

Special Issue
Traditions, Myths, and Utopias of Personhood

Approaches for Dealing with the “Natural Person” in the Chinese Legal System: A Statutory Way and a Principled Way

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Abstract

Along with numerous ethical and legal questions prompted by advancements in technology, there is a strong call for protection of “persons” in a broad sense. This Article discusses how such developments emerge in China. Chinese courts are often confronted with disputes concerning prenatal injuries, the disposition of frozen embryos, and infringements on the reputation of the deceased. After examining these cases, their underlying tensions, and the upcoming Chinese Civil Code, this Article reflects on the evolving concept of a natural person within the Chinese civil law context. The Article further asks how law deals with new problems while at the same time maintaining stability and coherence when viewed against a rapidly evolving biotechnological background.

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A. Introduction

As natural persons, we exist in three stages: Unborn, living, and deceased. In Chinese law, only the living command rights. This principle is embodied in Article 9 of the General Principles of Civil Law of the People's Republic of China (2009 Amendment), which stipulates that: "[A] citizen shall have the capacity for civil rights from birth to death and shall enjoy civil rights and assume civil obligations in accordance with the law."¹ Comparatively, the other two stages—unborn and deceased—deserve greater scrutiny, recognition, and respect in Chinese law and legal scholarship. Operating at the porous borders of natural and legal personhood, this Article discusses the ways contemporary Chinese law and jurisprudence come to terms with the unborn and the deceased.

As discussed elsewhere in this Special Issue,² advances in technology, especially human biotechnology, enable us to alter and discern life in profoundly new ways. Like other jurisdictions, the Chinese legal system has also encountered numerous conceptual, doctrinal, and ethical questions spurred on by technological changes. In this context, numerous cases have emerged concerning unborn children and dead people. The commonality in these cases is a call for added protection for those forms of human existence beyond the living. Without existing rules to reference, judges have struggled to find plausible grounds to decide cases. At the same time, both plaintiffs and respondents have established multifarious arguments to justify protection or non-protection of the unborn and the deceased. Legislatures have only recently been able to respond to this moving target.

This Article documents the premises, the doctrine, and the future implications of Chinese law as it applies to the unborn and the deceased. The Article articulates the contribution of these solutions to the concept of legal personality as it emerges from case law and legal scholarship. In particular, the Article introduces three prominent Chinese cases that dwell at the borders of legal personhood. Moreover, the Article discusses the new Chinese legislation, the recently adopted General Rules on Civil Law of the People's Republic of China (GRCL),³ assessing its

¹ Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则 (2009 年修订版)) [General Principles of the Civil Law of the People's Republic of China (2009 Amendment)] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987, amended Aug. 27, 2009) ch. II, § 1, art. 9, *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm [hereinafter GPCL]. China only issued the General Principles of the Civil Law of the People's Republic of China as general law within the civil legal system.

² See Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 GERMAN L.J. (2017); Lisette ten Haaf chapter in this volume, 18 GERMAN L. J. ## (2017).

³ Zhonghua Renmin Gongheguo Minfa Zongze (中华人民共和国民法总则) [General Rules on the Civil Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017), *translated at* <http://en.pkulaw.cn/display.aspx?cgid=291593&lib=law> [hereinafter GRCL]. The GRCL is deemed the most important and difficult part of drafting the Chinese Civil Code. China previously tried compiling a code three times, but failed to reach a general consensus. Now that the GRL has been adopted, it is promising that the first Civil Code will be issued by 2020.

contribution to how Chinese law should respond to evolving notions of natural and legal personhood as they relate to claims associated with the unborn and the deceased.

The Article is structured as follows. First, the Article will elaborate on the current statutes. Then, through an analysis of three cases, the Article assesses the legal argumentation when statutory provisions on liminal personhood remain silent or ambiguous. In order to identify what a fetus or a frozen embryo is, the upcoming civil code, as well as difficult cases and problems encountered in the Occidental legal order, are discussed. The Article concludes by exploring, using biotechnology as an example, how Chinese law deals with new problems, while at the same time maintaining its stability and coherence.

B. Status of the Unborn and the Deceased in Chinese Civil Law

In the Chinese legal system, a natural person has a capacity for civil rights from the moment of birth to her eventual death. The statutory ground for this principle—a loan from a continental European legal tradition and, more specifically, German Civil Law—is Article 9 of the GPCL, according to which “a citizen shall have the capacity for civil rights from birth to death and shall enjoy civil rights and assume civil obligations in accordance with the law.”⁴ This Section discusses the two conditions—the status of the unborn and deceased—not captured by the general principle of Chinese civil law.

In Chinese civil law, one needs to be alive after birth in order to be a right-holder. The completion of the birth is considered the primary marker indicating whether a person is alive or not—the so-called born alive criteria. Therefore, dozens of conditions for recognizing a completed birth have been proposed. These include criteria such as baby being partially out of the womb, entirely out of the womb, and a first, independent breath. In order to gain the capacity for civil rights, it is commonly believed that an individual must possess two elements, “out” and “live.” This translates to being entirely out of the mother’s body and having the capacity to breathe independently.⁵

As a corollary to the above, the capacity for holding civil rights is generally withheld from the unborn. This legislative style is closely related to the traditional treatment of a fetus that runs throughout Western philosophy. The Stoics, for example, believed that the unborn child is simply a part of the mother’s body, akin to a fruit as a part of a tree, and thus they did not recognize the

⁴ GPCL, *supra* note 1.

⁵ See, e.g., LIANG HUIXING (梁慧星), MINFA ZONG LUN (民法总论) [GENERAL INTRODUCTION TO CIVIL LAW] 88 (4th ed. 2011); MA JUNJU & YU YANMAN (马俊驹 & 余延满), MINFA YUAN LUN (民法原论) [THE THEORY OF CIVIL LAW] 76 (4th ed. 2010); WANG LIMING (王利明), MINFA ZONG LUN (民法总论) [THE GENERAL THEORY OF CIVIL LAW] 136–137 (2009); WANG WEIGUO (王卫国), MINFA XUE (民法学) [CIVIL LAW] 58 (2007).

independent value of the unborn child.⁶ Similarly, Roman Law regarded the fetus as an organ of its mother.⁷ Beyond that, science considered a child *en ventre sa mere* a part of the mother for a very long time. Some think that a just-conceived fetus is merely a collection of cells under the command not of a brain, but of only a genetic code, no more a child, yet, than a just-fertilized egg is a chicken.⁸ In this regard, China is not alone. In most countries, an unborn child does not have a legal personality and is incapable of exercising legal rights and obligations.⁹

Modern medical science, however, permits us to understand life in a way that we never could before.¹⁰ As an example, medical imaging technologies enable us to view a human body or any part of it independently, scan it, enlarge it, rotate it, adjust its transparency so that we can view inside a living being, and light it from any angle.¹¹ As a result, by the end of the second week of pregnancy, we can ensure a distinct embryo presence and that the fetus has a developing brain and a rudimentary heart. By the end of third week of pregnancy, the fetus has the beginning of a vertebrae, it develops eyes and ears, a closed circulatory system (separate from the mother's), and a working heart. By the eighth week, the fetus has forearms distinguishable from arms, thighs distinguishable from legs, and a developing nervous system with sympathetic nerves—meaning the fetus can feel pain. From the twenty-second week onwards, the fetus has the capacity to survive outside the womb.¹² Based on these changes in biotechnology and the enhanced abilities to discern the development of the fetus, every single developed jurisdiction has some limitations on conducting abortions. There are jurisdictions, such as some in the United States, that criminalize certain actions against the fetus in some

⁶ Liu Zhaocheng (刘召成), *Taier de Zhun Renge Goucheng* (胎儿的准人格构成) [*On the Quasi-Personality Construction of Fetus*], 6 *JURIST* 66, 67 (2011). See also BERNHARD WINDSCHEID, *LEHRBUCH DES PANDEKTENRECHTS* (8 Auflage) [TEXTBOOK OF PANDECTS (8th ed.)] 198 (1900).

