

Master of Laws: Advanced Studies in International Children's Rights

Promoting Children's Right to Identity in the Context of Irregular Migration Marriages in China



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Executive Summary

Each child enjoys equal rights to identity and nationality since he is born, regardless of the status of his parents. Article 7 of the UN Convention on the Rights of the Child (hereinafter CRC) confirms that each child should be registered immediately after his birth, and has the right to a nationality. Article 8 of the CRC further emphasizes the obligation of the state parties to realize children's rights to identity, including the right to nationality without unlawful interference. State authority also has a positive obligation to provide assistance and protection when a child is deprived of his right to identity.

Besides, as a general principle of the CRC, Article 2 confirms that all children enjoy equal rights set forth in the CRC, irrespective of their parents' status; Article 3 stipulates that the best interests of the child should always be a primary consideration in any action that may influence children.

State parties to the CRC have both positive and negative obligations to fulfill and realize the rights that children are entitled to. China ratified the CRC in 1992 and is legally bound to the obligation to realize children's rights within its jurisdiction.

In respect to the issue of irregular migration marriages in China, however, children born to this form of marriage are facing great violations of their right to identity and nationality. This complicated issue combines irregular migration management, Hukou registration, and family planning policy when their parents register their children's birth in the Hukou system (the national household registration system). Because of their mothers' illegal status as irregular migrants, documents required by birth registration and household registration are lacked. Furthermore, since each province has its own criteria on the birth registration procedure, there lacks a national policy to realize children's rights to identity, which adds more complexity and uncertainty to the situation. These unregistered children are called "black household children" in China and as a result, their social and economic rights to education, medical care, social protection are also breached.

Children born from irregular migration marriages are neglected, because previous studies on "black household children" mainly focus on children who born outside the "one-child policy". From a children's rights perspective, the main research question of this thesis is as follows: how to promote and protect children's rights to identity under Article 7 of the CRC of children in the context of irregular migration marriages in China? It manages to figure out how children's rights to identity and birth registration are violated in the context of irregular migration marriages in china, to what extent does China comply with its obligation under the CRC, and the consequent adverse impacts on realizing other rights of this group of children, including rights to education, medical care, social protection. Several possible solutions will be presented: the authority should adopt a children's rights-oriented methods in the national policy to promote the birth registration rates of children born from irregular migration marriage. And reforms in all levels of birth registration procedures should be launched. Furthermore, cross-border cooperation and mutual efforts between China and neighboring countries

should be developed to manage the illegal migrants for the realization of children's rights to birth registration and identity. The thesis is concluded by summarizing the main findings that the children born from irregular migration marriages are Chinese citizens, but they are facing barriers in their access to birth registration because of their parents' status. They are invisible and neglected in society, and their social and economic rights are hard to realize. China as a state party to the CRC shall take further legislative and administrative reforming measures to fulfill its obligation to promote equal rights to identity and birth registration of children born from irregular migration marriages.

Keywords

Children's rights - Right to Identity - Birth Registration - Irregular Migration Marriage - Social and Economic Rights

Overview of Main Findings

Children born from irregular immigration marriages enjoy equal rights to identity, birth registration, and nationality under the CRC. As state parties to the CRC, China has the positive obligation to realize children's rights to identity, birth registration, and nationality without any form of discrimination.

According to domestic nationality law, children from irregular migration families with Chinese fathers are Chinese citizens and shall enjoy all rights equally. In practice, however, they are facing lots of barriers in registering their birth in the Hukou household system. First of all, they have difficulties in getting required documents for birth registration because their mothers have no legal identity so irregular migration mothers can hardly get a medical certificate of birth for their children when they give birth at hospitals. Besides, according to domestic laws and policies, children born from undocumented irregular migration marriages are born out of wedlock and their birth thus violates the family planning policy a sum of social maintenance fees shall be paid by their parents and therefore, these families are reluctant to register their children in the Hukou system to avoid the social maintenance fees and to avoid possible investigation on the family. All these barriers defer their parents to take active steps to register their children born from irregular migration marriages.

In 2015, the State Council of China launched a national policy aiming at registering all unregistered children in the Hukou system. According to this policy, irregular migration families can register their children after taking a DNA paternity test. However, some irregular migration families are still reluctant to take the DNA test to register their children. Unregistered children are forgotten in the national household system and their identities are denied. Without a Hukou booklet and a legal identity, their social and economic rights entitled by the CRC are also difficult to realize, including access to education, health care and health institutions, and social support and protection.

As rights bearers, children born from irregular migration marriages are entitled to equal rights and they should not be left behind. To ensure universal access to birth registration for children born from irregular migration marriages, reformed legislative and administrative measures and procedures shall be adopted by local governments. General children's rights principles: best interests, participation, and non-discrimination shall be introduced throughout the birth registration work. Besides, all levels of the public security department may consider offering free DNA tests and collaborative investigation with the local community in order to include this ignored group and realize their equal right to birth registration. Specific reforms on the management of irregular migration families should also be launched for the best interests of children born from such families.

As rights holders, all children are protected by the CRC. Chinese government shall take further effective and practical legislative and administrative measures in all levels to realize the rights to identity, birth registration, and nationality of children born from irregular migration marriages.

List of Abbreviations

CRC	UN Convention on the Rights of the Child
CRC Committee	UN Committee on the Rights of the Child
Hukou	China National Household Registration System
ICCPR	UN International Covenant on Civil and Political Rights
PRC	People's Republic of China
UN	United Nations
Unicef	The United Nations International Children's Fund
2015 National Policy	PRC State Council, Opinion on Resolving Issues of Hukou Registration for Unregistered Citizens (2015)

1. Introduction

There are lots of female illegal immigrants across the Sino-Korea border in the northeast of China, and the Sino-Vietnam border in the southwest. Although the exact total numbers are hard to come by, each year tens of thousands of irregular migrants' cases are reported by border provinces.¹ Some of these female irregular migrants may choose to marry Chinese men in border areas. Children born to this form of irregular migration marriage, born in China with a Chinese father and a foreign mother are facing violations of Children's rights to identity and birth registration.² Consequently, their social and economic rights are also be breached.

According to China's domestic law, children born from irregular migration brides with Chinese fathers shall have Chinese nationality.³ However, they confront great difficulties being registered under the household registration system (hereinafter Hukou) in China since birth, because their mother lacks the required documents, or in the case of North Korea, their mother is afraid of being repatriated to their original country where they may face severe punishment.⁴ These children's rights to identity and nationality that they are entitled to under the CRC are thus greatly violated. Furthermore, these ignored children lack access to other rights under the CRC, such as non-discrimination, education, health, social support, and development.

China has ratified the CRC and has positive obligations to protect all children present on its territory equally, regardless of their or their parents' social status. Presently in China, however, there lack of legal and administrative measures to ensure the equal realization of this group of children's civil rights to birth registration, and their economic and social rights of education, health care, and social protection.⁵ Children's right to development, best-interests consideration, participation, and non-discrimination are also impacted. Existing laws and policies in China lack children's rights sensitivity and should be improved to protect the children's right to identity under the CRC.

This thesis focuses on the research question as follows: how to realize and promote the rights to identity and nationality of children born in the context of irregular migration marriages as they are entitled by Article 7 and 8 of the CRC within the jurisdiction of the People's Republic of China?⁶ And

¹ S. Lin, Research on the Main Types and Governance of Illegal Immigration in China, *National Academy of Governance* (2019).

² Z. Yue, A study on the Issue of Cross-Border Illegal Migration Marriages on China-Myanmar Border, *Central China Normal University* (2014).

³ PRC National People's Congress, *Nationality Law of the People's Republic of China* (1980), available at: http://www.npc.gov.cn/wxzl/gongbao/2000-12/11/content_5004393.htm

⁴ See Yue, *supra* note 2.

⁵ See Yue, *supra* note 2.

⁶ This thesis does not discuss the situation in Hong Kong and Macao Special Administrative Region, considering their

how to realize the social and economic rights under the CRC of this group of ignored children with limited access to education, medical care, and social support? Several sub-questions will be explored: according to International treaties and domestic law, do this group of children enjoy equal rights to identity and birth registration as any other Chinese children? Do they face barriers in the birth registration procedure in practice? Why their parents are reluctant to register them in the Hukou system? Are there specific legislative and administrative measures focusing on them to realize their right to birth registration? What social and economic rights under the CRC are impacted because their rights to identity and birth registration are hard to realize? And what further measures may be taken to realize the rights to identity and birth registration of this group of children. This research aims at ensuring that children born from irregular migration marriages in China can enjoy equal rights to identity and birth registration they hold under the CRC.

This thesis is formulated in 6 chapters. It starts with the introduction, in chapter 2 it presents the irregular immigration marriage phenomenon in China. It explores the reasons behind it and the related domestic laws and policies regulating this form of undocumented marriage. This chapter will end by the impacts of irregular migration marriages, including social problems in practice and violations of rights of children born to this form of marriage.

In chapter 3 it will move specifically to children's rights to identity and nationality at both international and domestic levels. Although in principle, laws in China recognize children's right to identity and birth registration, this chapter zooms in what difficulties children born in the context of irregular migration marriages face in the Hukou registration procedure. Practical barriers in birth registration procedure including lacking required documents, DNA paternity test and family planning fees will be explored in this part. Then it centers on how children's rights to identity, nationality, and birth registration of this group of children are violated under the domestic regulations. In chapter 4, this thesis will discuss the adverse impacts on children whose rights to identity and birth registration are breached: their social and economic rights to education, health care, social protection under the CRC are breached. As chapter 3 and 4 focus on different aspect of children's rights: civil and political rights to identity in chapter 3, and social and economic rights in chapter 4, in these two chapters the analysis of international framework concerning each right will be discussed respectively in each sub sections, followed by analysis of domestic policies, and dilemma in practice.

In chapter 5, with an effort to remedy the dearth of protection on children's rights to identity and birth registration they are entitled by the CRC, this thesis will then try to present several possible solutions on domestic measures and policies to promote children's equal right to identity and birth registration, before reaching the conclusion in chapter 6.

2. Irregular Migration Marriages in China

2.1. Introduction

Irregular migration marriages in China have a long history and form in the daily life of people living in border areas.⁷ This form of marriages mainly exists in the China and North Korea in the northeast border, and the China and Southeast Asia borders in the southeast border.⁸ Since most irregular migrant brides have no legal visa or residency in China, these marriages are seldom registered according to Marriage Law in China and thus are not protected by domestic laws in China.⁹ As a result, a series of social problems are brought by this form of undocumented marriages, including their children being unregistered in the Hukou system and becoming “black household” children. In practice, rights to identity and birth registration of children born from these irregular migration marriages are impacted in the birth registration procedure.¹⁰

2.2. Irregular Migration Marriage Phenomenon in China

Mainland China has the longest land border and shares international borders with 14 countries.¹¹ As the second economy in the world, China is attracting growing numbers of foreigners to enter the country for investment, employment, and residence. While most migrants applying for legal residence in compliance with the Exit and Entry Administration Law,¹² the number of illegal migrants is also increasing. Irregular migrants are called “three-illegalities” (*sanfei*) in Chinese, referring to their “illegal entry, illegal residence, and illegal work” status.¹³ There is no accurate statistics on the total number of illegal migrants in China, but the illegal immigration cases handled by the border departments and public security organs are increasing year by year.¹⁴ In 2018, the National Immigration Administration dealt with 121000 “*sanfei*” cases.¹⁵ China has evolved from a migrant-sending state to a destination

⁷ M. Hong, A Study on Illegal Immigration in Temporary China, *Minzu University of China* (2011).

⁸ See Yue, *supra* note 2.

⁹ See Yue, *supra* note 2.

¹⁰ See Hong, *supra* note 7.

¹¹ S. Lobell, The Political Economy of Regional Peacemaking, *Peace Research*, at 187 (2019).

¹² PRC National People’s Congress, *Exit and Entry Administration Law of the People’s Republic of China* (2012), available at: http://english.www.gov.cn/archive/laws_regulations/2014/09/22/content_281474988553532.htm, last visited (26-05-2020).

¹³ See Hong, *supra* note 7.

¹⁴ See Hong, *supra* note 7, at 84.

¹⁵ Youth.cn, *National Immigration Management Work in 2018*, (<https://baijiahao.baidu.com/s?id=1623398260924614564&wfr=spider&for=pc>), last visited (26-05-2020).

country.¹⁶ One of the challenges posed by such waves to China's society is the irregular migration marriage (illegal foreign brides) issue.

The first region of concern is the border of China and North Korea.¹⁷ The two countries have a long history of civil exchanges. The Korea nationality living in this area in China have deep geographical and identity relationship with the Korean Peninsula, which makes the area a main immigration destination for people from North Korea.¹⁸ Since the 1990s, with the economic decline in the North Korea, many people from North Korea have been taking risks to illegally cross the border to enter China.¹⁹ These irregular migrants do not have a passport, a legal visa, or a residence permit. Many females choose to marry a local Chinese single man to survive in China. This is visible in many villages in the border areas, since the majority in habitats are of Korean nationality, and they are also happy to help these migrants who share common nationality with them. This form of marriage between a Chinese man and a North Korean bride is not documented, and brides from North Korea would not be discovered if no one reports them to the authority. People living in the community also choose to protect these women and their children.²⁰ It happens that Chinese husbands bribe local police to get legal status for their wives and children. Some brides may take advantage of their marriages as a springboard: they would leave their family and their children once they get better chances to earn money elsewhere in China.²¹

Another region of concern is China's southeast border that connects China's Guangxi, Yunnan Provinces, and three Southeast Asian countries: Vietnam, Laos, and Myanmar. There have been lots of Southeast Asian brides in this region before the founding of the People's Republic of China. Convenient geographical conditions, similar languages, and shared cultural backgrounds in border areas encourage people's close contacts across the border. In history, people living in this border areas have less recognition of the concept of "state" and "border". In one village on the Vietnam-China border, half of the families in the village have cross-border marriages within their four

¹⁶ Migration Policy Institute, *China: An Emerging Destination for Economic Migration*, (<https://www.migrationpolicy.org/article/china-emerging-destination-economic-migration>), last visited (29-06-2020).

