

# The Concept of Civil Personality

By APOLONIO V. SANTIAGO\*

In the realm of the law, the "person" stands both as its fundamental subject and as its object. In the words of a learned writer, the "person is the star actor in the juristic drama, the pivot of the juristic system, the center of the legal universe, without whom there would be juridical chaos and oblivion. He enters into every legal relation from the highest to the lowest, the simplest to the most complex and is the "sum and substance of the legal world." After all, what are constitutional law and criminal law good for, if there were no persons? For was the law not made for persons rather than persons for the law?

Legal relations cannot be created and maintained without the existence of persons, who are susceptible of being its subject. But when does a human being acquire the personality, which makes him a fit subject of legal relations? When does he acquire that juridical capacity or "caput" as the Ancient Romans call it, which gives him a standing before the law, enacted primarily to guarantee and protect his rights to life, liberty, and property? This is the task which this humble work has assumed to undertake. The discussion will however, be limited only to natural persons and not to artificial beings, as corporate entities which are also regarded as "persons" under the law.

In the treatment of the subject, it is our aim to discuss the law and analyze its precepts in the light of the principles of modern medical science. For it cannot be denied that modern medical science plays a very important role in the administration of our present system of justice in the Philippines.

## I. THE PRESENT LAW IN CIVIL PERSONALITY

The present law on civil personality is found in our Civil Code.

Art. 29. Legal existence commences at birth but the conceived child is considered as born for all purposes favorable to it, provided that it be born with the requisites mentioned in the following article.

---

\*L.L.B., University of the Philippines.

Art. 30. In contemplation of law, the foetus shall not be considered as born unless it shall have a human form and shall live twenty-four hours after complete separation from the mothers' womb. (Fisher's Civil Code)

From the provisions of Art. 29, it is clear that from the moment of conception, the germ of human personality begins to exist; there is a human embryo in the process of its natural growth, which the law cannot disregard in any manner. The law safeguards the intrauterine life of man with three principal objects: First, to insure his existence; second, to promote and protect his free development; and third, to recognize in him certain civil rights.<sup>1</sup>

#### A. ORIGIN OF THE LAW

The precedents regarding the legal consideration of birth are varied both in the Roman Law as well as in the Ancient Spanish law. In the first, the Proculians require as a sign of life the cry of the newborn child and while this fact does not exist, the child is not considered as born. On the other hand, the Sabinians (another school of Roman juriconsults) were not contended with the real fact of birth. Their doctrine is, "Si vivus perfecte, natus est," that is, if the child lives perfectly, it is considered as born. This was the doctrine adopted by Justinian.

In Spain, the *Fuero Juzgo* (promulgated about the middle of the seventh century) requires baptism and life for ten days, while the *Fueros Municipales* makes the condition of birth dependent upon the duration of life, but a variety of periods has been fixed. The *Fuero Real* is concerned solely with baptism. The *Partidas* require primarily "birth with a human form," for, notwithstanding the fact that it establishes a legal presumption from the duration of a woman's pregnancy, fixing the minimum at 6 months and 1 day and the maximum in 10 months, this refers only to the relative aspects of birth, that is, to the legitimacy of the offspring. The *Leyes de Toro* require that the child be born wholly alive, lives for 24 hours and receives the sacrament of baptism.<sup>2</sup>

---

<sup>1</sup> Manresa, vol. 1., p. 191.

<sup>2</sup> Sanchez Roman, *Derecho Civil*, vol. 1, p. 166.

Manresa believes that our present provisions regarding birth, have been more directly taken from the "Leyes de Toro," Law XIII of which provides:

"We order that a child shall not be considered abortive if it is born wholly alive and should have lived after birth at least for 24 natural hours and has been baptized before it dies; or if it dies within said period or is not baptized, we order that said child be considered abortive and cannot inherit from his father or mother nor from ascendants; but if because of the husband's absence or because of the length of time that has elapsed since marriage, it is clearly proved that it was born at a time, in which it could not live naturally we order that although the child should possess the above mentioned characteristic that he shall not be considered as legitimately born.<sup>3</sup>

## II. THE REQUISITES OF THE LAW

Under our law three elements must concur in order to constitute legal birth, which is productive of civil personality. They are: (1) live birth, (2) human form and (3) Independent life during not less than 24 hours. A close critical study of each constitutive element is necessary.

### A. LIVE BIRTH

An interesting medico-legal question naturally arises in this connection namely, what constitutes live birth? Upon the answer to this query will often depend the decision in important trials for the rights of inheritance and other similar questions.<sup>4</sup> The determination of this question is also of great importance in criminal cases involving infanticide.

As to what constitutes a live birth it is well admitted that it means the accomplishment of the act of bringing into the world the whole body of a foetus coming from the mother's womb, having an independent circulation and respiration, even though the umbilical cord has not been separated.<sup>5</sup>

To prove that the child was alive is often difficult. Respiration is a true sign of life, but the reverse is not true, that the child is dead because it has not breathed.<sup>6</sup> It is admitted that children may be born alive and live for some time without re-

---

<sup>3</sup> Legal Medicine, by Dr. Angeles (new book in preparation p. 616.)

