The specific vulnerability of minority women and female refugees as victims of trafficking
- Issues of eugenics: reproductive limitations placed on the mentally and/or physically disabled
- Issues of ethnicity and coercive state policy regarding reproduction in ethnic minority groups.
- ‘Out of plan’ children and their specific vulnerability.

While I acknowledge that these issues are of great significance and weight, fully addressing such subject matter has ultimately proven to be beyond the capacity of this Masters thesis.

1.3 Methodology and Literary Review

The methodology of this thesis will be qualitative in nature, as a result of my focus on the contextual setting of China’s family planning policies, and the reporting process between the PRC and the CEDAW Committee. I have chosen the CEDAW Convention as my primary international human rights tool, owing to its specific mandate addressing the elimination of discrimination, reproductive rights and the adjustment of cultural norms that maintain harmful practices. Research into the particular aspects of the population policy upon which I have chosen to focus my research, has led me through a broad range of disciplinary fields and perspectives. While I aim to focus on international human rights law and domestic Chinese law as primary sources, I propose my thesis to be interdisciplinary, and as such I shall also use scholarly articles and reports from a variety of disciplinary backgrounds as secondary sources. Alongside the official reporting dialogue between the Chinese Government and human rights bodies of the United Nations, I have incorporated the work of anthropologists, public policy researchers, human rights experts and researchers into reproductive health and population. These shall include legal theory, philosophy, cultural studies and, finally, demography, including clarification from population policy observers.

Susan Greenhalgh and Edwin Winckler have chronicled the development of China’s population policy in its many incarnations, from the Mao era through to the present day,

examining the specific formulations of the policy itself, as well as its consequent social and political ramifications. By combining both anthropological and political perspectives, their work provides comprehensive insight into the resultant tension between the limitations of the policy and the strength of son preference in the local population.

Therese Hesketh and Zhu Weixing's analyses of the PRC's population policy via national surveys have provided clear data regarding the causes, effects and consequences of the family planning policy over the past quarter of a century. Their research clarifies not only the existence of the imbalanced sex ratio in China, but also the fact that sex selective abortion is the main reason for its occurrence.¹² In response to the increasingly evident discrepancy of male to female births in the mid 90s, the PRC outlawed sex determination of foetuses via ultrasound. However, as Xiaorong Li discusses, the failure of such laws to be implemented and effectively enforced has resulted in a continuance of previous practices.¹³

While improved enforcement against misuse of ultrasounds has proven successful in combating sex ratio imbalance in South Korea,¹⁴ Lesley Wexler advocates an additional two-fold approach to the matter within the Chinese context. She argues that discrimination against daughters in China is reinforced by both economic and social value structures, and thus proposes a combination of economic incentives for families with only daughters, along with social programs promoting positive norm promotion of girls and women.¹⁵

Li, furthermore, examines the fact that family planning officials have often employed coercive and sometimes severe methods, in order to guarantee compliance with the policy, and ensure that centrally decreed population goals are met. Carmel Shalev writes extensively on the physical violence and economic sanctions that are employed by officials in order to reach set population targets. By investigating the PRC's third and fourth

¹² Zhu (2009) pp.1 of 6, 6 of 6

¹³ Li (1996) p.169

¹⁴ Hesketh (2006) p.13274

¹⁵ Wexler (2006) p.103

periodic reports to the CEDAW Committee of 1999, she outlines the reporting process, social resistance to the policy, and the reports of systematic violence against women in the name of population policy enforcement.¹⁶

Li illuminates the problematic nature of Chinese legal protections regarding the Family Planning Policy, via investigation of the laws themselves and the apparent lack of enforcement, particularly in regard to disciplinary actions against officials. While not written in relation to the population policy of China, Peter Ho's concept of 'deliberate institutional ambiguity' has proven invaluable to this research. In his work concerning land rights in China, Ho has identified what he refers to as 'institutional and legal indeterminacy'¹⁷ as a primary feature of the issues currently facing the land rights question in the PRC. According to Ho's research, the Chinese State deliberately maintains nebulous and indeterminate legislation in order to allow room for officials and the judiciary to react to societal developments as they occur,¹⁸ and it is my belief that this theory provides an invaluable lens through which to view the issue of legal protections in the area of family planning policy.

In order to complete my research into the human rights reporting process, I intend to utilise the dialogue of reports between the PRC and the CEDAW Committee from the 36th Session (2006). By way of supplementing this information I have also made use of reports by the Committee on the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, The Committee on the Convention on the Rights of the Child, the Special Rapporteur on Violence Against Women, the United States Department of State 2008 Country Report on Human Rights Practices (China), the Congressional-Executive Commission on China's Annual Report 2009, as well the 2006 alternate report from Human Rights in China.

¹⁶ Shalev (2006) pp.639-666

¹⁷ Ho (2001) p.407

¹⁸ Ibid p.400

The approaches I have thus described are among those that have been the most insightful in relation to my research of this topic. I have found their work and methods to be both encouraging and motivating as I prepare to conduct my own discussion of the issues at hand.

PART ONE: POLICY AND SOCIAL CONTEXT

2 Chapter 2: China's Family Planning Policy

2.1 Background to China's Family Planning Policy

The 'One-Child' Policy, as it is often referred to, has become an enduring characteristic of the social and political landscape in China today. Yet this informal title is in truth a misnomer. The policy itself is not as much monolithic as it is multifaceted, stipulating considerable variation in the numbers of children permitted across lines of ethnicity, location, as well as between party cadres and the citizenry. Nonetheless, the policy has institutionalised direct state interference in what would, elsewhere in the world, be considered private family matters, for over thirty years, and at present this situation shows no sign of abating. The needs and aims of the state take primacy over the desires of individuals, and the population goals of the PRC are formalised in the nation's Constitution, Article 25 of which declares that:

The state promotes family planning so that population growth may fit the plans for economic and social development.¹⁹

Since 1979 the PRC has implemented strict controls on the number, timing and spacing of births in order to rein in the growth of its population and, as such, allow for greater social and economic development. At the time of the policy's introduction, China was already home to a quarter of the world's population, two thirds of whom were under the age of 30,

¹⁹ Constitution of the PRC: Hereafter 'Constitution' (2004) Article 25

inhabiting a mere 7% of the world's arable land.²⁰ Today, the population of China is estimated to be approximately 1.3 billion, with family planning policies being credited with preventing between 250 and 300 million additional births.²¹ Despite this reduction, the population continues to increase by around 10 million people per year.²²

The primary aim of the policy was to do away with traditional preferences for large families by creating one to two child families as the norm in rural areas, in order to both prevent a situation where the country could not feed its own people, and to enable swifter development. In retrospect, however, it is apparent that policy makers at the time did not account for the cultural and social reasoning behind local preferences for large families,²³ which had long been the norm in Chinese society. The predilections of peasant families, including the view that 'many children bring much wealth',²⁴ were viewed by the state as remnants of a 'feudal' culture, incompatible with the new state ideology of modernisation and Marxism, which it attempted to eradicate via ideological propaganda and public education campaigns. The approach failed to acknowledge the strength, and indeed the reasoning, behind such family planning strategies and, when persuasion failed, the state attempted to achieve its goal through coercion and force.²⁵ Some of the main features of the birth policy's administrative sanctions include the following:

- Married couples must apply for birth permits before a pregnancy is allowed,
- Pregnancies out-of-wedlock are illegal, and any unauthorised pregnancies must be terminated,
- Following the birth of their first child, women are required to wear an IUD or use

²⁰ Hesketh (2005) p.1171

²¹ It is worth noting however that obtaining reliable data on the Chinese population is unlikely, due to the suspected manipulation of figures by family planning officials, in order to comply with the policy's regulations and goals. Hesketh (2005) p.1172

²² Hesketh (2005) p.1174

²³ Greenhalgh (2005) p.218

²⁴ Ibid p.221

²⁵ Ibid p.219

alternate contraceptive methods,

- Following the birth of an unauthorised, or ‘out-of-plan’ child, one spouse must be sterilized.²⁶

Other facets of the policy deem that failure on the part of family planning officials to meet population targets could result in fines, the loss of bonuses, possible demotion and disciplinary sanctions. This policy of internal sanction and reward, though well intentioned, has spurned an array of unforeseen and undesirable outcomes.

2.2 Coercive Methods of Policy Enforcement

In pursuing its family planning policy, China has always adhered to principle of Government guidance with the voluntary participation of the people.²⁷

Despite state claims of voluntary participation on the part of the Chinese people, reports of coercion and the excessive use of force in attaining population targets have plagued the family planning policy.²⁸ Coercive measures undertaken by policy officials in order to meet population targets have consisted of economic sanctions or bonuses, as well as physical and psychological coercion. Reported methods include: forced removal from the home for medical inspection and treatment, forced abortion at late term, the killing of foetuses born alive, forced sterilisation procedures, detention of pregnant women for as long as necessary to persuade them to undergo abortions, confiscation of belongings, dismissal from work, detention and ill-treatment of relatives as incentives to comply, (or in the absence of family members) the destruction of homes and personal property.²⁹

²⁶ Shalev (2006) p.655

²⁷ CEDAW/C/CHN/5-6 (2004) p.47

²⁸ Shalev (2006) pp.639-666

²⁹ Ibid p.661

Forced late term abortions and forced sterilisation affect both individuals and families considerably, with the women who suffer these procedures experiencing significant long-term effects, both physical and psychological. Forced surgical procedures (sterilisations, abortions, or IUD insertions) violate the right to bodily integrity, security of person, and autonomy in decisions regarding medical procedures. Additionally, measures undertaken to verify compliance with birth policy constitute violations of personal liberty and privacy (public monitoring of menstrual cycles and round ups for medical intervention).³⁰ Actions such as these are clearly in violation of the human rights obligations of the PRC. The fact that they were carried out by officials in the pursuit of state policy is of particular concern for human rights observers, and may even constitute torture under the Convention Against Torture (CAT). Article 1 of CAT defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [...] intimidating or coercing him or a third person [...] when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³¹

In 2000 the CAT Committee expressed concern in response to “reports of coercive and violent measures resorted to by some local officials, in implementing the population policy of the State party,”³² which contravenes their obligations under the treaty. Similarly, in their 2008 parallel report to CAT regarding torture in China, Amnesty International reported that:

Reports persist of local authorities forcing women to undergo abortions or sterilizations in pursuit of birth quotas under China’s strict family planning policies. While such practices are clearly intentional, cause much suffering, and are inflicted for discriminatory reasons, officials responsible for such practices are rarely prosecuted.³³

³⁰ Shalev (2006) p.659-660

³¹ Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (1984) Article 1

³² CAT/C/SR.423/Add.1 (2000) para.17

³³ ASA 17/094/2008 (2008) p.10

The Committee monitoring the Convention on the Rights of the Child (CRC) have also expressed their concern regarding the negative effects of the family planning policy. While complementing the PRC on the legal measures in place prohibiting selective abortion and infanticide, they also note that these practices, in addition to the abandonment of children, continue to be reported.³⁴ The CRC Committee urged China to strengthen its efforts towards the full implementation of relevant laws, and to ensure the elimination of negative consequences of the family planning policy, including abandonment and non-registration of children, and the unbalanced sex ratio at birth.

It thus appears that despite having avoided a crisis of overpopulation, the family planning policy of the PRC has been enforced in a manner that fails to comply with international human rights law, and places its people under the serious threat of abuse. However, it remains clear that the burdens of this policy have fallen more heavily on some sectors of the population than others.