¹⁷ See Hong, *supra* note 7, at 84-85. This border area mainly includes Yanji city, Hunchun city in Jilin province, and Dandong city, Yellow Sea coast in Liaoning Province.

¹⁸ See Hong, *supra* note 7, at 85.

¹⁹ The domestic criminal law in North Korea prohibits illegal departure; so those "North Korean defectors" would face criminal penalties once they back to North Korea, art. 62 (Treason against the Fatherland) of the Criminal law impose penalties on defectors "reform through labor for more than five years... (for) a grave offense... reform through labor for more than five years and less than ten years." See *Criminal Law of the Democratic People's Republic of Korea* (2009), art. 62, available at: [https://www.hrmk.org/uploads/pdfs/The%20Criminal%20Law%20of%20the%20Democratic%20Republic%20of%20Korea_2009_%20\(1\).pdf](https://www.hrmk.org/uploads/pdfs/The%20Criminal%20Law%20of%20the%20Democratic%20Republic%20of%20Korea_2009_%20(1).pdf), last visited (26-05-2020).

²⁰ See Hong, *supra* note 7, at 86.

²¹ See Hong, *supra* note 7, at 87.

generations.²² After the founding of modern China, although the exchange activities of people living in this border area are under the regulation of China's law, people still visit friends, relatives and carry out trade activities across the border. Recently, the booming economy of China is attracting more women from southeast Asian countries to marry a Chinese man and to pursue a better life in China. Besides, the gender imbalance in China and poverty also prompts single Chinese men living in rural border areas to seek a foreign wife. According to statistics, by 2015 there were more than 100,000 "Vietnamese brides" living in China, while less than half of their marriages are legally documented.²³ Most of these brides illegally enter the border without a visa or a residence permit. Furthermore, the demand for foreign brides even results in lucrative business: a Chinese single man can pay some money to illegal intermediaries, then girls from Southeast Asia countries would be introduced to the man by the intermediaries.²⁴ There are also cases of girls trafficking reported by Chinese police: in 2019, Chinese police rescued more than 1,100 girls involved in brides trafficking cases, most of them are from Cambodia and Vietnam.²⁵

2.3. Domestic Law and Irregular Migration Marriage

2.3.1. Laws Concerning Cross-border Marriages and Residence Permit

China has issued a series of laws and regulations on the residence of foreigners. Article 7 of the Nationality Law stipulates that a foreigner or a stateless person who is willing to abide by the laws of China may be gain a Chinese nationality upon their application if he meets one of the three conditions: he is near relatives of Chinese nationals; he has settled in China, or he has other legitimate reasons.²⁶ Under this provision, an irregular migration bride may be granted a Chinese nationality if she meets one of the two necessary conditions: she is the near relative of Chinese nationals or she has settled in China. Foreign brides have been living with their Chinese husbands can be regarded as meets the settlement condition. However, irregular migration families may find it hard to prove that irregular migration brides are family members of Chinese citizens because of their illegal status. Besides, until now, there is no specific regulations on the nationality application procedure for irregular migration brides in local level governments because in some regulations, the terms are too general or simple to apply, which add more complexity and difficulty to deal with the

²² L. Luo, *The Foundation of Cross-border Marriage between China and Vietnam*, *Guangxi Ethnic Studies* (2010).

²³ Oushinet.com, *More than 100000 Vietnamese Brides Have Been Illegally Married in China*, (http://www.oushinet.com/news/china/chinanews/20150428/191488_4.html), last visited (27-05-2020).

²⁴ Reuters, *Southeast Asia Urged to Improve Women's Rights to Stop China Bride Trafficking*, (<https://www.reuters.com/article/us-china-crime-humantrafficking-asia/southeast-asia-urged-to-improve-womens-rights-to-stop-china-bride-trafficking-idUSKCN1TQ19R>), last visited (27-05-2020).

²⁵ See Reuters, *supra* note 24.

²⁶ See PRC National People's Congress, *supra* note 3.

legal status of these foreign brides. Lacking legal awareness and knowledge, many foreign brides also do not take a positive attitude to apply for a Chinese nationality.²⁷ And local governments and household departments in each province are not sure about how to apply this provision in practice to deal with the application from these brides. Irregular migration marriage families, as administrative objects, also do not know how to apply a Chinese nationality for the brides.

Difficulties also exist in the application of residence permit of these foreign brides. Article 29 of the Exit and Entry Administration Law confirms that:

*[w]here the duration of stay specified in a visa held by a foreigner does not exceed 180 days [...] Where the duration of stay needs to be extended, the visa holder shall file an application.*²⁸

Article 47 further regulates the condition for permanent residence:

*[f]oreigners who have made remarkable contributions to China's economic and social development or meet other conditions for permanent residence in China may obtain permanent residence status.*²⁹

Therefore, for irregular migration brides, they can only get a temporary residence permit- in most cases 180 days residence permit- unless they make “*remarkable contributions to China's economic and social development*”,³⁰ then they can get a permanent residence permit to live with her Chinese family.

Article 16 of the 2013 Regulations on Administration of the Entry and Exit of Foreigners holds that if a foreigner wants to apply for a residence permit, required documents include: “*passport or other international travel documents [...] with the exit and entry administration authority of the public security organ of the local people's government*”.³¹ And if one wants to apply for a residence permit for family reunification, required documents are:

[p]roof of family relationship and certification documents relating to the purpose of

²⁷ R. Huang, J. Li & Y. Long, Sociological Thinking on Cross-border Marriage between China and Vietnam, *Journal of Liaoning Administration College* (2008).

²⁸ See PRC National People's Congress, *supra* note 12.

²⁹ See PRC National People's Congress, *supra* note 12.

³⁰ See PRC National People's Congress, *supra* note 12.

³¹ PRC State Council, *Regulations of the People's Republic of China on Administration of the Entry and Exit of Foreigners* (2013), available at: <http://cs.mfa.gov.cn/zlbq/flfg/crjxg/t1060665.shtml>

*application; if the applicant needs to reside in China for fosterage or other purposes, he or she shall submit such certification documents as a power of attorney.*³²

It should be noticed that in most irregular migration marriages cases, these foreign brides entering the border through smuggling, and they may find it hard to get valid documentations to apply for their residence permit in China: some may lack valid travel documents; some may enter the border on tourist visas and their visa is inconsistent with the purpose of their entry; some may still stay in China after their residence permit is expired.³³ Thus, these laws and regulations actually overlook the limitations in reality, and close the door for irregular migration brides to apply for a permanent residence permit in practice.

Consequently, these irregular migration brides who lack legal residence permits may face “*on-the-spot interrogation, continued interrogation, detention for investigation, movement restriction and repatriation*” as regulated in Chapter VI of the Regulations on Administration of the Entry and Exit of Foreigners.³⁴

2.3.2. Laws Concerning Undocumented Marriage and De Facto Marriage

According to Article 21 to the Law on Choice of Law for Foreign-related Civil Relationships: “*the laws at the mutual habitual residence of the parties shall apply to the marriage qualifications [...] if there is no mutual nationality, the laws at the locality where the marriage is established shall apply*”.³⁵

Therefore, irregular migration marriages in China are governed by applicable Chinese laws and policies, including Marriage Law,³⁶ Regulation on Marriage Registration³⁷ and Measures for Registering the Marriage between Border Inhabitants of China and Neighboring Countries.³⁸

Article 8 of the Marriage Law stipulates that: “*marriage shall register in person with the marriage*

³² See PRC State Council, *supra* note 31.

³³ See Yue, *supra* note 2.

³⁴ See PRC State Council, *supra* 31.

³⁵ PRC Standing Committee of the National People's Congress, *Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships* (2010), available at: https://www.baidu.com/link?url=aNseYtH2V-KbF4ljJ4aKi7aXXXkryoK2W_QL6zOtAbc6b0vPvyfcwNUHUyBnB7B-3qiPqYRzCXecw6u8bbyYC3a&wd=&eqid=bd633343000d4e10000000065ece7f43

³⁶ PRC National People's Congress, *Marriage Law of the People's Republic of China* (2001), available at: <http://www.chinalawedu.com/new/23223a23228a2010/20101219shangf16569.shtml>

³⁷ PRC State Council, *Regulation on Marriage Registration* (2003), available at: http://www.gov.cn/gongbao/content/2003/content_62350.htm

³⁸ PRC Ministry of Civil Affairs, *Measures for Registering the Marriage between Border Inhabitants of China and Neighboring Countries* (2012)

registration office".³⁹ Required documents for a foreign bride to apply for marriage registration in with a Chinese citizen include:

*[a] valid passport, an international travel document or a border areas exit-entry pass [...] and a certification for proving that he or she has no spouse, as issued by a notarization institution or a competent agency in his or her country, and certified by the Chinese embassy [...] by the country's embassy (consulate) stationed in China, or by the government in the border area of the neighboring country at the same level as the China's township people's government.*⁴⁰

However, the three neighboring countries lack effective management and standard to issue required documents for these foreign brides to register their marriages in China. Thus, brides from Vietnam, Laos, and Myanmar find it complicated to get required documents issued by their government. In Vietnam, marriage certificate materials are regulated by multiple departments and the cost is high;⁴¹ in Laos, the application shall first be signed by parents, village heads and country heads, then would be submitted to provincial governors for further approval before be submitted to the Ministry of foreign affairs and the Ministry of public security for further approval. In the Myanmar border area, there are lots of conflicts and local separatist forces, which makes it hard for local people to apply for identity certificate and marriage status certificate required by Chinese procedure.⁴² Poor living condition and poverty also limit their willingness to register their marriage: they can hardly afford the time and transportation costs between the two countries. Besides, as they have no legal residence permit as analyzed above, many foreign brides dare not go to the civil affairs department for marriage registration, for fear of investigation, detention, or repatriation.

These irregular migration marriages do not follow legal registration procedures. Most couples would rather choose to hold a simple marriage ceremony according to local customs and people in the villages also recognize this form of marriage: they get used to this form of marriage for a long time and they do not consider it as an illegal marriage. Local governments also face obstacles from local people and officials when investigating these undocumented marriages.⁴³

³⁹ See PRC National People's Congress, *supra* note 36.

⁴⁰ See PRC State Council, *supra* note 37. Besides, art. 5 of the *Regulation on Marriage Registration* also stipulates that a foreigner applying for marriage registration shall present the applicant's valid passport or other valid international travel certificate, and the certification issued by the notary office or entitled organ in the applicant's country of nationality upon the authentication by the embassy (consulate) of the People's Republic of China in the said country to indicate that he / she has no spouse, or that issued by the embassy (consulate) of this country in the People's Republic of China. See 24, *supra*.

⁴¹ H. Zhuang, G. Du & H. Lin, *Cross Border Marriage in Yunnan and the Construction of a Harmonious Border*, *Yunnan Normal University Business School* (2015).

⁴² See 41, *supra*.

⁴³ M. Liang, *Transnational Undocumented Marriages in the Sino-Vietnamese Border Areas of China*, *Peking University*

As a result, there exists large number of undocumented de facto marriages in the border areas. In some villages, more than one-half of the families are de facto marriages that formed after living together and giving birth to children.⁴⁴ Such de facto marriages are not registered in the civil affairs department and had no marriage registration certificate issued by the authority.

Since February 1994, de facto marriages are no longer legally recognized in China. According to Article 5 of the Interpretation on Several Issues in the Application of Marriage Law, for couples who live together in the name of husband and wife without registration their marriages, if they bring the case to a court, their marriage can be treated as de facto marriage if the conditions happened before February 1, 1994; after the Regulation on Marriage Registration was implemented since February 1, 1994, their marriages would not be recognized as de facto marriage but as dissolution of cohabiting relations.⁴⁵

That is to say, irregular migration marriages that happen after February 1, 1994 is illegal and cannot be protected by Chinese marriage law. All in all, the current marriage law and marriage registration policies all clearly stipulate that the only form of legal marriage is registered marriage, and registration is the deciding condition for a valid cross-border marriage. Therefore, presently most undocumented irregular marriages are not recognized as legal form of marriages and are not protected by marriage law and other civil laws in China.

2.3.3. Absence of Immigration Law and Family Reunification Principle in Practice

Until 2020, China still has no National Immigration Law. Current regulations on immigration control are Exit and Entry Administration Law and the Regulations on Administration of the Entry and Exit of Foreigners. The provision concerning the family reunification principle is Article 6 of the Regulations on Administration of the Entry and Exit of Foreigners: “*the Q1 visa is issued to family members of Chinese citizens*”,⁴⁶ and according to Article 7, required documents to apply for a Q1 visa include: “*application form ... passport or other international travel documents, qualified photos...in the case of applying for residence in China for family reunion, the applicant shall submit the invitation letter... and proof of family relationship*”⁴⁷ Ministry of Foreign Affairs further lists the requirement for above documents, and for “proof of family relationship”, marriage certificate, kinship certificate issued by

Department of Sociology (2018).

⁴⁴ C. Wu, An Analysis of the Illegal Foreign Marriage in the Southwest Border Area of China, 29 *Journal of Hunan Public Academy* 15, at 18 (2017).

⁴⁵ PRC Supreme People's Court, *Interpretation No. 1 of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China* (2001), available at: <https://www.chinacourt.org/law/detail/2001/12/id/41906.shtml>

⁴⁶ See PRC State Council, *supra* note 31.