<sup>4</sup> Legal Medicine and Toxicology, by Petterson, Haines, and Webster (2nd ed) p. 958.

<sup>5</sup> Legal Medicine, by Dr. Angeles, p. 117.

<sup>6</sup> Legal Medicine and Toxicology by Emerson, p. 150.

spiring and this want of respiration is no objection to these children being considered as living in law.<sup>7</sup> Reese states that according to the laws of the United States and England neither breathing nor crying are essential to establish live birth; the pulsation of the child's heart or of one of its arteries or the slightest voluntary movement is regarded as sufficient for this purpose.<sup>8</sup> The opening of the eyes, the twitching of the lids, the flexion of a limb or any muscular movement has been held as sufficient evidence that the child was alive.<sup>9</sup> In France, the respiration and in Germany and Scotland, the crying attested by impeachable witnesses is enough for this purpose.

In relation to crying as a test of live birth, Lord Coke remarks: "If it be born alive, it is sufficient, though it be not heard to cry, for peradventure it may be born dumb."<sup>10</sup> Furthermore crying cannot always be regarded as an undisputable sign of live birth. Let us suppose, that the evidence of a child having been born alive is stated to be that it was heard to cry; it may be a question for a medical witness in cross examination whether this is to be taken as an absolute proof of live birth. The answer must be in the negative because a child may cry before its body is entirely born or there may have been what is called as vagitus uterinus, a uterine cry after the rupture of the membranes. It is quite certain that a child may breathe without crying, but it cannot cry without breathing, yet neither the crying nor the breathing is a necessary proof that the child was born alive. A child may breathe in the womb or vagina or with its head at the outlet and die before its body is wholly born, the discovery of its having breathed would not therefore be proof of its having enjoyed what has been termed as "extra-uterine life." As in all cases of this description, there must be eye witnesses either professional or not, the evidence will not rest solely upon a merely medical possibility of the occurrence of such a cry before birth, and proof will then be required of the crying of the child after it was born.

There is no doubt that the best test to apply in such cases for the determination of physiological life is auscultation. The beating of the heart as determined by the ear or the stethoscope, applied even for five consecutive minutes is an

---

<sup>7</sup> A Manual of Medical Jurisprudence, p. 614.

<sup>8</sup> Legal Medicine and Toxicology, by Petterson, Haines, and Webster, p. 958.

<sup>9</sup> Legal Medicine and Toxicology, by Emerson, p. 150

<sup>10</sup> Angeles, Legal Medicine, p. 177.

<sup>11</sup> Taylor, Med. Juris., pp. 616-617.

undoubted sign of life in a physiological sense, whether the child breathes, cries, or moves. Bouchut noticed on one occasion that passive life continued in an infant for 23 hours after its birth. Feeble but distinct pulsations were heard at long intervals but there was no motion of the ribs. Attempts at resuscitation were made, but the motions of the heart become more and more feeble until they entirely ceased. An examination showed that the lungs had not received air. As we take the cessation of the heart's action to be the only certain evidence of death, so the existence of pulsation in the heart or arteries when clearly perceived by the ear, stethoscope, or finger is positive evidence of life in a physiological sense. But is this legal life? Would the proof of pulsation without motion, respiration or crying, transfer an estate by inheritance or survivorship? Bouchut justly observes that apparent death succeeding to birth and characterized by the presence of a beating of the heart and an absence of breathing is only a morbid condition of the new born infant; and whether it is cured at this or dies, it is living, although it has not breathed. Those who contend that crying or breathing alone should be taken as a sign of life after birth would of course pronounce such a child to have been born dead, even if at the time they might be listening to the pulsations of its heart.<sup>12</sup>

Under the Philippine law, there is no doubt that if such a condition of apparent life is maintained for a period of 24 hours as fixed by law, the child will be considered as a person within the meaning of the law and vested with the juridical personality, necessary to make him a fit subject of legal relations. At the outset, we may here point out what is regarded as the undesirable condition of our law. It simply requires live birth and independent life for at least 24 hours. It does not take into account the degree of development or viability of the child. In the words of Mucius Scaevola, a well-known commentator of the Spanish Law: "No basta el hecho del nacimiento como determinante en exclusivo de la creacion de la personalidad; es preciso que el nacido reuna elementos de viabilidad suficientes para prolongar su existencia durante algun tiempo."<sup>13</sup> This brings us to another question hitherto left untouched by our law—the question of viability.

---

<sup>12</sup> Taylor, *Med. Juris.*, p. 616.

<sup>13</sup> Scaevola, *Codigo Civil*, vol. 1, p. 443.