2.3 Policy Differentiation in Rural and Urban Areas

In the discourse of Deng era modernity, rural peasants were viewed and portrayed as backward and feudal, ignorantly clinging to outmoded, superstitious beliefs. Greenhalgh and Winckler refer to their representation as that of ‘the uncivilised Other’: “large in quantity and low in quality”,³⁵ and as such their preferences for large families represented a threat to the successful modernisation and development of the entire nation. This portrayal served as a valuable tool to justify dehumanising treatment in the pursuit of greater goals, and the results are evident in the considerable differences in implementation of the birth policy in rural areas as compared to urban districts.³⁶

In the 1980s and 1990s, urban areas were under far greater social control and surveillance, in both communities and the workplace, making resistance less plausible, thereby resulting

³⁴ CRC/C/CHN/CO/2 (2005) para. 28-29

³⁵ Greenhalgh (2005) p.249

³⁶ Ibid pp.249-250

in a relatively stable situation for birth planners to manage. The stability of urban life, with steady employment and housing, made the move to smaller families with fewer children less disruptive. Policy enforcement in the cities relied heavily on propaganda and ideological measures, and thus there was no need to resort to other, more severe measures.³⁷ In the rural areas a perceived need for more children remained, particularly regarding sons, and thus intense resistance to the birth policy continued from both cadres and citizens, resulting in the eventual use of coercion and force to bring an end to dissent.³⁸ In city areas a removable IUD was the most common form of contraception, whereas in rural areas irreversible sterilisation procedures were preferred, as they provided a permanent solution and ended opposition.³⁹

Continued resistance by rural citizens in their desperate struggle to have sons resulted in the state conceding, and by 1988 a majority of province-level policy makers had acquiesced to peasant demands by allowing for the birth of a second child, if the first had been a girl. By doing so, the policy makers reformed official discourse by acknowledging and even codifying the preference for sons, which was now no longer a 'feudal' remnant, but part of the party line. As Li comments, this change in policy failed utterly to address the root causes of the abuse or neglect of female children. While state policy makers may blame 'backward' traditions for the existence of a strong preference for sons over daughters, this policy shift serves to perpetuate and even validate such views by incorporating them into law.⁴⁰

Consequently from the late 1980s on, while urban areas continued with a strict one-child policy regardless of gender, in rural areas the possibility existed for a second child, contingent on the first being a daughter. This not only created a difference in policy for

³⁷ Ibid p.234

³⁸ Ibid p.216

³⁹ Ibid p.259

⁴⁰ Li (1996) pp.159-160

those in rural and urban areas, but also in effect gives official recognition to the unequal value of sons and daughters.⁴¹

2.4 Discriminatory Treatment of Women in Policy Implementation

Formal equality between the sexes is codified into Chinese law, and has long been upheld as basic state policy. Similarly, the duties involved in family planning are legally stipulated as being the responsibility of both the husband and the wife. The Constitution of the PRC states in Articles 48 and 49 that:

Women in the People's Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life.⁴²

Marriage, the family and mother and child are protected by the state. Both husband and wife have the duty to practise family planning.⁴³ [sic]

Yet in practice, women have long been the focal targets of both responsibility for birth control and the coercive physical measures of policy enforcement. The systematic manner in which the family planning policy has been implemented has placed the burden on women, and therefore effectively constitutes discrimination due to its consequent inequitable effects.

Under the strict scrutiny that accompanies state monitored reproduction, women have become a particularly vulnerable group, as there is great risk that they become reduced to their perceived 'biological function', and thus are especially exposed to indirect discrimination in the areas of reproductive health. Patterns of behaviour, often perceived as 'natural', are institutionalised by the state and thereby validated. As Shalev claims, "these patterns persist by mere inertia of habit if no action is taken to address and remove the discriminatory practice".⁴⁴ While early Maoist propaganda had emphasised equality

⁴¹ Greenhalgh (2005) p.224

⁴² Constitution (2004) Article 48

⁴³ Ibid Article 49

⁴⁴ Shalev (2006) p.644

between men and women, in the age of the population policy focus shifted to biologically ‘natural’ roles dictated by one’s gender and, as such, women were portrayed as responsible for reproduction in all its aspects. The birth policy thus equated women with their reproductive function, and accordingly confirmed them as the central object for reproductive control.⁴⁵

Li illustrates how failure to ensure the full implementation of regulatory laws⁴⁶ regarding the enforcement of family planning policy has appeared to institutionalise a culture of violence against women.⁴⁷ She outlines the coercive and often extreme measures (including physical detention and abuse of mothers, forced late term terminations, and the killing of foetuses that survive late term abortion) undertaken by family planning officials to ensure that strict population targets are met. The threat of administrative consequences (fines or loss of employment) is so powerful that women are left with little to no choice but to submit to abortion or sterilisation procedures.⁴⁸ Li recounts instances of officials having mobilised armed local militia to assist in the ‘hunting down’ and collection of women who failed to undergo such procedures, and to assist in their delivery to medical facilities. Yet, even where penalties were in place to prosecute against such actions, there has been a significant lack of enforcement. This may be attributable to Ho’s concept of ‘deliberate institutional ambiguity’. By failing to prosecute such officials and turning a blind eye to the lack of implementation, which in turn allows for the attainment of centrally decreed population targets, the government of China is complicit in such abuses and, indeed, endorses them through lack of action.⁴⁹

The Marriage Law of the People’s Republic of China (1981), hereafter the Marriage Law, states in Article 12 that “Both husband and wife shall have the duty to practise family

⁴⁵ Greenhalgh (2005) pp.254-255

⁴⁶ Including The Marriage Law (1980), The Law on the Protection of Rights and Interests of Women (1992), and The Law on Maternity and Infant Health Care (1994) which will be discussed at length in Chapter 4.

⁴⁷ Li (1996) p.157

⁴⁸ Ibid p.163

⁴⁹ Ibid p.157

planning.” Yet as is noted in the data of Greenhalgh and Winckler, 74% of the 151 million sterilisation operations performed between 1971 and 2001 were on women,⁵⁰ despite the fact that the equivalent operation for males is easier, cheaper to perform, less intrusive, and results in far fewer complications. One of the reasons for the apparent reluctance to perform such operations on men can be linked to popular fears that the consequences of sterilisations for men would be far worse, including the loss of *qi*, sexual drive and ability to work effectively. Greenhalgh and Winckler comment that the belief in such effects has attained the status of cultural truism, and that women are compelled to submit as the effects for men would be disastrous.⁵¹

Shalev, in her discussion of the discriminatory application of the policy, refers to data from 1992,⁵² wherein women were the subjects of 95% of all sterilisations.⁵³ She also recounts examples from women in Tibet to illustrate:

A woman from Amdo described regular birth control meetings where they instructed women to have abortions, take pills, or insert rings. Men did not have to attend birth control meetings, and officials never talked about birth control for men.

A male health care worker reported that he was trained to perform abortions and sterilizations on women. “I was never trained in or saw any operations on men.” There were house-to-house visits to monitor menstrual cycles of women, but “it was not in the training for us to distribute condoms.”⁵⁴

Regardless of the formal declarations of equality between men and women in Chinese law, the focus upon women as the primary bearers of responsibility for coercive birth control and non-compliance measures, constitutes discrimination and has inequitable effects on the mental and physical health and wellbeing of targeted women. It is noteworthy that

⁵⁰ Greenhalgh (2005) p.256

⁵¹ Ibid p.251

⁵² International Committee of Lawyers for Tibet (1998) p.16 IN: Shalev (2006) p.656

⁵³ Shalev (2006) p.656

⁵⁴ Ibid p.656

neither Chinese domestic law nor the Constitution of the PRC contains any definition of discrimination, which makes the task of legally identifying discriminatory practices in the state virtually impossible.

2.5 Hu Jintao and the Reform Era

In the face of growing internal criticisms of corruption and the abuse of power by party officials, during his period as General-Secretary Jiang Zemin began a shift toward the promotion of lawful administration, in attempt to ensure that official management was conducted lawfully and that the rights of citizens were respected.⁵⁵ While reforms were not isolated to problems occurring within the administration of family planning, Jiang's campaign included crackdowns on official corruption within the policy, including the taking of bribes, extortion and misappropriation of fines, as well as collusion between sympathetic doctors, officials and citizens. The media were also utilised, with high profile reporting of the abuse of power by local officials being widely publicised in the hope of deterring others and alerting communities to their rights.⁵⁶

With the succession of Hu Jintao to the position of General Secretary in 2003, a new shift in the policies of the PRC Government came about. At the National People's Congress of March 2004, Hu announced a new doctrine of 'Comprehensive Reform', which sought to move away from the aggressively coercive disincentives of the 80s and 90s, to focus rather on positive incentives as a means of guaranteeing compliance with the regulations of family planning.⁵⁷ These efforts sought to lessen public dissatisfaction with the hugely unpopular enforcement techniques and substandard procedures, and to enhance the public's satisfaction by stressing the rights of citizens, rather than merely their duties.⁵⁸ Notably, in the hope of encouraging greater willingness to have daughters and thereby arrest the discrepancy in the ratio of male to female births, Comprehensive Reform

⁵⁵ Greenhalgh (2005) p.190

⁵⁶ Ibid p.192

⁵⁷ Ibid p.172-174

⁵⁸ Ibid p.177

measures included initial (however informal) steps towards the introduction of a long awaited program of social security for the aged.⁵⁹

Among Hu's instructions concerning the Comprehensive Reform agenda, was to arrest the growing discrepancy in the sex ratio at birth. In order to avoid future social problems, he advocated establishing new social customs of gender equality via the development of the 'Action to Foster Girls',⁶⁰ or 'Care for Girls', Campaign. The campaign was first introduced as a pilot program in areas that showed particularly high sex ratios at birth, in order "to improve the environment for girls' survival and development",⁶¹ and has subsequently been expanded to more than 300 rural counties. Campaign activities include lectures for grandparents on gender equality (as it is often perceived that the elderly generation are those clinging most fiercely to 'feudal' discriminations against daughters), small loans for daughter only families, and regular health examinations for daughters to ensure they are not subject to neglect. For example in Wuwei County, Anhui province, a family with one or two daughters is eligible for 30,000 yuan (3,750 US\$) in subsidies before the daughters marry, among which includes aid funds, education assistance and exemptions.⁶²

Among the further positive incentives introduced in Hu's Comprehensive Reforms, have been economic bonuses for women who comply with birthing limits. The Congressional Executive Commission on China (CECC) 2009 annual report provides details on some of the incentives offered to women who volunteer for sterilisation or abortion procedures. The report states that in October 2008, the Panyu District Population and Family Planning Commission in Guangzhou proclaimed that women who undergo tubal ligation were eligible for a monthly reward of 25 yuan, from the month of the operation until they reach 55 years of age. Additionally, in March 2009, authorities in the Shenzhen Special

⁵⁹ Ibid p.175

⁶⁰ Ibid p.176

⁶¹ China Daily (2004)

⁶² Ibid

Economic Zone announced that married women who fall pregnant without the appropriate authorisation would be eligible for subsidies if they volunteer for an abortion (500 yuan in the first 14 weeks of pregnancy and 700 yuan for abortions performed after the first 14 weeks).⁶³

While there is little sign of the family planning policy of the PRC coming to an end this decade, certain areas have experienced a relaxing of regulations. Several municipal areas of China have now stipulated that young couples, both of whom are from single child families, are permitted to have more than one child. One of these areas is Shanghai, which has received this dispensation due to its negative natural population growth for the past decade.⁶⁴ To make such an allowance for the entire nation, however, has been stated as impossible, as to do so would see China's population reach 1.6 billion as early as 2045, rather the current projection of at least ten years later. As such, the birth policy will continue in its current form until at least 2020, with any other changes being local, gradual and limited.⁶⁵

Thus, it appears that the family planning policy of China will remain in place for the foreseeable future. In spite of the legal and policy reforms that have taken place in recent years, the effects of the policy will be felt for many years to come, due to unexpected consequence of a hugely distorted sex ratio in China's young population today. Furthermore, disparity continues to exist between urban and rural areas, whereby women in the provinces experience higher, and more severe, levels of coercion in complying with policy directives.

