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## Unseen Heirs. Written Traces of Pregnant Widows and Posthumous Children in Early Modern Spain (c. 1490-1673)<sup>1</sup>

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# Unseen Heirs. Written Traces of Pregnant Widows and Posthumous Children in Early Modern Spain (c. 1490-1673)<sup>1</sup>

Herederos desconocidos. Fuentes escritas sobre viudas embarazadas e hijos póstumos en la Alta Edad Moderna en España (1490-1673)

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**Abstract:** The pregnant widow and the legitimacy of the posthumous child she carries were a liability that soon found its legal regulation. The distrust placed in her can be traced in various documents between the 15th and 17th century in Spanish legal, notarial and religious texts. The analysis of these sources will help to gain an insight in the perceptions of pregnant widows and posthumous children regarding power, legitimacy and credibility.

**Keywords:** Pregnant widow, Posthumous child, Legitimate birth, Letters of birth, Fueros, Siete Partidas, Feigned birth, Midwife.

**Resumen:** La viuda embarazada y el hijo/a póstumo/a que lleva dentro plantean una anomalía que pronto debió ser regulada legalmente. Dada la complejidad que plantea, se pueden encontrar rastros de esta materia en documentos legales, notariales y religiosos entre los siglos XV y XVII en España. El análisis de estos nos permite comprender mejor la imagen de las viudas preñadas y sus vástagos en conexión con el poder, la legitimidad y la credibilidad.

**Palabras clave:** Viuda preñada, hijo póstumo, hija póstuma, parto legítimo, cartas de parto, Fueros, Siete Partidas, parto fingido, comadrona.

## Introduction

Though it was January, the birth chamber prepared for the widow Isabel de la Cavallería had the windows open, uncovered and all the attendees exposed. This seems rather surprising as in medical treatises, such as the one written by Damián Carbón in 1541, it is advised to keep the windows shut as cold and wind were thought to cause difficult births<sup>2</sup>. The open windows «por do recibe lumbre»<sup>3</sup> seem additionally unexpected because the number of blessed candles in the room increased with the progress of the account, which together with other descriptions was interpreted as indicating exactly that: a difficult birth<sup>4</sup>. The image conveyed is not one of an intimate, dark and closed room but the open windows, as the documentation itself, seem to represent the public character of this birth.

Isabel de la Cavallería gave birth in 1490 after her husband had died while she was pregnant. The birth was recorded by a notary in a so-

called *carta de parto*. This 'letter of birth', as well as one from 1487, were both recovered from the notarial protocols of the Archivo Histórico Provincial de Zaragoza<sup>5</sup>. What connects the women in these two sources is their condition of being pregnant widows. To be a widow without children had different implications than to be a widow with children. Isabel de la Cavallería belonged to an influential converted noble family of Zaragoza. Her late husband was Pedro de Francia, lord of Bureta. Childless prior to this delivery, the posthumous birth had the potential to empower her with property, administration and guardian rights bound to the legitimacy of the newborn heir.

The time frame of this article is set by said late-medieval notarial account of the birth of a posthumous child and the Early Modern account of the birth given by the Marquise of Pescara in 1673. Her husband, Francisco María Fernando de Ávalos de Aquino y Aragón, marquis of Pescara, died in 1672 in Barcelona, leaving behind his pregnant wife and a last will regulating the effects of the posthumous birth<sup>6</sup>. What followed was the documentation of a controlled and observed pregnancy.

The article will analyze different perceptions of pregnant widows and the birth of posthumous children found in legal and notarial texts between the 15th and 17th century. How do these descriptions of pregnant widows interact with categories such as power, confidence, distrust and (un)protection? When talking about pregnant widows, we actually have to distinguish different pregnancy scenarios that influenced the perception of the pregnant widow. This article lays its focus on the pregnant widow claiming to carry the legitimate heir of her late husband and the regulations structuring the pregnancy and birth of the posthumous child. Consequently, this article evolves around another essential category that was highly important for the perception of the pregnant widow and her descendants: legitimacy.

## Widows between Entitlement and Imposed Ideals

«Muerto el marido, la mujer viuda, aunque tuviese hijos de él, poseerá todas las cosas que juntamente tenían mientras ella se mantenga viuda. Pero aunque no se case, si manifiestamente tuviese fornicador o adúltero, pierda la viudedad, y las dotes, como si se hubiese casado»<sup>7</sup>

The value of the notary's actions was based on his credibility and the confidence bestowed upon him. The notaries were an organizing institution in a widely illiterate society, writing down and attesting what different parties agreed upon in their presence and what could be used as evidence in case of later disagreements:

«el notario público se convirtió en el guardián de la honra, en principio de las instituciones públicas y por extensión de toda la sociedad: la costumbre de plasmar por escrito los compromisos y las decisiones más elementales de la vida contribuyeron a que la gente, sobre todo en la ciudad, pasara a depender de la palabra escriturada por un fedatario»<sup>8</sup>.

