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CERTAIN ASPECTS OF JUSTINIAN´S MARITAL FOURTH AND ITS RECEPTION IN CATALAN LAW*

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I. INTRODUCTION

Known to doctrine as <<marital fourth>> and after the 1984 Civil Law Compilation of Catalonia reform (hereinafter CDCC)[1], <<cuarta vidual o viudal>>[2] is a peculiar institution of

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With this paper I want to pay my most sincere and deserved tribute to my dear teacher Dr. Ricardo PANERO, with whom I was fortunate enough to share almost 30 years of my life, first as a student of Roman law, and then for many years as a disciple in the academic field. My relationship with Dr. PANERO from those early beginnings was always beyond strictly academic, because in him I had, I have and I will have not only a great friend, but also a father who helped me grow professionally and personally.

[1] Law 13/1984, of 20 of March.

[2] In this paper I opted for the term << cuarta vidual>>, because it is proper to the Catalan Law and the Spanish translations of Catalan laws with exception of the Preamble of Law 40/1991 of 30 of December, Code of Successions by cause of death in the Catalonia civil law and of Law 10/2008 of 10 July, of the fourth book of the Civil Code of Catalonia concerning successions. See amongst others, CASANOVA I MUSSONS, A., *arts. 147, 148, 149, 150, 151, 152, 153 and 154*, in *Comentaris a les reformes del Dret Civil de Catalunya*, vol. I, Barcelona, Ed. Bosch, 1987, pp. 627 and 629-630; DEL POZO CARRASCOSA, P., VAQUER ALOY, A., BOSCH

the Catalan law of succession. Unlikely other legal systems it takes into account the survivor's spouse assets and economical needs[3]. Nowadays regulated in Book IV of the Civil Code of Catalonia[4] in Title V Chapter II arts. 452-1 to 452-6 under <<Other successorial attributions determined by Law>>.

This concept originated in the JUSTINIAN days after the publication of the second *Codex* and from then on it will be subject to modifications, in particular, in the Catalan legal tradition. The nowadays known as <<cuarta vidual>> or widow´s allowance, as stated by the Justinian novellas, is an institution linked in its origins both to family law and in particular to the marital fourth in criminal law, thus are an important basis of the Law of Successions; and as BONINI[5]

CAPDEVILA, E., *Derecho Civil de Cataluña. Derecho de sucesiones*, 2ª ed., Madrid, Marcial Pons, 2013, p. 422.

[3] Cfr. GARRIDO MELERO, M., *Derecho de sucesiones. Un estudio de los problemas sucesorios del Código Civil y del Código de Sucesiones por causa de muerte en Cataluña,*vol. 1, Madrid-Barcelona-Buenos Aires, Marcial Pons, 2009, p. 118.

[4] Law 10/2008, of 10 of July, related to succession.

[5] *La quarta della vedova povera fra diritto di familglia e dirito delle successioni (Nov. Iustiniani 53, 6 and 117, 5)*, *Studi Sassaresi*, vol. III, Milano, Giuffrè Editore, 1973,

pp. 793-816, p. 794. Previously and in along these lines BIONDI, B., *Quarta uxoria. Diritto romano*, *NNDI*, XIV (1967) pp. 632 ff, p. 632.

mentioned, the institution´s history and means will be better understood if bearing in mind the evolution and integration in both fields[6]. In summary, this is an institution designed to solve the supervening poverty of the widowed spouse in the case of nuptials *sine dote* and nuptial donation, and at the end of Justinian's evolution, to resolve the absence of the widow's dowry instruments in the marriage.

The afore mentioned justifies in my opinion, that the interest of this paper starts with a reference to the institution, an immediate historical precedent of Justinian's marital fourth in succession law to then move on to some aspects of its legal sources[7] regulation and concluding with a summary of its reception in Catalan law. As already mentioned this institution has no comparison in current Spanish law.

[6] In similar terms PÉREZ TORRENTE, J. A., *Cuarta marital. Comentario de la Sentencia de 14 de octubre de 1971*, *RJC*, 72-2 (1973) pp. 353-372, p. 6; BONINI, R., *La cuarta de la vedova povera*, cit., 794; and LATORRE SEGURA, A., *Discurso de recepción. El Derecho a la cuarta marital*, Academia de Jurisprudencia y Legislación de Barcelona, Barcelona, C. Casacoberta, impresor, 1973, pp. 5-43, p. 6.

[7] The Latin version of the Greek texts of the novellas transcribed in these pages are the ones of MOMMSEN, T., *Corpus Iuris Civilis*: *Novellae. Recognovit Rudolfus Schoell. Opus Schoellii morte interceptum. Absolvit Guilelmus Kroll*, vol. III, 1912.

II. CERTAIN OBSERVATIONS OF THE IMMEDIATE PRECEDENT OF THE MARITAL FOURTH IN SUCCESSION LAW[8]

The first example of the so-called marital fourth or *uxoria* is the right that JUSTINIAN, in the case of an *indotata matrimonia,* attributes ex novo, in C. 5, 17, 11, 1, to the spouse who repudiates the other *ex iusta causa* or who is a victim of a repudiation *sine causa.*

In the year 533 AD the Byzantine emperor enacted a constitution on repudiation and its rules *(De repudis et iudicio de moribus sublato)* C. 5, 17, 11. Before addressing this matter it is clearly confirmed in JUSTINIAN´s *principium*[9], that marriage is constituted and therefore is valid by the mere *affectus* of the spouses regardless of the dowry's instruments and dowry[10].

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[8] For a more in detail study on this matter, vid. DOMÍNGUEZ, P., *La Novela 53, 6 y sus precedentes inmediatos*, in *Revista General de Derecho Romano (IUSTEL)*, 19 (2012) pp. 1-32, pp. 2-16.

[9] *Iubemus, ut, quicumque mulierem cum voluntate parentium aut, si parentes non habuerit, sua voluntate maritali adfectu in matrimonium acceperit, etiamsi dotalia instrumenta non intercesserint nec dos data fuerit, tamquam si cum instrumentis datalibus tale matrimonium processisset, firmum coniugium eorum habeatur: non enim dotibus, sed adfectu matrimonia contrahuntur.*

[10] In this sense, vid. C. 5, 4, 26 pr. (a. 530 AD) and C. 5, 3, 20, 2 (a. 531-533 AD). Regarding these Justinian constitutions see LUCHETTI, G., *Il*

In this sense, it is important to emphasize that the non-requirement of dowry and dowry instruments as a way of objectifying consensus, that is, as an *ad probationem* of the existence and validity of the marriage, although the latter was celebrated *inter impares honestate personas* and proclaimed in C. 5, 17, 11 pr., raised a serious problem regarding repudiation, since the absence of dowry and nuptial donations produced unfavourable effects for the spouse who repudiated the other *ex iusta causa* or who was the victim of an unjustified repudiation. In these cases the pecuniary penalties established for said repudiation could not be applied to the guilty spouse in marriages with dowry[11]. Therefore, in order to alleviate such negative effects and to protect the innocent spouse of repudiation, for the first time the emperor regulates this situation in C. 5, 17, 11, 1, by also sanctioning the spouse guilty

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matrimonio "cum scriptis" e "sine scriptis" nelle fonti giuridiche giustinianee, BIDR, 92-93 (1989-1990) pp. 325-376, pp. 332 ff.

[11] In terms of reputation as noted by FAYER, C., *La familia romana. Aspetti giuridici ed antiquari. Concubinato divorcio adulterio*, part 3ª, Roma, l'Erma di Bretschneider, 2005, p. 160, JUSTINIAN embraces in his code the constitution of THEODOSIUS II and VALENTINIAN III year 449 AD (C. 5, 17, 8) and the one of ANASTASIUS of 497 AD (C. 5, 17, 9), and adding others of his own in the same order of ideas introduced by CONSTANTINE: limit the repudiation to the established causes and penalize divorce outside such cases.

of repudiation in absence of dowry and nuptial donation, which later has been known as marital fourth or penal *uxoria*[12].

A careful examination of the aforementioned passage[13] makes it possible to notice a series of interesting observations which, in my opinion, and summarised are:

1ª) That the marital fourth as an emergency solution to the problem posed by the repudiation in marriages *sine dote*[14] is not

[12] The civil law tradition when referring to Justinian's new institution have hardly paid attention to this text, to the extent that some authors do not even mention it.

