ON THE ALIENATION OF THE DOWRY

Remarks concerning the application of the Senatus Consultum Velleianum and διδασκαλία τοῦ νόμου in Byzantine law

1. Introduction

Justinian’s 530 A.D. constitution C. 5,13,1,15 prohibited the alienation of the unassessed dowry by the husband, even with the wife’s consent. The ruling reads as follows:

Et cum lex Iulia fundi dotalis Italici alienationem prohibebat fieri a marito non consentiente muliere, hypothecam autem nec si mulier consentiebat, interrogati sumus, si oportet huiusmodi sanctionem non super Italicis tantummodo fundis, sed pro omnibus locum habere. Placet itaque nobis eandem observationem non tantum in Italicis fundis, sed etiam in provincialibus extendi. cum autem hypothecam etiam ex hac lege donavimus, sufficiens habet remedium mulier, et si maritus fundum alienare voluerit. Sed ne ex consensu mulieris hypothecae eius minuantur, necessarium est et in hac parte mulieribus subvenire hoc tantummodo addito, ut fundum dotaalem non solum hypothecae titulo dare nec consentiente muliere maritus possit, sed nec alienare, ne fragilitate naturae suae in repentinam deducatur inopiam. Licet enim Anastasiana lex de consentientibus mulieribus vel suo iuri renuntiantibus loquitur, tamen eam intellegere oportet in res mariti vel dotis quidem, aestimata autem, in quibus dominium et periculum mariti est: in fundo autem inaestimato, qui et dotalis propriae nuncupatur, maneat ius intactum, ex lege quidem Iulia imperfectum, ex nostra autem auctoritate plenum atque in omnibus terris effusum et non tantum Italicis et sola hypotheca conclusum.

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‘And since the Lex Julia prohibited the alienation of Italic rural dowry land by the husband without the consent of his wife and its being placed under hypothec even with her consent, we have been asked whether this rule (sanctio) ought to have a place not only in the case of rural Italic land, but all (rural) land. It is therefore Our decision that this usage (observatio) shall operate not just for rural Italic land, but be extended to rural provincial land as well. Since, moreover, we have also granted a hypothec in connection with this statute, the wife has an adequate remedy, even if the husband wishes to alienate the property. But in order that the wife’s hypotheoses not be diminished pursuant to her consent, it is necessary even here to come to the aid of wives with just this provision added, that the husband shall not only not be able to place rural dowry property under hypothec even with his wife’s consent but that he shall not be able to alienate it, so that she, through the weakness of her own nature (fragilitas naturae suae), not be reduced suddenly to poverty. For although the statute (lex) of Emperor Anastasius speaks about women giving their consent or renouncing their rights, nevertheless, this ought to be understood to apply to property of the husband or dowry property certainly, but only if appraised as to its value, of which the husband has the title and the liability (for damage). In the case, moreover, of an unappraised piece of rural property, which is properly described also as ‘dowry,’ her rights shall remain unabridged. Though not fully realized, admittedly, under the Lex Julia, thanks to the interposition of Our authority they are full, diffused throughout all lands, and not limited only to Italic lands nor to just a hypothec’.1

Nov. 61, issued in 537, stipulated that for a transaction involving prenuptial gifts to be valid, it was necessary for the wife to consent twice over a period of two years following the initial agreement. However, because Nov. 61 cites both the aforementioned Justinianic constitution C. 5,13,1,152 and C. 4,29,22 concerning the Senatus Consultum Velleianum (hereafter

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2 Nov. 61,1,3 (SK 331/30-33): Καὶ πολλῷ μᾶλλον τοῦτα ἐπὶ τῆς προικὸς κρατεῖν, ἐξερ τινὰ τῆς προικὸς ἡ ἐκποίησις ἢ ὑπόθεσιν ἢ ὑπόθεσιν ἢ ὑπόθεσιν ἣ ὑπόθεσιν ἢ ὑπόθεσιν. ‘And those

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SCV), the Byzantines were led to believe that not only the alienation of prenuptial gifts, but also that of the dowry were governed by the same legal framework and that both were somehow connected in some way with the SCV. Therefore, from the Byzantines’ point of view, the alienation of the dowry was subject to the same rules and restrictions as that of the prenuptial gifts, i.e. the transfer of the dowry was only valid if women were to reiterate their consent within two years after the initial transaction. The aforementioned Justinianic regulations were explicitly reproduced in imperial legislation and included in numerous legal collections and compilations from the middle and late Byzantine periods. For example, in the Eisagoge and the Prochiron, the first legal works of the Macedonian dynasty, we read:

| Eis. 19,3: εἰ δὲ καὶ ζώντος τοῦ ἀνδρὸς τῇ πρᾶσι τῆς προγαμμαίας διορεᾶς ἡ γυνὴ συναινέσαι πεσεῖθ, οὐκ ἐξήρωται ἡ τοιοῦτο πράξεις δεῖ γὰρ, καθάπερ καὶ ἐπὶ τῆς προικός, διετοῦ ἀυθίς παριόντος χρόνου | While if, when the husband is in life, the wife consents to the sale of the prenuptial gift, this type of legal act has no force. Since, as precisely in the case of the dowry, only after a period of two years has elapsed, her consent must be confirmed once again in writing, and only then is the legal act in force, thus it may come to pass and if the woman consents, correspondingly to what we legislated regarding intercessions, that, in other words, after two years have elapsed, the woman’s consent must be confirmed once again in writing, and only then is the legal act in force, unless stated otherwise, translations are my own.
Proch. 9.13: Τὰ τῆς προγαμμαίας διορεᾶς καὶ τῆς προικός πράγματα οὐπε προσανατομήσεις τῆς γυναικὸς ἐκκοιτᾶται, οὔτε ἠνεφεραίζεται, εἰ μὴ δευτέραν ποιηθῆναι συναίνεσιν αὐτοῦ ἡ γυνὴ μετὰ δευτέραν ἰδίως μὲν-

provisions apply even more so for the dowry, if, that is, someone wishes to sell off or mortgage the dowry. This is because the related topics have already been the object of consideration and have been legislated upon’. Unless stated otherwise, translations are my own.