## 1. VIABILITY

Viability is a term popularly used to denote the ability manifested by the child to be born alive and to live after its birth as an independent being apart from its mother. As to what extent may the normal period of gestation be consistent with viability, it is conceded generally that 180 days or six calendar months is the minimum intrauterine age necessary for the human infant.<sup>14</sup> Marco Tulio in his commentaries on the Civil Code interprets viability to mean that the child must have been born within the period comprising from the seventh month to the tenth month of gestation, following the doctrine of Hippocrates.<sup>15</sup>

Viability is an indispensable legal requirement in the most modern Codes. The French Civil Code in Art. 725 requires that the foetus must be born viable, that is, it must not have physical or congenital defects, which make it predestined to die; or before the normal period of gestation. According to the Civil Code of Louisiana: "Basta que el hijo haya nacido viable, aunque no haya vivido sino un instante." The fundamental basis of the French Civil Code is as follows: A child born before the 6 month's period of gestation, even if born alive is incapable to prolong its existence. The same thing may be said with regard to such children born with an inherent organic defect so apparent and clearly shown that it is predestined to die. No civil personality can be attributed to such beings, inasmuch as juridical capacity must depend not only upon live birth but also on capacity to maintain an independent existence.<sup>16</sup>

Viability as a requirement for legal birth has its scientific foundation in medicine. With the exception of very rare cases, it is known by experience that children born before the period of 6 months of gestation, although capable of being born alive and even if they survive the perils of birth, they are apt to succumb to diseases or accidents, that children of ordinary vitality will resist.<sup>17</sup> Infants born in the fifth month or even as early as the fourth month have survived for a short time, but such infants can never be conceived as having reached the period of viability. In instances in which infants of supposedly less than 6 months duration have survived, doubt must be entertained as

---

<sup>14</sup> Angeles, Leg. Med., p. 144.

<sup>15</sup> Marco Tulio, Derecho Civil, p. 38.

<sup>16</sup> Estudios sobre el Código Civil Chileno, por Luis Borja, vol. 2, p. 189.

<sup>17</sup> Angeles, Legal Medicine, p. 144.

to the accuracy of the calculation. The only reliable evidence in such cases consists in a careful expert investigation of the tissues and organs of the child if it subsequently die or if the physical manifestation at the time of birth.<sup>18</sup>

In this connection, it must be taken into account that the less the degree of maturity of the child, the less its probability to become alive at birth, and the better its physical formation the greater its resistance to perils of accidents and sickness at and after birth. Medical authorities generally admit that the age of viability of a child varies in different individuals and it is dependent upon the influences of several circumstances such as abnormalities, sickness, and the like. Some children at the seventh month are as sufficiently developed as others at the ninth, hence in deciding this question with relative accuracy it is essential to combine all the facts available in each given case, rather than to rely upon the mere calculation of intrauterine age only. In fact the figures used as belonging to certain periods of gestation are only approximate, and the most accurate and reliable basis of opinion is the degree of the actual development acquired by the child: that is, if the child is sufficiently well formed so that its condition is usually described as that of a normal one, it may be admitted that it is capable of independent existence<sup>19</sup> and may thus be regarded as viable.

The discussion of viability is of great importance in relation to our law, because its absence should be regarded as a *prima facie* incapability of being born alive, a requisite laid down in our law.

The most important point, therefore, not taken up by our law is the question of viability. It is still a desideratum in our law.

#### B. HUMAN FORM

The Civil Code also requires that the foetus must have a "human form." But what is meant by "human form"? This question has raised the most intricate problems for both the jurists and the medical men. The difficulty arises from the lack of a precise legal definition as to what constitutes "human form." Some Commentators on the Civil Code believe that there is no need for this requirement inasmuch as any being proceeding from the sexual union of a man and a woman must have at

---

<sup>18</sup> Leg. Med. & Tox., by Petterson, Haines & Webster, vol. 1, p. 958.

<sup>19</sup> Angeles, Legal Medicine, pp. 129-130.

least the characteristics of the human species. Scaevola is of this opinion. He criticizes the rule laid down in this respect in the following words: "A mas de esto requiero el Código que el feto tenga 'figura humana', condicion originaria de las Partidas, copiadas a su vez del Derecho Romano, y en nuestro sentir ociosa, porque todo ser procedente de la union sexual del hombre y la mujer tiene siempre los rasgos caracteristicos y generales de la especie humana, sin ser posible que ruena alguno ó algunos de otra cualquiera."<sup>20</sup>

But it is a well known fact that monstrous birth not frequently become the subject of court investigation, particularly in connection with infanticide and the definition of the civil rights of the newborn babies. As to the first point, a large proportion if born alive is killed on account of the hideous or repugnant features, inspite of the legal rule prohibiting the destruction of monsters. On the second point inquiry may rise as to whether such a monster as this possesses human shape entitled to civil personality as provided by Article 30 of our Civil Code.\* \* \* The importance of this determination rests upon the fact, that although the newborn infant is medically classified as a monster, yet if it is legally pronounced from the medical evidence to have a human shape and if it is born alive and lives at least twenty four hours after its birth, it may inherit or transmit an estate to its heir at law, as if it were a normally formed child. As no case of this kind has as yet been brought before the court in the Philippines, attention is called to the somewhat conflicting decisions, which having been handed down in other countries regarding monstrosities or as to the legal definition as to what is meant by human shape.<sup>21</sup>

The law of England has given no precise definition of what is intended by a monster. According to Lord Coke, a monster is a being which "hath not the shape of mankind."<sup>22</sup> If this principle is applied to ordinary practice, it does not constitute a monster to have deformity in any part of the body so long as the being has "human shape" and here medical evidence may be called in to determine whether such a being is a monster or a living human being. The legal question relates to the external shape and not to the internal arrangements.<sup>23</sup> Therefore malpositions, transpositions or defects of the internal or-

<sup>20</sup> Scaevola, *Codigo Civil*, vol. 1, p. 443.