[13] C. 5, 17, 11, 1: *Si quis autem eam, quam sine dote uxorem acceperat, a coniugio suo repellere voluerit, non alias ei hoc facere licebit, nisi talis culpa intercesserit, quae a nostris legibus condemnatur. Si vero sine culpa eam reicerit vel ipse talem culpam contra innocentem mulierem commiserit, compellatur ei quartam partem propriae substantiae pro rata portione persolvere, ut, si quidem quadringentarum librarum auri vel amplius vir substantiam habeat, centum libras auri mulieri praestet et nihil amplius, etsi quantamcumque substantiam possideat: sin vero minus quadrigentis libris auri puta substantia eius fuerit, tunc quarta pars computatione facta purae substantiae eius usque ad minimam quantitatem mulieri detur. Eodem modo servando et in mulieribus, quae indotatae constitutae sine culpa mariti constitutionibus cognita eos repudiaverint vel ipsae culpam innocenti marito praebuerint, ut ex utraque parte aequa lance et aequitas et poena servetur. Hoc lucro quartae partis filiis competente et ab his quo modo voluerint disponendo, filiis autem et deinceps personis ex eodem matrimonio intervenientibus eis servando ad similitudinem dotis et propter nupcias donationis per omnia, quae super his statuta sunt.*

born in the Justinian post *Codex* law (Nov. 22, 18) as incorrectly pointed out by NAVARRO AZPEITIA[15] and PÉREZ TORRENTE[16].

2ª) That the requirements that must be met by the wife or husband to be entitled to a fourth of the other's assets are: on one hand, the absence of dowry and dowry instruments in the marriage; and on the other hand the unjustified repudiation or repudiation by one *iusta causa* attributable to one of the spouses, due to the guiltiness of one of them.

3ª) Being marriages *sine dote* and nuptial donation does not mean thus that one or both spouses, did not have their own assets, but that, by not contributing with a dowry or nuptial donation, the spouses were not subject to the sanctions provided for marriages with dowry[17].

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[14] To these effects it cannot be forgotten that in the Justinian Roman Law rules a regime of property separation, a regime corrected by the dowry and the nuptial donation.

[15] *Discurso de recepción. La cuarta marital vidual justinianea*, Academia de Jurisprudencia y Legislación de Barcelona, Barcelona, C. Casacuberta, impresor, 1961, pp. 7-53, p. 12.

[16] *Cuarta marital*, cit., p. 356.

[17] En este sentido, NAVARRO AZPEITIA, F., *op. cit.*, pp. 32-33.

4ª) That the spouse who is guilty of repudiation is obliged to pay the innocent spouse a fourth of his assets, calculating the value of this fourth part of the assets once debts are paid[18].

5ª) The guilty spouse´s wealth is only taken into account to avoid that the penalty and therefore, the corresponding compensation is excessive. To this end the limit of 100 pounds of gold is imposed when the assets amounted to more than 400 pounds of gold, considering this as the maximum amount used to be delivered as dowry.

6ª) That although based on the most probable assumption of the unfairly repudiated woman as beneficiary of the fourth, for equity reasons, the innocent husband has the same right to the fourth part of the assets when the repudiation is caused by the wife.

[18] Although not mentioned in the text, if the woman was to blame for the repudiation, in addition to the pecuniary sanction, and in accordance with the provisions of the previous constitution of TEODOSIUS II and VALENTINIAN III (C. 5, 17, 8, 4) she could not re marry within five years; if the husband was guilty then she was required to wait a year to remarry. This period of time is later reaffirmed in Nov. 22, 18 *(indotata matrimonia)* the reason for this is clearly stated in case of pregnancy, to avoid problems on the attribution of paternity (…*merito et hic annum custodiat propter seminis confusionem*…).

7ª) And according to whether or not there are children of the same marriage, the right that is attributed to the innocent spouse on said fourth varies, therefore in the absence of children or descendants, the ownership is given to the innocent spouse, but if there are children or descendants, as established in the constitution, the ownership is reserved to the children and the spouse gets the usufruct[19].

Chapter 18 of Novel 22 (a. 536 AD) deals again with the *indotata matrimonia* and the punishment inflicted to the spouse guilty of repudiation[20]. The reading of the same expressly confirms that

[19] Cfr. BONINI, *La cuarta de la vedova povera*, cit., p. 13 y FAYER, *La familia romana*, parte 3ª, cit., p. 164, n. 393.

[20] *Sed a nobis aliquid etiam aliud adinventum est, ut etiam indotata matrimonia irrationabilibus factis divisionibus castigationi tradantur competenti. Si quis enim duxerit uxorem, aut etiam mulier ad virum veniat, nuptiali quidem assumpta voluntate atque sententia, non tamen secuta dote aut sponsalicia largitate (ubi quoque praesumptive fieri solutiones contingebat, nullo ex hoc contra temerarium sequente periculo), constitutionem scripsimus dicentem: si quis sub potestate constitutam mulierem voluntate parentum aut etiam suae potestatis forte ducat uxorem neque dote oblata neque instrumentis talibus factis, nuptiae quidem sint nuptiae, licet dotalia non sint conscripta, ut non ob hoc vir (quod in multis novimus factum) expellat domo uxorem sine una prius dictarum rationabilium causarum, quasque Theodosius quasque nos enumeravimus. Si quid autem tale fiat et aut sine causa eam abiciat domo, aut etiam ipse rationabilem causam praestet ut mulier separetur ab eius matrimonio, quartam partem propriae substantiae cogatur exsolvere ei. Et usque ad quadringentas quidem auri libras substantiam habens centum libris damnificabitur, hoc est quarta*

the marital fourth is born in Justinian law in order to correct an unjust[21] social practice and therefore, as a pecuniary sanction for the spouse guilty of repudiation in marriages without a dowry[22], or what is the same, as compensation in favour of the victim of unjust repudiation[23]. Ultimately, as NAVARRO

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substantiae parte, minorem autem ad hoc in quantum quartae facit quantitas. Si vero etiam maiorem praedictae quadringentarum auri librarum quantitatis substantiam habeat, non amplius centum auri damnificetur libris. Ad maximam namque plerumque respicientes dotem legem hanc scripsimus, substantiam illam merito secundum nostras leges aestimantes esse quae pura debitis videatur. Ratio quoque ex ipsis causis pro cautione procedat, et si mulier per culpam propriam separetur a viro indotata existens, aut etiam mittat ei sine aliqua causa rationabili repudium, iisdem in omnibus subiaceat poenis. Et si quidem per culpam eius matrimonium solvatur, quinquennium observandum mulieri est, et secundis non copulabitur nuptiis: sin vero per culpam mariti aut etiam bona gratia distrahatur, merito et hic annum custodiat propter seminis confusionem, ut per omnia nobis lex perfecta sit.

[21] In the marriage celebrated without dowry and nuptial donation, *ubi quoque praesumptive fieri solutiones contingebat,* the spouse guilty of repudiation did not suffer any sanction. Nov. 22, 18 notes that it was a frequent practice *(quod in multis novimus factum)* that the husband who married without dowry and without dowry instruments, will for this reason, throw the wife out of his house.

[22] In reference to the prohibition of the woman to remarry for a certain period of time, vid. *supra*, n. 18.

[23] This new law as C. 5, 17, 11, 1, although based on the probably more frequent case of the wife as beneficiary of the fourth part, being her the aggravated party of the husband's unjust repudiation, due to equity reasons, gives equal status to both spouses and therefore, as the

AZPEITIA[24] points out, what the legislator wanted with the marital fourth was to impose a pecuniary sanction to correct abuses and injustices that could serve both to curb and punish the spouses who misused the institution of marriage, distorting and corrupting it, as to compensate the victims of unjust repudiation.