⁴⁷ See PRC State Council, *supra* note 31.

public security department or kinship notarial certificate are required.⁴⁸

In the case of irregular migration brides, as analyzed above, these marriages are not documented in the local civil departments and most of them are not recognized as de facto marriages. Therefore, in administrative procedure it is impossible for a Chinese husband of irregular migration marriage family to prove that the irregular migration bride is his “family member”, not to mention getting a valid “invitation letter” and “proof of family relationship” from public security department. Therefore, for these unregistered irregular migration marriages, irregular migration brides can hardly resort to family reunification visa to legally resident in China.

2.4. Social Problems Brought by Irregular Migration Marriage

Undocumented irregular immigration marriages are void marriages under the Marriage law, and not protected by civil laws in China.⁴⁹ Consequently, a series of social problems are caused by this form of marriages in border areas, including limited access to social and economic rights, and barriers in household registration for children from irregular migration marriages.⁵⁰

There has been increasing “black households” in border regions. Irregular immigration brides enter and stay in China illegally, they don’t have valid identity documents and cannot be registered in the Hukou system. Some may face the risk of losing their own nationality and being stateless when they marry to Chinese citizens.⁵¹ In Chinese they are called “black households”, referring to their unregistered status. These “black households” impose great challenges to the local household management and border exit and entry control work. Lacking a legal identity, these brides find it hard to find a job and integrate themselves into local social life. Economically, their life largely relies on their husbands. With lower status in families and communities, they are vulnerable to domestic violence and they find no ways to safeguard their rights. These foreign brides cannot enjoy social welfare and policies because of their illegal status. Gradually, they become invisible groups of people in their villages.

Children born from irregular immigration marriages also face the dilemma of being “black household children”.⁵² These children who are not registered in the household system at birth and can therefore

⁴⁸ PRC Ministry of Foreign Affairs Consular Department, *Required Documents List for Family Reunification Visa*, (<https://www.fmprc.gov.cn/ce/cetur/chn/xwdt/P020171225819738504919.pdf>), last visited (29-06-2020).

⁴⁹ See 36, *supra*, at Article 12.

⁵⁰ See Yue, *supra* note 2.

⁵¹ According to Law in Vietnam, a girl would lose her Vietnamese nationality after she marry to a foreigner. See M. Lei, B. Wang, The Dilemma and Thinking of Cross-Border Marriage and Family of Border People in China: Analysis of Examples in Yunnan and Guangxi Provinces, *Journal of Minzu University of China Philosophy and Social Sciences Edition* (2016).

⁵² See Wu, *supra* note 44, at 18.

hardly enjoy the preferential policies in the local community. They are unable to receive nine-year compulsory education like their Chinese peers. Most of them are left at home with a low school attendance rate. Their rights to medical treatment and employment are also difficult to realize. Unlike “black household” children who born outside the one-child policy, undocumented children born from irregular migration marriages are largely neglected by present academic research and mass media. Promoting their rights to identity and birth registration entitled to under the CRC is an urgent children’s rights issue in China.⁵³

2.5. Concluding Remarks

Irregular migration marriage is a migration reality that should not be neglected in modern China society. Specific legislative and administrative measures should be taken to manage the illegal identity and residence permit issue of irregular migration brides, irregular migration marriage and household registration of irregular migration marriages and family members from such form of marriages. Children from irregular migration families are facing risks of being “black household” children,⁵⁴ and they are among vulnerable groups of children. Their rights to identity and birth registration under the CRC may be violated because of their irregular migration family and the status of their irregular migrant parents.

⁵³ UN Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of China*, CRC/C/CHN/CO/3-4, at 39 (2013).

⁵⁴ See Wu, *supra* note 44, at 18.

3. Children's Rights to Identity and Birth Registration

3.1. Introduction

Each child is entitled to equal rights to identity and birth registration under the CRC, regardless of his parents' status or the situation of his family.⁵⁵ As state parties to the CRC, China has an obligation to realize children's rights to identity and birth registration on an equal basis within its jurisdiction. In China, each child with a Chinese nationality has the right to be registered in the Hukou system at their birth to realize their right to identity and birth registration.⁵⁶ In the context of children born from irregular migration marriages, however, they face barriers throughout the birth registration procedure.⁵⁷ Because their mothers have no legal identity, they may find it difficult to get the documents required to register their birth in the Hukou system, including Medical Certificate of Birth and family planning certificate.⁵⁸

In 2015, the central government launched a new national policy with an attempt to register all unregistered citizens in the Hukou to realize their right to identity and birth registration.⁵⁹ This policy put specific emphasis on children born from irregular migration marriages. It regulates that for this group of children, a DNA paternity test report showing their kinship with their Chinese fathers is enough to register them in Hukou the Hukou system. However, some irregular migration families living in rural areas are still reluctant to take active steps to register their children: on the one hand, they are not familiar with the money and time-consuming DNA test; on the other hand, they are still worrying about paying social maintenance fees for their children born out of wedlock.⁶⁰

Therefore, despite the effective 2015 policy aiming at realizing the rights to identity and birth registration for all, children from irregular migration marriages still have limited access to birth registration in practice. Local government should consider launch proper administrative measures focusing on this group of children to realize their rights to birth registration in accordance with the 2015 national policy.

⁵⁵ UN *Convention on the Rights of the Child*, UN Treaty Series vol. 1577, at 3 (1989).

⁵⁶ S. Li, Y. Zhang and H. Liu, *Birth Registration of Chinese Children: Current situation, Problems and Policy Suggestions*, *Population Research* (2006).

⁵⁷ See Yue, *supra* note 2.

⁵⁸ See Yue, *supra* note 2.

⁵⁹ PRC State Council, *Opinion on resolving issues of Hukou Registration for citizens with no Hukou* (2015).

⁶⁰ See Li, *supra* note 56.

3.2. International Framework

As rights bearers, each child has equal and inalienable rights to identity at birth. Article 7 CRC confirms that each child should be registered immediately after his birth and each child has the right to a nationality.⁶¹ State parties thus have a positive obligation to realize all children's rights to identity and birth registration within its jurisdiction. Article 8 further stipulates the states' obligation to respect and realize children's rights to preserve identity, including nationality, name, and family relations. States should provide protection and assistance in case children are illegally deprived of their identity.⁶² Article 2 of the CRC as a general principle of non-discrimination regulates that all children enjoy equal rights recognized in the CRC, regardless of their parents' status.⁶³ Furthermore, Article 4 obligates state parties to take all appropriate legislative, administrative measures to implement children's rights.⁶⁴

The Committee on the Rights of the Child (hereinafter CRC Committee) monitors the implementation of the CRC in each state party. General Comments issued by the CRC Committee further clarify the responsibilities of state parties, meanwhile encourage state parties to take actions to realize children's rights on a domestic level.⁶⁵ In its General Comment 7, the Committee recommends that each state should ensure all children are registered at birth without any kind of discrimination.⁶⁶ It also points out that birth registration matters a child's sense of identity, and the realization of children's rights to education, health care, and social welfare.⁶⁷ A universal, well-managed registration system that free of charge for all is required in each state, and an effective system should be flexible to different family circumstances. The state shall also facilitate late birth registration for the unregistered, meanwhile ensuring their equal rights and access to education, health care, and other rights.⁶⁸ The committee also emphasizes the importance of late birth registration as a remedy, and children who are not registered their birth should have equal access to health care, education opportunities and other social services. Birth registration officially records a new born child's existence, identity, and family ties within one country. Unicef defines birth registration as the "*continuous, permanent and universal recording [...] of the occurrence and characteristics of birth*",

⁶¹ See 55, *supra*.

⁶² See 55, *supra*.

⁶³ See 55, *supra*.

⁶⁴ See 55, *supra*.

⁶⁵ D. Weissbrodt, J. Hansen, and N. Nesbitt, *The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law*, 24 HARV. HUM. RTS. J. 115 (2011).

⁶⁶ UN Committee on the Rights of the Child, *General comment No. 7: Implementing Child Rights in Early Childhood*, CRC/C/GC/7 (2005).

⁶⁷ See 66, *supra*, at 25.

⁶⁸ See 66, *supra*, at 25.

and an ideal birth registration system shall be “*compulsory, permanent, and universal*” for the purpose of “legal and statistical”.⁶⁹ A child who is not registered at birth does not legally exist, since there is no document to prove who they are; and they are more likely to face discrimination and denied access to other basic rights.

Other international human rights standards confirm the human right of children to identity and birth registration. In 1948, Article 15 of the Universal Declaration on Human Rights first declares that “*everyone has the right to a nationality*” and such right should not be arbitrarily deprived.⁷⁰ Article 24 of the International Covenant on Civil and Political Rights confirms that: each child shall be registered immediately after birth and each child has the right to acquire a nationality.⁷¹

China has ratified the CRC in 1992,⁷² and thus have a positive obligation to take legislative and administrative measures to respect and realize children’s rights to identity, to nationality and to make birth registration available and accessible for all children within its territory. When children are not registered at birth, the authority should implement late birth registration as a remedy for these children who were deprived of their entitled rights to identity, birth registration, and nationality at birth. China also has an obligation to ensure its domestic laws and policies are in compliance with the CRC to realize children’s right to identity, birth registration, and nationality. Any barriers to access to birth registration forms violation of children’s inalienable rights to identity and birth registration.

Access to birth registration is the basic rights of children to obtain their nationality and citizenship, only through birth registration, there established a legal connection between a new born child and the country, and a child is formally recognized as a person (citizen) within the jurisdiction of the country and an unregistered child is invisible in society and may be unnoticed by the authority. Birth registration also lays the basis for children to realize their economic and social rights entitled by the CRC in their later life. Therefore, government and parents have the responsibility and obligations to realize children’s rights to identity and birth registration as an important foundation to protect human rights of children.

3.3. Domestic Law and Policies in China

3.3.1. Acquisition of Nationality and the Hukou System

The acquisition of the Chinese nationality is based on the combination of the principle of jus soli and

⁶⁹ Unicef, *Birth Registration: Right from the Start*, at 2 (2002).

⁷⁰ UN *Universal Declaration of Human Rights*, 217 A (III) (1948).

⁷¹ UN *International Covenant on Civil and Political Rights*, 2200A (XXI) (1966).

⁷² UN, Treaty Body Database, (https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en), last visited (29-05-2020)

the principle of jus sanguinis. Article 4 of the Nationality Law entitles a child a Chinese nationality if he is born in China and his parents are both Chinese citizens or one of his parents has a Chinese nationality.⁷³ Article 6 regulates that a child born in China whose parents are stateless of uncertain nationality and have been settled in China also shall have Chinese nationality.⁷⁴

Therefore, a child born from irregular immigration marriage shall acquire a Chinese nationality since he is born in China, and his father is a Chinese citizen. His parents' undocumented marriage status does not impede his rights to identity and nationality he entitled.

Each Chinese citizen has the right to register their birth in the Hukou system (the Chinese household registration system). The Hukou booklet and the identity card are the most important two identity and nationality certificates of each Chinese citizen. The Regulation on Household Registration stipulates in Article 2 that each Chinese citizen should be registered in the Hukou system; in Article 4 it confirms that the Hukou registration has the effect of proving Chinese citizenship.⁷⁵ Hukou registration is also the basic identity document for Chinese citizens to apply for other identity certificates. The 2003 Law on Resident Identity Cards regulates in its Article 10 that a citizen should present his Hukou registration book for examination when applying for an identity certificate card.⁷⁶ The 2006 Passport Law also requires a Hukou registration booklet to issue a passport in Article 6.⁷⁷

In short, without Hukou registration, one Chinese citizen has no way to attest his identity and thus can find great difficulties in any situation where identity certificate is required. For example, they cannot take airplanes and trains, nor can they normally exercise their rights to education, social protection, and medical care. They may also hard to find a job. For Chinese citizens that not registered in the Hukou system, their legal identity and nationality cannot be protected by law. Without a Hukou, they are invisible groups in society.

3.3.2. Hukou and Birth Registration

In China, birth registration refers to the administrative procedure that the Hukou registration authority registers newborn children in the national household system in accordance with laws and regulations on the management of the Hukou system. It confirms the citizenship and permanent residence of a

⁷³ See PRC National People's Congress, *supra* note 3.

⁷⁴ See PRC National People's Congress, *supra* note 3.

⁷⁵ PRC Standing Committee of the National People's Congress, *Regulation of the Peoples' Republic of China on Household Registration* (1958).

⁷⁶ PRC Standing Committee of the National People's Congress, *Law of the People's Republic of China on Resident Identity Cards* (2011).

⁷⁷ PRC Standing Committee of the National People's Congress, *Passport Law of the People's Republic of China* (2006).

newborn child who has a Chinese nationality.⁷⁸

Article 7 of the Regulation on Household Registration underscores that parents, relatives or other legal guardians should apply for birth registration in the Hukou system for the newborn children within the first month since the born.⁷⁹ Besides, birth registration policies are enshrined in several different laws and regulations.

Article 25 of the Marriage Law further emphasizes the equal rights and non-discrimination principle for all children: “*Children born out of wedlock shall enjoy the same rights as children born in wedlock*”.⁸⁰ Policies also formulate that children born out of wedlock are equally protected by registration laws, they should be treated equally without discrimination or deliberate obstacles.⁸¹

In respect to the place of birth registration, a child born after July 22, 1998 can be registered at the place where his father or mother has permanent residence. For an infant born before this time and has been registered at the place where his mother has permanent residence, his later application for registering at his father’s residence city should be “gradually handled”.⁸²

Birth registration has the legal force to certify citizenship and family relationship.⁸³ It also serves as the basis for social governance. The birth registration records have changed slightly at different times in accordance with different policies.⁸⁴ In general, it is all about the confirmation of citizenship, kinship, and residence address to reflect the basic social status of the residents.

