

## Contingent Capability of a Conceived Child: Civil Law Aspect

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### ABSTRACT

This paper covers on contingent legal capability of a conceived child. To protect the capability of conceived children and legal rights, including property, emerging on that basis, it is imperative to strictly identify the moment of emergence and termination of legal capability. The objective of this research is to analyze the provisions on civil law governance of the relations, the object of which is a conceived child's legal capability, and to develop recommendations aimed at improvement of the international regulations. General scientific methods are mainly applied in the course of theoretical rationalizing of the problem, studying the issues of establishment and development of the concept on contingent legal capability of a conceived child in regulations of various countries. It is offered to formalize in the legislation contingent recognition of an embryo as a person, and in that case a mandatory provision should apply - further birth of an alive child which brings an embryo from the category of contingent person into the category of non-contingent person, enjoying a number of rights prior to the birth - the right to be an heir, a grantee, a fructuary. Capability classification was offered - contingent capability of a conceived child; partial capability of a born child; full capability of an adult. The absence of medical indications predetermines absolute protection of a conceived child as a special object of protection. It is required to identify the list of reasons to be accepted by all the states as sufficient for legal termination of pregnancy - first, to take care about life and health of mother, also allowing improving the demographic situation in some countries.

### KEYWORDS

capacity, capability, natural person, minor, realization of right.

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## 1. Introduction

Special significance of contingent capability of a conceived child is rather obvious, even if sources of the law are not referred to. Meantime, that right does

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not always attract academic interest as, for instance, the right to protection against torture and cruel treatment, right to privacy and others (Manciaux, 1998). It is submitted that this circumstance may be caused by seeming simplicity and clearness of the right to life of a conceived child. Meantime, today the contingent capability of a conceived child, stipulated in numerous national, regional and universal international acts, still contains a number of unsolved issues of significance.

The objective of this research is postulated by the object and subject of the study and is to analyze the provisions of regulations on civil governance of the relations in connection with legal capability of a conceived child and recommendations on improvement of regulations as the object. The basic task of this research is to identify the moment of life beginning as a legally significant event.

Legal identification of life beginning will allow identifying at what stage of development a human embryo is vital, i.e., capable to exist regardless from mother and is therefore a subject of law and property rights.

It is undoubted that the right to life is rather important to attract the attention of scholars, and some works covered the topic of contingent capability of conceived children. Irehobhude O. Iyioha, Remigius N. Nwabueze (2015) studied the right to protection of children, Mykitiuk R., Lee R. (2015) studied reproductive rights and protection of an embryo, Borská J., Vacková J., Small M.A. (2016) wrote on children's rights including those conceived but not yet born in the context of the UN Convention on the rights of the child, (2015) analyzed international approaches to a child's rights protection and his/her interests since the moment of birth, Alberth L., Bühler-Niederberger D. (2015) studied the rights of children unborn yet, Hackett S. (2015) wrote on a child's right protection, Bywaters P., Brady G., Sparks T., Bos E., Bunting L., Daniel B., Featherstone B., Morris K., Scourfield J. (2015) reviewed the intervention of law in the protection of children's rights, Léveillé S., Chamberland C. (2010) studied the general model of children's protection, Melton G. B. (2013) wrote on adoption of international programs to protect children's rights, and many other scholars devoted their works to children's rights protection.

Despite the fact that some aspects of the right to life were reflected in works by a number of authors, international formalization of contingent capability of conceived children has been studied only in a fragmentary way so far, not taking into account the factors contributing to realization and protection of that right. This paper is called to analyze the whole course of this right's development and highlight both theoretical and practical aspects in a comprehensive way.

## 2. Method

This study employed the statistical method of cognition in compliance with which public phenomena and processes are considered in development of mutual relation and causation. The study relies upon didactic categories like quantity and quality, causality and regularity, individual and common.

As the basic methods, general scientific methods were used – from the abstract to the concrete, unity of historical and logical, systematic approach, as well as special – construction of a theoretical model, etc.

General scientific methods are mainly used within theoretical rationalizing of the problem, covering the issues on establishment and development of the concept

on contingent capability of conceived children in the legislations of various countries.

Particular and specific methods of research were used in the course of concretizing general law provisions and principles and their adaptation to the specific of legal governance of protection of children's rights to life. Special attention was paid to the functional and systematic/structural approach to the research subject, in the course of work historical legal and comparative legal analysis methods were used.