⁷ *Id.*

⁸ RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION AND EUTHANASIA* 10 (1993).

⁹ Zhaocheng, *supra* note 6.

¹⁰ See Selkälä & Rajavuori, *supra* note 2; ten Haaf, *supra* note 2.

¹¹ J. Madeleine Nash, *Inside the Womb*, *TIME*, Nov. 11, 2002, at 68. See generally ALEXANDER TSIARAS, *FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS* (2002).

¹² Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to The Unborn from Creation to Natural Death*, 48 *ST. LOUIS U. L.J.* 425, 435 n.61 (2004). See also HENRY GRAY, *THE FORM OF THE EMBRYO AT DIFFERENT STAGES OF ITS GROWTH, IN ANATOMY OF THE HUMAN BODY* 74 (1918), https://ia600500.us.archive.org/15/items/anatomyofhumanbo1918gray/anatomyofhumanbo1918gray_bw.pdf.

manner.¹³ There are countries that recognize a right to limit the mother’s self-harming actions, such as predominant alcohol consumption or the use of narcotics, to protect the fetus.¹⁴

Differently, in the Chinese civil law system, a provision concerning protections for the unborn can only be found in Article 28 of the Law of Succession of the People’s Republic of China, which stipulates the following: “[A]t the time of the partitioning of the estate, reservation shall be made for the share of an unborn child. The share reserved shall, if the baby is stillborn, be dealt with in accordance with statutory succession.”¹⁵ With regard to whether Article 28 reveals recognition of a partial capacity of civil rights, prominent Chinese scholars maintain that it merely involves matters of inheritance allocation and has nothing to do with the capacity for civil rights.¹⁶ Even when there is a profound understanding of the growth of the fetus and also strong intentions to protect the unborn better, Chinese scholars, when discussing the unborn, avoid using terms like rights or full capacity for civil rights—let alone admitting that a fetus is a person.

The general thrust of the argument that precludes rights or a capacity for enjoying rights from the fetus aside, courts often face tough questions that impinge upon protections of the fetus in the civil law sphere. The three cases discussed below illustrate how Chinese judges and academics construe the legal doctrine in a manner that is, at least *prima facie*, consistent with the whole legal system. Moreover, it’s worth noting that the Chinese Civil Code is still in its drafting phase. The adoption of the new GRCL will be discussed, as it makes remarkable progress for the protection of the unborn.

Besides the fetus, the deceased as the last stage of life, is completely neglected by Chinese legislators. A logical deduction from Article 9 of the GPCL,¹⁷ however, seems to suggest that a death leads to the termination of the capacity for civil rights. Hence, a natural person loses her civil status of being a person in civil law at the moment of her death. Thus, the death of a natural person extinguishes its capacity as a subject of civil law, and further personality.¹⁸ This seemingly logical deduction, however, is challenged by judicial practice. As no rule with

¹³ Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1851 (2000).

¹⁴ See, e.g., ten Haaf, *supra* note 2.

¹⁵ Zhonghua Renmin Gongheguo Jicheng Fa (中华人民共和国继承法) [Law of Succession of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Apr. 10, 1985, effective Oct. 1, 1985), translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1383956.htm.

¹⁶ See, e.g., LI YONGJUN (李永军), MINFA ZONG LUN (民法总论) [GENERAL THEORY OF CIVIL LAW] 69 (2008); Huixing, *supra* note 5, at 89; Liming, *supra* note 5, at 136–37.

¹⁷ GPCL, *supra* note 1.

¹⁸ ZHANG JUNHAO (张俊浩), MINFA XUE YUANLI (民法学原理) [PRINCIPLES OF CIVIL LAW] 153 (2000).

respect to protections for the deceased can be found within the Chinese civil code, decisions that support a dead person's interest have led to widespread controversies in the public sphere.

C. Three Prominent Cases

This Section introduces three prominent cases that explore the structure of legal personality when Chinese civil law remains silent. Subsequent discussions in the Article build on the tensions contained in these cases.

I. A Case Concerning a Fetus—Wang Deqin v. Yang Desheng

*Wang Deqin v. Yang Desheng*¹⁹ concerned compensation for living and educational expenses of a child whose father was killed in a car accident. Wang, a one-year-old plaintiff, sued in the People's Court of Jiangyang District to seek damages from Yang and the No. 2 Automobile Team for running over his father. Wang alleged that according to Article 119 of the GPCL²⁰ and Article 28 of the Succession Law, Yang was responsible for the plaintiff's living and educational expenses. On the contrary, Yang argued that according to Article 9 of the GPCL, Wang was unborn at the time Wang's father died and thus did not have a capacity for civil rights, including the right to petition the court. As for Article 119, Wang was not the victim's dependent when he was alive and thus the plaintiff had no right to ask for any compensation.

Sympathetic to the plaintiff's argument, the court held that "the deceased dependent" in Article 119 includes not only the persons actually raised by the victim, but also the children that would have been raised, but had not yet been raised by the victim. The infliction imposed by Yang directly led to the victim's death before Wang's birth and thus effectively precluded Wang from receiving his father's upbringing. Therefore, Wang's claim was in compliance with

¹⁹ Sup. People's Ct., Wangdeqin su Yangdesheng, Luzhou Shi Qiche Er Dui Jiatong Shigu Sunhai Peichang Jiufen An (王德钦诉杨德胜、泸州市汽车二队交通事故损害赔偿纠纷案) [Wang v. Yang Desheng and the No. 2 Automobile Team of Luzhou City Traffic Accident Damage Compensation Dispute Case] (May 28, 2003), <http://en.pkulaw.cn/display.aspx?cgid=1970324837041987&lib=case>.

²⁰ GPCL, *supra* note 1, art. 119:

[A]nyone who infringes upon a citizen's person and causes him physical injury shall pay his medical expenses and his loss in income due to missed working time and shall pay him living subsidies if he is disabled; if the victim dies, the infringer shall also pay the funeral expenses, the necessary living expenses of the deceased's dependents and other such expenses.

In Chinese: "侵害公民身体造成伤害的, 应当赔偿医疗费、因误工减少的收入、残废者生活补助费等费用; 造成死亡的, 并应当支付丧葬费、死者生前扶养的人必要的生活费等费用。"

the prescribed GPCL provisions. Moreover, the court acknowledged a child’s capacity to bring an action for damages, even though injuries occurred before its birth. In doing so, however, the court circumvented the question of whether an unborn child had the capacity for civil rights.

The case highlights the lacunae of law and the interpretation of judges. Obviously, the focus of this case is on whether the offender is liable for compensation to the victim’s unborn offspring. Legislation remains silent on this point, and law must instead function through interpretations of judges. As judges are adjudicators, not legislators, they have a duty to adjudicate according to law, not create new law. In this case, the court interpreted the conception of “the deceased dependent” to include children that would have been raised by the deceased. We can hardly say that the court explained it as a strict literal interpretation. More accurately, it falls within the scope of an extensive interpretation, which would probably construe the rule to include not only the core, but also all “periphery” of the rule’s application. Such a generosity may seem strange, but it is linguistically possible.²¹ An extensive interpretation is a way of construing a rule in a linguistic perspective. It is generally regarded as precise interpretation of the statutory provision.²² But, some criticize extensive interpretations as a method of statute innovation or legal analogy, rather than a method of legal interpretation. Moreover, it relies on other essential or authoritative bases of arguments, and accordingly, it cannot be classified as an interpretive method which is relatively independent.²³ If improperly scrutinized, it can potentially distort or destroy law by wrongly extending norms while holding the flag of literal interpretation. Although subject to some scholarly criticism, its results are generally approved for showing concern for the unborn without trampling existing rules.