Different government institutions support the birth registration work at different levels. In general, there are three levels in charge:

At a national level, the Household Registration Administration Division of the Ministry of Public Security of the PRC is the central authority. At the provincial and autonomous regions’ level, the authority is the Household Registration Administration Division or Public Order Administration Division of the Bureau of Public Security. At the city level, the authority is the Household Registration department of Public Security organs. The basic level is the household offices of local police stations. Each residential committee or village committee (the lowest level of the administrative hierarchy of

⁷⁸ X. Wang, A Study on the Legal System of China's Household Registration (2001).

⁷⁹ See PRC Standing Committee of the National People's Congress, *supra* note 76.

⁸⁰ See PRC National People's Congress, *supra* note 361.

⁸¹ See S. Li, *supra* note 56.

⁸² Hualv.com, Circular of the State Council on Approving and Transmitting the Opinions of the Ministry of Public Security on Solving Several Outstanding Problems in the Current Household Registration Administration, (<https://www.66law.cn/laws/92951.aspx>), last visited (30-05-2020).

⁸³ See PRC Standing Committee of the National People's Congress, *supra* note 75.

⁸⁴ See X. Wang, *supra* note 78.

the government)⁸⁵ would assign an official to assist the local police station in household registration work.⁸⁶

In general, to register a children's birth in the Hukou system, required documents include a Medical Certificate of Birth issued by the public health department, a family planning certificate issued by the Family Planning department, Hukou (household registration booklet) and resident identity cards of the parents, and marriage certificate.⁸⁷ And especially, for children born out of wedlock, there lacks a national standard with respect to required documents to apply for birth registration.⁸⁸

The Medical Certificate of Birth is a legal document that records the newborn children's identity information, including birth date, family relationships, and nationality.⁸⁹ The national health and Family Planning Commission the authority that in charge, and each public health department at all levels manage the issuing of this certificate within its jurisdiction.⁹⁰ According to the 2014 new regulation on Medical Certificate of Birth, the issuing authority should examine the valid ID card of the newborn's parents and keeps the copy. A marriage certificate is not required during the procedure and children born out of wedlock enjoy equal rights to get the Medical certificate of birth. If the father's information is missing, the certificate can be issued after the mother signs a written statement, but the mother's identity is a prerequisite for issuing the certificate. If the information and identity of the newborn child's mother cannot be verified, the medical certificate of birth cannot be issued.⁹¹ If the child is born in a health institution that qualified for midwifery services—for example, a hospital—the health institution shall issue the certificate. If a child is not born in a health care institution but is delivered by a qualified midwife, the Health and family planning administrative department at the birthplace shall issue the certificate.⁹² The certificate shall follow a national standard format and charge no fee.⁹³

Another required certificate is the Family planning certificate. In accordance with the national family

⁸⁵ C. Ngeow, *The Residents' Committee in China's Political System: Democracy, Stability, Mobilization*, (https://www.researchgate.net/publication/286989663_The_Residents'_Committee_in_China's_Political_System_Democracy_Stability_Mobilization), last visited (30-05-2020).

⁸⁶ H. Liu, *The Child's Right to Birth Registration: International and Chinese Perspectives* (2004).

⁸⁷ Hualv.com, *Require Documents for Birth Registration in 2020*, (<https://www.66law.cn/laws/139596.aspx>), last visited (30-05-2020).

⁸⁸ Canada: Immigration and Refugee Board of Canada, *China: Information on Birth Registration for Children Born out of Wedlock*, (<https://www.refworld.org/docid/5821defa4.html>), last visited (30-05-2020).

⁸⁹ See Canada, *supra* note 88.

⁹⁰ PRC, National Health Commission, *Notice on the Management of New Edition of Birth Medical Certificate*, (<http://www.nhc.gov.cn/fys/s3585/201401/9289ca9fc9fc429c995dcf94de4eb740.shtml>), last visited (30-05-2020).

⁹¹ PRC National Health and Family Planning Commission, *Notice on Starting Using and Regulating the Management of New Edition of Medical Certificate of Birth* (2013).

⁹² See PRC National Health and Family Planning Commission, *supra* note 91.

⁹³ See PRC National Health and Family Planning Commission, *supra* note 91.

planning policy, this certificate works like a “birth permit”. According to Article 18 of the 2015 Law on Population and Family Planning, each couple is advocated by the state to bear two children.⁹⁴ Article 41 regulates that if a mother gives birth to a child in violation of Article 18, the parents shall pay the social maintenance fees.⁹⁵ The 2002 Measures of Collection of Social Maintenance Fees stipulates that citizens who bear children that are not in line with Article 18 of the Population and Family Planning Law shall pay social maintenance fees.⁹⁶ Children born out of wedlock violate the family planning policy. And in this case, parents shall pay a sum of social maintenance fees to the local family planning department to get a family planning certificate for their newborn children so that they can register the birth of their children in the Hukou system. Different provinces form their own standards on the maintenance fees. For example, in Sichuan Province, the fee for the first child born out of wedlock is three or four times the annual disposable income of urban residents and rural residents within the province.⁹⁷ For irregular migration families living in rural areas, the burden of paying social maintenance fees to register their children also defers them from actively applying birth registration for their children.

Except for required document mentioned above, the birth registration procedure of children born out of wedlock also varies in different provinces. In some regions, a procedure of notarized identity is required. For example, in Beijing, together with required documents mentioned above, birth registration of children born out of wedlock requires a parent-child identification certificate and the procedure should be further inspected and approved by the director of the police station.⁹⁸

In 2015, a new regulation (2015 national policy) was issued by the State Council, aiming at registering people without Hukou, in the Hukou system.⁹⁹ It focuses especially on the group of children born of irregular migration marriage with a Chinese parent. According to this new national regulation, if a child born to a marriage between a Chinese citizen and a foreign or stateless person who has no permanent residence in China, the child shall acquire Chinese nationality (if the child has not acquired the nationality of any other countries). To register such child in the Hukou system, the child himself or the Chinese parent shall submit a medical certificate of birth, a statement to explain undocumented marriage status, the Hukou registration booklet of the Chinese parent. If there is no

⁹⁴ PRC Standing Committee of the National People's Congress, *Law of the People's Republic of China on Population and Family Planning* (2015).

⁹⁵ See PRC Standing Committee of the National People's Congress, *supra* note 94.

⁹⁶ PRC State Council, *Measures for Administration of Collection of Social Maintenance Fees* (2002).

⁹⁷ China Family Planning Association, *Population and family planning regulations of Sichuan Province*, (http://www.chinafpa.org.cn/zcfg/gdfg/201901/t20190124_42901.html), last visited (30-05-2020).

⁹⁸ China Law, *How to Register Children Born out of Wedlock*, (<http://www.chinalawedu.com/web/3500/w11508284919.shtml>), last visited (01-06-2020).

⁹⁹ PRC State Council, *Opinion on Resolving Issues of Hukou Registration for Unregistered Citizens* (2015).

medical certificate of birth, a DNA paternity test report issued by a qualified institution is required to prove the blood relationship between the child and the Chinese citizen parent. More than twenty provinces have issued its detailed rules for the implementation of the 2015 new national regulation to register people in Hukou within each province's administrative region.¹⁰⁰ Despite the new national and local registration policies, however, there are still concerns exist in practice.

3.4. Dilemma in Practice and Black Household Children

3.4.1. DNA Paternity Test Report and Birth Registration

In accordance with the 2015 national Hukou registration policy, five provinces where irregular migration marriages prevail have issued detailed rules to implement the 2015 national policy. In 2016, Jilin¹⁰¹, Liaoning¹⁰², Guangdong¹⁰³ and Guangxi province¹⁰⁴; and in 2017, Yunnan province¹⁰⁵: each province issues a detailed regulation within each administrative region to register people who have not been registered in the Hukou system.

Generally, the rule in each province follows a common basis in accordance with the national policy with regards to register children born in irregular migration marriage. Rules in Jilin, Guangxi, Guangdong, and Yunnan provinces all regulate that children born to undocumented marriages between a Chinese citizen and a foreign or stateless person can apply for Hukou registration if the children do not have other countries nationalities. The required documents include a medical certificate of birth, a statement to explain undocumented marriage status, the Hukou registration booklet of the Chinese parent.¹⁰⁶ Jilin province discusses different situation when the mother is a

¹⁰⁰ Chinanews.com, 20 Provinces Issue Detailed Rules for Hukou Registration for Unregistered citizens, (<http://www.chinanews.com/gn/2016/09-13/8002210.shtml>), last visited (06-06-2020).

¹⁰¹ PRC, Department of Public Security of Jilin Province, *Opinions of Jilin Government on the Implementation of National Policy of Solving the Problem of Unregistered Citizens*, (http://gat.jl.gov.cn/zwgk/zcfg/hzgl/201604/t20160429_2228477.html), last visited (06-06-2020).

¹⁰² PRC, Department of Public Security of Liaoning Province, *Opinions of Liaoning Government on the Implementation of National Policy of Solving the Problem of Unregistered Citizens*, (<https://www.meipian.cn/ay0owq>), last visited (06-06-2020).

¹⁰³ PRC, Department of Public Security of Guangdong Province, *Opinions of Guangdong Government on the Implementation of National Policy of Solving the Problem of Unregistered Citizens*, (http://www.gd.gov.cn/gkmlpt/content/0/144/post_144881.html#7), last visited (06-06-2020).

¹⁰⁴ PRC, Department of Public Security of Guangxi Province, *Opinions of Guangxi Government on the Implementation of National Policy of Solving the Problem of Unregistered Citizens*, (<http://www.gxzf.gov.cn/zwgk/zfwj/zzqrmzfbgtwj/2016gzbwj/201605/P020160514319281547615.pdf>), last visited (06-06-2020).

¹⁰⁵ PRC, Department of Public Security of Yunnan Province, *Opinions of Yunnan Government on the Implementation of National Policy of Solving the Problem of Unregistered Citizens*, (http://www.yndzj.gov.cn/yndzj/_300579/482732/index.html), last visited (06-06-2020).

¹⁰⁶ See 101, 103, 104 and 105, *supra*.

Chinese citizen, and when the father has a Chinese national.¹⁰⁷

However, an obvious dilemma faced by irregular marriages families is that “foreign brides” with illegal status do not have identity cards required by the medical certificate of the birth procedure.¹⁰⁸ In such a case, Yunnan province and Guangdong province regulate that: if a medical certificate of birth cannot be provided, a DNA paternity test report issued by a qualified institution should be provided to prove that the child and the Chinese parent are biologically related.

The DNA paternity test for Hukou registration is a unique phenomenon deriving from the household registration management system in China.¹⁰⁹ Since the 2015 national policy to record unregistered citizens, there is a surge in the DNA paternity tests to register children in the Hukou system.¹¹⁰ The test is part of judicial expertise procedure and thus the family must resort to a Judicial Expertise Center recognized by public security departments or judicial departments.¹¹¹ According to an expertise center in Guangxi province, a family should make an appointment first, then bring the required valid identity documents and go to the center. After finishing an application procedure, the center will collect biological samples of the parent and the child. The report would be released within one week and the fee is 1200-yuan RMB (around 150 Eur).¹¹²

The complicated procedure and high cost of the DNA paternity test for registering Hukou cause a burden on irregular migration families, especially for those living in remote and rural areas. In order to reduce the burden on unregistered families, Jilin province has adopted a flexible policy: when a child born out of wedlock is applying for Hukou registration with his Chinese father, the local public security police station should investigate and verify the situation of the family first. The registration can proceed with a family situation statement issued by a local residential committee or village committee, and under such situation, a DNA paternity test report is not required. Only for those families that local police station cannot verify the situation of the family after a thorough investigation, a DNA paternity test report is required to register the child.¹¹³ A similar policy is also adopted in Guangxi province:

¹⁰⁷ See 102, *supra*.

¹⁰⁸ Sohu News, Vietnamese bride, how are you in Jinzhai? (https://www.sohu.com/a/167423229_747199), last visited (06-06-2020). In this case, an irregular migrant bride comes from Vietnam and married to a Chinese man. She gave birth at a local hospital in China and the hospital refused to issue a medical certificate of birth to her child because she could not provide a Chinese identity card number.

¹⁰⁹ Tencent News, The Police Resorts to DNA Paternity Test to Register a Girl in Hukou System. (<https://new.qq.com/omn/20191019/20191019A0DCPO00.html>), last visited (06-06-2020).

¹¹⁰ South China Morning Post, Surge in China DNA Paternity Tests after Call to Record Nation’s Unregistered Citizens, (<https://www.scmp.com/news/china/society/article/1913870/surge-china-dna-paternity-tests-after-call-record-nations>), last visited (06-06-2020).

¹¹¹ See Tencent News, *supra* note 109.

¹¹² Zhongzheng Expertise Center, Fee for DNA Paternity Test, (<http://gx.dna123.cn/zsoufei.html>), last visited (06-06-2020).

¹¹³ See 101, *supra*.

generally, a DNA test is required if the child born from irregular migration marriage wants to register in Hukou with his Chinese father, but due to special circumstances if the DNA paternity test report cannot be provided, the family or the local residential committee or village committee can apply for a police investigation to verify the situation of the family. And if there is no abduction, trafficking, the Hukou registration can be carried out without a DNA paternity report. Policy in Liaoning province regulates different situations based on a Chinese mother or a Chinese father. The Dandong city is on the China-North Korea border in Liaoning province. Policy in Dandong stipulates that: to register a child born out of wedlock with a Chinese father, a DNA paternity test is required; if the mother is a Chinese citizen, a medical certificate of birth is required rather than a DNA report.¹¹⁴

However, compared to an investigation and verification procedure on “family situation” carried out by local police station, irregular migration family may prefer a DNA paternity test to register the child: They would rather pay the DNA test fee for fear that irregular migrant brides in the family being investigated and repatriated by police, or they worry that the police would record the evidence that there is an irregular migration bride in the family and a further migration investigation would be carried out after finishing registering the child in Hukou. As a result, despite the 2015 national policy encouraging registering children born from irregular migration marriages, many irregular migration families still postpone registering their children until the child has to attend school at 7 years old, which requires a Hukou booklet of the child.