Studies of the last decades have shown the role of widows in regard to the production of notarial acts. While the wife could only make a contract with the permission of her husband, the widow acquired, through her changed marital status, new opportunities for acting as an independent grantor in notarial documents and by that occupying a changed social place of interaction with her surroundings<sup>9</sup>. As our letter of birth states, it was the widow herself and her *procurador*, Martín Gil de Palomar y de Gurrea, who required the attendance of a notary so he could «hiciera y sacara de las sobredichas cosas una y muchas cartas públicas, y tantas cuantas serían necesarias»<sup>10</sup>. Rather than being an intrusion of the official bureaucracy intervening in the private birthing chamber, it is Isabel de la Cavallería who is using bureaucracy for her own means and advantage<sup>11</sup>.

In Aragon existed since approximately the 13th century the so-called *viudedad foral*<sup>12</sup>. It endowed the widow in Aragon with particular rights of entitlement, thus giving her a better position in comparison with other parts of the Peninsula<sup>13</sup>. In the *Fueros de Aragón*, the widow was assigned the usufruct of all the property and income of the late husband during her lifetime or until she remarried under the condition of being an «honest widow». Before that regulation, the right of the common properties and goods were lost with the death of the first child and could be returned to the family of the late husband<sup>14</sup>.

Nonetheless, the amount of resignations of the special widow rights can be seen in the study of José Antonio Salas Auséns, who showed that in the 341 marriage contracts he analyzed from Loporzano between 1578 and 1634, three out of four wives gave up their advantages expressed in the *Fueros*<sup>15</sup>. Additionally, marriage contracts could readjust the regulation of the *Fueros* with certain limits or conditions such as a «temporal widowhood» in which the widow could only benefit for a certain amount of years from the usufruct, sometimes just during the mourning year<sup>16</sup>. To be a widow with children put the woman therefore in another position than being childless, which is why pregnant widows were under suspicion: «es pactado entre las dichas partes que la dicha María de Sus haya de tener y tenga tres años de viudedad sin hijos y con ellos perpetua, siendo viuda honesta y trabajando en utilidad de la casa»<sup>17</sup>. Often the legal regulations were restricted by marriage contracts that bound the widow's usufructuary rights to the existence of common children. So for Isabel de la Cavallería it was important to show that it was a legitimate birth in order to gain the right to administrate the inheritance belonging to her husband's posthumous child<sup>18</sup>. In the *Partidas*, the rights arising through the sheer pregnancy before the birth has even taken place, show the possible empowerment of the widow: «debe ser apoderada de aquellos bienes que demanda en nombre de aquella criatura de que es preñada; y puede vivir y mantenerse en ellos»<sup>19</sup>.

As for the Aragonese inheritance regulations for widows, María del Carmen García Herrero pointed out that it was also a way for the husbands to ensure that their widows would not remarry. If the widow

was economically cared for by being universal heiress or usufructuary of his possessions and tutor of their common children, it was less likely for her to remarry or in case she did, the assets she brought into the marriage would empower her to set demands such as keeping her children with her. If confronted with an unsecure economic position or still very young, the widow was more likely to remarry soon, henceforth, the husband would appoint guardians for his children prior to his death<sup>20</sup>.

Aside from possible autonomy through the usufruct, the widow was subjected to specific socially imposed ideals of how she should behave. Once the husband was dead, the code of honor of Golden Age Spain put the widow in a meticulously elaborated corset of adequate behaviour. The ideal widow should retire from public life and dedicate her life to religious duties and honorable contemplation<sup>21</sup>. It arranged her set of options of interactions within society around the adjective «honorable»<sup>22</sup>. In wills and legal texts, the behaviour that was acknowledged as honorable guaranteed her certain rights that, once the reputation was lost, also meant the loss of her social status. The way a widow mourned was closely watched and judged. In his treatise, Juan de Vives depicted the ideal widow and different ways of defying that aspirations, making the mourning look like a dangerous balancing act: «Dos maneras de mujeres hallo yo en mi cuenta las cuales en llorar a los maridos y erran de una misma manera [...] las que plañen demasiado y las que nada o muy poco»<sup>23</sup>. His worry for the relative independence of the widow from male control finds its spiritual solution in the subjection of the widow to her late husband's judgement:

«la viuda tenga memoria del marido no con lágrimas ni con señales exteriores sino con acatamiento y veneración interior pensando de continuo tenerle presente y que él está siempre atento a lo que ella hace y dice. [...] Viva de manera como que es cierta y segura de agradar con su vivir no ya a varón sino a un espíritu símplice y puro y casi divino»<sup>24</sup>.

## Attesting distrust

The *carta de parto* shows that the pregnant widow felt it necessary to bring an official notary into her birthing chamber to guarantee that the legitimacy of her child would not be questioned, what suggests that mistrust against pregnant widows was not uncommon. They were suspected of deceiving their late husband's family by pretending to have a child. It also shows that the written testimony overruled an oral one. It was not enough to have the word of the mother, the midwives and the witnesses but it had to be written down and the fruit of her womb officially attested. Using a written testimony instead of an oral one provided the possibility of easier reproduction whenever and in as many numbers as needed.

