

# Legislative Defects and Perfection of Fetal Interests Protection under the Background of the Civil Code

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**Abstract:** *In the background of the increasingly serious situation of population aging, China has introduced important fertility policies to further optimize the population structure. From the original two-child policy to selective and universal two-child policies, and now the three-child policy, all without exception, have reflected the major trend of the times. Also, the protection of fetal interests has received growing attention from society. The policies on fetal interests protection in the Civil Code of the People's Republic of China, which came into force in January 2021, mainly focus on inheritance and acceptance of gifts, while with no clear limits to the scope of the provisions. A comprehensive survey of recent court judgments shows that judges have certain discretion in the scope of fetal interests protection. This paper analyzes legislative defects of fetal interests protection and proposes several solutions to further improve the legislation.*

**Keywords:** *Civil Code, Fetus Interest Protection*

## 1. The Status Quo of Fetal Interests Protection in the Context of the Civil Code

### 1.1 Definitions and Differences between Fetus and Infant

The definition of the fetus is still controversial in academic circles. Mr. Guo Mingrui believes that "a fetus is a living organism in the placenta of the mother, which is the last stage of existence of a living organism[1]." Mr. Fu Cuiying holds that "a legally protected fetus should be a life form that has not yet come out of the mother and is in the process of gestation before the legal fact of birth[2]." The definition proposed by Mr. Hu Changqing is more accepted by the academic circles, "A fetus is a child born in the mother's body, from the time of conception to the time of completion of birth[3]." It is generally believed that a test-tube baby, as the production of novel science and technology, "is not a human being or an object, but has the properties as a newborn[4]", according to professor Xu Guodong. The definition of fetus in the context of the Civil Code includes not only the fetus conceived by the mother in the traditional sense, but also the fetus born by in vitro fertilization using modern technology. An infant is a child who is born from the mother's body, with the umbilical cord disconnected from the mother's body, and who becomes an individual up to the age of twelve months. The main difference between a fetus and an infant lies in whether it is completely separated from the mother's body.

### 1.2 Fetal Rights Capacity

Throughout China's current laws, the fetal interests protection is mainly focused on inheritance and acceptance of gifts, but there is no explicit provision on whether the fetus enjoys full civil rights capacity. It is also a controversial issue in academic circles.

Some scholars believe that the fetus enjoys conditional civil capacity, and that although the fetus is conceived in the mother's body, it has the opportunity to become an independent individual from the time of conception, and can be given conditional capacity first. Some scholars believe that the fetus should be treated as an independent individual and enjoy the capacity of the law, but the fetus is subject to the resolutive condition as clearly stipulated in the law, "the capacity of the fetus begins at birth[5]." Some scholars believe that resolutive and suspensive conditions can be applied to different aspects of fetal interests protection, and the difference lies in whether the legal act is effective. For example, Article 16 of the Civil Code stipulates that it is appropriate to apply the resolutive condition to the fetus' capacity to inherit and accept gifts, which means the legal act is established and effective, and the duration of this effect is limited by the condition; for the scope of the fetus' capacity that is not explicitly provided for in the law, it is appropriate to apply the suspensive condition to the fetus' capacity to inherit and accept gifts, i.e., the legal act is established but ineffective, and its effect arises when the condition is fulfilled[6].

## **2. The Development of Foreign Countries on Fetal Interests Protection and Experience to Learn from Them**

### **2.1 Germany**

As an early adopter of fetal interests protection, Germany has a well-developed civil law system. Since the 1950s, Germany has gradually shifted from a simple "compensation for damage to the interests of the fetus after birth" to a multi-dimensional protection. The most typical case was OLG Schleswig (NJW 1950, 388) in the 1950s, in which the biological father, knowing that he had syphilis, had sex with his unwitting wife, resulting in the fetus being infected with syphilis. In the name of the fetus, the wife filed a lawsuit in the district court, suing the biological father for concealing the facts and damaging the legal rights of the fetus[7]. The district court held that the fetus did not have the capacity to be the object of the infringement, so the father's infringement could not be established and he could not be held liable for compensation. The High Court and the Supreme Court held different opinions on this case, and there was widespread concern and discussion in the academic and social circles. However, similarly in BGHZ8.243 and BGHZ58.48, which occurred after the judgment of the above case, the interests of the fetus were damaged by a third party who harmed the legal rights and interests of the mother. The court held that the tort should not be judged solely from the perspective of whether the simple right capacity is available, but also from the perspective of causation. Even if the fetus is not yet born and does not belong in the "other person" as stipulated in Article 823 of the German Civil Code (BGB), the legal rights and interests of the fetus can still be supported due to the causal relationship with the infringement to the mother.

