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## NOTES and COMMENTS

### WHAT IS A HUMAN FORM

From conception in his mother's womb to reception in his own tomb, man is the principal subject and object of the law. Despite this importance of man in the study and development of law, there has never been any serious attempt to formulate with legal precision an exact and definite rule of what is a human form. A human form is one of the essential requisites under our law in order that the legal existence of the conceived child (*nasciturus*) may be said to have commenced for purposes favorable to it. No case involving this subject has as yet been brought to the proper attention of our local judicial authorities and it may be rightly said that this particular phase of the law is still a "virgin field" for legal exploration and dissertation for the enrichment of Philippine legal jurisprudence. The apparent lack of interest on this subject may be attributed to the fact that in most cases, if not all, a newly born child exhibiting unnatural appearance and repugnant features is secretly destroyed or killed to save him from shame, ridicule, and suffering if perchance he would be able to survive. Moreover, the greater part of the law, in providing for the rights, duties, and responsibilities of man, his relations with society and the government, is based on the assumption that man is already vested with legal personality. And if he has legal personality, then he has also a human form which is essential to the commencement of that legal personality at his birth. And furthermore, in the very nature of things, man is a human being, and being so, he must naturally and necessarily be in human form. This is plain

enough. In fact, Mucius Scaevola, the eminent commentator of the Spanish Civil Code, rightly criticizes the requirement of "figura humana" in that there is no need for it inasmuch as "any being proceeding from the sexual union of a man and a woman must have at least the general characteristics of the human species and not of any other kind." Mucius Scaevola, *Codigo Civil*, vol. 1, p. 443, 5th edition.

In spite of this criticism and the apparent lack of interest on this subject however, the importance of this question cannot be overlooked much less taken for granted for upon its settlement determines the commencement of civil personality and the acquisition and transmission of civil rights by the conceived child. A foetus, where its interests are concerned, is regarded as equal to man (*nasciturus pro jam nato habitur, si de ejus commodo agitur*). In pursuing this subject therefore, we feel constrained to be cautious in dealing with this portion of the law, so basic and foundational.

#### *The Provisions of our Law*

Our law on the subject is found in the following provisions:

ARTICLE. 29. Birth determines personality; but the conceived child is considered born for all purposes favorable to it provided it be born under the conditions prescribed in the following article.

ARTICLE 30. For purposes of the civil law, only such foetus which has a human form and lives twenty-four hours entirely removed from the mother's womb, shall be considered born. (Spanish Civil Code, Sinco and Capistrano, vol. 1, pp. 59-60.)

And the pertinent provisions of the same code which affects the rights of the conceived child and those succeeding him are:

ARTICLE 195. He who claims a right formerly belonging to another person whose existence is not acknowledged must prove that such person was alive at the time his existence was necessary to the acquisition of such right.

ARTICLE 627. Donations made to children conceived but yet unborn may be accepted by the person who would lawfully represent them had their birth occurred.

ARTICLE. 745. The following are incapable of succession:

1. Abortive infants, by which are understood those who are not included among those described in Article 30.

2. \* \* \*

ARTICLE 814. The pretirition of one or all of the forced heirs in the direct line whether living at the time of the execu-

tion of the will or born after the death of the testator, shall void the institution of heir, but the legacies and betterments shall be valid, in so far as they are not inofficious.

#### *The Antecedents of Our Law*

Article 30 cited above finds its antecedents from the old Spanish laws which in turn evolved from the Roman law. In the old Roman law, there were two schools of thought, the Proculians which required as a sign of life, the cry of the new-born child, and the Sabinians which, following the maxim "*Si vivus perfecte, natus est*" claimed that the child should live perfectly to be considered born. It was the latter view which was adopted by Justinian in the Institutes. But tracing the history of Article 30 more directly to the Spanish laws, we discover that Law 18, Title 2, Book 4 of the Fuero Juzgo, promulgated about the middle of the seventh century required baptism and life for ten days. Law 3, Title 6, Book 3 of the Fuero Real is concerned solely with baptism. Law 5, Partida 4, Title 13, of the Siete Partidas provided that "a child shall be considered born if it has the form of a man." Mucius Scaevola, *Codigo Civil*, vol. 1, p. 447, later, Law XIII of the *Leyes de Toro* had the following provision: "We order that a child shall not be considered abortive if it is born wholly alive and should have lived after birth twenty-four natural hours and has been baptized before it dies; and 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 his 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-named characteristics that he shall not be considered legitimately born."

