

Relationship Between Fetal Life Rights and Women's Abortion Rights

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Abstract: Starting from the attitudes of different historical periods and countries towards the right to fetal life, this article focuses on analyzing the conflict and reconciliation between the right to fetal life and women's right to abortion. At the same time, this article also compares the different provisions on the determination of fetal life in legislation of countries such as the United States, Germany, and China, and analyzes the different manifestations of the conflict between the right to fetal life and women's abortion rights within and outside the region. Finally, based on the current conflict situation, root causes, and excellent practices abroad, some suggestions are proposed for abortion legislation in China.

Keywords: fetal life rights, abortion rights, conflicts and reconciliation

1. Introduction

On June 24th local time, the Supreme Court of the United States ruled to overturn the "Roe v. Wade case", a decision that sparked widespread discussion about the right to abortion and the protection of fetal related rights.

The Roy case is the first typical case of abortion by the United States Supreme Court, which extends the right to privacy to include the right of women to abortion. In March 1970, a single woman, Roy, filed a lawsuit against the county's district attorney claiming that Texas's criminal abortion law was unconstitutional. The United States Supreme Court ultimately ruled in favor of Roy, arguing that American women have the fundamental right to choose whether to have an abortion without being unduly restricted and combated by the government [1].

The Supreme Court took a positive step in the Roy case, but it caused widespread controversy in state legislation and public opinion. Women's right to abortion is part of freedom, while the other end of the scale is the potential benefit of life. The standard of three months of pregnancy established in the Roy case has aroused widespread concern and criticism. The "three month" standard is too clear and arbitrary, and the precise timing of "vital ability" is influenced by medical development. The "three month" pregnancy standard ignores the national interest in potential life.

In order to resolve the dispute over the denial of fetal personality in the Roy case, the Casey case in 1992 extended the national interest in life to the entire pregnancy period and proposed an inappropriate burden standard to reconcile national interests with women's freedom [2]. Compared to the "three month" standard in the Roy case, the improper burden standard lowers the national threshold for restrictions, and the provisions on limiting abortion are more explicit.

Whether a fetus has the right to life is a very serious and controversial issue in Western countries, and the conclusion on this issue is directly related to the direction of a country's public policy. In biology, a fetus refers to the fetus after 8 weeks of gestation. In law, the priority value of the right to life of the fetus must be reflected in the protection obligations of the other party. The obligation to protect the right to life should not be limited to the obligation of results, but also include those obligations that seriously endanger the health and safety of the body. Whether the death result of the infringement of the right to life is accomplished or attempted, as long as there is a possibility or purpose of harming life in the behavior, it is a violation of the obligation to protect the right to life [3]. For this reason, the specific stage at which the right to life of the fetus is established has a significant impact on the specific establishment of the right to abortion.

2. Historical Development of the Protection of the Fetal Right to Life

Compared to the lack of legislation on the right to fetal life in China, the protection of the right to fetal life in foreign countries is relatively perfect. Over the past 2000 years, the protection of the right to life of the fetus has gradually deepened and refined. From the recognition of the independent existence of the fetus in the Roman law period to the recognition of the fetus as a "person" in the Middle Ages, to modern times, the right to life of the fetus has been continuously recognized in the fields of constitution, criminal law, civil law, etc., and the legal protection of the fetus' life has become more comprehensive and complete.

In the protection of fetal life interests, both civil law and Anglo-American law systems affirm the protection of fetal life interests, but the status of their protection and legislative status quo are still very different, with Germany and the United States as representatives.

2.1. Germany

Although Germany is a civil law country, it has gradually established the system and theory of safeguarding the right to life of the fetus through constitutional precedents and discussions on abortion liberalization, upholding the comprehensive protection of "human dignity".

In 1974, Germany denied that abortion was a crime in the fifth amendment of its criminal law, advocating the promotion of abortion liberalization because it denied the protection of fetal life. However, this has led to the prevalence of underground illegal abortion, which seriously infringes on the life and health interests of pregnant women. Therefore, in 1992, Germany revised the criminal law again, affirming that abortion by pregnant women within 12 weeks is not illegal. In the two constitutional precedents of Germany, it is clear that "the fetus is a constitutional 'person' and the subject of the right to life, and the state has the obligation to protect the life of the fetus."