II. A Case Concerning Frozen Embryos—Shen & Shao v. Liu & Hu

*Shen & Shao v. Liu & Hu*²⁴ concerned a dispute over custody and the disposition of frozen embryos. An infertile couple created fifteen embryos through IVF and froze four embryos at Nanjing Gulou Hospital in 2012. The couple died in a car accident before the embryo implantation. The plaintiffs, Shen and Shao, and the defendants, Liu and Hu, were the parents of the dead husband and wife, respectively. Shen and Shao sued Liu and Hu, and the Gulou

²¹ ALEKSANDER PECZENIK, *ON LAW AND REASON* 318 (Springer 2d ed. 2008).

²² *Id.* at 319.

²³ Jiang Fudong (姜福东), *Kuozhang Jieshi Yu Xian Suo Jieshi de Fansi* (扩张解释与限缩解释的反思) [*A Rethinking of Extensive Interpretation & Restrictive Interpretation*], in *ZHEJIANG SOCIAL SCIENCES* 127 (2010).

²⁴ Chenxinnan, Shaoyumei su Liu jinfafa, Huxingxian Jianguan, Chuzhi Quan Jiufen An—Renti Lengdong Peitai Jianguan, Chuzhi Quan Guishu de Sifa Rending (沈新南、邵玉妹诉刘金法、胡杏仙监管、处置权纠纷案—人体冷冻胚胎监管、处置权归属的司法认定) [Shen Xinnan, Shao Yumei v. Liu Jinfa, Hu Xingxian Supervision, Dispute Cases—Judicial Determination of Human Embryo Supervision and Disposition of Ownership], Sept. 17, 2014, http://www.pkulaw.cn/case/pfml_1970324845293374.html?keywords=沈新南、邵玉妹诉刘金法、胡杏仙监管、处置权纠纷案&match=Exact (China) [hereinafter *Shen & Shao v. Liu & Hu*].

Hospital as the third party, for the right of custody and disposition of frozen embryos in the People's Court of Yixing City. The plaintiffs and defendants both argued that the four frozen embryos were the property of their children and should be turned over to them. The Gulou Hospital, in turn, insisted that frozen embryos were not property and therefore could not be objects of a succession. As gestational surrogacy is prohibited in China, neither party to the case could use the embryos to conceive a child. Furthermore, there was a contract between the Gulou Hospital and the deceased couple stipulating that the retention period of the four frozen embryos was one year, after which the frozen embryos were to be discarded.

The People's Court of Yixing City dismissed the plaintiffs' claim by reasoning that a frozen embryo was a special thing containing future life characteristics, and therefore could not be transferred or inherited like other ordinary things. Moreover, it is impossible to achieve the reproductive purpose of the dead couple because surrogacy is illegal in China. Hence, the deceased couple's rights in the frozen embryos cannot be inherited because the couple had no means to implant the embryos if they would not carry them by themselves.

Both parties refused to accept the trial court's decision of the first instance and the case eventually reached the appellate court, the Intermediate People's Court of Wuxi City. By that time, the case gained great public attention. The Intermediate People's Court of the second instance held that even though there was an agreement over the disposition of the frozen embryos, the Gulou Hospital still had no right to dispose of them unilaterally, as the couple had died by accident, which made the contract unenforceable. In the absence of settled rules, the court emphasized that a pre-implantation embryo was a one of a kind entity, a being in-between a person and a thing. It had the potential to become a person and therefore it deserved a higher moral status than non-life objects. For this reason, it should also be respected and protected in a special way. Accordingly, the appellate court held that the four non-transferred embryos would be placed under the custody and disposition of the four elders, but in a way that would not violate public order, good customs, or harm the interests of others. As for how and which kinds of uses they could have for the embryos, the presiding judge simply held that the court bore an open mind. He further pointed out that it was possible that with the developments of the society and changes in people's values, gestational surrogacy could be legitimate one day, and anyway, cryopreservation technology left plenty of room for imagination.²⁵

²⁵ Fu Jin & Su Zhen (付金, 苏振), *Quanguo Shou Li Lengong Peitai Quan Shu Jiufen An Luomu: Peitai de Falu Shuxing Gai "Hequhecong"* (全国首例冷冻胚胎权属纠纷案落幕: 胚胎的法律属性该“何去何从”) [*The First Dispute concerning Frozen Embryos in China Has Finally Brought down to Curtain: What is the Legal Nature of Embryos?*], PEOPLE'S COURT DAILY 1 (Sept. 23, 2014).

III. A Case Concerning the Deceased—Chen Xiuqin v. Wei Xilin

The two previous cases focused on the conditions of the unborn. At the other end of personhood, the deceased deserve similar attention. The following case attracted substantial attention due to the challenges it poses to the archetypal model of a natural person in Chinese civil law. The case has contributed immensely to what we consider death to entail in the field of Chinese civil law.

Chen Xiuqin v. Wei Xilin,²⁶ also known as the *Lotus Girl* case, is the first case referring to protection of the reputation of the dead. The plaintiff, Chen, filed a suit against the defendants before the Tianjin Municipality Intermediate People's Court in 1987 arguing that Wei damaged the right to reputation of her and her deceased daughter, Ji Wenzhen. Ji was a folk actress whose stage name was Lotus Girl. Wei had written a novel, entitled *Lotus Girl*, in which Ji's real and stage names were used. The novel described Ji's affairs, her relationships with the leaders of Tianjin's underworld and local tyrants, and hinted that she suffered from a venereal disease and died from a mistaken injection. The defendant argued that Ji's right to reputation was not violated because Ji already died.

Experiencing great difficulties in rendering a proper verdict, the Tianjin Municipality Intermediate People's Court wrote a letter to the Supreme People's Court asking for instructions. The Supreme People's Court issued its reply in the 1989 document entitled, “A Letter of Legal Protections of Right to Reputation of the Deceased.” The letter provided that, although Ji was dead, her reputation should be protected by law and her mother retained the right to initiate a suit.²⁷ After receiving the letter, the Tianjin Municipality Intermediate People's Court upheld the plaintiff's request, reasoning that the GCPL entitled citizens to protections of reputation that apply after death.

Conceding that the deceased enjoys the reputational protection rights raises an essential question: Why does a “person” still enjoy rights after death? Furthermore, is recognizing that the deceased enjoys rights equivalent to granting a capacity for civil rights to the deceased? If so, the system of traditional Chinese civil law *viz.* the capacity for civil rights is destabilized. Instead of providing a clear-cut settlement, the *Lotus Girl* case provoked widespread controversies over the deceased's rights. Most Chinese scholars continue

²⁶ Chenxiuqin su Weixilin, Jin Wan Baoshe (陈秀琴诉魏锡林、今晚报社) [Chen Xiuqin v. Wei Xilin and Tonight Newspaper Office], June 21, 1989, <http://en.pkulaw.cn/display.aspx?cgid=1970324837041272&lib=case> [hereinafter *Xiugin v. Wei Xilin*] (China).

²⁷ Zuigao Renmin Fayuan Guanyu Siwang Ren de Mingyu Quan Ying Shou Falu Baohu de Han (最高人民法院关于死亡人的名誉权应受法律保护的函) [A Letter of Legal Protections of Right to Reputation], Apr. 12, 1989, http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=4278&keyword=死者名誉权的法律保护&EncodingName=&Search_Mode=like. The letter provides: “吉文贞（艺名荷花女）死亡后，其名誉权应依法保护，其母陈秀琴亦有权向人民法院提起诉讼。”

to maintain that the deceased cannot have civil rights.²⁸ But, the refusal to provide protections of personality interests to the deceased, however, will encourage others to slander the deceased, thus harming the reputation of the dead. This is also an unpalatable situation.

To maintain consistency in the model of the natural person, as it emerges consistent, the Supreme People's Court later adopted a more elastic strategy. Avoiding terms like "the deceased's right of reputation," the Supreme People's Court held, in a later Interpretation,²⁹ that a close relative is entitled to claim emotional damages. These infringements must run contrary to public order and good customs, and they include actions upon the name, portrait, reputation, or honor by insulting, libeling and disparaging, or disclosure or use of the privacy, use or damage to the remains of a deceased person, and so forth. Plaintiffs who can successfully link these actions with public order and good customs will likely receive support before the court.

