The unborn child in Private Law in the 18th century and its reflections on the 18th century society

by Quintus Hortensius Hortalus

Bibliography

Heide Barmayer, „Die Personalunion England-Hannover – Ihre Entstehung, Etablierung und Fortsetzung aus hannoverscher Sicht“, in: Heide Barmayer (Hgin.), Hannover und die englische Thronfolge, Bielefeld, Verlag für Regionalgeschichte, 2005

Georg Ludwig Böhmer, Georg Ludwig Böhmers auserlesene Rechtsfälle aus allen Theilen der Rechtsgelehrsamkeit, nach dessen Tode gesammelt und herausgegeben, erster Band, zweite Abteilung, Göttingen, Vandenhoeck und Ruprecht, 1799

Friedrich von Bülow, Theodor Hagemann, Practische Erörterungen aus allen Theilen der Rechtsgelehrsamkeit, hin und wieder mit Urtheils-Sprüchen des Zelleschen Tribunals und der übrigen Justizhöfe bestärkt, Band 1, Hannover, Gebrüder Hahn, 2. Auflage, 1806

Ferdinand B. Busch, Theoretisch - praktische Darstellung der Rechte geschwächter Frauenspersonen gegen ihre Verführer und der unehelichen Kinder gegen ihre Erzeuger, aus dem Gesichtspunkte des gemeinen bürgerlichen Rechts betrachtet, Ilmenau, Bernh. Fr. Voigt, 1828

Christoph Gottlieb Büttner, Vollständige Anweisung, wie durch anzustellende Besichtigungen ein verübter Kindermord auszumitteln sey, Königsberg und Leipzig, Joh. Dan. Zeifens Wittwe und Joh. Heinr. Hartungs Erben, 1771

Uriel Dann, Hannover und England 1740 – 1760 – Diplomatie und Selbsterhaltung, Hildesheim, August Lax, 1986

Rolf Deppert, Die rechtliche Stellung des ungeborenen Menschen, Disp. Jur., Buchdruckerei M. Krahl, Erlangen-Bruck, 1940

Gerhard Dilcher, “Die Ordnung der Ungleichheit. Haus, Stand und Geschlecht” in: Ute Gerhard, Frauen in der Geschichte des Rechts, München, C. H. Beck 1997

Richard Drögereit, „Das Testament König Georgs I. und die Frage der Personalunion zwischen England und Hannover“, Niedersächsisches Jahrbuch für Landesgeschichte, Band 14, 1937, p. 94-199

Richard Drögereit, Quellen zur Geschichte Kurhannovers im Zeitalter der Personalunion mit England 1714 – 1803, Hildesheim, 1949, August Lax

Barbara Duden, „Zwischen »wahrem Wissen« und Prophetie: Konzeptionen des Ungeborenen“ in: Barbara Duden, Jürgen Schlumbohm, Patrice Veit (Hg.), Geschichte des Ungeborenen – Zur Erfahrungs- und Wissenschaftsgeschichte der Schwangerschaft, 17.-20. Jahrhundert, Göttingen, Vandenhoeck & Ruprecht, 2002

Wilhelm Ebel, Friedrich Esajas Pufendorfs Entwurf eines hannoverschen Landrechts (vom Jahre 1772), Hildesheim, August Lax, Verlagsbuchhandlung, 1970

Joh. Bernh. Christ. Eichmann, Erklärungen des Bürgerlichen Rechts nach Anleitung des Hernn Ordinarius Hellfelds Lehrbuch der Pandekten, Zweyter Theil, Berlin und Stralsund, Gottlieb August Lange, 1781

Christian Friedrich Glück, Ausführliche Erläuterung der Pandecten nach Hellfeld ein Commentar,1. Theil, Erlangen, Johann Jacob Palm, 2. Auflage, 1797, 2. Theil, Erlangen, Johann Jacob Palm, 2. Auflage 1800

Christian Friedrich Glück, Hermeneutisch-Systematische Erörterung der Lehre vom Intestaterbrecht nach Grundsätzen des älteren und neuern Römischen Rechts, Erlangen, Palm‘sche Verlagsbuchhandlung, 2. Auflage, 1822

Johann Friedrich Ludwig Göschen, Vorlesungen über das gemeine Civilrecht 1. Band, herausgegeben von Albrecht Erxleben, Göttingen, Vandenhoeck und Ruprecht, 2. Auflage, 1843

Albrecht von Haller, Vorlesungen über die gerichtliche Arzneiwissenschaft, Erster Band, Bern, neue typographische Gesellschaft, 1782

Beate Harms-Ziegler, “Außereheliche Mutterschaft in Preußen im 18. und 19. Jahrhundert” in: Ute Gerhard, Frauen in der Geschichte des Rechts, München, C. H. Beck 1997

Ragnhild Hatton, George I, New Haven and London, Yale University Press, New Edition, 2001

August Wilhelm Heffter, Die Erbfolgerechte der Mantelkinder, Kinder aus Gewissensehen, aus putativen Ehen und Brautkinder bei Lehen und Familienfideicommissen mit Hinsicht auf den Gräflich Bentinckschen Rechtstreit über Gräflich Aldenburgischen Fideicommißherrschaften Kniphausen und Barel, Berlin, Ferdinand Dümmler, 1836

Johann August Hellfeld (Hg.), Repertorium reale practicum Iuris Privati Imperi Romano-Germanci oder Vollständige Sammlung aller üblichen und Brauchbaren Rechte im Heil. Römischen Reiche, und den benachtbarten Landen Band 1 A - B, Jena, Christian Heinrich Cuno, 1753

Ewald Helml, Die geschichtliche Entwicklung der bayrischen Erbrechtsnormen, Disp. Jur., Universität Passau, 1985

Heumann, „Ueber die Erbfähigkeit der Postumi“, Zeitschrift für Civilrecht und Prozeß 19, 1844, p. 289 - 354

Carl Christian Eduard Hiersemenzel, Vergleichende Uebersicht des heutigen Römischen und Preußischem gemeinen Privatrechts, Berlin, Gustav Hempel, 1852

Hans Hofmann, Das Lebensrecht des Nasciturus – Zivilrechtliche Aspekte der Abtreibung, Disp. Jur., Bonn, 1992

Daniel Hornuff, Schwangerschaft – Eine Kulturgeschichte, Paderborn, Wilhelm Fink, 2014

Gustav von Hugo, Lehrbuch des heutigen Römischen Rechts, Berlin, August Mylius, 2. Versuch, 1799

Gustav von Hugo, Lehrbuch des Naturrechts, als einer Philosophie des positiven Rechts, Berlin, August Mylius, 4. Auflage, 1819

Johann Friedrich Hunger, Das römiosche Erbrecht, Erlangen, Palm‘sche Verlagsbuchhandlung, 1834

Günter Jerouschek, Lebensschutz und Lebensbeginn: Kulturgeschichte des Abtreibungsverbots, Stuttgart, Ferdinand Enke Verlag, 1988

Günter Jerouschek, „Mittelalter. Antikes Erbe, weltliche Gesetzgebung und kanonisches Recht“, in Robert Jütte (Hg.) Geschichte der Abtreibung – Von der Antike bis zur Gegenwart, München, C. H. Beck, 1993

Johann Friedrich Joachim, Sammlung vermischter Anmerkungen in welchen unterschiedene in die Staats- und Lehens- Rechte wie auh in die Geschichte gehörige Sachen abgehandelt werden, Halle, Rengerische Buchhandlung, 1753

Robert Jütte, „Griechenland und Rom. Bevölkerungspolitik, Hippokratischer Eid und antikes Recht“, in *derp.* Geschichte der Abtreibung – Von der Antike bis zur Gegenwart, München, C. H. Beck, 1993

Max Kaser, Das römische Privatrecht. Erster Abschnitt, München, C.H. Beck, 2. Auflage, 1971

Max Kaser, Römische Rechtsgeschichte, Vandenhoeck & Ruprecht, Göttingen,2. Auflage, 1967

Christian Friedrich Koch, Das Preußische Erbrecht aus dem gemeinen deutschem Rechte entwickelt, Berlin, J. Guttentag, 1866

Elisabeth Koch, „Der nasciturus als Rechtsgut. Historische Lehren und Begründungen“, in: Ludwig Burgmann; Marie Theresa Fögen; Andreas Schminck (Hg.), Cupido legum, Frankfurt a.M., Löwenklau-Gesellschaft 1985, p. 87-98

R. Nina Kölsch-Bunzen, Das gebildete Ungeborene – Ein vieldeutiges Faktum in der Reproduktionsmedizin und humanistischer Pränataldiagnostik als Herausforderung für die konstruktivistische Erziehungswissenschaft, Herbolzheim, Centaurus Verlag, 2003

Wiguläus Xaverius Aloysius Kreittmayr, Anmerkungen über den Codicem Maximilianeum Bavaricum Civilem, worinn derselbe sowol mit dem Gemein- als ehemalig Chur-Bayrischen Land-Recht genau collationirt, […] Erster Theil., München, Johann Jacob Vötter, 1758, Dritter Theil., München, Johann Jacob Vötter, 1764

Karl Kroeschell, Recht unde Unrecht der Sassen, Göttingen. Vandenhoeck und Ruprecht, 2005