In the case of the Marquise of Pescara, two important roles performed by family members show the different interests involved. Her mother, the Marquise of Camarasa, a widow herself, appears as Isabel Ana of

Mendoza's guardian and is the one who asks to secure the future position of the posthumous child by «medios de justicia y gobierno»<sup>25</sup>. Isabel's father-in-law, the Marquis of Vasto, was interested in guaranteeing the legitimate inheritance. His son had only been married to her for eight months and had died in Barcelona where he was on behalf of king Charles II. It finally even caught the interest of the Court, resulting in a *Provisión Real* regarding her pregnancy and birth.

The Marquis of Vasto's right to be regularly informed about the pregnancy, as well as the Marquise of Pescara's fulfillment of such obligations is pointed out in the source. At the time of birth, witnesses were considered as especially important to the Marquis as he was the most interested in preventing any fraud, so his relatives could attend the birth as well if wanted<sup>26</sup>. Already in Justinian we find evidence that if a pregnant widow claimed that it was the child of her late husband, then any interested party was allowed to attend the birth or send representatives<sup>27</sup>. Hence, women could be sent into the birth chamber as witnesses. This also included the midwives, so one midwife could be sent by the late husband's family and another one by the woman's family. But not only the mother seemed to have been met with certain distrust but the midwives too. In the account of 1490, the notary did not fail to point out that Isabel insisted on letting the midwives take an oath on the gospels and an image of Jesus that they would not commit any fraud during the birth. So she secures her position by enhancing the credibility of the midwife. In this case, midwives were not seen as witnesses but they were actually considered possible perpetrators by the notary. Great was the fear that they could smuggle in an illegitimate child. It shows two very different aspects of midwives: the helper and the supervisor. On the one hand, they were trusted companions of pregnant women which could discredit them as accomplices in cases of illegitimate children. On the other hand, this collided with an increased function as witnesses in law cases regarding motherhood. Mikel Berraondo Piudo presented some examples in his article about infanticide in Navarre in the 16th and 17th century, in which the midwife was called upon to use her expertise on birth in order to determine if a widow had given birth to a child or not<sup>28</sup>. In her function as expert she accompanied the mayor and the notary to the house of the widow where she was left alone in a room with her. In the face of the examination and knowing the outcome, the widow confessed to the midwife that she had given birth to an illegitimate child. The knowledge they shared about what was inscribed in the body but hidden by garments to the rest, implied a relationship of trust and the image of a helper. However, as an official witness she had to inform the mayor and notary about the birth.

## Control Mechanisms: The Law

The need for a clear legislative regulation regarding posthumous children is already shown in the *Partidas*, drawn up under the rule of Alphonse



X in the second half of the 13th century. The necessity is argued by emphasizing the potential fraud by the widow:

«Mujeres hay algunas que después que sus maridos son muertos dicen que son preñadas de ellos, y porque en las grandes herencias que quedan después de la muerte de los hombres ricos, podría acaecer que pudieran las mujeres hacer engaño en los partos, mostrando hijos ajenos diciendo que eran suyos»<sup>29</sup>.

The *Partidas* clearly regulated the duration of the pregnancy of the widow, creating an image of the pregnant widow as potentially deceitful, somebody who was met often with distrust. During her pregnancy, she had to inform the closest relatives of her late husband about her condition and visit them twice a month in the period between the death of her husband and until somebody was sent to examine her. If the relatives were doubtful, they could send five women to verify her condition but they were only allowed to touch her body with her consent. However, it can hardly be called freedom to act over her own body as the consent was better be given if she did not want to raise suspicion. The widow's body was under scrutiny and turned into a subject of judgement by more than just the family of the late husband. Thirty days before the supposed birth, the relatives had to be informed and could send again women to examine her progressing pregnancy. The control over the period of pregnancy by official legal structures highlights the public character of the birth. Though of course the division of «public» and «private» has to be used with caution in the medieval and early modern period and these categories have to be socially, spatially and temporally contextualized. Who was seen as an intruder in the birthing chamber? The tenth known, the first unknown or the most skeptical person in the room? Is it a public birth as soon as the widow cannot decide anymore who will be attending it but an official appointment takes place? According to the *Partidas*, the relatives could appoint three men and three women who again had two male and two female companions to guard the widow. The control over the life and the radius of action was furthermore determined by accompanying the widow if she went to visit other houses which had to be searched first, just in case a pregnant woman or a new born were hidden there.

It is interesting to see that law texts posterior to the *Partidas*, such as the *Leyes de Toro* and the *Nueva Recopilación* of 1567 (later editions in: 1569, 1581, 1592, 1598, 1625 and 1640), referred to the birth given by a widow only in a more general context, namely, if the duration of the pregnancy correlated with factors such as presence/absence of the husband and the period of marriage<sup>30</sup>.

