

## Insufficiency and Perfection of the Legal Protection System for the Interests of the Fetus in China

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### Abstract

**The Civil Code of the People's Republic of China (referred to as the Civil Code in the following discussion) separately stipulates the rights of inheritance of fetal inheritance and acceptance of gifts and protects a series of rights. Regarding the interpretation of the protection of fetal interests, China is more based on the legislative logic of individual protectionism. In some relatively specific interests, the fetus has the capacity for civil rights. Regarding the interests of this particular group, we can regard it as the right to satisfy the average growth and development of the fetus and the specific relief measures and measures to realize this right. The former mainly includes personal rights such as life and health and necessary property rights, while the latter mainly includes relief when the above rights of the fetus are damaged. Starting from the evolution and development of the legal protection system for the interests of the fetus in China, this paper mainly analyzes the possible rights of the fetus and the problems faced in protecting its rights from the two aspects of the rights that the fetus may enjoy and the methods and measures to protect its rights and to propose perfect measures.**

### Keywords

**Fetal interests; Evolution and development of the system; Civil code.**

## 1. Introduction

### 1.1. Fetus

Concept about the fetus. Each field has a different understanding of the identification of the fetus. Biologically, the fetus is the physical form at the stage of embryonic development to the end of the second month from the beginning of humanoid form to birth. According to its shape, it is divided into the embryonic stage and the fetal stage. In medical terms, a fetus is an unborn child after eight weeks of gestation. Embryos are 4-8 weeks old, and fertilized eggs are four weeks old. Currently, Chinese laws and regulations do not directly stipulate the concept of fetuses. According to Article 16 of the Civil Code, concerning the protection of the fetus's interests, the fetus is regarded as a civil subject and has the capacity for civil rights(Zhao 2022). The jurisprudence expands the understanding of the concept of the fetus and believes that as long as the protection of the interests of the fetus is involved, no matter what stage it is in, it is regarded as having the capacity for civil rights. With the development of medical technology, does the fertilized egg in vitro also belong to the fetus? The author believes that the fetus exists

in the mother's body from conception to the whole period before birth. In vitro fertilized eggs, not fetuses, are considered to be protected only when they are implanted in the mother. For the determination of the date of conception, there are four calculation methods in medicine. In practice, if it is necessary to determine the date of conception of a pregnant woman, medical identification shall prevail.

## 1.2. Fetal Benefit

The fetus is regarded as having the capacity for civil rights concerning its property rights and is the subject of civil law protection. Although the fetus is protected in this regard, the protection of the fetus by the law is different from the protection of the natural person. In practice, this fictitious method is often used to resolve the conflict between fact and law. Among them, "benefits" can be regarded as the fetus can obtain pure benefits but does not bear civil obligations. Furthermore, protecting the rights enjoyed by the fetus and not assuming civil obligations is more in line with the original intention of Chinese legal protection.

Chinese law limits the protection of fetal interests to the protection of property rights such as inheritance and acceptance of gifts. Within this scope, the fetus is considered a civil subject with the capacity for civil rights. In addition to property rights, there are many other issues concerning protecting the interests of the fetus in practice, which should include other situations to protect the interests of the fetus. We believe that the fetus's personal and other property rights should be within this scope. For example, a taxi driver ran a red light and hit a pregnant woman who was five months pregnant. After the incident, the pregnant woman was identified as having a grade 10 disability. The drug was taken as a last resort during the treatment period, and the fetus was identified as disabled after birth. The reason was that the pregnant woman took the drug after the injury. If the law does not stipulate that the fetus has the capacity for civil rights, it also has no personal and property rights. Then, the infringement suffered by it cannot be remedied. It can be seen that there is a real need to clarify the civil rights enjoyed by the fetus.

## 1.3. The Theoretical Basis for The Protection of Fetal Interests

"Civil Code" clearly stipulates: "If the deceased's name, portrait, reputation, etc. Like face infringement, his spouse, children, and parents have the right to request the perpetrator to bear civil liability according to law(Zhang 2021)." It can be seen that the rights of the deceased can still be protected by law, and the rights of the fetus, as an inevitable stage of human growth and development, should also be protected by law. Theoretically, it is mainly divided into two viewpoints: the theory of legal interests and the theory of rights and capacity.