René Lalou, Étude de la maxime ‘infans conceptus pro nato habetur‘ en droit français, Disp. Jur., Paris, Arthur Rousseau, 1904

Detlef Liebs, Lateinische Rechtsregeln und Rechtssprichwörter, München, C. H. Beck, 7. Auflage 2007

Johann Willhelm Heinrich Ludolff, Systematische Entwicklung der Lehre von der Intestat-Erbfolge nach römischen und heutigem Rechten, Halle, Hemmerde und Schwetschke, 1794

Ferdinand Mackeldey, Lehrbuch des heutigen Römischen Rechts 2. Band, Giessen, 7. Auflage, 1837

Kurt Mehlhose, Nasciturus und nondum conceptus im bürgerlichen Gesetzbuch und in der Rechtsprechung, Disp. Jur., Marburg 1933

Scipione Mercurio, La Commare, Kindmutter oder Hebammen-Buch, Überp. Gottfried Welsch, Wittenberg, Verleger Tobiæ Meviisel‘s Erben, Elerd Schumacher, Druck bei Matthæus Henckel

Johann Daniel Metzger, Kurzgefaßtes System der gerichtlichen Arzneywissenschaft, Wien, Ghelensche Schriften, 2. Ausgabe, 1799

Ingo Mittenzwei, „Die Rechtsstellung des Vaters zum ungeborenen Kind“, AcP 187 (1987), p. 247 - 284

Edwin Morenz, Der privatrechtliche Schutz des nasciturus, Disp. Jur., Zeitz, Buchdruckerei Reinhold Jubelt, 1909

Pape, „Über der Brautkinder Succesions-Fähigkeit in den Gütern ihrer Väter“, Archiv für die theoretische und practische Rechtsgelehrsamkeit 4. Theil 1789, p. 177-217

Alfred Pernice, Marcus Antistius Labeo: Das römische Privatrecht im ersten Jahrhundert der Kaiserzeit, Band 1, Halle, Verlag der Buchhandlung des Waisenhauses 1873

Joseph Jakob Plenk, Anfangsgründe der gerichtlichen Arzneywissenschaft, Wien Rudolph Grässer und Compagnie, 3. Auflage, 1793

Wilhelm Gottfried Ploucquet, Ueber die physische Erfordernisse der Erbfähigkeit der Kinder, Tübingen, Jakob Friedrich Heerbrandt, 1779

Johann Stephan Pütter, Beyträge zum Teutschen Staats- und Fürstenrechte, 2. Theil, Göttingen, Verlag der Wittwe Vandenhoeck, 1779

Martina Roller, Die Rechtsfähigkeit des Nasciturus, Diss. Jur., Berlin, Dunker & Humblot, 2013

Hans Schlosser, „Kritik an den Entwürfen des Freiherrn von Kreittmayr zum ‚Codex Maximilianeus‘“, in. Georg Klingenberg, Johann Michael Rainer, Herwig Stiegler (Hg.), Vestigia Iuris Romani, Festschrift für Gunter Wesener, Graz, Leykam Verlag, 1992

Johann Ludwig Schmidt, öffentliche Rechtssprüche zur Erweiterung der praktischen Rechtsgelehrsamkeit, Jena, Johann Rudolf Crökers, 1777

August Ludwig Schott, Einleitung in das Eherecht zu akademischen und gemeinnüzlichem Gebrauch, Nürnberg, Felßeckerschen Buchhandlung, „neue Auflage“, 1802

Fritz Schulz, Classical Roman Law, Oxford, Oxford University Press, 1951

Hamish Scott, „Dynastic Monarchy and International Rivalry during the long Eighteenth Century“, in: Frank-Lothar Kroll, Martin Munke, Hannover – Coburg-Gotha – Windsor, Berlin, Duncker & Humblot, 2015

David Georg Strube, Rechtliche Bedenken, Hannover, Johann Wilhelm Schmidt, 1761

David Georg Strube, Rechtliche Bedenken Dritter Theil, Darmstadt, Verlag der Herausgeber der besten Juristischen Werke, „neueste Auflage“, 1788

Yan Thomas, „L‘enfant à naître et l‘„héritier sien“ - sujet de pouvoir et sujet de vie en droit romain“, Editions de l‘E.H.E.S.S. 62 (2007), Nr. 1, p. 29-68

Andrew C. Thompson, George II, New Haven and London, Yale University Press, 2012

Otto Wehde, Die rechtliche Stellung des nasciturus und nondum conceptus, Diss. Jur., Borna Leipzig, Buchdruckerei Robert Noste, 1913

Ernst Christian Westphals, Theorie des Römischen Rechts vom Testamenten, deren Erblasser und Erben, ihrer Form und Gültigkeit, Frankfurt und Leipzig, 1790

Franz Wieacker, Privatrechtsgeschichte der Neuzeit, Göttingen, Vandenhoeck & Ruprecht, 2. Auflage 1967

Used codes of law:

Das Böhmische Stadt Recht – Wie dasselbe in dren Prager / auch anderen Städten des Königreich Bohaimb / täglich observiret und löblich gehalten wird. Kurz zusammen gezogen / in ordentliche Tittel verfasset / und in Teutsche Sprache versetzet, Leipzig, Henning Grossen der Jüngere, 1614

Codex Maximilianeus Bavaricus Civilis, München, Johann Jacob Vötter, 1756

Ostfriesisches Landrecht, Aurich, Hermann Tapper, 1746

Preußisches Allgemeines Landrecht, https://opinioiuris.de/quelle/1621 , viewed on 10.07.2019

List of abbreviations:

CMBC = Codex Maximilianeus Bavaricus Civilis

PrALR = preußisches Allgemeines Landrecht

Gliederung

1. Introduction

On 20 February 1790, the *Amt Schnackenburg* (one of the lowest tier courts in the Electorate of Brunswick-Lüneburg or Hannover) decided that a child of two engaged people but born after the death of the father before marriage inherited his father as a marital child.[1]

Georg Ludwig Böhmer discussed one case in his *auserlesene Rechtsfälle aus allen Theilen der Rechtsgelehrsamkeit, erster Band zweyte Abtheilung* (which was a collection of court ruling assembled for student and judges to have an overview about controversial legal cases) where an unborn girl is declared heiress by the court according to the will of a *Rath* (a civil servant) in which the *Rath* stated that all living children of his cousin should inherit him.[2]

As this single case in the 18th century German Private Law shows, unborn children were often treated as already having been born. This was and still is a legal fiction serving the unborn child, in Latin: *Nasciturus pro jam nato habetur quotiens de commodo ejus quaeritur.*

Why is in those cases the unborn child treated as it was already born?

This question requires examination ancient laws and knowledge deep in the roots of European culture in ancient Rome and how they saw and treated the unborn in law. The article will follow the later developments in science (and religious views) and law until the 18th century Germany.

There the laws of inheritance and legitimacy regarding the unborn in 18th century Germany will be the focus of this article. This leads to the question which parts of those laws were part of the tradition from the Classical Roman Law and which were new?

Also we will examine how the religious view and scientific advance influenced the Private Law regarding unborn children and if they had any effect on the Private Law at all. The effect of those influences on the 18th century jurist will be researched too.

---

1 *von Bülow/Hagemann*, p. 140

2 *Böhmer* p. 616, recital 1. 3.

Furthermore, the importance of the unborn child and its rights for the ruling princes in Germany, especially the Hanoverians, will be discussed. The leading question in that regard is: Did they treat the unborn child differently and if yes, why?
Finally we will consider what all those different themes (legal tradition, national interest, science and religion) regarding the unborn child tell us about the 18th century society, how it was organised and which role the unborn child played in it.

2. Legal basis

First the legal basis has to be analysed, how jurists in the 18th century saw the unborn and how they came to their views.

2.1. The Classical Roman Law as a starting point

It was completely alien to Roman law to regard the unborn child as a separate legal entity in civil law.[3] It was bound to the *Stoa*, after which human life began with a living birth.[4] Before being born the unborn child was part of his mothers womb.[5] Still the unborn child wasn't without legal protection. A mother who died in childbirth could not be buried unless the unborn was extracted from her body.[6] Furthermore corporal punishment wasn't executed on the mother unless the child was born.[7]
On the other hand the Classical Roman Law took the already begotten unborn child, the *Nasciturus* (although this term did not come from the Roman lawyers, they used „*qui in utero est*" or „*qui nasci*

3 See *Pernice* p. 196, 204; *Thomas* E.H.E.S.S., p. 29 [67]; *Kaser*, Das römische Privatrecht, p. 272; *Morenz* p. 10; *Roller*, p. 21, 23f.; *Lalou,* p. 148.
4 See Papin. D. 35, 2, 9, 1; *Eichmann*, p. 192; *Glück,* 2. Theil, p. 65; *Wehde*, p. 25;*Thomas* op. cit.; *E. Koch* Cupido legum, p. 87 [88]; *Roller*, p. 20f.; *Jütte*, Geschichte der Abtreibung, p. 27 [31, 37f.], the newborn must have looked human, *monstrosa* and *prodigiosa* (meaning deformed persons) were not seen as humans, *Roller*, p. 21; *Eichmann*, p. 217.
5 See Ulp., D. 25, 4, 1, 1; *Wehde* op. cit.; *Roller*, p. 23; *Eichmann*, p. 192f.; *E. Koch* op. cit.; *Jütte* op. cit.; *Hiersemenzel*, p. 77.
6 See Marcell., D. 11, 8, 2; *Glück,* 2. Theil, p. 66; *Eichmann*, p. 196; *Thomas* E.H.E.S.S., p. 29 [32].
7 See Ulp. D. 48, 19, 3; *Glück*, 2. Theil op. cit.; *Eichmann*, p. 197ff.