So the final question was: how long could a natural pregnancy take? The pregnancy or potential pregnancy of a widow required a set of rules and regulations regarding time limits with the utmost goal of avoiding doubts about the paternity. Consequently, Roman law obliged the widow to a certain period of mourning in which she could not engage in another marriage. This period ranged from nine months to a year<sup>31</sup>. The regulation of the mourning year, the *tempus lugendi*, was suspended during the 14th century for reasons of depopulation in Castile and the

growing control of the church over marriage rites<sup>32</sup>. The possibility of remarriage within a year after the husband's death was still included in the editions of the *Nueva Recopilación*, though morality demanded that the widow mourned her late husband<sup>33</sup>. The *Partidas* derived their estimation of the time period in which a birth could still be considered legitimate from the Roman law and the Hippocratic medical treatises. Ten months were set as maximum limit and seven months as minimum duration of a pregnancy<sup>34</sup>. In the medical treatises of the 16th century by Damián Carbón and Francisco Núñez, we find the estimated time of pregnancy in which a natural birth could take place ranging from seven to eleven months<sup>35</sup>.

## Control Mechanisms: The Church

The distrust related to births was not limited to pregnant widows. Thus, the confessional developed its own guidelines for dealing with pretended or adulterous mothers. The church's opinion on the matter, spread through the confessional, took its written form as manuals, such as the *Compendio del manual de confesores y penitentes*, composed in the 16th century. Its author was Martín de Azpilcueta, a Spanish canonist and theologian belonging to the so-called School of Salamanca. The chapter about adultery unites two scenarios of illegitimate children that could actually be seen as very different: first, the woman that pretends to be pregnant and takes a child from someone else; and second, the woman who has a child from an adulterous relationship<sup>36</sup>. Martín de Azpilcueta defines a hierarchical order in which reputation is put above material goods while health and life are put above reputation. If the woman was afraid for her own life, then she could be forgiven by the confessor without being forced to tell her secret to her husband, even if it would mean wronging the alleged father and the feigned heir. If she had already lost her reputation and the supposed father and son would believe her confession, then she had to tell them as long as she did not have to fear that harm would come to her by them. Another important factor beside health and reputation was the inheritance. If the woman thought that by confessing she could not prevent harm to the father and heirs, she had to convince the illegitimate son to enter a religious order and leave the inheritance to the other brothers. Should the son refuse to renounce the inheritance, the woman had to make up for it herself by spending less on clothes and food than she otherwise rightly could. So, in times when there were no paternity tests, it was entrusted to the power of the confessor to bring the woman to confess and state the legitimacy of a child.

## The Importance of the Birthing House

The *Partidas* made an attempt to determine meticulously the conditions of the widow's pregnancy and the birth of a posthumous child. The location of the birthing chamber was subsequently an important factor



as it could reflect social relations between mother and house owner and the esteem enjoyed by its inhabitants. In the case of the *Partidas*, a judge could determine a house of a «buena dueña y honesta» where the widow had to reside until the birth. So as a first characteristic can be identified the honor and public reputation of the house owner. In the case of Isabel de la Cavallería, it is precisely explained in which house she gave birth and which other houses bordered with it. The house chosen for her birth shows the different family interests coming together in this certain scenario. The birthing chamber was located in the house of her brother-in-law, Martín Gil de Palomar y de Gurrea, the husband of her sister, Juana de la Cavallería. Not only was the birth taking place in his house but additionally the brother-in-law took an active role in the process.

Another factor was light. According to the *Partidas*, three lights had to be lit in the house until the widow gave birth, so no secret actions or fraud could be committed. The instructions for the birth of the posthumous child of the Marquis of Pescara also contained the requirement to ignite three lights «en los cuartos donde asiste y a la salida y entrada»<sup>37</sup>. When the day of the birth had arrived, the notary wrote down that one light was lit in the main entrance, one at the staircase and another one in the antechamber to the birthing chamber of the Marquise<sup>38</sup>.

The directions of where the lights had to be put highlight another factor: the doors. The Marquise of Pescara decided to give birth in her mother's house. Four days before the birth, the notary visited the house where the Marquise of Pescara apparently resided already during her pregnancy<sup>39</sup>. In this inspection, as well as on the day of the birth, he noted that the birthing chamber could only be entered and left through the main entrance door. Already in the *Partidas*, a second door for leaving the birthing house was seen as too high a risk and had to be locked<sup>40</sup>. Same as the precaution with the light, it was feared that through a secret door a baby could be smuggled in.

## Attending a Birth

Beside the characteristics of the house, risk was not only related to how it was equipped but with whom it was filled: the inhabitants and witnesses. Who was close and familiar to the parturient was allowed in the birthing chamber. This at least was the ideal supported by Carbón. Then again, if there was deep devotion felt by the parturient for somebody in the room, she could feel ashamed and not do the effort required during the birth<sup>41</sup>. This is to say that who could be in the room was an important decision with several effects.