This theoretical point of view can be further divided into the theory of extended protection of personal rights and the theory of legal interests of life. For the former, a natural person needs to protect the corresponding legal interests before birth and after death(Jing 2017). As for the latter, the fetus's life can be maintained against external aggression. The so-called civil rights of natural persons are a whole process from birth to death. The extended protection at this time is not for rights but legal interests(Feng 2020). However, the relationship between legal interests and rights is still unclear, which shows flaws in the theory. The theory of legal interests of life, which distinguishes the legal interests of life from rights and abilities, has its advantages, but the core of its theory is still the theory of legal interests, which is the same as the above, and still cannot be the theoretical basis and basis for the protection of fetal interests.

According to the viewpoint of this theoretical system, whether the fetus satisfies the suitable capacity is an essential prerequisite for protecting its interests. Only based on rights can the issue of protection be involved. Otherwise, everything will be out of the question. Therefore, the protection of the fetus is regarded as a civil subject in the subsequent time. From the point of view of the interests of the fetus, its interests need to be maintained and guaranteed. From

the analysis of the existing legislation in China, the definition of the fetus's interests in the "Civil Code" is more of the content of "the theory of legal interests." This paper believes that, from the perspective of relevant theoretical foundations, the "legal benefit theory" is more tenable and conducive to strengthening the protection of the fetus's interests. In addition, the vital principle of "protecting early personal legal interests" has been practiced and applied in many regions worldwide and has been widely recognized in the judicial field.

## **2. The Evolution and Development of Fetal Interests**

### **2.1. The Legislative Model of the Protection of Fetal Interests**

According to its concept, it is proposed that the fetus has a specific capacity for civil rights and needs to have all the rights that should be included. As long as it is alive after birth, the civil rights capacity is satisfied after the fertilized egg is formed. For the recognition of its rights, increasing the time frame can better safeguard the fetus's interests. In the judicial field, this view has apparent advantages in the degree of protection of the fetus compared with China's adoption of individual protectionism in protecting fetal interests. This article is more inclined to apply umbrella protectionism to propose the necessary rights and remedies that the fetus may need in practice.

Individual protectionism uses an enumeration method to enumerate the rights that the fetus enjoys and should be protected. This protects the fetus to a certain extent but fundamentally does not recognize that the fetus is a civil subject and does not meet the capacity for civil rights. This is the pattern in Chinese legislation. Mainly because the cases of fetuses being violated continue to increase, and the lack of protection has been entirely unable to meet the needs of reality. Therefore, legal protection is granted within the scope enumerated by law. The most significant difference between it and Omnipotence is that the former does not recognize its status as the subject of civil rights, while the latter does. The limitations of individual protectionism let us know that general protectionism can protect the interests of the fetus more comprehensively and is more in line with the trend of various countries to strengthen the protection of fetal interests continuously.

Absolutism is the belief that the fetus does not have the capacity for civil rights and should not be protected. With the progress of society, this view is entirely out of date. It cannot keep up with the pace of the times and has been abandoned by most countries. This point of view was adopted in the early days of Chinese civil law, but on its basis, provisions were added to reserve the necessary share for the fetus. It is better than simply adopting this theory. China's "Civil Code" adopted a more advanced individual protectionism when it was revised and strengthened the protection of the fetus's interests. Many countries have recognized the importance of fetal protection, have written the protection of fetal interests into legislation, and have begun to realize that the fetus should have the capacity for civil rights.

### **2.2. China's Legislative Model and Protection Status**

China adopts a legislative model of individual protectionism. Only when inheritance and acceptance of gifts are involved is the fetus considered to have the capacity for civil rights, the word, etc. Which is added to cover the bottom line. It also attaches the statutory conditions for termination, that if the fetus is dead at the time of delivery, then it has no capacity for civil rights since the initial fertilization. The protection of the fetus by individual protectionism is limited. In this regard, the author believes that overall protectionism can best meet the needs of the times and achieve more comprehensive protection of the fetus.

In Chinese law, the fetus is considered to have only rights, and it does not take it for granted that the fetus should perform obligations. When the fetus enjoys its rights, it cannot express its will and should be represented by the legal representative of the fetus. Because the fetus is in

the mother's body, it is impossible to register the inherited or donated property. In this case, it is also planned to be represented by its legal representative to complete the registration, but the right holder is still the fetus.

