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 dotalem 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 intellegi oportet in res mariti vel dotis quidem, aestimatas autem, in quibus dominium et periculum mariti est: in fundo autem inaestimato, qui et dotalis proprie 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 hypothecs 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. 5,13,1,15[2] and C. 4,29,22 concerning the *Senatus Consultum Velleianum* (hereafter

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1 The translation in B.W. Frier (ed.), *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text*. Based on a Translation by Justice Fred H. Blume, Volume II: Books IV-VII, Cambridge 2016, 1199. The Greek version transmitted in the *Basilica* remains faithful to the Justinianic reduction. Cf. B. 29,1,119,15 = C. 5,13,1,15 (BT 1478/7-17): Ὁ νόμος ὁ κελεύων μὴ πιπράσκεσθαι τὸν προικιμαῖον ἀγρὸν παρὰ γνώμην τῆς γυναικὸς μήτε ὑποτίθεσθαι, κἂν συναινῇ ἡ γυνή, χώραν ἔχει οὐ μόνον ἐπὶ τοῖς Ἰταλικοῖς ἀγροῖς, ἀλλὰ καὶ ἐπὶ τοῖς ἐπαρχικοῖς. Καὶ κεκώλυται ἡ ἐκποίησις αὐτοῦ πρῶτον μὲν ἐπειδὴ τὸ ὑποκείμενον οὐ καλῶς τις ἐκποιεῖ, ἄλλως τε δὲ καὶ διὰ τὴν τοῦ νόμου κώλυσιν, ὥστε μηδὲ συναινούσης τῆς γυναικὸς τὴν ἐκποίησιν γενέσθαι. Κἂν τὰ μάλιστα γὰρ ἡ Ἀναστασίου διάταξις ἐκέλευσεν, ἵνα δύναται ἡ γυνὴ πιπράσκοντος τοῦ ἀνδρὸς πρᾶγμα συναινεῖν αὐτῷ καὶ ἀποτάττεσθαι τοῖς ἀπὸ τῆς προικὸς δικαίοις, ὅμως ἐκείνη χώραν ἔχει ἐπὶ τῶν τῷ ἀνδρὶ διαφερόντων πραγμάτων ἢ προικιμαίων διατετιμημένων· ἐπὶ δὲ ἀγροῦ ἀδιατιμήτου οὐδὲν βλάπτεται ἡ γυνὴ ἐκ τῆς συναινέσεως.

2 Nov. 61,1,3 (SK 331/30-33): Καὶ πολλῷ μᾶλλον ταῦτα ἐπὶ τῆς προικὸς κρατεῖν, εἴπερ τινὰ τῆς προικὸς ἢ ἐκποιήσειεν ἢ ὑπόθοιτο· ἤδη γὰρ τὰ τοιαῦτα ἱκανῶς περιείργασται καὶ νενομοθέτηται. 'And those

SCV),[3] 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.[4] 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 *Procheiron*,[5] the first legal works of the Macedonian dynasty, we read:

Eis. 19,3: εἰ δὲ καὶ ζῶντος τοῦ ἀνδρὸς τῇ πράσει τῆς προγαμιαίας δωρεᾶς ἡ γυνὴ συναινέσαι πεισθῇ, οὐκ ἔῤῥωται ἡ τοιαύτη πρᾶξις·δεῖ γάρ, καθάπερ καὶ ἐπὶ τῆς προικός, διετοῦς αὖθις 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	Proch. 9,13: Τὰ τῆς προγάμου δωρεᾶς καὶ τῆς προικὸς πράγματα οὔτε συναινούσης τῆς γυναικὸς ἐκποιεῖται, οὐδὲ ἐνεχυριάζεται, εἰ μὴ δευτέραν ποιήσηται συναίνεσιν αὐτοῖς ἡ γυνὴ μετὰ διετίαν ἔνθα μέν-

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' ὥςπερ ἐπὶ τῶν intercessionων ἐγράψαμεν τὸ δεῖν διετοῦς ὕστερον χρόνου παριόντος αὖθις ἑτέραν ὁμολογίαν γράφειν βεβαιοῦσαν τὴν συναίνεσιν καὶ τότε κύριον εἶναι τὸ γινόμενον, οὕτω κἀνταῦθα γινέσθω, καὶ εἰ συναινέσειεν ἡ γυνή, κατὰ τὸ τῶν intercessionων σχῆμα ἔστω παντελῶς ἀζήμιος, εἰ μὴ καὶ δευτέραν, καθάπερ εἰπόντες ἔφθημεν, ποιήσαιτο συναίνεσιν. 'However, precisely 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, thus it may come to pass and if the woman consents, correspondingly to what we legislated regarding *intercessions*, she should not in any way be liable, save for if she consents for a second time, precisely as in the case to which we referred above'.

4 For all this, see A. Χριστοφιλόπουλος, 'Η εκποίησις των προικώων ακινήτων κατά το βυζαντινόν δίκαιον', *Αρχείον Ιδιωτικού Δικαίου* 6 (1939), 538-549 (= A. Χριστοφιλόπουλος, *Δίκαιον και Ιστορία. Μικρά Μελετήματα*, Αθήνα 1973, 186-196); N. Μάτσης, *Το οικογενειακόν δίκαιον κατά την νομολογίαν του Πατριαρχείου Κωνσταντινουπόλεως των ετών 1315-1401*, Αθήνα 1962, 96-123; H. Saradi-Mendelovici, 'A Contribution to the Study of the Byzantine Notarial Formulas: The *infirmitas sexus* of Women and the *Sc. Velleianum*', *BZ* 83 (1990), 72-90 (72-79); H. Saradi, 'The alienation of the dowry in the acts of Byzantine notaries', *VV* 55 (1998), 72-77 (72).

5 On the *Eisagoge* and the *Procheiron* and the issues regarding their dating see Σπ. Τρωιάνος, *Οι πηγές του βυζαντινού δικαίου*, Αθήνα-Κομοτηνή 2011[3], 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).