The sixth *partida* allowed the following amount of people in the house: «cuando ya fuere cuitada por razón del parto, no debe estar en aquella casa donde ella está hombre ninguno, mas pueden allí estar hasta diez mujeres buenas que sean libres, y hasta seis sirvientas que no sea ninguna de ellas preñada, y otras dos mujeres sabedoras que sean usadas de ayudar a las mujeres cuando paren»<sup>42</sup>. So it is interesting to see the restricted

access for men in comparison to the notarial protocol of 1490, in which we have various men not only in the house but even in the birthing chamber. In our account of 1673, the notary wrote down which people could and should attend the birth given by the Marquise of Pescara. Three midwives, that had already examined the Marquise during her pregnancy, were accepted in the room as well as up to six maids. In the case of Isabel Ana de Mendoza, we have a group of witnesses that is inside the birthing chamber and one that is outside. While the royal notary, José de Ablitas Cardona, Pedro de Gamarra, the Duke of Nájera and the Marquis of Viana are waiting in an antechamber during the birth, the Marquise of Camarasa, Doctor Palomino, the Countess of Oropesa, the Countess of Escalante and the Marquise of Viana attended to Isabel inside the birthing chamber<sup>43</sup>. As it was already defined in the *Partidas*, no pregnant women or babies were allowed in the room during the birth<sup>44</sup>. What sticks out in the comparison of the witnesses attending the birth by the Marquise of Pescara and Isabel de la Cavallería is the social standing. While in the case of the notarial account of 1490 the witnesses are a shoemaker and a carpenter, the witnesses in the account of 1673 are marquises, countesses and a duke. In the latter case, we additionally have testimonies of attendees such as the doctor and some servants. Thus, possible witnesses ranged from midwives to notaries, non-nobles to nobles.

What does the attendance of witnesses at births subsequently tell us about the conceptions of morality and intimacy? Actions and thinking is and was framed by ideas of morality that can be interpreted as organizing and regulating elements of society. In our context of the body it is furthermore closely related to the question of female intimacy to which is inherent the already mentioned opposition of private (close relatives and assistants in the birth) and public (presence of witnesses). The topic of the public birth of a widow additionally opens up the question of what the parturient needed and what was needed from the parturient. The intrusion of the observing spectator was exactly the opposite of the calm environment recommended in manuals for birth. What the spectator represents is distrust, doubt and suspicion. The image of witnesses in the birthing chamber was a familiar one in a royal context. Giving birth to the heir was of public interest. But as we can see, it was not limited to that space. Issues of inheritances and honor were deemed delicate matters by the nobility, enough to resort to the means of a notary and witnesses.

When revising the existing literature about childbirth, the common ground is that the birthing chamber was a predominantly female space where the midwives and female family members were supporting the expecting mother. Nonetheless, detailed revisions of different sources such as this letter of birth reveal another image of the birthing chamber. Isabel de la Cavallería gave birth «estando echada de espaldas en los brazos y piernas del dicho señor Martín»<sup>45</sup>. This support provided by a man also appears in the *Diez privilegios* by Fontecha in which he states that «que por mejor tienen un gentil hombre, aun para detrás, y échanle los brazos al cuello, y de aquella suerte se ayudan»<sup>46</sup>. Nonetheless, borders within the birthing chamber should not be forgotten, resulting

in a limitation of the male view such as the brother-in-law positioned behind the parturient. We could likewise suspect that the male presence indicates the need for a witness. In the case of the notary attending the birth given by Isabel de la Cavallería, he checked under the clothes of the parturient and the midwives if they hid a baby underneath to pretend it to be the newborn («levantadas las faldas de sus ropas hasta la camisa por ver y reconocer si con alguna cautela o engaño las madrinas consigo traerían alguna criatura»<sup>47</sup>). His interaction with the female body seems to put truth (as opposed to fraud) over propriety and pudor. Different perceptions of borders surrounding the birthing chamber can be seen in different accounts of births where men can be in front of the house of the parturient, in front of the birthing chamber or, lastly, inside the birthing chamber.

### The Body under Scrutiny: Declaring Pregnancy and Birth

In the group of attendees of such described births of posthumous children we find family relatives, midwives and witnesses, all being differently involved in the birth process. They fulfilled distinct roles and were subjected to different borders —both material and immaterial— limiting their gaze. Borders could be walls like the one separating the birthing chamber of the Marquise of Pescara and the antechamber in which the Marquis of Viana, the Duke of Nájera, the oidor Pedro de Gamarra and the notary waited. In this distinction between inside and outside of the birthing chamber, the level of audible signs gained importance as they were listening for the moaning and crying of the mother and newborn<sup>48</sup>. However, once the child was born, also the appointed male witnesses were called to join the female witnesses in the birthing chamber to confirm the visible signs of a newborn: «acabado de nacer, con las señales de tal, y que era varón y estaba sano y bueno, y le oyeron quejarse al dicho niño con voz de muy sano y vieron que estaban fajando a la dicha señora marquesa de Pescara, y según decían no había echado las pares»<sup>49</sup>. Doctor Palomino additionally highlights that the umbilical cord was not cut yet when Pedro de Gamarra and the notary recognized the newborn. The witnesses of Isabel de la Cavallería were all already inside the birthing chamber but were nonetheless confronted with limitations set by moral conceptions of where they could turn their eyes to. Here, the optic level during the birth is added as the notary pays special attention to fluids. The notary described in detail the blood and amniotic fluid dropping into a basin («yo, notario, y testimonios sentíamos y veíamos caer la sangre y agua que a la dicha Isabel de la Cavallería con los dolores del parto y exprimiéndose del cuerpo le salían»<sup>50</sup>) and the umbilical cord connecting the newborn and the placenta («vimos colgaba la vit del lecho que dentro del cuerpo de la dicha Isabel de la Cavallería estaba fija en el melsco de la dicha criatura nacida»<sup>51</sup>).