JUSTINIAN, after acknowledging in Nov. 22, 18 that he already had penalised marriages without a dowry in the case of repudiation without reasonable cause[25], refers to the constitution that he enacted to punish the spouse guilty of repudiation and thus ending the impunity of the spouse who recklessly dissolved the marriage *sine dote*. Such previous constitution is none other than the already mentioned C. 5, 17, 11, 1, whose provisions are repeated, mostly, in Nov. 22, 18[26],

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aforementioned constitution already did, establishes that the innocent husband of the repudiation can benefit from said fourth part. Cfr. BONINI, *La cuarta de la vedova povera*, cit., p. 801, n. 17; and NAVARRO AZPEITIA, *Discurso de recepción*. *La cuarta marital vidual,* cit., p. 21.

[24] *Id.* previous n., p. 12. Cfr. also, PÉREZ TORRENTE, *Cuarta marital,* cit., p. 356.

[25] *Sed a nobis aliquid etiam aliud adinventum est, ut etiam indotata matrimonia irrationabilibus factis divisionibus castigationi tradantur competenti.*

[26] This law confirms what already has been stated in C. 5, 17, 11, 1 regarding the cases that determine the birth of the right to the marital fourth as well as its amount.

although with certain particularity[27], since the new law does not reproduce what is established in C. 5, 17, 11, 1 *in fine,* in other words, that in the presence of children *ex eodem matrimonio* with respect to the marital fourth, the same regime established for the dowry and donation *propter nuptias* should be observed. Now it must be understood that whether or not children of the same marriage concur, the ownership of the fourth is always attributed to the innocent spouse of the repudiation[28].

III. THE MARITAL FOURTH SUCCESSION: NOVELLAS 53, 6 AND 117, 5

[27] Accordingly to BONINI, *La quarta de la vedova povera*, cit., p. 799, n. 13. Although NAVARRO AZPEITIA, *Discurso de recepción. La cuarta marital vidual,* cit., p. 12, the Nov. 22, 18 insists on the path initiated in a previous constitution (C. 5, 17, 11), however, I do not share his view whereas this novel expands its content and reinforces with sanctions the already established prohibition. My view is that the comparison of the sources mentioned contradicts this statement.

[28] Nov. 22, 18 silence must be interpreted along BONINI, *La quarta de la vedova povera*, cit., p. 799, n. 13, as an implicit derogation of the rule. BONINI says that a further confirmation can be found in the context of a study on the Justinian's <<testi unici>>: it is therefore necessary to accept the frequency of the implicit derogations of parts of constitutions in their insertion in the <<single text>>. It is one of Justinian's legislative technique problems which in the author's view is worth further study.

Novella 53, 6 (537 AD), was published a year after 22, 18, and for the first time regulates the so called marital fourth or *uxoria* in succession law and nowadays <<cuarta vidual>> or widow's allowance.

After appealing to the *clementia* of this law -*Quoniam vero ad clementiam omnis a nobis lex aptata est* -[29] , the emperor contemplates in his *principium* the situation of the married woman *sine dote*[30] after the death of the husband, noting that,

[29] In respect to the *clementia* or *humanitas,* common in the Justinian´s constitutions, vid. in general, BIONDI, *Humanitas nella leggi degli imperatori romano-cristiano, Scritti giuridici*, vol. I. *Diritto Romano. Problemi generali*, Milano, Giuffrè Editore, 1965, pp. 593-612, pp. 602 ff (= *Miscellanea G. Galbiati*, vol. 2, Milano, 1951, pp. 81-94, pp. 86 ff), and also *Il Diritto romano cristiano*, vol. III, Milano, Giuffrè Editore, 1954, pp. 159 ff.

[30] This expression, says BONINI, *La quarta de la vedova povera*, cit., p. 796, n. 7, is equivalent to <<without the writing of dowry instruments>> and this in turn to marriage *sine scriptis*. On the meaning of the difference between marriage *cum scriptis* and *sine scriptis,* see cited bibliography by said author and also LUCHETTI, *Matrimonio "cum scriptis* cit., pp. 325 ff. For the doctrine it is still possible a marriage with a dowry not followed by a nuptial donation. On this question, vid. MONNIER, H., *"Du Casus non existentium liberorum" dans les novelles de Justinien*, en *Mèlanges Gèrardin,* Paris, 1907, pp. 448 and ff; ANNE, L., *Les rites des fiancailles et la donation pour cause de mariage sous le Bas-Empire,* Louvain, Desclée de Brower, 1941, pp. 344 ff; GARCÍA GARRIDO, M., *Ius uxorium. El régimen de la mujer casada en Derecho romano*, Roma-Madrid, Ed. Cuadernos del Instituto Jurídico Español, 1958, p. 104 and pp. 140 ff.

until that moment, while the children were called *ex lege* to the father's inheritance, the widow, however, despite having remained as legitimate spouse, could not have anything, precisely, because no dowry or donation *ante nuptias*, was made and therefore lives *in novissima inopia*[31]. To end this situation and protect the widow with no dowry[32], the new provision establishes that such a widow be called with her children to the succession of the deceased[33]. To this end, JUSTINIAN recalls, just as he enacted a constitution referred to Nov. 22, 18, whereby if the husband repudiated the wife *sine dote*, he should give her a fourth_of his assets[34], he also[35], adds to this rule that the widow with no dowry obtains a fourth of the estate of her deceased husband regardless the number of children[36]. Hereunder, Nov. 53, 6 pr. provides that if the husband leaves

[31] *Quoniam vero ad clementiam omnis a nobis lex aptata est, videmus autem quosdam cohaerentes mulieribus indotatis, deine morientes, et filios quidem ex lege vocatos ad paternam hereditatem, mulieres autem, licet decies milies in statu legitimae coniugis manserint, attamen eo quod non sit facta neque dos neque antenuptialis donatio nihil habere valentes, sed novissima viventes inopia…*

[32] *propterea sancimus providentiam fieri etiam harum…*

[33] *et in successione morientis et huiusmodi uxorem cum filiis vocari.*

[34] *Et sicut scripsimus legem volentem, si sine dote existentem uxorem vir dimiserit, quartam partem eius substantiae accipere eam…*

[35] *sic etiam hic…*

[36] *quoniam contingit forte paucos aut plures esse filios, quartam partem substantiae habere mulierem, sive plures sive minus filii fueriut.*

the wife a legacy lesser than a fourth of his assets, it must be completed[37], and the reason is, just as it aids the wives with no dowry who are affected by the repudiation of their husbands, these widows should also enjoy this protection provided they have stayed with their husbands[38]. In this case, the emperor affirms, that all the provisions of his previous law (Nov. 22, 18), which grants the fourth part to both men and women victims of repudiation[39], must be observed, since this new law, as in the previous, is common to both spouses[40].

JUSTINIAN states in Nov. 53, 6, 1 that if the woman had her own things in the husband's household or elsewhere[41], she shall

[37] *Si tamen legatun aliquod reliquerit ei vir minus <a> quarta parte, compleri hoc,…*

[38] *ut sicut laesas eas iuvamus, si forte dimissae fuerint a viris indotatae consistentes, ita vel si perduraverint semper cum eis, eadem perfruantur providentia.*

[39] *Scilicet omnibus secundum instar illius nostrae constitutionis, quae quartam decernit eis, etiam hic servandis similiter quidem in viris, similiter autem in mulieribus.*

[40] *Communem namque etiam hanc super eis ponimus legem, sicut etiam praecedentem.*

[41] The *Epit. Iuliani* 47 (48), 6, specifies it can be either mobile or immobile things.

have the right to claim them and retain them[42]; since such assets are not liable to the creditors of her deceased[43] husband, unless the woman, *ex hac lege*, was his heiress[44].

Novel 56, 6 concludes in its second paragraph that what is said in respect to the right of the surviving spouse is subject at one end to the poverty by lack of dowry or nuptial donation and on the other end by the wealth of the deceased[45]. Therefore, it is established in the text that if the surviving spouse had other assets, it will not be fair that the wife who does not offer a dowry or husband who does not give a donation *propter nuptias* would disfavour the children in the succession of the deceased spouse[46], and the reason according to a provision of another Justinian law, is that the woman who does not offer dowry can not accept any of her husband's assets by *ante nuptias*

[42] *Si vero quasdam res proprias mulier in domo viri aut alibi repositas habuerit, harum exactionem et retentionem habeat omnibus modis inminutam…*

[43] *subiacere huiusmodi rebus viri creditoribus nullo modo valentibus,…*

[44] *nisi forte secundum quod in illius iura ex hac lege heres extiterit.*

[45] *Haec itaque dicimus, si coniunctorum alter dotem aut antenuptialem donationem non faciens inops aut vir aut mulier inveniatur, et moriens quidem aut vir aut femina locuples sit, ille vero vel illa superstes pauper existat.*

[46] *Nam si aliunde forsan habeat, non offerentem dotem aut non dantem propter nuptias donationem non erit iustum gravare filios per successionem,…*

donation[47]. The emperor states that what is affirmed in this previous rule also applies to this case, unless the husband bequests a legacy to his wife or *aliquam parte institutinonis*[48], to which the emperor does not oppose[49] in order to preserve the concordance of laws and that the poverty of one spouse is remedied with the wealth of the other[50].