ἑτέραν ὁμολογίαν γράφειν βεβαιοῦσαν τὴν συναίνεσιν, καὶ τότε κύριον εἶναι τὸ γινόμενον·	shall the woman consent in writing, and thus give the transaction legal force.	τοιγε δυνατόν ἐστι τὸ ἱκανὸν αὐτῇ γενέσθαι ἐξ ἑτέρων πραγμάτων.

However, as the studies of A. Christophilopoulos and Helen Saradi-Mendelovici have shown,[6] 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[7] 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

6 See above note 4.

7 For a general overview of the legal status of women in Byzantium, see J. Beaucamp, 'La situation juridique de la femme à Byzance', *Cahiers de Civilisation Médiévale* 20 (1977), 145-176 (= J. Beaucamp, *Femmes, patrimoines, normes à Byzance*, (Centre de recherche d'histoire et civilisation de Byzance. Bilans de recherche, 6), Paris 2010, No. II, 21-56).

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,[8] 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

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8 For the use of the term βοήθεια νόμου in another legal context, see H. Gerstinger, 'Zur Klausel ἀποτάττομαι πάσῃ βοηθείᾳ νόμων in den byzantinischen Landpachtverträgen', *Κανίσκιον Φαίδωνι Ι. Κουκουλέ*, *ΕΕΒΣ* 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; Ε. Παπαγιάννη, *Η νομολογία των εκκλησιαστικών δικαστηρίων της βυζαντινής και μεταβυζαντινής περιόδου σε θέματα περιουσιακού δικαίου* ΙΙ. *Οικογενειακό δίκαιο*, (Forschungen zur byzantinischen Rechtsgeschichte. Athener Reihe 11), Αθήνα / Κομοτηνή 1997, 101-104; Saradi, 'The alienation of the dowry' (note 4 above), 75.

10 On the SCV, see U. Mönnich, *Frauenschutz 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*, ΙΙ (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.

12 On the term *intercessio* with particular reference to the Justinianic legislation, see A. Diaz Bautista, 'L' intercession des femmes dans la législation de Justinien', *RIDA* 30 (1983), 81-99. For a detailed and in-depth analysis of the meaning of intercession, see J. Beaucamp, *Le statut de la femme à Byzance (4e-7e siècle)*. I : Le droit impérial, (Travaux et mémoires du Centre de recherche d'histoire et civilisation de Byzance. Collège de France. Monographies, 5), Paris 1990, 54-78.

13 On the possibility for women to renounce the *exceptio SCti Velleiani* in classical Roman law, see Th. Finkenauer, 'Der Verzicht auf die *exceptio SCti Velleiani* im klassischen Recht', *TRG* 81 (2013), 17-49.

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 practice[15] 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.

15 See the list of the relevant notarial documents by Saradi-Mendelovici, 'Contribution to the Study of the Byzantine Notarial Formulas' (note 4 above), 83-86. On the use of the SCV in Sicily and in South Italy, see A. Peters-Custot, 'La mention du sénatus-consulte velléien dans les actes grecs d'Italie du Sud et de Sicile', in J.-M. Martin / A. Peters-Custot / V. Prigent (dir.), *L'héritage byzantin en Italie.* II : *Les cadres juridiques et sociaux et les institutions publiques*, (Collection de l'École française de Rome, 461), Rome 2012, 51-72. For a contemporary use of the SCV in Italy during the 12th century based on material in Latin, see F. Theisen, 'Die Bedeutung des SC Velleianum in der Rechtspraxis des Hochmittelalters', *SZ* 122 (2005), 103-137.

16 Peira 12,1: Ὅτι γυναικὶ ἐγγυωμένῃ βοηθεῖται, καταβαλοῦσα δὲ ὑπέρ τινος οὐκ ἀναλαμβάνει.

17 See Beaucamp, *Le statut de la femme à Byzance* (note 12 above), 56-62. Cf. Rhom. ag. 3,2,3/18-27: καὶ ἐάν, ἀγνοῶν ἐγὼ τὸ πραττόμενον, <συναλλάξω, ἡ δὲ> δανεισαμένη παρ' ἐμοῦ δωρήσηταί σοι, οὐ βοηθεῖται. εἰ δὲ βουλομένη σοι δωρήσασθαι καταβάλλει τῷ δανειστῇ σου, ἀργεῖ τὸ δόγμα· οὐ γὰρ ταῖς

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 ἑρμήνευσεν, ὅτι, ὅτε μὲν ἐγγυᾶται, ἢ ἀγνοεῖ τὸν νόμον τὸν περὶ τῶν ἐγγυητῶν καὶ ὡς 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 ταῦτα ἐπιζητοῦσα τὸ καταβληθέν, οὐκ ἀναλαμβάνει. διατί; ὅτι ἐκ δύο ἁμαρτημάτων ἕλκεται καὶ ὡς ἐγγυησαμένη καὶ ἢ ἀγνοοῦσα τὸν νόμον ἢ δολερῶς ὑπελθοῦσα τὴν ἐγγύην, καὶ ὡς δυναμένη καὶ μετὰ τὴν ἐγγύην ἀντιλέγειν καὶ ὅτε τὴν ἀρχὴν εἵλκετο πρὸς ἀπαίτησιν μὴ ἀντειποῦσα.[19]

δωρουμέναις, ἀλλὰ ταῖς γινομέναις ἐνόχοις βοηθεῖ· εὐχερῶς γὰρ ἑαυτὰς ἐνοχοποιοῦσιν ἥπερ δωροῦνται. (…). εἰ δὲ καὶ γινώσκουσα μὴ ἐνέχεσθαι γυνὴ ἀντιφωνήσῃ, οὐ βοηθεῖται.(...)· εἰ δὲ λήθῃ τοῦ δόγματος καταβάλῃ, ἀναλαμβάνει. 'And should I be in ignorance of this, I proceed to a transaction and she, having borrowed from me, proceeds to give a gift to you, the SCV shall not come to her aid. And if she wishes to give you a gift and for that reason pays your lender, the SCV cannot be invoked. Not those who give gifts, but those who have a debt obligation are assisted because it is easier for women to take on a debt than it is to give gifts. And, while the woman knows she has no debt obligation, and despite being a guarantor for someone, she receives no assistance from the SCV. If, however, the payment is made because she is ignorant of the SCV, she receives this money back'.