3.4.2. Social Maintenance Fees and Birth Registration

The 2015 national policy explicitly emphasizes that any precondition that prevents registration of unregistered citizens is prohibited; it also strengthens the new task to comprehensively solve the issue of unregistered citizens and to guarantee that each citizen is registered in the Hukou system in accordance with the law.¹¹⁵ According to the policy, two red lines that regarded as bottom lines are regulated in managing Hukou registration work across the country. Firstly, it prohibits setting any precondition to pave the way for Hukou household registration to improve social governance. Secondly, it recognizes that the right to household registration is a basic social right of each Chinese citizen. It is the premise for each citizen to participate in social affairs and exercise their legal rights. All levels of government institutions should respect and promote the basic right of Chinese citizens to household registration, and no one should infringe the realization of this right at any time.¹¹⁶ The

¹¹⁴ PRC, Department of Public Security of Dandong City, *Opinions of Dandong Government on the Implementation of National Policy of Solving the Problem of Unregistered Citizens*, (<http://dd110.dandong.gov.cn/m/news/78193>), last visited (07-06-2020).

¹¹⁵ See 99, *supra*.

¹¹⁶ Sina News, Prohibition on Any Preconditions for Household Registration, (<http://news.sina.com.cn/o/2016-01-15/doc-ixnqrkc6436330.shtml>), last visited (10-06-2020).

policy aims at registering all unregistered citizens based on the data of the sixth national population census. With strict words, the policy shows the determination of the central government to solve the problem of “black household children”- a Chinese term refers to unregistered children with Chinese nationality. The policy recognizes the fact that due to policy barriers in different provinces, the “black household children” issue is prominent in many regions and children’s rights to birth registration and identity are violated. All “black household” children should be registered immediately in accordance with the 2015 policy, no matter when and why they were not registered.¹¹⁷ And this is not the first time the central government focuses on the issue of “black household children”.

One principal reason why the issue of “black household children” persists for a long time is the link between birth registration and the family planning birth control policy.¹¹⁸ Children born to undocumented irregular migration marriages violate the family planning policy and as mentioned above, an amount of social maintaining fee should be paid to the local family planning department to get a family planning birth permit certificate. These children are referred to as “additional children” in China.

In many provinces, proof of paid social maintenance fee is required by the Hukou registration institution to register a child whose born violates the family planning policy. In some other regions, although the paid social maintaining fee certificate is not a must to register a child whose born violates the family planning policy, the Hukou registration institution would submit the list of these additional children to the local family planning department on a regular basis.¹¹⁹ Therefore, despite the 2015 policy, many families with children born of undocumented marriages are still facing the financial burden to pay the social maintenance fees and are not positively register their children in the Hukou system: they are still waiting to see further policy regarding social maintenance fees.

One family in Beijing expressed their concern regarding their second child born violating the family planning policy: *“We heard about the 2015 policy, but we still have not registered our second child. Because we are worried that once we register him in the Hukou system, the personal information of him will be used by the local family planning department as evidence against us to pay the social maintenance fees. Besides, the city has a strict population control policy, so we are not sure whether he can really enjoy the social benefits if he is registered.”*¹²⁰ Another family with a 2-year-old

¹¹⁷ See 99, *supra*.

¹¹⁸ Before 2015, according to the family planning policy in China, most couples in China can have one child; after 2015 the two-child policy was introduced. See 67, *supra*. See also (https://en.wikipedia.org/wiki/Family_planning_policy), last visited (10-06-2020).

¹¹⁹ Fenghuang Hainan, Difficulties in Turning Black Households into Regular Ones, (http://hainan.ifeng.com/a/20160115/4200274_0.shtml), last visited (10-06-2020).

¹²⁰ PRC, Central Government, Tracking the Implementation of Settlement Policy for Unregistered Citizens, (http://www.gov.cn/xinwen/2016-02/22/content_5044740.htm), last visited (10-06-2020).

unregistered child also said that: “Now the two-child policy is in force. Our child is born before the two-child policy and we still need to pay social maintenance fees for him. We feel it is not fair and the social maintaining fee regulation should be improved.”¹²¹ In the meantime, survey shows that many families that have registered their “additional child” after the 2015 national policy think that: we decide to register the child first no matter what, but we are not sure about paying the social maintenance fees: it depends and we will wait to see.¹²² Furthermore, as many provinces are amending the local family planning policies, many families are waiting for a new policy that exempts them from the social maintenance fees and they don’t want to take the risk to register their children.¹²³

The 2015 policy requires that all concerned institutions should amend or abolish their policies that are inconsistent with the 2015 national policy. It strongly stresses that any old regulation that does not match up the new 2015 policy should be abolished and future birth registration work must strictly follow the 2015 policy.

When the 2015 national policy was issued, the deputy director of the National Family Planning Department made it clear that the national health and family planning commission would actively cooperate with the public security department to manage the Hukou registration work for unregistered children. For black household children whose born violate the family planning laws and regulations, they will also file a case for investigation and collect evidence according to relevant laws and regulations, and then require the family to pay social maintenance fees legally.¹²⁴

In fact, after the 2015 policy prohibiting any kind of precondition that prevents the registration of “black household children”, family planning departments also face challenges. The department in Anhui province says that “if the Hukou registration is totally disconnected from social maintenance fees, it is hard for us to charge that fee in the future.” However, it is a new trend to cancel the link between birth registration and social maintenance fees. How to ensure the implementation of the family planning policy under the new 2015 policy is a difficult task for the family planning department across the country. Since the 1980s, one important way to ensure the charge of the social maintenance fees and the implementation of the family planning policy is to set it as a precondition to birth registration. Without the link to birth registration, family planning departments in each region actually lose their way to manage the family planning plan.¹²⁵

Consequently, a dilemma occurs that at one hand, the 2015 policy and public security institutions are

¹²¹ See 120, *supra*.

¹²² See 120, *supra*.

¹²³ Sohu News, Uncovering the Difficulties of Turning 13 Million Black Households into Regular Ones: Policy Barriers Still Exist in Some Places, (https://www.sohu.com/a/54611773_119536), last visited (10-06-2020).

¹²⁴ See 120, *supra*.

¹²⁵ See 123, *supra*.

committed to registering all “black household children” in the Hukou system: any precondition is prohibited and the certificate of paid social maintenance fees is not required document. On the other hand, however, the black household families are reluctant to register their children for fear of further fine for violating family planning policy.

3.4.3. Black Household Children and Denied Rights

The issue of unregistered children (black household children) has been a constant international children’s rights concern for a long time. In 1996, the CRC Committee showed its serious concern on black household children in its first concluding observations on China. It noticed that: “*deficiencies in the registration system lead to children being deprived of basic safeguards for the promotion and protection of their rights*”.¹²⁶

In this document, the CRC Committee further recommends that the State party should consider the possibility of reviewing the effectiveness of the existing system of registration.¹²⁷ In 2005, in its second concluding observation on China, although the CRC Committee notes “*the significant efforts made by the State party to address the Committee’s previous concerns regarding the non-registration of children at birth*”,¹²⁸ it still shows concerns that “in part because of existing family planning policies, all children are not systematically registered immediately after birth in mainland China”.¹²⁹

In 2013, in the third Concluding Observations on China the CRC continues shows great concern on the issue of black household children:

*[t]he rate of birth registration is low [...] The current family-planning policies on birth registration, including the issuance of birth certificates and the negative impact of financial [...] significantly deter parents or guardians from registering their children [...] Numerous administrative requirements for obtaining a birth certificate and complex registration procedures create many barriers to birth registration.*¹³⁰

It recommends that the government should consider: “*reform family planning policies in order to remove all forms of penalties and practices that deter parents or guardians from registering the birth*”

¹²⁶ UN Committee on the Rights of the Child, *Concluding Observations: China*, CRC/C/15/Add.56, at 16 (1996).

¹²⁷ See UN CRC Committee, *supra* note 99, at 37.

¹²⁸ UN Committee on the Rights of the Child, *Concluding Observations: China*, CRC/C/CHN/CO/224, at 42 (2005).

¹²⁹ See 128, *supra*.

¹³⁰ UN Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of China*, CRC/C/CHN/CO/3-4, at 39 (2013).

of their children".¹³¹

Especially, rights to identity and birth registration of children born from irregular migration marriages are mentioned twice in this document: "*children whose mothers are from the Democratic People's Republic of Korea lack legal identity and access to basic rights, particularly education, as they are not registered under the Hukou system*".¹³²

And it recommends that the state party should "... (women who have children with Chinese men) ... ensure that children of mothers from the Democratic People's Republic of Korea have access to fundamental rights, including the right to identity and education".¹³³

In this 2013 Concluding Observations, it is a pity the CRC Committee only focuses on the right to identity of children born to marriages between mothers from North Korea and Chinese fathers in northern China, and those "black household" children born from irregular migration marriage in southwestern China are ignored. Unregistered "black household" children born from irregular migration marriages across the country should be focused equally and no one should be left behind.

Since the 2015 national policy, detention or repatriation of the irregular migrants in the family is no longer the first concern of registering their children in the Hukou system, since irregular migration families have the alternative choice to do a DNA paternity test in order to register their children. The new barrier faced by them is the DNA test cost and the social maintenance fees as analyzed above.

The procedure and costs of DNA test, together with the mandatory social maintenance fees defer irregular migration marriage families from actively registering the birth of their children. The public security departments usually take positive action to register "black household children" during the national population census that carried out every ten years. The next census is planned in November 2020;¹³⁴ therefore, part of present black household children is expected to be registered in the Hukou system by the end of 2020. However, as different provinces have their own work focus, it is hard to estimate which group of unregistered children would benefit from the coming national census.

The purpose of charging social maintenance fee is to cover the public financial support on additional children and to prevent further violation of the family planning policy. Consequently, although parents are the objects of family planning management, the rights of children born from irregular migration marriages are actually violated and these "black household" children are in fact taking responsibility

¹³¹ See UN CRC Committee, *supra* note 103, at 40.

¹³² See UN CRC Committee, *supra* note 103, at 81.

¹³³ See UN CRC Committee, *supra* note 103, at 83.

¹³⁴ PRC, Bureau of Statistics, 7th National Population Census, (http://www.stats.gov.cn/zjtj/zdtjgz/zgrkpc/dqcrkpc/dqcrkpcrpzs/202005/t20200507_1743565.html), last visited (12-06-2020).

for their parents' mistake.

These unregistered "black household" children born from irregular migration marriages have no Hukou information or identity cards. They are excluded from normal social life and may suffer all kinds of discrimination just because they are called as "black household children" and are labeled as "immoral" by others since their birth. The "black household" label has brought a negative impact on the psychological development of these children. As an ignored group of children, they are unknown and unrecognized by the public. Without documented identities, these children always have feelings of emptiness and not belonging. Furthermore, unequal life experience since birth may motivate their revenge behavior against the society: in one case, an 8-year-old "black household" child says that he wants to join a gang to retaliate the family planning department because his mother cannot afford the social maintenance fee to register him.¹³⁵

This group of unregistered children is not protected by Chinese law, and they have no way to exercise the economic and social rights they are entitled to under the CRC. Their legal rights to education, medical care and social support are denied because of their undocumented status.

3.5. Concluding Remarks

Equal rights to identity and birth registration of children from irregular migration marriages are recognized both in International children's rights treaties and in China's domestic laws. Although a new national policy was launched in 2015 aiming at registering all children in the Hukou, in the implementation and enforcement of the 2015 national policy there are all sorts of administrative obstacles preventing the realization of rights to identity and birth registration of children born from irregular migration marriages.

Barriers arise from the DNA paternity test procedure, as families may not understand about the test and may not actively take the time and money-consuming DNA test for their children. And considering that the most irregular migration families living in rural areas with low income¹³⁶, these parents' concern for the payment of social maintenance fee cannot be easily eased unless there is clear regulation making it explicit that the birth registration is not linked to the social maintenance fee.

Therefore, with the effective 2015 national policy committed to realize the right to birth registration for all children, detailed enforcement regulation in local levels should be launched to ease the concerns of parents who still reluctant to register their children. And special attention shall be paid to the need and actual situation of children born from irregular migration marriages so they can also benefit from the

¹³⁵ Youth.cn, Black Household Children: Want to Retaliate the Family Planning Department after Growing up, (http://news.youth.cn/jsxw/201312/t20131219_4408090.htm), last visited (12-06-2020).

¹³⁶ See Yue, *supra* note 2.

2015 national policy to realize the rights to birth registration equally as all other children in China.