What comes into play additionally is the performativity of birth. As described above, the notary knows exactly what he had to see and write

down in order to confirm that it was the birth of a legitimate heir. Thus, the follow-up question would be how a notary would get this information. From a midwife, a medical treatise or informed by other such documents which were used as kind of manuals? The birthing chamber turned therefore in two ways into a social place of rituals<sup>52</sup>. First, it was the birth itself constituted by various rituals and secondly, the additional evaluation and provision of especially performed actions to provide the act with legitimacy.

Already in the months before the birth, the optic and haptic signs of pregnancy were examined and declared by the authority of the midwife and the doctor. Doctor Palomino testified that he visited the Marquise of Pescara various times during her pregnancy and could confirm that the physical signs were in accordance with her claims<sup>53</sup>. Also the testimony of Ana de Isla<sup>54</sup>, one of the three «matronas examinadas y aprobadas»<sup>55</sup>, shows that during the pregnancy the midwives examined her more than once because she declares that from the moment of being called in December to visit the Marquise of Pescara after her trip until giving the testimony, she saw typical signs of pregnancy. Ana de Isla explains what methods she used in her examinations focusing on the two areas of the womb and the breasts. At her first visit, she measured the womb which had to proportionally correspond to the four missing menstruations that the Marquise had claimed. At the time of giving the testimony in March, another midwife confirmed that the Marquise of Pescara was already in the «meses mayores», so close to the birth<sup>56</sup>. Further physical evidence seen as «señales naturales del embarazo» were changes regarding the breasts as a result of the formation of mammary glands. And lastly, the irregular movements that could be felt when touching the womb, first haptic signs of what was still hidden to the sight<sup>57</sup>.

## Feeling, Seeing and Declaring: Inheritance and Posthumous Children

The play *El Príncipe despeñado* by Lope de Vega evolves around two different views on the posthumous child of the king that are being confronted: the first, represented by the mother Elvira, is the prenatal concept of the child already as representative and heir of the father. Poetically put, it speaks through the mother, politically put, it reigns through the mother as long as she carries him in her womb. The second, represented by her lady's husband Martin, asks in the play the decisive question «Por fe de aquello que no se ve, ¿un reino tengo que dar?» and calls the child that Elvira carries a «rey de imaginación»<sup>58</sup>. In this literary case, the rights of the unborn heir are questioned but not the legitimacy of the birth itself which is integrated into the righteous cosmic order.

The relation between posthumous birth and legitimacy built the main focus of law texts such as the *Partidas* and *Fueros*. The pregnant widow was a legal liability that had to be regulated. The newborn was defined through the death of the father, thus the application of the term *póstumo*

already implicated legitimacy. There seems to be no clear distinction in the terms applied before and after the birth. Nonetheless, before the birth, the reference tends to focus on the pregnant mother and her womb but it also sometimes refers to the fetus as *criatura* or in anticipation of its birth though still unborn as *póstumo*, while after the birth the terms applied are defined through its own legal status, namely *hijo* and *póstumo*.

The *Fueros* regulated, amongst other social issues, the legitimate inheritance. The posthumous child was defined out of the conditions of its birth but received its rights as though it was conceived during the lifetime of the father. The *Fuero-Juzgo* tied the rights to the birth. This means that it had to overcome its state of an embryo and could not be a miscarriage. The rights of inheritance were bound to a minimum time for the child to be alive<sup>59</sup>. In the *Fuero Real* the mother could claim the rights of the property of the late husband during her pregnancy and the child would receive them once born and baptized: «Si el que muriere dejare su mujer preñada, y no hubiere otros hijos, los parientes más propincuos del muerto en uno con la mujer escriban los bienes del muerto ante el alcalde, y téngalos la mujer: y si después nasciere hijo o hija, y fuere bautizado, haya todos los bienes del padre»<sup>60</sup>. The potential existence of a *criatura* in the woman's womb stalled the inheritance process until the legitimate birth confirmed it<sup>61</sup>. The status of the posthumous child can be also seen in 1533 when Charles I issued that the posthumous children were entitled to get a tutor and guardian assigned before their birth and afterwards to receive their goods as children born during the father's lifetime, a customary practice turned into law<sup>62</sup>.