<sup>21</sup> Angeles, *Legal Medicine* (new book in preparation), p. 618-618 (a)

<sup>22</sup> Taylor, *Medical Jurisprudence*, p. 623.

<sup>23</sup> Emerson, *Legal Medicine and Toxicology*, p. 168.

gans of the cavities do not form monstrous births within the meaning of the law. It is a well-known fact that many internally malformed persons live to a great age and it is not until after death that malpositions and defects of this kind are discovered: Likewise, a mere deformity in any part of the body such as supernumerary fingers or toes, twisted or deformed limbs will not constitute a monster in the law as far as succession to property is considered provided, the being still has "human shap."<sup>24</sup> On the other hand, a blighted foetus or a mole is not legally a child, so far as succession to property is concerned.<sup>25</sup>

In French jurisprudence the case appears to be different; if the malposition or defect was such as to become a cause of death soon after birth, the child would be pronounced not "viable" and therefore incapable of acquiring civil rights. The English law does not regard internal monstrosity as forming a bar to civil rights and the cases hitherto decided by the English courts show clearly that the simple question in English jurisprudence is not whether a child is or is not viable, but whether it has manifested any distinct sign of life after it was entirely born. The French law is much more complex and throws a much greater degree of responsibility on French medical jurist.<sup>26</sup>

Accordingly human form and monstrosity are not entirely inconsistent with each other, the capability to maintain an independent life after birth being the essential element for decision in the law.<sup>27</sup> Monstrosity is not also entirely inconsistent with viability. The Siamese twins, joined to each other in the shoulders is an example to show that a notorious monstrosity does not necessarily imply lack of viability. Hofmann cites of a case in Vienna in the clinic of Braun, where the life of a hemicephalus was maintained for 7 days.<sup>28</sup> Furthermore, under its strict interpretation, an amancephalus, for example, which may be considered a monster according to the medical terminology would be a person in law, as it certainly has the human form. Hence, because of the absence of clear divisory line drawn, it may be concluded that this question must be decided by the courts the function of the physician being limited to the description of the object or subject, which was born and its distinguishing characteristics.<sup>29</sup>

---

<sup>24</sup> Taylor, *Medical Jurisprudence*, pp. 623-624.

<sup>25</sup> Angeles, *Legal Medicine*, p. 618 (a)

<sup>26</sup> Taylor, *Medical Jurisprudence*, pp. 628-624.

<sup>27</sup> Angeles, *Legal Medicine* (new book), p. 618 (b)

<sup>28</sup> Hofmann, *Medicine Legal*, p. 169.

<sup>29</sup> Angeles, *Legal Medicine* (new book), p. 618 (b)

## C. INDEPENDENT LIFE DURING NOT LESS THAN TWENTY-FOUR HOURS

We now come to the discussion of what is regarded as the objectionable portion of our law on civil personality. For legal purposes in the Philippines proof that the child was alive during twenty-four hours after birth, completely separated from the mothers womb, is the essential requirement. Whether the child was viable or not, affected or not by disease or conditions which will make it impossible that his life be maintained for longer time than twenty-four hours, these do not enter into the legal definition.<sup>30</sup> The principal object of this requirement is to look for means by which the certainty of birth is guaranteed and not to fix the essential conditions for human existence.<sup>31</sup>

The question that inevitably arises is: "Why is the period fixed by law limited to twenty-four hours?" Has this requirement any scientific foundation in legal medicine?

Mucius Scaevola believes that the requisite of independent life for twenty-four hours does not conform to the principles of medical science. Commenting on Article 30 of the Civil Code, he says: "No se aviene esta doctrina con el rigorismo científico. Un feto puede bien vivir 24 horas y, sin embargo, por su constitución especial, por alguna enfermedad congénita, esta condenado a muerte fatal é irremediable, y en cambio, otro que tenga todas las condiciones de viabilidad puede no vivir el termino que marca la ley, por cualquier causa independiente y extraña a esas mismas condiciones. De aqui que no debe admitirse teoreticamente la doctrina del articulo de fijar un espacio de tiempo como signo de viabilidad; de aqui tambien que haya verdadera oposición entre la natural y la legal, si bien precisa reconocer que en la practica es necesario asentar un principio general, como hace el Codigo por los inconvenientes que traeria consigo el dejar que en cada caso concreto hubiese que determinar si el nacido era ó no viable."<sup>32</sup>

Sanchez Roman holds the same view as Scaevola. He admits that the sum total of all the requirements enumerated in the law as a legal criterion, constitute a presumption *iure et de iure*, which in most cases produces results contrary to both justice and reality. And this will truly happen, when notwithstanding the poor organic constitution of the child at its birth, which renders impossible the maintenance of his life for

---

<sup>30</sup> *Id.*, p. 118.

<sup>31</sup> Manresa, *Codigo Civil*, vol. 1, p. 198.