In its jurisprudence, the German Constitutional Court held that, "When the fetus is within the mother's body, it is an independent individual, the only irreplaceable life that is bound to develop into a human being [4]." The Constitutional Court believes that the enjoyment of the right to life is not premised on the conscious ability of the living body, and the enjoyment of human dignity is not premised on whether the subject is aware of dignity. Therefore, the fetus also enjoys constitutional protection of human dignity. This constitutional precedent affirms that the life of a fetus should become the object of legal protection, affirms that the protection of human life by law is not premised on the consciousness and social relations of the living body, and that the fetus belongs to the category of human beings and should enjoy the right to life.

In addition to affirming the life value of the fetus, Germany even promulgated the "Embryo Protection Law" to affirm the life value enjoyed by the embryo, which clearly stipulates that "the scope of the constitutional protection of the right to life not only includes vegetations who are not

aware of human dignity, patients with mental disorders, and people with intellectual disabilities, but also extends to the unborn fetus, and further advances to the embryo.”

In the two constitutional precedents mentioned above, Germany affirms the existence of the right to fetal life, and the principle of infringing on fetal life is illegal. However, the above jurisprudence also proposes that strict conditions must be established for the abortion of pregnant women and affirms that the law should establish appropriate and effective protection systems to help pregnant women better protect the lives of the fetus.

2.2. USA

As a common law country, the United States, due to its pragmatic tradition, does not have the constraints of the right capacity theory in the legislation of civil law countries. For the protection of the right to fetal life, the United States mainly forms its system through jurisprudence.

The United States was the first to deny the right of a fetus to life and made it clear in its legal provisions. For example, Article 377 of the United States Civil Procedure Law is considered to be: “When the legislator refers to ‘person’ in a general manner in Article 377, it explicitly excludes the fetus despite its implication.” Therefore, many state courts have also denied claims for damages from the fetus when handling cases of fetal infringement. Representative examples include the case of Dieter Rich V. Northampton in 1884, “A woman who was five months pregnant fell on the road where the defendant was poorly managed, resulting in premature birth and death of the fetus. The state court denied the claim for damages by the pregnant woman for fetal death. Similarly, in the case of Allarie. V St.luke’s Hospital in 1900, the court also denied the plaintiff’s claim for damages [5].”

This judgment of indifference to the interests of the fetus has caused dissatisfaction among the public. At the same time, due to the decline in the birth rate and religious condemnation of harming the fetus, American states have gradually changed their attitudes towards the protection of the fetus. “In 1946, the United States District of Columbia Court in the Bon Brest v Kotz case recognized the independent status of the fetus as a subject of rights and recognized the right to claim compensation for fetal damage. At the same time, in order to achieve the protection of the interests of the fetus, the abortion behavior of pregnant women is also strictly restricted, and in law, all states have enacted laws to strictly prohibit abortion, “After Connecticut passed the first anti-abortion law in the history of the United States in 1821, over the next few decades, states gradually strictly limited abortion behavior, and by 1965, 50 states in the United States banned abortion at any stage. Some states even banned abortion to save the lives of mothers [6].” At this stage, the United States changed its attitude of indifference to fetal life, Strengthen the absolute protection of fetal life.

The absolute protection of the right to life of the fetus has also caused various social problems, such as the strict restrictions on abortion leading to population expansion, the prohibition of abortion limiting the scope of freedom for pregnant women, and the prevalence of underground abortion that will harm the lives and health of pregnant women. To protect whether the fetus can naturally deprive pregnant women of their freedom of choice, in the Roy case in 1973, the Federal Supreme Court affirmed that introducing a broad prohibition on abortion to protect the life of the fetus violates the constitutional right of free choice of pregnant women. This jurisprudence clearly states that the law should protect the free choice of pregnant women, but also affirms the constitutional value of protecting potential lives.

In modern times, with the strengthening of awareness of the protection of the right to life, the United States has enacted separate legislation to severely combat malicious acts of violence that cause fetal death.

The United States has gone from denying the right to fetal life to affirming it, and then to re restricting the right to abortion through the “Heartbeat Act” of 2022. The attitude towards the protection of fetal life is established in accordance with the social needs of the United States in various

periods. Whether it is the denial of the right to fetal life or the absolute affirmation of the right to fetal life, there are drawbacks. When limiting protection based on survival rates, the respective spatial scope is determined for both the right to fetal life and the right to pregnant women's choice, achieving effective protection of both.