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'.

4. ‘The law aiding women’ in the judicial practice of the middle Byzantine period

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.[20] 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:[21] by virtue of a chrysobull issued by the emperor Basil II in 1006/1007 to his grandpar-ents *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 *koubouk*leisios Leon. The transaction was perfectly legal, since Vivarion had already been donated to Stephanos Iveritzes in 996/997.[22] 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.[23] However, after her husband’s death, Maria contested the initial transaction and the transfer of Vivarion to Pikrides, pleading τὸν βοηθοῦντα νόμον:

> καὶ ἐπεὶ τοῦτο ἐνόσει, ἑτέρῳ δικαιώματι τὸ νοσοῦν τεθεράπευτο. αὐτὴ γὰρ ἡ πρὸς τὴν πρᾶσιν παρανομήσασα, καὶ διὰ τὸν βοηθοῦντα νόμον εἰς τὴν ἀνάληψιν δικαιουμένη τοῦ κτήματος, ἀγῶνα μὲν δικαστηρίου μετὰ τὴν τοῦ ἀνδρὸς ἀποβίωσιν κατὰ τοῦ Πικρίδου ἐκρότησε, (...).[24]

20 Michael Psellos, Actum 3 (ed. G.T. Dennis, Michaelis Pselli Orationes forenses et Acta, Stutgardiae et Lipsiae 1994, 160-168).

21 A brief presentation of the trial is offered by G.T. Dennis, ‘A Rhetorician Practices Law: Michael Psellos’, in A.E. Laiou / D. Simon (eds.), *Law and Society in Byzantium: Ninth-Twelfth Centuries*. Proceedings of the Symposium on Law and Society in Byzantium, 9th – 12th Centuries, Dumbarton Oaks, May 1-3, 1992, Washington D.C. 1994, 187-197 (194). For a detailed and annotated analysis of the trial, cf. M. Τάνταλος, ‘Μια δίκη βυζαντινή του 11ου αιώνα’, *Βυζαντινά* 36, forthcoming.

22 Michael Psellos, Actum 3, ed. Dennis (note 20 above), 161/1-163/76.

23 Michael Psellos, Actum 3, ed. Dennis (note 20 above), 163/76-78: καὶ ἕτερον, αὐτὴν τὴν Μαρίαν ἅμα τῷ οἰκείῳ ἀνδρὶ διαπωλήσασαν τοῦτο τῷ τοῦ μαγγλαβίτη πατρὶ τῷ Πικρίδη.

24 Michael Psellos, Actum 3, ed. Dennis (note 20 above), 163/78-164/83.

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.

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25 Michael Psellos, Actum 3, ed. Dennis (note 20 above), 164/83-89: (…), πρὶν ἢ δὲ ἐξενεχθῆναι ἀπόφασιν νομίσματά τινα παρ'αὐτοῦ λαβοῦσα, καθαρῶς διελύσατο. ἐπὶ δὲ τῇ διαλύσει παρ' αὐτοῦ δὴ τοῦ δικάζοντος ἀπελύθη ὑπόμνημα· μεθ' ὃ ἡ αὐτὴ πάλιν δευτέραν ἔννομον πρᾶσιν τοῦ κτήματος πρὸς τὸν αὐτὸν Πικρίδην ἐξέθετο, μεθ' ὃ καὶ ἕτερά τινα 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'.

26 On the similar wording used in Roman Law and in Byzantium to denote the female weakness, see J. Beaucamp, 'Le vocabulaire de la faiblesse féminine dans les textes juridiques romains du III^{e} au VI^{e} siècle', *RHD* 54 (1976), 485-508 (= Beaucamp, *Femmes, patrimoines, normes à Byzance* (note 7 above), No. I, 1-20); S. Dixon, 'Infirmitas sexus: Womanly weakness in Roman Law', *TRG* 52 (1984), 343-371 (356-361); H. Saradi-Mendelovici, 'L''infirmitas sexus' présumée de la moniale byzantine: doctrine ascétique et pratique juridique', in J.Y. Perreault (ed.), *Les femmes et le monachisme byzantin*. Actes du Symposium d'Athènes, 28-29 Mars 1988, (Publications de l'Institut Canadien d'Archéologie à Athènes, 1), Athènes 1991, 87-97.

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,[27] 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 συνᾴδον παρ' ἡμῖν οὐ κρατεῖ, ἀλλ' οὕτως ἐξ ἔθους πολιτεύεται· τοῦ γάμου συνεστῶτος ἐὰν γυνὴ πωλήσῃ προικιμαῖον αὐτῆς κτῆμα συναινοῦντος καὶ τοῦ ἀνδρὸς αὐτῆς καὶ μετ' αὐτὴν προτάσσοντος ἢ δι' ὑπογραφῆς ἢ διὰ σιγνογραφίας ἐν τῷ γενομένῳ ταβελλιωνικῷ συμβολαίῳ, καὶ προβῇ μὲν τὸ συμβόλαιον ἐκ προσώπου ταύτης – συναινοῦντος καὶ τοῦ ἀνδρός ὡς εἴρηται – τὴν αἰτίαν δηλοῦν, δι' ἣν παρὰ τῆς γυναικὸς τὸ προικιμαῖον κτῆμα πιπράσκεται ἀληθῆ τε οὖσαν καὶ ἀναγκαῖαν, δοθῇ δὲ καὶ τὸ τίμημα τοῦ πραθέντος εἰς τὰς χείρας (sic) τῆς γυναικὸς διὰ τοῦ ταβελλίωνος τῶν ἐντελῶν οὔσης δηλονότι, ἔρρωται ἡ πρᾶσις καὶ διεκδικηθῆναι παρὰ τῆς γυναικὸς τὸ πραθὲν ὡς προικιμαῖον οὐ δύναται μετὰ ταῦτα, εἰ καὶ ὁ ἀνὴρ ὕστερον ἐν ἀπορίᾳ τελευτήσει. καὶ ταῦτα δὲ καὶ ἐπὶ τῶν δανείων γίνεται· καὶ συνεστῶτος γὰρ τοῦ γάμου, ἐὰν γυνὴ νομίσματα παρά τινος ἢ ἕτερόν τι πρωτοτύπως δανείσηται καὶ προβῇ μὲν τὸ συμβόλαιον ἐκ προσώπου ταύτης συναινέσει καὶ τοῦ ἀνδρός, ὡς ἀνωτέρω δεδήλωται, παραδοθῇ δὲ καὶ τὸ χρέος εἰς τὰς χεῖρας αὐτῆς, αὐτὴ γίνεται τούτου χρεώστης καὶ τοῦ ἀνδρὸς ἀπόρου γενομένου ζῶντος ἢ καὶ τελευτήσαντος αὐτὴ τοῦτο πρὸς τὸν δανειστὴν ἀποδίδωσιν ἐμπροθέσμως κατὰ τὴν συμφωνίαν αὐτῆς ἀπὸ τῆς οἰκείας 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