In 2004, *The People's Daily* reported that senior PRC officials intended to take 'forceful measures' to balance the sex ratio by 2010. The deputy director of the National Population and Family Planning Commission stated that this goal was to be achieved following

⁶³ Congressional-Executive Commission on China (2009) p.156

⁶⁴ It is hoped that this initiative could begin to circumvent what is known as the "4:2:1" phenomenon, wherein couples are responsible for the financial support of four parents and one child. Hesketh (2005) p.1174

⁶⁵ Greenhalgh (2005) p.168

crackdowns on illegal sex determinative ultrasounds and abortions, the further promotion of the 'Care for Girls' campaign in rural areas, and expedition of social insurance programs in rural areas.⁶⁶ While such a response signals clear recognition of the unfortunate repercussions of the population policy, it falls short of acknowledging the potential consequences for the women's rights that such a campaign may inadvertently entail.

⁶⁶ People's Daily (2004)

3 Chapter 3: The Causes and Consequences of Daughter Discrimination

3.1 Discrimination Against Daughters

As Wexler states, the family planning policy of the PRC is facially neutral, insofar as it does not dictate gendered population targets to its citizens. Consequently, the existence of a discordant sex ratio and discrimination against daughters can only be attributable to the strategic preferences and cultural habits of the people themselves.⁶⁷ Despite sixty years of socialist rule, and considerable effort on the part of the Chinese Communist Party (CCP) to eradicate traditional beliefs, it appears that conventional strategies towards family planning continue in many areas. It has been noted that in the context of CEDAW reporting, culture is often blamed for non-compliance with human rights principles, particularly when it occurs in rural, ‘backward’ areas, as opposed to the more developed urban districts.⁶⁸ This approach is repeatedly used in the PRC’s Combined Fifth and Sixth Report to CEDAW, as a cause of social resistance to the full implementation of CEDAW obligations:

Given the constraints from varying levels of economic and social development, [and] the influence of traditional modes of thought, [...] the full realization of equal rights for Chinese women in the political, economic, cultural, social and family spheres will continue to be a lengthy process.⁶⁹

It thus follows that given this situation, any adjustments to the family planning policy alone would have little impact on the desires and preferences of peasant families, by failing to address the root causes of son preference and discrimination against female

⁶⁷ Wexler (2006) p.91

⁶⁸ Merry (2006) pp.101-2

⁶⁹ CEDAW/C/CHN/5-6 (1994) p.7

infants and girls.⁷⁰ The wording of the report effectively accepts the discrimination of women, perceiving it as embedded within ‘political, economic, cultural, social and family spheres’ and thus contradicts the nation’s claim to gender equality.

3.2 The Causes of Daughter Discrimination

In the traditional Chinese family model, children play a significant role in what has been referred to as an ‘inter-generational contract’⁷¹ between family members. Parents provide economic welfare and protection, to which children are expected to reciprocate in later life with filial piety, contributions to the family economy and, for sons, the responsibility to financially support their elderly parents, and perpetuate the family line by producing more sons. Rural tradition holds that when a daughter marries, she not only relocates to live with her husband’s family, but in effect ‘belongs’ to that family. Only sons remain with their parents, and as such they are expected to care for and support their elderly parents in shared households, with wives caring for their parents-in-law, rather than their own parents. Thus, the need for educational or vocational investment in daughters is deemed of lesser value, avoiding the ‘loss’ of that investment when daughters inevitably leave the family unit upon marriage.⁷² As the old rural expression states: ‘raising a daughter is like watering someone else’s fields’.⁷³

This ‘intergenerational contract’ is supported in the domestic law of the PRC. The Marriage Law (1981) states in Article 15 that:

Parents shall have the duty to bring up and educate their children; children shall have the duty to support and assist their parents.

⁷⁰ Wexler (2006) p.91

⁷¹ Greenhalgh (2005) p.220

⁷² Ibid p.220

⁷³ China Daily (2006)

If children fail to perform their duty, parents who are unable to work or who have difficulty in providing for themselves shall have the right to demand support payments from their children.

This duty is also stipulated in the Constitution of the PRC, as stated in Article 49: “Parents have the duty to rear and educate their children who are minors, and children who have come of age have the duty to support and assist their parents.”⁷⁴ Despite the apparent gender neutrality of these stipulations, in traditional rural communities the sole recipient of the filial duties described in these laws, in most instances, is the male child alone.

Greenhalgh and Winckler state that in the early 2000’s only 25% of the Chinese working population had any form of pension (even more disturbingly, this figure accounts for 55% of urban workers, but only 11% of rural workers).⁷⁵ As a consequence of the lack of formal social security programs, in traditional peasant communities the elderly are almost entirely dependent on their sons for support.⁷⁶ The social structures of the Chinese peasant family then, being patriarchal, patrilineal and patrilocal, contribute significantly to the gendered notion of identity in Chinese society, wherein sons have a far greater value in the social economy than daughters.⁷⁷ The preference for sons, therefore, is for many a socioeconomic necessity, to guarantee the ensured survival and security of the family in uncertain economic times. As a consequence, for those who face the prospect of no financial support in their later years, in a social setting where only a son can provide such care and support, the decision to try to ensure the birth of a son is highly pragmatic given the limited options available.

⁷⁴ Constitution (2004) Article 49

⁷⁵ Greenhalgh (2005) p.303

⁷⁶ Shalev (2006) p.657

⁷⁷ Greenhalgh (2005) p.220

3.3 The Consequences of Daughter Discrimination: China's Sex Ratio at Birth

As has been discussed above, roles, duties and responsibilities connected to one's gender are a deeply entrenched aspect of social and family life in China. In its attempts to rein in the alarming growth of its population, the CCP instigated a birth policy of extraordinary scale, yet in doing so they applied a facially gender-neutral policy upon a society and culture that was deeply connected to a gendered perception of 'personhood'.⁷⁸ As a result of policy makers' failure to acknowledge the depth and pervasiveness of such influence, the facially neutral campaign to lower family size had the unexpected and, certainly unintended, result of creating a seriously distorted population that exposes the strength of male dominance in Chinese culture.

Historically, the male to female sex ratio in China had always been high, however, it is clear that since the introduction of the population control policy, the sex ratio of the PRC has become progressively more distorted. Prior to the introduction of ultrasound-B machines in the mid-80s, the difference in sex ratio could be attributed to infanticide, discriminatory care giving and allotting of resources, and the abandonment or sale of female infants and children. The arrival of ultrasound, however, provided a far more attractive, modern and considerably less ethically troubling solution to the acquisition of a son.⁷⁹

Additionally, it is often the case that when daughters are born, they are subject to prejudiced treatment in their home environment. According to research carried out in Shanxi province,⁸⁰ boys are more often delivered in hospitals while daughters are born at home, boys are fed more nutritious foods than girls, and boys are sent to hospitals more often and more quickly than girls when they are ill, with girls more commonly left to

⁷⁸ Greenhalgh (2005) p.246

⁷⁹ Ibid p.227

⁸⁰ Research attributed to Professor Zhu Chuzhu, IN: China Daily (2004)

recuperate in the home.⁸¹ Such discrimination in formative age care giving is also deemed responsible for a far higher childhood mortality rate among girls than boys.

The naturally occurring sex ratio at birth is surprisingly consistent, and has been identified as around 105/107:100. This slight excess of males at birth is countered by differing mortality rates for the sexes throughout the human lifespan, which favour females (having better resistance to disease, greater longevity, and less tendency towards risk taking and violence).⁸² Greenhalgh and Winkler have ascertained, via Chinese census information, that the sex ratio at birth has increased steadily in the era of population policy, with the national rate in 1982 being 109:100, by 1990 rising to 111:100, in 1995 increasing to 116:100, and finally in 1999 being published at 117:100, while the actual rate is believed to have been 120:100.⁸³ In a finding that leaves little room for doubt regarding the impact of state policies, they have identified a direct relation between increases in the ratio at birth to tightening of the birth policy over time. In one rural village surveyed in the Shaanxi province for example, prior to the introduction of the birth policy the sex rate at birth was at the naturally expected level, 105:100. Mirroring a severe crackdown in implementation of the policy from 1979-1983 it rose to 121:100, during a period of relaxation from 1984-1987 it fell to 109:100, and then rose drastically to 153:100 during the tightening of restrictions in 1988-1993⁸⁴ (notably higher in the age of ultrasound availability). Indeed it is on a local scale that these numbers become all the more shocking, with some provincial areas revealing local highs up to 185:100, with the 2000 census showing that for example, the counties of Yisong in Anhui and Xingan in Jiangxi reporting combined local populations of 640 boys but only 353 girls.⁸⁵

⁸¹ China Daily (2004)

⁸² Hesketh (2006) p.13271

⁸³ Greenhalgh (2005) p.265

⁸⁴ Ibid p.268

⁸⁵ Ibid p.267

In response to the growing alarm over the sex ratio at birth, in 1994 the PRC outlawed the use of ultrasound for the purpose of sex-determination of fetuses. While such moves on behalf of the state are obviously well intended and to be applauded, the question remains of why the sex ratio has continued to climb in the years following the laws implementation of June 1, 1995. Li claims that failure to implement and effectively enforce such law has resulted in a continuance of previous practices.⁸⁶

Hesketh provides clear data on the imbalanced sex ratio in China, and offer some speculation on the consequences of what, in some areas, may be a 12-15% excess of single men, in a society where marriage is necessary for social acceptance.⁸⁷ What full consequences the skewed sex ratio in China will have on the human rights situation remains to be seen. What is undeniable is that by limiting the number of children available to Chinese families, the birth policy has exposed the widespread devaluation of women, and indeed even codified into law the unequal value of sons and daughters. While the family planning policy achieved its goal of slowing the rate of population growth in China, an additional legacy of the policy has been the widespread loss or denial of female life, the targeting of reproductive women for state control and a huge distortion of the modern Chinese demographic. As Greenhalgh and Winckler propose, this remains the unintended result of an ill thought through policy, and the enforcement of an ostensibly gender neutral policy upon a deeply gendered society.⁸⁸

3.4 The South Korean Example

A cultural preference for sons is certainly not limited to China. The inclination exists in many Asian and East Asian cultures, where the combination of son preference, a low rate of fertility and the availability of sex-determinative ultrasounds have also resulted in a high sex ratio (for example Taiwan and South Korea). The difference in the case of China,

⁸⁶ Li (1996) p.169

⁸⁷ Hesketh (2006) p.13273

⁸⁸ Greenhalgh (2005) p.246

however, is that it has the single highest sex ratio at birth in the world, and that policies of the government have played a direct role in its creation.⁸⁹