All the foregoing differences were soon resolved by the "Ley de Matrimonio Civil" enforced all over Spain, which provided in Art. 60 that "for all legal purposes, a child shall not be considered born unless it is born with a human form and has lived twenty-four hours after complete separation from the mother's womb." This precept was later followed by the Spanish Civil Code in Article 30 which states the rule affirmatively. 1 Manresa, *Commentaries al Codigo Civil*, p. 196.

*Comparison with other Codes*

Comparing the provision of our code requiring that the conceived child be born with a human form, with those of foreign codes, it is significant to note that nowhere in the latter do we find a similar requisite. In the German Civil Code, the legal capacity of a human being begins with the completion of birth, (Art. 1); complete severance from the mother is not required and the completion of the act of birth in the medical sense coupled with the survival of the child for one moment at least after such completion is all that is necessary. An heir must be living at the date of accrual but a *nasciturus* conceived at the date of accrual and subsequently born alive is for this purpose deemed a person living at the date of accrual. The Civil Code of Brazil provides in Art. 4. The Civil Personality of man commences at birth with life. Likewise, the Civil Codes of Switzerland, Art. 31; of California, Art. 29; of Louisiana, Arts. 28-29; and of China, Arts. 6-7 provide in about the same terms that the legal capacity of a person begins from the moment of birth and a child in *ventra sa mere* is considered as if he were already born with respect to the protection of his personal interests, provided he was subsequently born alive.

The old French law was that the child must live an hour and be able to see the four walls and ceiling of the chamber. Later, the law required it to weep. Again, the law prescribed that the child should be born alive and this has been interpreted by French lawyers and physicians to mean as having a complete and perfect respiration. Stewart, *Legal Medicine*, pp. 172-173. The French Civil Code, Art. 906 provides that "To be capable of receiving a donation *inter vivos* \* \* \* and receiving under a will, it is sufficient that one should be conceived at the time of the donation or at the time of the death of the testator. Nevertheless, the donation or will can only take effect in case the child at his birth is likely to live." By the English law, a child that is born alive or has come wholly into the world in a living state may inherit and transmit to its heirs, even though it may die immediately afterwards. If the child is born dead, whether within the uterine cavity or during birth, it is not considered to have been born and does not acquire civil rights. Motion is required as proof that the child was born alive for Lord Coke believed that if the crying was made the test of life, a dumb child would never inherit, but this belief is unsound for it is a well-known fact that a dumb child at birth will give utterance

to the natural cry the same as one not dumb. The English law does not require that a child, when born be capable of living independently, or viable, in order to acquire civil rights. Emerson, *Legal Medicine and Toxicology*.

*Monsters in Law*

Notwithstanding the absence of a particular legal provision in the more important European and American codes requiring the possession of a human form by the newly-born child, French and English jurisprudence are however agreed in that a monster, as understood in their respective legal systems, is denied legal existence and cannot be vested with civil rights." A monster which hath not the shape of mankind but in or any part evidently bears the resemblance of the brute creation, hath no inheritable blood and cannot be heir to any land, albeit to be brought forth in marriage; but although it hath deformity in any part of its body, yet if it hath human shape, it may be heir. This is very ancient law in the rule of England; and its reasons is too obvious and too shocking to bear a minute succession." Cooley's *Blackstone*, vol. 1, p. 623, 4th ed. The Roman law, regarded as a man (*homo*) only that being born of a woman which has a human form; and he is considered to have that form even though his body be defectively shaped (*portentum*, *ostentum*). But if the human form be wanting, it is a monster (*monstrum*). *Compendium of Modern Civil Law*, McKeldy, p. 128.

At this instance, we must distinguish a "monster" in law from a "monster" as classified in medicine. A "monster" in the latter is not necessarily a "monster" in the former. A newly-born-child may be medically classified as a monster but if it is legally pronounced through medical evidence that it has a human shape, then such monster in medicine shall be endowed with legal personality. Thus an *anencephalus* (a brainless foetus) which may be considered a monster in medical terminology would be a person in law as it certainly has a human form. Taylor, *Manual of Med. Jur.* 12th Am. ed., cited in *Angeles, Legal Medicine*, p. 511.

Although French and English jurisprudence are agreed in holding that a monster in law has no capacity for civil rights, yet the legal interpretations of a monster in each jurisdiction are sadly conflicting. According to the meaning of the English jurists, this legal question of monstrous or prodigious birth is concerned solely with the external appearance of the newly-born

child. The outward shape of the child is the determining factor in the solution of the question of what constitutes a monstrous birth. Any defect in the arrangement of the internal organs or any malposition or transposition in the cavities of the body of the child does not determine monstrous births. A mere deformity in the external shape of any part of the body of the child like supernumerary fingers or toes and twisted, deformed, distorted, or useless limbs does not preclude the law from conferring legal personality to the child. But the law cannot legally consider as a child the blighted fetus nor a mole. The ultimate test therefore in the consideration of what is a monster is the external appearance, leaving aside as of little consequence the internal malformations that may exist.