3. The Relationship Between the Right to Fetal life and the Right of Women to Abortion

Conflicts between different rights are inevitable, and the conflict between fetal life rights and women's abortion rights is an important type of rights conflict. Since conflicts arise between rights, it is necessary to establish a legal balance mechanism to reconcile conflicts. However, Chinese scholars have not paid much attention to this issue, and the law also exhibits a vague attitude. Therefore, it is of great significance to study the conflict between fetal life rights and women's abortion rights within and outside the region, taking the current imbalance between fetal life rights and women's abortion rights as the starting point.

3.1. The Conflict Between Extraterritorial Fetal Life Rights and Women's Abortion Rights

3.1.1. Two Abortion Cases of the Federal Constitutional Court of Germany

3.1.1.1. First Abortion Judgment in 1975

The 1975 ruling was the first to legalize abortion. The Fifth Criminal Law Reform Act was enacted by the German Federation in 1974, and it provided that women who have an artificial pregnancy termination performed by a licensed physician within the 12th week of pregnancy will not be held criminally liable for an abortion. The Federal German Basic Law's Article 2 was broken, and as a result, this clause was finally deemed unconstitutional.

The ruling of the Federal Constitutional Court of Germany states that the main issue in this case is whether the state should provide protection for the life of the fetus and when protection should begin. Although some people think that Article 2 of the Basic Law's protection scope only applies to those who have already been born, the court believes that both the purpose and significance of this provision require that the protection scope be extended to unborn life; otherwise, the protection of life would not be sufficient.

3.1.1.2. Second Abortion Judgment in 1993

Germany's reunification in 1990 came many challenges, one of which was how to harmonize East and West Germany's legal systems. In regard to abortion, West German law stipulates that women who are pregnant and under 12 weeks along are exempt from punishment for abortions carried out by licensed medical professionals whereas the former East German law stipulated that any act of terminating a pregnancy in violation of the law should be punished. The "Pregnant Women and Family Assistance Act" was passed by the Federal House of Representatives in 1992 in response to this conflict, and it provides that abortions must be carried out by a doctor with the pregnant woman's consent within the first 12 weeks of pregnancy. However, once the law was promulgated, it was submitted for unconstitutional review.

Pregnant Women and Family Assistance Act in 1992, which states that an abortion carried out by a doctor with the consent of a pregnant woman during the first 12 weeks of pregnancy is no longer subject to criminal law standards if the woman receives consultation from a qualified consulting agency at least three days before having surgery [7]. The law regulating abortion should measure the protection of fetal life and the protection of women's rights, not only fulfilling the obligation to protect fetal life, but also respecting women's basic personality rights.

3.1.2. Abortion and Anti-Abortion Debate in the United States

3.1.2.1. Formation of Roy's Jurisprudence

Before the formation of the Roy case in 1973, the abortion legislation in the United States experienced a process of "from allowing to prohibiting". The criminalization of abortion law, which was formed in the mid-19th century, has not been substantially challenged in the past 100 years or so. However, the formation of the Roy case in 1973 declared the end of this law.

In 1973, the Supreme Court affirmed that women's autonomy in abortion is a constitutional right and declared that laws prohibiting abortion are unconstitutional. In its ruling, the Supreme Court stated that the right to privacy is a fundamental right protected by the Constitution, and that women's right to choose abortion is included in this right. However, from the perspective of interpreting the Federal Constitution, the "person" referred to in the Constitution refers to a person who has been born, and the fetus is not included.

3.1.2.2. Debates Caused by Roy's Case

Due to different attitudes towards abortion, American society is divided into "life oriented" and "choice oriented" factions, which are irreconcilable and constantly struggling. In *Webster v. Department of Reproductive Services*, the Supreme Court held that Missouri's strict restrictions on abortion were legal and that the government had no obligation to fund abortionists; In the *South Pennsylvania Family Planning Clinic v. Cather* case, the Supreme Court abolished the three stage theory proposed in Roy's case, which advanced the time for government intervention in abortion; In 2003, Congress passed the "Prohibition of Late Abortion Act", which stipulates that no one shall have an abortion during the third trimester unless it is to save the life or physical and mental health of a pregnant woman. Although such precedents and bills have not completely overturned Roy's judgment, they have further restricted women's freedom of abortion, which must be said to be a victory in the struggle of the "life faction".