For those generations born in the last few decades, there is little that can realistically be done to address the current population discrepancy between the sexes.⁹⁰ However, efforts made now to reduce the reliance on sons and the availability of sex selection of foetuses, could arrest the continuance of this phenomenon, and reduce the problem for future generations. The first country to have reported a disproportionately high sex ratio at birth was South Korea, due to the combination of a traditional culture preferring sons and the early arrival and widespread use of sex-determinative technology. Following the introduction of ultrasounds in the mid-1980s, the sex ratio at birth leapt dramatically. The city of Taegu for example, reported a normal sex ratio in 1980, yet by 1990 it had increased to 122-130:100. As parents sought to ensure the birth of a son, the disproportionate rate of males rose even further in third to fourth order births, with the ratio for fourth order births across South Korea in 1992 escalating as high as 229 males to 100 females.⁹¹

However, the South Korean government intervened in the 1990s, launching public information campaigns and outlawing sex-determinative ultrasounds. Media campaigns warned of the anticipated dangers of the gender imbalance, with particular concentration on the expected shortage of brides. Laws introduced prohibiting the use of ultrasounds for sex-determination were strictly enforced, and in 1991 eight physicians were suspended from practice after it was revealed that they had performed such procedures.⁹² The measures implemented by the South Korean government appear to have had considerable

⁸⁹ Greenhalgh (2005) p.266

⁹⁰ Hesketh (2006) p.13274

⁹¹ Ibid p.13273

⁹² Ibid p.13274

success, with the sex ratio at birth falling from 122-130 in 1990, to 116 in 1998, and 110 in 2004.⁹³

While such methods have proven successful in South Korea, the situation in China is arguably far more complex. South Korea enjoys a higher level of social and economic development, and consequently a greater level of equality across the social spectrum than China.⁹⁴ Significantly, another factor of crucial relevance is that families in South Korea do not bear the limitations of enforced low fertility. Wexler therefore proposes a two-fold approach to combating the sex ratio in China. She argues that in the case of China, discrimination against daughters is reinforced by both economic and social value structures, as has been discussed, and thus she proposes a combination of economic incentives for families with only daughters, along with social programs that advocate positive norm promotion of girls and women.⁹⁵ It remains notable, however, that the measures undertaken in South Korea seemingly failed, or perhaps did not attempt, to address the root causes of son preference, and did not extol the value or benefits of daughters. Nonetheless, the ameliorative impact of well-enforced prohibitive laws on rectification of the sex ratio at birth remains clear.

3.5 Positive Outcomes for Girls

In spite of the litany of abuses and suffering that have been endured by Chinese women in the name of birth planning and population controls, there have been some unexpected positive side effects. In urban areas, where Chinese citizens had little means of resisting the enforcement of the single child policy, young urban girls have experienced increasingly fortunate childhoods, being the sole beneficiaries of their parent's attention and means, as well as the solitary bearers of filial responsibilities for elderly care and support. In an era of significant economic reform and growth, the labour markets in urban

⁹³ Ibid p.13273

⁹⁴ The question of whether the success of the Governments efforts can be attributed to the strict enforcement of laws or the greater social equality in general cannot, however, be dealt with in this paper.

⁹⁵ Wexler (2006) p.103

areas now provide unprecedented opportunities for generations of highly educated and career orientated young women. In the villages, the enforcement of smaller family size has also brought about an enhanced appreciation of, and reliance on, daughters, advancing their standing within the stratification of rural society. Additionally, daughters are increasingly being recognised as emotionally closer and more attentive than sons, and in some cases consciously groomed as future caregivers.⁹⁶

In the resultant situation then, it appears that China's population policy may have afforded a significant number of young women with unprecedented opportunity and newfound respect and recognition. Yet the price that has been paid for this awakening has regrettably been high, and the full consequences of the unbalanced sex ratio are yet to be manifested.

⁹⁶ Ibid p.283

PART TWO: HUMAN RIGHTS AND DOMESTIC LAW

4 Chapter 4: Domestic Law

While controversial aspects of the PRC's family planning policies have come under fire internationally on numerous occasions, on occasion resulting in the withdrawal of aid, China has responded by stating that such external measures interfere with its domestic jurisdiction. China in particular opposed suggestions that its policy failed to respect human freedoms, and in 1995 stated that:

Any such practice of interfering in China's internal affairs has not only deviated from the basic principle set up in the field of population by the international community, but it has also violated the established principles of international law.⁹⁷

While China maintains its staunch position on state sovereignty, territorial integrity, and non-interference in the internal affairs of other states,⁹⁸ customary international law as stated in the Vienna Convention on the Law of Treaties provides that internal law may not be used as justification for failure to comply with a treaty.⁹⁹ Eriksson states that "the practical significance of the doctrine of state sovereignty versus human rights has been

⁹⁷ Information Office of the State Council of the PRC, Family Planning in China 34, 1995. Cited in: Eriksson (2001) p.28

⁹⁸ "China ... adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries." Constitution (2004) Preamble

⁹⁹ "Article 27: Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties (1969)

minimized through the latest developments in international human rights law.”¹⁰⁰ In spite of what may be perceived as an attitude of resistance on behalf of China regarding international critique, by being party to the CEDAW Convention and participating in the reporting process that it entails, numerous amendments to domestic law have taken place following the ratification of CEDAW, and to these I will now turn.

4.1 Amendments to Domestic Law Prior to 2006

Prior to the PRCs Combined Report to CEDAW in 2006, numerous amendments were made to domestic laws, and I intend to consider the revisions and the impact they have had in improving the situation of affected women and children. The domestic legislation I will consider in this section shall include, but not be restricted to, the Law Protecting Women’s Rights and Interests (LPWRI), the Law on Maternal and Infant Health Care (LMIHC) and the introduction of the Law on Population and Family Planning.

In 1996, the same year that China presented its Third and Fourth Combined Report to CEDAW, Li stated that:

China’s birth-control regulations and relevant laws have permitted discrimination and violence against women and children. In some cases the permission has been explicit; in others it has been implicit.¹⁰¹

Despite the existence of prohibitive laws, instances of the physical abuse of women at the hands of policy officials have been reported in considerable numbers and, in particular, there has been little evidence of convictions against officials who perpetrate such violations.¹⁰²

¹⁰⁰ Eriksson (2001) p.28

¹⁰¹ Li (1996) p.157

¹⁰² Ibid p.165

4.1.1 Laws Covering the Indirect Effects of Family Planning Policy

As discussed in Chapter 3, the indirect effects of the PRC's family planning policies can be understood as those resulting from the restrictions on number of births in combination with a traditional preference for male offspring. This has resulted in the devaluing of daughters and employment of strategies to ensure a son, thus creating a serious divergence of the natural sex ratio. In this section I will consider amendments to domestic laws intended to prevent or curtail the continuation of such practices.

The Chinese Law on the Protection of Women's Rights and Interests (LPWRI) underwent considerable revision in 2005, including efforts to eliminate the occurrence of female infanticide in Article 38, which states that:

Drowning, abandonment or cruel infanticide in any manner of female babies shall be prohibited;¹⁰³

As previously discussed in chapter three, another indirect consequence of the birth policy has resulted from the use of sex identification of foetuses via ultrasound, and the subsequent impact on the sex ratio. The introduction of 1994's LMIHC included Article 32, which states that: "Sex identification of the fetus by technical means shall be strictly forbidden, except that it is positively necessitated on medical grounds." [sic] Furthering this, Article 37, under stipulations regarding Legal Liability, states that:

Where personnel engaged in the work of maternal and infant health care, in violation of the stipulations of this Law, [...] undertake sex identification of the fetus, medical and health institutions or administrative departments of public health shall in light of the circumstances give them administrative sanctions: if the circumstances are serious, they shall be disqualified for practice of their profession according to law.¹⁰⁴ [sic]

¹⁰³ LPWRI (2005) Article 38

¹⁰⁴ LMIHC (1994) Article 37

There are clearly elements of legislative indeterminacy, as described by Ho, in this legislation. The phrase ‘administrative sanctions’ is not clarified, neither is what was the intended interpretation of ‘circumstances’, nor ‘serious circumstances’. In 1996, Li discussed the ongoing pervasiveness of the practice of sex-selective abortions in spite of the introduction of this law. In her opinion, the practically non-existent rate of prosecution and punishment under this offence showed that law enforcement officials were either unwilling or incapable of enforcing the law, and as such it served as little or no credible deterrent.¹⁰⁵ However, in 2001 the State Council released guidelines for the interpretation of the LMIHC which offer some clarification as to the intended understanding and implementation of the afore mentioned legislation:

Those who, in violation of these Measures, conduct gender identification of fetus shall be given a warning and ordered to stop the illegal acts by the administrative departments of public health. The person directly in charge and other persons held directly liable for conducting such identifications in the medical and health institutions shall be imposed upon administrative sanctions. Those who conduct gender identification of fetus for two or more times, or those who conduct such identification for the purpose of making profits, their technical qualification certificate for practicing maternal and infant health care or doctor’s practice certificates shall be revoked by the original departments which issued the certificates concurrently.¹⁰⁶ (sic)

In spite of such efforts towards the eradication of sex selective ultrasounds and abortions, a 2005 report stated that sex selective abortion is ‘illegal but is known to be widely carried out, helped by a burgeoning private sector.’¹⁰⁷ Thus it seems that further action is required for the PRC to fall in line with its obligations to CEDAW and to progress towards its proclaimed intention to normalise the sex ratio at birth by 2010.

¹⁰⁵ Li (1996) p.170

¹⁰⁶ Measures for Implementation of LMIHC (2001) Article 47

¹⁰⁷ Hesketh (2005) p.1173

4.1.2 Laws Covering the Direct Effects of Family Planning Policy

Regarding the direct consequences of the family planning policy, 2001 saw the official introduction of the Law on Population and Family Planning of the People's Republic of China, with the intention of providing a legal foundation for the management of population policy. Despite family planning having been official procedure and strictly enforced for over twenty years, this was the first Chinese law ever enacted that directly covered its management. Other laws prior (including the 1980 Marriage Law, 1992 LPWRI, and the 1992 LMIHC) included regulations that were applicable to family planning, but previous attempts to introduce a law governing it directly were abandoned in the fear of attracting too much international attention to an already unpopular policy.¹⁰⁸ The Family Planning Law outlines the various rights of citizens under the policy, along with their concurrent responsibilities, and includes numerous Articles clearly intended to reform and improve the policy. Article 4, for example, signals a clear effort to ensure administrative accountability in the area of family planning:

When promoting family planning, the people's governments at all levels and their staff members shall perform their administrative duties strictly in accordance with law, and shall enforce the law in a civil manner, and may not infringe upon legitimate rights and interests of citizens.¹⁰⁹

Notably, the Family Planning Law also includes a section devoted to 'Rewards and Social Security', which includes the following stipulation in Article 24 :

In rural areas where conditions permit, various types of old-age support schemes may be adopted in adherence to the principles of government guidance and willingness on the part of the rural people.¹¹⁰

¹⁰⁸ Li (1996) p.151

¹⁰⁹ Population and Family Planning Law (2001) Article 4

¹¹⁰ Ibid Article 24

This article is far from a formal commitment to guaranteed old age care, being highly contingent on numerous factors. In spite of its shortcomings, the inclusion of this legal stipulation signals a shift in attitude toward the perceived future implementation of further social reforms, and could also provide the legal basis for local authorities to enact relevant legislation.