4. Impacts of Non-registration on Social and Economic Rights of Children

4.1. Introduction

All children enjoy equal social and economic rights as codified in the CRC. The right to birth registration is closely linked with the realization of social and economic rights of children including rights to education, health care, and social supports. Unregistered children born from irregular migration marriages are not recorded in the Hukou system, and are invisible in the society as they have no social identity and status. Therefore, being vulnerable and discriminated, they find obstacles in accessing to education, medical care, and social support and protection.¹³⁷

In respect to right to education, China has a series of laws and administrative regulations aiming at providing 9-year free compulsory education for all school-age children without any kind of discrimination.¹³⁸ But without Hukou address, unregistered children born from irregular migration marriages find difficulties in enrolling a school within his “school districts” based on Hukou residency address, and are often excluded from higher education and development opportunities.¹³⁹ As to right to the highest standard of health, “black household” children from irregular migration parents meet barriers in taking vaccine and in accessing to basic health care.¹⁴⁰ And they are also excluded from national social protection and supports polices because of their unregistered status.¹⁴¹ Therefore, with the launch of the 2015 national policy requiring realizing social and economic rights for all unregistered citizens, further steps should be adopted to pay attention to this group of ignored children and to realize their social and economic rights without any form of essential and procedural discriminations against them.

4.2. Children’s Rights to Education and Development

4.2.1. International Legal Framework and State’s Obligations

The right to education is recognized in many international human rights treaties.¹⁴² As right holders, children have the equal right to education and there should be nondiscrimination in their access to education. Article 28 of the CRC requires that state party should recognize and realize children’s right

¹³⁷ UN General Assembly, *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law*, A/HRC/27/22 (2014), at 18.

¹³⁸ PRC Standing Committee of the National People's Congress, *Compulsory Education Law of the People's Republic of China* (2015).

¹³⁹ See Yue, *supra* note 2.

¹⁴⁰ See Yue, *supra* note 2.

¹⁴¹ See Yue, *supra* note 2.

¹⁴² L. Laura, and P. O’Lynn, *The Education Rights of Children*, International human rights of children (2018).

to education “on the basis of equal opportunity” and should “make primary education compulsory and available free to all”.¹⁴³ Article 4 stipulates that state parties shall “take all measures to the maximum extent of available resources to realize education right of children”.¹⁴⁴ Equal access to education also matters children’s right to development as recognized in Article 6 of the CRC.¹⁴⁵ And non-discrimination is a basic principle recognized by the CRC and should be applied to children’s right to education.¹⁴⁶ Inequity in access to education opportunity is discriminatory and violates children’s rights.

Discrimination in access to education right is defined in the Convention Against Discrimination in Education by the United Nations Educational Scientific and Cultural Organization in Article 1 as:

*[a]ny distinction, exclusion, limitation or preference which being based on [...] birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (a) Of depriving any person or group of persons of access to education of any type or at any level.*¹⁴⁷

The promotion of equal access to education is an enduring focus of the CRC Committee. In its first General Comment, it points out that “*the child’s right to education is not only a matter of access [...] but also of content*”.¹⁴⁸ States parties are required to report “gross and net enrolment and attendance rates for primary and secondary schools and vocational training centers” in periodic reports.¹⁴⁹ And in period Concluding Observations, the Committee shows concerns on children with denied access to education opportunities, and promotes equal access to education for all children all the time. The Unicef report on Education and Children Development also puts emphasis on ensuring “inclusive enrolment and equal treatment of all school-aged children”.¹⁵⁰

Furthermore, Article 13 of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes that the right of everyone to education and “primary education shall be compulsory and available free to all”.¹⁵¹ In its General Comment, non-discriminatory accessibility to education is further emphasized: “education must be accessible to all, especially the most vulnerable

¹⁴³ See 55, *supra*.

¹⁴⁴ See 55, *supra*.

¹⁴⁵ See 55, *supra*.

¹⁴⁶ See 55, *supra*.

¹⁴⁷ UN *Convention against Discrimination in Education*, UNTS vol. 429, at 93 (1960).

¹⁴⁸ UN Committee on the Rights of the Child, *General Comment no. 1*, CRC/GC/2001/1, at 3 (2001).

¹⁴⁹ UN Committee on the Rights of the Child, *Treaty-specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties*, CRC/C/58/Rev.3, at 22 (2015).

¹⁵⁰ Unicef, *Child-Friendly, Equitable and Quality Basic Education: 6-12 Years* (2017).

¹⁵¹ UN *International Covenant on Economic, Social and Cultural Rights*, vol. 993, p. 3 (1966).

groups, in law and fact, without discrimination on any of the prohibited grounds”.¹⁵²

4.2.2. Domestic Policies and Barriers to Access

Under the obligation of the CRC, China must ensure that all children have equal access to education without any kind of discrimination.

China’s Constitution law stipulates that all Chinese citizens are equal before the law;¹⁵³ and all Chinese citizens “have the duty as well as the right to receive education”.¹⁵⁴

Since the ratification of the CRC, China confirms the education right of children in a series of domestic laws and policies. The Compulsory Education Law regulates that 9-year compulsory education is adopted within the mainland China and Chinese children reached the age of 6 “shall have equal right and have the obligation to receive compulsory education, regardless of the gender, nationality, race, status of family property, religion, belief” and children’s parents or legal guardians shall “enroll their children who reach the school-age in school to receive the compulsory and free education”.¹⁵⁵ The Minor Protection Law also confirms that minors shall “*enjoy the right to education [...] enjoy their rights equally in accordance with law*” and “parents or other guardians of minors shall respect the minors’ right to receive an education, must ensure that school-age minors go to school to receive and complete compulsory education”; besides, schools shall also “respect the minor students’ right to receive an education”.¹⁵⁶ Ministry of Education also repeatedly underscores that “we are committed let every child have a fair and quality education”.¹⁵⁷

The China National Program for Child Development 2011-2020 (2011-2020 National Program) aims at enhancing the government’s abilities and responsibilities to promote children’s rights. Regarding equal access to education, it requires the government should “*ensure equal education for all children, balance educational resources allocation, and narrow [...] disparities*” and “raise to 95% enrollment rate of nine-year compulsory education, including equal education for all children”.¹⁵⁸

¹⁵² UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education* (art. 13), E/C.12/1999/10 (1999).

¹⁵³ PRC National People’s Congress, *Constitution of the People’s Republic of China*, art. 33 (1982).

¹⁵⁴ See PRC National People’s Congress, *supra* note 120, art. 46.

¹⁵⁵ PRC Standing Committee of the National People’s Congress, *Compulsory Education Law of the People’s Republic of China*, arts. 2, 4 and 11 (2015).

¹⁵⁶ PRC Standing Committee of the National People’s Congress, *Law of the People’s Republic of China on the Protection of Minors*, arts. 3, 13 and 18 (2012).

¹⁵⁷ Xinhua Net, Minister of Education Chen Baosheng Answers Questions from Chinese and Foreign Journalists, (<http://www.xinhuanet.com/politics/2018lh/zb/20180316a/index.htm>), last visited (16-06-2020).

¹⁵⁸ PRC National Working Committee on Children and Women under State Council, *China National Program for Child Development 2011-2020* (2001).

The right to education is a basic right granted to each Chinese citizen by the Constitution. Children born in the context of irregular migration marriages, as Chinese citizens, also bear the right to education as any other children in China without any discrimination. Above domestic laws refer to “all Chinese children” and implicitly include those undocumented and unregistered children.

However, despite a series of national laws and policies aiming at promoting equal admission and universal access to the 9-year compulsory education for all, the legislation does not necessarily immediately eradicate inequalities and discrimination in right to education. There are difficulties faced by undocumented children born in the context of irregular migration marriages to realize their right to attend school because their unregistered status and lack of valid identity documents cannot meet administrative requirements to enroll a school in practice.

In its third Concluding Observations on China, the CRC Committee routinely puts emphasis on children who are experiencing denied access to education. In the third Concluding Observations on China, the CRC Committee concerned: “*the increasing disparities in access to and availability of education for children [...] whose mothers are from the Democratic People’s Republic of Korea*”¹⁵⁹ and “*children whose mothers are from the Democratic People’s Republic of Korea lack legal identity and access to basic rights, particularly education*”.¹⁶⁰ The Committee thus advises the government should ensure “*children of mothers from the Democratic People’s Republic of Korea have access to fundamental rights, including the right to [...] education*”.¹⁶¹

In China, in accordance with the Compulsory Education Law, all primary and junior schools are divided into different “school districts” in different residency area to promote equal education opportunities.¹⁶² The education department of each county-level government is primarily responsible for the management of admission and enrollment of the 9-year compulsory education. Based on the Hukou registration, the enrolment is determined by the area of residence of the child (family): a school-age child should enroll the schools within his “school districts” in compliance with his residency address recorded on his family’s Hukou booklet.

Besides, to enroll in a primary school a school-age child should register in the national education information management system. The system will assign a unique student registration number to each child which works as an identification number throughout the whole education years of the child. The education departments use this system to “*promote fair and open management of the education*”

¹⁵⁹ See UN CRC Committee, *supra* note 53, at 75.

¹⁶⁰ See UN CRC Committee, *supra* note 53, at 81.

¹⁶¹ See UN CRC Committee, *supra* note 53, at 83.

¹⁶² OECD, Education in China: A Snapshot (2016).

throughout the country.¹⁶³ Every school-age child should have the equal right to be registered in the system as it is the first step to enroll in school. Usually, a Hukou registration booklet and an identification card number are required to register in the system and get the student registration number.¹⁶⁴

Since 2016 the online education information management system is adopted. The national education department makes it clear that all school-age children should be registered in the system, the registration is the outcome of enrolment in school, but not the precondition of enrollment. It requires that no local education departments or schools shall refuse the enrolment of a child who is not registered in the education information system due to a lack of Hukou or identification number.¹⁶⁵

In 2015, with the national policy aiming at registering unregistered children in the Hukou system, these children's rights to education are also centered. The State Council underscores that in order to realize unregistered children's equal right to education, the discrimination they may face should be abolished in all levels. Firstly, newly registered children have the equal right to education. For school-age children who have no Hukou registration or have not finished the registration, they shall enroll in schools to receive compulsory education without any barriers. Education institutions cannot refuse to enroll them because they have no Hukou registration or their born violates the family planning policy. Besides, all local education departments are responsible to carry out the case-by-case investigation on all unregistered school-age children living within its administrative residence area. Then the local education department should arrange the immediate enrollment of these children. Under such circumstances, these black-household children can be registered in the Hukou system after they enroll in schools. And schools are prohibited from charging additional fees for black-household students.¹⁶⁶

The 2015 policy attracts attention to the realization of the right to compulsory education to black-household children across the country. However, unregistered children born from irregular migration marriages are still usually excluded from accessing to higher education and their opportunities to pursue further education after they finish the 9-year compulsory education. Most irregular migration families are in rural villages with backward economy and culture level, children born to these families tend to leave school early and look for a job to support the family, even the right to education is

¹⁶³ See 162, *supra*.

¹⁶⁴ Sina News, 10-year-old Black-household Boy Still Has Not Entering School, (<http://edu.sina.com.cn/news/temp/2016-11-29/doc-ifyyawmm3763386.shtml>), last visited(17-06-2020).

¹⁶⁵ PRC, Ministry of Education, *Answers about the Management of Enrolling Primary and Secondary Schools*, (http://www.moe.gov.cn/jyb_xwfb/gzdt_gzdt/s5987/201608/t20160831_277196.html), last visited(17-06-2020).

¹⁶⁶ Sohu News, A Comprehensive Solution to the Problem of Household Registration And Settlement for People Without Household Registration in China, (https://www.sohu.com/a/54590436_103035), last visited (17-06-2020).

accessible for them.¹⁶⁷ Losing opportunities to further education impacts their right to development and impose the risks of child labor or even trafficking on this group of children. The situation turns more complicated when this group of children are “left behind” as their parents become migrant workers.

Therefore, to realize the education rights of children born in the context of irregular migration marriages, each level of education department and schools should take active measures to count and register this group of children, and instruct the families to enroll these children to available schools. And an education department- school – family mechanism should be set up to jointly realize equal education rights of children born from irregular migration marriages.

4.3. Children’s Rights to the Highest Standard of Health

4.3.1. International Legal Framework and State’s Obligations

Under the CRC, all children are entitled to the equal right to enjoy the highest attainable standard of health. Article 24 holds that state parties shall ensure that “*no child is deprived of [...] right of access to such health care services*”, including “primary health and preventive health care”.¹⁶⁸ The article also entitles the “pre-natal and post-natal health care for mothers”.¹⁶⁹ This Article is in accordance with Article 25 of the Universal Declaration of Human Rights which codifies that everyone has the right to health and “mother and children are “entitled to special care and assistance”.¹⁷⁰ And Article 12 of the International Covenant on Economic, Social and Cultural Rights also notes the state’s obligation to ensure “everyone’s enjoyment of the highest attainable standard of physical and mental health” and the full realization of “the healthy development of the child”.¹⁷¹

In its General Comment 15, the CRC committee guarantees the equal right to health for all children without discrimination:

*[i]n order to fully realize the right to health for all children, States parties have an obligation to ensure that children’s health is not undermined as a result of discrimination, [...] including the child’s, parent’s or legal guardian’s national, ethnic or social origin [...] birth or other status.*¹⁷²

¹⁶⁷ Q. Wan, A Study on the Irregular Migration Marriages in China, *Chinese Academy of Social Science Graduate School* (2017).

¹⁶⁸ See 55, *supra*.

¹⁶⁹ See 55, *supra*.

¹⁷⁰ See 70, *supra*.

¹⁷¹ See 151, *supra*.

¹⁷² UN Committee on the Rights of the Child, *General Comment No. 15 on the Right of the Child to the Enjoyment of the*

It especially emphasizes the importance of birth registration for the realization of children's right to the highest standard of health: "universal free birth registration is a prerequisite" to eliminate "barriers to children's access to health services".¹⁷³ And since health service for women during and after their pregnancy is essential for realizing their children's right to health and development, the CRC Committee recommends that state parties should ensure "universal access to a comprehensive package of sexual and reproductive health interventions should be based on the concept of a continuum of care from pre-pregnancy, through pregnancy, childbirth and throughout the post-partum period".¹⁷⁴

UNICEF has also made explicit that children's right to health is the start to realize their right to life and to develop the full potential of children,¹⁷⁵ which is one of the key principles under Article 6 of the CRC.