3 Nov. 61,1,1-2 (SK 330/35-331/4): ἀλλ’ ὀπλαῖ ἐπὶ τῶν ἑραίσεων ἐγράφαμεν τὸ δὲ δικαίου ὑποτερ χρόνου παριόντος ἀυθίς ἐπάραν ἔμοιον γράφαν βεβαιοῦσαν τὴν συναινέσιν καὶ τότε κύριον εἰναι τὸ γνόμενον, οὕτω κάνταρτια γνοσθέντα, καὶ εἰ συναινούσιν ἡ γυνή, κατὰ τὸ τῶν ἑραίσεων σχήμα ἐστι παντελῶς ἐξήρωται, εἰ μὴ καὶ δευτέραν, καθ’ ἐπίκοντος ἐρθημένον, ποιηθῆναι συναινέσιν. Ἡρεμούν, accurately as we had legislated regarding the intercessions, that, in other words, after two years have elapsed, the woman’s consent must be confirmed once again in writing, and only then is the legal act in force, unless stated otherwise, translations are my own.


5 On the Eisagoge and the Prochiron and the issues regarding their dating see Σπ. Τριαντάκης, Οἱ πηγὲς τοῦ βυζαντινοῦ δίκαιου, Αθήνα-Κομοτηνή 2011, 240-252, and more recently Th. E. van Bochove, ‘Preluding the Basilica, but how? The final paragraph of the preface to the Prochiron reconsidered’, SG IX (2014), 267-318 (272-277).
However, as the studies of A. Christophilopoulos and Helen Saradi-Mendelovici have shown, these regulations were in fact never enforced.

2. The non-implementation of Justinian’s legal provisions regarding the alienation of the dowry

In Byzantine law there were many provisions safeguarding the dowry. Dotal property was considered a separate property unit, forming on many occasions a substantial part of the family estate. The wife had legal ownership of the dotal property while the husband was its administrator. There was also the competing requirement for those transactions involving the alienation of the dowry to be secure and streamlined so as to protect the interests of any bona fide purchaser. In a sense, in all transactions involving alienation of any piece of dotal property, two competing interests were at play and needed to be balanced: on the one hand, the need to safeguard women’s interests on their own property ensuring that women knowingly and freely consented to its disposition, and on the other hand, the need to protect the interests of any potential purchaser. One can imagine the legal problems that would arise if, for example, the initial buyer of the dotal property decided to sell it to a bona fide purchaser and the original owner, the endowed woman, at the end of the two-year period changed her mind and contested the initial agreement. If the Justinianic regulations, as understood by the Byzantines, were enforced, then the initial transaction would be void and the dotal property would be rendered inalienable.

Hence, due to the two competing interests, Justinian’s legal provisions that prohibited the alienation of the unassessed dowry by the husband even with the wife’s consent, were never enforced. However, in order to counterbalance and protect the woman’s rights, it was deemed necessary to ensure that in cases of alienation of dotal property, women should give their informed consent. This is the reason why in some notarial documents from the middle
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and mainly the late Byzantine period related to the alienation of dotal property, as well as in decisions of the Patriarchal court, the ‘law aiding women’ is repeatedly cited, along with the woman’s own declaration that knowingly and out of her own free will, she renounces her right to invoke its protection. This declaration, also referred to as the process of teaching (διδασκαλία τοῦ νόμου),9 prevented women from contesting the alienation of their dotal property and reclaim it.

From the Byzantine’s point of view the ‘law aiding women’ was related to, or more precisely, identified with the SCV.10 The SCV, enacted in the mid-first century A.D.,11 provided that women should not intercede on behalf of anyone. Intercedere means to intervene, interpose oneself between a debtor and a creditor and undertake a debt on someone’s behalf.12 Thus, a woman who was sued with respect to an intercessio of any kind could plead the exceptio senatus consulti Velleiani.13

Under Byzantine law, in contrast to Roman law, the SCV was not limited to intercessio cases, but was broadly applied. In my view, the SCV’s broader application was not, at least initially, merely the result of a misinterpretation of the Roman doctrine of the

8 For the use of the term βοήθεια νόμου in another legal context, see H. Gerstinger, ‘Zur Klausel ἀποτάττομαι πάση βοήθεια νόμων in den byzantinischen Landpachtverträgen’, Kanáskos Philíou I. Κοκκοκΐ, EEBZ 23 (1953), 206-212.
9 On the διδασκαλία τοῦ νόμου of women, see Μάτσης, Το οικογενειακόν δίκαιον (note 4 above), 99-123; Saradi-Mendelovici, ‘Contribution to the Study of the Byzantine Notarial Formulas’ (note 4 above), 81-82; E. Παπαγιάννη, Η νομολογία των εκκλησιαστικών δικαστηρίων της βυζαντινής και μεταβυζαντινής περιόδου σε θέματα περιουσιακού δικαίου II. Οικογενειακό δίκαιο, (Forschungen zur byzantinischen Rechtsgeschichte. Athener Reihe 11), Athéna / Κομοτηνή 1997, 101-104; Saradi, ‘The alienation of the dowry’ (note 4 above), 75.
10 On the SCV, see U. Mönnich, Frauenrecht vor riskanten Geschäften: Interzessionsverbote nach dem Velleianischen Senatsbeschluss, (Dissertationen zur Rechtsgeschichte, 10), Köln / Weimar / Wien 1999 with extensive bibliography; R. van den Bergh, ‘Roman women: sometimes equal and sometimes not’, Fundamina 12/2 (2006), 113-136. For an attempt to identify specific Justinianic regulations with ‘the law aiding women’, see Μάτσης, Το οικογενειακόν δίκαιον (note 4 above), 118-123; Matses was the first scholar, to my knowledge, who dealt systematically with the identity of ‘the law aiding women’ and concluded that from the Byzantines’ point of view it was probably identified with the SCV. The same conclusion but with more certainty was reached by Παπαγιάννη, Η νομολογία των εκκλησιαστικών δικαστηρίων, II (note 9 above), 102-103.
11 For the exact date of the promulgation of the SCV, probably 54 A.D., see P. Buongiorno / F. Ruggio, ‘Per una datazione del “senatus consultum Velleianum”’, RDR 5 (2005), 1-9.
13 On the possibility for women to renounce the exceptio SCi Velleiani in classical Roman law, see Th. Finkenauer, ‘Der Verzicht auf die exceptio SCi Velleiani im klassischen Recht’, TRG 81 (2013), 17-49.
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decree. It was rather used to counteract the non-application of the Justinianic legal provisions, which if enforced, would have led to transactions liable to being overturned.