### **3. Insufficiency of the fetal Interest Protection System**

#### **3.1. Parent-child relationship**

In the parent-child relationship, the parent is the parent, and the child is the child, including natural and imaginary blood relatives. The confirmation of the parent-child relationship determines the rights and interests of child support, elderly support, inheritance between parents and children, and guardianship. It mainly includes two aspects: natural blood relatives, identifying the parent-child relationship between legitimate and illegitimate children; and identifying the parent-child relationship between illegitimate children. Each aspect can be further divided into various situations where determining the parent-child relationship is more complicated. The result of the judgment will directly affect the protection of the interests of the relevant subjects.

The fetus has the right to defend and protect this right. The law must confirm a parent-child relationship between the fetus and its parents. However, the "Civil Code" only stipulates the parent-child relationship between parents and children and does not provide for the parent-child relationship during pregnancy and the parent-child relationship generated by surrogacy. In judicial practice, once such problems arise, they are often difficult to identify and cannot be dealt with effectively.

#### **3.2. Inheritance and Gift**

In the relevant laws and regulations, such as the Inheritance Law and some interpretations of the Supreme Court, the state has made some interpretations and regulations on fetal inheritance and acceptance of gifts, providing essential protection of interests. However, it is not difficult to find that this protection is minimal. If a more in-depth study is carried out, it is not difficult to find that although the "law of inheritance" defines and explains the "special reserve" of the fetus. However, the inheritance rights of the fetus need to be based on the premise of "birth." On the issue of inheritance division, the "special reserve" of the fetus is not considered, and the parents cannot defend their rights through judicial means. Legal rights can only be claimed after the fetus is born. Based on the analysis of the protection of fetal rights, the rights obtained by the fetus as a natural person at the earliest stage of life differ from those of ordinary natural persons.

Under the existing legal framework, the fetus is endowed with the right of inheritance and the right to obtain pure benefits. Judging from the current regulations on the right to claim compensation for fetal damage, there are still some problems: First, the regulations on the fetus do not meet the actual development and social needs. In terms of fetal protection, individual protectionism has been chosen in principle, but broad protection of the fetus has not yet been achieved.

### **4. The Perfection of The Protection System of Fetal Interests**

Combined with the discussion on the fetal interest protection system in the previous third chapter, the existing deficiencies are analyzed, and some targeted improvement suggestions are given below.

#### **4.1. Fetal Paternity Identification**

The problem with the identity of the fetus is the identification of the parent-child relationship between the father and the fetus. In practice, if the parent-child relationship with the fetus

cannot be determined in the case of unmarried pregnancies, inheritance, etc. The method of paternity testing is often used to confirm the parent-child relationship.

However, in medicine, under some particular circumstances, such as: receiving an allogeneic blood transfusion, receiving bone marrow or organ transplantation, receiving immunotherapy, stem cell therapy, and other treatments that introduce foreign DNA, or pregnant women who are prone to miscarriage, etc. Suitable for paternity testing. In this case, it is impossible to determine a parent-child relationship between the father and the fetus, and the fetus cannot participate and exercise rights in the case of inheritance and other fetal interests. The law does not regulate the parent-child relationship between the fetus and its father, which may result in the loss or impairment of their rights.

#### **4.2. Fetal Inheritance and Receipt of Gifts**

According to the provisions of the reserved share system of the Civil Code, the necessary share should be reserved for the fetus, but the fetus is dead and should be redistributed among the heirs at this time. The fetus is uncertain in the mother's body. If the fetus is born usually, the share of the retained inheritance belongs to the fetus. Pregnant women are pregnant for ten months, and no one can guarantee that the fetus will be able to deliver normally. If the fetus is aborted spontaneously, the retained share of the estate is redistributed(Yan 2022).

In practice, we do not rule out unnatural abortion of the fetus. As long as the fetus is not alive at the delivery time, the other legal heirs will redistribute their share of the estate reserved for the fetus following the law. Other legal heirs will share more of the estate, likely leading to the unnatural death of the fetus. This is not conducive to the protection of the fetus. Therefore, we believe that: if the fetus is spontaneously aborted, the share of the inheritance reserved for the fetus shall be distributed according to the legal inheritance; if the mother performs an induced abortion for various reasons because the mother has the freedom to decide whether to have children or not, we recognize this freedom, but the reserved share of the fetus will still be redistributed according to the legal inheritance; if the fetus is unnaturally aborted, such as an accidental miscarriage of the pregnant woman, we believe that the reserved share for the fetus should be handled under the legal inheritance. However, if other heirs intentionally commit acts that endanger the fetus, resulting in the death of the fetus, the right to redistribute the share reserved by the fetus shall be canceled under the law, and its responsibilities shall be investigated. The share of the inheritance shall be redistributed among other legal heirs.