3.1.3. Summary

The fetus growing in the mother still has independent rights, and the conflict between the mother's right to abortion and the fetus's right to life is the result of the fetus's dependence on the mother and its own independence conflict. In the process of reconciling this conflict, countries make different choices based on differences in national conditions, religions, beliefs, and other reasons. However, in current law, few laws completely lean towards one side and ignore the other, and more importantly, find an appropriate balance between the two. In the United States, the law tends to protect women's freedom to choose abortion, while Germany is more concerned with protecting fetal life.

3.2. The Conflict Between Fetal Life Rights and Women's Abortion Rights Within the Domain

3.2.1. The Object Conflict Between Women's Right to Abortion and the Right to Fetal Life

There are many disputes over the protection of the fetus in China, and even the issue of whether the fetus is a "person" has not been properly resolved. However, in any case, it should not be denied protection of the fetus due to the immaturity of theory or the absence of laws. The protection of the fetus is a common choice around the world, as the fetus already has a form of life and carries significant life value and benefits.

The law should protect the legitimate rights and interests of the fetus, especially the rights and interests of life. Although the life rights and interests of a fetus are not equivalent to the right to life

in the positive law, the fetus has the form of life and will ultimately form a complete right to life, which requires the law to recognize the life rights and interests of the fetus and provide necessary protection. The right to life safety of a fetus takes the maintenance of life interests as its object, and the fetus is parasitic in the mother's body. In order to achieve the requirements for the maintenance of its life interests, it is necessary to require the mother not to artificially terminate the pregnancy before the birth of the fetus, otherwise this right cannot be guaranteed at all.

To sum up, in order for pregnant women to achieve their freedom of fertility, they must exercise the right to abortion, which means that the continued growth of the fetus must be ended; In order for a fetus to realize its life rights and interests, it is necessary for pregnant women to give up the option of abortion and continue to maintain the growth of the fetus. The objects of abortion rights and life rights are antagonistic to each other, which is the fundamental reason for their conflict.

3.2.2. Restrictions on the Right to Abortion

First, the birth of a fetus is closely related to the population of a country. The excessive growth of population will inevitably lead to an increase in the demand for resources and an insufficient supply of daily necessities, leading to a series of social problems. Zero or negative population growth will exacerbate issues such as aging, labor supply, and economic growth.

Secondly, the fetus is the source of social metabolism, and its birth and growth are related to the integrity of the social division and cooperation structure, the survival of social members, the continuation of race, and the development of a country. It is necessary for laws to restrict women's right to abortion in order to protect the interests of the fetus and the country and ensure the development of the nation.

Finally, protecting the rights and interests of the fetus is related to a country's respect for the value of life. Although there is no unified understanding of whether the fetus is a legal person, the nervous system of the fetus in the third trimester of pregnancy has developed, and it is only a different growth environment compared to a newborn baby. "In a political community, if abortion has become a non-surprising and non-ethical matter, just like doing an appendectomy, then this society will be a ruthless and insensitive society and may also be a dangerous society [8]."

Therefore, the state should play a role in the competition between women's right to abortion and the right to fetal life and should not allow the expansion of the right to abortion. The fetus carries significant national and social interests and is in a vulnerable position in the conflict with women's abortion rights. Safeguarding the public interests of the fetus, the country, and society has become a responsibility that the country cannot shirk. However, in China's current legal system, the conduct of abortion is not restricted by law, and the state only focuses on the interests of the population, leading to a certain degree of neglect of the rights and interests of the fetus. The government should draw on extraterritorial recognition of the right to fetal life and restrictions on women's abortion rights, combine the actual population situation of the country, and comprehensively formulate policies to deepen understanding of the conflict resolution between women's abortion rights and fetal life rights [9].

4. Legal Balance Between the Conflict of Fetal Life Rights and Women's Abortion Rights

There are multiple reasons for the conflict between fetal life rights and women's abortion rights, including politics, religion, technology, and national conditions. In the process of dealing with the conflict between fetal life rights and women's abortion rights, the most important thing is to play a coordinating role in law, so that the conflict between the two is limited to the minimum scope. However, in China's current legal system, the coordinating role of the law has not been fully realized.

In dealing with this conflict, China emphasizes the freedom of abortion for women and completely ignores the rights and interests of the fetus.