<sup>32</sup> Scaevola, *Codigo Civil*, vol. 1, p. 449.

a period of twenty-four hours, the resources of medical science is able to preserve artificially its life until after the expiration of 24 hours; thereby giving rise to important changes and innovations in the order of succession to an inheritance. On the other hand, it may happen that a child is born completely viable or after having attained such a degree of physical development, absolutely compatible with life for even a longer period than twenty-four hours. But due to some external cause, or some accident or criminal act, he dies before the lapse of 24 hours after birth. He will not be considered as a person endowed with civil personality, because the condition of the law is strict in requiring an independent extra-uterine life for 24 hours.<sup>33</sup> Such rulings are greatly open to serious objections as they bring up problems of difficult solution, if not inconsistent with actual scientific notions and possibilities, and even with sound reasons. The question of a live birth and capability to live during twenty-four hours after birth is not merely inconsistent with justice and reason, but also of difficult, nay impossible appreciation by scientific procedures, in the sense that such a requirement does not take into account neither the lower degree of viability or development of the child nor the possibility of accidental death shortly after birth of a full-developed viable child. Such an inconsistency of the Philippine law is further demonstrated by the well-known fact that the test of legal existence in almost all civilized communities is simply the live birth, regardless of the number of hours that the child has become alive after birth.<sup>34</sup>

The basic defect of our law, therefore, as has been already pointed out, is its failure to take into account the condition of viability of the child or its capacity to live. The period of twenty-four hours has been fixed in an arbitrary manner because it is not based upon any principle of legal medicine. Leading commentators on the Spanish Civil Law have, however, given their justification to the legal requirement. Sanchez Roman while admitting the defective condition of the law from a scientific view point, gives his justification to it in the following words: "En cambio de los inconvenientes que alguna vez puede ofrecer este criterio delCodigo, de regla fija y tasada, si se hubiera aceptado el de atender a la prueba de la viabilidad fisica en cada caso, se hubiera entregado punto tan fundamental a los

---

<sup>33</sup> Sanchez Roman, *Derecho Civil*, vol. 1, pp. 174-175.

<sup>34</sup> Angeles, *Legal Medicine*, p. 177.

peligros de error, de malicia, y de falta de suguridad, que todo genero de pruebas penciales y testificales traen consigo.<sup>357</sup>

Manresa holds the same opinion. He maintains that viability as required by the French Civil Code is justly criticized by jurists. He contends that there is no fixed criterion by which viability can be determined by judges and that it is even difficult for medical science itself to fix the precise conditions, by which the capacity of the child to live may be determined. According to him the legislators that framed the Spanish Civil Code has not failed to take into account the defective means of investigation afforded to the machinery of human justice and the possibility of fraud, which will occasion serious consequences to such a matter of transcendental importance to family life. The Code having this facts in view has fixed the minimum period of life for the new-born child and if it does not live during that period, it is not considered to have civil personality.<sup>36</sup>

But a doubt arises as to whether such reasons as advanced by these illustrious jurists still holds true at the present time. Medical science has progressed with such rapid strides and has endowed the machinery of human justice with adequate and satisfactory methods of investigation and no longer is the capacity of the child for an independent life calculated or determined by chance or hazard. It is now ascertained by definite scientific tests<sup>37</sup>, which has been proved by medical experience as reliable.

### 1. *The Meaning of Independent Life*

The meaning of "independent life" is not clear to many lawyers. Its determination is by no means free from all difficulty. Can the child have an independent life while its circulation is still dependent upon its mother? Is the life which the child lives between the time of its birth and the establishment of respiration and independent circulation an independent life?

There are two senses in which the word "independence" may be used. There is actual independence and there is potential independence. A child is actually independent of its father when it is earning its own living. It is potentially independent when it is capable of earning its own living. In what

<sup>35</sup> Sanchez Roman, *Derecho Civil*, v. pp. 174-175.

<sup>36</sup> Manresa, *Codigo Civil*, vol. 1, pp. 197-198.

<sup>37</sup> These tests are discussed in Angeles, *Legal Medicine*, pp. 130-135.

sense, is the word independence used in this connection? Is it actual or potential independence?<sup>38</sup>

While the blood of the child circulates through the placenta, it is renovated through the lungs of the mother. In such sense, it breathes through the lungs of the mother. It has no occasion during that period to breathe through its own lungs. But when the resource of its mothers lungs is denied it, then arises the exigency of establishing an independent circulation and respiration. Children it seems, oftentimes, do not breathe immediately upon being born, but if the umbelical cord is severed, they must then breathe or die. Cases are recorded it is true, where a child has been wholly severed from the mother and respiration has not apparently been established until after the lapse of several minutes of time. During that time it must have had circulation and circulation was independent. Whether it had appreciable respiration or was in the condition of a person holding his breath, it is a question not necessary to be considered. It is sufficient to say that while the circulation of the child is still dependent its connection with the mother may be suddenly severed by artificial means, and the child not necessarily die. This is proven by what is called Caesarean operation. A live child is cut out of a dead mother and survives. Such a child has a potential independence antecedent to its actual independence. What the law requires is actual independence. And the reason is obvious, because there is no way of proving the possibility of independent life, if actual independence was never established<sup>39</sup>

## 2. *The Legal Meaning of "Complete Birth"*

The other question which arises in this connection is the legal meaning of complete birth. Our law requires a complete separation from the mother's womb. It seem to be well specified that the term complete birth, imply a complete extrusion of the child from its mother's body; hence even if a child has been lying for some time in bed, if one of its feet happens to have remained in the vagina at the moment of his death, there would not be a live birth in the eyes of the law.<sup>40</sup> But still the following inquiries arise. Does the law consider a child fully extruded from the maternal passages but having the umbilical cord still attached to the womb of the mother as born alive and

---

<sup>38</sup> State v. Winthrop, 22 American Reports 257.