Therefore, state parties have the positive legal obligations to integrate all children, irrespective of their legal status, into the national health care system at the beginning of childhood. The state shall ensure equal access to health care services and health care institutions for all children within its jurisdiction, meanwhile providing pre-natal and post-natal health care for mothers.

4.3.2. Domestic Policies and Barriers to Access

As a ratifying state party to the CRC, the national government of China have the legal obligation to ensure all its domestic policies are in compliance with the CRC regarding equal right to access to health care services for all children. In China's legal system, there is a series of laws and regulations guaranteeing children's right to health care services.

The Law on Maternal and Infant Health Care holds in Article 2 that: "*the State shall develop the maternal and infant health care [...] provide necessary conditions and material aids so as to ensure that mothers and infants receive medical and health care services*".¹⁷⁶ Article 14 emphasizes the health care for the fetus and newborn babies, as well as pregnant women and post-natal health care. And Article 24 formulates that medical and health institutions shall carry out "physical check-up and preventive health care including vaccination to infants".¹⁷⁷ The 2018 Law on the Promotion of Basic

Highest Attainable Standard of Health, CRC/C/GC/15, at 8 (2013).

¹⁷³ See 172, *supra*, at 28.

¹⁷⁴ See 172, *supra*, at 53.

¹⁷⁵ Unicef, *Is Health Care Accessible?* (2017).

¹⁷⁶ PRC Standing Committee of the National People's Congress, *Law of the People's Republic of China on Maternal and Infant Health Care* (2017).

¹⁷⁷ See 175, *supra*.

Medical and Health Care regulates in Article 24 that the state “shall develop the maternal and child health care cause, establish and improve maternal and child health care service system, provide health care and common disease prevention and control s The state shall adopt measures to provide citizens with services such as pre-marital health care and maternal health care, promote reproductive health, and prevent birth defects. Services for women and children, to guarantee the health of women and children.¹⁷⁸

However, despite the national laws and policies, there are barriers faced by undocumented children in the context of irregular migration marriages in realizing their right to the highest standard of health.

In the 2013 Concluding Observations, the CRC Committee dedicates specific attentions to the barriers to children’s access to health care services: “it is deeply concerned about the persistence of health disparities”,¹⁷⁹ and it recommends the government should:

[s]trengthen efforts to address, as matter of urgency, the existing disparities [...] to ensure that all children in mainland China enjoy the same access to and quality of health services.¹⁸⁰ [...] take all measures to ensure that all children and their families have access to effective redress, including free medical treatment and adequate compensation.¹⁸¹

Unregistered children born from irregular migration marriages face a lack of availability of public health services. Taking the China National Immunization Program (NIP) as an example. The NIP was launched in 1978, and it is proved a successful health intervention to protect young children from up to 12 preventable diseases.¹⁸² In 2004, the Law on Prevention and Treatment of Infectious Diseases stipulates in Article 15:

[t]he State practices a planned prophylactic vaccination system [...] a system by which certificates are issued to children who have received prophylactic vaccination free of charge. Medical agencies, disease prevention and control institutions and guardians to children shall cooperate to ensure that all children receive prophylactic vaccination in time since birth.¹⁸³

¹⁷⁸ PRC Standing Committee of the National People's Congress, *Law of the People's Republic of China on the Promotion of Basic Medical and Health Care* (2019).

¹⁷⁹ See UN CRC Committee, *supra* note 53, at 62.

¹⁸⁰ See UN CRC Committee, *supra* note 53, at 63.

¹⁸¹ See UN CRC Committee, *supra* note 53, at 66.

¹⁸² Unicef, *Children in China: An Atlas of Social Indicators 2018*, National Immunization Programme (2018).

¹⁸³ PRC Standing Committee of the National People's Congress, *Law of the People's Republic of China on the Prevention and Treatment of Infectious Diseases* (2004).

According to the Regulation on the Management of the NIP, each child must be granted a vaccination certificate before the child receives free vaccination. The certificate should be applied by parents or legal guardians within 1 month (two months in rural areas) after the child is born; the management of the certificate is based on the child's Hukou residency address. To apply for a vaccination certificate, required documents usually include the Hukou booklet of the family and medical birth certificate of the child. The vaccine certificate is required to enroll in kindergartens and schools.¹⁸⁴

Under such policies, unregistered black household infants born from irregular migration marriages are likely to be excluded from the NIP, since they don't have the required Hukou registration booklet to apply for a vaccination certificate to have access to free vaccination services. In one case, a black household boy cannot get vaccination until he is 5 years old.¹⁸⁵ This invisible group of children are thus exposed to a high risk of disease infection, and also bring disease control risks to the local community.¹⁸⁶ In some cases, local community workers and health care givers have committed to visiting villages house by house to find out black household children and arrange free immunization for them to ensure their equal right to preventive health care. However, without a Hukou registration, this kind of protection lacks legal standing and is instable meanwhile causing enormous socioeconomic costs.¹⁸⁷

Barriers also arise from limited access to basic health services. Without an identification card or Hukou household booklet, one cannot register an appointment at the hospital for health care service except for emergency situations, nor can they get a prescription from the doctor to buy medicine. Most unregistered black household children thus resort to using other's identity to get health care or going to incompetent small hospitals.¹⁸⁸ As a result, undocumented children born in the context of irregular migration marriages rarely have access to specialist health care that meets their demand. This will have impacts on these children's state of being healthy in an early age and their further development.

Another issue concerns the pre-natal and post-natal health care for irregular migrant mothers, which aims at preventing maternal mortality and morbidity and promoting the health and well-being of mother and newborn child. Without a Chinese nationality and a legal Hukou registration status,

¹⁸⁴ PRC Ministry of Health, *Regulation on the Management of the National Immunization Program* (1998).

¹⁸⁵ Sohu News, 5-year-old Black-household Boy Finally Got His Vaccine, (https://www.sohu.com/a/314735997_100188379), last visited (21-06-2020).

¹⁸⁶ HealthChina.com, Let Black Households Enjoy the Right to Health Equally as Soon as Possible, (http://health.china.com.cn/2016-01/18/content_8524495.htm), last visited (21-06-2020).

¹⁸⁷ See 186, *supra*.

¹⁸⁸ Fenghuang News, Troubles Faced by Black-household:Cannot Enroll in Schools or Buy Medicine, (http://phtv.ifeng.com/a/20160101/41533132_1.shtml), last visited (21-06-2020).

irregular migrant mothers have limited access to obtaining pre-natal and post-natal support under the national policy, including regular pre-natal examinations, timely production instruction and education, adequate pre-natal post-natal care and childbearing insurance. Barriers may also exist in their access to health care institutions during their delivery because they have no legal identification. Furthermore, villages on south-east China border areas have less-developed health care system and higher HIV infection rates, which posts huge health risks on children born in these areas.¹⁸⁹ Violations of health rights of children born from irregular migration families are thus aggravated.

Therefore, to realize the right to the highest standard of health of children born from irregular migration marriages, further specific strategies that increase access to health care services and institutions for both this group of children and their mothers should be adopted, and immediate birth registration constitutes the basis for realizing children's right to health in the context of irregular migration families.

4.4. Children's Rights to Social Support and Welfare

4.4.1. International Framework and State's Obligations

Article 26 of the CRC commits state parties to take all necessary measures to realize children's right to benefit from social security including social insurance.¹⁹⁰ Article 27 formulates that state parties shall recognize children's right to "a standard of living adequate for the child's physical, mental, spiritual, moral and social development" and shall take appropriate measures to assist parents in realizing children's right to minimum standard of living, and shall "provide material assistance and support program" when necessary.¹⁹¹ And according to Article 4, to realize the social and economic rights of children, states shall take domestic measures "to the maximum extent of their available resources".¹⁹²

In General Comment 19, the CRC Committee underscores equal right for all children to social support and welfare without discrimination "in budget-related legislation, policies or programs, in their content or implementation".¹⁹³ Besides, to achieve substantive equality, States parties shall "identify groups of children that qualify for special measures".¹⁹⁴

¹⁸⁹ See Yue, *supra* note 2.

¹⁹⁰ See 55, *supra*.

¹⁹¹ See 55, *supra*.

¹⁹² See 55, *supra*.

¹⁹³ UN Committee on the Rights of the Child, *General Comment No. 19 on Public Budgeting for the Realization of Children's Rights (art. 4)*, CRC/C/GC/19, at 41 (2016).

¹⁹⁴ See UN CRC Committee, *supra* note 160, at 43.

In short, state parties have positive obligations under the CRC to provide social support and welfare to assist families in realizing children's right to the minimum standard of living. The domestic supporting measures should be planned to the maximum extent of domestic resources and should be committed to realizing substantive equality for all.

4.4.2. Domestic Policies and Limited Access

The 2011-2020 National Program stresses the improvement of the well-being and welfare of children to realize the all-round development of all children. One of the program goals is to expand the scope of children's welfare system and to establish an inclusive children's welfare system.¹⁹⁵ It adopts the policy to improve the minimum living security system for all urban and rural children, and improve the living standards of children from poor families through classified insurance. It also guarantees the gradual equalization of basic public services for all children without discrimination.¹⁹⁶ The National Development Program for Children in Poor Area (2014–2020) was also adopted in 2014 to comprehensive social support and welfare services and interventions for nearly 40 million children living in poor areas.

Furthermore, the National Anti-poverty policy is the main strategy focusing on supporting children in poor families with their need for basic living, health care, and education. This aid policy is implemented for different classified groups of children based on their situation.¹⁹⁷ In 2007, the rural minimum living security was adopted to guarantee basic living standards for children in poor rural areas. At the same time, the government also launched a national nutrition improvement program for all school-age children.¹⁹⁸

In the 2013 Concluding Observation, the CRC recommends that the government should “*eliminate [...] disparities in children's standard of living through social protection and targeted programs for children who are particularly vulnerable to poverty*”.¹⁹⁹ Although above national policies have greatly improved the overall development of the majority of children in China over the past ten years,²⁰⁰ unregistered children born in the context of irregular migration marriages are mostly excluded from the social support and poverty reduction programs in China. Without a Hukou registration an identity card number, this group of children is invisible in the national social support and protection system. Black household children in rural areas cannot get the distribution of land and homestead they are

¹⁹⁵ See 158, *supra*.

¹⁹⁶ See 158, *supra*.

¹⁹⁷ C. Zuo, *The Evolution of China's Poverty Alleviation and Development Policy 2001-2015*, at 219 (2019).

¹⁹⁸ See 197, *supra*, at 218.

¹⁹⁹ See UN CRC Committee, *supra* note 53, at 74.

²⁰⁰ See 197, *supra*, at 218.

entitled to, neither can they benefit from the minimum living security policy.

Additionally, in the context of irregular migration families, irregular migrant mothers in the families usually have no work or do low-paid illicit work and the burden to support the whole families are mainly on the father. These families are most poverty-stricken and are in great need in social support provided by the state to realize their children's social and development rights. Since Hukou entitles children the social support services in their residency area, unregistered children lack access to the minimum living support and are excluded from the basic social welfare coverage, the right to the adequate living standard of children in the context of irregular migration marriages are largely violated. Compared to other groups of children, their vulnerabilities increase; and the social divides and development gaps among children are also aggravated.

To sum up, in China most irregular migration families are living below the poverty line and should be the center of social support and welfare work. However, unregistered children born from irregular migration marriages, together with their irregular migrant mothers have limited access to the national social support and welfare programs. Most children in the context of irregular migration families are facing deprivation and poverty, and they are in particular need of social support and welfare measures. Specific social support strategies on this group children are needed to implement the equal right to the minimum standard of living of them.

4.5. Concluding Remarks

With the 2015 national policy aiming at eliminating administrative discriminatory procedural obstacles against unregistered children in all matters affecting them, unregistered children in the context of irregular migration marriages still face dilemma in accessing to social and economic recognized by national laws and policies in local levels across the country. The need, vulnerability of this group of children shall be paid special attention in policy-making procedures of all legislative and administrative levels.

All levels of local government and administrative institutions should further develop their policies in accordance with China's obligation under the CRC and the 2015 national policy, to guarantee equal access of children in the context of irregular migration marriages to education, health care, and social support and protections, and to ensure the full realization of their access to social and economic rights.

5. Further Steps to Realize the Right to Identity of Children in the Context of Irregular Migration Marriages

5.1. Introduction

For the full and universal realization of rights to birth registration and identity of children born from irregular migration marriages in China, it is important to take effective legislative and administrative measures to protect the rights they entitled. A children's rights centered method should be introduced to the government's working methods. Birth registration policies and procedures shall be reformed to meet the particular need and to solve barriers in practice faced by this group of ignored children. And a special migration management policy on irregular migration families is also recommend for the best interests of children born from this form of family.

5.2. Adopting General Children's Rights Principles into Domestic Laws and Policies

Under the CRC, China bears the positive obligation to take further legislative and administrative measures to realize the right to identity and birth registration of children born from irregular migration marriages. Non-discrimination, participation, and best interests of children are guiding principles and these principles should be adopted throughout the domestic measures with children's rights oriented working methods.

Firstly, the general principle of non-discrimination is codified in Article 2 CRC.²⁰¹ It entitles all children equal rights without all forms of discrimination. With respect to children born in the context of irregular migration marriages with Chinese nationality, there should be no discrimination or unequal barriers against their rights to identity and birth registration, regardless of the status and social origins of their parents. All barriers they face in birth registration procedures should be thus eliminated, because they are rights holders, like any other group of children in China. It is also important that the irregular migrant status of the children's parents, as a ground of discrimination, should be explicitly prohibited in domestic laws. Therefore, the state shall consider amending its current legislative and administrative regulations to make birth registration free and accessible to all children on a fair basis.