IV. Summary

The three cases discussed above have several things in common. Most significantly, they are all decisions that show deep concern for life under no settled rule. Judges struggled to deal with those entities that escaped traditional civil law categories. The unborn were protected with the help of an extensive interpretation of the phrase of "the deceased dependent." In the cases of the pre-embryos and the deceased, public order and good customs arguments were utilized to explain the outcomes that expand the scope of legal protections for the unborn and the deceased.

The extensive interpretation pursued by the courts, however, bypasses hard, but important questions, such as the vexing nature of the unborn. Are the unborn people or things? What would broad legal protections for the unborn look like? Should the unborn enjoy rights from

²⁸ WANG LIMING (王利明), RENG QUAN YANJIU (人格权研究) [STUDY ON PERSONALITY RIGHTS] 188 (2d ed. 2012); JUNJU & YANMAN, *supra* note 5, at 86.

²⁹ Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti de Jieshi (最高人民法院关于确定民事侵权精神损害赔偿若干问题的解释) [Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts], (promulgated by Sup. People's Ct., Mar. 8, 2010, effective Mar. 10, 2010), art. 3 (China), *translated at* <http://en.pkulaw.cn/display.aspx?cgid=34937&lib=law>. In Chinese:

自然人死亡后，其近亲属因下列侵权行为遭受精神痛苦，向人民法院起诉请求赔偿精神损害的，人民法院应当依法予以受理：（一）以侮辱、诽谤、贬损、丑化或者违反社会公共利益、社会公德的其他方式，侵害死者姓名、肖像、名誉、荣誉；（二）非法披露、利用死者隐私，或者以违反社会公共利益、社会公德的其他方式侵害死者隐私；（三）非法利用、损害遗体、遗骨，或者以违反社会公共利益、社会公德的其他方式侵害遗体、遗骨

the moment of conception? How can we reconcile the interests of the unborn when they conflict with the rights of others, especially the rights of the mother? How do we translate nebulous concepts like public order and good customs into practical legal principles? What are the risks associated with having multiple and distinct readings? How can we tackle the numerous tricky legal problems posed by technology? Which way should we proceed and how should the Chinese legal system respond? The subsequent Section examines some of these questions in the context of forthcoming Chinese legislation and legal scholarship.

D. Two Approaches: A Statutory Way and A Principled Way

This Section discusses the recent adoption of the GRCL as a legislative solution to questions and tensions arising from the three cases discussed above. First, the Section deals with the new protections of the fetus introduced in the GRCL. Second, the Section extends the new legislative rationale to frozen embryos and the deceased.

I. Legal Protections for a Fetus

1. Is a Fetus a Person?

When does a human life start? Is a fetus a person from the moment of conception? Is abortion murder or homicide? As has been the case for many years, abortion is an issue central to discussions about the legal status of the unborn. And yet, this is not the case in China.

As is well known, questions concerning the rights of the unborn and, relatedly, a woman's control over her own body and reproduction has been fiercely debated for decades. In the United States, for example, *Roe v. Wade* declared decades ago that unborn human beings were not persons and, accordingly, did not have constitutional rights to life and liberty. This result was in line with the Supreme Court's review of history that disclosed, “the unborn have never been recognized in the law as persons in the whole sense.”³⁰ In other jurisdictions, it is hotly debated whether abortion ought to be made permissible when the birth of a fetus would have a detrimental effect on the child's quality of life or the life of the mother and other family members.³¹

Furthermore, the tension between the fetus and its mother becomes more acute when it comes to questions of maternal harm. In this context, the Congenital Disabilities (Civil Liability) Bill of 1976 considered that—only the father could be responsible for the damage while the mother was considered free of blame. A subsequent report, which based on research of the Royal Commission on Civil Liability and Compensation for Personal Injury established in 1973, stated that neither the father nor the mother are liable for prenatal

³⁰ *Roe v. Wade*, 410 U.S. 113, 162 (1973).

³¹ DWORKIN, *supra* note 8, at 97–98.

injuries.³² Yet, there is an English case, *R v. Sarah Louise Catt*,³³ where a woman who ordered abortion medication online and unilaterally induced an abortion at a very last stages of pregnancy was sentenced to eight years in prison. Moreover, the rule of immunity setting in interfamilial tort immunity is now being abrogated by many states in the U.S.³⁴ The question of whether a cause of action for prenatal injuries should be brought by a child against its mother might no longer be remote. The problem is balancing the pregnant woman's right to unfettered use of her body against the unborn child's interest to begin life with a sound mind and body. It is remarkable that courts in the Netherlands give great weight on the point of viability when considering the interests of an unborn child. It is from that point that the unborn child counts as a person and renders abortion no longer legal.³⁵ Therefore, it is reasonable to prohibit the expectant mother from smoking, taking drugs, or excessively drinking in order to protect a viable fetus.

In China, however, this important viability demarcation point does not exist. Chinese abortion legislation operates very differently from that of most European or American countries. While it's interesting to note that China criminalized abortion in the Criminal Law Draft of Qing Dynasty because of Western influence, the implications turned out to be unpleasant.³⁶ Elevating abortion to criminal law codes did not reduce the abortion rate. Instead, women risked their lives to keep abortions secret. Traditionally, China has never had a dominant religion analogous to the role that Catholicism served in Europe, and thus lacks a strong belief system that would consider abortion murder. Moreover, China's family planning policy has

³² Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Commission): Report, Cmnd. 7054-1, at 71 (Gr. Brit.):

It can be argued that, as a child retains full right of action against its parents in respect of any injury inflicted after birth, he should be able to sue her or both parents in respect of ante-natal injury. We believe, however, that the social argument which has impressed so many of our witnesses should prevail. The argument is particularly strong in the case of the mother, but the danger of disrupting family life applies also to the father. We recommend that a child should not have a right of action for damages against either parent for ante-natal injury.

³³ Sentencing Remarks, *R. v. Catt (Sarah Louise)*, Sept. 17, 2012, <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/sarah-louise-catt-sentencing-remarks-17092012.pdf> (Eng.); *R. v. Catt (Sarah Louise)*, 2013 WL 3550521 (Ct. of App. 2013).

³⁴ Beverly I. Chernaik, *Recover for Prenatal Injuries: The Right of a Child against its Mother*, 10 SUFFOLK U. L. REV. 582 (1976).

³⁵ District Court Amsterdam Feb. 21, 2006, Bj 2007/6.

³⁶ HUANG YUANSHEG (黄源盛), WAN QING MINGUO XINGFA SHILIAO BIANZHU (晚清民国刑法史料编著) [ARCHIVES OF CRIMINAL LAW IN THE LATE QING DYNASTY AND THE REPUBLIC OF CHINA] 171 (2010).

made it impossible to consider abortion a crime.³⁷ Despite a universal two-child policy that allows couples to have two children so as to address low fertility rates and problems stemming from an aging population, it seems unlikely that the Chinese government would change its basic attitude towards abortion.³⁸

Thus, until now, China has not had a national law concerning abortion. As many prospective parents still have a preference for the future child’s gender, there is only a rule issued on March 28, 2016, for the purpose of controlling the gender balance of the newborn.³⁹ Generally, Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy (Rules) permits four types of gender selective abortion.⁴⁰ According to Article 9 of

³⁷ China has been carrying out its family planning policy since the 1970s in order to limit population growth. XIANFA art. 53, § 3 (China) (1978) provides that “[t]he State promotes and implements a family planning policy” [国家提倡和推行计划生育]. Article 25 of the present Constitution of the People’s Republic of China (2004 Amendment) also clearly states that “[t]he State promotes the family planning policy, so that the population growth may fit the plans for economic and social development” [国家推行计划生育, 使人口增长同经济和社会发展计划相适应]. XIANFA art. 25 (China) (1982), *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm. Similarly, Section 2 of Article 49 of the present Constitution provides that “[b]oth husband and wife have the duty to practice family planning” [夫妻双方有实行计划生育的义务]. Xianfa art. 49, § 2 (China) (1982), *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm.