speratur“ for example), into account when considering different rights that were to its advantage.[8] The most important of those rights was that the *Posthumus*, the posthumous child, was a forced heir of its father (or grandfather). A *Posthumus* was a child born after the death of his or her father (or grandfather) but needed to be begotten at the when the testator died in order to inherit.[9] This doesn’t mean, that the unborn child had the right to inherit immediately on the death of his father (or grandfather). The inheritance was saved until the *Posthumus* was born alive, the so-called condition of a living birth.[10]

Initially this fiction was intended to prevent the extinction of a house, *gens*, when there was no heir. This first required that the unborn child was considered born upon the death of the testator in order to be able to inherit.[11] In addition the birth under the paternal power, the *patria potestas*, of the father of the family, *pater familias,* was needed, which meant that the unborn child would have been born into the line of patrilineal succession, and thus entitled to inherit.[12] This fiction had consequently two parts: On one hand the date of birth was treated as having been brought forward to the date of death of the testator and on the other hand, the time of death itself was considered to have been postponed, so that the unborn child was born under the paternal power.[13]

The consideration of the posthumous child went so far that, without a corresponding reservation in the will, the existence of a posthumous child made the will invalid.[14] Accordingly, it was only logical that

8 See *Morenz* p. 10f., *Thomas* op. cit.; *Kaser*, Das römische Privatrecht, p. 272; *Roller*, p. 24f.; *Hiersemenzel*, p. 77; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [296]; *Eichmann*, p. 210ff, newborns were free as soon as the mother was a free woman during pregnancy and it retains the original status of the father, even if he lost this status during the pregnancy.

9 See Jul. D. 1, 5, 26, D. 38, 16, 6; Ulp. D. 5, 2, 6 pr., D. 29, 2, 30, 2, D. 38, 16, 3, 9, D. 50, 16, 164 pr.; *Ludolff* p. 132; *Thomas* E.H.E.S.S., p. 29 [37]; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [291]; *Hunger*, p. 352; *Eichmann*, p. 194; *Westphals*, p. 332; *Glück*, Intestaterbfolge, p. 189.

10 See Ulp. D. 38, 16, 3, 9; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [298f.]; *Ludolff* op. cit.; *Eichmann*, p. 220.

11 See *Pernice* p. 200.

12 See Ulp. D. 28, 2, 12 *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [302]; *Thomas* E.H.E.S.S., p. 29 [35, 37, 57ff., 65, 67]; *Hunger*, p. 166.

13 See *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [302]; *Thomas* E.H.E.S.S., p. 29 [58, 65, 67]; *Hunger*, p. 167.

14 See *Schulz*, p. 268; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [309]; *Glück*, 2. Theil, p. 68; *Hunger*, p. 168; *Eichmann*, p. 214f.; *Westphals*, p. 332,

Roman lawshould acknowledge the possibility of a posthumous child in the will. [15] Conversely, this also applied to disinheritance. [16] Crucial to these rights of inheritance was the legitimacy of the unborn child. Legitimacy was assumed if the birth took place no later than the end of the 10th month after the death of the husband.[17]

However, postponing the death of the testator was abandoned in the praetorian inheritance law (*bonorum possessio*), so that a cognatic succession was made possible (cognate heirs were blood relatives who were not under the paternal power). So only the earlier birth of the unborn child was faked. This applied to the law of intestate succession, as well as wills.[18] Consequently, it was now also possible to nominate a posthumous child of a third person as heir[19] and they could be legal heirs, under the condition that they derived from siblings or relative.[20]

In marriage law a similar concept was applied. An illegitimate child could be made legitimate when the parents married during pregnancy and the child was born during the marriage.[21]

To summarize, in the Classical Roman Law the unborn child, if a potential heir, was considered already have been born at the death of the testator, but the rights connected to the family and inheritance were not acquired before the birth, they were suspended until the child survived the birth. Only on being born alive were the rights acquired.[22] The legal fiction was only needed because the unborn child was not legally a human.[23]

336f.; *C. F. Koch*, p. 721.

15 See Pompon. D. 28, 2, 10; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [310];*Hunger*, p. 169, 181; *Westphals*, p. 335; especially after the formula of Aquilius Gallus for grandchildren p. Scaevola D. 28, 2, 29 pr., Urenkel p. Scaevola D. 28, 2, 29, 2 – 4.; *Hunger*, p. 170f.

16 See *Hunger*, p. 181f.; *Westphals*, p. 336.

17 See Ulp. D. 38, 16, 3, 11; Scaevola D. 28, 2, 29 pr.; *Glück,* 2. Theil, p. 103; *Mercurio/Welsch*, p. 73.

18 See *Thomas* E.H.E.S.S., p. 29 [65, 67]; Paul. D. 37, 11, 3; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [332ff.]; *Hunger*, p. 186ff., 193, 362f.

19 See Paul. D. 37, 11, 3; Inst. 3, 9 pr.; Inst. 2, 20, 28; *Eichmann*, p. 214.

20 See *Eichmann*, p. 216

21 See Nov. 89, 8, 1; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [350f.]; *Glück*, 2. Theil, p. 111; *Eichmann*, p. 213.

22 See *Kaser*, Das römische Privatrecht, p. 272; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [292].

23 See *Roller*, p. 25; *Heumann*, Zeitschrift für Civilrecht und Prozess 19, p. 289 [296].

2.2 The unborn child in private law in the Early Modern Age

The private law in the Civil Law in the Early Modern Age builds on the Classical Roman Law concerning the unborn child. Several aspects shall be reviewed to come to an understanding what role the unborn child had in the German society in the Early Modern Age.

2.2.1 From the Romans to the 18th century

There is no direct continuity from the Roman Law to the Early Modern Age. With the destruction of the Western Roman Empire Roman Law was party incorporated in the Codifications of the German tribes but otherwise it was lost.[24]
In the Eastern Roman Empire things were different. Emperor Justinian gave the order (exact date: 13.02.568) to collect the old Roman Law. This collection is today known as *Corpus iuris civilis.*[25] It has four parts of which all were given force of law:

1. The *Institutes* are a student textbook, introducing the code.[26]
2. The *Digest* or *Pandects*, contains short extracts from the writings of Roman jurists.[27]
3. The *Codex Iustinianus* compiled the laws of all Roman Emperors since Hadrian which were still in force.[28]
4. The *Novellae Iustiniani* contained new Law set by the Emperor Justinian which was added after his death to the *Corpus iuris civilis.*[29]

The *Corpus iuris civilis* was distributed through the parts of Western Roman Empire conquered by Justinian but afterwards lost.[30]

24 See *Wieacker* p. 27, 34.
25 See *Kaser*, Römische Rechtsgeschichte p. 246; Wieacker p. 27.
26 See *Kaser*, Römische Rechtsgeschichte p. 245.
27 See *Kaser*, Römische Rechtsgeschichte p. 246.
28 See *Kaser*, Römische Rechtsgeschichte p. 253.
29 See *Kaser*, Römische Rechtsgeschichte p. 254.
30 See *Wieacker* p. 34.

About 1070 it was recovered in Northern Italy. It was then thought in Bologna and subsequently found its way back into the world of Medieval Western Europe.[31]

The *Corpus iuris civilis* was taught in the newly founded universities. New lawyers learnt how to handle many different cases with it and used their knowledge as judges or experts for courts with judges who had not studied.[32] From century to century the *Corpus iuris civilis* was more widely used in this fashion in Germany, starting in the south and moving to the north. This got reinforced by the fact that more and more universities were founded and more lawyers, administrators and judges had studied at them.[33] Eventually the *Corpus iuris civilis* became the major source of law in Germany because it was seen as a universal law and superior to the old Customary law.[34] Furthermore the universities didn't teach the latter so the Early Modern lawyers only knew the *Corpus iuris civilis*. Subsequently they used it in legal practice and the Customary law was outed.[35] So it became an eternal part of the *ius commune* or *Gemeines Recht* (English translation: Civil Law, not to be confused with Common Law).[36] This slow process from the Middle Ages to the Early Modern Age is today known as "reception of the Roman Law".[37]

With the reintroduction of the Roman Law all the laws concerning unborn children in private law were taken over into the Civil Law.[38]

2.2.2 The unborn in the Civil Law

It was accepted that the unborn child was considered as already born at the death of the testator in order to receive an inheritance.[39] If a