3. The identity of the ‘law aiding women’ and its connection with the SCV

What, then, is the identity of the ‘law aiding women’? And, what exactly do we mean by the term διδασκαλία τοῦ νόμου (teaching of the law)? Evidently, when referring to ‘law aiding women’, the Byzantines did not have in mind a specific regulation, but the SCV, which they regarded as a law protecting women in general. The term ‘teaching’ did not mean that women were actively informed of their rights according to a particular legal provision that, as noted above, did not exist as such. Rather, ‘teaching’ was another way to denote that a woman received consideration and knowingly and explicitly renounced the benefit, afforded by the SCV, to later challenge the transaction. In this way, transactions were secured. For this reason, a woman could only renounce this right if she had attained the age of majority.14

The broad application of the SCV is attested in notarial practice15 and the mutation of its Roman core led in turn to misinterpretation. The Byzantines’ lack of knowledge regarding the legal matters that the SCV was designed to settle becomes clear in Peira. Particularly revealing is the legal reasoning in Peira 12,1 concerning the regulation ‘that law [viz. the SCV] comes to the assistance of women who have acted as guarantors, but if they paid money for others, they have no right to recover it’.16 The true meaning of the regulation is that women can invoke the SCV when their debt is still outstanding, not if they have already paid it, since there is no more obligation, an essential element of the intercessio.17 In contrast, Eustathios Rhomaios seems to believe that women are assisted by the law [viz. the

14 See note 47 below.
16 Peira 12,1: Ὅτι γυναικὶ ἐγγυωμένῃ βοηθεῖται, καταβαλοῦσα δὲ ὑπέρ τινος οὐκ ἀναλαμβάνει.
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SCV] when they act as guarantors, because their ignorance of the law is excused due to the weakness of their sex or because, despite being acquainted with the law, they still hope that it comes to their assistance:

τούτου τοῦ νομίμου τὸν νοῦν ὁ βέστης οὕτως ἐρμήνευσεν, ὅτι, ὅτε μὲν ἐγνώται, ἢ ἐγνοεῖ τὸν νόμον τὸν περὶ τῶν ἐγγυητῶν καὶ ὃς γυνὴ συγγινώσκεται, ἢ γινώσκουσα τὸν νόμον ἐλπίζει βοηθεῖσθαι διὰ τοῦ νόμου' (...).18

However, they have no right to recover their payments, when they have fulfilled their obligation, because according to him, they are at fault twice: not only they ignored the relevant law but also they did not raise an objection before making any payments:

(...)· ἀρξαμένη δὲ ὑπὲρ τῆς ἐγγύης καταβάλλειν, καὶ μετὰ ταύτα ἐπίζητούσα τὸ καταβλήθεν, οὐκ ἀναλαμβάνει. διὰτι; ὅτι ἐκ δύο ἁμαρτημάτων ἔλκεται καὶ ὃς ἐγγυησαμένη καὶ ἢ ἐγνοοῦσα τὸν νόμον ἢ δολερῶς ὑπελθοῦσα τὴν ἐγγύην, καὶ ὃς ὁνόμαζεν καὶ μετὰ τὴν ἐγγύην ἀντιλέγειν καὶ ὅτε τὴν ἀρχὴν εἶλκετο πρὸς ἀπαίτησιν μὴ ἀντεἰποῦσα.19

18 Peira 12,1: ‘This regulation the vestes interpreted in this way: that when the woman guarantees or is ignorant of the specific law she is thus forgiven as a woman, or, if she in fact knows the law, she hopes that the law will come to her assistance’.