On the basis of the foregoing, a detailed analysis of Nov. 53, 6 advises, in my opinion, to distinguish and examine some of the various issues it contemplates[51], being aware and as BONINI[52],

[47] *quoniam lex alia est nostra dicens dotem non offerentem non posse res viri conquirere per antenuptialem donationem.*

[48] *Quod etiam hic volumus obtinere, nisi tamen ipse vir aut legatum ei aut aliquam partem institutionis reliquerit.*

[49] *fieri namque hoc nullo invidemus modo…*

[50] *ut in omnibus nobis concordantiae legum serventur, et inopia coniugis per divitias alterius salvetur.*

[51] Over time, one of the mostly discussed dogmatic problems in doctrine in the light of the later interpretation of this novella and, in particular, of the phrase *et in successione morientis et huiusmodi uxorem cum filiis vocari* is that of the legal nature of the marital fourth in the succession law in Justinian Roman law. The examination of this problem far exceeds the object of this study, since there are many theses that have postulated in this respect. On this question, amongst others, vid. NAVARRO AZPEITIA, *Discurso de recepción. La cuarta marital vidual*, cit., pp. 22 ff.

[52] *La quarta de la vedova povera*, cit., pp. 803-804.

points out, of the silence and uncertainties which the text suffers from.

It is noteworthy that Nov. 22, 18, referred to in Nov. 53, 6 pr., takes special interest in this context precisely because it is the rule that gave rise, by comparison of effects, to the birth and regulation of the so-called <<cuarta vidual>>[53], or widow's allowance, whose legal bases and requirements differ from those of the marital fourth in criminal law. In spite of the differences that exist between both laws, JUSTINIAN refers several times to the aforementioned[54] novella, on one hand, to justify the protection that he now also grants to the poor widow with no dowry as to the married woman *sine dote* who is repudiated because of her husband, a fourth of the estate of her deceased husband; and on the other hand to equal both

[53] Cfr. NAVARRO AZPEITIA, *Discurso de recepción*. *La cuarta marital vidual*, cit., p. 13.

[54] We must agree with NAVARRO AZPEITIA, *ibidem*, p. 22, and BONINI, *La quarta de la vedova povera*, cit., p. 800, that the submission of Nov. 53, 6 to 22,18 is necessary and exclusively of a quantitative and extrinsic order, but not qualitative and intrinsic. However, for FADDA, C., *Concetti fondamentali del Diritto Roman ereditario,* part 1ª, Napoli, Pierro Editore, 1900, p. 101, the remission of Nov. 53, 6 to Nov. 22, 18 would indicate the simple development or extension of what already was established in the previous precept.

spouses, as the previous rule did in an unjustified repudiation, in respect to the right to the new fourth[55].

Nov. 53, 6, 2 states, *in fine*, that the object of the marital fourth or *uxoria* (in succession law) is to remedy the poverty of the surviving spouse with the wealth of the predeceased[56] and in this respect structures the requirements for the right to this fourth, namely: a) the existence of a marriage *sine dote* and *ante nuptias* donation; b) the dissolution of the marriage by death; and c) the poverty of the widowed spouse and wealth of the deceased.

One of the most controversial questions raised in doctrine[57], according to the later interpretation of the phrase *ita vel si*

[55] *Communem namque etiam hanc super eis ponimus legem, sicut etiam praecedentem.* In every other parts of the text, as in Nov. 22, 18, it only mentions the surviving woman since as in the case of unjustified repudiation, constituted the paradigm present in the Chancery. Cfr. BONINI, *op. cit.*, p. 800.

[56] *…et inopia coniugis per divitias alterius salvetur.*

[57] NAVARRO AZPEITIA, *Discurso de recepción. La cuarta marital vidual*, cit., p. 45, despite the interest on the matter, not many authors deal with it.

perduraverint semper cum eis (Nov. 56, 6 pr.)[58], is whether the right to this fourth requires the existence of a legitimate marriage dissolved by the death of a spouse or, if in addition, it is necessary a cohabitation *de facto* continued until the moment of death[59]. In this respect my position coincides with the

[58] Although this phrase is said about the widow, JUSTINIAN insofar equals both spouses in respect to the right to the marital fourth in succession law and therefore, it must be understood that it also applies to the widower.

[59] For some authors, this sentence must be interpreted, *ad pedem litterae* and, therefore, must be understood that an uninterrupted cohabitation is also required until the death of the spouse. In this sense, GLÜCK; SINTESIS y SCHIRMER, cited by WINDSCHEID, B., *Diritto delle Pandette*, vol. III, Part 1 (Italian translation of the last German edition by C. FADDA and P. E. BENSA), Torino, Unione typografico-editrice, 1904, p. 139, n. 4 and, more recently, NAVARRO AZPEITIA, *Discurso de recepción*. *La cuarta marital vidual*, cit., pp. 46-48. However, for others, such as WINDSCHEID, *ibidem,* the requirement of uninterrupted cohabitation can not be drawn from the aforementioned sentence, since they maintain that its only purpose is to indicate the situation as opposed to the dissolution of marriage by divorce and, therefore, that the marriage will remain until the death of the spouse. Amongst others, BIONDI, *Quarta uxoria,* cit., p. 633; BORRELL I SOLER, A. Mª., *Derecho civil vigente en Cataluña* tom. 5. *Sucesiones por causa de muerte*, 2nd ed. (Translated and supplemented by the author), Barcelona, Ed Bosch, 1944, pp. 404-405, n. 17. It should also be pointed out that, although for FADDA, *Concetti fondamentali,* cit., p. 103, there must not only be a valid marriage, but that the spouses should not be separated. He considers, however, an exaggeration to demand, as some do, that there be an uninterrupted cohabitation until the moment of death.

authors who postulate that the aforementioned phrase only alludes to the requirement that the marriage be dissolved by the death of a spouse. In addition WINDSCHEID's argument in favour of this interpretation[60], which I share, and that JUSTINIAN refers previously in the same fragment *(principium)*, to women with no dowry who have remained *in statu legitimae coniugis*, indicate that before the enactment of this law, they could not have anything, a situation which he precisely modifies with Nov. 53, 6. Here the words are clearer and in my opinion leave no doubts, since they are exclusively designated for those women who ceased to be legitimate spouses upon the death of their husbands. In the end, a favorable interpretation of the requirement of a continued cohabitation until the death of one of the spouses, as a prerequisite to obtaining the aforementioned fourth, collides with the very conception of Roman marriage, since in no source cohabitation is present in a material sense as an essential element of marriage neither in classical, postclassical or Justinian period[61].

[60] Vid. previous n.

[61] In this respect ROBLEDA, O., *El matrimonio en Derecho romano. Esencia, requisitos de validez, efectos, disolubilidad*, Rome, Gregorian University, 1970, p. 109, mentions that <<it is not the cohabitation which is given in concubinage as in marriage, which gives meaning to this, but the *affectio* or *consensus*>>. However, against this opinion GARCÍA GARRIDO, has already expressed in *La convivencia en la concepción romana del matrimonio,* in *Homenaje al prof. Jiménez Fernández*, vol. III, Seville, Publications of the

In order for the widow or widower to be entitled to a fourth of the estate of the deceased spouse, as explicitly stated in Nov. 53, 6, 2, the former must be poor and the predeceased spouse rich[62]. The concepts of poverty and wealth are used for the first and only time in this novella[63] and as already pointed out by the

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Faculty of Law of the University, 1967, p. 34, <<it is necessary to take into account that in reality both elements were not separated, cohabitation existed as soon as there was a willingness and a reciprocal intention to initiate and continue it and the consent was always directed to act the cohabitation >>. In general, on the cohabitation of the spouses in Roman law, vid. FERNÁNDEZ GONZALEZ-REGUERAL, Mª. A., *El presupuesto del matrimonio en los derechos sucesorios de cónyuge viudo*, published on CD-ROM, Madrid, 2001, pp. 17 ff, with bibliography on the subject.