31 See *Kaser*, Römische Rechtsgeschichte p. 274.
32 See *Kaser*, Römische Rechtsgeschichte p. 276.
33 See *Kaser*, Römische Rechtsgeschichte p. 277.
34 See *Kaser*, Römische Rechtsgeschichte p. 13.
35 See *Kaser*, Römische Rechtsgeschichte p. 13.
36 See *Kaser*, Römische Rechtsgeschichte p. 13.
37 See *Glück*, 1. Theil, p. 351f.; *Pütter*, p. 42, 66, 92; *Hiersemenzel*, p. 14f.
38 See *Mehlhose*, p. 11; *Roller*, p. 29; Böhmisches Recht, F 10.
39 See *Roller*, p. 29; *Ludolff* p. 133; *Eichmann*, p. 194; In contrast to Classical Roman Law the patrilineal and cognatic succession of the Roman family (and the patria potestas) did not matter, instead the natural family as described in Nov. 118 were base of the succession, see *Hunger*, p. 395; *von Hugo*, Lehrbuch des heutigen

testator's child was born posthumously, and his will did not mention the possibility of a posthumous child, then the whole will was invalid.[40]

Still, the right to inherit was a right reserved on the condition of a living birth.[41] This meant the unborn child wasn't capable of holding any rights while still being in the womb.[42] The assumption of the legitimate conception was extended to cases, where the pregnancy would have lasted up to 12, 13 or even 14 months.[43] The legal figure of the posthumous child was widely acknowledged in the Civil Law.[44]

In relation to the legitimacy of the unborn child the result is similar.[45] For the status of legitimacy it was necessary that the parents married at least during the pregnancy and the birth took place when the parents were married, as long the father did not challenge the legitimacy.[46] Illegitimate children had no right to inherit from their father.

The unborn child was also protected against the enforcement of corporal punishment of the mother, which had to wait until the unborn child was born. This protection went so far that even oaths could not be taken from pregnant women in court which meant a much wider protection of the unborn child than in the Roman Law.[47]

Ultimately the sentence: „*Nasciturus pro jam nato habetur quotiens de commodo ejus quaeritur*" or „The begotten unborn child is treated as already born, as far as its advantage is in question."[48] summarised the treatment of the unborn child accurately.[49]

This rule could also be applied when a will had to be interpreted. As an example, a case from the collection *"Georg Ludwig Böhmers*

röm. Rechts, p. 67f.
40 See *Mackeldey*, p. 471; *Joachim*, p. 367; *Göschen*, p. 121.
41 See *Hunger*, p. 404; *Roller*, p. 29; *Eichmann*, p. 220; *Joachim* op. cit.
42 See *Eichmann*, p. 194f.; *Deppert* p. 2; *von Hugo*, Lehrbuch des heutigen röm. Rechts, p. 10; *Göschen*, p. 121.
43 See *Glück*, 2. Theil, p. 108f.; *von Haller*, p. 119; *Büttner*, p. 22.
44 See *Helml*, p. 80; z.B. Böhmisches Recht, F 10; *Roller*, p. 29; *Joachim*, p. 367.
45 See *Glück*, 2. Theil, p. 111f.
46 See *Glück*, 2. Theil, p. 110ff., who takes this on p. 112 for the Civil law for granted. He lists proof options for the legitimacy, which were common in the 18th century, like Church records or official documents.; Eichmann, p. 213.
47 See *Glück*, 2. Theil, p. 67; *Eichmann*, p. 207ff.; *Plenk*, p. 98; *Göschen*, p. 121.
48 *Liebs*, p. 140, this based on Paul. D. 1, 5, 7, *Mittenzwei*, AcP 187 p. 247 [254].
49 See *Ludolff* p. 132.

auserlesene Rechtsfälle aus allen Theilen der Rechtsgelehrsamkeit" will be discussed.

A *Rath* sets in his will, that all living children of his cousin shall be his heirs.[50] The cousin fathered a female unborn[51], who was born 3 months and 7 days after the death of the *Rath* and testator. The question is if this girl was a testamentary heiress although she wasn't born at the time the *Rath* died.[52]

The arguments in favour of the unborn child were founded on the premise that literally life and birth can't be equated and that living children could also be those who were still in the womb.[53] In addition the posthumous child could have been a legal heir if there wasn't a will.[54] The testator must have known this, as a jurist and could have taken it for granted when writing the will.[55] In the end, in the interpretation of the will, the rule of the posthumous, according to which their inheritance was preserved until the living birth, was taken into account.[56]

This shows that the rule "*Nasciturus pro jam nato habetur..."* was a general rule for jurists in the Early Modern Age. It was used to interpret wills and was subsequently applied in cases in which the above-stated fiction was not used in Classical Roman Law.

Now the exception from this fiction, which was founded as an exception, needed to be justified.[57]

2.2.3 Extension of the theorem: *"Nasciturus pro jam nato habetur..."*

This section will show how much the theorem „*Nasciturus pro jam nato habetur...*" was extended by the jurists.

50 See *Böhmer* p. 616, recital 1. 3.
51 The daughter Maria Magdalene of the cousin, see *Böhmer* p. 616, recital 1.
52 See *Böhmer* op. cit.
53 See *Böhmer* p. 617, recital 6, 619 recital 11.
54 See *Böhmer* p. 618. recital 8.
55 See *Böhmer* p. 619, recital 12.
56 See *Böhmer* p. 621, recital 15.
57 See *Böhmer* op. cit.; *Roller*, p. 29.

2.2.3.1 *Brautkinder*

A real innovation of the Early Modern Era was the concept of *"Brautkinder"* (bride children) and their potential right to inherit from their fathers.

"Brautkinder" were children who were conceived during the engagement but before marriage the father died (or ran away).[58]

This was made possible because of the Christian wedding ceremony which required a ceremony performed by a priest in addition to consent between the spouses (in contrast to the Classical Roman Law where only consent of the spouses was required to form a marriage, having sex and being engaged led to the conclusion that the partners were married[59]).[60] Without that ceremony no legal marriage existed and the unborn child had no right to inherit from its father.[61]

For that reason some jurists and in fact the *Codex Maximilianeus Bavaricus Civilis* (CMBC) and the *preußische allgemeine Landrecht* (PrALR) argued that a *"Brautkind"* could not inherit from his father because one could not simply pretend an non-existent marriage into reality.[62]

But in 1790 the *Amt Schnackenburg* decided differently.[63] It argued that a fictional marriage was possible because if the deceased groom had lived on, he would have married the bride and the child would have been born within the marriage and therefore would have been a legitimate child.[64] The condition on which this decision was made was that the failure of the marriage wasn't caused by the bride, instead it

58 See *Hellfeld*, Band 1 Brautkinder § 1, p. 708; *Ludolff*, § 90 p. 137.
59 See *Ludolff*, § 90 p. 138; *Strube* Theil 3, p. 295f.
60 See *Strube* Theil 3, p. 296; *Ludolff*, § 91 p. 139f.
61 See *Pape*, Archiv für die theoretische und practische Rechtsgelehrsamkeit 4. Theil 1789, p. 177 [197f.]; *Ludolff* op. cit.; *Strube* op. cit.
62 See *Heffter*, p. 165; *Ludolff*, § 90 p. 137; *Pape*, Archiv für die theoretische und practische Rechtsgelehrsamkeit 4. Theil 1789, p. 177 [203, 216]; *Hellfeld*, Band 1 Brautkinder § 3, p. 708; *Busch*, p. 396; *Glück*, 2. Theil, p. 115f; in the CMBC the couple must have been married (CMBC I 3 § 2), See *Kreittmayr*, Anmerkungen 1. Theil, p. 60; in II 2 § 597 PrALR it was up to the husband's statement of whether the *Brautkinder* were recognized, but the mother could also sue to be acknowledged as a wife, II 2 § 592 PrALR.
63 *von Bülow/Hagemann*, p. 142f.
64 See *von Bülow/Hagemann*, p. 142f.; *Ludolff*, § 91 p. 141 (with reference to the law of Brandenburg and Saxony); *Strube* Theil 3, p. 298f. (with reference to the Saxon law); *Hellfeld*, Band 1 Brautkinder § 5, 7, p. 709; *Glück*, 2. Theil, p. 113.

was required that the priest did not perform the ceremony in time or the groom died before the ceremony (or left the bride "culpably").[65]

2.2.3.2 Legitimacy and advantage

The complicated situation of the *"Brautkinder"* included another part of the legal status of a (posthumous) child; legitimacy. In the above already cited case, presented in *David Georg Strube's "Rechtliche Bedenken"* Part 3 (another collection of court rulings) a man's right to inherit from his father and his legitimate birth was questioned by those who would be heirs instead.[66] Strube discusses if there is a presumption for the legitimate birth. In his conclusion he refers to the *"Brautkinder"* and states that it would be unnatural not to have a presumption for the legitimate birth if only the ceremony in front of a priest is missing for a formally correct marriage.[67]

Another situation is discussed in Part 1 of Strube's *"Bedenken"*.[68] The first part states that a child is seen as legitimate even when after the birth the mother renounces her previous statement.[69] The exception is when the married "parents" are poor and the child was, in fact, the one of a richer man and it could profit (financially) from the "new" father. In this case the proof of a different father who wasn't the husband of the mother was possible.[70]

In general everything possible was done to give the unborn child at its birth legitimacy except when a legitimate birth was to its (financial) disadvantage. This is the logical extension to the theorem "*Nasciturus pro jam nato habetur…"* to avoid that an unborn child had any disadvantages from its birth.