27 For the exact date, origin and the transmission of the scholion, see M.Th. Fögen, 'Die Scholien zur Hexabiblos im Codex vetustissimus Vaticanus Ottobonianus gr. 440', *FM* IV (1981), 256-345 (285-292, 295).

28 Most recent edition by Fögen, 'Die Scholien zur Hexabiblos' (note 27 above), 310.

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

29 Cf. Fögen, 'Die Scholien zur Hexabiblos' (note 27 above), 311-312.

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 συμφωνηθείσης πρὸς αὐτοὺς προικὸς ἀποδιδομένης βιάζονται καὶ καταναγκάζουσιν, ἵνα τὰ μὲν τῶν προικιμαίων πραγμάτων δίδωνται πρὸς αὐτοὺς κατὰ λόγον ξενίου, τὰ δὲ προικοδοτῶνται ταῖς γυναιξί· καὶ εἰ συμβῇ προτελευτῆσαι τὴν γυναῖκα καὶ ἀπαιτηθῆναι τὴν προῖκα, ἀντιστρέφηται μόνον τὸ καταγραφὲν ὑπὲρ προικός, τὸ δὲ ἐπέκεινα πρᾶγμα ἐναπομένῃ αὐτοῖς ἀναπαίτητον ὡς ξενίου λόγῳ δοθὲν πρὸς αὐτούς, ὥστε καὶ ἐπεκράτησεν ἡ τοιαύτη συνήθεια 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*, (Variorum 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, 'Η προστασία της 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*, (Variorum Collected Studies),

from the region of Thessaloniki, dated to 1112, 1327 and 1373 respectively,[31] in which the renouncement of the SCV is mentioned, almost all the criteria set out by the scholion are met. The women, all married,[32] appear as sole owners and main contracting parties[33] while their husbands consent to the sale with their signature.[34] The women declare that the sale is absolutely necessary[35] while their protection is secured by the fact that the proceeds from the sale are given directly into their own hands.[36]

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 *doux* of Thessaloniki to grant her permission to sell her dotal property. The judge recognizes her claim as perfectly legal, referring to the

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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 (…) σύζυγο(ς) [δὲ τ]υγχάνουσα Στε[φάνου] (πρωτο)-σπαθ(α)ρ(ίου) τοῦ Ῥασοπ(ώ)λ(ου)…; Actes de Vatopédi, I, No. 65, p. 364/2-3: Θεοδότη ἡ σύζυγο(ς) τοῦ περιόντος κ(ῦρ) Ἰω(άνν)ου τοῦ Φάλκωνο(ς); Actes de Docheiariou, No. 42, p. 237/5: Ἄννα Καντακουζηνὴ Παλαιολογίνα. 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: δεῖν ἔγνων ἐκ[ποιήσα]σθαι κ(α)τὰ πράσιν τὰ κ(α)τὰ τὴν ἐνορίαν τῶν Βρύων διακείμενα προικιαῖα μου ἀκίνητα...; Actes de Vatopédi, I, No. 65, p. 364/4-9: πιπράσκω (καὶ) ἀποδίδωμι (...) τὸ (...) γονικοπροικιμαῖον μου...; Actes de Docheiariou, No. 42, p. 238-239/12-13,33,43-44: Τὸ περὶ τὴν Καλαμαρί(αν) διακείμενον κτῆμα, (...) εἰς προῖκα δοθὲν (…) πιπράσκω (...) ἐγώ, ἡ ἀληθὴς κυρία τοῦ πράγματος....

34 Actes de Docheiariou, No. 3, p. 72/66: Κἀγὼ δὲ Στέφαν(ος) (…), ὁ σύνευνο(ς) τ(ῆς) προρηθ(είσης) Εὐδοκί(ας)(...), στέργω (καὶ) ἐπιβεβαιῶ τ(ὴν) παροῦ(σαν) πρά(σιν)...; Actes de Vatopédi, I, No. 65, p. 364/4-5: συναινέσει (καὶ) συμπράξει (καὶ) τοῦ τοιούτ(ου) συ(ζύγ)ου μου...; Actes de Docheiariou, No. 42, p. 237/1: [+Τὴν κάτωθεν γεγραμμένην] πρᾶσιν στέργων καὶ συναινῶν αὐτῇ (...). Ὁ δοῦλος (...) Δημήτρ(ιος) Παλαιολόγ(ος).