Secondly, all children have the right to be heard and giving views in any procedures that may affect them, their voice should be given due weight of consideration in accordance with their age and maturity. This general principle is recognized in Article 12 CRC.²⁰² For children in the context of irregular migration marriages, they are not only vulnerable while facing all kinds of barriers and discriminations, but they cannot participate in the decision-making procedures to express their voice and advocate for their interests and benefits. Adult decision-makers do not always have sufficient

²⁰¹ See 55, *supra*.

²⁰² See 55, *supra*.

insight into the life and actual difficulties faced by children born from irregular migration marriages, and they may not be able to make effective policies to realize their right to identity and birth registration. This group of children have direct experience of living as unregistered children, they may form their unique views and concerns about their rights. Thus, the state should involve and encourage children born in irregular migration marriages to participate and express their voice in the birth-registration promoting strategy, because they are the main object of birth registration management. Their active involvement can promote children's rights sensitivity in birth registration work and their voice can no longer be ignored. And an improved birth-registration system that fully taking account of children's views would be more effective and sustainable to realize children's rights to birth registration for all. Besides during such participation in the decision-making procedures, children in the context of irregular migration marriages can develop their competence, self-esteem, and confidence: they know they are not ignored and invisible in society.

Besides, the best interests of children should be a primary consideration in birth-registration management, as Article 3 of the CRC indicates, and the state has the positive obligation to take all appropriate legislative and administrative measures to realize the best interests of children.²⁰³ In realizing the right to identity and birth registration of children born in the context of irregular migration marriages, their best interests- immediate and equal access to birth registration- should be the primary consideration, rather than other social and political concerns such as management of irregular migration, family planning policy and social maintaining fees.

All in all, in further reform of birth registration policies, entitled rights under the CRC of children born from irregular migration marriages should be focused and a children's rights-oriented approach should be adopted in all legislative and administrative procedures concerning children's right to identity and birth registration.

5.3. Possible Changes in Domestic Legislation and Policies

5.3.1. Reforms on Birth Registration Procedures

Since the 2015 national policy, as analyzed above, the main barrier concerned by irregular migration families to register their children in the Hukou system is the DNA paternity test. The test procedure and cost of the test makes many irregular migration families reluctant to actively take the test and register their children. They may prefer to wait until a Hukou is a must, for example, to enroll their children in school, to take the test, and to register their children in Hukou. To solve the issue, the local public security department may consider offering free DNA paternity test service for irregular migration families. In Suining City of Sichuan Province, local public security has adopted the policy to

²⁰³ See 55, *supra*.

offer free DNA paternity test for poor families within its jurisdiction. The policy has helped more than 300 families with unregistered children do DNA test and register them in the Hukou system. It saves more than 1.6 million yuan of testing fees for these families and 348 black-household children have been registered in the Hukou system and have their rights to birth registration and identity realized.²⁰⁴ Therefore, irregular migration families who want to take DNA test to register their children in Hukou shall have access to free and simple test procedure to the test.

Besides, the birth registration procedure for children born from irregular migration marriages should be further simplified. Presently, as analyzed in previous section, the Hukou registration application for this group of children is still complicated and requires lots of documents, which defers many irregular marriages from actively register their children. Considering best interests of children born in irregular migration families, a national policy should launch a simplified and specific birth registration procedure for children in irregular migration families to ensure their equal enjoyment of the right to birth registration and identity. For example, by collaborating with local community committee to identify an unregistered child and his family relationship, the public security department can immediate register a child in Hukou without DNA testing procedure once the local community committee proves the family relationship and situation of the child.

What's more, all levels of public security departments in charge of birth registration over the country should consider carry out comprehensive investigations to collect information of unregistered children born in the context of irregular migration families within their jurisdiction. In the past, the research on this group of children was mainly carried out during the population census every ten years. Such investigations should be normalized on a routine basis. And immediate follow-up work to register these children case by case in Hukou should be started after the investigation.

The state shall also consider promoting awareness of the importance of birth registration, especially in areas where irregular migration marriage families gathering on border areas. Former cases show that many irregular migration families have no idea about the importance of birth registration for their children.²⁰⁵ In another case in Suining, when public security department offers free DNA test to a family with unregistered child, the father asked what is a DNA test and why he needs to register his child.²⁰⁶ Various publicity channels should be taken to raise public awareness of the regulation and importance of immediate and free birth registration for all children mass media at both national and local levels. Schools, communities, and NGOs are also encouraged to support improving the enthusiasm of the masses for active application for birth registration for all children.

²⁰⁴ Suining News, Free Paternity Test Helps 348 Black Household Children in Suining, (http://snxw.com/xwzx/bwzj/201903/t20190322_443977.html), last visited (22-06-2020).

²⁰⁵ See 43, *supra*.

²⁰⁶ See 204, *supra*.

To sum up, together with the 2015 national policy, children born from irregular migration marriages should not be left behind in realizing their rights to birth registration and identity. Birth registration for this group of children concerns several different administrative, legal and health departments and institutions. Effective collaboration among different divisions and reformed policies paying specific attention to this left-behind groups of children are the keys to ensure universal, timely and available birth registration service for children born in the context of irregular migration marriages.

5.3.2. Reforms on the Policy of Social Maintenance Fees

Social maintenance fee is another barrier to the Hukou registration of children born from irregular migration marriages. As analyzed above, many irregular migration marriage families are reluctant to actively register their children in Hukou for fear that they have to pay the large sum of social supporting fees after registering their children.

The 2015 national policy makes it explicit that all other administrative policies that are not in compliance with should be amended to match the 2015 national policy, aiming at promote universal birth registration for all unregistered children. Therefore, local government at all levels should amend their regulation concerning the social maintenance fee in compliance with the 2015 policy, that the paid social maintenance fee should not be a precondition for birth registration. In this way, irregular migration families would be assuring that they are safe if they register their children in Hukou and their concerns and confusion would also be eliminated in the implementation the policy.

Since it is impossible to abolish the social maintenance policy presently, legal interference or social credit system may be introduced to collect social maintenance fees. For example, the Health and Family Planning Department of Guangdong Province regulates that: late fee would be charged if a family does not pay the social maintenance fee on time, and if the family still refuses to pay, the department would apply to the court for mandatory enforcement.²⁰⁷ Although this regulation does not exempt irregular migration families from paying social maintenance fees, it clearly cancels the link between birth registration for children and the social maintenance fees; and it makes parents, rather than their children, pay the consequences for their own behaviors. This kind of amendment may be launched across the country so that birth registration is no longer be used as a tool to collect social maintenance fees, and then irregular migration marriage families would have fewer worries to register their children in the Hukou household system and to realize the rights of their children to birth registration and identity at the beginning of their life.

5.3.3. Reforms on the Management of Irregular Migration Marriages

The management of irregular migration marriages is a complicated issue involving several administrative departments and legislative regulations. Although irregular migrants in such marriages

²⁰⁷ Southcn News, The Social Maintenance Fee is Still the Heart Disease of Household Registration, (http://epaper.southcn.com/nfdaily/html/2016-02/23/content_7518384.htm), last visited (22-06-2020).

have illegal statuses due to domestic migrant management law and these marriages are undocumented, there are de facto marriages; and the fact that Chinese children are born from irregular migration marriages cannot be ignored. Therefore, further reforms on the legislative and administrative regulation on the management of irregular migration marriages are required so as to realize the human rights of children in the context of irregular migration marriages. Since a legally documented marriage is protected by Chinese laws and the family don't have to pay the social maintenance fees for their children.

Cooperation between and neighboring countries is the foundation to the management of irregular migration marriages. In essence, irregular migration marriages are the result of conflicts between China and neighboring countries on applying different marriage law and lack of mutual cooperation. To solve the issue, communication and negotiation with border countries are needed to reach agreement on cross-border marriages. Convenient and effective marriage registration channels should be provided for people residing in border areas from two countries. And two governments should also cooperate in file issuing and certification procedures. Such a cooperation mechanism would also help combat cross-border human trafficking activities.

Besides, special marriage registration agencies should be set in border rural areas to serve the registration of cross-border marriages. One important cause of undocumented irregular migration marriages is that the marriage registration agency at rural levels cannot register a marriage between a Chinese citizen and a foreigner.²⁰⁸ These families are reluctant to spend much time and travel all the way to the agency at the municipal level just to get a piece of marriage certificate paper. Therefore, the function of marriage registration agencies in border villages should be improved and specialized in providing cross-border marriage registration services.

On the legal level, laws concerning the residence of irregular migrant mothers should be developed. Generally, China's policy dealing with "three-illegalities" (sanfei) issue is to firmly repatriate irregular migrants back to their origin countries.²⁰⁹ However, in the context of migrants who already have a family and children with a Chinese citizen in China, the repatriation of these mothers face great resistance from both the family and the local rural officials since they are seen as members of the families.²¹⁰ Meanwhile, the repatriation of these mothers may also violate children's right to family reunification under Article 10 of the CRC.²¹¹ Therefore, irregular migrant mothers with Chinese children should be treated as a special group of irregular migrants, and domestic policies should be developed to naturalize them in China's society. For example, under Article 7 of the Nationality Law,

²⁰⁸ See Wu, *supra* note 44.

²⁰⁹ See Wu, *supra* note 44.

²¹⁰ See Wu, *supra* note 44.

²¹¹ See 55, *supra*.

they may get a Chinese nationality as they are near relative of their Chinese husbands. And to realize the best interests and the right to family reunification of children born with irregular migrant mothers, special formalization of family reunification policies and procedure shall be introduced in migration management of these families. Specific designed legislative and administrative policies should be launched to deal with the legal status of this group of irregular migration mothers, rather than just ignore them. Once these mothers have legal status, it is easier to register their children in the Hukou system since born, and this group of children also face fewer risks on their right to identity and birth registration.

5.4. Concluding Remarks

To realize the rights to identity and birth registration of children in the context of irregular migration marriages, one national policy is never sufficient. With large amounts of departments in all levels of government involved, detailed regulations and polices in each field and effective cooperative work paying special attention to the rights and actual needs of children born from irregular migration marriages are required. And it should not be ignored that the realization of children's rights is closely linked with their families. Therefore, the administrative management work of irregular migration families should never neglect the rights and best interests of children in the context of irregular migration families.

6. Conclusion

Children born in the context of irregular immigration marriages are entitled to equal right to identity, birth registration and nationality under the CRC. China is a state party to the CRC and thus has the positive obligation to realize the rights to identity, birth registration, and nationality of children born from irregular migration marriages without any form of discrimination, regardless of status of their parents and families. According to domestic nationality law, this group of children are Chinese citizens since born. In practice however, irregular migration family are facing lots of barriers in register their children in the Hukou system since the birth of their children.

According to China's laws and policies, irregular migration brides can hardly get legal permanent residence permit in practice and have illegal status. The marriages between Chinese men and irregular migration brides cannot be registered in China's civil system and their marriages are not protected and legally supported by China's laws. Children born from irregular migration marriages are children born out of wedlock and their birth violates the national family planning policy, and a sum of social maintenance fees shall be paid to local family planning department. All these elements form the barriers to the birth registration of children born from irregular migration marriages. Without an identity certificate, irregular migration mothers can hardly get a medical certificate of birth for their children when they give birth at hospitals. Besides, the social maintenance fees impose huge financial burdens on irregular migration families, and thus these families are reluctant to register their children in the Hukou system to avoid the social maintenance fees and to avoid possible investigation on the irregular migrants in the family.

Since 2015, the state council launches a national policy aiming at registering all unregistered Chinese citizens in Hukou. According to the 2015 national policy, irregular migration families can simply register their children after taking a DNA paternity test indicting the kinship between the children and their Chinese fathers. However, some irregular migration families are still reluctant to pay the DNA test fees to register their children.

Unregistered children are called "black household children" in China. They are invisible in the national household system and their identity are denied. Without a Hukou booklet and an identity card, their social and economic rights recognized by the CRC are also difficult to realize in China. To enroll in 9-year compulsory education, schools always require a Hukou booklet to register the school-age children into the national education system, and unregistered children also face limited opportunities to further education which impacts the development of them. Besides, unregistered children have denied access to health services and institutions since their birth, and their right to highest attainable standard of health are greatly violated. Unregistered children born to poor irregular migration marriages are also excluded from the national social support and welfare policies, they thus suffer from great deprivation and poverty.

As rights bearers, children born from irregular migration marriages shall enjoy equal rights like any other groups of children in China and they should not be left behind. To ensure the universal, free and accessible birth registration for children born from irregular migration marriages, reforms in legislative and administrative regulations and procedures should be adopted by the authority. First the government shall consider include general children's rights principles: best interests, participation and non-discrimination throughout the birth registration manage work. Besides, all levels of public security department may consider offering free DNA test and cooperation with local community to carry out investigation on unregistered children, in order to include this ignored and vulnerable group of children into the Hukou system and realize their equal right to birth registration. Furthermore, the social maintenance fees should be separated from birth registration procedure to encourage more families register their black household children. And reforms on the management of irregular migration marriages should also be launched to eliminate discriminations against children born from irregular migration marriages.

Children born from irregular migration marriages should never be overlooked and neglected as they are rights holders protected by the CRC. Their best interests shall always be a primary consideration in birth registration procedures. From a children's rights perspective, all levels of China government, legislative and administrative institutions have the positive obligation to adopt further effective measures and policies to realize the equal rights to identity, birth registration, and nationality of children born from irregular migration marriages as they are entitled by article 7 and 8 of the CRC, and their social and economic rights to education, health care, and social protection without any discrimination.

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