65 See *Schott*, p. 193; *von Bülow/Hagemann*, p. 142; *Strube* Theil 3, p. 299.
66 See *Strube* Theil 3, p. 293ff.
67 See *Strube* Theil 3, p. 298f.
68 See *Strube* Theil 1, p. 331.
69 See *Strube* op. cit.
70 See *Strube* op. cit.

2.2.3.3 The reason for the extension of the rule

Underlying this view was the theorem "*Nasciturus pro jam nato habetur…".* The unborn child should get all possible rights to its benefits (or those related to its birth) and - in the view of contemporary jurists - it was fair to give him those. This shows how much the above stated theorem was embedded into the thinking of the contemporary jurists.[71] On the other hand this spared the 18th century states from taking care of illegitimate children which weren't accepted in 18th century and could not inherit a fortune.[72]

2.3 The codifications of the Early Modern Era

In addition to the Civil Law the Early Modern Era saw several new codifications and several codification attempts.
The fiction of the posthumous child wasn't included in the *Ostfriesischen Landrecht* from 1518 or the *Bayrischem Landrecht* of 1616[73], but in the *Böhmischen Stadtrechten* the fiction was codified.[74]
In two of the great codifications of the 18th century in the Holy Roman Empire the unborn child was considered.

The *Codex Maximilianeus Bavaricus Civilis* from 1756[75] had several rules concerning the unborn child. I 3 § 2 CMBC codified the principle that the begotten child is treated as already born, as far as its advantage is in question.[76] Furthermore the posthumous belonged to the forced heirs or *Notherben* in the case of intestate succession („*Hæredes necessarii"*, III 1 § 3, III 3 § 14 CMBC) and they had to be designated as heirs in any will (III 1 § 3 CMBC).[77]

71 See *Busch*, p. 392; *von Bülow/Hagemann*, op. cit.; *Schott* op. cit., *Joachim*, p. 367; *Roller*, p. 29.
72 See *Ludolff*, § 9, p. 140; *Pape*, Archiv für die theoretische und practische Rechtsgelehrsamkeit 4. Theil 1789, p. 177 [188]
73 See *Helml*, p. 80; 2. Buch, Cap. 1, 3 Ostfriesisches Landrecht.
74 See Böhmisches Recht, F 10.
75 See *Wieacker* p. 326.
76 See also *Kreittmayr*, Anmerkungen 1. Theil, p. 59.
77 See also *Kreittmayr*, Anmerkungen 3. Theil, p. 7, 377.

I 3 § 2 CMBC stated that in regard to the legitimacy of an unborn child the conjugal birth was decisive.[78]
All those rules came from the Civil Law which the CMBC had simply taken over without adding anything new.

The *preußische allgemeine Landrecht* (PrALR) from 1794 in I 1 § 12 PrALR ties in with the theorem "*Nasciturus pro jam nato habetur…"* and the Classical Roman law: The unborn child had no legal capacity until it was born alive but all advantages were saved until then.[79] The inheritance was saved for the unborn child until the condition of a living birth was achieved (I 9 § 371 PrALR).[80] In addition to the previous the unborn child had to be legitimate (II 2 § 23 PrALR)[81], however not considering the unborn child in a will didn't automatically invalidate the will.[82]
In I 12 § 527 PrALR the statutory rule of interpretation was that by appointment of an heir with the formula children of 'person X' (I 12 § 527 PrALR) the already begotten unborn child was treated as a child of the person the testator referred to and was therefore an heir according to the will.[83]
In terms of legitimacy the status of the parents at the birth was decisive (II 2 §§ 1, 19, 20, 59 PrALR).
Thus, the PrALR was tied to the Civil Law conceptions of the Early Modern period but attenuated the consequences when an unborn child wasn't considered in a will.[84]

In contrast Friedrich Esajas Pufendorf's draft of a Hanoverian Landrecht didn't explicitly mention the unborn child.[85] Yet it contains laws in favour of the unborn child. In Titul III § 14 it is stated that a child begotten before the marriage will become legitimate with the

78 See also *Kreittmayr*, Anmerkungen 1. Theil, p. 60.
79 See *Morenz*, p. 21; *Roller*, p. 32f.
80 See *C. F. Koch*, p. 114, 1001; *Morenz*, p. 22.
81 See *Ludolff*, p. 134, Anm. f).
82 II 2 §§ 443, 450, 451, 454, 455 PrALR, see *C. F. Koch*, p. 424, 722.
83 See *Morenz*, p. 23.
84 See *Hiersemenzel*, p. 78; *Hofmann*, p. 33; *Roller*, p. 32f.
85 See Ebel, Friedrich Esajas Pufendorf's Entwurf eines hannoverschen Landrechts (vom Jahre 1772).

marriage of the parents. This is in fact an extension form the legitimate birth concept. Titul LXXXV § 4 states that those children are heirs of their father.

Also in hereditary law in Titul LXXXV § 1 *Brautkinder* are legally acknowledged as legal heirs of the father with reference to the jurisprudence in the Electorate of Hannover.

The latter reference also explains why the unborn child itself wasn't mentioned in the draft of the Hanoverian Landrecht. Pufendorf didn't aim to write a complete codification which is in contrast to the ALR or CMBC. He used the method of the *Kontroversen-Gesetzgebung* (literally: controversial legislation) where the legislator aimed to solve all legal disputations on how the law must be interpreted or which law was applicable.[86] This goal is explicitly stated in Titul I § 1: *"*[…] *Uns bekannt gemachte Zweifel durch dieses Unser Gesetz-Buch, und zwar solchergestalt, wie Wir es zugleich dem gemeinen Besten nützlich erachtet, zu entscheiden* [...]*"* ([legal] uncertainties made known to us are to be resolved through this code of law). The use of this technique further implies that the laws concerning the unborn child which existed since the Romans were so universally acknowledged that they didn't need to be in the draft.[87] In addition Titul I §§ 2 and 6 state that the Roman and Civil Law are the applicable law in the Electorate of Hannover when the draft of the Hanoverian Landrecht doesn't specify something different.[88]

In codifications of the 18th century which are examined here, no general deviations from Civil Law can be determined, only the draft of the Hanoverian Landrecht extents the conditions in which a child is legitimate beyond the PrALR or CMBC.

86 See *Ebel*, Friedrich Esajas Pufendorf's Entwurf eines hannoverschen Landrechts (vom Jahre 1772), p. XVI; *Kroeschell*, p. 197.
87 See among others: *Kroeschell*, p. 174;*Böhmer* p. 617, recital 5 who declares the rule „postumus pro iam nato habeatur" (here postumus instead of nasciturus) to be a universal rule; *Helml*, p. 80; *Roller*, p. 29; *Joachim*, p. 367; *Glück*, 2. Theil, p. 111f; *Ludolff* p. 132.
88 See *Ebel*, Friedrich Esajas Pufendorf's Entwurf eines hannoverschen Landrechts (vom Jahre 1772), p. XVII.

2.4 Maximum abstraction of the unborn child – the not yet begotten unborn child

Above the already begotten unborn child was discussed. But how could the not yet begotten unborn child, the *nondum conceptus*, be taken into account?

A testator could consider it in one's will because it's not out of question to save the inheritance for the not yet begotten. The Civil Law refused it. The not yet begotten child wasn't able to inherit a share of the deceased's estate, it was only capable of receiving a legacy of a specified sum of money or specified items.[89]

But the wording of I 3 § 2 CMBC seems to contradict this: "*Ungebohrene oder im Mutterleib liegende (Embriones, spes Animantis, Posthumi) werden für gebohren geachtet, wenn es ihr Nutzen also erfordert […].”* [Unborn children or those in the mother's womb are deemed to be already born, that is to their advantage]. This could mean that the not begotten unborn child was taken into account.[90] In the *Anmerkungen* Kreittmayrs, Kreittmayr, who (partly) created the CMBC[91], just referred to the already begotten unborn child to explain the above cited law; "*Embryones, Posthumi, Spes Animantis*".[92] Following Kreittmayr himself the CMBC didn't take the not yet begotten unborn child into account.[93] It seems that the wording of I 3 § 2 CMBC was wrong and a change of the law wasn't intended.[94] This is confirmed by the Latin terms in brackets in I 3 § 2 CMBC; *Posthumi* are the at the death of their father begotten posthumous children, *spes Animantis* are according to Marcell. D. 11, 8, 2 the already begotten unborn, as well as the *Embryones* (embryo).[95]

89 See *Deppert* p. 4; Appellationsgericht Hamm, Beiträge zur Erläuterung des deutschen Rechts 18, 1874, p. 380 [381]; *Roller*, p. 29.
90 *Deppert,* p. 5.
91 See *Helml* p. 32f., *Schlosser*, Festschrift Gunter Wesener, p. 395 [403ff.].
92 *Kreittmayr* Anmerkungen 1. Theil, p. 59.
93 See *Kreittmayr* op. cit.
94 See also *Helml*, p. 80 f., who does not even mention any right to inherit of the not yet begotten unborn child.
95 See *Eichmann*, p. 189f.