19 Peira 12,.1: ‘Having fulfilled her obligation as guarantor, she would thereafter claim back what she had paid, but she would not receive this. Why was this? Because she had committed two errors, and since she acted as guarantor and either she ignored the law or guaranteed with dolus, and although after the guarantee she could have challenged the payment of the obligation, she did not raise any objection’.
The ‘law aiding women’ was not exclusively applied in the judicial practice of the late Byzantine period. It is even mentioned by Michael Psellos in March 1049 in a case concerning the alienation of dotal property. The testimony of Psellos is of particular interest since it is the earliest mention of ‘the law aiding women’ in judicial practice and it was never mentioned, at least to my knowledge, in the relevant bibliography. The legal proceedings took place presumably in Asia Minor. It is not clear if Psellos was the judge or simply the recorder of the case, the pertinent parts of which are as follows: by virtue of a chrysobull issued by the emperor Basil II in 1006/1007 to his grandparents protospatharios and vestiarites John Iveritzes claimed ownership of a suburban property named Vivarion, which was actually occupied by the manglabites Basil. Basil, in rebuttal, asserted that the land had been sold in October 1000 by the grandfather of the petitioner, Stephanos Iveritzes, to Michael, brother of the kouboukleisios Leon. The transaction was perfectly legal, since Vivarion had already been donated to Stephanos Iveritzes in 996/997. Michael conveyed Vivarion as a dowry to his daughter Maria, who in turn, jointly with her husband, sold the land to the father of the respondent manglabites Basil, Pikrides. However, after her husband’s death, Maria contested the initial transaction and the transfer of Vivarion to Pikrides, pleading τὸν βοηθοῦντα νόμον: καὶ ἐπὶ τοῦτο ἐνόσει, έτέρφω δικαιώματι τὸ νοσοῦν τεθεράπευτο. αὐτή γὰρ ἡ πρὸς τὴν πρᾶσιν παρανομήσασα, καὶ διὰ τὸν βοηθοῦντα νόμον εἰς τὴν ἁπατήν κτήματος, ἀγὼν μὲν δικαστηρίου μετὰ τὴν τοῦ ἀνδρὸς ἀποβίωσιν κατὰ τοῦ Πικρίδου ἐκρότησε, (...).
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Before the judge came to a decision, the two litigants, Maria and Pikrides, agreed to reach a settlement sanctioned by the court. According to their settlement, Maria in exchange for an additional amount of money, consented to sell to him once again her dotal property.25

Psellos’s account is noteworthy for a number of reasons. It clearly shows that during the 11th century not only the alienation of the dotal property was allowed, but also that the woman’s right to invalidate such a transaction invoking τὸν βοηθοῦντα νόμον was established. Furthermore, it illustrates the flexible and practical way the Byzantines were able to settle disputes that might arise if the original transaction regarding dotal property was challenged. The two parties came to an agreement before the judge and the woman was ‘compensated’ with a certain amount of money. In exchange, she consented once again to the sale of her dotal property to the same buyer. It is important to note that in classical Roman law the SCV is attached to the promissory transaction, granting women a ‘defensive’ exceptio in order to avoid the fulfillment of a debt that they commit themselves to propter infirmitas sexus.26 According to the interpretation that prevailed in Byzantine law, however, both the promissory transaction and the alienation of the dotal property could be invalidated, regardless of the given price. A woman who did not knowingly and explicitly renounce the benefit that the ‘law aiding women’ afforded her in the first place, could raise an ‘offensive’ actio, claiming back her dotal property, even if the transfer of her dowry had already been completed.

25 Michael Psellos, Actum 3, ed. Dennis (note 20 above), 164/83-89: (…), πρὶν ἤ δὲ εξενεχθῆναι ἀπόφασιν νομίσματα τινα παρ’ αὐτοῦ λαβοῦσα, καθαρῶς διελύσατο. ἐπὶ δὲ τῇ διαλύσει παρ’ αὐτοῦ δὴ τοῦ δικάζοντος ἀπελόθη ἰσότητα: μεθ’ ὧν ἡ αὐτὴ πάλιν δευτέραν ἐννομον πράξειν τοῦ κτήματος πρὸς τὸν αὐτὸν Πικρίδην ἐξέθετο, μεθ’ ὧν καὶ ἔτερα ταύτα δικαιώματα προβεβήκασι παρέλκοντα τῇ γραφῇ. ‘Prior to the judgment and having received some money from Pikrides, Maria agreed to a settlement. And for this settlement, the judge himself drafted a document, and after which Maria did sell once again, this time legally, the property to Pikrides himself, together with other rights noted in the document’.

5. The alienation of dotal property as customary law

Nonetheless, the need for the alienation of dotal property to remain secure and valid led to different legal solutions. According to a scholion cited in the *Hexabiblos* that can safely be dated shortly before 1345 and that originated in the region of Thessaloniki, the prohibition of the alienation of dotal property is not legally binding. The relevant passage of the scholion reads as follows:

sch. ad Hex. 1,13,20: Τοῦτο τὸ κεφάλαιον πολλοῖς καὶ ἄλλοις νομίμοις κεφαλαίοις συνήδον παρ’ ἡμῖν οὔ κρατεῖ, ἀλλ’ οὕτως έξ έθους πολιτεύεται: τοῦ γάμου συνεστώτος ἐὰν γυνὴ παλιή προικιμαῖον αὐτῆς κτῆμα συναινοῦντος καὶ τοῦ ἀνδρός αὐτῆς καὶ μετ’ αὐτὴν προτάσσοντος ή δι’ ὑπογραφής ή διὰ συναγραφής ἐν τῷ γενομένῳ ταμβελλιανῳ συμβολαίῳ, καὶ προβῇ μὲν τὸ συμβόλαιον ἐκ προσώπου ταύτης – συναινοῦντος καὶ τοῦ ἀνδρός ὡς εκρήγηται – τὴν αὐτὴν δηλοῦ τινὰ, δι’ ἥν παρὰ τῆς γυναικὸς τὸ προικιμαίον κτήμα παράσκεται ἀληθῆ τε σύσσαι καὶ ἀναγκαῖον, δοθῇ δὲ καὶ τῷ τίμημα τοῦ πραθέντος εἰς τὰς χεῖρας (sic) τῆς γυναικὸς διὰ τὸ ταμβέλλιωνος τῶν ἐντελῶν οὐσίας δηλοῦντός, ἔρρωται ἡ πράσις καὶ διεκδικήθηναι παρὰ τῆς γυναικὸς τὸ πραθέν ὡς προικιμαίον οὐ δύναται μετὰ ταύτα, εἰ καὶ ὁ ἄνηρ ὑστερον ἐν ἀπορία τελευτήσει. καὶ ταύτα δὲ καὶ ἐπὶ τῶν δανείων γίνεται: καὶ συνεστώτος γάρ τοῦ γάμου, ἐὰν γυνὴ νομίσματα παρὰ τίνος ἢ ἠτέρων τι πρωτοτύπως δανείσηται καὶ προβῇ μὲν τὸ συμβόλαιον ἐκ προσώπου ταύτης συναινέσει καὶ τοῦ ἀνδρός, ὡς ἀνωτέρω δεδήλωται, παράδοθη δὲ καὶ τὸ χρέος εἰς τὰς χεῖρας αὐτῆς, αὐτὴ γίνεται τούτῳ χρεώστησαι καὶ τοῦ ἀνδρός ἀπὸ τοῦ γενομένου ἐμπροθέσμως κατὰ τὴν συμφωνίαν αὐτῆς ἀπὸ τῆς αἰκείας προικός.28