³⁸ In fact, China’s one-child policy has gradually loosened since a selective two-child policy was issued in November 2013. Article 2 of the Resolution of the Standing Committee of the National People’s Congress on Adjusting and Improving the Family Planning Policy states that “we approve the launching and implementation of the policy of allowing couples to have two children if either parent is an only child” [同意启动一方是独生子女的夫妇可生育两个孩子的政策]. Quanguo Renda Changwei Hui Guanyu Tiaozheng Wanshan Shengyu Zhengce de Jueyi (全国人大常委会关于调整完善生育政策的决议) [Resolution of the Standing Committee of the National People’s Congress on Adjusting and Improving the Family Planning Policy] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 28, 2014, effective Dec. 28, 2013), art. 2, *translated at* <http://en.pkulaw.cn/display.aspx?cgid=215349&lib=law>. Starting on January 1, 2016, and although family planning policy remains a basic national policy in China, the universal two-child policy came into effect. Article 18 of the Law of the People’s Republic of China on Population and Family Planning (2015 Amendment) stipulates that “[t]he State advocates that one couple bear two children” [国家提倡一对夫妻生育两个子女]. Zhonghua Renmin Gongheguo Renkou Yu Jihua Shengyu Fa (2015 Xiuzheng) (中华人民共和国人口与计划生育法(2015修正)) [Law of the People’s Republic of China on Population and Family Planning (2015 Amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2001, effective Sept. 1, 2002, amended Dec. 27, 2015), art. 18, *translated at* <http://en.pkulaw.cn/display.aspx?cgid=261790&lib=law>.

³⁹ It is important to note that Chinese regulations exist in a hierarchy. Zhonghua Renmin Gongheguo Lifa Fa (2015 Nia Xiuzheng) (中华人民共和国立法法 (2015年修正)) [Legislation Law of People’s Republic of China (2015 Amendment)] (promulgated by the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015), *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383554.htm. The hierarchy of regulations are: (1) the Constitution of the People’s Republic of China; (2) national Laws issued by the National People’s Congress; (3) administrative regulations issued by the State Council; (4) local decrees issued by local People’s Congresses; and (5) administrative and local rules issued by ministries or commissions of the States Council or local People’s Governments.

⁴⁰ The Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy were jointly issued by the National Health and Family Planning Commission of the People’s Republic of China, State Administration for Industry & Commerce of the People’s Republic of China and China Food and Drug Administration.

the Rules, barring circumstances such as serious genetic diseases of the fetus, grave deformities of the fetus, conditions that seriously threaten or endanger the pregnant woman's health and other necessary situations as prescribed by law or administrative regulations or based on medical science apply, one shall not artificially discontinue gestation on the basis of sex selection.⁴¹ With regard to the limit in terms of gestational weeks for terminations of pregnancy, the Rules do not provide any reference. Actually, the Rules only deal with sex selective termination of pregnancy, by which situations like abortions after rape, incest, or unexpected pregnancy are not governed. Because of the special conditions of family planning policy, abortion is basically unlimited in China.⁴²

Considering the Chinese situation, I think Dworkin's conclusion, pointing out that whether a fetus is a person is not the central issue of abortion or other protections of the unborn, is correct.⁴³ As almost everyone shares the belief that human life has value in itself, the unborn deserves protections even without admitting that it is a person. That is why it makes sense that China has struggled to protect the unborn, while paradoxically remaining quite tolerant of abortion.

2. A Statutory Way: Legal Fiction

The GRCL, a new law approved on March 15, 2017, which will come into force in October 2017, includes provisions that alter the Chinese legal landscape. In particular, the general part of the upcoming legislation seeks to give a response to the call for greater protection of nasciturus interests. While the code generally sticks to the natural person model whereby "only the living command rights," the new Article 16 refers directly to the status of the fetus. According to

Jinzhì Fēi Yìxué Xuyào de Tàier Xìngbié Jiāndìng Hé Xuānzé Xìngbié Rēngōng Zhōngzhì Rénshēn de Guǐdìng (禁止非医学需要的胎儿性别鉴定和选择性别人工终止妊娠的规定) [Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy] (promulgated by the Nat'l Health & Fam. Plan. Comm'n, the State Admin. for Indus. & Com., the State Food & Drug Admin., Mar. 28, 2016, effective May 1, 2016), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=268852&keyword=禁止非医学需要的胎儿性别鉴定和选择性别人工终止妊娠&EncodingName=&Search_Mode=accurate [hereinafter Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy].

⁴¹ Rules of Preventions on Non-Medical Fetal Sex Identification and Gender Selective Termination of Pregnancy, *supra* note 41, art. 9. Article 9 provides in Chinese:

符合法定生育条件，除下列情形外，不得实施选择性别人工终止妊娠：（一）胎儿患严重遗传性疾病的；（二）胎儿有严重缺陷的；（三）因患严重疾病，继续妊娠可能危及孕妇生命安全或者严重危害孕妇健康的；（四）法律法规规定的或医学上认为确有必要终止妊娠的其他情形。

⁴² WANG XIUZHE, ABORTION AND ABORTION REGULATIONS IN CHINA (2014), <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws7/w7-xiuzhe.pdf>.

⁴³ DWORKIN, *supra* note 8, at 67.

Article 16, where the protection of the interests of a fetus is involved, among others, a succession or acceptance of a gift, the fetus shall be presumed to have the capacity for civil rights; however, in the case of a stillborn, the fetus’s capacity for civil rights never existed.⁴⁴

With respect to protections of the unborn, there are two general legislative patterns around the continental law system: Generalized protectionism and individualized protectionism. Countries that adopt generalized protectionism, such as Taiwan which, in Article 7 of its Civil Code, maintains that an unborn is considered as if it was already born with regard to its interests, except if it was subsequently born dead.⁴⁵ Individualized protectionism, however, is an enumerative legislative style which can be found in German and Japanese Civil Codes.⁴⁶ These codes enumerate a number of cases that merit special consideration. Article 16 of the GRCL obviously belongs to the realm of individualized protectionism. Nevertheless, it only explicitly enumerates two types of circumstances, succession and receiving gifts, both of which are pertinent to property. It seems illogical that the unborn child’s property interests are protected while setting aside its health interests. With regard to the question of when does the capacity for civil rights of an unborn begin, it is evident that Article 16 follows the legal release conditions theory,⁴⁷ which means that an unborn child enjoys the capacity for civil rights from the moment of conception, but,

⁴⁴ GRCL, *supra* note 3, art. 16. Article 16 provides in Chinese:

涉及遗产继承、接受赠与等胎儿利益保护的，胎儿视为具有民事权利能力。但是胎儿娩出时为死体的，其民事权利能力自始不存在。

⁴⁵ Other examples, such as the Swiss Civil Code in Article 31, provide that an unborn child has legal capacity provided that it survives birth. Article 1.2 of the Dutch Civil Code provides as follows: “[I]f it is in the interest of the child of whom the woman is pregnant, it will be regarded as already born. If it is born dead, it is considered never to have existed at all.”

⁴⁶ Section 844 of the German Civil Code provides that liability for damages also arises where the third party at the time of injury had been conceived, but not yet born. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], § 844, para. 2, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.). Comparatively, the German Civil Code in Article 1923 prescribes that a person who is not yet alive at the time of the devolution of an inheritance, but has already been conceived, is deemed to have been born before the devolution of an inheritance. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], § 1923, para. 2, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.). The Japanese Civil Code in Article 721 provides that to demand damages, a child in the womb is deemed to have been born. MINPŌ [MINPŌ] [Civ. C.] art. 721 (Japan). Article 886 and Article 965 acknowledge that the unborn child has the right of inheritance and the right of legacy respectively. MINPŌ [MINPŌ] [Civ. C.] art. 866, 965 (Japan).