Turning to the French jurisprudence, the sole circumstance which is taken into account in defining monstrosity is the nature of that monstrosity, that is, if the monstrosity is such as to cause the newly-born child to die soon after birth or to render it incapable of maintaining a life separate and independent from the mother, the child is denied civil personality. The ability to live an independent life after birth or viability constitutes the essential consideration under the French law.

In the light of these apparently opposing views on the subject, we should be slow in accepting either or both of them in case they may be reconciled, but the particular provision of our law should not be lost sight of. We note that the English interpretation of the term monster does not attempt to define what kind or nature of external shape or appearance should constitute a human form. Since it is very evident that a monster as understood in law does not possess a human form and it is the absence of such form precisely that this being is termed a monster, we therefore direct our attention in the definition and description of what is a monster. In finding out what a monster lacks in human form, we shall have come to the point of knowing what is a human form. Lord Coke, the eminent English jurist, described a monster as that "which hath not the shape of mankind." Bouvier defines a monster as "an animal which has conformation contrary to the order of nature." It is a being with unnatural appearance, not possessing the essential features of the general outline of the human body. It is a prodigious perversion of nature bearing resemblance to brute creation.

From these, we can reasonably say that a human form is "the shape of mankind." It possesses the essential features of

the general outline of the human body, subject to the exception recognized in favor of mere deformities. That appearance which is the natural and common form of a human offspring proceeding from the sexual union of man and woman is a human form. To claim that a human form is the form of a human being, and therefore of a man since he is the only human being is not at all impertinent nor illogical here. Describing a human form in the face of the criticism of Mucius Scaevola cited above, we may further add that a human form is that which "possesses at least the general characteristics of the human species and not of any other kind."

The French law does not also attempt to define what monstrosity is, limiting itself to laying down the rule that if the monstrosity be such as to cause the newly-born child to die soon after birth or to render it incapable of maintaining a separate and independent life, such child shall not be bestowed with civil personality. What monstrosity would cause death or render the child not viable, we do not know but the particular kind of monstrosity in each and every case is perhaps the concern of the French magistrate in cooperation with French medical men. However, we can surely infer that if the monstrosity does not result to either of the two fatal consequences, the child, although a monster, would be a person. Perhaps, we should not use the term "monster" in the sentence immediately preceding for a contradiction might be understood between the accepted rule that a monster as no legal personality and the above inference, but no contradiction arises here for the term "monster" in law is limited exclusively to those dying soon after birth. Those not dying soon after birth do not come within the contemplation of the law. It is in the latter sense that the term monster in the inference is used.

Does the external appearance of the child, which is the determining circumstance in the English interpretation, never taken into account in the French conception of monstrosity? In investigating the nature of the monstrosity, whether it has caused the death of the child soon after birth or not, or whether it has rendered the child viable or not, is the external appearance of the child not also examined and investigated? We believe that the English circumstance of external shape of the newly-born child cannot be entirely disregarded in the determination of the monstrosity under the French view. Surely, if the external appearance of the child be such as it does not cause the death

or does not incapacitate him for a separate and independent existence, the child may be conferred with civil rights and personality. Whether the French meaning of monstrosity also considers as of little consequence the internal conformation of the child, we harbor grave doubts. There are greater and more cogent reasons for believing that the French law does not consider the internal disarrangements of the child than believing otherwise. The internal malpositions of the child cannot be as readily and apparently observed as the external appearance upon the birth of the child and only upon the death of the child can the autopsy reveal such internal malposition, if any. Even assuming that the internal transposition is taken into consideration, yet if it does not cause the death of the child nor incapacity for a viable life, the child may be vested with legal capacity.

We have attempted to reconcile the French and English interpretation on the subject. Now, in this reconciled view, if we extend that portion of the French conception or interpretation which requires life soon after birth only by requiring that the child should live twenty-four hours after being wholly removed from the mother's womb, we shall have established the Philippine law on the subject with what we believe to be a reasonable interpretation of what is a human form. The blend of the two greatest systems of modern law, the common law of England, and the civil law of France, on this particular phase of the law is once again engrafted into our peculiar legal structure.

In the last analysis however, the determination of what is a human form rests within the exclusive discretion of the magistrate sitting in the case where this question may be involved, but his decision should be based largely on the medical evidence available in each and every particular case of monstrous births, describing the distinguishing features and special peculiarities of the subject of the investigation, and in no small measure upon what has been said above.

JUVENAL K. GUERRERO

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NOTE: *The article of Mr. Jose Lava will be concluded in the next issue.*