‘This provision, though consistent with many other provisions, is not applied by us, but that is how it is in customary law. If a married woman sells a dotal property of hers, given to her with the consent of her spouse, who, together with her, signs the notarial deed and she declares on the deed – with the consent of her spouse as spoken – the reason for which the dowry is being sold by the woman, and that this reason is real and the sale necessary, and that the consideration for the property is placed in the hands of the woman by the notary, the sale has validity and the woman cannot claim the property as dotal subsequently, even if the husband dies destitute. The same also pertains to loans: if a married woman borrows money or something else from someone and enters into an agreement with the consent of her husband, as

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28 Most recent edition by Fögen, ‘Die Scholien zur Hexabiblos’ (note 27 above), 310.
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noted above, and the loan is delivered into her hands, she herself becomes the debtor therein, even should her husband become destitute while alive or when deceased and she herself renders the debt from her dowry in a timely manner in accordance with her agreement'.

The legal practice which is valid instead and which reflects local customary law, can be summarized as follows: if a woman, a) during the marriage, b) sells her dowry, c) with the consent of her husband, d) while declaring that the sale is absolutely necessary and justified, and e) if the proceeds from the sale are given directly in the woman’s hands, the transaction is perfectly legal and the woman cannot reclaim her dotal property, even if her husband later dies destitute.29

Thus, we can attest to the emergence of customary law,30 which explains the legal formulation in some notarial documents. It is not a coincidence that in at least three documents

30 A contemporary local practice in Asia Minor, which is connected with the dotal property, is reported in 1317 / 1318 to the Patriarchal tribunal by the metropolitan of Attaleia. See H. Hunger / O. Kresten (Hrgb.), Das Register des Patriarchats von Konstantinopel. 1. Teil: Edition und Übersetzung der Urkunden aus den Jahren 1315–1331, (CFHB XIX/1), Wien 1981, Nr. 53 (= Darrouzès, Regestes V, No. 2083), 348/17-26: Ἀνέφερε καί, ὡς τινὲς τῶν τοπικῶν γυναιξὶ κατὰ νόμους συναπτόμενοι καὶ τῆς συμφωνηθέσις πρὸς αὐτοὺς προικὸς ἀποδιδομένης βιάζονται καὶ καταναγκάζονται, ἵνα τὰ μὲν τῶν προικίμων πραγμάτων δίδονται πρὸς αὐτοὺς κατὰ λόγον ξενίου, τὰ δὲ προικοδοτῶνται ταῖς γυναιξί καὶ εἰ συμβῇ προτελευτῆσαι τὴν γυναῖκα καὶ ἀπαιτηθῆναι τὴν προικά, ἀντιστρέφηται μόνον τὸ καταγραφὲν ὑπὲρ προικός, τὸ δὲ ἐπέκεινα πράγμα ἐναπομένη αὐτοὺς ἀναπαιτητὸν ὡς ξενίου λόγῳ δοθὲν πρὸς αὐτοὺς, διότι καὶ ἐπεκράτησαν ἢ τοιαύτη συνήθεις καὶ ἐνεργεῖται παραλόγως, μὴ βουλομένων ἄλλως συνάπτεσθαι εἰς γάμον τῶν πρὸς τοῦτο ἐρχομένων ἀνδρῶν (…). Transl. A.E. Laiou, ‘Marriage Prohibitions, Marriage Strategies and the Dowry in Thirteenth-Century Byzantium’, in J. Beaucamp / G. Dagron (eds.), La transmission du patrimoine. Byzance et l’aire méditerranéenne, (Travaux et mémoires du centre de recherche d’histoire et civilisation de Byzance, Collège de France. Monographies, 11), Paris 1998, 129-160 (= A.E. Laiou, Women, Family and Society in Byzantium, (Varioirum Collected Studies), Aldershot 2011, No. II), (145): ‘some of the men of the region, when they marry women according to the laws, and the agreed-upon dowry is handed over to them, they force and oblige [the girl’s family] to give some of the dowry goods to them in the form of a gift, and the rest to the woman in the form of dowry. So that, if the woman should predecease the husband, and the dowry is reclaimed [by her family], only the part that is registered as dowry would be returned to them, while the rest will remain with them [the husbands] without any claim, since it was given them as gift. This custom has become prevalent and it is practiced, unreasonably, so that these men refuse to marry otherwise (…’). Cf. T. Κιουσοπούλου, ‘Ἡ προστασία τῆς προίκας στο Βυζάντιο (12ος - 14ος αιώνας)’, Τα Ιστορικά 6 (1989), 265-276 (274); R. Macrides, ‘Dowry and Inheritance in the Late Period: some cases from the Patriarchal Register’, in D. Simon (Hrgb.), Eherecht und Familiengut in Antike und Mittelalter, (Schriften des Historischen Kollegs. Kolloquien, 22), München 1992, 89-98 (= R. Macrides, Kinship and Justice in Byzantium, 11th-15th Centuries, (Variourum Collected Studies),
from the region of Thessaloniki, dated to 1112, 1327 and 1373 respectively, in which the renouncement of the SCV is mentioned, almost all the criteria set out by the scholion are met. The women, all married, appear as sole owners and main contracting parties while their husbands consent to the sale with their signature. The women declare that the sale is absolutely necessary while their protection is secured by the fact that the proceeds from the sale are given directly into their own hands.