35 Actes de Docheiariou, No. 3, p. 67/7-9: (Καὶ) γὰρ ὑπὸ τῆς τῶν χρόνων ἀνωμαλί(ας) (καὶ) στενότητο(ς) εἰς πενίαν κ(α)ταντησάντ(ων) ἡμ(ῶν) (καὶ) πάντων τῶν ἀναγκαί(ων) ὑστερουμέν(ων), μὴ ἐχόντ(ων) δὲ πόρον τινὰ εἰς παραμυθίαν τῆς ἐφημέρου τροφῆς (...), ὡς ἂν διὰ τοῦ περιελευσομένου μοι τιμήματο(ς) διαθρέψω ἑαυτὴν (καὶ) τοὺς παῖδ(ας) μου (καὶ) μὴ τῷ λιμῷ ἀπολεσθῶμεν.; Actes de Docheiariou, No. 42, p. 238/22-23: μὴ δυνάμ(εν)οι δὲ ὀφελῆ[σαι] τοῦτο, μηδ[ὲ εἰς] τὸ ἀρχαῖον ἀποκαταστῆσαι.... 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 νομίσμ(α)τ(α) ὑπέρπ(υ)ρ(α) παλαιὰ πενταλαίμια εἰκοσιοκτὼ (...) ἔλαβον ταῦτα ἀπὸ χειρ(ῶν) σου εἰς χεῖρας μου...; Actes de Vatopédi, I, No. 65, p. 364/18-19: (καὶ) ἔλαβον ἀπο σοῦ (...) (νομίσμα)τ(α) (ὑπέρ)π(υ)ρα τεσσαράκονταἕξ (...), χειροδότ(ως); Actes de Docheiariou, No. 42, p. 238/39-40: καὶ ἔλαβον ἀφ' ὑμῶν τὰ εἰρημένα ἑξακόσια (ὑπέρ)π(υ)ρα διὰ βενετικῶν δουκάτ(ων) πραττομέν(ων)....

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]

> ἔνθα ἡ πλείων τοῦ δικαίου δοκιμασία καὶ βάσανος οὐκ ὀλίγη τούτοις διασυρμοῦ ἀφορμὴ παρὰ τῶν πολλῶν καὶ μάλιστα παρὰ τοῦ μὴ κατὰ τὴν τάξιν τὴν συνοδικὴν καταδικασθέντος· οὐκ ἔλαττον τούτου καὶ τὸ διδασκαλίαν γίνεσθαι νόμου παρ' αὐτῶν μὴ εἰδότος τοῦ πατριάρχου· ῥᾴδιον γὰρ ἔσται τῇ διδαχθείσῃ γυναικὶ καὶ ἀποβαλομένῃ τὸν νόμον διαβαλεῖν ὕστερον αὐτὸν ἢν ἐθέλῃ, εἰ μήτε τὸν πατριάρχην ἔχῃ τούτου συνίστορα, μή τέ τινα ἕτερον μετ' αὐτοῦ πρὸς μαρτυρίαν· ὅθεν κἂν τούτοις εἰ βούλοιντο ἀπρόσκοποι εἶναι, οὐ συνοδικῶς χρὴ μόνον τὰς ἐξετάσεις τῶν ὑποθέσεων τούτους ποιεῖν καὶ προῖκα καὶ ἀμισθὶ τὴν βοήθειαν τοῖς καταπονουμένοις παρέχειν – «δωρεάν γάρ, φησι, ἐλάβετε, δωρεὰν δότε»- ἀλλὰ καὶ τὴν διδασκαλίαν τοῦ νόμου οὐκ ἄλλως ποιεῖν εἰ μὴ κοινωθῇ τὰ περὶ τούτου τῷ πατριάρχῃ καὶ ἐνδῷ αὐτὸς τοῦτο· ὁ δὲ καὶ αὖθις οὐ μόνος τῇ ἐπερωτήσει τῇ πρὸς τὴν γυναῖκα χρήσεται, οὐδὲ αὐτὸς οἰκειοχείρως τὸ συμβόλαιον γράψει, ἀλλὰ συμπαραλήψεται μεθ' ἑαυτοῦ ἕνα τῶν τῆς Ἐκκλησίας γραμματικῶν, τὸν γράψαντα τὴν τοῦ νόμου διδασκαλίαν, συμπαρόντων αὐτοῖς καὶ ἑτέρων ἱκανῶν πρὸς μαρτυρίαν τῶν παρ'αὐτοῦ πρὸς τὴν γυναῖκα τὴν διδασκομένην λεχθησομένων· οὕτω γὰρ τό τε γεγονὸς ἀμετάθετον ἔσται, καὶ τῷ τὴν τοιαύτην ὁδὸν μετιόντι μῶμος οὐδεὶς προστριβήσεται.

37 Saradi-Mendelovici, 'Contribution to the Study of the Byzantine Notarial Formulas' (note 4 above), 81. For a detailed analysis of the case see Κιουσοπούλου, 'Η προστασία της προίκας' (note 30 above), 266-272. Cf. Saradi, 'The alienation of the dowry' (note 4 above), 75-76.

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

39 *Patriarchatus Constantinopolitani acta selecta*. Collegit et in linguam Gallicam vertit Ioannes Oudot, Vol. I, (Sacra Congregazione per la Chiesa Orientale. Codificazione canonica orientale. Fonti, Ser. II, fasc. III), Città del Vaticano 1941, p. 160, Actum XXVII, §§ 31-32.

> 'Where most of the trials and tribulations of the law became for them (the *exokatakoiloi 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 (*exokatakoiloi 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 *exokatakoiloi archontes*) if she so wishes, if they (the *exokatakoiloi 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 *exokatakoiloi 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 *exokatakoiloi archontes*[40] 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.[41] The document is perhaps related to the drafting of the *Hexabiblos aucta,* a legal compilation seeking the return to Roman origins.[42] 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

40 On the term, see J. Darrouzès, *Recherches sur les ὀφφίκια de l'Église byzantine*, (Archives de l'Orient Chrétien, 11), Paris 1970, 59-60, 101-103.

41 The situation in Constantinople at that time is described by R. Estangüi Gómez, *Byzance face aux Ottomans. Exercice du pouvoir et contrôle du territoire sous les derniers Paléologues (milieu XIV^e^ – milieu XV^e^ siècle*, (Byzantina Sorbonensia, 28), Paris 2014, 287-290.