[62] *Haec itaque dicimus, si coniunctorum alter dotem aut antenuptialem donationem non faciens inops aut vir aut mulier inveniatur, et moriens quidem aut vir aut femina locuples sit, ille vero vel illa superstes pauper existat.*

[63] There are several words used to designate them, so in the *principium* of the norm it is affirmed, ... *mulieribus indotatis ... sed in novissima viventes inopia ...* In fragment 2, at the beginning, it is said, ... *si ... inops aut vir aut mulier inveniatur, et Moriens quidem aut vir aut femina locuples sit, ille vero vel illa superstes pauper existat.* And at the end of the same fragment 2 it says ... *et inopia coniugis per divitias salvetur alterius.* Following NAVARRO AZPEITIA, *Discurso de recepcion. La cuarta marital vidual*, cit., pp. 31-32, the words used to describe the husband's wealth are of abundance with sufficient means. *Locuples, of locus plenus*, means <<opulent, wealthy>>, even though the doctrine has interpreted it as well-off that is (<<benestante, agiato>>, in Italian). *Divitias,* in *dives*, rich translate as <<riches, fortunes >>, without prejudice that the doctrine interprets it as

doctrine[64] are relative concepts because according to the social status, the same estate is abundant for one and scarce for another; so that in order to determine the wealth of one and the correlative poverty of the other it will be necessary to take into account each specific case, according to the social position of the family and all the other particular circumstances[65].

Due to the relativity of these concepts the expression <<*novissima inopia*>> (Nov. 53, 6 pr.), does not seem to be translated as extreme poverty in the sense of almost begging, but as <<newest poverty>> that is, a new situation of poverty experienced by the woman or man[66], precisely because the fact

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sufficient wealth to provide well-being, without the need to reach opulence. The words used to describe poverty are: *inops,* opposite of *in-opus,* which means <<without shelter, without consolation>>, rather spiritual or affective meanings; *pauper,* means <<without tangible property, needy, indigent>>, a material meaning, although both words are used as synonyms.

[64] Cf. amongst others, DERNBURG, A., *Pandette*, vol. III. *Diritto de famiglia e Diritto dell'eredità*, 6ª ed. (first translation to italian by F. B. CICALA), Torino, Fratelli Bocca, 1905, pp. 517-518; FADDA, *Concetti fondamentali,* cit., p. 103.

[65] In this sense, NAVARRO AZPEITIA, *Discurso de recepcion. La cuarta marital vidual*, cit., p. 35.

[66] Although the *principium* of Novel 53, 6 takes as an example and argument the case of the married woman with no dowry and no ante nuptial donation that by death of the rich husband starts living *in*

of becoming a widow or widower contrasts with the wealth of marriage which was enjoyed during marriage life[67]. Thus, the decisive element to obtain this fourth, as it emerges from Nov. 53, 6, 2 *in fine,* is supervene poverty itself due to the death of one spouse, understanding poverty in the mentioned terms unless the husband as stated in Nov. 53, 6, 2, would have voluntarily bequest the woman with no dowry but with assets of her own a legacy *aut aliquam partem institutionis*. The emperor has no objection since the purpose of this exception is, in any case, to maintain the harmony of the laws and that the poverty of one spouse is remedied with the wealth of the other[68].

The unanimous opinion is that this marital fourth or *uxoria* originates both in the intestate and testate[69] succession and that

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novissima inopia, what has been said about the woman with the right to the fourth also extends to the husband in fragment 2 (vid. *supra*, n. 62) in clear harmony with the proclaimed equality of both, in this same provision, for the purposes of the mentioned law (see s*upra*, n. 40).

[67] Cfr. FADDA, *Concetti fondamentali,* cit., p. 102; BORRELL I SOLER, *Derecho civil vigente en Cataluña*, vol. 5, cit., pp. 402-403, and NAVARRO AZPEITIA, *op. cit.*, pp. 35-36.

[68] Nov. 53, 6, 2 *in fine*: … *Quod etiam hic volumus obtinere, nisi tamen ipse vir aut legatum ei aut aliquam partem institutionis reliquerit; fieri namque hoc nullo invidemus modo, ut in omnibus nobis concordantiae legum serventur, et inopia coniugis per divitias alterius salvetur.*

[69] Although the law only mentions children whom concur the inheritance with the widow, as already observed by WINDSCHEID, *Diritto delle*

in this case as stated in Nov. 53, 6, pr., testamentary dispositions may increase the rights recognised by the law for the widow or widower, but not decrease them. Therefore, if the husband bequests a legacy to his wife, which is less than the fourth due, he will have to complement[70] it up to the corresponding legal amount; while if he bequests her any other title as much or more than the due *portio*, it must be understood, *sensu contrario*, that the widow will be denied the right to the said fourth.

Thus, according to the aforementioned, the provisions of Novel 56, 6 should be considered valid and applicable only when the husband does not bequest the poor woman[71] and with no dowry at least a fourth of his estate whether by legacy, as heiress in a quota[72] or by any other title[73], whether or not it is explicitly mentioned in the text.

Pandette, vol. III, cit., p. 139, n. 6; and FADDA, *Concetti fondamentali,* cit., p. 103, with more reason the concurrence with any other person must be admitted.

[70] *Si tamen legatun aliquod reliquerit ei vir minus <a> quarta parte, compleri hoc,…*

[71] Or vice versa, by virtue of the equally applicable law to both spouses established in Nov. 53, 6 with respect to the right to the marital fourth or *uxoria.*

[72] On the Byzantine expression *pars institutionis*, used in Nov. 53, 6, 2, as well as in Nov. 22, 23 and 44, 9, see VAN DER WAL, N., *La codification des Justinien et la practique contemporaine*, *LABEO,* 10 (1964) pp. 220-233, p. 227,

To this end, another question that may arise and on which the law is silent, since it only contemplates the *indotata matrimonia*, is whether the existence of a dowry, however insignificant it may be, prevails over the widow's need who lacks any other relevant property and, therefore in this case has no right to the fourth[74]. In this respect, I join the thesis already defended by the Pandectists[75] and subsequently by FADDA[76], or as BONINI[77], correctly explains that the right to the marital fourth would correspond to the widow both in the case of total absence or insufficiency of the dowry, since the ultimately determinant is that the husband's death had deprived her of the necessary means to subsist in the same conditions as during the marriage. What is affirmed in the novella concludes that the guiding concept of this fourth is not that of the dowry, but that of the

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for it derives from the jargon of contemporary practice and is difficult to explain.

[73] Cfr. BONINI, *La quarta de la vedova povera*, cit., p. 798.

[74] In this sense they interpret the rule, amongst others LÖHR; VANGEROW; SCHIRMER; KERSTORF, cited by WINDSCHEID, *Diritto delle Pandette*, vol. III, cit., p. 139, n. 5.

[75] See WINDSCHEID, *id.* previous n.

[76] *Concetti fondamentali,* cit., p. 102.

[77] *La quarta de la vedova povera*, cit., p. 805.

<<need>>[78] and, therefore, the widow is entitled to a fourth of her deceased husband estate when as mentioned in the cited fragment, in the absence of dowry she has some assets that are insufficient to be able to have the same lifestyle as when her husband was alive, or, in my view, when still having a dowry, this is insufficient to live decently as corresponds to her husband's status and class[79]. The position defended here reveals, according to BONINI, another aspect of Nov. 53, 6 which translates into the alimony study of the fourth marital in succession law[80], a point already accepted by the doctrine[81].

With regard to the amount of the fourth part of the deceased spouse estate, it is enough to point out that another issue raised by the new law and has been subject of doctrinal controversy, is

[78] NAVARRO AZPEITIA, *Discurso de recepción. La cuarta marital vidual*, cit., p. 36, speaks of proportional, relative, qualitative, and not total, absolute, quantitative poverty.