## The Will of the Late Husband and Father

Examples of testaments show the intention of the fathers to authenticate by themselves the legitimacy of their posthumous children in order to protect their soon-to-be widows and children. Legitimacy arose out of characteristics linked with the father and mother. The limits of the duration of the pregnancy were used to determine possible paternity. Supposed maternity was connected to determination of pregnancy signs and a birth attended by witnesses such as the midwives. If the posthumous child was unmentioned in the will drawn up by the father, said will was consequently invalidated, unless the child was aborted or not born for other reasons<sup>63</sup>. This regulation found its inclusion in the *Fuero-Juzgo*, the *Partidas* and posterior legal treatises<sup>64</sup>. In order to avoid the annulment of the testament, potential posthumous children were included, sometimes when the wife was pregnant, sometimes just as a prevention without an actual pregnancy at the time of writing the last will. Testaments regulated the inheritance of the posthumous child, including scenarios in which the wife was thought to be pregnant, in which it only was a yet unnoticed potential pregnancy in the future and the scenario of a male or female newborn<sup>65</sup>. Consequently, the following formula for designating a posthumous heir was introduced in the form of Torneo in



the 16th century: «Y si la mujer quedare preñada dirá: Y porque la dicha fulana mi mujer queda preñada, al póstumo o póstuma que naciere, para que los partan con la bendición de Dios y la mía»<sup>66</sup>.

Depending on the perspective, the fetus –half orphan before even born– was connected to different expectations and consequences. A posthumous firstborn could determine the financial and social situation of the mother. Subsequently, can we call it an empowerment through birth? The Marquis of Pescara stated in his will that if they had common children, the «señora mayora poderosa y usufructuaria de fruto teniendo dichos hijos y no de otra manera no sea tenida ni obligada dicha mi señora y mujer de dar cuenta ni razon ni a prestar caución alguna»<sup>67</sup>. If they had no children or they died, the Marquise, now just called «señora y mujer», would only have lifetime benefits of the islands of Procida.

Will there be a firstborn to inherit from the Marquis of Pescara? A question unanswered at the time of his death. In his will, he referred to the «hijo o hija póstumo [...] mi mujer lleva en su vientre» that «si a luz viva pervendrá y heredero o heredera mío será»<sup>68</sup>. If not, his father Diego de Ávalos was bestowed with hereditary rights. Here, the birth by itself is not enough but Isabel's rights are bound to the surviving of her child. Widowhood had the potential to empower women by giving them more options for autonomous action, seen in notarial acts and judicial processes where they claimed their rights. But it could also be restricted by the condition of common progeny. So a legitimate birth could empower too. In absence of the father, the mother took on responsibility for the continuation of a noble line by raising the heir and administering his properties. It provided her with a different (negotiating) position and rank within her late husband's family.

## Conclusion

«Le vieron y reconocieron»<sup>69</sup>. This phrase was used by the notary of the birth account for the son of Isabel Ana de Mendoza. No father of the child was present to receive and acknowledge the newborn as legitimate descendant. The children of this article remained unseen, so the acknowledgment by the father could not be fulfilled. Other male authorities had to take this act upon themselves. This could be achieved by the family of the late husband, appointed witnesses or through using official institutions such as the notary. The fragile position of the widow can be seen with her special rights (taken into the group of people who were considered as in need of protection<sup>70</sup>) and during her pregnancy with the feared effects of the mourning on the child she carried. The birth represented various options for the widow. It could provoke a shift in the inheritance regulations if it was a boy and only sisters were involved. If it was the first child of the mother, it affected the mother's position as administrator of the property of her late husband. And in royal circumstances, it could represent the longed-for heir or another opportunity for marriage politics. The distrust which was placed



in the pregnant widow soon led to detailed regulations that structured her pregnancy and birth. While the unborn child was attributed with special protection, the latter transformed into rights once it was born. It represented an intermediate state, a coming-into-being, something that still remained hidden, like *reyes de imaginación*.