The PrALR turned away from this principle. The not yet begotten could be the heir.[96] On the other hand it did not receive the same rights as the begotten unborn child.[97]

In contrast the royal dynasties of the Early Modern Era established in their dynastic thinking far more complex succession regulations that deviated from Civil Law. Of those regulations, the Act of Settlement of 1701 is still in force.[98] This concerned no longer the immediate succession of the next generation but disinherited whole family strands (all Catholics, but above all the descendants of James II) or declared family strands (in this case the descendants of Electress Sophia of Hanover) and all their descendants to be heirs to the thrones of England and Ireland („Heirs of her body"). Most of the people affected by the Act (for instance, the current Queen of England) were far from being begotten when the Act was passed but still had a firm right to succeed.[99]

In the will of George I of Great Britain it was decisive that the heirs didn't exist at the time of his death.[100] The idea was to disinherit the not yet begotten firstborn of Frederik Louis (the grandson of George I) in regard of the Electorate of Hannover and give it to the second not yet begotten son if he should ever exist. This complex will was needed because according to Civil Law George I couldn't disinherit Frederik Louis in regard to the Electorate of Hannover.[101] Against this will was the fact that following the *Golden Bull of 1356* the potential future

96 See I 12 §§ 526-530 PrALR; *Mehlhose*, p. 12; *Roller*, p. 32; Appellationsgericht Hamm, Beiträge zur Erläuterung des deutschen Rechts 18, 1874, p. 380 [381].
97 See *Roller* op. cit.
98 See *Barmeyer*, Hannover und die englische Thronfolge, p. 65 [75]; *Thompson*, p. 26.
99 See *Barmeyer*, Hannover und die englische Thronfolge, op. cit., *Thompson*, op. cit.
100 "Wann Unseres Enkels Friedrich Ludwig [firstborn son of George II., who had not fathered a child in 1716 when the will was written] […], zween männliche Erben hinterlässt. Alsdann soll die Succession in Unsere Gross-Britannische Königreiche von der Succession in Unsere Teutsche Lande separiert werden und der zweite Sohn und dessen Descendenten in Unsere Teutsche Lande succedieren" (if Frederick Louis would have two male heirs the firstborn should inherit the Kingdom of Great Britain and the second son the Electorate of Hannover), Quote after, *Drögereit,* Quellen zur Geschichte Kurhannovers, p. 27.
101 See *Hatton*, p. 166, 168 („birthright").

firstborn of Frederik Louis couldn't be disinherited as long as Frederik Louis didn't renounce his claim to the Electorate for himself and his possible offspring. Because of this the will never took effect.[102]
This, as well as the Act of Settlement, showed how stable succession rights of not yet begotten children in royal dynasties were.[103] The dynastical thinking didn't only involve the next generation(s), it involved a potentially endless row of possible heirs.[104] Ultimately, this implies a need for stability, which should be secured by the succession over several generations.[105]
In contrast in private law, not yet begotten children had no rights (with a partial exception in the PrALR). Guaranteed succession of not yet begotten children can only be found in royal and noble dynasties.

2.5 Conclusion concerning the legal basis

As result it can be said that the unborn wasn't human according to the Civil Law, following the traditions of the Classical Roman Law. On the other hand in the Early Modern Era the rules of the Roman Law were condensed to a simple sentence and fiction and after that the begotten but unborn child was treated as already born as far as its advantage was in question. An exception from this rule which was originally an exception itself in the Classical Roman Law needed to be justified.

3. Scientific advance and its influence on the law

The next part focuses on the scientific advancement in regard to the unborn child and the reaction of the law and jurists.

102 See *Drögereit*, Niederp. Jahrb. f. Landesgeschichte, 14, 1937, the author presents several opinions up to the end of the reign of George II p. 94 [98, 154f., 158f., 162, 168, 174, 177f.]; for the opinion of 1744, compare also *Dann*, p. 152.
103 See *Drögereit*, Niederp. Jahrb. f. Landesgeschichte, 14, 1937, p. 94 [177]; *Hatton*, p. 166.
104 See *Scott*, Hannover – Coburg-Gotha – Windsor, p. 33 [39].
105 See *Hatton*, p. 167f.; *Scott*, Hannover – Coburg-Gotha – Windsor, p. 33 [39f.]; *Drögereit*, Niederp. Jahrb. f. Landesgeschichte, 14, 1937, p. 94 [114, 118, 125, 162].

The question arises as to whether there was a uniform picture of the unborn child or whether the ideas of law and theology or medicine diverged?

3.1 Inclusion of new (medical) knowledge by the law?

First of all, it has to be clarified what developments were made to the scientific picture of the unborn child in the Early Modern Era and how it changed.
Afterwards it will be explained how the jurists took up and dealt with these processes and how the codified law handled them.

3.1.1 Development in the medicine

From late Antiquity through the Medieval to the Early Modern Era it was generally accepted that the unborn child gained personhood through gaining a soul during the pregnancy following the theory of successive ensoulment.[106] According to this theory the unborn gained its soul when it gained human form, the point at which the human life started.[107]
Following this theory when anatomists started - for the first time in human history - to picture the unborn it was presented as a little human sitting in the womb.[108] From those pictures Vesalius' presentation was formative although he pictured a uterus of a dog.[109] From the 17th century onwards the idea of the successive ensoulment was increasingly questioned. Thus, in 1609, Daniel Sennert took up the doctrine of simultaneous ensoulment (the theory that the unborn gained its soul at the conception) from Tertullian's early work, and from this developed his own theory that the semen must already

106 See *Koch* Cupido legum, p. 87 [90f.]; *Jerouschek*, Lebensschutz und Lebensbeginn, p. 34, 83, 180; Geschichte der Abtreibung p. 44 [46, 55f., 59f., 63f.]; *Kölsch-Bunzen*, p. 92, *Duden*, Geschichte des Ungeborenen, p. 11 [32].
107 See *Jerouschek*, Geschichte der Abtreibung p. 44 [46]; Lebensschutz und Lebensbeginn, p. 34.
108 See *Kölsch-Bunzen* p. 108; *Duden*, Geschichte des Ungeborenen, p. 11 [23, 30].
109 See picture 1, as well as picture 2, the presentation of a fetus in the womb by da Vinci, who used a uterus of a cow to create his drawing.

contain the soul as the origin, because something without a soul couldn't create something with a soul.[110] Sennert was ignored by contemporaries. This was different when Thomas Fienus in 1620 in principle followed the idea of the successive ensoulment but stated that the semen played a part in the conception. To bring both ideas into accordance with each other the ensoulment had to take place very early in pregnancy, following Fienus on the third day after the conception.[111] Both Sennert and Fienus were Professors of Medicine and both (in particular Fienus) affected only the medical world. In contrast Paulus Zacchias (one of the leading physicians in the Early-Modern Era and working in the Papal State[112]) took the idea of simultaneous ensoulment into the world of the church.[113] In his first works Zacchias followed the successive ensoulment[114], but later he argued for the idea of the simultaneous ensoulment.[115] His reason was that the soul was the reason for every creation and therefore the ensoulment had to take place at conception.[116]

From this point on the doctrine of the preformation was developed.
This theory assumed that a tiny human, already prefabricated in the egg or semen was present and had to mature in the womb.[117] Thus one stood completely in the tradition of representations of the unborn as a small, already formed person in the womb.[118] The scientists saw only what they wanted to see in their consolidated view on the unborn, whereby they didn't recognize embryos as human beings, but instead they regarded them as freaks, so-called moon children.[119]

110 See *Jerouschek*, Lebensschutz und Lebensbeginn, p. 181.
111 See *Jerouschek*, Lebensschutz und Lebensbeginn, p. 182f.
112 See *Jerouschek*, Lebensschutz und Lebensbeginn, p. 184.
113 See *Jerouschek*, Lebensschutz und Lebensbeginn, p. 188.
114 See *Jerouschek*, Lebensschutz und Lebensbeginn, p. 184f.
115 See *Jerouschek*, Lebensschutz und Lebensbeginn, p. 188.
116 See *Jerouschek*, Lebensschutz und Lebensbeginn, p. 189f., in which Zacchias stayed with the theory of successive ensoulment because any other theory would be heresy, *Jerouschek*, Lebensschutz und Lebensbeginn, p. 190.
117 See *Duden*, Geschichte des Ungeborenen, p. 11 [37]; *Jerouschek*, Lebensschutz und Lebensbeginn, p. 181; *Hornuff*, p. 112f., See also picture 3, even if Hartsoeker only stated, that on could see the little human in the seamen if one could see through the skin, *Hornuff*, p. 116.
118 See *Duden* op. cit.
119 See *Hornuff*, p. 113f.; *Duden*, Geschichte des Ungeborenen, p. 11 [37, 39].

This led to the universal view among physicians in the 18th century that the unborn lived from its conception on.[120]

However, not only was the earlier view of the beginning of life denied and revised, the end of the pregnancy and thus the possible length of this was scientifically researched. Especially the assumption that a woman could give birth after 11 or more months was criticized.[121] The average pregnancy duration was set around 39 weeks[122], birth after the 10th month, however, was considered either unlikely or simply impossible, despite many conflicting but highly dubious legal and medical case reports.[123]

The result is that science had gained an ever more accurate idea of the unborn child (the beginning of life and the duration of time *in utero*). The scientists broke away from old ideas and put their own results in their place.