In the document dating from 1112, it is even mentioned that because of the legal ban on the alienation of dotal property and the understandable concern of any potential buyer, the vendor Eudokia requests the praetor and dux of Thessaloniki to grant her permission to sell her dotal property. The judge recognizes her claim as perfectly legal, referring to the

Aldershot 1999, No. V), (93); Παπαγιάννη, Η νομολογία των εκκλησιαστικών δικαστηρίων, II (note 9 above), 74-76.

31 Actes de Docheiariou, No. 3 (1112); Actes de Vatopédi, I, No. 65 (1327); Actes de Docheiariou, No. 42 (1373).

32 Actes de Docheiariou, No. 3, p. 67/1-2: Εὐδοκία (…) σύζυγος(ς) [δὲ τῇ γυναικοσύνα στεφάνι] (προτο- σπαθ(α)(η)ς) τοῦ ’Ραποσ(ο)λου(η); …; Actes de Vatopédi, I, No. 65, p. 364/2-3: Θεοδότη ἡ σύζυγος(ς) τοῦ περιόντος κύρ(η) ἐν(άν)τοι τοῦ Φύλλου(ος); Actes de Docheiariou, No. 42, p. 237/5: Ἀννα Καντακούνη[ή] Παπαγιάννη. Although most of the cases at our disposal that concern the alienation of the dowry involve prominent women of Byzantine society, their social status does not seem to influence the legal formatting of the notarial acts, in contrast to what V. Kravari, ‘Les actes privés des Monastères de l’Athos et l’unité du patrimoine familial’, in Simon, Eherecht und Familiengut (note 30 above), 77-88 suggests. Similarly Saradi, ‘The alienation of the dowry’ (note 4 above), 76.

33 Actes de Docheiariou, No. 3, p. 67/8: δέν ἔγγον ἐκποίησε[θη]τα κ(α)τά πρόστασιν τό κατά τήν ἔνορον τόν Βρώνων διακείμενα προικίματα μου ἁκάπηντα; …; Actes de Vatopédi, I, No. 65, p. 364/4-9: παράσκευο (καὶ) ἀποδοθοῦν (…) τὸ (…) γονικοπροικίμαμον μου; …; Actes de Docheiariou, No. 42, p. 238-239/12-13,33,43-44: Τό πείρι τήν Καλαμαρίαν διακείμεναν κτήμα, (…) εἰς προίκα δοθὲν (…) παράσκευα (…) ἔγον, ἡ ἠλπιὸς κυρία τοῦ πράγματος; …

34 Actes de Docheiariou, No. 3, p. 72/66: Κάγῳ δὲ Στέφανο(ος) (…) δὲ σύνενεον(ος) τῆς ἱερείας(ος) Εὐδοκίας(ος)(…), στέργο (καὶ) ἐπαδερματία τῆς παραδοκοῦ(σα) πράσιν(ια); …; Actes de Vatopédi, I, No. 65, p. 364/4-5: συναντίς (καὶ) συμπεραζότα (καὶ) τοῦ τοιοῦτου(ου) συναντίς(α) μου; …; Actes de Docheiariou, No. 42, p. 237/1: [Τὴν κατώτατη γεγραμμένην] πρίστας στέργον καὶ συναντίς αὐτή; (…) ὁ δοῦλος (…) Δημήτριο(ος) Παπαγιάννης(ος).

35 Actes de Docheiariou, No. 3, p. 67/9-9: (Καὶ) γὰρ ὑπὸ τῆς τῶν χρόνων ἀνωμαλίας(ος) (καὶ) σταυλόπτος(ος) εἰς πεντακ(α)πηντησίαν(ια) ἡμ(ῶν)(καὶ) πάντων τῶν ἀναγκαίων(ωσ) ἀσπρομάχων(ον), μὴ ἔχον(ες) δὲ πόρον τινα εἰς παραμυθίνα τῆς ἐφημέρου τροφῆς (…), ὡς ἀν διὰ τοῦ περιπεπερασμένου μου τιμήματος(ος) διαθέναισαι εὐποτὴν (καὶ) τοὺς παῖδας(ος) μου (καὶ) μὴ τὸ λιμό ἀποτελεθῶ; …; Actes de Docheiariou, No. 42, p. 238/22-23: μὴ δυνάμ(εν)οι δὲ ὁρελήσαι(σα) τοῦτο, μηδ[ε] εἰς τὸ ἄρχων ἀποκαταστήσθη (…) In the notarial act of Vatopedi no such kind of justification for the alienation of the dowry is mentioned.