<sup>39</sup> State v. Winthrop, 22 Am. Rep. 257.

<sup>40</sup> Angeles, Legal Medicine, p. 188.

having independent existence? On the other hand, does the law regard the non-essential connections between the mother and the child as immaterial to qualify that a child was born alive and enjoying an independent existence, even though some of its parts are in or connected with the maternal passages, provided that an independent circulation and respiration were established. In other words, is the mere possession of the power of living free from essential connection with its mother, sufficient for a child to be regarded by law as a live being?<sup>41</sup> The law, however, is strict in requiring complete extrusion and hence the mere power of living is not sufficient.

Considering this question from its purely scientific aspect, it appears that it would be out of reason to require a material and complete extrusion of the child from the mother's body as essential requisite for a live birth. Aside from the fact that the life may exist independently whenever there is independent circulation and respiration, it is well-known that the question of a total extrusion from the maternal passages depends upon so many insignificant circumstances which do not affect the power and efficiency of living of the new born child.<sup>42</sup>

Again, if the date of live birth should be fixed at the moment of complete delivery, it would always be hard for a medical witness to swear positively as to the exact moment of legal birth, and even the approximate time, taking into account that the living condition is not incompatible with partial birth during certain length of time. Tidy reported a case where the head was born one minute before midnight on December 31st, 1799, but the body was not completely born till one minute after midnight, so the child's birthday was January 1st, 1800.<sup>43</sup> The Civil rights of the child and its heirs will therefore depend upon the careful observation made by the medical practitioner of the circumstances attending delivery. He should note the time when the child is completed by the body of the child being entirely out of the body of the mother.<sup>44</sup> In cases where the birth is accomplished, care should be taken that the proper date and hour are accurately registered as a variation of 24 hours may make a great difference in the civil rights of the child or his heirs.<sup>45</sup>

---

<sup>41</sup> *Ibid*, p. 128.

<sup>42</sup> Angeles, *Legal Medicine*, p. 129.

<sup>43</sup> *Ibid*, p. 118.

<sup>44</sup> Taylor, *Medical Jurisprudence*, p. 616.

<sup>45</sup> Emerson, *Legal Medicine and Toxicology*, p. 167.

## III. THE LEGAL RIGHTS OF THE UNBORN CHILD

The study of the legal rights of unborn children is of great importance and interest to us in view of the provisions of our law to the effect that the conceived child shall be considered as born for all purposes favorable to it, provided that it be born with all the requisites prescribed by law. The importance of this question is well demonstrated by the fact that it has become the object of many legal controversies in foreign jurisdictions.

Has the unborn child in the mother's womb such a legal existence as that with another living co-heir, that it gave a court jurisdiction to order a sale for the division of inheritance between the two? This was the question before the Supreme Court of Alabama in the case of Gillespie v. Nabors (31 Am. Rep. 20-23). In this case a petition was filed by the administrator of the estate of John. S. Gillespie deceased praying that an order of sale be issued by the court with respect to the property left by the deceased on the ground that said lands are of unequal value and are so situated and are of such dimensions that they cannot be equitably divided among the heirs. The petition sets forth only one heir John Jr. and the belief that there will be another, then in ventre sa mere. This belief is based upon the pregnancy of the widow of the deceased. The court in deciding the case held: "That the existence of the infant as a real person before birth is a fiction of law, for the purpose of providing for and protecting the child, in the hope and expectation that it will be born alive and be capable of enjoying those rights which are thus preserved for it in anticipation. Although by the civil law of succession a posthumous child was entitled to the same rights as those born in the lifetime of the decedent, it was only on the condition that they were born alive and under such circumstances that the law presumes they would survive. \* \* \* Children in the mother's womb are considered in whatever relates to themselves as if already born; but children born dead, or in such an early stage of pregnancy as to be incapable of living, although they be not actually dead at the time of birth, are considered as if they had never been born or conceived. Infants unborn are not "seized," hence courts cannot sell their interests because such interest do not exist and the courts can only sell interests that are existing. Furthermore, division implies two or more claimants or recipients; and its aim and object are that the property, when divid-

ed shall pass into separate enjoyment. Hence, a petition for sale of lands that shows on its face that there is but one heir or devisee is a nullity.

It is now settled that from the time of conception the infant is in esse, for the purpose of taking any estate, which is for his benefit whether by descent, device, or under the statute of distribution provided, however, that the infant be born alive and after such a period of foetal existence that its continuance in life might be reasonably expected. Thus the fiction of the law regards an unborn child as born for the purposes connected with the acquisition and preservation of real and personal property.

But what are the rights of the unborn child connected with his person. After birth, can he maintain an action for damages for injuries suffered by him while in his mother's womb? Cases on this point are unanimous in holding that such an action will not lie.