42 On this legal source, see Τρωιάνος, *Οι πηγές του βυζαντινού δικαίου* (note 5 above), 391-392.

after 1398, indeed even in notarial templates regarding adoption[43] or even sales of a slave or an animal.[44] From the body of material that mentions 'the teaching of law'[45] most cases refer explicitly to the rights of women over their dowries[46] or to the gratuitousness of the 'teaching of the law' since the women involved are minor.[47] Ecclesiastical officials who

43 D. Simon / Sp. Troianos, 'Dreizehn Geschäftsformulare', *FM* II (1977), 262-295, No. VIII, p. 277/2-5 (= Sp. Troianos, *Historia et Ius*. I: 1969-1988, Athen 2004, 157-192 (p. 174/2-5)): (...) Θεοδώρα ἡ Μιχελήνα ἐντελὴς οὖσα τὴν ἡλικίαν, ἀναδειαχθεῖσά τε παρὰ τοῦ τιμιωτάτου μεγάλου οἰκονόμου Θεσσαλονίκης πρεσβυτέρου κυρ(οῦ) Γεωργ(ίου) τοῦ ὁ δεῖνος καὶ ἀποταξαμένη παντὶ νομίμῳ κεφαλαίῳ τῷ προσβοηθοῦντι μοι (...). The mention of the adoption in the template misled its editors to connect the 'teaching of the law' with the institution of adoption itself. See *ibid*, 281 (= 178): 'Bemerkenswert ist dagegen die Einschaltung des Ökonomen von Thessaloniki. Die von ihm erteilte "Belehrung" ist kein geistlicher Rat, sondern Rechtsbelehrung, das läßt sowohl der Kontext als auch der Umstand, daß sie überhaupt in der Urkunde erwähnt wird, deutlich erkennen. Die Belehrung dürfte sich auf die rechtlichen Folgen einer Adoption bezogen haben'. See also G. Ferrari Dalle Spade, 'Formulari notarili inediti dell'età bizantina', *Bulletino dell'Istituto Storico Italiano* 33 (1912), 41-128 (repr. in: G. Ferrari Dalle Spade, *Scritti giuridici*, I, Milano 1953, 337-408 (= edition consulted)), No. 40 ll. 2-6: ἄκτον εἰς υἱοθεσίαν: - Ἐν ὀνόματι τοῦ πατρός· καὶ τὰ λοιπά: ἡμεῖς οἱ ὁμόζυγοι ὅτε ὁ δεῖνα καὶ ἡ δεῖνα. οἱ ἀπὸ τῆς χώρας τῆς δεῖνα ὁρμώμενοι. καὶ ἄνωθεν τοῦ παρόντος ὕφους τὸν τύπον τοῦ ζωηφόρου σταυροῦ ἐγχαράξαντες· καὶ ἀποβαλλόμενοι πρότερον νομικὴν βοήθειαν, ἐπαρρήγουσαν ἡμῶν τὸ παρὸν τῆς υἱοθεσίας ἔγγραφον. On the person of 'Γεωργ(ίου)' see below, note 57.

44 Ferrari Dalle Spade, 'Formulari notarili inediti dell' età bizantina' (note 43 above), No. 37 ll. 23-27: ἄκτον εἰς πρᾶσιν ψυχαρίου. ἢ ζώου: ἐν ὀνόματι τοῦ πατρός: καὶ τὰ λοιπά. ἡμεῖς οἱ ὁμόζυγοι ὅτε ὁ δεῖνα καὶ ἡ δεῖνα. οἱ ἀπὸ τῆς χώρας τῆς δεῖνα ὁρμώμενοι. καὶ ἄνωθεν τοῦ παρόντος ὕφους τὸν τύπον τοῦ ζωηφόρου σταυροῦ ἐγχαράξαντες. καὶ ἀποβαλλόμενοι πρότερον νομικὴν βοήθειαν. For the term ψυχάριον in the sense of the slave, see Π. Ζέπος, '«Ψυχάριον», «Ψυχικά», «Ψυχοπαίδι»', *Δελτίον της Χριστιανικής Αρχαιολογικής Εταιρείας* 10 (1980-1981), 17-28 (= Π. Ζέπος, *Μνήμη Παναγιώτη Ι. Ζέπου* I, Θεσσαλονίκη 1988, 291-301), 17-20.

45 Actes de Saint-Pantéléèmôn, No. 12 (1358), p. 104/1-105/19, 28-30; Actes de Vatopédi, II, No. 118 (1362), p. 295/28-32; Actes de Docheiariou, No. 42 (1373), p. 239/52-53; MM II, No. 523 (1399) (= Darrouzès, Regestes VI, No. 3084), p. 300/15-17; MM II, No. 528 (1398/1399, 1399 resp.) (= Darrouzès, Regestes VI, Nos. 3067 and 3076), p. 304/24-26; MM II, No. 536 (1399) (= Darrouzès, Regestes VI, No. 3089), p. 326/31-327/4; MM II, No. 537 (1400) (= Darrouzès, Regestes VI, No. 3092), p. 330/28-31; MM II, No. 547 (1400) (= Darrouzès, Regestes VI, No. 3104), p. 344/29-31; MM II, No. 557 (1400) (= Darrouzès, Regestes VI, No. 3113), p. 363/16-20, 24-27, and 34-35, p. 364/3-9, and 34-35, p. 366/26-28; MM II, No. 558 (1400) (= Darrouzès, Regestes VI, No. 3114), p. 367/6-7, and 19-23; MM II, No. 562 (1400) (= Darrouzès, Regestes VI, No. 3118), p. 372/14-16; MM II, No. 581 (1400) (= Darrouzès, Regestes VI, No. 3140), p. 400/32-401/1; MM II, No. 617 (1400) (= Darrouzès, Regestes VI, No. 3179), p. 452/26-29; MM II, No. 622 (1401) (= Darrouzès, Regestes VI, No. 3183), p. 458/29-34; MM II, No. 678 (1401) (= Darrouzès, Regestes VI, No. 3240), p. 557/11-13; Actes de Docheiariou, No. 57 (1419), p. 291/1-2; Actes de Docheiariou, No. 58 (1419), p. 296/40.