Included in the LPWRI's previous incarnation of 1992, Article 47, under Rights and Interests Relating to Marriage and Family had already included the following provisions:

Women have the right to child-bearing in accordance with the relevant regulations of the State as well as the freedom not to bear any child.

Where a couple of child bearing age practice family planning according to the relevant regulations of the State, the departments concerned shall provide safe and effective contraceptives and techniques, and ensure the health and safety of the woman receiving any birth-control operation.¹¹¹

Whether, or not, the promises of the second provision of this law had been implemented satisfactorily prior to the law's revision in 2005 is questionable. Nonetheless, the law was amended to include the implementation of health care programs for both mothers and infants, and a provision requiring that various levels of Government should 'take measures' to ensure the provision of technical services with regard to family planning and the enhancement of women's health.¹¹²

In spite of the positive measures undertaken by the amendment of existing laws protecting women and children, and the promulgation of the PRC's first official law regulating population policy (regardless of whether they are implemented or otherwise), the very existence of the Family Planning Law and policy remain in stark opposition to international human rights law. For all of the continuing amendments made to domestic legislation, it appears that the promises of the formal equality doctrines and protections

¹¹¹ LPWRI (1992) Article 47

¹¹² LPWRI (Revised) (2005) Article 51

against the abuse of women and girls under the population policy are yet to be adequately fulfilled.

4.2 Obstructions to the Implementation and Enforcement of Law

Having considered domestic legal protections in their progressive forms, I shall now move to discuss possible challenges to their full implementation and enforcement. There remains a considerable gap between Chinese law *de jure* and *de facto*. Problematic issues that have arisen include a lack of clarity in the laws themselves, institutional resistance to their implementation, structural incentives for the achievement of set targets by officials, and refusal to accept the forced shift of pre-existing cultural norms, and it is these challenges that I shall now discuss.

In addressing the topic of rural land rights in China, Peter Ho introduces what he calls ‘deliberate institutional ambiguity’; a tactic that he claims is purposefully maintained by the Chinese state regarding the lack of clarity in domestic law. He suggests that it is in the interests of the state to keep certain terms and legal phrasing vague, as this allows for the creation of greater leeway for manoeuvring and reaction to societal developments as they occur. This ‘institutional indeterminacy,’ he argues, is a result of efforts by the state to perpetuate and sanction the status quo.¹¹³ Ho claims that this situation is a “potentially explosive force for future social conflict”¹¹⁴ and that the Central government must “lift the veil of institutional ambiguity and articulate (the) legal nature...”¹¹⁵ to prevent the continued violation of citizen’s rights. If we accept Ho’s position, it is possible to infer that maintaining a certain amount of ‘deliberate institutional ambiguity’ in the area of family planning may indeed be beneficial for the PRC, by allowing for a degree of manoeuvrability in the interpretation of laws and their enforcement.

¹¹³ Ho (2001)

¹¹⁴ Ibid p.401

¹¹⁵ Ibid p.409

The USDS report of 2008 additionally notes that authorities do not often act to enforce laws that protect the rights of women. It states that in the opinion of legal experts, it remains difficult to litigate a case based on sexual discrimination due to the vagaries of the legal language and definitions, the complexities of the law and difficulties in its interpretation and, that as a result, few cases ever end up in the courts.¹¹⁶ Another example can be found in the lack of clarity and consistency in the laws regarding penalties, whereby detailed sanctions are proscribed for officials who aid citizens evading birth limits, while the penalties in laws concerning officials who violate citizen's rights fail to be clearly defined.¹¹⁷

O'Brien and Li offer some insight into the arduous process of achieving successful litigation against unlawful administrative acts, in their paper concerning the effectiveness of the 1989 Administrative Litigation Law. They note that the implementation of the law has been seriously affected by both feigned compliance and interference from those it is aimed against.¹¹⁸ The authors outline a variety of strategies adopted by local officials to disrupt legal proceedings instigated against them. Prior to the courts acceptance of a case, methods employed may include interference with the local population's access to official regulations and documents¹¹⁹ and the illegal use of coercive measures to convince complainants to withdraw their filed suits. In the event of the case being accepted to court, reported methods of interference have included failure to appear in court, direct Party intervention in legal proceedings via the pressuring of judges, and even the direct stipulation of verdicts.¹²⁰ In effect, such opposition to judicial proceedings may be viewed as State resistance to the possibility of citizens taking advantage of the legislative indeterminacy that it appears to maintain for its own benefit.

¹¹⁶ Ibid Section 5

¹¹⁷ Ibid Section 1f

¹¹⁸ O'Brien (2004) p.75

¹¹⁹ Ibid p.78

¹²⁰ Ibid pp.83-84

Another critical factor to be considered is the internal system of penalty and rewards that family planning officials are themselves subject to, depending on their ability to meet population goals set by regional policy administration. Among the key incentives to meet targets are that of job promotion and economic bonuses, which may prove to be too great a temptation for some government officials to refrain from applying coercive methods. The 2009 CECC report provides details of a point system published in January that year, used in the performance evaluation of family planning officials in Wuyishan County, in the province of Fujian. The scheme operates as follows:

Officials receive 15 points for completing all of the tubal ligation targets for the year and 10 points for meeting intrauterine device targets. Five points are added for each mid- to late-term abortion that an official oversees and two points are added for each first-trimester abortion. Conversely, two to five points are deducted from an official's evaluation for each child born out of plan, depending on the number of children already present in the household. Officials who score 90 points or higher on their evaluations are rewarded with a bonus of 2,000 yuan (US\$293).¹²¹

By deliberately linking financial reward or career advancement with the achievement of population targets, family planning administrators have created a system of compelling structural incentives to achieve prescribed goals,¹²² that may in fact serve to incite coercive or forced measures. The US Department of State (USDS) 2008 Country Report on human rights practices in China describes an example concerning officials in Gansu province, who “were often promised a promotion and a monetary reward, reportedly detained and sterilized a Tibetan woman who had abided by local population planning requirements.” Despite legal protections being in place to protect citizens from such coercive treatment, including the right to sue family planning officials who act in excess of their authority,

¹²¹ Congressional-Executive Commission on China (2009) p.156

¹²² Bureau of Democracy, Human Rights, and Labor (2009) Section 1f

very few protections are in place to safeguard whistleblowers from retaliatory acts by local officials.¹²³

Finally, turning to a more behavioural perspective, in her discussion of possible methods to combat daughter discrimination in China, Wexler refers to evidence which suggests that attempts to eliminate what have previously been socially acceptable practices with harsh penalties can often prove counterproductive.¹²⁴ Efforts to change established social behaviour may be met by a reluctance on the part of officials to enforce prohibiting laws, which in turn reinforces the original practice. She suggests that if the law of China stipulates harsh penalties in attempts to reform son preference, but breaches continue to go unscrutinised and unpunished, the result may be a perpetuation of the belief that discrimination against daughters is legitimate.¹²⁵ As has previously been discussed, such efforts based in the prohibition of customary practices by law fail to treat the underlying causes of the practice, and the reasons for its very existence in the first place. Wexler argues that “daughter discrimination is deeply embedded in Chinese society and is reinforced by existing economic and kinship structures,”¹²⁶ and thus she promotes the incorporation of both economic incentives and positive norm promotion as more appropriate means of eliminating harmful discrimination against female infants under the ‘One-Child’ Policy.

From this discussion it is clear that one of primary stumbling blocks facing the full enforcement of Chinese law exists in apparent institutional resistance to the implementation of laws *de facto*, in both the political and law-enforcement establishments. The structure of the population policy itself, with its system of rewards and punishments for officials, is problematic because it has an evident tendency to support reckless behaviour, by promising financial reward or career advancement for the achievement of set

¹²³ Ibid

¹²⁴ For more on this subject see: Kahan (2000) pp.607-645

¹²⁵ Wexler (2006) p.93

¹²⁶ Ibid p.103

goals, regardless of how they are achieved. Additional problems lie in the reluctance of both citizens and policy officials to change their ways, an issue that would be better dealt with by norm promotion and education, than by changes to the laws alone. In spite of Government campaigns, such as 'Care for Girls', it appears that more may need to be done for the advancement of human rights for women and girls in China.

5 Chapter 5: China's Family Planning Policy in the Context of CEDAW

The CEDAW Convention came into force in 1979, and is overseen by a Committee that monitors state party compliance with its obligations. While the CEDAW treaty, along with the remaining human rights' treaties, constitute the legal framework of the human rights system, the Committees monitoring compliance with these treaties have limited legal power in compelling states to abide by their obligations. For this reason, Sally Engle Merry refers to CEDAW as "law without sanctions".¹²⁷ The criticism that the entire human rights system 'lacks teeth' is often made, and yet the process of reporting is not merely an adversarial one. While power certainly lies in the ability to name and shame those who fail to live up to their international commitments, the process is also one of constructive dialogue, via joint cooperation and 'soft' influence.

5.1 The CEDAW Reporting System

Article 18 of CEDAW requires that state parties submit reports every four years to the monitoring Committee, detailing the legislative, judicial, administrative or other measures they have taken to give effect to the provisions outlined in the treaty.¹²⁸ Upon receiving a state report, the Committee responds with a list of issues and questions, which are tabled to state representatives who then provide a response. The Committee closes with a report of concluding comments and recommendations, which are to be considered for implementation by the state party prior to the next round of reporting. This process has been bolstered by the inclusion of 'shadow' or alternate reports, that are submitted to the Committee by NGOs and civil society without the relevant Government's delegation present. The process of reports and hearings between the Committee and state party are

¹²⁷ Merry (2006) p.72

¹²⁸ CEDAW (1979)

legal in form, and yet have been criticised for being an essentially political process,¹²⁹ due to the Committees power to expose and shame, but not to penalise for lack of compliance. However, the objectives of the Committee are to oversee and assist in the fulfilment of the treaty's obligations, rather than the policing of their implementation. The event of a State party's session with the CEDAW Committee is a constructive means of bringing international pressure to bear on a State's compliance with obligations under the treaty. If a state were to endure stern criticism, for example, in the face of international or national exposure, considerable pressure to act may be felt by the government.¹³⁰

5.2 State Obligations Under the CEDAW Convention

China's acceptance of, and commitment to, human rights has increased,¹³¹ and in 2004 the Constitution was amended to include a formal, if rhetorical, commitment to human rights.¹³² By being party to UN human rights treaties, China is obliged to report on the implementation of its obligations therein. The areas of state compliance, which I shall now discuss, are three-fold; firstly, I shall consider the legal definitions included in CEDAW that cover both direct and indirect discrimination. Secondly, I shall review articles which relate directly to reproductive rights, and finally I shall discuss the state obligations in CEDAW that stipulate the inclusion of cultural practice within the bounds of state responsibility.