In the case of Walker vs. Great Northern R. Co. Inc. (Ir.L.R.A. 28 C.L. 69) cited in Gorman vs. Budlong, 55 L.R.A. 118, the plaintiff an infant of a few months of age brought action for injuries sustained by her while en ventre sa mere, hereby she was permanently crippled and deformed. The child's mother was a passenger in the defendant's railroad and suffered injuries during her pregnancy, and brought action and recovered damages for her own injury. The infant also brought the present suit. The case was learnedly argued and considered and the judges were unanimous in holding that the action will not lie. The court held that "as a matter of fact, when the negligence occurred the plaintiff was not in esse—was not a person or a passenger or a human being. Her age and her existence are reckoned from her birth and no precedent has been found for this action. \* \* \* It is not contended that the action arose out of contract. But the contract, if there was any was between the defendant's and Mrs. Walker (the mother) and so far as contract is concerned, it was to Mrs. Walker that the defendants were liable for the breach of it. If it did not spring out of contract, it must have arisen from the relative situation and circumstances of the defendants and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence was not a human being and was not a passenger, \* \* \* and there is no principle or authority to show that a legal duty has ever been held to arise towards that which is not in esse in fact and has

only a fictitious existence in law as to render a negligent act a breach of that duty."

In *Allaire v. St. Lukes Hospital* (48 L. R. A. 225; 56 N. E. 638) the facts are similar to the case previously cited. The plaintiff an infant of tender age brought suit by his next friend against the defendant for injuries sustained while in the womb of his mother, alleged to have been caused by the negligence of the defendant in an elevator accident. The plaintiff was crippled and deformed as a result of the accident. The court dismissed the action and held that the doctrine of the civil law that the unborn child shall be regarded in esse for some purposes when for its benefit is a mere legal fiction and cannot be interpreted to the extent of allowing an action by an infant for injuries occasioned by the negligence of another while the child is still in his mother's womb. The same ruling was laid down in the case of *Gorman v. Budlong* (55 L. R. A. 18) by the Rhode Island Supreme Court in dismissing an action instituted by the plaintiff in behalf of his child for the recovery of damages sustained by the latter while on ventre sa mere. In this case, the plaintiff was renting a tenement of the defendant. The latter failed to make repairs on the defective ceiling of the tenement, notwithstanding the repeated demands of the plaintiff. As a result of the defective condition of the ceiling, it fell on the wife of the plaintiff, severely bruising and injuring her and causing her to give birth prematurely to a child. The child became ill and weak as a result of the premature birth and the plaintiff incurred considerable expenses for medical treatment. The court held that the action will not lie.

The rule laid down in the foregoing cases, was further ratified in the case of *Dietrich v. Northampton* (52 Am. Rep. 242) where the mother of the deceased child slipped upon a defect in a highway of the defendant town. She was at the time between 4 and 5 months advanced in pregnancy. The fall brought on a miscarriage and the child was too little advanced in foetal life to survive its premature birth. An action was brought on behalf of the deceased child. The court in dismissing the action held that the child was a part of its mother at the time of the injury and that it could not be said to have become a person recognized in law as capable of having a locus standi in court or being represented there by an administrator.

THE CRIMINAL LIABILITY FOR THE KILLING OF A LIVE BORN  
CHILD BEFORE THE EXPIRATION OF 24 HOURS AFTER  
BIRTH, IF THE ELEMENTS OF INFANTICIDE DO  
NOT EXIST

The problem to be solved may be concretely presented as follows: "Suppose that a live born child has been killed before the expiration of 24 hours after birth and as yet having not acquired the status of a civil person in law, is such a killing classifiable as murder or homicide, whenever the grounds of infanticide do not exist?"

Infanticide is the killing of a new born child not more than 3 days old caused by the mother of the infant or his maternal grandparents for the purpose of concealing the dishonor of the mother. The crime of infanticide is therefore limited to the mother or maternal grandparents of the infant and its essential element is that it must have been committed with the purpose of concealing the mother's dishonor. The crime must have been committed "within three days after the birth of the child." Interpreting the law in its reasonable sense, it is but logical to infer that the crime of infanticide may be committed upon a live born child, if he is killed before the expiration of 24 hours after birth, because the act clearly falls within the three-days period prescribed by law. Thus, the crime of infanticide exists even when the child or the victim has not lived for 24 hours necessary to create civil personality.

With regard to the crimes of murder and parricide, the Penal Code is silent as to the period during which a child should have lived if it happens to be the victim of the act of killing and the elements of infanticide do not exist. Art. 402 of the Penal Code provides: "Any person who shall kill his father, mother, or children, whether legitimate or illegitimate, or any other ascendant or descendant, or his spouse, shall be guilty of Parricide and shall suffer the penalty of cadena perpetua to death." Art. 403 provides that "the crime of murder is committed by any person who, not falling within the terms of the next article, shall kill another under any of the following circumstances: 1. With alevosia. 2. For a price or promise of reward. 3. By means of inundation, fire, or poison. 4. With evident premeditation. 5. With cruelty, by deliberately and inhumanly increasing the sufferings of the offended party." (Guevara's Penal Code)

Doubt arises as to whether the killing of a child before the expiration of twenty-four hours after birth can constitute as murder or parricide, in view of the fact that such a child has not as yet acquired the status of a person in law and has therefore no civil personality, necessary to make him a fit subject of juridical relations. But should the crime go unpunished? Should the offender be free just because a technical requirement of the law, the victim happens not to be a "person."