3.1.2 The reaction of jurists

18th century jurists didn't fail to recognize that scientific progress could be used - as above in the case of the *Rath* described – in the interpretation of wills.[124] But they partly played this progress down as unsure and singular opinions which had yet to be proved.[125]
Especially in regard of the length of the pregnancy (and thus the length of time after which a child could still be a posthumous child) they argued about whether the law should follow the rule from the

120 See *von Haller*, p. 96, with further references; *Plenk*, p. 90; *Kölsch-Bunzen* p. 155f.; *Jerouschek*, Lebensschutz und Lebensbeginn, p. 181.
121 See *von Haller*, p. 118ff., *Ploucquet*, p. 99f., *Glück*, 2. Theil, p. 107ff.; *Metzger*, p. 220.
122 See *von Haller*, p. 108; *Ploucquet*, p. 74f.; *Metzger*, p. 222; *Büttner*, p. 21; *Plenk*, p. 116.
123 For the first part see *Mercurio/Welsch*, p. 73f.; *Büttner*, p. 22, *Metzger*, op. cit., with the presentation of other different opinions; for the latter part see *Ploucquet*, p. 99f.; *von Haller*, p. 119f.; *Glück*, 2. Theil, p. 108f.; *Plenk*, p. 117; *Metzger*, p. 223, after which the legitimacy is only to be accepted until the 280th day of pregnancy; on top of that summary and rating of different opinions at *von Haller*, p. 121ff.
124 See *Eichmann*, p. 191; *Böhmer* p. 617, recital 6.
125 See *Glück*, 2. Theil, p. 109f.; *Schmidt*, p. 217ff.; *Schott*, p. 255, Not. **, ****.

Novellae Iustiniani (Nov. 39, 2) or a commentary to the *Sachsenspiegel* (I Art. 33)[126] which both stated that a pregnancy could last up to the beginning of the 11th month after the conception or if they had to follow the scientific finding that a pregnancy lasted only 39 weeks.[127] Largely they stayed to the (ancient) laws and refused to apply the new knowledge as long law and tradition gave them another solution.

3.1.3 The reaction in legislation

Still the reaction of the legislation itself has to be analysed.
The Private Law stayed despite several new changes in the 18th century with the Civil Law. Also the presumption of legitimacy of an unborn child wasn't adjusted in the legislation. Thus, for example, in the PrALR, II 2 § 19, the presumption of legitimacy of a posthumous child was extended to 302 days from the death of the husband and (presumptive) father to the birth. This contradicted the newest medical findings (~ 39 weeks). Even more if one considers that after the newest medical findings the conception could take place 8 – 14 days after the death of the presumptive father.[128] Just in I 1 § 10 PrALR the legislation reacted and granted the unborn child the "allgemeinen Rechte der Menschheit" (general rights of humanity), which was a weak declaration devoid of all practical meaning and also stood in contrast to the actual beginning of legal capacity of the unborn child at the moment of the living birth in I 1 § 12 PrALR.[129]

3.2 Conclusion of part 3

The Early Modern Era saw significant changes in science in regard of the unborn child. Thus science and law which persisted on its old

126 See *Schott*, p. 256, Not. ****; *Schmidt*, p. 218.
127 See *Glück*, 2. Theil, p. 109f.; *Schmidt*, p. 217ff., who says on p. 218 that the new scientific findings can not be applied because they were not accepted universally; *Schott*, p. 255, Not. **, ****.
128 See *Glück*, 2. Theil, p. 108; *Metzger*, p. 223f.; *C. F. Koch*, p. 1001.
129 See *Roller*, p. 34.

principles drifted apart. Not that the jurists didn't recognize the progress, but they resisted taking it into account. Only when it suited the desired result they took the new medical findings into account to create the result in cooperation with the old law.
Even more the legislation itself resisted taking over these findings. It stood to the old principles and partly expanded them as in II 2 § 19 PrALR.
The sole exception was I 1 § 10 PrALR. But this rule had no practical effect.
At the end both jurists and legislation recognized the scientific advance in medicine but failed to implement it if it didn't suit their predetermined thinking.

4. Conclusion

In order to understand the significance of the unborn child and its place in society and private law we need to give up our modern day view of the 18th century. This means that inheritance wasn't the tool to hand property to the next generation. In the 18th century (monetary) property wasn't as important as in our society. More importance was given to the transition of social status, the "Rang" or rank through inheritance. [130]

The unborn child in law is a mirror of this transition and therefore of the patriarchal society of the 18th century. This shows the importance of the legitimacy of a new child. A child had to be bound to a father, the husband. He was the one who transmitted the social (ascribed) status to the child. The new-born child was part of the family of the father and not part of the mothers family.[131] All rules in favour of the unborn child served the unborn child to give him a connection to a legitimate father (with exception of the rare case where the unborn child had more advantages from an illegitimate father). The fiction

130 See *Dilcher* in Frauen in der Geschichte des Rechts, p. 61.
131 See *Dilcher* in Frauen in der Geschichte des Rechts, p. 81f.

"*Nasciturus pro jam nato habetur…"* did link the unborn child to its father (and his heritage) and was useless in concern of the mother because the mother was always the one who gave birth.[132] In order to establish this link in every possible case even scientific knowledge was ignored by the jurists or new legislation.

Although jurists did know (at least in the late 18th century) that the unborn child lived from the moment of conception it made sense not to give him legal capacity. The uterus itself was closed (remember that even Vesalius and da Vinci did not depict a human uterus) and nobody knew whether the unborn child was a stillbirth. So it was uncertain if an actual person was inside the womb. From this perspective it made much more sense to save all rights to the advantage of the unborn child until the living birth, the time at which it was clear that the unborn child lived.
Giving the unborn child its own (property) rights would lead to a complicated dissolution if it was a stillbirth.[133]
So the fiction was a way to avoid complicated consequences.

But the fiction had also another important part. In 18th century fatherless children had mostly to be taken care of by the state as the mothers were somewhat outcast for having sex before marriage. This means that the state had to provide (costly) help for keeping them off the streets and avoiding them becoming beggars. The simple answer was to make those children legitimate so that the father had to take care of them. An excellent example is Titul LXXV § 2 of the draft of the Hanoverian Landrecht which stated that a man having sex with the mother during the probable time of conception had to provide payments to the child even if the mother had sex with other men at the time because the children should always get their payments.

132 See *Glück*, 2. Theil, p. 103; *Ploucquet*, p. 8f.
133 See *Duden*, Geschichte des Ungeborenen, p. 11 [17], *von Hugo*, Lehrbuch des Naturrechts, p. 209; *Ploucquet*, p. 124; *Göschen*, p. 121.

The same applies to the possible legal length of the pregnancy. Jurists did know that their data was wrong and outdated. The new shorter length was applied to unmarried women (285 days in contrast to 302 days).[134] Still they didn't take the new findings over in order to preserve the link of the unborn child to his dead putative father in order to serve the idea that the social status was inherited from the father and that a child without a father was outside the social order and consequently at its bottom.

All those are also manifestations of the patriarchal society. So far analysing the law in regard of the unborn child doesn't give new scientific knowledge but the private law in regard of the unborn child is an excellent example of how the law is influenced and made according to the general idea of how society is organised.

For the royal dynasties the unborn child was even more important. Having a future (male) heir led to the stability of the European monarchies. If a ruler failed to produce a (male) heir the consequence could be fatal as we can see in several wars of the 18th century which were fought about the succession of a childless ruler, such as the War of the Spanish Succession or the War of the Austrian Succession. To avoid these wars the monarchies tried to establish a clear line of succession even for future generations for a smooth transition of power and even more to gain more splendour and longevity for their own dynasty. The not yet begotten unborn child personified this hope for the future of the dynasty.[135]