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

47 Cf. Μάτσης, *Το οικογενειακόν δίκαιον* (note 4 above), 101-102, 113; Παπαγιάννη, *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* Theodoros Perdikes,[51] *megas sakellarios* Demetrios Balsamon,[52] *megas chartophylax* Holobolos,[53] *protekdikos* Michael Balsamon,[54] *megas sakellarios* Meli-

48 MM II, No. 581 (1400) (= Darrouzès, Regestes VI, No. 3140), p. 400/32-401/1: (…) ἐδιδάχθη οὖν συνοδικῶς παρὰ τῆς μεγάλης ἁγιωσύνης αὐτοῦ τὸν βοηθοῦντα αὐτῇ νόμον ἐπὶ τῇ οἰκεία προικὶ καὶ παρῃτήσατο τὴν ἀπὸ τούτου βοήθειαν (...). Cf. Μάτσης, *Το οικογενειακόν δίκαιον* (note 4 above), 112.

49 MM II, No. 562 (1400) (= Darrouzès, Regestes VI, No. 3118), p. 372/14-16. Cf. Μάτσης, *Το οικογενειακόν δίκαιον* (note 4 above), 115. On the *exokatakoiloi archontes* see E. Χατζηαντωνίου, 'Οφφικιάλιοι των σεκρέτων της μητρόπολης και του μητροπολιτικού ναού της Θεσσαλονίκης', *Βυζαντιακά* 26 (2007), 83-174 (88-89), with further bibliography.

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 ἐνδόσει καὶ προτροπῇ τοῦ ἁγιωτάτου ἐκείνου καὶ ἀοιδίμου πατριάρχου γέγονεν ἡ τοῦ νόμου διδασκαλία πρὸς τὴν Ἀσασίναν παρὰ τοῦ τιμιωτάτου πρωτεκδίκου (...). Cf. Μάτσης, *Το οικογενειακόν δίκαιον* (note 4 above), 117-118. On the ecclesiastical office of *protekdikos* and his duties, see Χατζηαντωνίου, 'Οφφικιάλιοι των σεκρέτων' (note 49 above), 122 -123.

51 Actes de Saint-Pantéléèmôn, No. 12 (1358), p. 105/32: + Ὁ μέγας σκευοφύλ[αξ τῆς ἁγιωτάτης τοῦ Θεοῦ] μεγ(ά)λ(ης) ἐκκλησί(ας) (καὶ) ἀρχῖδιάκονος Θεόδ(ω)ρ(ος) ὁ Περδίκης ὑπ(έγραψα); 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, 'Οφφικιάλιοι των σεκρέτων' (note 49 above), 106-107.

52 MM II, No. 536 (1399) (= Darrouzès, Regestes VI, No. 3089), p. 327/1-4 : (...) διὰ τῶν τιμιωτάτων, αὐτῆς ἐκκλησιαστικῶν ἀρχόντων, τοῦ μεγάλου σακελλαρίου τοῦ Βαλσαμών, τοῦ μεγάλου χαρτοφύλακος τοῦ Ὁλοβόλου καὶ τοῦ πρωτεκδίκου τοῦ Βαλσαμὼν (...); MM II, No. 622 (1401) (= Darrouzès, Regestes VI, No. 3183), p. 458/29-34: (...) ὅτε καὶ ἡ μετριότης ἡμῶν, τὸ τῶν γυναικῶν ἄστατον συνειδυῖα, ἐπεφωνήσατο ταύτῃ διὰ τοῦ μακαρίτου ἐκείνου μεγάλου σακελλαρίου, κῦρ Δημητρίου τοῦ Βαλσαμών, ὡς εἰ μὲν βούλοιτο ἀπεκδύσασθαι τὸ μοναχικὸν σχῆμα καὶ διάγειν ὡς κοσμική, παραχρῆμα τοῦτο ποιῆσαι, εἰ δὲ μὴ εὐθέως τοῦτο ποιήσει, οὐκ ἐξέσται μετὰ καιρόν τινα τοῦτο τολμῆσαι (…); PLP No. 2114. Cf. Μάτσης, *Το οικογενειακόν* δίκαιον (note 4 above), 115. On the ecclesiastical office of *sakellarios* see Χατζηαντωνίου, 'Οφφικιάλιοι των σεκρέτων' (note 49 above), 103.

53 MM II, No. 536, p. 327/1-4 (note 52 above); PLP No. 21044. Cf. Μάτσης, *Το οικογενειακόν δίκαιον* (note 4 above), 115. On *Ioannes Chrysokephalos Holobolos* and his connection to the 'Hexabiblos aucta', see A. Schminck, 'Zur Einzelgesetzgebung der "makedonischen" Kaiser', *FM* XI (2005), 269-323 (313-314 and note 311). On the office of *chartophylax* and its functions see Χατζηαντωνίου, 'Οφφικιάλιοι των σεκρέτων' (note 49 above), 108-109.

54 MM II, No. 536, p. 327/1-4 (note 52 above); PLP No. 2120. Cf. Μάτσης, *Το οικογενειακόν δίκαιον* (note 4 above), 115.

tiniotes,[55] *sakellios deacon* Ioannes Syropoulos,[56] *megas oikonomos of Thessaloniki, priest* Georgios,[57] *megas chartophylax of Thessaloniki* Nikolaos Prevezianos.[58] Of great interest is the reference to Michael Balsamon,[59] who as *epi ton kriseon*[60] does not belong to the *exo-katakoiloi archontes*, an indication that in 1362 the 'teaching of the law' could be performed

55 MM II, No. 537 (1400) (= Darrouzès, Regestes VI, No. 3092), p. 330/28-31: (…) ὡς ἂν ἀναδιδαχθῇ ἡ μήτηρ αὐτῶν ἐπὶ τούτοις προικῴοις οὖσι τὸν βοηθοῦντα αὐτῇ νόμον, καὶ ἀποβάληται, καὶ οὕτω τοὺς γάμους γενέσθαι. γέγονε γοῦν τοῦτο παρὰ τοῦ τότε μεγάλου σακελλαρίου, τοῦ Μελιτινιώτου ἐκείνου (...). Cf. PLP No. 17851.