The use of comparative legal method enabled to identify the current trends in development of that right and general attitude of some states to particular aspects of its development. The same method was employed to compare international legal provisions on the right to life with legislations of some states. Within this research, the basic cognition methods developed by the law science and philosophy were applied: dialectic (analysis, synthesis, deduction, induction, analogy) and special methods of social humanitarian sciences (formal legal, sociological, etc.).

The research puts forward a hypothesis that the current law does not solve all the issues put forward. In that connection, attempts of scientific reasoning of the concept of contingent capability of conceived children under the contemporary conditions are relevant accounting for the experience of the Western Europe.

### 3. Results

Right after the World War I International Association of childcare was established within the League of Nations. In 1924, Geneva Declaration on the Rights of the Child was adopted. In 1945, the UN General Assembly established United Nations International Children's Emergency Fund (UNICEF). In 1959, the UN announced Declaration on the Rights of the Child (Aiken, & Purdyb, 2012).

Meantime, while in the Declaration on the Rights of the Child of 1924 children were considered only as an object to be protected, the Declaration on the Right of the Child of 1959 saw a trend to admit the child as a subject of rights as evidenced by its particular provisions. On November 20, 1989, General Assembly of the UN unanimously adopted the Convention on the Rights of the Child which fixed it as the subject of rights. The Convention on the Rights of the Child established a new model of attitude towards children, served as a driver to change the position of a child inside family and society. Of interest is the opinion expressed in connection with the above that "none of the contemporary ... law scholars argues the fact that the child is the bearer of rights – a special subject of rights" (Kilborn, 1990).

Human life begins with the impregnation but until a human is born he/she has no independent life from the life of his/her mother. Therefore, by the tradition dating back to the Roman law, legal capability in principle begins with the human birth (Iyioha, & Nwabueze, 2015).

Since the last period of the Roman Republic, an individual was deemed born at the moment of his/her separation from mother, naturally or in a surgical way (Léveillé, & Chamberland, 2010). Although, to be admitted an individual he/she was required to be born, the conceived (conceptus) was not totally removed from the view of the law science. There were cases (for example, if any inheritance expectations were related to the person to be born), when he/she was deemed born and therefore could be assigned a curator whose rights were similar to those of a guardian. In that respect, the general Germanic law established a rule:



“nasciturus pro jam nato habetur, quoties de commodis ejus quaeritur” (Ennektserus, 1949). Most researchers of the civil law put that the moment of legal capability’s emergence should not be mixed with the legal protection of future child’s rights (Svevo-Cianci et al., 2011). They opine that “provision that legator’s children born after his/her death may be legatees should not be interpreted as a case provided for by the law on emerging legal capability prior to an individual’s birth. If a child is not born alive, no legal capability emerges” (Bywaters et al., 2015). A conceived but unborn child is not vested with legal capability or any legal rights as the law provides for protection of his/her interests of probable legatee. Kilborn S. wrote in that connection that while a baby is in utero, legal capability was admitted only subject to birth. Depending on that, the legal capability may be divided into contingent – since impregnation and non-contingent – since birth (Kilborn, 1990). However, some elements containing legal capability emerge upon attaining a certain age. Partial legal capability is typical first for minors and suggests simultaneous emergence of separate elements of legal capability and capacity (Parton, 2006). Partial capability as a category of the civil law may be determined as follows: partial capability means the ability of minor children to have particular civil rights and bear liabilities not since the moment of birth but upon attaining the legal age of discretion. Therefore, on the contrary to the widespread opinion, the fact of a human birth does not mean that full legal capability emerged in a newborn.

Attaining a certain age is a fact affecting not only the capacity but legal capability (Clements, & Read, 2008). In connection with particular elements of legal capability content, simultaneous emergence of both capacity and capability is not excluded. So, it should be admitted that not only partial capacity but also partial capability do exist in citizens, enabling to offer the following classification (Figure 1. Categories of legal capability):



Figure 1. Categories of legal capability

Legal identification of life beginning will allow identifying at what stage of development a human embryo is vital, i.e., capable to exist regardless from mother and is therefore a subject of legal rights. The general legal status of a conceived but unborn child is determined as follows. A fetus since a particular moment becomes a special object to be absolutely protected. Absolute protection of a fetus is excluded by the happening of two conditions – if its existence:

- a) does not contradict to will and wish of mother;
- b) does not threaten the mother’s life (Goldson, & Muncie, 2015).