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## Notes

- 1 This publication is part of the Research Project El Calderón cómico, funded by the FWF Austrian Science Fund, project number P 29115.
- 2 Carbón, *Libro del arte de las comadres*, fol. 37r.
- 3 A.H.P.Z., protocolos de Domingo Cuerla, fol. 2v.
- 4 García Herrero, 2005, p. 38.
- 5 García Herrero, 1989.
- 6 Rojo Vega, 1997.
- 7 Código de Huesca, Lib. V, Del Derecho de las Dotes.
- 8 Blasco Martínez, 2015, p. 116.
- 9 Excluded from the permission are the wills that the wife could draft independently from a permission by her husband and acts regarding her dowry. See Marchant Rivera and Barco Cebrián, 2017.
- 10 A.H.P.Z., protocolos de Domingo Cuerla, fol. 4v.
- 11 García Herrero, 2005, p. 33.
- 12 García Herrero, 1993; on *viudedad foral* in Navarre see Nausia Pimoulier, 2013.
- 13 Salas Auséns, 2015, p. 229.
- 14 García Herrero, 1993, p. 157.
- 15 Salas Auséns, 2015, p. 248.
- 16 Gómez de Valenzuela, 2006, p. 32.; Salas Auséns, 2015, p. 250.
- 17 Gómez de Valenzuela, 2006, p. 33.
- 18 García Herrero, 1993, p. 163.
- 19 Part. VI, Tít. VI, Ley XVII.
- 20 García Herrero, 1990, pp. 91-92.
- 21 Hernández Bermejo, 1987-1988, pp. 185-187.
- 22 Fernández Merino, 2012, p. 115; see also Nausia Pimoulier, 2006, p. 246.
- 23 Vives, *Instrucción de la mujer cristiana*, fol. CXXVIIIv.
- 24 Vives, *Instrucción de la mujer cristiana*, fol. CXXXIIIr.
- 25 A.H.P.V., protocolos, legajo no 2.260, fol. 750r.
- 26 A.H.P.V., protocolos, legajo no 2.260, fol. 758v.
- 27 Justinian, *Digest*, 25.4.1.10.
- 28 Berraondo Piudo, 2013, pp. 72-73.
- 29 Part. VI, Tít. VI, Ley XVII.
- 30 Leyes de Toro, Ley 13; N.R., Lib. X, Tít. V, Ley II.
- 31 González Gutiérrez, 2017, p. 110.

- 32 Birriel Salcedo, 2008, p. 16.
- 33 N.R., Lib. V, Tít. I, Ley III; Birriel Salcedo, 2008, p. 17.
- 34 Part. IV, Tít. XXIII, Ley IV.
- 35 Carbón, *Libro del arte de las comadres*, fol. 34v; Núñez, *Libro intitulado del parto humano*, fol. 4v, 5r.
- 36 Azpilcueta, *Compendio del manual de confesores y penitentes*, fol. 63r-v.
- 37 A.H.P.V., protocolos, legajo núm. 2.260, fol. 767r.
- 38 A.H.P.V., protocolos, legajo núm. 2.260, fol. 770r.
- 39 A.H.P.V., protocolos, legajo núm. 2.260, fol. 767r-v.
- 40 Part. VI, Tít. VI, Ley XVII.
- 41 Carbón, *Libro del arte de las comadres*, fol. 37r.
- 42 Part. VI, Tít. VI, Ley XVII.
- 43 A.H.P.V., protocolos, legajo núm. 2.260, fol. 771r; The Countess of Escalante is not mentioned amongst the appointed witnesses but in her declaration she states that she has attended the birth.
- 44 A.H.P.V., protocolos, legajo núm. 2.260, fol. 767r.
- 45 A.H.P.Z., protocolos de Domingo Cuerla, fol. 3v.
- 46 Fontecha, *Diez privilegios para mujeres preñadas*, Privilegio octavo.
- 47 A.H.P.Z., protocolos de Domingo Cuerla, fol. 3v.
- 48 Cohen, 2010, pp. 132-133.
- 49 A.H.P.V., protocolos, legajo núm. 2.260, fol. 770v.
- 50 A.H.P.Z., protocolos de Domingo Cuerla, fol. 4r.
- 51 A.H.P.Z., protocolos de Domingo Cuerla, fol. 4r.
- 52 Usunáriz Garayoa, 1999, p. 335; Usunáriz Garayoa, 2016, p. 324.
- 53 A.H.P.V., protocolos, legajo núm. 2.260, fol. 779r.
- 54 A.H.P.V., protocolos, legajo núm. 2.260, fol. 754r-v.
- 55 A.H.P.V., protocolos, legajo núm. 2.260, fol. 755r.
- 56 A.H.P.V., protocolos, legajo núm. 2.260, fol. 755v.
- 57 A.H.P.V., protocolos, legajo núm. 2.260, fol. 754v.
- 58 Vega Carpio, *El príncipe despeñado*, p. 97; Aichinger, 2015; Barbara Duden already referred to the haptic-somatic perceptions by the woman of her own body that created a reality that was hidden from others until evidenced through the birth, see Duden, 2002, p. 17.
- 59 Fuero-Juzgo, Lib. IV, Tít. II, Leyes XVIII y XIX.
- 60 Fuero Real, Lib. III, Tít. VI, Ley III; Gacto Fernández, 1975, p. 158.
- 61 Part. VI, Tít. VI, Ley XVI.
- 62 García Herrero, 1990, p. 373.

63 González Gutiérrez, 2017, p. 108.

64 Part. VI, Tít. I, Ley XX.

65 Gómez de Valenzuela, 2002, pp. 285-287.

66 Mártir Alario, 2012, p. 280.

67 A.H.P.V., protocolos, legajo núm. 2.260, fol. 760r.

68 A.H.P.V., protocolos, legajo núm. 2.260, fol. 762r.

69 A.H.P.V., protocolos, legajo núm. 2.260, fol. 778r.

70 Nausia Pimoulier, 2006, p. 233.