As the elimination of discrimination against women is the primary goal of CEDAW, Article 1 of the Convention defines discrimination against women as "any distinction, exclusion or restriction on the basis of sex which has *the effect* or purpose of impairing or nullifying recognition, enjoyment or exercise by women [...] of human rights and fundamental freedoms."¹³³ Such a definition not only includes direct discrimination

¹²⁹ Merry (2006) p.81

¹³⁰ Byrnes (1994) p.207

¹³¹ See: Table 1

¹³² "The state respects and protects human rights". Constitution (2004) Article 33

¹³³ CEDAW (1979) Article 1 (Italics added)

(wherein the discrimination is explicit and intended), but also indirect discrimination, which refers to discrimination resulting from a facially neutral act that has a disproportionate effect on one group over another. In order to clarify the obligations of a state party to CEDAW, the Committee releases General Recommendations (hereafter: GR) to advise and assist states regarding the legal nature of their obligations on particular aspects of the treaty. GR25 defines indirect discrimination as follows:

Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination.¹³⁴

State obligations concerning the prohibition of indirect discrimination are three-fold. In the first instance, State parties to CEDAW are obliged to ensure that their laws do not only explicitly guarantee the lack of direct discrimination, but also indirect discrimination, in both the public and private spheres. Secondly, States are obliged to improve the *de facto* situation of women via appropriate policies and programmes; and finally:

[The] States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.¹³⁵

As previously stated, the intention of the CEDAW Convention is to eliminate discrimination against women, however in the drafting of the Convention the concept of gender-based violence as a form of discrimination against women was omitted. Therefore the CEDAW Committee moved to demonstrate and clarify the relationship between violence against women and discrimination in GR19:

The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, *violence that is directed against a*

¹³⁴ CEDAW GR25 (2004) note.1

¹³⁵ CEDAW GR25 (2004) para.7

woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.¹³⁶

The highlighted phrase in this definition of gender-based violence can be interpreted as applicable to the situation of women under China's population policy, in light of the discriminatory application of family planning measures which I have discussed, in addition to reports of coercive, and sometimes forced, surgical proceedings. Such elements of the population policy can consequently be read as constituting discriminatory gender-based violence against women, especially due to the systematic and official nature of the actions.

Family relations and choices regarding the number and spacing of children are directly covered in CEDAW Article 16(e), as such, its directives are of particular relevance to this discussion. It requires that state parties measures to:

[E]liminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure [...]

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;¹³⁷

In elaborating the meaning and obligations this Article infers, in GR21, the CEDAW Committee states that:

22. Some reports disclose coercive practices which have serious consequences for women, such as forced pregnancies, abortions or sterilization. *Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government.*¹³⁸

¹³⁶ CEDAW GR19 (1992) para.6 (Emphasis added)

¹³⁷ CEDAW (1979) Article 16

¹³⁸ CEDAW GR21 (1994) para.22 (Emphasis added)

This stipulation confers the right to be free from state interference regarding the number and spacing of one's children, and yet the family planning policy of the PRC is entirely antithetical to such provisions. CEDAWs GR24 on health recommends that States:

- (e) Require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, [...] informed consent and choice;
- (f) Ensure that the training curricula of health workers includes comprehensive, mandatory, gender-sensitive courses on women's health and human rights, in particular gender-based violence.¹³⁹

Similarly, GR19, concerning violence against women in reference to Articles 16 and 5 (which requires that states take appropriate measures to combat prejudiced social and cultural patterns of conduct), states that “compulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.”¹⁴⁰ While the CEDAW Committee does not mention the PRC directly, it is clear that the inclusion of this has significant relevance to the country's population policy.

State obligations under CEDAW Article 16(e) can be further understood as entailing both positive obligations (the right to be provided with stipulated resources or services by the state) and negative obligations (the rights provided should not be interfered with by the state). Negative rights implied under the Article thus include freedom *from* state interference with regard to decisions made on the number, spacing and timing of births. It is clear that the family planning policies of the PRC exist in direct opposition to this right, as the policy inherently restricts the number, spacing and timing of births. Positive rights under the same article include the right to access information on reproductive options and state provided reproductive health services. Li suggests that positive obligations on the state parties imply the right to choose freely from a range of available services and

¹³⁹ CEDAW GR24 (1999) para.31

¹⁴⁰ CEDAW GR19 (1992) para.22

contraceptive methods, while China's policies in fact restrict choices via enforced birth control measures.¹⁴¹

However, an alternate reading of this article is possible. The inclusion of the phrase "The same rights to decide freely and *responsibly* on the number and spacing of their children", could be interpreted to mean 'responsibly' in regard to one's state and society, as far as the PRC enforces 'responsible' restrictions on the reproduction of its citizens, given the particular social and economic circumstances it experiences. Nonetheless, Li asserts that "in balancing personal 'responsibility' and 'freedom', the CEDAW in no way authorizes the state to use compulsory means to enforce 'responsibility'."¹⁴²

By becoming a ratified party to CEDAW, the PRC has obligated itself to bear responsibility for any facilitation, accommodation, tolerance, justification, excuses or conditions that result in public or private denials of women's human rights.¹⁴³ Article 2 of the Convention states that:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: [...]

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women...¹⁴⁴

The inclusion of such provisions demonstrates that the CEDAW Convention aims to establish that the causes of discrimination against women cannot be traced back to formal

¹⁴¹ Li (1996) p.183

¹⁴² Ibid p.184

¹⁴³ Cook (1994) p.22

¹⁴⁴ CEDAW (1979) Article 2

legal provisions alone, and that in fact the causes of discrimination are far more complex. Article 2, therefore, expands the responsibility of states to not only include the actions of private individuals and organisations, but also for ‘customs and practices’, which may otherwise have been viewed as outside of direct state control. In the opening of its GR21, the Committee states that:

The Convention [...] recalls the inalienable rights of women which are already embodied in [...] conventions and declarations, but it goes further by recognizing the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights by women.¹⁴⁵

This leads directly to Article 5(a), which requires that states take all appropriate measures to:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁴⁶

The question of ‘culture’ is often a contentious one in the field of women’s rights. The inclusion of provisions such as Article 2(e-f) and Article 5(a) in the CEDAW Convention make clear the intention of drafters to place custom and traditional practice explicitly within the sphere of State responsibility. In order to clarify the manner in which the PRC responds to the issues of State obligation and responsibility under the CEDAW Convention, I shall now move to an examination of their latest round of reporting with the CEDAW Committee.

¹⁴⁵ CEDAW GR21 (1994) para.3

¹⁴⁶ CEDAW (1979) Article 5

5.3 China's Combined Fifth and Sixth Report to CEDAW

In 2006, the PRC tabled its most recent reports to the CEDAW Committee in its 36th session, the Combined Fifth and Sixth Report.¹⁴⁷ The report comprises three sections. The first and main part of the document deals with the Chinese Government's implementation of CEDAW in Mainland China, and will be the focus of my discussion. The second and third sections are addendums relating to the Special Administrative Regions of Hong Kong and Macau. As these areas are not subject to the family planning policies that exist in the mainland, they will not enter into this discussion.

Included in the state response to obligations under CEDAW Article 12, on discrimination in health care (which includes family planning), the PRC representatives acknowledge the link between the population policy and the disparate sex ratio, outlining public awareness campaigns introduced in attempt to combat the preference for sons. The state party discusses its wide promotion of gender equality in urban and rural areas, purporting "to eliminate stereotypes valuing men over women, encourage people to change their views concerning childbearing, and reduce the psychological and social pressure on families without sons", thereby reducing the disproportionately high rate of males to females at birth.¹⁴⁸

Since 1998, for example, a nationwide campaign has been underway to promote new concepts regarding marriage and childbearing in all households, such as family planning, gender equality, no preference for boys over girls, and girls' ability to carry on the family line and eliminate the traditional view of sons being more advantageous or better than daughters, in an effort to persuade couples of childbearing age to practice family-planning voluntarily.¹⁴⁹

¹⁴⁷ This paper was written in the first half of 2010, the PRC's next round of reports are due later the same year.

¹⁴⁸ CEDAW/C/CHN/5-6 (2004) p.48

¹⁴⁹ Ibid p.47

This approach, focussing on attempts to provide incentives towards the voluntary practice of family planning, highlights a more positive tactic than has previously been evident in crackdowns on resistance. The State party describes similar national campaigns promoting gender equality and the value of female children, but also acknowledges the role of officials in discrediting the program, outlining efforts made to decrease use of excessive force and non-compliance with regulations.

Governments at all levels provide training to local family-planning officials, enabling them to [...] carry out enforcement efforts in a proper and civil manner, and improve the quality of services [...]. Actions which violate the legitimate rights and interests of citizens in some areas are promptly stopped and violators are severely reprimanded, punished, or even subjected to legal prosecution, depending on the seriousness of the offence.¹⁵⁰

Despite the positive implications of the inclusion of such a statement, the PRC fails to include details or figures relating to the enforcement of such policy. In the PRC's response to the obligations under CEDAW Article 14, which deals with the particular problems faced by rural women, they outline the continuing introduction of social security measures for the elderly in an effort to reduce "their dependence on their children and help eliminate the deep-rooted preference for sons over daughters."¹⁵¹

In aiming to "create equal, harmonious and civilised marriage and family relations, and building on the long-term 'Model Families of Five Virtues' campaign"¹⁵² the report details educational and social development programs, which involve regular meetings and activities. The campaign includes training seminars for newly-weds and the promotion of laws, regulations and the environment required for 'civilised families', including the amended Marriage Law. One activity, described as "designed to establish civilized families", includes:

¹⁵⁰ Ibid p.47

¹⁵¹ Ibid p.58

¹⁵² Ibid p.63

[O]rganising study, reading and lecture activities to eliminate ignorance, superstitions and backward customs and traditions, and disseminate scientific and cultural knowledge;...¹⁵³

Notably, this approach echoes the key strategy of utilising education and propaganda to ensure compliance with population policy, that has long been the primary tactics used in urban areas. In their introduction to the report, the state party claims that:

Given the constraints stemming from varying levels of economic and social development, [and] the influence of traditional modes of thought, [...] the full realization of equal rights for Chinese women in the political, economic, cultural, social and family spheres will continue to be a lengthy process.¹⁵⁴

Similarly, in the commentary on Article 5 regarding social and cultural patterns of prejudice:

China was a feudal society for a long time, so thoroughly changing the old ways men and women behave in social and cultural settings and overcoming misconceptions based on gender discrimination is a long and arduous challenge.¹⁵⁵

Such excerpts demonstrate the manner in which PRC appropriates notions of ‘backward culture’ and ‘tradition’ as the root causes for difficulties in achieving the goals of equality and the elimination of discrimination against women, as laid out in CEDAW. Yet to identify ‘tradition’ as the lone culprit in such a situation is not only contrary to CEDAW Articles 2 and 5, which clearly place ‘custom and practices’ under state responsibility, it is also a tenuous argument. In order to further elaborate this line of reasoning, I shall return to discuss this issue in Section 5.4.

¹⁵³ Ibid p.63

¹⁵⁴ Ibid p.7

¹⁵⁵ Ibid p.17

5.3.1 Issues, Questions and Responses

Following the CEDAW Committee's review of the PRC's report, a list of issues and questions is relayed to the state party's representatives. In this instance, the Committee's first issue raised is the lack of a definition of discrimination in Chinese law. In spite of positive efforts made in reforming laws and procedures against discrimination, the lack of a clear definition impacts the usefulness of such provisions, particularly by leaving the concept of indirect discrimination unacknowledged. The Committee questions whether such a lack will impact upon China's compliance with its obligations under CEDAW.¹⁵⁶

In its response, the PRC reports that the absence of a definition "in no way influences China's legal and practical compliance with its obligations under the Convention"¹⁵⁷ and states that provisions guaranteeing as much are stipulated in a variety of laws, including Article 2 of the LPRIW which states that "the implementation of equality between men and women is a basic state policy". This article also prohibits discrimination against women, and the PRC states that such stipulations unequivocally incorporate equality between men and women, and the elimination of all forms of discrimination against women into 'the letter of Chinese law'.¹⁵⁸ In spite of such reassurances, the lack of a full and clear definition remains problematic for the effective application of laws covering instances of alleged discrimination, as well as for any hopes of establishing cases of indirect discrimination.