36 Actes de Docheiariou, No. 3, p. 69/70-39:40: …εἰς νομόσημα(α) καὶ ἅπερ(π)ο(α) παλαιὰ πενταλαίματα εἰκοσικοῦτο (…) ἔβαλον τοῦτο ἀπὸ χιρ(ῶν) τούτου (…) εἰς χεῖρας μου; …; Actes de Vatopédi, I, No. 65, p. 364/18-19: (καὶ) ἔβαλον ἀπὸ σοῦ (…) νομίσματα(α) (ὑπὲρ)π(ου) τος διπλοκούμαντας (…), χειροδότης(ος); Actes de Docheiariou, No. 42, p. 238/39-40: καὶ ἔβαλον ἀφ’ ἑως τῶν εἰρήκειν ξεκόσια (ὑπὲρ)π(ου) ρα διὰ βενετικὸν δουκάτ(ον) πραττομέν(ον) (…).
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law of the Basilica in B. 28,8,20, which is interpreted broadly on the legal grounds that her husband had no income, and allows her to sell her property. The warranty of her husband protospatharios Stephanos Rasopoles, which follows the deed of sale, proves, however, that he was anything but destitute and that the whole procedure was a device to circumvent the law.37

6. The “teaching” of the “law aiding women” in the judicial practice and the notarial acts of the late Byzantine period

At the end of the 14th century the need to prescribe the ‘teaching of the law aiding women’ was pressing since it seemed that the law was used as a loophole in cases where women changed their minds and wanted to withdraw from a transaction.38 In 1398, a hypotyposis of the Patriarch Matthew I attempted to prescribe the process of ‘teaching’. The relevant passage reads as follows:39

ένθα η πλείον τοῦ δικαίου δοκιμασία καὶ βάσινος οὐκ ὀλίγη τούτος διασυρμοῦ ἀφορμὴ παρὰ τῶν πολλῶν καὶ μᾶλλον παρὰ τοῦ μή κατὰ τὴν τάξιν τὴν συνοδικήν καταδίκασθέντος· οὐκ ἔλαττον τούτον παρὰ τῶν πολλῶν καὶ μάλιστα παρὰ τοῦ μὴ κατὰ τὴν τάξιν τὴν συνοδικήν καταδικασθέντος· τὸν γὰρ πατριάρχην ἄρᾳ, καὶ τὸν ἰερέαν συνιστόν τοῦτον παρὰ τὴν γυναῖκα τῆς ἐπερωτήσεως· ἐλαύνετε δὲ τὴν διδασκαλίαν τοῦ νόμου μὴ εἰδότος τοῦ πατριάρχη· ῥᾴδιον γὰρ ἔσται τῇ διδαχθείσῃ γυναίκῃ καὶ ἀποβαλομένῃ τὸν νόμον διαβάλειν ἥστερον αὐτοῦ·


38 Saradi-Mendelovici, ‘Contribution to the Study of the Byzantine Notarial Formulas’ (note 4 above), 82.

‘Where most of the trials and tribulations of the law became for them (the *exokatakoiloī archontes*) the great cause of vilification from many and principally from he who was condemned in breach of the synodic order. Of similar gravity was the practice of ‘teaching’ of the law by those (*exokatakoiloī archontes*) without the knowledge of the Patriarch. Because it is a simple matter for the woman who was ‘taught’ the law to after deny the fact and to thereafter accuse them (the *exokatakoiloī archontes*) if she so wishes, if they (the *exokatakoiloī archontes*) do not have as witness the Patriarch or someone else. Thus, for that reason if they do not want to face such problems, it does not suffice that the examination of the cases be held in accordance with the synodic order and they should aid gratis those who are suffering since, according to the gospel ‘freely you have received, freely you shall give’, but that also the ‘teaching’ of the law should be performed only if the Patriarch has been notified and that he himself concurs with this, and that the *exokatakoiloī archontes* should not do the ‘teaching’ alone, neither should they write in their own hands the act, but take with them one of the Church’s grammarians to write the ‘teaching’ of the law and let them be present with them and other persons competent to bear witness to what was indeed spoken before the woman regarding the ‘teaching’ of the law. Thereby, legal transactions are unshakeable and no one may come into dispute with this procedure’.

Patriarch Matthew I decreed that the *exokatakoiloī archontes* in charge of ‘teaching’ should explain to women their rights only after the Patriarch had been informed. Furthermore, the document renouncing the woman’s right to invoke later the ‘law aiding women’, was to be drafted by a secretary of the church other than the ecclesiastic who explained the law to them. The presence of witnesses was also mandated.

It is worth noting that the *hypotyposis* was issued at a time of political instability and confusion, with Constantinople being under siege by the Turks, and its people suffering famine and deprivation. The document is perhaps related to the drafting of the *Hexabiblos aucta*, a legal compilation seeking the return to Roman origins. This *hypotyposis* as well as the Byzantines’ view, especially in the late Byzantine period, that the SCV applies to any transaction that involves women, explains why ‘the teaching of the law’ or ‘the law aiding women’ is mentioned in numerous notarial documents and in the Patriarchal register shortly

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42 On this legal source, see Τριώνας, *Οι πηγές του βυζαντινού δικαίου* (note 5 above), 391-392.
after 1398, indeed even in notarial templates regarding adoption or even sales of a slave or an animal. From the body of material that mentions ‘the teaching of law’ most cases refer explicitly to the rights of women over their dowries or to the gratuitousness of the ‘teaching of the law’ since the women involved are minor. Ecclesiastical officials who


46 Cf. Μάστος, Το οικογενειακόν δίκαιον (note 4 above), 99, 102-112; Παπαγάληνη, Η νομολογία των εκκλησιαστικών δικαστηρίων, II (note 9 above), 99-102.

47 Cf. Μάστος, Το οικογενειακόν δίκαιον (note 4 above), 101-102, 113; Παπαγάληνη, Η νομολογία των εκκλησιαστικών δικαστηρίων, II (note 9 above), 103-104.
perform the ‘teaching of the law’ are the Patriarch himself,\(^{48}\) the exokatakoiloi archontes who are either mentioned as a group\(^{49}\) or identified individually by their office\(^{50}\) or names, e.g. megas skeuophylax Theodoro Perdikes,\(^{51}\) megas sakellarios Demetrios Balsamon,\(^{52}\) megas chartophylax Holobolos,\(^{53}\) protekdikos Michael Balsamon,\(^{54}\) megas sakellarios Meli-

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48 MM II, No. 581 (1400) (= Darrouzès, Regestes VI, No. 3140), p. 400/32-401/1: (…) ἐξεδήρθη σὺν συνοικικάς παρὰ τῆς μεγάλης ἁγιοσύνης αὐτῶν οἱ βοηθῶνται αὐτῇ νόμον ἐπὶ τῇ ὀκείᾳ προκεῖ καὶ παρθενίασα τὴν ἀπὸ τούτου βοηθεῖσαν (…). Cf. Μάτσης, Τὸ οἰκογενειακὸν δίκαιον (note 4 above), 112.