⁴⁷ There is another theory called the legal termination condition theory. In the opinion of scholars who support the legal termination condition theory, an unborn child does not have a capacity for civil rights. Furthermore, the capacity for civil rights of the child are retroactively effective and start at the moment when inheritance begins or the right of action for the recovery of damages is established. This capacity holds so long as the unborn survives birth. WANG ZEJIAN (王泽鉴), MINFA XUEXHUO YU PANLI YANJIU (4) (民法学说与判例研究(4)) [CIVIL LAW THEORIES AND PRECEDENTS STUDY] (4) 272 (1998).

in the case of a stillborn, its capacity for civil rights extinguishes retroactively at the moment it was conceived.

II. Legal Protections for Embryos and the Deceased

1. What is a Frozen Embryo?

If it is reasonable, Article 16 of the GRCL suggests that an unborn child is considered a person and thus has the capacity for civil rights at the instant of conception, but the situation for frozen embryos seems different.

We are living in an era of rapid technological changes that has a profound effect on our everyday lives. Following law's nature, human beings dominate the nature on the one hand, while on the other hand natural environments have been changed by technology to serve human desires. Within the field of biotechnology, the biological facet of a human being becomes the object of the intervention of biotechnology, and the results of this intervention, in turn, have strongly influenced the non-biological facet—social or ethical—of human beings. Artificial reproductive technologies (ARTs) enable infertile couples to have their own biological children; genetic engineering could reedit inherited genes in human embryos. Gene cloning technologies are able to produce the same exact genetic copies of persons. It is probably fair to say that no technology could compare to biotechnology in terms of the degree of potential for changing a human's life. Other technologies could destroy human life at most, while biotechnology, is—or will be soon able to create human life out of nothing. This is very close to the role of God.⁴⁸ As biotechnology directly interferes with the process of creation and the development of life, it reaches the deepest question of what it means to be a human, which then has ethical ramifications that have been often answered by religion. Taking the example of frozen embryos, this has raised a plethora of ethical and legal problems: What are these cryopreserved embryos? Are they persons or things? Who should have custody and dispose of them in the event of the death or divorce of the couple?

When it comes to the status of frozen embryos, the two courts in *Shen and Shao v. Liu and Hu* held subtly different opinions. On the one hand, the court of first instance believed that a non-transferred embryo was a special thing containing future life characteristics. On the other hand, the appellate court maintained that a cryopreserved embryo is an entity between a person and a thing. Comparatively, some scholars, however, insist that an *in vitro* fertilized embryo is a thing. They divide things into three different categories: Ethical things, special things, and ordinary things. A preimplantation embryo fits within the scope of ethical things.⁴⁹

⁴⁸ YAN JUE'AN (严厥安), *FA YU SHIJIAN LIXING (法与实践理性)* [LAW AND PRACTICAL REASON] 320 (2003).

⁴⁹ Additionally, organs and tissues separated from the human body, corpses, and medical waste are ethical things as well. Yang Lixin (杨立新), *Ren de Lengdong Peitai de Falu Shuxing Ji Qi Jicheng Wenti (人的冷冻胚胎的法律属性及其继承问题)* [*The Legal Nature of Frozen Embryo and its inheritance*], 13 *THE PEOPLE'S JUDICATURE* 25 (2014).

Other scholars argue that this potential offspring is neither a person nor a thing, but rather occupies some position in-between.⁵⁰ Having challenged traditional *persona/res* distinction, this view is supported by few. Generally speaking, most Chinese jurists still maintain that frozen embryos are within the realm of things.⁵¹

Yet, no matter where we put them, no one denies the value of frozen embryos. As we can see, the GRCL does not confront the issue. It seems that the legislature has not been ready to directly deal with frozen embryos.⁵² In an era of rapid changes in society, law must find a balance between maintaining consistency in existing law and political practice, and adapting itself to new circumstances.⁵³ Law would lose its integrity if it failed to maintain consistent ties with the past. Indeed, this is not a uniquely Chinese problem. At the very least, the whole world is facing this problem caused, at least in part, by biotechnology such as ART and CRISPR. Each country may have its own way to tackle it.

In China, in the cases of frozen embryos and the deceased, instead of codifying protections of the unborn child leading to a statutory article in the upcoming civil code, the legislature and judiciary resort to the concepts of public order and good customs. This concept, called “*gong xu liang su*,” is drafted into Chinese laws. Maintaining public order and adhering to good

⁵⁰ Xu Guodong (徐国栋), *Tiwai Shoujing Lengdong Peitai de Falu Diwei Yanjiu* (体外受精冷冻胚胎的法律地位研究) [*The Legal Position of Externally Fertilized Embryo*], 5 L. & SOC. DEV. 65 (2005).

⁵¹ This conclusion can be drawn from propositional versions for the Civil Code Draft. There are three propositional versions for the Civil Code Draft of China: The versions written by Liang Huixing, Wang Liming, and Yang Lixin respectively. See, for example, a propositional version for the Civil Code Draft of China written by Wang Liming that provides in Article 128 that except when violating public orders and good customs, organs, blood, marrow, tissues, sperms, oocytes (or eggs) of a natural person can be considered things. Wang Liming (王利明), *Minfa Zongze Caoan Zhuanjia Jianyi Gao* (民法总则草案专家建议稿) [Civil Code Draft], art. 128 (China). Article 94 of a propositional version written by Liang Huixing prescribes that in limitation of not violating public orders and good customs, organs, blood, marrow, tissues, sperms, oocytes (or eggs) of a natural person can be treated as if they were objects of civil rights. Liang Huixing (梁慧星), *Minfa Zongze Caoan Zhuanjia Yijian Gao* (民法总则草案专家意见稿) [Civil Code Draft], art. 94 ##### (China). Although both of these Articles do not refer to frozen embryos, a number of scholars believe that an in vitro fertilized embryo can be considered as a thing. These scholars reason that these Articles are quasi-rules concerned with the civil status of pre-implantation embryos. Zhang Shengbin, Fan Li & Zhuang Xulong (张圣斌, 范莉, 庄绪龙), *Renti Lengdong Peitai Jianguan, Chuzhi Quan Guishu de Renshi* (人体冷冻胚胎监管、处置权归属的认识) [*Recognition of the Right to Custody and Disposition of Human Frozen Embryo*], 11 J. L. APPLICATION 44 (2014).

⁵² All three propositional versions for the Civil Code Draft are silent with regards to the thorny question of the civil status of externally fertilized embryos. Surprisingly, the propositional Version for the General Rules of Civil Code of the People’s Republic of China (Draft for Comments), specifically Article 18 of Chapter 2 Natural Person, provides that the preservation and disposition of an in vitro fertilized embryo shall not violate social morality or damage public interests. Even though Article 18 does not explicitly define the nature of an in vitro fertilized embryo, the Draft for Comments nonetheless seems to give greater recognition to frozen embryos akin to a person to under the systematic interpretation.