Concerning health, the Committee notes that despite efforts made to combat sex selective abortion and infanticide (including the 1995 outlawing of sex-determinative ultrasounds and sex selective abortions), the 2000 census still showed a male to female sex ratio at birth of 117:100, and calls for further information on what is being done to combat such practices. The Committee further requests that China describe the concrete measures ensuring full compliance with the Population Law (2001), cases brought under that law

¹⁵⁶ CEDAW/C/CHN/Q/6 (2006) para.1

¹⁵⁷ CEDAW/C/CHN/Q/6/Add.1 (2006) p.2

¹⁵⁸ Ibid p.3

and sanctions imposed on offenders.¹⁵⁹ In response, China describes its campaigns designed to support the promotion of girl children. In 2006, the ‘Care for Girls’ Campaign was launched nationally, after initial testing in selected areas from 2003, aiming at the elimination of son preference through promotion of equality between the sexes, economic assistance for daughter only households, investigation of illegal sex selection practices and the gradual adoption of social guarantees for rural villages. The PRC’s response, however, does not include any reply to the Committees call for data on cases and prosecutions brought under the Population Law.

Regarding illegal sex identification, the PRC claims that the LMIHC and the Population Law both stipulate penalties for those continuing to provide such procedures, including confiscation of equipment and suspension of business operations. However, they note the difficulties that remain concerning the identification and verification of such practices, and the fact that concrete laws to combat them are still lacking. The state party further notes that they have been investigating the legislative experiences of South Korea and India in their efforts, and are researching the issue of amending China’s Criminal Law regulations.¹⁶⁰ They conclude their response by reiterating that the Chinese Government “has set a goal of effectively halting the trend of higher ratios of male births and normalizing the gender ratios of newborns overall by the year 2010.”¹⁶¹ It remains significant however, that the means by which this is to be achieved are not stated.

5.3.2 The Parallel Report from Human Rights in China and CEDAWs Concluding Comments

The reporting process, as previously referred to, has increasingly been strengthened by the inclusion of ‘shadow’ reports, made to the CEDAW Committee by relevant NGOs, and viewed separately from the State party. Following the preparatory reporting phase, the final stage of the process takes place when the state party and CEDAW Committee meet to

¹⁵⁹ CEDAW/C/CHN/Q/6 (2006) para.19

¹⁶⁰ CEDAW/C/CHN/Q/6/Add.1 (2006) para.19

¹⁶¹ Ibid para.19

discuss the issues raised. In this section, I shall review the parallel report made by the NGO Human Rights in China (HRIC), alongside the final Concluding Comments report of the CEDAW Committee.

The HRIC report claims that the lack of a clear definition of discrimination, in line with the stipulations of the CEDAW Convention, must be adopted in able to guarantee equality *de facto* as well as *de jure* between Chinese men and women.¹⁶² Correspondingly, the Committee reiterates this position and expresses its concern that the PRC does not appear to acknowledge the importance of such a provision. The Committee repeats its recommendation to include a definition that encompasses both direct and indirect discrimination, in line with Article 1 of CEDAW.¹⁶³ As I have previously referenced, the Chinese State may indeed find it beneficial to maintain the lack of a definition of discrimination, in line with Ho's proposed theory of 'deliberate institutional ambiguity'.

The Committee also expresses its concern at 'the persistence of deep-rooted stereotypes' concerning the roles and responsibilities of women and men, in both society and the family, which in turn contributes to the adverse sex-ratio and the pervasiveness of illegal sex-selective abortions. The Committee remains concerned that such attitudes contribute to the devaluation of women and the continued violation of their human rights,¹⁶⁴ and therefore, calls on the PRC to:

[P]ut in place a comprehensive approach to overcoming traditional stereotypes regarding the role of women and men in society, in accordance with articles 2 (f) and 5 (a) of the Convention. Such an approach should include legal, policy and awareness-raising measures, involve public officials and civil society and target the entire population, in particular men and boys.¹⁶⁵

¹⁶² Human Rights in China: Hereafter HRIC (2006) p.vi

¹⁶³ CEDAW/C/CHN/CO/6 (2006) para.9-10

¹⁶⁴ Ibid para.17

¹⁶⁵ Ibid para.18

Regarding the unnatural sex ratio evident in China, the HRIC states that:

The (CEDAW) Committee, during its review at the 20th Session, encouraged the Chinese government to help eliminate preferences for sons by expanding educational and employment opportunities for women in rural areas. The Committee further recommended that the government enforce laws against sex-selective abortion, female infanticide, and the abandonment of children, [...] The laws that the Government adopted in response to these recommendations have been insufficient in balancing the sex ratio.¹⁶⁶

Referring to both Article 23 of the Measures for Implementation of LMIHC¹⁶⁷ and Article 36 (2) and (3) of the Population Law,¹⁶⁸ HRIC point out that these laws merely *prohibit* the use of ultrasound for sex identification of the foetus, rather than criminalise such acts, leaving the appropriate level of enforcement unlikely.¹⁶⁹ Criminalisation could certainly prove that the PRC is serious in its intention to eradicate these procedures, yet while sanctions for breaches remain ambiguous, their effect as an adequate deterrent will continue to be unclear.

Regarding the population policy under CEDAW Article 12 (health), HRIC make particular reference to the lack of reliable data and problems resulting from the classification of information relating to the implementation of family planning policy as state secrets.¹⁷⁰ HRIC claim that:

¹⁶⁶ HRIC (2006) p.11

¹⁶⁷ “It is strictly prohibited to conduct gender identification of fetus by technical means.” Measures for the Implementation of LMIHC (2001) Article 23

¹⁶⁸ “Anyone who, in violation of the provisions of this law, commits one of the following acts shall be instructed to make rectification and be given a disciplinary warning, and his unlawful gains shall be confiscated by the administrative department [...] if the circumstances are serious, his licence shall be revoked [...]; if a crime is committed, he shall be investigated for criminal liability in accordance with law: [...] (2) Using ultrasonography or other techniques to identify fetal gender for non-medical purposes or to bring about sex-selective pregnancy termination for non-medical purposes for another person; or (3) Performing a fake birth-control operation, providing a false medical report, or issuing a counterfeit certificate of family planning.” The Population Law of the PRC (2001) Article 36

¹⁶⁹ HRIC (2006) p.12

¹⁷⁰ Ibid p.11

The data provided, therefore, has first been vetted by the Government, impacting comprehensive, accurate and complete review of the implementation of the Convention by the Committee. At a domestic level, if civil society actors, including, civil society organizations, ordinary citizens and the media, cannot have access to the information that would enable them to review and access the full extent of issues concerning women, then they cannot actively or effectively contribute to the promotion of women's rights in China.¹⁷¹

Among the data classified as state secrets, are numbers relating to induced abortions, statistics regarding infanticide and the abandoning of infants. HRIC remain concerned that by rendering such information inaccessible, the true numbers may prove to be far greater than they actually appear. In addition to the issue of transparency, HRIC comment on the substantial gap between formal Chinese law and compliance with the international law that China is bound to, an example of which being the lack of a definition of discrimination. They note that such gaps not only have a negative impact on the effective implementation of CEDAW, but are also exacerbated by insufficient implementation within the legal system of the PRC.¹⁷²

The Committee, while commending the state party for legal measures prohibiting sex-selective abortions and female infanticide, and the 'Care for Girls' campaign, "remains concerned at the persistence of illegal practices of sex-selective abortion, female infanticide and the non-registration and abandonment of female children, and about forced abortions,"¹⁷³ as well as the continuing impact of the imbalanced sex ratio and the effect that this may have on the trafficking of women and girls.

Regarding the population policy and its effects, the Committee urges the PRC to:

¹⁷¹ Ibid p.iii

¹⁷² Ibid p.iii

¹⁷³ CEDAW/C/CHN/CO/6 (2006) para.31

[S]trengthen its monitoring of the implementation of existing laws against selective abortion and female infanticide and to enforce them through fair legal procedures that sanction officials acting in excess of their authority.¹⁷⁴

In continuing its reference to the use of force by policy officials, the Committee additionally advocates the introduction of ‘mandatory gender-sensitivity training’ for family planning officials, no doubt in the hopes of alleviating the perceived systematic ill-treatment and violence to women. The Committee finally recommends that:

[T]he State party vigorously address the causes of son-preference, which remain strong in rural areas, and of the negative consequences of the one-child policy as regards the adverse sex ratio by expanding insurance systems and oldage pensions to the population at large, in particular in rural areas.¹⁷⁵

It is significant that the CEDAW Committee include this reference concerning the availability old age pensions and social security programs, in spite of Chinas insistence that ‘backwards traditions’ provide the reasoning for the sex selective strategies of Chinese couples.

The HRIC report concludes by stating that the focus of the PRC continues to be on formal law and law-making efforts, and lacks adequate attention to the scrutiny and evaluation of the impact of the laws and their implementation, particularly in regard to the differing approaches undertaken in rural and urban areas. The report further states that strict control of information and a lack of transparency weakens the sufficient review of laws, social programs, and remaining gaps between domestic and international law.¹⁷⁶ The CEDAW Committee also note that the Combined Fifth and Sixth Report from the PRC failed to

¹⁷⁴ Ibid para.31

¹⁷⁵ Ibid para.32

¹⁷⁶ HRIC (2006) p.21

include adequate statistical data disaggregated by sex and, notably, a lack of analytical data on the *de facto* situation of women.¹⁷⁷

In their final recommendations, both the CEDAW Committee and HRIC urge the PRC to make greater efforts towards the full implementation of formal laws, and thereby, the fulfilment of their obligations as a party to the CEDAW Convention. HRIC propose a review of the current framework regarding state secrets, as well as the clarification (or introduction) of definitions in line with the requirements of the Convention. In its final comments, the CEDAW Committee invites the State party to submit its Combined Seventh and Eighth Report in September 2010.¹⁷⁸

5.4 Culture in the CEDAW Reporting Process

China's Fifth and Sixth Report to CEDAW consistently referred to traditional ideas and modes of thought as barriers to the amelioration of women's status, and furthermore such references were often targeted at rural dwellers and the peasant community.

There are still some people who cling to the traditional view of sons as being more advantageous or better than daughters, especially in areas of high poverty. Owing to the low level of productivity and the lack of information in those areas, changing such attitudes will take some time.¹⁷⁹

In a 2006 report to the Human Rights Council concerning intersections between violence and culture, the Special Rapporteur on Violence against women, Yakin Erturk addresses the culture based paradigms often used to explain or justify violations of women's rights, and discusses the normative challenges involved when violence against women is reduced to an issue of 'culture'. She describes three 'myths' surrounding the use of cultural

¹⁷⁷ CEDAW/C/CHN/CO/6 (2006) para.2

¹⁷⁸ The Concluding Comments report had earlier noted that the Combined Fifth and Sixth Report of the PRC had been delivered late, and this is not atypical for the majority of state parties. This paper was written in the early half of 2010, and at the time writing, the PRC's Combined Seventh and Eighth Report had not yet been delivered.