50 A certain protekdikos in the years of the Patriarch Antony IV (1389-1390, 1391-1397), can safely be identified as Demetrios Balsamon, who in 1400 appears as megas sakellarios (see below note 52). For the identification see Darrouzès, Regestes VI, No. 2910 (1392/1393, date of the mentioned act), 192-193. The relevant passage is as follows: MM II, No. 557 (1400) (= Darrouzès, Regestes VI, No. 3113), p. 363/33-35: (…) ὡς ἐνδόσας καὶ προτροπῇ τοῦ ἁγιοτάτου ἐκείνου καὶ αὐτοῦ παρὰ πατριάρχου γέγονεν ἢ τοῦ νόμου διοικήσας πρὸς τὴν Ἀσασίναν παρὰ τοῦ τιμιότατον πρωτεκδίκου (…). Cf. Μάτσης, Τὸ οἰκογενειακὸν δίκαιον (note 4 above), 117-118. On the ecclesiastical office of protekdikos and his duties, see Χατζηαντωνίου, ‘Οφρυκαίλιος των σεκρέτων’ (note 49 above), 122-123.

51 Actes de Saint-Pantéleémon, No. 12 (1358), p. 105/32: ὡς ἐνδόσας τῆς ἁγιοσύνης τοῦ Θεοῦ μετὰ ἀπατεωσιιάς ἐκκλησίας (καὶ) ἁγιασόντος Θεοῦ (διὰ) τοῦ Περδίκης ὑπερήφανου; PLP No. 22439. Although not explicitly stated, the presence of the signature of the megas skeuophylax can only be justified if we assume that he was the one who performed ‘the teaching of the law’. Cf. Saradi-Mendelovici, ‘Contribution to the Study of the Byzantine Notarial Formulas’ (note 4 above), 81 and note 65. On the office of skeuophylax and its functions see Χατζηαντωνίου, ‘Οφρυκαίλιος των σεκρέτων’ (note 49 above), 106-107.


54 MM II, No. 536, p. 327/1-4 (note 52 above); PLP No. 2120. Cf. Μάτσης, Τὸ οἰκογενειακὸν δίκαιον (note 4 above), 115.
tiniotes, sakellios deacon Ioannes Syropoulos, megas oikonomos of Thessaloniki, priest Georgios, megas chartophylax of Thessaloniki Nikolaos Prevezianos. Of great interest is the reference to Michael Balsamon, who as epi ton krison does not belong to the exokatakoilo archontes, an indication that in 1362 the ‘teaching of the law’ could be performed


56 MM II, No. 558 (1400) (= Darrouzès, Regestes VI, No. 3114), p. 367/19-23: (…) τὸν τε γὰρ νόμον ἐκδιδάσκει, ὡς ἐδίδαξε, παρὰ τοῦ τιμιωτάτου σακελλίου τῆς καθ’ ἡμέραν ἀγιωτάτης τοῦ θεοῦ μεγάλης ἐκκλησίας (...) δικάνον κυρίου Ἰουαννοῦ τοῦ Σωροπούλου (...). Cf. PLP No. 27210. On the ecclesiastical office of (epi ton sakellioi) and his duties see Χατζηαντωνίου, ‘Ὀφφίκιαλοι τῶν σεκρέτων’ (note 49 above), 116.

57 See above, note 43. In my view, Γεώργιος should be identified as Georgios Senacherim, who in 1419 is referred to as megas oikonomos of the archbishopric of Thessaloniki and priest. Cf. PLP No. 25148 and Χατζηαντωνίου, ‘Ὀφφίκιαλοι τοῦ σεκρέτου’ (note 49 above), 102 and note 58, 169. It should be noted that all the other known megaloi oikonomoi of the archbishopric of Thessaloniki appear as deacons. On the date of their copying ‘bald nach 1426’ see ibid, 265 (= 162). For the structure and the offices of the archbishopric of Thessaloniki, which are similar to those of the Patriarchate of Constantinople, see Χατζηαντωνίου, ‘Ὀφφίκιαλοι τῶν σεκρέτων’ (note 49 above), 90; on the office of oikonomos and its functions, see ibid, 98.


60 On the ecclesiastical office epi ton krison, see Darrouzès, Recherches sur les officia (note 40 above), 377-378.
by ecclesiastical officials of lower rank. The *katholikoi krites* were also authorized to perform ‘the teaching of the law’.  

#### 7. Conclusion

The above discussion reveals the different pictures that emerge from the study of normative texts (‘law in books’) compared with the documentary evidence (‘law in action’). In the case of the alienation of dotal property, it also illustrates that the deviation of Byzantine law from the Roman legal tradition is not always a result of misinterpretation or poor knowledge of the doctrines current in that tradition. The non-implementation of the Justinianic regulations in legal practice, despite their inclusion in the Byzantine law books, was – at least in my view – deliberate, with the intention to serve financial purposes, in this case, the need, under certain circumstances, to alienate and liquidate dotal property. The regulations of Justinian led to a broader application of the SCV, confusion regarding its origin and even to the emergence of local customary law. It would seem therefore that in Byzantium, law could simultaneously serve as a means of change and of stability.

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