[79] Cfr. FADDA, *op. cit.*, p. 102, as well as BORRELL I SOLER, *Derecho civil vigente en Cataluña*, vol. 5, cit., p. 403; and NAVARRO AZPEITIA, *ibidem*, pp. 35-36.

[80] BONINI, *La quarta de la vedova povera*, cit., p. 805.

[81] Vid. authors cited by BONINI, *ibidem*, p. 805, n. 30. On the alimony obligation between spouses, in particular, in Justinian law, vid. by all, *status quaestinis* of PENE VIDAR, G. S., *Ricerche sul diritto agli alimenti*, I, Torino, Giappichelli, 1972.

whether, in Nov. 22, 18, the quantitative limit of the 100 pounds of gold is maintained or not[82].

A few years after Nov. 53 in 543 AD, JUSTINIAN will publish a new law, 117, whereby in chapter 5 he considers convenient to modify in some aspects the regulation of the marital fourth or

[82] While it is true that the silence of Nov. 53, 6 on this could be interpreted in a negative sense and in this respect BORRELL I SOLER, *Derecho civil vigente en Cataluña*, vol. 5, cit., p. 406, n. 26, argues amongst other reasons that the limit of 100 pounds of gold was established for the fourth of the spouse who was victim of repudiation, not for the survivor; also, later in time, Nov. 117, 5, refers explicitly to the limit of the 100 pounds of gold of the previous law, 53, 6, to say then that it wants to change this situation (see *infra*). In favor of this argument amongst others, WINDSCHEID, *Diritto delle Pandette,* vol. III, cit., p. 139, n. 7; FADDA, *Concetti fondamentali,* cit., pp. 101-102, n. 2; PACCHIONI, G., *Corso di Diritto Romano,* vol. 3, Rome-Turin-Napoli, UTET, 1922, p. 497; BONINI, *op. cit*., pp. 804, and 811. Ultimately, what does not seem to be questionable is that the controversy over the aforementioned limit once again shows that the Chancery's ambiguity and technical deficiency poses problems that are difficult to solve from the text itself. Having said this, however, I do not think that the thesis on the above-mentioned limit can be considered implicit in Nov. 53, 6 (cfr. DERNBURG, *Pandette*, vol. III, cit., p. 518; IMPALLOMENI, *Successioni (Diritto Romano), NDI*, XVIII (1957) pp. 704-727, p. 726, and BONINI, *La quarta de la vedova povera*, p. 804), since it should not be forgotten that this refers to the preceding Nov. 22, 18 relating to the amount of the fourth, as well as the equality of the spouses. For KÖPPEN, cited by FADDA, *op. cit*.; and BONINI, *ibidem*, p. 804, n. 24, another textual confirmation in this respect is obtained from *Ep. Iuliani*, 47 (48), 6, who also claiming Nov. 22, 18, refers to the limit of 100 pounds of gold.

uxoria in the criminal and succession laws in order to improve the dispositions in the previous novellas; 22, 18 and 53, 6[83].

In this respect Nov. 117, 5, after referring to the previous criminal and succession regulation of the marital fourth or

[83] It cannot be ignored that after Nov. 53, 6 (AD 537), the Byzantine emperor enacts another new law 74 (a. 538 AD), titled <<*Quibus modis natural filii efficiuntur legitimi et Sui supra illos modes qui superioribus constitutionibus continentur* >>. Chapter 5 of Nov. 74 examines the assumption of de facto marriage, following a sacred oath to apply the regime of Nov. 22, 18 and 53, 6, in its own specific aspects, in respect to cases referred to in that provision (see Nov. 74, 5). This law, although as NAVARRO AZPEITIA observes, *Discurso de recepción. La cuarta marital vidual*, cit., p 15, is not usually referred to when dealing with the marital fourth, however presents interesting particularities,: it does not mention the limit of 100 pounds of gold, does not contain an explicit mandate of subordination to previous rules and manifests in a different manner the right of the woman with no dowry to receive the fourth part of the husband's assets in case of sanction (for being thrown out of the house) and in case of succession (by death of the husband), an *ex lege* distinction that proves that the legislator did not want the Nov. 53, 6 to be a mere development of the 22, 18, but each one was aimed at regulating different situations with respect to their origin, development and effects.

The Nov. 74, 5 does not refer to the poverty of the woman or to the wealth of the husband, and the reason may be that the purpose of the law was none other than to impose on the husband the legitimacy of marriage and children which he wanted to ignore. Cfr. NAVARRO AZPEITIA, *op. cit.*, p. 33.

uxoria, (Nov. 22, 18 and Nov. 53, 6)[84], and in order to improve what is established in both laws (reference to the aforementioned novellas), provides that now -*in praesenti melius utramque legem disponentes sancimus*- in both cases children born of such marriages shall be legitimate and shall be called to the father's inheritance -*in utroque casu ex talibus matrimoniis natos filios legitimos ese et ad paternam vocari hereditatem*-, in either case the woman, if her husband had no more than three children with her or another marriage -*uxorem autem ex utroque horum casuum, si quidem usque tres habuerit filios eius vir sive ex ea sive ex alio matrimonio*-, acquires a fourth of her husband's assets -*quartam ex parte substantia viri accipere*-. The novella stipulates if in both cases the number of children is greater -*Si autem amplius fuerint filii*-, then the wife shall have the same share as a child -*tantum in utroque similiter casu accipere iubemus mulierem quantum uni competit filiorum*-, so that the woman shall only have the usufruct of such property and the ownership is reserved for the children of the same marriage -*ita quippe ut usum*[85] *solum in*

[84] *Quia vero legem dudum posuimus praecipientem, ut si quis uxorem aliquando sine dotalibus acceperit cum affectu nuptiali et hanc sine causa legibus agnita proiecerit, accipere eam quartam partem eius substantiae, et aliam post haec fecimus legem decernentem, si quis indotatam uxorem per affectum solum acceperit et usque ad mortem cum ea vivens praemoriatur, accipere similiter et eam quartam illius substantiae portionem, ita tamen ut non transcendat haec centum auri librarum quantitatem,…*

[85] About the meaning of the word that appears in the Greek text, the Latin translation is << *usus* >>, vid. BONINI, *La quarta de la vedova povera*, cit.,

solum in talibus rebus mulier habeat, dominium autem illis filiis servetur quos ex ipsis nuptiis habuit-. However, if such woman had no children with the husband -*Si vero talis mulier filios ex eo non habuerit-*, she shall also have the ownership of the assets -*iubemus etiam dominii iure habere eam res-* which according to the present law she receives from her husband -*quas ex viri facultate ad eam venire per praesentem iussimus legem-*. For the woman that without reason was repudiated -*Quae tamen inrationabiliter exclusa est-*, the rule says she will receive the portion of the assets mentioned herein at the time of the repudiation -*in ipso tempore expulsionis partem iubemus accipere quae continetur hac lege-*.

The fragment concludes with the prohibition that the husband receives in such cases, the fourth part of the wife's assets, as the previous laws admitted (refer to Nov. 22, 18 and 53, 6) -*Virum enim in talibus casibus quartam secundum priorem nostram legem ex substantia mulieris accipere modis omnibus prohibemus-*. To conclude, this new provision denies the husband the right to the fourth *uxoria*, both in criminal and succession law.

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pp. 811-812, n. 46. The nature and scope of this so-called usufruct, as NAVARRO AZPEITIA indicates, in his *Discurso de recepción. La cuarta marital vidual*, cit., p. 28, is also subject of doubt and controversy. On this matter, vid. NAVARRO AZPEITIA, *ibidem.*

Nov. 117, 5 introduces important changes in the regulation of the marital fourth or *uxoria* with regards to this fourth in its succession law. Being this the subject of my study, it should be noted that: 1º) the limit of the 100 pounds of gold as the maximum amount of the fourth is removed[86]; 2º) it becomes an exclusively <<marital>> institution, for it is only granted to the poor woman with no dowry who has remained married to her spouse until his death, denying it to the widower in equal circumstances; 3º) the widow is entitled to a different amount according to the number of children who concur with her to the husband's inheritance, since she is entitled to a fixed and raised portion of the <<fourth part>> of the husband's property when there is up to three children whether or not they belong to the marriage with the husband, however, that fourth part is transformed into a *virile portion* when they have in common or not four or more children, being the wife in this case considered as a child for inheritance purposes; 4º) likewise, the right of acquisition of the said fourth part or virile portion of the husband's inheritance is put into context depending if the widow concurs with common children or children of a husband's previous marriage since in the first case the wife receives the portion in usufruct[87], and the children the bare

[86] Vid. *supra*, n. 82.