56 MM II, No. 558 (1400) (= Darrouzès, Regestes VI, No. 3114), p. 367/19-23: (…) τόν τε γὰρ νόμον ἐδιδάχθη, ὡς ἔδει, παρὰ τοῦ τιμιωτάτου σακελλίου τῆς καθ' ἡμᾶς ἁγιωτάτης τοῦ θεοῦ μεγάλης ἐκκλησίας (...) διακόνου κυρίου Ἰωάννου τοῦ Συροπούλου (...). Cf. PLP No. 27210. On the ecclesiastical office of (*epi tou*) *sakelliou* and his duties see Χατζηαντωνίου, 'Οφφικιάλιοι των 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, 'Οφφικιάλιοι των σεκρέτων' (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 the original collection of the templates, 'die (...) aus der Region der genuesischen Ostkolonien in der zweiten Hälfte des 14. und der ersten Hälfte des 15. Jahrhunderts gekommen sein müssen', see Simon / Troianos, 'Dreizehn Geschäftsformulare' (note 43 above), 264 (= 161). 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 Constantinopel, see Χατζηαντωνίου, 'Οφφικιάλιοι των σεκρέτων' (note 49 above), 90; on the office of *oikonomos* and its functions, see *ibid*, 98.

58 Actes de Docheiariou, No. 57 (1419), p. 291/1-2, and p. 292/31: <+Θεοδώρα>, ἡ σύζυγος τῶ περιόντι ἄρχοντι κῦρ Βαρθολομαίω τῶ Κόμητι, ἀναδιδαχθεῖσα τὰ προσβοηθοῦντα [μο]ι διὰ τὴν γυναικεῖαν ἁπλότητα καὶ ἀποταξαμένη (...) [+ Ὁ μέγας χα]ρτοφύλαξ τ(ῆς) ἁγιωτ(ά)της μ(ητ)ροπ(ό)λ(εως) Θ(εσσα)λ(ο)ν(ίκης) διάκονος Νικόλαος ὁ Πρεβεζιάνος. The fact that *Prevezianos* performed 'the teaching of the law' is also evident from the following passage: Actes de Docheiariou, No. 58 (1419), p. 296/39-40: ἀλλὰ κ(αὶ) αὖθις ἐπείσθησαν κ(αὶ) λαβόντες τὰ δικαιώμ(α)τ(α) κ(αὶ) ἔτι γράμμα ἰσα{σα}σμοῦ τελείου παρὰ τ(ῶν) ὁμοζύγων, ἐκθεμένου τοῦτο τοῦ μεγάλου χαρτοφύλακας μετὰ διδασκαλίας (...). On the person of *Prevezianos* see PLP No. 23701. Cf. Χατζηαντωνίου, 'Οφφικιάλιοι των σεκρέτων' (note 49 above), 113 and note 99, 114-115, 174; Ε. Χατζηαντωνίου, *Η μητρόπολη Θεσσαλονίκης από τα μέσα του 8ου αι. έως το 1430. Ιεραρχική Τάξη-Εκκλησιαστική Περιφέρεια-Διοικητική Οργάνωση*, (Βυζαντινά Κείμενα και Μελέται, 42), Θεσσαλονίκη 2007, 258 and note 1022, 267.

59 Actes de Vatopédi, II, No. 118 (1362), p. 295/28-32: (...) παρὰ τῆς συζύγου μου, τῆς δι' ἐπερωτήσεως τοῦ ἐπὶ τῶν κρίσεων τῆς ἁγιωτάτης Μεγάλ(ης) τοῦ Θ(εο)ῦ Ἐκκλησί(ας) ἐξάρχου, πρεσβυτέρου (καὶ) ταβουλλαρίου Μιχαὴλ τοῦ Βαλσαμὼν ἀποβαλομένης πάντα νόμον τ(ὸν) βοηθοῦντα αὐτῇ ἐπὶ τοῖς καινοτομηθείσειν αὐτῆς προικιμαίοις πράγμα(σ)ι (...). Cf. PLP No. 2121. See also Ch. Kraus, *Kleriker im späten Byzanz*, (Mainzer Veröffentlichungen zur Byzantinistik, 9), Wiesbaden 2007, 387, 399.

60 On the ecclesiastical office *epi ton kriseon*, see Darrouzès, *Recherches sur les ὀφφίκια* (note 40 above), 377-378.

by ecclesiastical officials of lower rank. The *katholikoi krites* were also authorized to perform 'the teaching of the law'.[61]

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').[62] 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.

Athens M.Th. Tantalos

61 MM II, No. 547 (1400) (= Darrouzès, Regestes VI, No. 3104), p. 344/29-31: (...) ὅτι οὐδὲ ἐδιδάχθη τὸν βοηθοῦντα αὐτῇ νόμον ἐπὶ τῇ ἰδίᾳ προικὶ ἢ παρὰ τῶν καθολικῶν κριτῶν τοῦ βασιλικοῦ σεκρέτου ἢ διά τινος τῶν τιμιωτάτων ἐξωκατακήλων (...). Cf. Μάτσης, *Το οικογενειακόν δίκαιον* (note 4 above), 115-116. On the *katholikoi krites*, see Α. Γκουτζιουκώστας, *Η απονομή δικαιοσύνης στο Βυζάντιο (9ος – 12ος αιώνες). Τα κοσμικά δικαιοδοτικά όργανα και δικαστήρια της πρωτεύουσας*, (Βυζαντινά Κείμενα και Μελέται, 37), Θεσσαλονίκη 2004, 302-306; Α. Γκουτζιουκώστας, 'Παρατηρήσεις για την απονομή δικαιοσύνης κατά τους παλαιολόγειους χρόνους: «*Το βασιλικόν σέκρετον*»', in Β.Α. Λεονταρίτου / Κ.Α. Μπουρδάρα / Ε.Σπ. Παπαγιάννη (εκδ.), *ΑΝΤΙΚΗΝΣΩΡ. Τιμητικός τόμος Σπύρου Ν. Τρωιάνου*, Αθήνα 2013, 397-417 (411 and note 47). On the *basilikon sekreton*, see *ibid*, 412-415, albeit without reference to the document mentioned above.

62 For the marked divergence of legal theory from prevalent practice in Byzantine law and the problems that arise, see B. Stolte, 'Not new but novel. Notes on the historiography of Byzantine law', *BMGS* 22 (1998), 264-279.