⁵³ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY 1* (Xin Chunying & Wu Yuzhang trans., Chinese ed. 1998).

customs are principles of capital importance in Chinese civil law,⁵⁴ especially for those difficult cases that are not resolved by explicit rules. These overarching concepts are, more or less, similar to the role of dignity (Würde) in the German constitutional system, which can be found from the first article of its Basic Law, providing—in English translation)—“the dignity of man is inviolable . . . [t]o respect and to protect it shall be the duty of all public authority”⁵⁵, and in some other countries, like notably Hungary and Israel.⁵⁶

In Germany, the Federal Constitutional Court held that “human dignity means not only the individual dignity of the person but the dignity of man as a species. Dignity is therefore not at the disposal of the individual.”⁵⁷ Dignity has played an especially significant role in protecting entities that are at the margins of legal personality, where there might not be too many direct rights to utilize. For example, in cases regarding abortion, in which the German Constitutional Court “used the human dignity clause to underline the constitutional requirement for protection of unborn life.”⁵⁸ Similarly, in a case dealing with the use of force by security forces, in which the German Federal Constitutional Court voided provisions of the Aviation Security Act that authorized the armed forces to shoot down aircraft that were intended to be used as weapons in crimes against human lives.⁵⁹ Finally, there are also examples and cases concerning the dead where the German Federal Constitutional Court has protected the posthumous deceased’s reputation.⁶⁰

With no existing rules, the court in the case of frozen embryos supported the claims of the deceased couple’s parents, and the court in the deceased *Lotus Girl* case condemned the defendant’s acts, both by referring to public order and good customs, which served as safety valves to prevent complicated situations from running amok. Human community developed

⁵⁴ Article 10 of Chapter I Basic Provisions of the GRCL states that “[c]ivil disputes shall be resolved in accordance with the law; or, if the law is silent, customs may apply, but as long as they are not contrary to public order and good morals” [处理民事纠纷, 应当依照法律; 法律没有规定的, 可以适用习惯, 但是不得违背公序良俗]. GRCL, *supra* note 3, art. 10.

⁵⁵ GRUNDGESETZ [GG] [BASIC LAW] art. 1, para. 1, *translation at* http://www.gesetze-im-internet.de/englisch_gg/ (Ger.).

⁵⁶ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 694 (2008).

⁵⁷ DAVID KRETZMER & ECKART KLEIN, THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 148 (2002).

⁵⁸ Christian Walter, *Human Dignity in German Constitutional Law*, in EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW: THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY (PROCEEDINGS OF THE UNIDEM SEMINAR, MONTPELLIER JULY 2-6, 1998) 15, 28 (1998), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1998\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1998)026-e).

⁵⁹ Bundesverfassungsgericht [BVerfG], 1 BvR 357/05, Feb. 15, 2006, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html; see also MCCRUDDEN, *supra* note 57, at 692.

⁶⁰ DONALD P. KOMMOERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 301 (3d ed. 2012).

with rapid changes in values and technologies since around the first industrial revolution. There is a question that seems paradoxical when technology is always moving forward pursuing innovations, while law always tries its best to keep stability. Undeniably, to a certain degree, technologies influence law and even sometimes come to define law. Questions become much harder to reconcile when both of them are dealing with a “human.” We do not know exactly what we will discover or invent in the future, and accordingly, it is unrealistic to draft laws with clear details on everything. In order to keep pace with technology, law sometimes resorts to principles rather than simply expanding categories, creating exceptions, or making more rules.

2. *A Principled Way: Public Order and Good Customs*

Appealing to general principles might be an expediency in the legislature for maintaining the logical integrity of the whole legal system, and tempering or mitigating the rigor of rules. Public order and good customs are basic principles stipulated in Chapter 1 of the GRCL.⁶¹ It is true that statutory rules with a high degree of accuracy and certainty are the fundamental form in guiding private or official behaviors in a legal system, but some basic principles with a vague and flexible wording are also an indispensable feature of legal systems. Taking the example of the three cases discussed above, the law-makers of the GRCL who have undoubtedly noticed strong calls for protections of the unborn and the dead, create legal fictions to protect unborn children, but deliberately keep silent with respect to frozen embryos and the deceased. Given so many intellectual and social limitations, the legislators may not be able to foresee them when articulating provisions of law. It is necessary to leave room for judges to resort to guiding principles in the application of law to counter the rigidities or inadequacies of positive rules.

In the context of rapid changes in society, weighing principles is an inescapable part of the work of everyone participating in the execution of law, as excluding principles from the execution of law may mean refusing justice.⁶² The court, in the case of the frozen embryos, found that it is an injustice not to allow the custody and disposition of the remaining embryos to the four elder parents who lost their children. The court reached this conclusion even though it was unable to substantiate such injustice by citing a settled rule. Principles like public order and good customs have played a prominent role in settling controversies where existing rules offer judges no guidance and advice. There are a substantial amount of cases available to illustrate the significance of relying on principles in deciding disputes where the positive resources do not provide an answer for the point of law to be adjudicated, especially under the Anglo-

⁶¹ GRCL, *supra* note 3.

⁶² JUE'AN, *supra* note 48, at 67.

American common law system.⁶³ For example, in *Bonbrest v. Kotz*,⁶⁴ the Court for the District of Columbia held that a cause of action existed for prenatal injuries to a viable child subsequently born alive even without a precedent supporting such a reading. In *Davis v. Davis*,⁶⁵ the Tennessee Supreme Court addressed the validity of written agreements regarding the disposition of frozen embryos in the event of divorce when there was no legislation concerning such situations. Where the existing rule left the problem adjudicated before the court entirely unsettled, a principled sense of appropriateness should play a decisive role in bringing about a satisfactory solution to the dispute. Public order and good customs reveal a sense of appropriateness. In examining the facts of controversies, the party that can demonstrate that its claims are in accordance with public order and good customs would receive support before a Chinese court.

In a system of separation of powers, a non-elected judge is but an instrument—"Organ"—of the legislative will.⁶⁶ Nevertheless, it is undeniable that the positive system established by a state is incomplete, fragmentary, and full of ambiguities. These defects must be overcome by resorting to ideas, principles, and standards which are presumably not as well articulated as the formalized sources of the law, but nevertheless provide some normative direction to the court's findings.⁶⁷ Public order and good customs principles exist within the deep structure of Chinese laws and are connected to the more general ethical order. In circumstances where statutes or rules of law are vaguely worded or kept silent, to a greater or lesser extent, judges would consider or weigh principles in order to better achieve justice in a case. Naturally, public order and good customs as typical principles in Chinese civil law are, by definition, vague, nebulous, and amount to a number of different interpretations. Judges, on the one hand, are limited to applying the legislative will, while on the other hand, inescapably exercise their discretion. It is by no means an easy task for judges to arrive at an objective standard to interpret principles and to also achieve a reconciliation and synthesis of the needs of stability of law. That is the reason why a judge must apply the positive and unambiguous mandates of the existing law, even though she is firmly convinced that these mandates are not, or are no longer, consonant with basic contemporary notions of justice. Therefore, appealing to public order and good customs should be limited to those very rare situations where there is no settled rule or any other solutions. For example, in *Wang Deqin v. Yang Desheng*, the court did not set aside existing rules or resort to public order and good customs, but, instead, the court interpreted the phrase "the deceased dependent" in Article 119 of the GPCL to include not only the person actually raised by the deceased, but also virtually all potential future

⁶³ EDGAR BODERHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 350–51 (rev. ed. 1981).

⁶⁴ *Bonbrest v. Kotz*, 65 F.Supp. 138 (D.D.C. 1946).

⁶⁵ *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

⁶⁶ FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 33 (spec. ed. 2005).

⁶⁷ BODERHEIMER, *supra* note 63, at 349.

dependents. This was done to achieve a sense of appropriateness while conforming to principled and tolerable legal techniques.