Some scholars believe that the protection of fetal interests should be based on the perspective of respecting life and equality, and recognizing that the fetus enjoys full rights and abilities in the mother's womb. Some scholars hold that the concept of "other person" is necessary for the infringement to be established; and since the fetus is not yet born and cannot survive independently, the concept of "other person" does not apply, meaning the fetus cannot be held liable for damages even if its interests are harmed. Some scholars also believe that the fetus should be subject to the right capacity with resolutive conditions, and that the tort damages during the fetal period depend on whether the fetus can be delivered. Once the fetus is completely detached from the mother and could breathe on its own, damages could be sought for the harm to its interests during fetal period.

### **2.2 Britain and the United States**

The concern for fetal interests protection in Britain began with a 1939 case, in which a ladder struck a mother in Liverpool and caused the fetus' death prematurely. The case ended up with a settlement because there was no applicable legal basis. Since then, the protection of fetus interests has attracted much attention and discussion from the society and academia. "Report on injuries to the unborn children" issued by the Law Commission in 1974 and "Congenital Disabilities (Civil Liability) Bill" passed in 1976 have strengthened the legislative protection of fetus interests in many aspects, among which are four main elements as follows: First, the fetus can only have the right to claim damages after birth; second, the damage must occur while the fetus is still in the mother's body before birth; third, additional restrictions are attached to the rights of the fetus, that is, the fetus must survive for at least 48 hours after birth; fourth, intentional or negligent, as long as the perpetrator's actions have a causal relationship with the results of fetal damage, he/she should be held liable for the corresponding compensation.

The United States has also seen a shift from a negative view of fetus interests to an affirmative view of seeking damages for the fetus. The shift resulted from a 1884 case, in which the Supreme Court of Massachusetts rejected the separate personality of a fetus and held that the fetus was not a "person" in the sense of the law until it was separated from the mother, and that the perpetrator had no duty of noting the fetal interests. Until the middle of the 20th century, the academic community remained highly critical of this practice. In *Bonbrest v. Kotz*, 1946, the District of Columbia Court affirmed the protection of fetal interests, holding that a fetus born alive had a right to claim damages for its fetal life, and that even a stillborn fetus had a right to claim damages for a causal link to its death. In this way, anyone, including fetus, is protected from tortious acts[8].

### **3. The Shortcomings of China's Current Law on Fetal Interests Protection and Suggestions for Improvement**

#### ***3.1 Impossibility to Define When a Fetus Has the Capacity to Enjoy Rights***

The central focus of the civil law protection of fetal interests is that the newborn must be alive, as a necessary precondition[9]. China's current Civil Code follows the provisions of the General Principles of the Civil Law regarding civil capacity, and considers that the starting point of the capacity of a natural person should be the date of birth, which denies the capacity of the fetus. Coupled with the gaps in other legislative areas, there have been several similar cases with different judgments, and this issue has caused big controversy in the academic community.

The author believes that although the Civil Code excludes the fetus from the scope of civil capacity, it still recognizes the legal interests of the fetus in specific situations such as inheritance and acceptance of gifts. And with the attached condition of fetus being born alive, the author defines the fetus' capacity of rights as resolutive-condition-attached. Through the means of legal fiction, the fetus' rights and interests are protected in multiple aspects. But since the fetus is still alive in the mother's body, unable to act independently, it should not be held liable. From the medical point of view, the fetus is born from the time of conception, and generally speaking, the fetus will develop into an infant, i.e., a natural person with civil rights capacity. It is also in line with the principle of equality of life that the fetus is considered to have conditional capacity, while with no legal obligations, from the moment of conception.

#### ***3.2 Great Disparity in Practice Regarding the Protection of Fetal Interests in Similar Cases***

The recent years has witnessed many judicial precedents involving fetal interests, such as disputes over the responsibility of motor vehicle traffic accidents and disputes over the rights and interests of members of collective economic organizations. The focus is not on the two aspects of inheritance and acceptance of gifts, which are clearly listed in the law, but on the ending word "etc.". The judges have greater discretion in this regard, thus subjectivity dominates, resulting in different practice in similar cases.