Meantime, the legislature of some countries of Europe and Russia fixes the moment when a conceived but unborn child is transferred into another state in the view of two terms (general and special), attaining which transfers the embryo from so-called category “part of mother’s body”, giving no absolute protection, into “special object” category, granting absolute protection (Orlando, & Seals, 2005).

These are expiry of twelve weeks of pregnancy (general rule) until which abortion is possible by woman's wish, and expiry of twenty-two weeks of pregnancy (special rule) after which abortion is impossible in connection with social parameters as well. Offers of some experts should be agreed with, namely legislative fixation of the duty of medical staff to do their best to ensure life support of a seven months' fetus, having respective weight and growth which in connection with any circumstances is in utero of a dead mother taking into account medical indications and consent of husband and the closest relatives (Melton, 2013).

#### 4. Discussion

The concept on contingent legal capability of a conceived child was put in the science of civil and family laws of many countries, noting that an embryo's legal capability differs from non-contingent legal capability of an individual (Borská et al., 2016). In Hungary, for example, if a child is born alive, he/she enjoys legal capability since impregnation (Civil Code of Hungary of 1977); the same provision is contained in Civil Code of Czechoslovakia and American Convention on human rights (American Convention on Human Rights, 1969). In somewhat different way the legal capability of a conceived child is determined in Civil Code of Spain of 1889; civil legal capability emerges in a born child within the first 24 hours since the moment of birth (Alberth, & Bühler-Niederberger, 2015).

To date, most international legal acts and court practice evidence that the theory of admitting the right to life in born children only is dominating (Hackett, 2015); the same position towards human embryos is taken by the European Court of Human Rights as illustrated by the following heinous case. In 2001, N. Evans (32) and her fiancée H. Johnston went through artificial insemination procedure in vitro (outside organism), in the course of which six embryos were created and frozen. Later, N. Evans was diagnosed ovarian cancer and those embryos remained the last chance for the woman to have her own child. In compliance with the Human Fertilisation and Embryology Act of 1990, both parties should give consents to in vitro insemination, i.e., for each stage of insemination both a man' and a woman's consents are required. H. Johnston first gave his consent but changed his mind after breaking with N. Evans and claimed against defrosting embryos. The problem was also in connection with the fact that five years' term to store embryos was expiring and the embryos had to be destroyed. The UK Service for Human Insemination and Embryology ordered the hospital where the embryos were stored to destroy them as it would otherwise threaten the loss of license. High Court of Justice and Court of Appeal rejected debarred N. Evans's right to use the embryos following which the House of Lords rejected to consider her suit. Meantime, the British courts admitted that in compliance with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as Convention), saying about the right to respect of private and family life, the woman's rights were violated. However, they opined that this provision does not relate to the absolute right area, i.e., contradicts to other provisions of Convention. Thus, regarding in vitro insemination, equal rights policy applies, and H. Johnston has full right not to give his consent to use the embryos. Following that, N. Evans applied to the European Court of Human Rights. Her advocate insisted that the embryos should be kept in the hospital until Evans's case is heard. Appealing to the Court, three articles of Convention were referred to: Article 2 which guarantees the right to



life, Article 8 on respect to private and family life, and Article 14 forbidding any discrimination of people suffering infertility. Article 2 of Convention guaranteeing the right to life is applicable to embryos, too, as the issue of guaranteeing the right to life relates to the essence of debates about sacredness of human life, the advocate of N. Evans said. As the European Court has not faced the protection of an embryo's life, court's resolution may greatly affect the law institution. Despite deep empathy of the Court's members in connection with the wish of N. Evans to have children, judges could not but rule against the use of embryo materials without her former partner's will. The judges noted that an individual's right to life does not apply to human embryos. The court considered the position of the woman's former partner refusing to have children with her after their diversion an invincible obstacle (Woman Loses Frozen Embryos Fight, 2006).