4.1. The Shortcomings of China's Current Law

The current legal norms for regulating abortion in China are composed of laws, administrative regulations, departmental rules, and local regulations, with rules and local regulations as the main focus. In addition to the lower legal status and many issues with legislative content, these regulations not only fail to pay attention to the rights and interests of the fetus in terms of legislative philosophy and value selection, but also fail to respond to the conflict between the rights and interests of the fetus and women's abortion rights.

4.2. Legal Perfection of the Conflict Between Fetal Life Rights and Women's Abortion Rights

The conflict between fetal life rights and women's right to abortion is the result of multiple factors working together. To reconcile this conflict, it should be considered from multiple aspects. Although the legal root cause is only part of the conflict of rights, it is the most important reason. Without the assistance of the law, it is impossible to reconcile the contradictions between the two. Therefore, exploring the appropriate attitude towards the law is the only way to balance the conflict between fetal life rights and women's abortion rights.

4.2.1. Implement the Legislative Concept of Respecting Life

Although China has established a complete legal system, there are still many areas that need to be improved in this legal system. For example, in terms of legislative concepts, there is an excessive emphasis on national interests and economic development, a lack of due attention to "people", and in terms of protecting the rights and interests of the fetus, the fetus is ignored by the law because it is not a complete "person" [10]. Implementing the legislative concept of respecting and protecting life in the legal system has become an undeniable task.

According to the basic legal theory of China, the fetus does not have the ability to exercise rights. However, the fetus itself is a living existence with the potential to develop into a social person. The fetus carries significant social interests that cannot be ignored. Establishing a legislative concept that respects life will not hinder the implementation of family planning policies or disrupt China's existing legal system. With the vigorous development of China's human rights cause, implementing the awareness of respecting life in the legal system will become an unstoppable trend.

4.2.2. Legislatively Recognize the Life Rights and Interests of the Fetus

At present, most countries around the world start with birth and end with death in the calculation of rights and abilities. Under this system, the fetus cannot become the subject of rights and is protected by law. In order to solve the problems caused by this, most countries will soften the system of capacity for rights through appropriate institutional design, mainly including the theory of statutory termination conditions and the theory of statutory cessation conditions. Taiwan Province of China and Switzerland adopt the legal termination condition theory, that is, the fetus enjoys the right capacity before birth and has the same legal status as the person who has already been born. If the fetus is stillborn in the future, the right capacity will be eliminated retroactively. On the contrary, there is the theory of statutory cessation conditions, which Japan and Germany adopt. According to this theory, the fetus does not have the right to capacity before birth, and only when the fetus is born alive can it retroactively enjoy the right to capacity [11].

In the judgment of *Roy v. Wade*, the United States Supreme Court proposed a three-stage standard. Although this standard was challenged in subsequent cases, the Supreme Court failed to propose an alternative solution. In a word, in the process of reconciling the conflict between women's right to abortion and the rights and interests of fetal life, the United States Supreme Court chose to protect women's freedom of abortion. On the contrary, in Germany, fetuses are considered a constitutional 'person', and the state has an obligation to provide legal protection for unborn fetuses. Women's abortion behavior is restricted and considered a crime, and only after strict procedures, abortion behavior in the first twelve weeks of pregnancy is not punished, but its illegality is not ruled out.

In terms of China's current national conditions, perhaps the approach taken by the United States is more worthy of our reference, which is to restrict women's mid to late-stage abortion behavior [12]. Of course, if we only consider fully protecting the rights and interests of the fetus, then the German model is undoubtedly more worthy of reference. The formulation of laws should consider people's actual needs and predict their effects.

5. Conclusions

Abortion policies in different countries depend on different historical and cultural backgrounds, legal settings, and also on the attitude of national laws towards the right to fetal life. The conflict and balance between fetal life rights and women's right to abortion is the result of compromise between different interests. The widespread phenomenon of abortion is the result of multiple factors working together, and legal means alone cannot solve all problems. It is also necessary to vigorously promote the concept of gender equality, popularize contraceptive knowledge, and improve the social security system. Only by relying on the joint efforts of various stakeholders and utilizing various tools can the conflict between fetal life rights and women's abortion rights be legally and reasonably balanced, the improvement of the legal system can be promoted, the public interests of the country and society can be safeguarded, and the development of human rights in various countries can be promoted.

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