In the author's opinion, the current law mainly adopts a combination of general and enumerated approaches for the protection of fetal interests, and there is still a gap in the legislative field, resulting in excessive discretionary power of judges. In the absence of legislation to guide the formation of the same judicial system in the practice circle, most courts in China use value judgment and application of similar cases to deal with this practical problem within the same legal framework in order to complete the continuation of the law, which objectively promotes the effective development of fetus rights protection in China[10]. Under the background of the existing registration system, in order to solve the dilemma of judicial practice, the author believes that different litigation models can be adopted for different aspects of fetal interests. First, we can refer to the litigation model for the protection of the personality interests of the deceased, that is, after the death of a natural person, his/her civil rights capacity is terminated; the relevant lawsuit can be brought by other related subjects, and this also fits the protection of fetal interests. When the rights and interests of the fetus are infringed, the mother or father has the right to file a lawsuit in her/his own name to make up for the defect that the fetus is incapable of filing a lawsuit. Second, the fetus is to be designated as a person with civil capacity, with resolutive conditions attached, so that the fetus, after born alive, has the right to claim compensation for the infringement suffered during its fetal life.

#### ***3.3 The Ambiguity of Scope of Application for Fetal Interests Protection***

The Civil Code does not enumerate the scope of fetal interests protection, but only roughly generalizes it with "etc.", indicating that the fetus also enjoys other rights. Although the way of the generalized legislation left enough room for the development of the scope of fetal rights protection and made up for the limitations of the single legislation, it has also caused great instability and a series of disputes among scholars.

In the author's opinion, due to the special nature of the fetus, the legal protection it can receive has certain limitations and uncertainties. For the scope not clearly listed in the legal provisions, the ability to claim damages mainly depends on the judge's personal decision, which makes the equality somewhat undermined. Therefore, it is increasingly urgent to further clarify the scope of fetal interests protection.

Recent judicial cases show that the vacancies in this scope mainly focus on the right to claim alimony, compensation for land or housing resettlement, medical damage, traffic accidents, etc. The right to claim alimony is an important aspect of the protection of the economic interests of the fetus, which is not explicitly provided for in the Civil Code and related judicial interpretations, but there are cases in which courts have upheld the right to claim alimony for the fetus in judicial precedents. In order to protect the economic basis for the growth and development of the fetus after birth, the tortfeasor is required to bear the liability for acts that cause or may cause damage to the economic rights and interests of the fetus, i.e., intentionally or negligently resulting in the father's or the mother's incapability of raising the fetus. Combined with the views of judicial practice, most of the rulings support the fetus to enjoy the right to land or housing compensation, and that the fetus can enjoy civil rights capacity as a legal "person" to participate in the distribution, in which the share can be set aside by the collective economic organization. If the fetus is born alive, its legal representative has the right to receive and escrow the share; if the fetus is born dead, the share reserved for it will be returned to the collective organization. In the case of medical damages, traffic accidents, etc., different situations need to be discussed: first, if the fetus is born alive, it has the right to recover the damage suffered during its fetal life in order to protect its legal rights and interests; second, if the fetus dies in the mother's body due to the infringement, it is reasonable to assume that, for the fetus is inseparable from the mother, it does not enjoy civil rights capacity at this time, i.e., the fetus does not have the right to claim damages. But the perpetrator should make appropriate compensation for the psychological and mental damage suffered by its parents; third, if the fetus continues to suffer violations after birth, which results in its death, the fetus is considered with civil rights capacity at birth, who is fully entitled to request death compensation for suffering continuous violations.

#### 4. Conclusion

The fetus is the original state of life. Fetal interests protection exactly reflects the respect and protection of human freedom and value. As we usher in the era of three-child, the current trend is to strengthen the protection of fetal interests. The Civil Code further improves the protection of fetal interests on the basis of the original General Principles of Civil Law. This paper analyzes the legislative defects of fetal interests protection by taking into account the legal provisions and judicial characteristics of China and consulting foreign legislation. It also analyzes the problems such as the impossibility to define when the fetus has the capacity to enjoy rights, the phenomenon of different judgments in similar cases, and the large number of blank areas in the scope of fetal interests protection. In the future, we need to combine humanistic care and rational discretion in judicial practice, and to enrich the existing legal provisions so that there are laws for judges to follow. Also, judges need to develop more uniform standards in judicial precedents to reduce the occurrence of different judgments in similar cases, and strengthen the feasibility and stability of fetal interest protection. The author believes that in the context of the Civil Code, the legal regulation will compensate for the loss of the legal interests of the fetus, so as to achieve the purpose of stabilizing social order and defending the human rights and interests.

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