[87] Vid. *supra*, n. 85.

ownership, while in the second case she acquires the full ownership[88].

I agree with BONINI[89] that the examined text does not offer unlike Nov. 53, 6, particular interpretation problems although it is true that the doctrine has postulated different opinions of those here stated or even unclear in respect with the entity of the corresponding quota given to the widow, the determination of the cases in which the portion given to the widow is in ownership or usufruct, as well as the impact of the fact that the widow concurs with their children in common or with the deceased husband´s children of a previous marriage[90]. In my view, as stated by the aforementioned Romanist the position

[88] The novella does not contemplate the situation of concurrence of the widow with persons other than the children, whether in common or not. For this reason, according to BONINI, *La quarta de la vedova povera*, cit., p. 812, n. 47, in this case it must be assumed that the previous rule continues in force, that is, that the widow would always acquire the ownership of the fourth part of the deceased husband's property. In the same direction, previously amongst others, WINDSCHEID *Diritto delle Pandette*, vol. III, cit., p. 237, n. 6; y POLACCO, V., *De las sucesiones*, tom. 1 (Spanish translation by SENTÍS MELENDO), Buenos Aires, Ed. Jurídicas Europa América, 1950, p. 128.

[89] BONINI, *ibidem*, p. 812.

[90] On the different opinion of some authors in relation to these questions, vid. BONINI, *La quarta de la vedova povera*, cit., p. 812, ns. 48, 49 and 50.

held here on such issues is the only possible and most reasonable if one heeds to the literal wording of the text[91].

In accordance with the aforementioned, JUSTINIAN definitively sets with Nov. 117, 5 the marital fourth in succession law , and although the provisions of this new law do not contradict the spirit and purpose of the previous novella, 53, 6, this fourth will now only take place in favour of the widow when the following requirements are met: 1) that the woman has no dowry or that the dowry provided to the marriage is insignificant[92]; 2) that the widow is poor, not in an absolute sense, but relatively poor, in comparison with the condition and wealth of her deceased husband and, therefore, can prove her poverty or supervene need after his death[93], in

[91] See BONINI, *ibidem,* p. 813, n. 51. In the author's words, p. 813, n. 52 << it would be more useful to investigate the reasons that led the Chancery to give to the women in certain cases the simple usufruct. In my opinion, it should be further considered the relationship with the Nov. *Iustinian*i 98 of 539, which mentions other cases of legal usufruct related to the death of one of the spouses or repudiation>>.

[92] On this matter, vid *supra*, Nov. 53, 6.

[93] As already pointed out in this paper, the concepts of poverty and wealth are only used in Nov. 53, 6, since they do not refer, not once, to Nov. 117, 5. However, we must agree with NAVARRO AZPEITIA, *Discurso de recepcion. La cuarta marital vidual*, cit., p. 34 that the silence of the new law should not be understood as a derogation of the concept of the widow's poverty since it is subsequently mentioned in the Authentic *Praeterea,*

other words, that there is a relation between her poverty and her husband's wealth, a requirement closely related to the previous one; and 3º) that the marriage has dissolved by the death of the husband[94].

Finally, and as a closure on the marital fourth succession in the Roman Justinian law, I consider of interest to point out that the later CVI constitution of LEON VI THE WISE OR THE PHILOSOPHER[95], which has not reached us and bears the title <<How much do the women with no dowry inherit>> stated that the Justinian's virile portion that the widow should receive is not only in usufruct but <<that she has intact the ownership of this portion and disposes of it as she pleases, without the children being compelled by anything other than what is owed to them by the Falcidia>>. This is if she did not remarry, for then she would lose the ownership of her marital fourth and the children would acquire it <<at the death of their mother, and

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added to the edict *Unde vir et uxor* in C. 6, 18, and also because, despite its relativity, it has always been considered by all authors as a necessary requirement for the <<cuarta vidual>> or widow's allowance; <<to the point whereby it is a legal reality and an aphorism of law and in Roman law a hereditary calling in concurrence with the deceased relatives is only granted to the poor widow>>.

[94] On this matter, vid. *supra*, Nov. 53, 6.

[95] **Byzantine Emperor (a. 886-912). Son of BASILIO I, published *ta Basílikià* (887-893) and several novellas.**

become owners of the assets>>[96]. This constitution appeared, therefore, to improve the widow´s position.

IV. CERTAIN CONSIDERATIONS ON THE RECEPTION IN CATALAN LAW[97]

In the Middle Ages the premarital agreements[98] and the system of separation of property was maintained in Catalonia although this one was corrected by the development of <<heretaments>> (inheritance).

The reworking of the marital fourth by the authors of the *Ius commune* was done on the basis of the Authentic *Praeterea*, that is, a summary of the Novellas 53, 6 and 117, 5, which the glossators added to the Code of Justinian, hereafter Edict *Unde*

[96] NAVARRO AZPEITIA, *Discurso de Recepción. La cuarta marital vidual*, cit., p. 17.

[97] On the organization or family system of <<pre-Catalonia>> (s. VIII-X), Early Middle Ages (s. XI-XIV) to the CDCEC (1960), and from the CDCEC to nowadays, vid. MIRALES BELLMUNT, M., *La posició del cònyuge i del convivent en parella estable supervivent en el Dret civil de Catalunya* (disertation, Digital Repository UB), Barcelona, Universitat de Barcelona, 2016, pp. 113-151.

[98] LATORRE SEGURA, *Discurso de Recepción, El Derecho a la cuarta marital*, cit., pp. 8-9.

vir et uxor (C. 6, 18)[99]. This development involved two important innovations: on one hand the widower could also benefit from this fourth; and on the other that the concept of poverty should become more flexible. It should be added that the doctrine on the congruity or incongruity of the dowry is mentioned as of BALDO and subsequently the right to the fourth ends up disconnecting from the dowry institution[100].

The Catalan jurists of the sixteenth and seventeenth century mention both changes which are seconded, amongst others, by FONTANELLA and CANCER[101]. However, in the nineteenth

[99] *Praeterea si matrimonium sit absque dote, coniux autem praemoriens locuples sit, seperstes vero laboret inopia, succedet una cum liberis communibus alteriusve matrimonii in quartam, si tres sint vel pauciores, quodsi plures sint, in virilem portionem, ut tamen eiusdem matrimonii liberis propietatem Servet, si exstiterint; his vero non exstantibus, vel si nullos habuerit, potietur etiam dominio, et imputabitur legatum in talem portionem.* Therefore, the Authentic *Praeterea* maintains of Nov. 53, 6 the doctrine of the poverty in life and of Nov. 117, 5, the quantity (fourth part or virile portion) and its perception (in usufruct or full ownership), in respect of the number of children which concur with the widow and according if they are in common or not to the marriage with the husband.

[100] LATORRE SEGURA, *Discurso de Recepción. El Derecho a la cuarta marital*, cit., p. 9. Vid. bibliography cited by MIRALES BELLMUNT, *La posició del cònyuge i del convivent*, cit., p. 308, n. 980.

[101] In words of LATORRE SEGURA, *id.* previous n.: <<so strong was this conviction in the jurists of the time that even Gregorio López defended it in his comment in the "Partidas", where the text of the novellas had been

century, they generally return to the principle that only the widow could claim the fourth[102], a limitation that becomes the irrefutable rule for modern authors and the jurisprudence. With respect to the common tendency of the *Ius commune* to make the concept of poverty more flexible and to disassociate the marital fourth from the dowry, it not only had a great impact on the classical Catalan jurists, but was also developed by modern doctrine, which in this respect, as LATORRE points out, <<maintained a clearly progressive line>>[103].