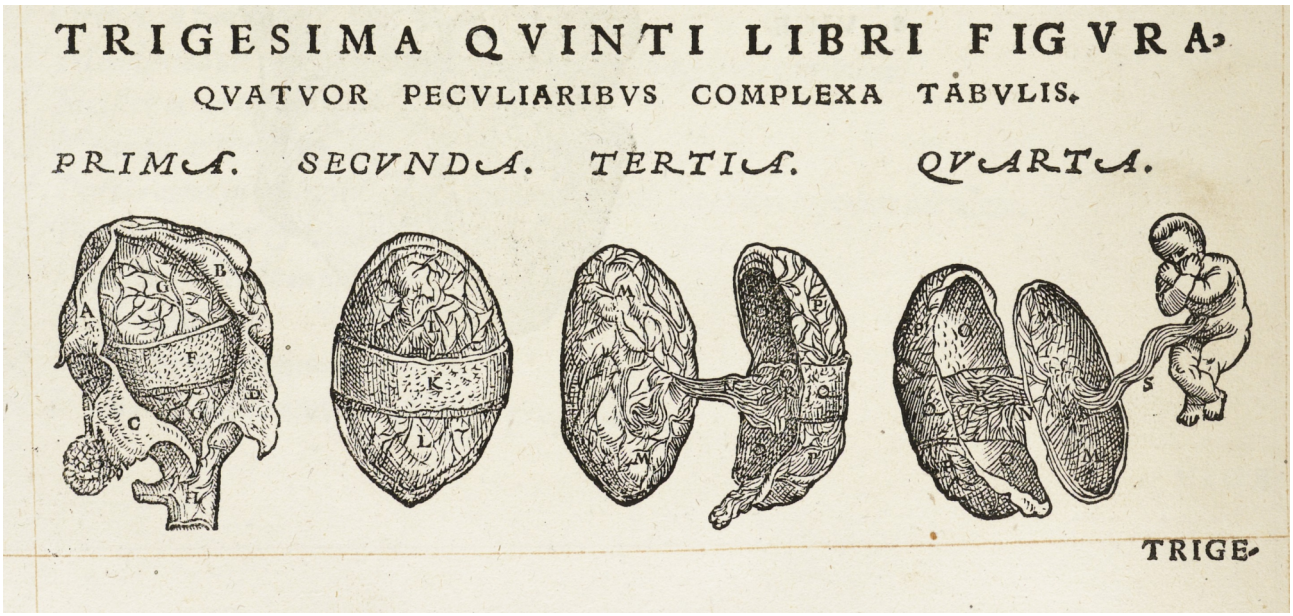
In the final analysis the unborn child is the embodied hope for the survival of the family or dynasty. When its rights to its advantage are saved until the living birth this embodies the hope of an heir, a successor. This idea was predominant in the Roman society when the fiction in favour of the unborn child (already born at the father's

134 See *Harms-Ziegler* in: Frauen in der Geschichte des Rechts, p. 334.
135 See *Scott*, Hannover – Coburg-Gotha – Windsor, p. 33 [39].

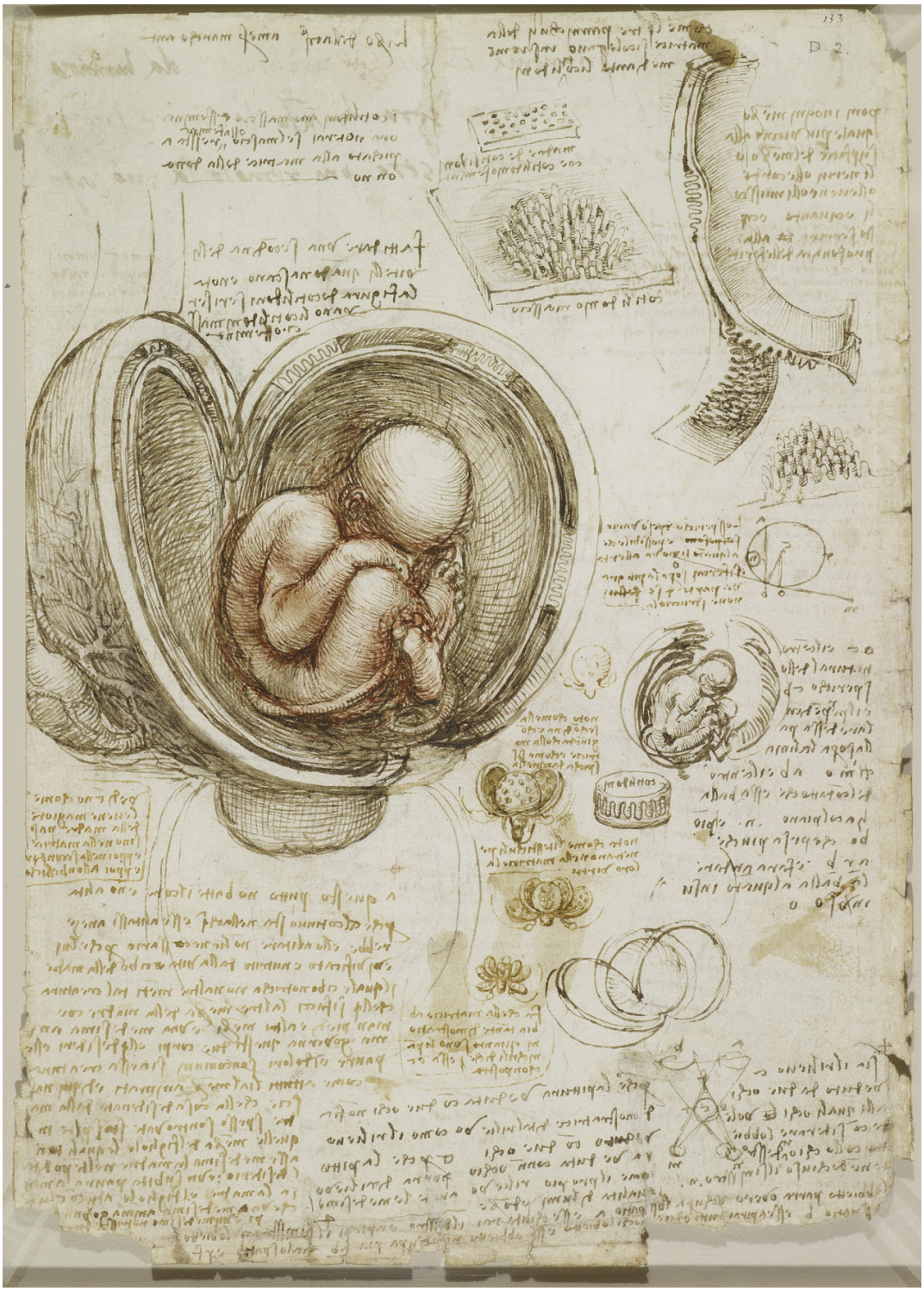
death) was invented in favour of giving a dead father a child in order to save the family – gens – of the father from extinction.[136] She survived up to the 18th century and was the foundation why the fiction of the Roman law was extended in favour of the unborn. The hope of a successor was dominant and important so that the jurists and legislation served it.

136 See *Thomas* E.H.E.S.S., p. 29 [33, 60, 67].

Appendix:



Picture 1: Andreas Vesalius – the unborn, De humani corporis fabrica libri septem p. 382, 1543 wikimedia commons, Wellcome Images

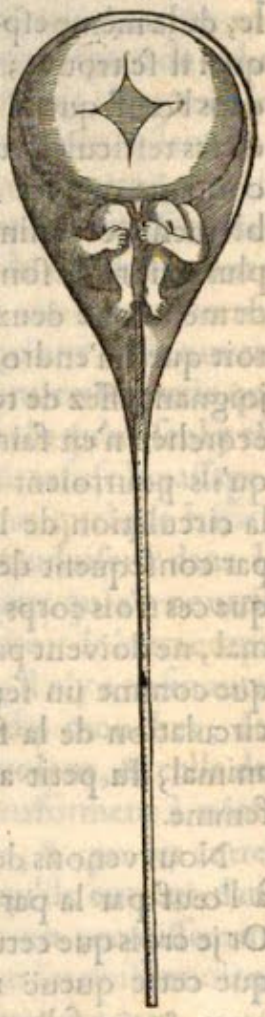


Picture 2: Leonardo da Vinci - The foetus in the womb (Recto) c.1511, Her Majesties Royal Collection

que la tête ſeroit peut-être plus grande à proportion du reſte du corps, qu'on ne l'a deſſinée icy.

ART. XC. Ce que c'eſt que l'œuf de la femme, & comment un enfant vient ordinairement au monde.

Au reſte, l'œuf n'eſt à proprement parler que ce qu'on appelle *placenta*, dont l'enfant, aprés y avoir demeuré un certain temps tout courbé & comme en peloton, briſe en s'étendant & en s'allongeant le plus qu'il peut, les membranes qui le couvroient, & poſant ſes pieds contre le *placenta*, qui reſte attaché au fond de la matrice, ſe pouſſe ainſi avec la tête hors de ſa priſon; en quoi il eſt aidé par la mere, qui agitée par la douleur qu'elle en ſent, pouſſe le fond de la matrice en bas, & donne par conſequent d'autant plus d'occaſion à cet enfant de ſe pouſſer dehors & de venir ainſi au monde.



L'experience nous apprend que beaucoup d'animaux ſortent à peu prés de cette maniere des œufs qui les renferment.

ART. XCI. Que l'on peut pouſſer bien plus loin cette nouvelle penſée de la generation, & comment.

L'on peut pouſſer bien plus loin cette nouvelle penſée de la generation, & dire que chacun de ces animaux mâles, renferme lui-même une infinité d'autres

Picture 3: Nicolas Hartsoeker - , Essay de Dioptrique, Paris 1694, p. 230, Google Books

Furthermore, how does the advance of scientific knowledge influenced the view of the lawyers of the 18th century on the matter?

And how did the princes, especially the Hanoverian dynasty, adopt the idea of giving an unborn child rights?

At last a picture of the importance of inheritage in the 18th century German society and it ties to the organisation of society shall be drawn.

To answer these question first the roots in the Classical Roman Law will be discussed. After that I'll highlight which parts were still in force in the 18th century and how the lawyers and rulers extended the fiction for the benefit of the unborn child. At last I'll compare these legal facts to the scientific development to show if the lawyers adopted the new scientific development or ignored it.