In earlier resolutions, the European Court of Human Rights also rejected guaranteed protection of a fetus's life, consistently implementing a principle "A fetus's right to life is invaluable but the right to life of a human born is still more invaluable". So, in one of its resolutions the European Court of Human Rights interpreted that according to the general rule, the use in the European Convention for the Protection of Human Rights of the word "each" and the context thereof in Article 2 do not apply to a child who is to be born (resolution of Commission under claim No. 8416/79, DR 19, p. 244, spec. 259). Not admitting an unborn child a human, the Court noted that "as the life of a fetus is closely connected to the life of a pregnant woman, if we would state that a fetus has the absolute right to life we should admit that an abortion is inadmissible even in case if the situation concerns the life of future mother... If an abortion was produced to avoid a serious threat for physical and mental health of a woman, such acts should be considered as restrictions imposed on the right to life of a fetus to protect a woman's life and health".

Meantime, the analysis of the contemporary international law allows stating that currently it is impossible to govern abortions from the standpoint of their relation to the right of life (Peak, & Del Papa, 1993). It is obvious that policy tightening to fight abortions and amounting abortions to murders thus admitting the right of a human fetus to life will hardly cause any positive results. As the practice shows, abortion ban results only in growing death rate among pregnant women therefore worsening the general demographical situation and national health parameters while birth rate either does not occur or is very little (Steinbock, 1996). Concerning the relation of abortions to the right to life, the contemporary position of European countries is based on postnatal legal capability of a child while in special cases his/her rights prior to birth may be protected only via the rights of his/her parents (Mykitiuk, & Lee, 2015).

So, the moment of emergence of the right to life is disputable, both concepts – admitting the right to life in a conceived child and admitting the right to life in a born child are rather vulnerable and scholars should come to a common conclusion whether a conceived child may be deemed a full personality and if medical professionals, biologists and embryologists come to such a conclusion, embryos may be vested with the unambiguous legal status of the holder of right. Protection of the right to life of conceived children and newborn children in the contemporary laws of the countries of Western Europe, America, Russia needs further improvement to identify the legal status of conceived children and the guarantee of the right to life of newborn children.

It is worth noting that the students respond with interest to the interactive methods, they willingly provide feedback, saying that the interactive methods "help to realize themselves during the lessons", "provide an opportunity to express one's own point of view", "hear other participants, draw the student group together", "develop communication skills", etc.

Thus, the interactive teaching methods allow influencing not only the cognitive sphere, but also the emotional-sensual and motivational spheres of the person. By virtue of these methods, the students' interest in the study of professional disciplines is awakened, the learning motivation is increased, the communication skills and the ability to work in a team are formed.

## 5. Conclusion

1. It is offered to legally formalize contingent admission of an embryo a person as in the property sphere a person (both individual and entity) is solely a construct of law, in which connection there are, as we opine, no logical obstacles and reasons to reject any future human's ability to have that legal status. Surely, in that case as well the mandatory condition should apply – further birth of a living child which brings an embryo from contingent into non-contingent person status. Taking into account the fact that legal capability of a person may not be limited, it will be contingent legal capability referring to the ability to have, prior to birth, only a number of property rights – the right to be an heir, a grantee, a fructuary, i.e., a kind of contingent legal capability. It will exist as such prior to birth as a legal fact upon which contingency of the state as a person and the contingent feature of legal capability (as well as its specialty) either will disappear or the state and respective feature will. In property relationships of a conceived child a suspensive condition applies, fixing that in cases provided for by law he/she has all and any property rights of an individual (but not liabilities) subject to a single legal fact – birth.

2. Capability classification was offered – contingent capability of a conceived child; partial capability of a born child; full capability of an adult.

3. Partial legal capability as a category of civil law may be determined as follows: partial legal capability means the ability of minors to have some civil rights and liabilities not since the moment of birth but upon attaining the age legally set. Therefore, in contrast to the widespread opinion, the fact of a human birth does not mean that a newborn has full legal capability.

3. The analysis of the international law and the Russian civil law allows concluding that currently there is some dualism in connection with the legal status of unborn children. It is feasible to note the general legal status/state of a fetus and civil status/state of a fetus while the latter – in connection with property relations is the subject of the civil law. In the first case, a natural person (namely, a pregnant woman) acts as the holder of rights, in the second case – a person as a legal state (reflecting the really existing embryo) does. The general legal status/state of a conceived but unborn child is determined as follows. The fetus, since some moment, becomes a special object subject to absolute protection. It is needed to identify the list of reasons to be accepted by all the states as sufficient for legal abortions – first, to take care of a mother's life and health.

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