Although a bequest is a unilateral legal act, the Civil Code stipulates: "The legatee shall, within 60 days of knowing that he has received the bequest, make an indication of accepting or abandoning the bequest; if there is no indication, it shall be deemed to have given up the bequest(Wang 2017)." Then, how can the fetus accept or give up the bequest if the fetus cannot express its meaning in the mother's body? A gift is a legal act of both parties. When the fetus accepts the gift, it is regarded as having the capacity for civil rights, but it cannot exercise power alone. If a gift requires a written gift contract, who will represent it? What to do with gifted property in case of a miscarriage or if the fetus is delivered dead? Can the donor revoke the gift because the fetus has not yet been born? Various situations may be encountered in practice, and the Civil Code has not made explicit provisions.

#### **4.3. Tort Damages**

This article discusses the rights that may exist to satisfy the normal development of the fetus. To realize the fetus's interests, it is necessary to clarify the remedy of tort damage compensation. Chinese law does not stipulate which tort damages the fetus. In principle, the fetus has the right to compensation for damages when property rights such as inheritance and acceptance of gifts are infringed. The infringement damage to the fetus is mainly the third party and the parents, for example, due to traffic accidents, medical accidents, etc. The mother's body

has been infringed, which has indirectly led to damage to the fetus's interests, which is a third-party infringement. The law does not stipulate the right to remedy when the fetus is violated in this way but only stipulates compensation for the damage to the mother's right to health and mental damage. There are also no relevant provisions in the law for cases where the interests of the fetus are damaged due to infringement by a third party, where the interests of the fetus are damaged intentionally or negligently by the parents, or where the interests of the fetus are damaged jointly by a third party and one of the parents or one of the parents (Nie 2021).

In addition, whether "wrongful birth," "wrongful life," and "wrongful pregnancy" can claim tort damages is also a defect in the protection of fetal interests. For example, in the case of *Lv Zhitao v. Jiangmen City Maternal and Child Health Hospital and Heshan City Hecheng Town Center Health Center's medical damage liability dispute*, there were three adverse consequences: one was the improper birth of the fetus, causing damage to its parents; constitute fetal infringement, resulting in the presence of cerebral palsy when the fetus is born; third, causing another fetus to be stillborn. It is precisely because the medical practices of the Health Center, Hecheng Health Center, and Gonghe Health Center have different degrees of fault, which infringed on the civil rights and interests of Lu Zhitao (intrauterine growth and development rights) in the fetal state. The violation of the rights of the fetus involved in the case, due to the ambiguity of the law, there is still a great deal of controversy in the practice of protecting the fetus's interests.

To sum up, mothers have the freedom to bear children. Therefore, if the mother decides to terminate the pregnancy, she is not legally responsible and does not constitute a tort. Nevertheless, it should be divided into stages, abortion can be done before the fetus is formed, and abortion is not allowed after the fetus is formed. On the one hand, the fetus's right to life and health is protected; on the other hand, abortion may cause significant risks to the mother after the fetus is formed. In medicine, there is also a rule that abortion is not allowed at 28 weeks of pregnancy. However, if the father commits tort alone, such as intentionally causing the mother to take abortion pills or extreme sexual acts to cause fetal death, disease, or deformity, it shall constitute a tort, compensation for damages, and cancellation of guardianship.

## 5. Conclusion

In practice, the protection of the fetus by the law is not only expressly stipulated, but when the judges deal with cases in practice, when they encounter problems that are not expressly stipulated in the law, they often use the method of legal fiction to make judgments. This phenomenon has to exist because there are gaps in the law in some aspects, and such problems are encountered in practice. From the perspective of development, express provisions are an inevitable trend. Only when the relevant rights of the fetus are protected in an explicit form can it meet the needs of social development. It is recommended to add principles and specific regulations on protecting fetal interests. There is still considerable room for development in the fetal protection system. The questions and opinions we put forward here are limited and cannot fully cover the problems that may arise in fetal protection. Laws often lag, and problems that may arise in practice may be difficult to predict. Therefore, the protection in principle and the protection of substantive law can be combined to protect the fetus's interests better. There is a long way to go to protect the fetus's interests. Its protection is necessary for theory and practice.

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