Under the Common Law, the act clearly constitutes murder if committed by a stranger. According to Blackstone, life begins in completion of criminal law as soon as the infant is able to stir in the mother's womb.<sup>46</sup> Murder has been defined or described by Lord Coke in the following words: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace with malice aforethought, express or implied." This definition was adopted by Blackstone and upon commenting upon the phrase "reasonable creature in being," said: to "To kill a child in the mother's womb is now no murder, but a great misprision; but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion to be murder in such as administered or gave them. This interpretation is based upon the settled principle of the common law, that where death ensues from an act done without lawful purpose, dangerous to life; malice the essential element of murder is implied."<sup>47</sup> If the acts violence, even if committed before birth is considered as murder the more reason, should it be considered as murder if they were inflicted on the child after birth. It is therefore clear that under the common law, the only requirement is live birth and once the child is born alive, the crime of murder is committed if he is killed.

Viada is of the opinion that " a stranger who kills a newly born child is also liable for the crime of infanticide but he must suffer the penalty prescribed for murder and not for homicide for the reason that the lawmaker believes perhaps that in such an iniquitous death, the killer always acts with evident treachery."<sup>48</sup> It is evident from the phrase newly born child that Viada refers to a child that has not lived for a very long time after extrusion from the mother's womb. It clearly applies to a child who has been killed before the expiration of 24 hours

---

<sup>46</sup> Ruling Case Law, vol. 14, p. 217.

<sup>47</sup> Clark v. Stage, 23 Southern Reporter, 671.

<sup>48</sup> 3 Viada 59: Albert's Law on Crimes, pp. 374-375.

after its birth. But what the writer cannot comprehend is why the act should be classified as infanticide if the penalty to be imposed is that the prescribed for murder. The essential elements of infanticide are lacking. Moreover, the penalty being that of murder, there is no legal reason why the crime should not be considered as murder. Furthermore, if the crime of infanticide can be committed upon a child, who has not lived for 24 hours after its birth, there is no reason why the same child cannot be considered as the subject of murder or parricide (if the offender is related to the victim) if he is killed and the elements of infanticide do not exist.

The law pays such a high regard for human life, that any interpretation of the law that would endanger human existence will be out of place. The principal object of the law is to safeguard and insure the existence of the newly born child. This object can only be attained, if the penal law should be applied to the culprit, who kills a newly born child with the same severity as it is applied to one who kills a full-grown person. The conclusion is irresistible that the rule of civil personality found in the Civil Code, applies only to civil rights. It is not applicable in criminal cases. The best solution therefore, of the problem under discussion is to consider the crime either as murder or parricide according as to whether the elements of either of these two offenses are present, and the grounds of infanticide do not exist. The principles of public policy, the exigencies of public safety, the security of society, and the preservation of infant life requires such a solution in order that so horrible a crime should not go unpunished.

#### CONCLUSION

After a critical study of the subject, the writer has come to the following conclusions:

1. Our law does not take into consideration, the condition of viability of the child. For legal purposes, proof that the child was born alive, has a human form and lives independently of the mother for 24 hours is the essential requirement. Once these requisites prescribed by law are proved to exist, the child becomes a person under our law, regardless as to whether it is viable or not.

2. The requirement of twenty four hours of life is consistent not only with justice and reason but also with the principles of medical science. In view of the foregoing, and due consideration

to the practical defects surrounding the exact determination of the 24 hours age of a new born child, proof as to the length of life after birth should be considered by the courts of justice not as a conclusion, but merely as a *prima facie* evidence which may be rebutted by other evidences. These are mainly those related to the degree of development, the healthy condition and the absence of any signs indicating shorter life. Accordingly, the foetus shall not be regarded as born for legal purposes unless it should have been born alive and of a sufficient degree of development indicating beyond reasonable doubt its potentiality and capacity to maintain an independent existence after complete separation from the mother. Such a condition shall be legally presumed, unless there be conclusive evidence to the contrary.<sup>49</sup>

3. The existence of a child as a person before birth is a mere fiction of the civil law and the child shall be entitled to his rights only when he is born with all requisites prescribed by the law.

4. The killing of a live born child before the expiration of 24 hours after its birth may be classified either as murder or parricide, if the elements of infanticide are absent.

#### RECOMMENDATIONS

It is suggested that our law on civil personality be modified in such a manner as to provide that when a child is born viable and such viability is proved by competent medical evidence, the child should be considered as a person, regardless of the number of hours that it lives after birth. It is furthermore recommended that the terms "complete separation from the mother's womb" should not be strictly construed as to require complete extrusion. Once an independent circulation and respiration is established, the child should be considered as born alive according to the law, and the non-essential connections with the mother should be disregarded.

---

<sup>49</sup> Angeles, Legal Medicine (new book in preparation), p. 620.