Public order and good customs connect law to society at large.⁶⁸ As Edgar Boderheimer points out, it is one of the cardinal errors of legal positivism that it limits its theory of the sources of law exclusively, or almost exclusively, to formal sources of law.⁶⁹ Public order and good customs favor a prerequisite of recognition bringing good social customs to the field of law. Boderheimer concluded that public policies, moral convictions, and social trends constitute non-formal sources of law. In the case of *In re Liberman*,⁷⁰ public policy served as an independent source of adjudication without the support of controlling precedent. Loosely, public order could be understood as general social interests, and good customs could be envisaged as general moral convictions.⁷¹ It, with the natures of the vague, variable, and uncertain, mitigates strict law, but also gives rise to difficulties in identifying its content. According to Mengyong, a judge, in adjudicating based on public order and social customs—when elevating public interests, moral convictions, or social trends to the status of a controlling rule, of judicial decision—should abandon her own biases, and take into account the nation as well as the region that the litigants belong to, and consider both the public feeling and comments of experts.⁷² In balancing a strong and dominant moral conviction or social trend with an equally forceful opposing one, a court should account for differences of opinion as to what constitutes the foundations of justice, and to not resist social progress by stubbornly clinging to antiquated notions of justice—which may be those of a dying epoch.⁷³

In the frozen embryo case, although gestational surrogacy is forbidden at present in China, the court still supported the custody and disposition of the cryopreserved embryos of the four elders. The court kept an open mind to public opinions on gestational surrogacy and even other currently more controversial questions relating to the development of technology and moral convictions. This Article takes the position that, while resorting to public order and good customs when devising protections for the deceased is roughly acceptable, doing the same when it comes to frozen embryos might lead to difficult issues. Developments in human

⁶⁸ Yi Jun (易军), *Lun Sifa Shang Gongxuliangsu Tiaokuan de Jiben Gongneng* (论司法上公序良俗条款的基本功能) [*The Basic Functions of Public Order and Good Customs in Private Law*], 5 J. COMP. L. 32 (2006).

⁶⁹ BODERHEIMER, *supra* note 63, at 346.

⁷⁰ *In re Liberman*, 18 N.E.2d 658, 279 N.Y. 458 (N.Y. 1939). The New York Court of Appeals held that the beneficiary should lose her right to the trust fund if she entered a marriage contract without the consent of the trustees, because retaining her right in these circumstances would have run contrary to public policy.

⁷¹ Dai Mengyong (戴孟勇), *Lun Gongxuliangsu de Panduan Biaozhun* (论公序良俗的判断标准) [*On the Criterion to Judge Public Order and Good Custom*], 3 L. & Soc. DEV. 47 (2006).

⁷² *Id.* at 47.

⁷³ BODERHEIMER, *supra* note 63, at 372.

biotechnology are likely to continue to cause countless ethical and legal problems. Within the Chinese context, certain questions are likely to emerge. For instance, questions—such as what should happen if one party demands use of the frozen embryos and the other refuses consent?; would gestational surrogacy remain illegal despite a public's increasingly large demands?; could the mother-in-law voluntarily be the surrogate for her daughter-in-law in the case that gestational surrogacy is not forbidden? Siding with the judges in *Shen and Shao v. Liu and Hu*, I consider that gestational surrogacy will one day be legitimate in China.

Some jurisdictions, such as the Netherlands and several American states, allow children resulting from ARTs to sue for what is called a wrongful life. This concept caused law to encounter questions of non-existence.⁷⁴ Reflecting on the sociocultural position of Chinese law, this Article submits that the interest in non-existence is a strange notion for Chinese society. Being a person—no matter what condition it is—in this world is generally considered to be an occurrence to be thankful for, although we know sometimes it is not. We should thank our parents, the doctor, and even God for bringing us to this real world despite our external and inherent conditions. Every innocent life deserves to be respected and protected despite how severely disabled it is. This Article further takes the position that cases of wrongful life against its parents or cases advocating an interest in non-existence would only rarely be allowable in China. Considering the Baby Kelly case before the Dutch Supreme Court,⁷⁵ this Article concedes that, in cases of wrongful life, it would be possible to claim damages to compensate the parents if the condition was caused by a third party or due to her negligence, while it might be impossible to sue against parents or in the name of an interest in non-existence. It is true that rules tackling these questions could be a difficult task for legislators to properly designate. These questions need to be discussed further along with the changing social trends. The legislature and judiciary should not always indiscriminately resort to public order and good customs when faced with such intricate ethical questions.

III. Summary

Regarding the nature of the unborn (*in vivo* or *in vitro*) and the deceased, neither the Chinese legal system nor Chinese legal academics acknowledge any of them as persons. Although some controversies do exist, the legislators and major scholars maintain the original Roman structure of *persona/res* and the natural person model, and hence, deny positions that

⁷⁴ ten Haaf, *supra* note 2; Britta van Beers, *The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of Person*, 18 GERMAN L.J. 559, 584 (2017). Wrongful life is a legal action in which a severely disabled child sues someone for failing to prevent the child's birth. For example, in the *Baby Kelly case* (see *infra* note 76), a Dutch girl named Kelly was born severely handicapped. The 1990 Human Fertilisation and Embryology Act (HFEA) provides standing to pursue a cause of action where a child's disability results from ARTs, including pre-implantation genetic diagnosis (PGD), etc. For an overview of wrongful life actions in several jurisdictions see Ivo Giesen, *The Use and Influence of Comparative Law in "Wrongful Life" Cases*, 8 UTRECHT L. REV. 35 (2012) and Ronen Perry, *It's a Wonderful Life*, 93 CORNELL L. REV. 329 (2007).

⁷⁵ H.R. 18 Maart 2005, NJ 2006, 606 m.nt. JBMV (Neth.) [hereinafter *Baby Kelly*].

advocate legal personality for frozen embryos or the deceased. When considering protections for the unborn, many jurisdictions made strong efforts to balance the interests of the unborn child and the ability of the woman to control her own body. While these debates have not emerged in China—largely because of China’s family planning policy—it makes sense that China struggles to protect the unborn regardless of its tolerant attitude towards abortion. Consequently, as a recent affirmation, the new GRCL recognizes the capacity for civil rights of an unborn with respect to certain property interests, such as succession and receiving gifts. This limited capacity is contingent on the unborn surviving birth. With respect to embryos and the deceased, Chinese scholars divide things into three categories: Ethical things, special things, and ordinary things. Both frozen embryos and remains of the deceased fall into the realm of ethical things, meaning that disposition or other acts on them shall not be contrary to public order or good customs.

E. Conclusion

Chinese civil law has, in the past, drawn heavily on the continental tradition. At the same time, China’s particular policies, such as the family planning policy and the lenient position towards abortion, separate the contemporary Chinese tradition from the rest of the world. In these circumstances, and particularly when considering the rapid technological change, the Chinese civil law system displays both familiar and original solutions when compared to other jurisdictions, particularly those in Europe and the United States. Is a fetus a person? Is a frozen embryo a person? These questions are treacherous because the concept of a “person” has a great many uses and senses that can be easily confused⁷⁶—or tainted.⁷⁷ With rapid changes in technology, numerous ethical and legal questions concerning these new entities have emerged. To maintain the coherence of the Chinese civil law system, the traditional *persona/res* structure and natural person model have remained mostly intact. Whether fetus, frozen embryo, or the remains of the dead, none are recognized as a new “person.” At the same time, however, Chinese courts have recognized that these entities undoubtedly deserve extra protections. Operating without statutory support, judges have upheld the claims of plaintiffs by referring to an extensive interpretations of existing rules or referring to public order and good customs.

The forthcoming Chinese Civil Code recognizes that in certain instances the unborn will be considered as if they were already born. In dealing with protections for the unborn, the internal civil code system operates in a roughly coherent manner under the legal fictions afforded by the legal release condition theory. This theory provides that an unborn child’s capacity for civil rights exists from the moment of conception, but may be retroactively extinguished if the child is stillborn. While the efforts of the Chinese legislature clearly recognize a need to address rapid changes in values and technology, legislators will nonetheless need to resort at times to more

⁷⁶ DWORKIN, *supra* note 8, at 22.

⁷⁷ See Selkälä & Rajavuori, *supra* note 2.

open-ended principles like public order and good customs, rather than simply making more rules. Regarding protections for frozen embryos and the deceased, the forthcoming civil code seems unable to directly deal with them. Referring to public order and good customs plays a significant role within the Chinese legal system by mitigating strict rules, pursuing justice on a case-by-case basis, deciding disputes where existing rules are unclear or silent, and connecting positive rules with moral convictions and social trends.