However, in its final phase this tendency could not modify the original purpose of the fourth which remained in essence a right of an alimony character with a charitable and benevolent

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collected with more accuracy than in the Authentic and prescriptively stipulated that the fourth only belonged to the widow>>.

[102] Cfr. BROCÀ Y DE MONTAGUT, G. Mª., AMELL LLOPIS, J., *Instituciones de Derecho civil vigente en Cataluña*, Barcelona, Imprenta Barcelonesa, 1880, pp. 437-438. DURAN Y BAS, M., *Memoria acerca de las Instituciones del Derecho civil de Cataluña*, Barcelona, Imprenta de la Casa de la caridad, pp. 270-272. DURAN Y BAS dealt succinctly with the marital fourth, alluding to the widow in comparison with the evolution experienced in the <<Partidas>> laws.

[103] LATORRE SEGURA, *Discurso de Recepción. El Derecho a la cuarta marital*, cit., p. 9, n. 91.

approach and without becoming a spouse's inheritance right independently of the estate.[104]

The described situation irremediably conditioned the work of the compilers[105], as confirmed by the Catalan Compilation of 1960 (CDCEC)[106] which in general regulated the marital fourth[107], to the legal configuration of Nov. 117, 5[108]. Although true that it came to temper the relative condition of poverty (article 147. 1)[109], since it no longer uses the word <<poor>>, but rather limits to establish a comparison between the widow's assets and the necessary means to maintain a state of

[104] LATORRE SEGURA, *op., cit.*, p. 10.

[105] Although art. 350 of the Appendix Project of 1930 always granted the widow in the intestate succession a fourth part of her husband´s inheritance, however, as observed by PÉREZ TORRENTE, *Cuarta marital*, cit., p. 161, << in the testate succession they did not provide such a drastic solution >> and stated that << in the case the widow is poor or of a much inferior economic position to the one of the husband she will have this same right even if the husband provides a will>>.

[106] Law 1960, of 21 of July.

[107] Vid. Arts. 147 to 154.

[108] Vid. ROCA-SASTRE, M., *Contestación al discurso de recepción del académico de número Excmo. Sr. Fausto Navarro Azpeitia, La cuarta marital vidual justinianea*, Academia de Jurisprudencia y Legislación de Barcelona, Barcelona, C. Casacuberta, impresor, 1961, pp. 57-65, p. pp. 59 ff.

[109] Vid. bibliography by MIRALES BELLMUNT, *La posició del cònyuge i del convivent*, cit, p. 310, n. 991

widowhood according to the social condition of her husband and the assets of the estate[110].

The requirement to adapt the Catalan Compilation (CDCEC) to the constitutional principle of equality between spouses before the law determined in its reform of 1984 (CDCC) a series of changes[111], among which it is necessary to emphasize the extension of the mentioned right to the widowers[112] and therefore to be renamed <<cuarta vidual or viudal>>; the adoption of the *coniugalis status*, as a congruence module[113], thus surpassing the criterion of *status vidualis* of the 1960 Compilation; and the abolition of the *Hac Edictali* law, which protected the children of the first or previous marriages from the second or further marriages[114].

Subsequently, following the entry into force of the Code of Successions of 1991 (CS)[115], and as stated in the Preamble of the law (section IV), the <<cuarta vidual>> or widow's allowance is

[110] PÉREZ TORRENTE, *Cuarta marital*, cit., p. 367.

[111] Vid. Arts.147 to 154.

[112] Vid. Art. 147.

[113] Vid. Art. 147.

[114] Vid. Art. 253 CDCEC 1960.

[115] Law 40/1991, of 30 of December, Code of Successions by cause of death in civil law of Catalonia (In force until January 1, 2009).

ruled by a new regulation (articles 379 to 386 Chapter II) which although inspired by the 1960 text, <<substantially improves the expectations of the surviving spouse, whom, if not having sufficient economic means at the death of the other spouse, may claim in any case the ownership of the inheritance assets or its equivalence in money>> (translation of the Spanish version). Therefore, CS improves the position of the surviving spouse, since it always gives the surviving spouse the ownership of the <<cuarta vidual>> or widow's allowance (article 379. 1º), unlike the 1960 Compilation (CDCEC) and its reform in 1984 (CDCC) which followed the distinction of Nov. 117, 5, whereas it depended if the surviving spouse concurred or not with common children in the marriage[116]. The new articles also provide a formula to capitalize the revenues and salaries of the widowed spouse to determine the amount of the aforesaid fourth (article 382. 2)[117].

[116] Art. 149: <<The "cuarta vidual" or widow`s allowance consists on one fourth of the deceased spouse inheritance´s liquid assets. However, if he leaves –or not- four or more children in common or lineage strains of descendants of predeceased children, the said fourth shall consist of an equal portion to that which if the predeceased died intestate it would have corresponded to each of his children. In case of children in common, the surviving spouse will only have the usufruct of the "cuarta vidual" or widow`s allowance and the bare ownership will be incorporated in the inheritance >> (translation of the Spanish version).

[117] <<In any case, and for the purpose of reducing the "cuarta vidual" or widow`s allowance, the assets or rights that the deceased has awarded to

With the Law 10/1998, of July 15, of partners in a stable relationships it is possible to attribute a similar right as the <<cuarta vidual>> or widow's allowance in favor of the surviving homosexual cohabitant partner with respect to the testate and intestate succession of the deceased cohabitant partner (articles 34 and 35).

Finally, the current Book IV of the Civil Code of Catalonia (CCC) introduces important modifications with respect to the previous regulation (CS), in order to adapt the <<cuarta vidual>> or widow's allowance to the needs of Catalan society in the new times[118]. In this respect, it is sufficient to point out that in the Preamble to the aforementioned Law 10/2008, of 10 of July (section VI, paragraph 7), states that <<The widow allowance also witnesses major changes. Despite maintaining

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his or her spouse in the former's inheritance are imputed to the "cuarta vidual" or widows allowance even if the surviving spouse waivers the mentioned assets and rights together with those of the spouse and with the revenues and salaries perceived by the latter which shall be capitalized for this purpose at the legal interest rate>> (translation of Spanish version).

[118] On the regulation of the <<cuarta vidual>> or widow's allowance in the current CCC, vid. MOLL DE ALBA LACUVE, C., *Algunos aspectos de la cuarta viudal en el Libro IV del Código Civil catalán y su fundamento romanístico en las Novelas 56, 5 y 117, 5 de Justiniano*, en *Fundamentos romanísticos del derecho de sucesiones*, cit. (in press).

its traditional name, the widow allowance is not only attributed to the widowed spouse, but also to the surviving member of a stable relationship, and it does not involve a fourth of the inherited estate, since a fourth only acts as a maximum limit, as was the case before this law came into effect>> (translation of the Spanish version).

The requirements for claiming this allowance are brought up-to-date: instead of the parameter for means for subsistence, linked to a declining social notion of widowhood, the fourth book resorts to the parameter of meeting needs, an area that may be granted content based on criteria such as the standard of living, age, health, salaries and income received or foreseeable financial prospects, which are analogous to those used to set the compensatory allowance in the event of a marital crisis. Referral to the statutory framework of the compensatory allowance specifically seeks to ensure that in the event of widowhood, the spouse will not paradoxically end up in a worse position than that which said individual would have experienced if the marriage had been terminated by means of divorce. It is necessary in this regard to bear in mind that the previous regulation of the widow allowance, to which salaries, income and allowances received by the widow, capitalised at the legal interest rate, used to have to be allocated for the purposes of its reduction, a fact which in many cases made it

unviable to claim said amount or reduced it unfairly to insignificant figures (translation of the Spanish version)[119].

[119] As asserted, amongst others, CASANOVA I MUSSONS, << arts. 147, 148, cit., pp. 627 and 629-630; DEL POZO CARRASCOSA, VAQUER ALOY and BOSCH CAPDEVILA, *Derecho Civil de Cataluña*, cit., p. 422, bearing in mind that the <<cuarta viudal>> refers to the widower and is thus intimately related to marriage, whereas the <<cuarta vidual>> has a less restrictive meaning, since nowadays it is understood to comprise not only the widowed spouse, but also the cohabiting partner in a stable relationship, it seems more logical to use this last designation. Vid. *supra*, n. 2.