¹⁷⁹ CEDAW/C/CHN/5-6 (2004) p.48

paradigms against women. The first myth she introduces involves the presentation of culture as static and immutable.¹⁸⁰ Secondly, culture is mythologised as monolithic and homogenous, whereby a dominant, discriminatory paradigm is presented as the only legitimate interpretation.¹⁸¹ The final myth Erturk introduces depicts culture as apolitical and detached from the existing political, social and economic situation at hand.¹⁸² Merry also discusses how culture is often used by states in the CEDAW reporting process as a way of justifying violations; wherein, culture is presented as distinctiveness to be maintained and celebrated.¹⁸³

In the case of China's reports, however, it appears evident that culture and tradition are used *not* in these ways, but rather as a means of shifting the blame, from the state itself onto the 'backwards elements' who refuse to conform with the majority way. The state promulgates good laws, and creates public campaigns declaring men and women as equal, and yet the violence, which occurs to women and infants, is the result of an unsophisticated culture. Another understanding of culture discussed by Merry describes the discrepancy between notions of national culture (high) and rural culture (low), wherein national culture is modern, celebrated and lauded, while rural culture is regressive, backward and unenlightened.¹⁸⁴ Such distinctions carry the formidable echoes of paternalism and colonialism, and yet such an attitude is prevalent throughout the PRC's reports to CEDAW.

It is crucial at this point, to return to CEDAW Article's 2(e-f) and 5(a), which clearly place the modification of discriminatory culture and custom directly within the realms of state responsibility. Any arguments tabled by state parties that directly name culture as problematic for the implementation of human rights can, therefore, easily be dismissed by

¹⁸⁰ A/HRC/4/34 (2007) para.58

¹⁸¹ Ibid para.60

¹⁸² Ibid para.62

¹⁸³ Merry (2006) p.98

¹⁸⁴ Ibid p.99

reference to these provisions. The PRC willingly became party to the CEDAW treaty and the obligations therein, and as such, their claims are highly contentious.

In this thesis I have discussed both direct and indirect consequences of the population policy. When considering the indirect consequences, including the sex ratio at birth and occurrences of female infanticide, it is apparent that while these events have been the result of choices made by individuals and families, they have been made under the duress of a policy that offers them little chance to do otherwise. Given a situation which lacks old age support or pension, in an environment wherein future support can, in effect, only be guaranteed by having a son to care for you, it seems that people have been left with little to no choice. Such a perspective allows us to see the choices made by families under such restrictions as strategic habit borne out of pragmatism, as opposed to uneducated superstition. Thus, rather than simply blaming the backward traditions of the rural populous as the cause of population discrepancy, the Chinese Government cannot escape the fact that its policy in combination with common convention has resulted in the severity of the population crisis it faces today.

In the case of direct consequences of the population policy, including the violations of the bodily sanctity of women by forcible surgical proceedings, 'culture' may indeed also be the cause of such actions by officials. Referring to a previous example, if no training was provided in the procedure for male sterilisation, then the surgeons themselves cannot be held to account for having acted in a manner contrary to gender equality. What this shows instead is the level of institutionalised attitudes regarding gender, which constitutes a 'culture' in and of itself. If culture is to be blamed for the human rights violations that have arisen as a result of the family planning policy, then it is unacceptable to place the blame at the feet of the rural peasantry alone. 'Culture' may be at the heart of the problem in the implementation of family planning policy, but this could be better attributed to the culture of authoritarianism and the impunity of party officials rather than the backwardness of rural citizens. While the PRC seems content to blame policy failure on the peasantry, it cannot sidestep responsibility for those who have acted in its name.

In concluding her report on the intersection of culture and violence against women, Special Rapporteur Erturk proposes that any viable strategy to combat the issue must incorporate the application of a political-economy perspective to the understanding of cultural practices, and that this should include:

- (i) Addressing social, economic and political factors that underlie and reinforce harmful cultural paradigms that subordinate women; [...]
- (iv) Recognizing that protection of rights needs not only the transformation of cultural norms and attitudes but also changing their material foundation; [...]¹⁸⁵

Such a perspective could prove fruitful to the situation of resistance to the full implementation of rights for women and female infants under the PRC's population policy. If alterations to the law alone prove insufficient in tackling issues deeply embedded in cultural practice, then an approach that encompasses the causes and reasons for the perpetuation of such practices must be included.

From the discussion I have now put forward relating to the ongoing preference for sons, it is clear such choices are frequently based in economic pragmatism, rather than merely outmoded thinking. This pragmatism, while resulting in the new population crisis of gender imbalance, is the result of a situation that offers little in the way of credible alternatives. The continuance of institutionalised discrimination against women, alongside systematic abuse of power and impunity, lie clearly within the realm of state responsibility, as I have now argued. Therefore, for the PRC to continue to place the blame for these issues on traditional customs and culture may prove to be an attempt to divert attention, rather than admit its own culpability.

¹⁸⁵ A/HRC/4/34 (2007) para.72b

6 Chapter 6: Concluding Remarks

In the introduction of their shadow report, HRIC stated that:

The PRC report notes that “China has always adhered to the principle of government guidance with the voluntary participation of the people,” yet in the implementation of the family planning policy, abusive or coercive enforcement measures including cases of forced abortions, compulsory sterilization and the forced implantation of intrauterine devices after abortions or births, continue to be documented.¹⁸⁶

As I have now discussed, the methods used to implement China’s strict family policy continue to contravene the human rights laws and standards that the State has obligated itself to uphold, in breach of both national and international laws. In spite of the numerous amendments made by the PRC in the period prior to their report to CEDAW in 2006, the Committee still found the legal protections to be lacking, both in respect to the direct consequences of the policy’s enforcement, and to the indirect effects it has yielded.

Despite China’s persistent claims hailing equality as basic state policy, evident in formal law, the fact remains that the burdens of the population policy weigh far heavier on some than others. The discriminatory approach that has been taken has resulted in the targeting of women as the primary bearers of responsibility for reproduction, and thereby they have been subjected to coercive measures in order to ensure compliance with state policy. The rural population have suffered harsher implementation methods, and yet, they have also been permitted the possibility of having more than a single child. Although this aspect of the policy has allowed a certain degree of policy relaxation in rural areas, by permitting the birth of a second child if the first is female, the policy gives official, institutionalised validity to the unequal value of sons and daughters, and in doing so has failed to address the root causes of discrimination against daughters.

¹⁸⁶ HRIC (2006) p.11

Furthermore, the population policy in combination with son preference has led to, and will continue to lead to, serious ongoing human rights concerns. In effect, this grand scale social engineering program appears to have swapped one population crisis (that of a rapidly increasing population) for another, as the nation now faces the unique predicament of future generations overwhelmed by a surplus of single men. The consequences of such a dilemma at this stage remain unforeseeable, yet it seems unlikely that the scenario will be a happy one. While the policy has succeeded in slowing the explosive rate of population growth that China once experienced, this success has come at the cost of millions of female lives lost, the systematic targeting of women for reproductive control and an immense distortion of the natural population balance.

Following the analysis of data from a 2005 census, research published conclusively stated that almost all of the excess males in the Chinese population are attributable to sex selective abortions.¹⁸⁷ It seems clear then, that attempts by the Chinese government to normalise the sex ratio at birth ought to focus considerable effort on the increased enforcement of laws prohibiting sex determinative ultrasounds. Yet, as this discussion has shown, while the strict enforcement of law should have ameliorative effects on the situation, as a lone measure it may not be enough. Certainly, much of the unwillingness on the behalf of cadres and doctors to act against the wishes of parents seeking to ensure the birth of son is due to sympathy, and awareness of the fact that actively preventing the birth of a son may guarantee the parents a lonely and impoverished old age. It is, therefore, crucial that the PRC continue in its additional efforts to arrest the perceived need for sons, by the positive promotion of daughters, and by continuing to take decisive steps towards the provision of elderly care. The son preference evident in China today is maintained by a lack of state provided social security, and while this situation continues, any changes in law will prove to be an inadequate solution. To further prevent the disastrous consequences of daughter discrimination, therefore, alongside continued positive norm promotion, moves must be made toward the institution of social security for the elderly, in order to relax the economic need for sons.

¹⁸⁷ Zhu (2009) pp.1 of 6, 6 of 6

While the achievement of formal equality in law appears superficially adequate, unless these laws are supported by the community at large and are adequately enforced they will remain purely symbolic, without substantive meaning or relevance. While the legal prohibition of sex-determinative ultrasounds in South Korea proved to be a successful measure against an increasingly imbalanced sex ratio, the difference between the situations in South Korea and the PRC may require that extra steps be taken in order for Chinese laws to succeed. As long as prohibitive sanctions in the PRC go unenforced they will serve as little deterrent, and therefore it may be the case that criminalising the provision of ultrasounds for sex determination and selective abortions could prove to be a more effective response.

Yet the lack of law enforcement is not the only problematic aspect of the family planning policy. For as long as the system of structural incentives remain in place, officials will remain subject to contradictory messages, with formal legal stipulations on one hand, and policy targets, career advancement and monetary incentives on the other. Therefore, structural review and modification of the internal operating procedures of the policy itself may prove beneficial to the eradication of coercive practices on the part of population policy officials.

While the right to freedom from state interference in the area of reproduction has been thoroughly established in human rights law, the government of the PRC knowingly persists in direct and clear opposition to its obligations. Furthermore, it consistently places the blame for infractions of such obligations on “the influence of traditional modes of thought”,¹⁸⁸ which also appears dismissive of obligations under CEDAW that explicitly calls upon state parties to take responsibility for the modification of discriminatory practices and custom. Certainly, the PRC has made moves towards the amelioration of this situation, thanks to ongoing campaigns of positive norm promotion for girls. However, in doing so it cannot continue to falsely blame sectors of its society for acting in a pragmatic manner under limitations it has itself placed on the people.

¹⁸⁸ CEDAW/C/CHN/5-6 (2006) p.7

The implications of China's population policy has had significant effect on the rights of women, including direct effects on women of reproductive age, and indirect effects manifesting in the mistreatment or disregard of young girls. The policy itself has thereby exposed the persistence of male-centeredness in Chinese society, and the damage that has been wrought owing to the effects of a gender-neutral policy on a highly gendered society. While China's willingness to partake in international human rights dialogue is praiseworthy, unless it is prepared to ensure the full realisation of the rights therein and guarantee their protection in domestic law, the promise of full equality and the assurance of human rights for women will remain unfulfilled.

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All material referred to in this essay is listed in the reference list.

Annex

Appendix 1: Relevant CEDAW Articles

Article 1: For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 5: States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 12: 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 14: 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in

the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Article 16: 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Table 1: China's Ratification of Human Rights Treaties

International Human Rights Treaty	Ratification	Optional Protocol
International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1966	1981	-
International Covenant of Civil and Political Rights (ICCPR) 1966	(Signed 1998, not ratified)	OP1: - OP2: -
International Covenant of Economic, Social and Cultural Rights (ICESCR) 1966	2001	-
International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979	1980	-
Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) 1984	1988	-
Convention on the Rights of the Child (CRC) 1989	1992	OP1: 2008 OP2: 2002
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) 1990	-	-
Convention on the Rights of Persons with Disabilities (CPD) 2006	2007	-
Convention for the Protection of All Persons from Enforced Disappearance (CED) 2006	-	N/A

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